

Character Evidence: A Guided Tour of the Grotesque Structure

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This Article presents the law of character evidence through the use of twelve rules. These twelve rules describe the complex structure of character evidence and clarify its use. Examples present and explain how each rule is used. The Article is especially useful to teachers, students, and practitioners who must struggle through character evidence's "grotesque structure," as it explains character evidence in the context of modern federal and state evidence codes.

INTRODUCTION

This Article examines the law of character evidence — evidence about the character of a human being.¹ The term “character” means a human being’s² propensity to engage in a general type of

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¹ Several excellent sourcebooks cover the law of character evidence: M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE §§ 404.1-406.4, 608.1-609.9 (2d ed. 1986); M. GRAHAM, EVIDENCE 481-524, 578-631 (1983); C. MCCORMICK, EVIDENCE §§ 41-44, 186-95 (3d ed. 1984); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 181-264, 493-559 (4th ed. 1986); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶¶ 404-406 (1986); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶¶ 608-609 (1985); 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5271-5277, 5381-5393 (1980); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5231-5269 (1978).

² This definition of character evidence is limited to human beings. It does not apply to evidence about objects, animals, or legal entities such as corporations. In everyday speech, we might refer to a sidewalk as having a “dangerous character,” or to a dog as having a “vicious character,” or to a corporation as having an “irresponsible character.” Proof of those qualities of the sidewalk, dog, or corporation can raise some of the same problems as proof of a human being’s character. However, with respect to sidewalks and dogs and corporations, courts tend to resolve those problems under the three general rules of relevance, reserving the law of character evidence for human beings. In

conduct.³ For example, *D*'s character with respect to truthfulness means *D*'s propensity to tell the truth, and *P*'s character with respect to carefulness means *P*'s propensity to act with care. The term "character evidence," then, means evidence that helps to prove a human being's propensity to engage in a general type of conduct.

The law of character evidence causes recurring problems for those who must learn, teach, and apply it. Justice Robert Jackson once described this body of law as a "grotesque structure."⁴ Common-law judges built this structure stone by stone. The result is "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other."⁵

In *Michelson v. United States*⁶ the Supreme Court had an opportunity to reform one aspect of the law of character evidence. The Court declined the opportunity. As Justice Jackson explained: "To pull one misshapen stone out of the grotesque structure is more likely simply to

stating the rules of character evidence, the modern evidence codes speak of a *person's* character, thus excluding objects and animals. See FED. R. EVID. 404; CAL. EVID. CODE § 1100 (West 1966). The intent to exclude legal entities such as corporations is not as clear, since such entities are treated as persons in some legal contexts. See 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5233, at 358-61; see also *Stafford v. United Farm Workers of Am.*, 33 Cal. 3d 319, 324-25, 656 P.2d 564, 568, 188 Cal. Rptr. 600, 604 (1983) (holding that rules of character evidence applied to a labor union when union's negligent conduct on one occasion was offered to prove its negligence on the occasion in question); *American Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1336 (Alaska 1982) (holding that rules of character evidence applied to corporation when corporation's reckless conduct after plaintiff's accident was used to prove its recklessness before plaintiff's accident); E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:04 (1984) (arguing that rules of character evidence should apply to artificial entities).

³ McCormick 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." C. MCCORMICK, *supra* note 1, § 195, at 574. Simple definitions such as McCormick's and the one in the text gloss over some interesting issues discussed in 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5233. For instance, to what extent should the law of character evidence apply to evidence about a person's physical characteristics? If evidence that a person is "careless" is character evidence, what about evidence that the person is "clumsy"? If evidence that a person is "chaste" is character evidence, what about evidence that the person is "a virgin"? Likewise, to what extent should the law of character evidence apply to evidence about a person's mental characteristics? If evidence that a person is "dishonest" is character evidence, what about a psychiatrist's testimony that the person is "a kleptomaniac"?

⁴ *Michelson v. United States*, 335 U.S. 469, 486 (1948).

⁵ *Id.*

⁶ 355 U.S. at 469.

upset its present balance between adverse interests than to establish a rational edifice."⁷

From Jackson's day to the present, critics have charged that the law of character evidence is not only grotesque, but is built on a foundation of shifting sand. This foundation consists of questionable assumptions about human nature. The law assumes that every person has a character that can be divided into traits. It assumes that these traits can be proved in a courtroom, using primitive forms of evidence such as the person's reputation in the community. It assumes that, once proven, these traits will help the trier of fact deduce how the person acted on a particular occasion. Critics have observed that some psychologists believe these assumptions are invalid, or at least are not demonstrably valid.⁸

Despite the widespread criticism, the law of character evidence endures. In the 1960s and 70s drafters of modern evidence codes had an opportunity to bulldoze the grotesque structure. Although the drafters did some remodeling, the slight changes left the structure as grotesque as in Justice Jackson's time.

This Article divides character evidence law into twelve rules. After each rule is an explanation, followed by examples of how each rule is applied. This Article's object is not to criticize the structure further, or suggest how to reform it, but rather, simply to explain character evidence for those who must learn it, teach it, and apply it.

I. AT THE THRESHOLD: THE RULES OF RELEVANCE

This section provides a brief review of the three basic rules of relevance that provide the rationale for the law of character evidence.

The first rule of relevance states that if an item of evidence is not relevant, then it is not admissible.⁹ To be relevant, an item of evidence

⁷ *Id.* at 486.

⁸ The thoughts expressed in this paragraph are concisely explained in Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-31 (1987). For other modern criticism of character evidence law, see Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758 (1975); 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); Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

⁹ FED. R. EVID. 402; CAL. EVID. CODE § 350 (West 1966). This article cites the Federal Rules of Evidence (adopted in 1975) and the California Evidence Code

must meet two conditions.¹⁰ First, it must have some “probative value,” that is, it must be some help in proving the fact that the proponent seeks to prove.¹¹ Probative value is tested by logic and common sense. If logic and common sense suggest that the item of evidence is *some* help in proving the fact, then the evidence has enough probative value to meet the first condition.¹² The evidence need not prove the fact with certainty. It need not even prove that the fact is more likely than not to exist; it must only be *some* help in proving that the fact exists.¹³

The second condition requires that the fact the proponent is seeking to prove must be a “material” fact — a fact that is “of consequence” in the case.¹⁴ To determine what facts are “of consequence,” one must look to the substantive and procedural law that applies to the case. Thus, if *P* sues *D* for breach of a contract to buy a truck, and if *D* offers evidence that *P* is a wicked person and therefore deserves to lose the case, the court will exclude *D*’s evidence for failing to meet the second condition of relevance. Under contract law *P*’s wickedness or righteousness is of no legal consequence in determining whether *P* should recover for *D*’s breach of a contract to buy a truck.

The second rule of relevance is that if the evidence satisfies the two conditions stated above then it is admissible — unless a rule of law excludes it.¹⁵ But for this “unless” clause the law of evidence would be

(adopted in 1967) as examples of “modern evidence codes.” Thirty-one states, Puerto Rico, and the United States military used the Federal Rules of Evidence as the pattern for their evidence codes. In several of these jurisdictions, character evidence provisions are not identical to their counterparts in the Federal Rules of Evidence. The similarities and differences are summarized in 1 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE T-36 to T-70, T-119 to T-131 (1986 Supp.) For more detailed state-by-state comparisons, see 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶¶ 404[21], 405[05], 406[05] (1986); 3 J. WEINSTEIN & M. BERGER, *supra* note 1 ¶¶ 608[09], 609[12] (1985); 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5231, at 335-39, § 5261, at 562-64; 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5271, at 11-13.

¹⁰ FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966).

¹¹ CAL. EVID. CODE § 210 (West 1966) uses the phrase “tendency in reason” to express this idea. If the item of evidence has “any tendency in reason” to prove the fact, then the evidence meets the first condition.

¹² FED. R. EVID. 401 expresses the idea: The evidence meets the first condition if it has “any tendency” to make the existence of the fact “more probable . . . than it would be without the evidence.”

¹³ FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966).

¹⁴ FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966).

¹⁵ FED. R. EVID. 402; CAL. EVID. CODE § 351 (West 1966). Federal and state constitutions, statutes, and rules of procedure contain some exclusionary rules, but the bulk of the rules are found in evidence law (either in an evidence code, when one exists, or in the judge-made common law, when no code exists). FED. R. EVID. 402 states that

simple. Without this clause, one would need to know only two things: relevant evidence is admissible and irrelevant evidence is not. However, the “unless” clause is vital because the law contains a multitude of rules that exclude relevant evidence. Each of these exclusionary rules is based on some policy, some reason why it is better not to admit the evidence, even though the evidence is relevant.¹⁶

The third rule of relevance is an exclusionary rule, perhaps the most important of all the exclusionary rules: the trial judge has discretion to exclude relevant evidence if the evidence’s dangers are likely to outweigh its probative value.¹⁷ The possible dangers include creating undue prejudice, confusing the issues, misleading the jury, wasting time, or needlessly presenting cumulative evidence.¹⁸ In short, this third rule of relevance states a general principle that applies to all types of evidence in all situations: evidence can be excluded if its costs are likely to outweigh its probative value.¹⁹

The law of character evidence consists of specific rules that tell judges how to apply this general principle to certain commonly recurring patterns of proof. Indeed, character evidence rules can be viewed simply as “concrete applications” of the general principle that evidence can be excluded if its costs are likely to outweigh its value.²⁰ Because

“all relevant evidence is admissible, except as provided by ‘the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.’” One example of a federal constitutional rule of exclusion is the privilege against self-incrimination. U.S. CONST. amend. V.

¹⁶ For example, the policy behind the hearsay rule [FED. R. EVID. 802; CAL. EVID. CODE § 1200 (West 1966)] is concerned with the truth-finding function of courts: hearsay evidence is generally excluded because it is too likely to be unreliable. In contrast, the policy behind the rule on subsequent repairs [FED. R. EVID. 407; CAL. EVID. CODE § 1151 (West 1966)] does not relate to truthfinding. The policy’s premise is that the law should not discourage people from repairing dangerous conditions; some people might not make a repair if the repair could be used as evidence that the prior condition was dangerous.

¹⁷ See FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966).

¹⁸ See FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966).

¹⁹ One exception to the discretionary exclusion principle is FED. R. EVID. 609(a)(2), which limits the trial judge’s discretion with respect to certain types of criminal convictions offered to impeach a witness. See *infra* text accompanying notes 236-37.

²⁰ The drafters of the Federal Rules of Evidence explain that Rules 404 through 411 (including the rules on character evidence, subsequent repairs evidence, liability insurance, and similar topics) are “concrete applications” of the general principle stated in Rule 403 that relevant evidence can be excluded if its probative value is outweighed by its dangers. See FED. R. EVID. 403 advisory committee’s note, 56 F.R.D. 183, 218 (1973); see also R. LEMPert & S. SALTzBURg, A MODERN APPROACH TO EVIDENCE

character evidence is frequently offered in litigation, and its uses are many and varied, common-law judges developed specific rules for handling character evidence. These rules were later incorporated into modern evidence codes. Character evidence rules are helpful to litigants and judges because they reduce the need for case-by-case balancing of cost versus value.²¹

II. HOW CHARACTER IS PROVED AND HOW IT IS USED

A. *How Character Is Proved*

Suppose that plaintiff *P* wants to prove an aspect of defendant *D*'s character — specifically, that *D* is a dishonest person. *P* can accomplish this in three ways.²²

First, *P* can offer evidence that *D* acted dishonestly on various occasions in the past. This is called “specific instances of conduct” or “specific acts” evidence.²³ For example, *P* can offer the testimony of a witness that *D* cheated on last year's income tax return, that *D* misrepresented her qualifications on a job application, or that *D* misused money entrusted to her.

Second, *P* can offer evidence about *D*'s character in opinion form. For example, *P* can offer the testimony of a witness who knows *D* well and who can state: “Based on my knowledge of *D* over many years, it's my opinion that *D* is thoroughly dishonest.” The witness' opinion is

186-88 (2d ed. 1982).

²¹ The rules concerning character evidence *reduce* rather than *eliminate* the need for case-by-case balancing. McCormick explains:

If a rule has evolved forbidding the use of character evidence for a particular purpose, then there is no need for ad hoc balancing of probative value as against prejudice, distraction, and the like. The exclusionary rule already reflects the judgment that the outcome of the balancing test should preclude admission. It does not follow, however that if character evidence falls under an exception to the general rule of exclusion, it is necessarily admissible. That the general rule mandating exclusion does not dictate the outcome merely means that the decision as to admission must be made in light of the general principle that relevant evidence is admissible unless its probative value is substantially outweighed by countervailing considerations. . . . Hence, in these cases, individualized balancing is still essential.

C. MCCORMICK, *supra* note 1, § 186, at 550 n.4; *see also* R. LEMPERT & S. SALTZBURG, *supra* note 20, at 187.

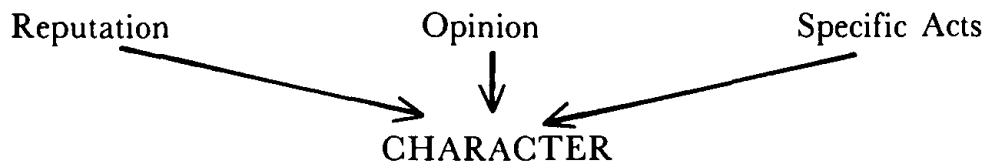
²² *See* FED. R. EVID. 405; CAL. EVID. CODE § 1100 (West 1966).

²³ “Specific instances of conduct” is the phrase used in FED. R. EVID. 405 and CAL. EVID. CODE § 1100. Wigmore and McCormick use the shorter phrase “specific acts.” *See* C. MCCORMICK, *supra* note 1, § 186, at 551; 1A J. WIGMORE, EVIDENCE § 70.4, at 1545 (Tillers rev. 1983).

built on specific acts. The witness gives the jury a conclusion drawn from the witness' observation of *D*'s specific acts over many years.

Third, *P* can offer reputation evidence — the testimony of a witness familiar with what people in *D*'s community say about *D*'s character. For example, *P*'s witness could state: "Among the people in the community where *D* lives, *D* is known as a thoroughly dishonest person." This reputation evidence is built on specific acts. Various people in the community observed *D*'s specific acts over the years; the reputation witness then reports the community's collective conclusions about those acts to the jury.

These three common methods of proving character²⁴ are shown in the following diagram:



Each method of proving character has advantages and disadvantages. Of the three methods, specific acts evidence is probably the most accurate and, therefore, has the highest probative value.²⁵ This is because, in one way of thinking, a person's character is the sum total of that person's acts over a lifetime. Thus, if *X* repeatedly acts violently toward

²⁴ Wright and Graham point out that the three common methods of proving character are not the *only* possible methods. 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5233, at 361-62. For example, to prove that *D* is dishonest, *P* offers a witness' testimony that *D*'s employer fired *D* after she discovered that money was missing from the cash register. This can be a type of opinion evidence; *D*'s employer is of the opinion that *D* took the money and thus is dishonest. Under the traditional common law, this evidence is objectionable on two grounds. First, opinion evidence cannot be used to prove character. *See infra* text accompanying notes 35-42. Second, the evidence is hearsay under traditional common law. The firing of *D* is nonassertive conduct by *D*'s employer. If this nonassertive conduct is used to prove that *D* is dishonest, it falls within the common-law definition of hearsay. *See Wright v. Tatham*, 7 Adolph. & E. 313, 112 Eng. Rep. 488 (Ex. Ch. 1837). However, under modern evidence codes, opinion evidence is a proper method of proving character, and nonassertive conduct is not regarded as hearsay. *See* FED. R. EVID. 405, 801(a); CAL. EVID. CODE §§ 225, 1100, 1200 (West 1966); *see also* 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5265, at 586-87 (concerning the admissibility of this type of character evidence under Federal Rule 405).

²⁵ *See* FED. R. EVID. 405 advisory committee's note, 56 F.R.D. 183, 222 (1973); C. MCCORMICK, *supra* note 1, § 186, at 550; *see also* 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5262, at 566-67.

other people, one can conclude that *X* is violent — and that is true even if *X*'s neighbors speak well of her, and even if some people have a good opinion of her.

Although specific acts evidence is highest in probative value, it is also highest in cost — it raises the most danger of creating prejudice, confusing the issues, misleading the jury, and consuming time.²⁶ This is because to conclude that *X* is a violent person, the jury must hear evidence of numerous occasions when *X* acted violently. The more occasions, the more probative the evidence; but the more time the evidence consumes, the greater the danger of diverting the jury's attention from the case's main issues.²⁷

Opposite of specific acts evidence is reputation evidence. If specific acts are the most probative evidence of character, then reputation evidence is the least probative. A reputation witness is not allowed to state her opinion of the person's character, nor what she knows the person has done. She is limited to summarizing what she "has heard in the community, although much of it may have been said by persons less qualified to judge" than herself.²⁸ A person's reputation is "the shadow his daily life has cast in his neighborhood."²⁹ Reputation "sums up a multitude of trivial details," expresses "the teaching of many incidents and the conduct of years," and is the "average intelligence drawing its conclusion."³⁰ In essence, reputation evidence is a shapeless bag of hearsay, doubly suspect because the hearsay declarants are anonymous.³¹

²⁶ See *Michelson v. United States*, 335 U.S. 469, 477-78 (1948); FED. R. EVID. 405 advisory committee's note, 56 F.R.D. 183, 222 (1973) (stating that "[O]f the three methods of proving character . . . [specific acts] is the most convincing. . . . At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.").

²⁷ FED. R. EVID. 405 advisory committee's note, 56 F.R.D. 183, 222 (1973).

²⁸ *Michelson*, 335 U.S. at 477.

²⁹ *Id.* The term "neighborhood" is not interpreted literally. Under the old common law, reputation evidence was limited to the community in which the person lived. 5 J. WIGMORE, EVIDENCE §§ 1615-1616 (Chadbourn rev. 1974). However, modern common law and the modern evidence codes recognize that people may be better known by their associates at work or school than by their neighbors. *Id.* Thus, FED. R. EVID. 803(21) and CAL. EVID. CODE § 1324 (West 1966) cover reputation among a person's "associates" as well as reputation in the community where the person lives.

³⁰ *Michelson*, 335 U.S. at 477.

³¹ 5 J. WIGMORE, *supra* note 29, §§ 1609-1610. For an argument that reputation need not be regarded as hearsay, see 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5264, at 575-76. The modern evidence codes follow the common law in admitting reputation evidence under an exception to the hearsay rule. See FED. R. EVID. 803(21); CAL. EVID. CODE § 1324 (West 1966).

The traditional justification for admitting reputation evidence is because it is likely to be reliable.³² Perhaps a more candid argument could be made for the opposite proposition: reputation evidence is likely to be unreliable, but its unreliability is an accepted fact of everyday life known to everyone, including jurors. The court can safely admit reputation evidence over a hearsay objection because the jurors' common sense will prevent them from giving it more weight than it deserves.

Although low in probative value, reputation evidence has the advantage of being low in cost. Reputation testimony can be presented quickly by asking a few questions of one or two witnesses.³³ Because reputation testimony is "typically bloodless, ritualistic and a bit dull," it is unlikely to prejudice anyone. Further, "while it might put some jurors to sleep, it is unlikely to draw their attention from the central issues in the case."³⁴

Opinion evidence about character lies in the middle of the spectrum between specific acts and reputation, both in probative value and in costs. As to probative value, the testimony of a witness who knows the person well can be just as persuasive, and probably more persuasive, than a reputation witness' dry recitation.³⁵ Some danger exists that a well-connected litigant may sway the jury by having prominent citizens express a good opinion of the litigant's character.³⁶ However, that danger also exists when a prominent citizen is called as a reputation witness.³⁷ As to costs, opinion testimony can be presented as quickly as reputation testimony.³⁸ Finally, opinion evidence is unlikely to confuse the issues or to sidetrack the jury.

Despite the relatively high value and low cost of opinion evidence, the orthodox common-law position in the United States was that opinion evidence could not be used to prove a person's character.³⁹ Wigmore

³² See 5 J. WIGMORE, *supra* note 29, § 1610; FED. R. EVID. 803(19)-(21) advisory committee's note, 56 F.R.D. 183, 317-18 (1973).

³³ See E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 97-98 (1986); Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 519-27 (1939).

³⁴ R. LEMPert & S. SALTZBURG, *supra* note 20, at 239-40.

³⁵ See 7 J. WIGMORE, EVIDENCE § 1986, at 243-44 (Chadbourn rev. 1978).

³⁶ See S. SALTZBURG & K. REDDEN, *supra* note 1, at 242-43.

³⁷ Students who have learned evidence from the Kaplan & Waltz casebook will recall the delightful story of Theodore Roosevelt as a purported reputation witness. According to the story, Roosevelt's stature and irrepressible enthusiasm carried the day for the litigant who called him. Hogan, *Theodore Roosevelt as Character Witness*, 10 J. CLEV. B.A. 36 (1938), reprinted in J. KAPLAN & J. WALTZ, EVIDENCE 364 (5th ed. 1984) and 7 J. WIGMORE, *supra* note 35, § 1986, at 246-49.

³⁸ See E. IMWINKELRIED, *supra* note 33, at 98-99.

³⁹ 7 J. WIGMORE, *supra* note 35, § 1985.

criticized this position as bad scholarship and bad policy.⁴⁰ The Federal Rules of Evidence and most modern evidence codes depart from the common-law position and allow opinion evidence to be used interchangeably with reputation evidence.⁴¹ Thus, under most modern evidence codes, whenever reputation evidence is admissible to prove character, opinion evidence is also permitted.⁴² This is one of the few areas in which the modern evidence codes remodel the grotesque structure.⁴³

B. *How Character Is Used*

Thus far, this Article has examined three ways that a person's character can be proved. This section considers the possible uses of character — when is character relevant?

A person's character can be relevant in three different ways. First, a person's character is obviously relevant if it is one of the ultimate issues that the trier of fact must decide. In these cases, character *itself is in issue*.⁴⁴ For example, suppose that *P* sues *D* for slander, alleging that *D* called *P* a thief. *D* pleads truth as a defense — *P* is a thief. One of the ultimate issues the jury must decide is whether *P* is or is not a thief. Thus, *P*'s character itself is in issue.⁴⁵

Second, a person's character can be relevant as circumstantial evidence of how that person probably acted on a particular occasion. In these circumstances, character is relevant to prove *conduct*. The chain of reasoning is based on the belief that a person usually acts in conformity with her character. If we know what a person's character is, it is some help in deciding how that person acted, or will act, on a particular occasion. For example, if *X* needs to hire a manager for her store,

⁴⁰ *Id.* §§ 1985-1986.

⁴¹ FED. R. EVID. 405; CAL. EVID. CODE § 1100 (West 1966). Several states that patterned their evidence codes after the Federal Rules of Evidence chose to adhere to the orthodox common-law view and did not allow the use of opinion evidence to prove character. These state code provisions are summarized in 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 405[05].

⁴² FED. R. EVID. 404(a), 405(a), 608(a); CAL. EVID. CODE §§ 780(e), 786, 1100-1104, 1106 (West 1966 & Supp. 1987).

⁴³ See *supra* text accompanying notes 6-8. The remodeling job has not escaped criticism. See S. SALTZBURG & K. REDDEN, *supra* note 1, at 242-43 (finding a danger of turning trials into swearing contests that focus on moral worth rather than the disputed facts); 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5265, at 588-95 (questioning wisdom of allowing expert testimony concerning character).

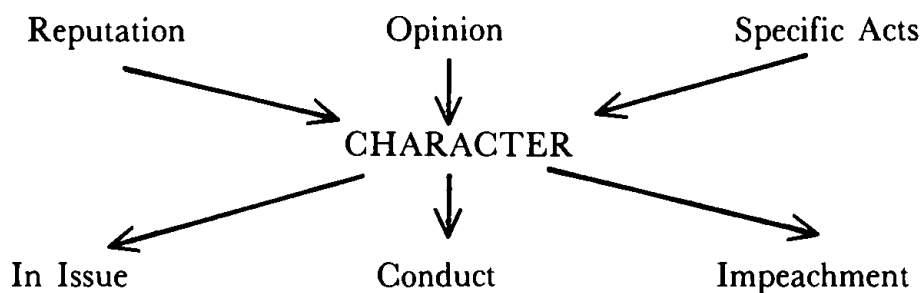
⁴⁴ FED. R. EVID. 405(b) conveys this idea by the phrase "cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense."

⁴⁵ See C. MCCORMICK, *supra* note 1, § 187, at 551; 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5235, at 368.

she doubtless would not pick a notorious embezzler. *X* is applying this theory of character evidence — a person's character is some circumstantial evidence of how that person will act on a particular occasion.

Third, character can be relevant when it concerns a witness' credibility. Thus, character evidence can be used for *impeachment*. For impeachment, the relevant character trait is truthfulness. Knowing that witness *W* is an inveterate liar is useful in deciding whether to believe what *W* says on the witness stand.⁴⁶ This third use of character evidence is simply a variety of the second use. Both uses require us to infer conduct from character, but the third use limits us to one type of conduct: truth-telling.

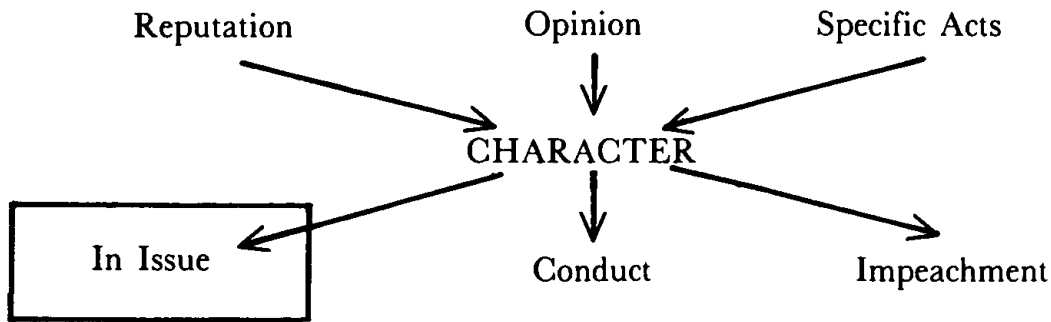
In summary, there are three common ways to prove character: reputation, opinion, and specific acts. There are three possible uses of character evidence: when character itself is in issue; when character is evidence of conduct; and when character is used for impeachment. The relationships are shown as follows:



The remainder of this Article divides the law of character evidence into twelve rules. Each rule is accompanied by examples and the reason for the rule. The object is to bring some sense of order, if not logic, to the grotesque structure.

⁴⁶ Note that the converse is also true; if we know that witness *W* is a truthful person, that gives us some reason to believe what *W* says on the witness stand. Thus, character evidence is relevant to *rehabilitate* a witness whose credibility is attacked by the other side. For the sake of simplicity, this Article refers only to "impeachment," but the principles that apply to impeachment also apply to rehabilitation. See FED. R. EVID. 608-609; CAL. EVID. CODE §§ 780(e), 786-788 (West 1966).

III. WHEN CHARACTER ITSELF IS IN ISSUE



Rule 1: When character itself is in issue, a litigant can use specific acts and reputation evidence (and opinion evidence under most modern evidence codes).⁴⁷

The theory behind Rule 1 is that when a person's character is an ultimate issue to be decided in the lawsuit, the need to prove character is obvious. Therefore, litigants should be allowed to prove character by any of the three methods. Courts should allow specific acts evidence because its high probative value outweighs its costs when character itself is in issue.⁴⁸ The dangers of diverting the jury's attention and confusing the issues are minor because character is a major issue.⁴⁹ The importance of specific acts evidence to prove character justifies the time consumed.

McCormick observes that some common-law cases push this argument beyond good sense by holding that specific acts evidence is the *only* acceptable method of proving character when character itself is in

⁴⁷ Under the Federal Rules of Evidence, Rule 1 is derived by reading FED. R. EVID. 402 (all relevant evidence is admissible unless excluded by a rule of law) together with FED. R. EVID. 405(a) (reputation and opinion evidence can be used when character evidence is admissible) and FED. R. EVID. 405(b) (specific acts evidence can be used when character is an "essential element of a charge, claim, or defense"). Under the California Evidence Code, Rule 1 is derived from § 351 (all relevant evidence is admissible unless excluded by statute) and § 1100 (unless excluded by statute, reputation, opinion, and specific acts can be used to prove character).

⁴⁸ The drafters of the Federal Rules of Evidence expressed this point as follows:

Of the three methods of proving character provided by [Rule 405], evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry.

FED. R. EVID. 405 advisory committee's note, 56 F.R.D. 183, 222 (1973).

⁴⁹ See 1A J. WIGMORE, *supra* note 23, § 202, at 1860-63.

issue.⁵⁰ McCormick believes that this view is unsound.⁵¹ Although reputation and opinion are lower in probative value than specific acts evidence, they also cost less.⁵² Further, our adversary system generally does not force litigants to use the “best evidence” available. Litigants can present their cases as they see fit, so long as their evidence is relevant and does not offend an exclusionary rule.⁵³ Sometimes opinion evidence or reputation evidence, standing alone, is not convincing enough to take the issue of character to the jury or to support a jury’s finding. However, that is a question of *sufficiency* of the evidence which must be kept separate from the question of *admissibility*.⁵⁴

Example: A applies for a license to practice law in state S. State S’s law requires bar applicants to demonstrate “good moral character.”⁵⁵ The state bar refuses to license A, claiming that she lacks good moral character. A then sues the state bar to compel the issuance of a license. Under state S’s procedural law, A is entitled to a de novo court hearing on the issue of her moral character. At the hearing, both A and the state bar can offer specific acts evidence and reputation evidence (and opinion evidence under most modern evidence codes).⁵⁶

⁵⁰ C. MCCORMICK, *supra* note 1, § 187, at 552-53.

⁵¹ *Id.*; see also 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5267, at 603-04 (stating that in some cases when character is in issue, specific acts evidence may simply be unavailable).

⁵² See *supra* text accompanying notes 28-38.

⁵³ The most obvious exception to this general principle is the best evidence rule. The best evidence rule requires a litigant who wants to prove the contents of a writing to use the “best evidence available,” preferably, the original of the writing. See FED. R. EVID. 1002; CAL. EVID. CODE § 1500 (West Supp. 1987).

⁵⁴ McCormick states:

Whether the entire body of one party’s evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable. Thus, the common objection that the inference for which the fact is offered “does not necessarily follow” is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall.

C. MCCORMICK, *supra* note 1, § 185, at 542-43 (footnotes omitted).

⁵⁵ Concerning the history and application of the “good moral character” standard for attorneys, see Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491 (1985); see also C. WOLFRAM, MODERN LEGAL ETHICS § 15.3.2 (1986).

⁵⁶ For example, the state bar could offer evidence that A was convicted of bank robbery 10 years ago (specific acts) and W’s testimony that A remains a dishonest person (opinion). Alternatively, A could offer evidence that after serving her prison sentence,

Example: *P*'s spouse was killed in the crash of an airliner piloted by *X* and owned by *D* airlines. *P* sues *D* for wrongful death, alleging that *X*'s error caused the crash. *P* claims that *D* is liable, based on *respondeat superior* and negligent entrustment. On the negligent entrustment theory, *P* seeks to prove that *X* was a reckless pilot, that *D* knew she was reckless, and therefore *D* was negligent in placing *X* at the controls of its airliner.⁵⁷ The negligent entrustment theory places *X*'s character itself in issue — is she a reckless pilot or is she not? *P* can offer *X*'s pilot training records to prove that *X* acted recklessly on numerous occasions during her training (specific acts). *P* also can offer witness *W*'s testimony that *X* was known among her fellow pilots as "The Daredevil" (reputation) and that *W* herself would sooner walk than be flown by *X* (opinion admissible under most modern evidence codes).⁵⁸

she went to law school and performed honorably and excellently as a law clerk to the public defender (specific acts), and *A* could offer the testimony of her law school dean that *A* is well regarded by her law school peers (reputation) and that the dean believes her to be an honest, reliable person (opinion). See *In re* Application of G.L.S., 292 Md. 378, 439 A.2d 1107 (1982) (holding that convicted bank robber could be admitted to bar after demonstrating rehabilitation); see also cases collected in Annotation, *Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct As Bearing on Requisite Good Moral Character for Admission to Bar*, 30 A.L.R.4th 1020 (1984) and Annotation, *Criminal Record As Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 88 A.L.R.3d 192 (1978).

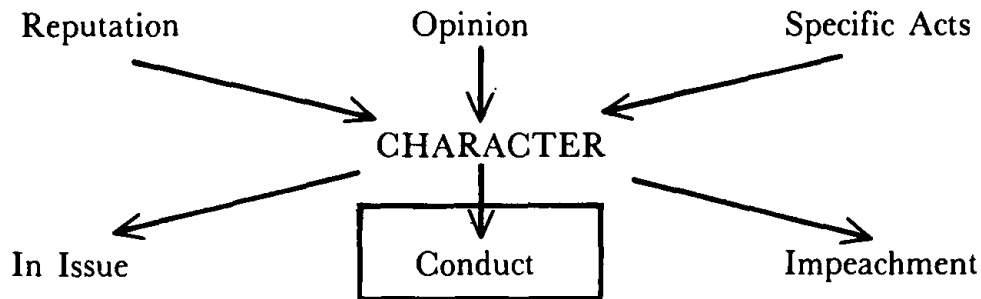
⁵⁷ The theory of negligent entrustment is stated in RESTATEMENT (SECOND) OF TORTS § 308 (1965):

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

⁵⁸ Cf. *In re* Aircrash in Bali, 684 F.2d 1301, 1313-15 (9th Cir. 1982) (holding pilot's training records and expert opinion testimony admissible on negligent entrustment theory); *Crawford v. Yellow Cab Co.*, 572 F. Supp. 1205, 1208-10 (N.D. Ill. 1983) (holding taxi driver's accident record admissible on negligent entrustment theory). The following section, *infra* text accompanying notes 59-64, discusses the rule that character evidence is inadmissible in civil cases as circumstantial evidence of conduct on a particular occasion. In the example of the reckless pilot, the plaintiff cannot use the pilot's training records or the opinion testimony as evidence that the pilot acted recklessly in the air crash. Nonetheless, the evidence is admissible in support of plaintiff's negligent entrustment claim. Under the doctrine of limited admissibility, the trial judge can admit the evidence for its proper purpose and instruct the jury not to consider it as evidence of the pilot's conduct on the occasion in question. See FED. R. EVID. 105; CAL. EVID. CODE § 355 (West 1966). If the trial judge believes that the jury cannot draw such a fine distinction and that danger of misuse outweighs the evidence's probative value, then the judge can exclude the evidence entirely under the discretionary exclusion rule. FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966); see *Rocky*

In response, *D* can offer contrary specific acts evidence, reputation evidence, and (under most modern evidence codes) opinion evidence.

IV. WHEN CHARACTER IS EVIDENCE OF CONDUCT



A. Character as Evidence of Conduct in Civil Cases

*Rule 2: In a civil case no type of character evidence is admissible to prove a person's conduct on the occasion in question.*⁵⁹

We routinely infer a person's conduct from our knowledge of that person's character. If a mother hears the cookie jar lid clink, and if she knows that only her son, Freddie, snacks between meals, she will call out, "Freddie, put it back!" The law rejects this common-sense chain of inference⁶⁰ because the costs of character evidence in civil cases are said

Mountain Helicopters, Inc. v. Bell Helicopters Textron, 805 F.2d 907, 916-18 (10th Cir. 1986) (upholding trial judge's discretionary exclusion of evidence of helicopter pilot's dangerous flying on prior occasions); *In re Aircrash in Bali*, 684 F.2d at 1315.

⁵⁹ Under the Federal Rules of Evidence, Rule 2 is derived from the opening clause of 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" Under the California Evidence Code, Rule 2 is derived from § 1101(a): "Except as provided [elsewhere], evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his conduct on a specified occasion."

The same principle is expressed more narrowly in CAL. EVID. CODE § 1104 (West 1966): "Except as provided [elsewhere], evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion."

⁶⁰ Wigmore argued that in civil cases a "party's character is usually of *no* probative value" (emphasis added) because in the ordinary civil case "there is no moral quality in the act alleged, or at any rate any moral quality that may have been present is ignored by the law." However, Wigmore's reviser questions the soundness of this argument. 1A J. WIGMORE, *supra* note 23, § 64, at 1399-1400 n.2; *see also* C. WRIGHT & K. GRAHAM, *supra* note 1, § 5234, at 365-67.

to outweigh its probative value.⁶¹

Character evidence is an imperfect indicator of conduct because everyone acts "out of character" at some time.⁶² Courts and commentators have warned that the dangers of confusing the issues, sidetracking the jury, and excessive time consumption are too high if character evidence is admissible to prove conduct in civil cases.⁶³

Example: *P* sues *D* for personal injuries suffered when *D*'s railroad train ran over her while she was lying unconscious on the railroad tracks. *P* alleges that an unknown assailant knocked her unconscious and that *D*'s employees negligently failed to see her in time to stop the train. *D* claims that *P* was contributorily negligent because *P* was drunk and passed out on the tracks. To prove that *P* was drunk, *D*

⁶¹ See C. McCORMICK, *supra* note 1, § 189, at 554-55; 1A J. WIGMORE, *supra* note 23, § 64, at 1399-1418; 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 404(3).

⁶² 1A J. WIGMORE, *supra* note 23, § 64, at 1400. Lempert and Saltzburg offer two additional reasons for believing that in civil cases the probative value of character evidence is relatively low:

[E]vidence bearing on character is likely to be conflicting. Most individuals have engaged in actions sufficiently inconsistent to suggest diametrically opposed character traits, and most people can point to individuals who hold very different evaluations of their character [Further], there is a good deal of psychological evidence that attributes which we think of as character traits are dynamic rather than static aspects of personality. They differ over time and as contexts change. Thus, evidence that a building inspector regularly takes bribes might have little bearing on the issue of whether he acted honestly as church treasurer.

R. LEMPERT & S. SALTZBURG, *supra* note 20, at 237 (footnotes omitted). According to Professor David Leonard's reading of the psychological literature, the types of character evidence used in the law are of virtually *no* help in predicting a person's conduct. See Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-31 (1987).

⁶³ See authorities collected in 1A J. WIGMORE, *supra* note 23, § 64, at 1401-18 and 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 404(03), at 404-22 to 404-25. *But see* Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 581-84 (1956). The drafters of the California Evidence Code express the dominant view:

Section 1101 excludes evidence of character to prove conduct in a civil case for the following reasons. *First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of the issues and require extended collateral inquiry.

Comment of the California Law Revision Commission on CAL. EVID. CODE § 1101 (West 1966); FED. R. EVID. 404(a) advisory committee's note, 56 F.R.D. 183, 221 (1973).

offers evidence that *P* was convicted of public intoxication on four occasions (specific acts). *D* also offers witness *W*'s testimony that *P* is known in the community as a public drunkard (reputation) and that *W* regards her as an abuser of alcohol (opinion). This evidence is not admissible to prove *P* was drunk at the time of the accident.⁶⁴

B. Character as Evidence of Conduct in Criminal Cases

1. The Prosecutor's Proof

*Rule 3: In a criminal case the prosecutor cannot initiate an inquiry into character to prove a person's conduct on the occasion in question.*⁶⁵

The same policy argument supports both rules 2 and 3 — evidence of a person's character has some probative value in proving what that person did on the occasion in question, but not *enough* probative value to outweigh its costs. The probative value is low for the same reasons stated under Rule 2.⁶⁶ Also, just as with Rule 2, the dangers of confus-

⁶⁴ Cf. *Reyes v. Missouri Pac. R.R. Co.*, 589 F.2d 791 (5th Cir. 1979) (excluding evidence of convictions for drunkenness when offered to prove plaintiff's contributory negligence in railway accident case).

⁶⁵ Under the Federal Rules of Evidence, Rule 3 is derived from the opening clause of 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" Under the California Evidence Code, Rule 3 is derived from § 1101(a): "Except as provided [elsewhere], evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." See *People v. Perkins*, 159 Cal. App. 3d 646, 649-50, 205 Cal. Rptr. 625, 627 (1984) (holding that California's Proposition 8, CAL. CONST. art. I, § 28(d), did not repeal CAL. EVID. CODE § 1101).

For simplicity, Rule 3 is stated more narrowly than it properly should be. A more accurate statement of the rule is: "In a criminal case neither the prosecutor nor the defendant can offer any kind of character evidence, at any stage of the case, to prove a person's conduct on the occasion in question, except as permitted by Rules 4 through 7." See FED. R. EVID. 404(a); CAL. EVID. CODE § 1101(a) (West Supp. 1987). For example, suppose that in a criminal case the defendant seeks to prove that a third party *X* committed the crime rather than defendant. Can defendant offer evidence of *X*'s character to prove that *X* did commit the crime? The answer is no. Evidence of *X*'s character is excluded by the general rule and is not within any of the exceptions expressed in Rules 4 through 7. See FED. R. EVID. 404(a)(1)-(2); CAL. EVID. CODE §§ 1101(a), 1102-1103 (West 1966 & Supp. 1987).

⁶⁶ See *supra* note 62 and accompanying text. In *Michelson v. United States*, 335 U.S. 469, 475-76 (1948), Justice Jackson described the policy of Rule 3:

The state may not show defendant's prior trouble with the law, specific

ing the issues, sidetracking the jury, and consuming too much time are high.⁶⁷ But an even greater danger exists — the danger of undue prejudice to the criminal defendant. If the court allows the prosecution to inquire into the defendant's character and to prove that the defendant is the kind of person who would commit the crime, the jurors might be inclined to convict her, even if they were not convinced beyond a reasonable doubt that she did commit the crime.⁶⁸ This risk is unacceptable in our legal system, a system that imposes criminal sanctions for what people *do*, not for what they *are*.⁶⁹

Example: *D* is on trial for the burglary of *V*'s home. Prosecutor *P* offers the arresting officer's testimony that he found in *D*'s automobile objects burglarized from the homes of *X*, *Y*, and *Z* some months earlier. *P* argues that the stolen objects are circumstantial evidence that *D* burglarized the homes of *X*, *Y*, and *Z*, which helps to prove that *D* also burglarized *V*'s home. The judge should exclude the officer's testimony

criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

⁶⁷ See *supra* note 63 and accompanying text.

⁶⁸ Wigmore expresses the danger:

It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the accused's life makes it impossible for him to be prepared to refute the charge.

1A J. WIGMORE, *supra* note 23, § 58.2, at 1212-13; see also, M. GRAHAM, *supra* note 1, at 495-96.

⁶⁹ See H.W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 3.1-.2 (2d ed. 1986); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 73-79 (1968); see also Robinson v. California, 370 U.S. 660 (1962) (criminalizing a status, such as drug addiction, violates the cruel and unusual punishment clause of the eighth amendment); *supra* note 66.

about the stolen objects.⁷⁰

Example: *D* is on trial for smuggling cocaine into the United States. A package of the drug was found hidden in *D*'s luggage, but *D* claims that he did not know it was there. Narcotics officer *O* testifies during the prosecutor's case-in-chief. The prosecutor asks *O* whether *D* is known by an alias, and *O* responds: "Yes, *D* is well known under the nickname 'Snowman Dan.'" *D* objects, arguing that "Snowman Dan" implies that he is connected with cocaine. If the nickname's only relevance is to show that *D* is known as a person connected with cocaine, the judge should exclude *O*'s testimony about the nickname.⁷¹

2. Character Evidence Offered by the Defendant

*Rule 4: In a criminal case the defendant can offer reputation evidence (and also opinion evidence under most modern evidence codes) of her own character to prove that she did not commit the crime with which she is charged.*⁷²

According to Rule 3, the prosecutor cannot initiate an inquiry into the defendant's bad character to prove that the defendant committed the act charged. However, Rule 4 allows the defendant to do what the prosecutor cannot do — offer evidence of her good character to prove

⁷⁰ Cf. *State v. Gailey*, 301 Or. 563, 725 P.2d 328 (Or. 1986) (holding inadmissible evidence that defendant in burglary case possessed objects stolen in prior burglaries).

⁷¹ Cf. *United States v. Williams*, 739 F.2d 297, 300 (7th Cir. 1984). In a prosecution for driving a stolen car across a state line, a police detective's testimony about *D*'s unsavory nickname should have been excluded:

[T]he detective's testimony about the defendant's nickname was completely unrelated to any of the other proof against the defendant. The prosecution's only possible purpose in eliciting the testimony was to create an impression in the minds of the jurors that the defendant was known by the police to be an unsavory character or even a criminal. [This] was tantamount to testimony about a defendant's character that is proffered to show the probability that the defendant acted in conformity with that character in a particular case.

⁷² Under the Federal Rules of Evidence, Rule 4 is derived from FED. R. EVID. 404(a)(1): "Evidence of a pertinent trait of his character [is admissible when] offered by an accused [to prove that he acted in conformity therewith on a particular occasion]," and FED. R. EVID. 405(a); when character evidence is admissible: "proof may be made by testimony as to reputation or by testimony in the form of an opinion." Under the California Evidence Code, Rule 4 is derived from § 1102: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is [admissible] if such evidence is . . . offered by the defendant to prove his conduct in conformity with such character or trait of character."

that she did not commit the act charged.⁷³

Rule 4 can be viewed simply as an act of grace, akin to the presumption of innocence and the privilege against self-incrimination, a noble concession to the plight of the citizen who stands accused of a crime.⁷⁴ However, the more common explanation of Rule 4 is that, with the danger of prejudice to the defendant removed from the balance, the probative value of the evidence outweighs its costs.⁷⁵

To be relevant, the defendant's evidence must concern a character trait that is inconsistent with the crime charged. For example, if the defendant is charged with embezzlement, evidence of her honesty in money matters is relevant, but evidence of her nonviolence is irrelevant. Conversely, if the defendant is charged with killing a person in the heat of passion, evidence of her nonviolence is relevant, but evidence of her

⁷³ As Justice Jackson explained in *Michelson*:

[T]his line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.

Michelson, 335 U.S. at 476 (footnote omitted). The quoted passage's last sentence may be somewhat misleading. Some modern federal decisions hold that the jury should *not* be instructed that the defendant's good character evidence "standing alone" may be enough to raise a reasonable doubt about the defendant's guilt because no item of evidence should be singled out and considered "standing alone." *See, e.g.*, *United States v. Marquardt*, 786 F.2d 771 (7th Cir. 1986).

⁷⁴ *See* J. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 204 (1947) (stating that: "The brutal rigors of the old English criminal law engendered or at least greatly encouraged this doctrine of admissibility as a rule of mercy."); *see also* 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 404[05], at 404-41 (suggesting that the apparent inconsistency between Rule 3 and Rule 4 "is not based upon a difference in probative force, but rather upon an underlying policy somewhat akin to that involved in the privilege against self-incrimination which seeks to protect a defendant from 'uncontrollable and undue prejudice, and possible unjust condemnation'").

⁷⁵ *See* FED. R. EVID. 404 advisory committee's note, 56 F.R.D. 183, 220 (1973); R. LEMPERT & S. SALTZBURG, *supra* note 20, at 237; *see also* Falknor, *supra* note 63, at 585; C. McCORMICK, *supra* note 1, § 191, at 566. In addition, Wright and Graham argue that good character has more probative value than bad character as evidence of conduct. The defendant's bad character "may show his capacity to engage in crime but is little proof that he was involved in the particular crime charged." In contrast, good character evidence puts the defendant "in a class of people who are highly unlikely to engage in criminal conduct." 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5236, at 380-81. In other words, "people are much less likely to commit their first crime than they are their second or third." *Id.* at n.10.

honesty in money matters is irrelevant.⁷⁶

The defendant cannot use specific acts evidence to prove her good character under Rule 4.⁷⁷ In this context, specific acts evidence has low probative value. For example, if *D* is charged with arson for burning down *X*'s house, it is not convincing to offer evidence about other houses that *D did not* burn down.⁷⁸ Nor is it convincing to offer evidence that *D* befriended a homeless person (to show her concern for humanity), or that she once returned a lost purse to its owner (to show her respect for the property of others). These specific acts are not sufficiently related to the issue to justify the time or the risk of clouding the issues.

Example: At *D*'s trial for drug peddling, *D* offers the testimony of witness *W* that she has known *D* for several years and that, in her opinion, *D* is a law-abiding person. Under most modern evidence codes, *W*'s opinion testimony is admissible.⁷⁹

Example: *D* is on trial for unlawfully possessing restricted firearms, a crime that does not involve an element of false statement. *D* elects not to testify on his own behalf. Instead, *D* offers the testimony of character witness *W*. If permitted to testify, *W* will state that *D* is known in the community as a person who always tells the truth and is law abiding. Since a firearms violation does not involve an element of false statement, and since *D* has not testified as a witness,⁸⁰ the trial judge should

⁷⁶ CAL. EVID. CODE § 1102 (West 1986) allows the defendant to offer evidence of his "character or a trait of his character," but FED. R. EVID. 404(a)(1) speaks more narrowly of "evidence of a pertinent trait of his character." See generally 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5236, at 382-85. However, even under the narrower statute, evidence that the defendant is a "law-abiding person" is generally admissible. See, e.g., *United States v. Angelini*, 678 F.2d 380 (1st Cir. 1982).

⁷⁷ See FED. R. EVID. 405(a) (reputation and opinion evidence only); CAL. EVID. CODE § 1102 (West 1966) (reputation and opinion evidence only).

⁷⁸ See *United States v. Benedetto*, 571 F.2d 1246, 1249-50 (2d Cir. 1978). Defendant, a federal meat inspector, was accused of taking bribes at meat packing plants *A*, *B*, *C*, and *D*. As good-character evidence, defendant offered the testimony of four witnesses that he had *not* taken bribes at plants *E*, *F*, *G*, and *H*. The appellate court held that this specific acts evidence should not have been admitted. *Id.*; see also *Government of Virgin Islands v. Grant*, 775 F.2d 508, 510-13 (3d Cir. 1985) (holding that defendant's testimony that he was never arrested or charged with a crime was testimony about "multiple instances of good conduct" and was thus inadmissible specific acts evidence).

⁷⁹ Cf. *Angelini*, 678 F.2d at 380 (holding that a drug peddler was entitled to offer opinion evidence of his law-abiding character); *United States v. Darland*, 626 F.2d 1235 (5th Cir. 1980), *cert. denied*, 454 U.S. 1157 (1982) (holding that a bank robber was entitled to offer reputation evidence that he was an honest, peaceful, law-abiding person of high integrity).

⁸⁰ For a discussion of Rule 10 and the use of reputation evidence to attack or support

exclude *W*'s testimony about *D*'s truthfulness. That character trait is irrelevant here. However, the trial judge should permit *W* to testify to *D*'s reputation as a law-abiding person; that character trait is inconsistent with unlawful possession of firearms.⁸¹

3. Cross-Examination of Defendant's Character Witnesses

Rule 5: In a criminal case, once the defendant offers evidence of his good character under Rule 4, the prosecutor can cross-examine defendant's character witnesses and ask them about specific acts in the defendant's past that might tarnish his reputation (or, under most modern evidence codes, affect their opinions of his character).⁸²

Two grave risks face the criminal defendant who chooses to take advantage of Rule 4 by offering evidence of her good character.⁸³ The first and most serious risk, expressed in Rule 5, arises when the prosecutor cross-examines the defendant's character witnesses. When cross-examining a reputation witness, the prosecutor can explore the witness' familiarity with rumors about the defendant and can probe the accuracy of the witness' report of what she has heard others say. When cross-examining an opinion witness, the prosecutor can ask questions designed to test the basis for the witness' opinion that the defendant has a good character, such as how long and how well the witness has known the defendant. But more important, when cross-examining ei-

a witness' credibility, see *infra* text accompanying notes 187-96.

⁸¹ See *United States v. Hewitt*, 634 F.2d 277 (5th Cir. 1981) (holding that reputation as law-abiding person was admissible in firearms possession case, but reputation as truthful person was not admissible); *cf.* *United States v. Danehy*, 680 F.2d 1311 (11th Cir. 1982) (excluding reputation evidence of *D*'s truthful character as not pertinent to the crime charged when charged with unlawfully resisting Coast Guard officers in performance of their duties).

⁸² Under the Federal Rules of Evidence, Rule 5 is derived from the second sentence of FED. R. EVID. 405(a): "On cross-examination [of reputation or opinion witnesses] inquiry is allowable into relevant specific instances of conduct." The California Evidence Code contains no parallel provision, but Rule 5 fairly reflects the California case law. See, e.g., *People v. Hempstead*, 148 Cal. App. 3d 949, 196 Cal. Rptr. 412 (1983); *People v. Hurd*, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970). See generally Note, *Have You Heard? Cross Examination of a Criminal Defendant's Good Character Witnesses: A Proposal for Reform*, 9 U.C. DAVIS L. REV. 365 (1976).

⁸³ It is sometimes said that when a criminal defendant invokes Rule 4 and offers evidence of his good character to prove his conduct, he "puts his character in issue." Numerous commentators have cautioned against this loose terminology because it invites confusion with Rule 1 (concerning character as an ultimate issue in the case). See, e.g., C. MCCORMICK, *supra* note 1, § 191, at 568; Graham, *Evidence as to Character; Circumstantial Use*, 19 CRIM. L. BULL. 234, 240 (1983).

ther a reputation or opinion witness, the prosecutor can inquire about *specific acts* in the defendant's past to assess the value of the reputation or opinion testimony. For example, if *D* is on trial for embezzling money, and if *D* offers *W*'s testimony that *D* has a reputation for honesty, the prosecutor can ask *W* on cross-examination: "Have you ever heard that two years ago *D* was fired from his previous employment for taking money out of the cash drawer?"⁸⁴

If a reputation witness had not heard of specific acts that engendered negative comment among defendant's associates, it suggests that the reputation witness' knowledge of the defendant's reputation is shallow and unreliable.⁸⁵ However, if the reputation witness heard about the specific acts, it suggests either that the witness is lying about defendant's reputation or that the reputation witness is a poor judge of what constitutes a good reputation.⁸⁶ Similarly, if an opinion witness is ignorant of the specific acts, it suggests that the opinion witness lacks an adequate basis for the opinion. However, if an opinion witness is aware of the specific acts, but still claims to have a good opinion of the defendant's character, that suggests that the opinion witness has low standards for good character.⁸⁷

In theory, the trier of fact cannot use the prosecutor's questions about specific acts as evidence that the acts occurred. Rather, the trier of fact can use the questions and the witness' responses solely to assess the value of the witness' reputation or opinion testimony.⁸⁸ Thus, upon

⁸⁴ Cf. *United States v. Glass*, 709 F.2d 669, 673 (11th Cir.), *reh'g denied*, 717 F.2d 1401 (1983). Defendant, a sheriff, was on trial for drug smuggling. He called several distinguished citizens to testify to his good character. On cross-examination, the prosecutor asked the character witnesses if they had heard that defendant had once accepted \$300 to "fix" a drug charge against another person. The court held the cross-examination proper. The cross-examiner is not limited to questions about prior criminal *convictions*. He can inquire about anything that might tarnish the defendant's reputation or affect other people's opinions of his character, including accusations, arrests, and even noncriminal conduct. *Id.*; see *Michelson v. United States*, 335 U.S. 469, 482-84 (1948) (explaining why questions concerning arrests are proper); see also Annotation, *Cross-Examination of Character Witness for Accused with Preference to Particular Acts or Crimes — Modern State Rules*, 13 A.L.R.4th 796, 800-01, 804-06 (1982).

⁸⁵ See *United States v. Hewitt*, 663 F.2d 1381, 1390-91 (11th Cir. 1981); see also *Michelson*, 335 U.S. at 479.

⁸⁶ *Michelson*, 335 U.S. at 479.

⁸⁷ See *People v. Hurd*, 5 Cal. App. 3d 865, 879-80, 85 Cal. Rptr. 718, 727-28 (1970).

⁸⁸ See *Michelson*, 335 U.S. at 472 n.3, 484-85; 3A J. WIGMORE, EVIDENCE § 988, at 912-21 (Chadbourn rev. 1970). Professors Wright and Graham question whether FED. R. EVID. 405(a) was intended to change the common-law rule expressed in *Michelson*, and thus to allow the cross-examiner's questions and the witness' responses to be

request, the defendant is entitled to a limiting jury instruction — the jury cannot use the questions and responses as evidence that the specific acts occurred, but only for whatever light they may cast on the worth of the reputation or opinion testimony.⁸⁹ Further, the prosecutor is limited to cross-examination of the defendant's character witnesses and cannot offer extrinsic evidence (for example, documents or the testimony of other witnesses) to prove that the specific acts did occur.⁹⁰

In *Michelson* Justice Jackson conceded that jurors probably cannot follow a judge's instruction not to use the questions and responses about specific acts as evidence that the acts did occur.⁹¹ Thus, the law has developed some restrictions that help prevent the abuse of this type of cross-examination.

First, the trial judge has discretion to limit or prohibit cross-examination about specific acts if its value is outweighed by the danger of undue prejudice to the defendant or the danger of confusing the issues or sidetracking the jury.⁹² Second, the prosecutor must have good faith grounds for presenting adverse material. For instance, the prosecutor cannot ask the defendant's reputation witness whether she has heard rumors that the defendant murdered his mother unless the prosecutor can demonstrate a good faith belief that such rumors circulate in the community.⁹³

used as evidence that the defendant did commit the specific acts. 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5268, at 604-09. They point out that the wording of Rule 405(a) and the Advisory Committee's commentary are unclear, but they ultimately conclude that Rule 405(a) should be interpreted as confirming, rather than rejecting, the common-law rule. *Id.* at 627-28.

⁸⁹ See *Government of Virgin Islands v. Roldan*, 612 F.2d 775, 781 (3d Cir. 1979), *cert. denied*, 446 U.S. 920 (1980) (holding that defendant entitled to limiting instruction, but if he does not request it, trial judge's failure to give it is not reversible error). For sample jury instructions, see 1 CALIFORNIA JURY INSTRUCTIONS — CRIMINAL (BAJI) No. 2.42, at 51-52 (4th ed. 1979); E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 15.26 (3d ed. 1977).

⁹⁰ *United States v. Benedetto*, 571 F.2d 1246, 1249-50 (2d Cir. 1978); see also *Graham*, *supra* note 83, at 246.

⁹¹ *Michelson*, 335 U.S. at 484-85.

⁹² See *FED. R. EVID.* 403; *CAL. EVID. CODE* § 352 (West 1966); C. McCORMICK, *supra* note 1, § 191, at 569-70; R. LEMPERT & S. SALTZBURG, *supra* note 20, at 242-44; cases collected in Annotation, *supra* note 84, at 807-22.

⁹³ For example, in *Michelson*, the trial judge asked the prosecutor (out of the jury's presence) whether his "best information" was that the defendant was arrested for receiving stolen goods. The prosecutor affirmed that it was and produced a "paper record" (probably an arrest report) to prove it. *Michelson*, 335 U.S. at 472. Some cases recommend that the trial judge hold a hearing out of the jury's presence to assess the basis for the prosecutor's questions. See, e.g., *People v. Hempstead*, 148 Cal. App. 3d

Third, the prosecutor's questions must be pertinent to the character traits that the witness has covered on direct examination. The cross-examination can cover as much ground, but not more ground, than the testimony it tests.⁹⁴

Fourth, the prosecutor must be careful about the form of the questions posed on cross-examination, at least under the traditional common-law view. Traditionally, the questions to a reputation witness are in the form "Have you heard . . . ?" because the questions are designed to probe the witness' knowledge of what he has heard in the community.⁹⁵ In jurisdictions that permit opinion testimony, the prosecutor can ask questions of an opinion witness in the "Do you know . . . ?" form.⁹⁶

949, 196 Cal. Rptr. 412 (1983); *People v. Fields*, 287 N.W.2d 325, 93 Mich. App. 702 (1979); 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5268, at 622-25 (noting division of authority on whether prosecutor's affirmation is sufficient or whether hearing is required).

⁹⁴ See R. LEMPERT & S. SALTZBURG, *supra* note 20, at 242-44. For example, in *Michelson* the defendant was charged with bribing a federal revenue agent. Defendant's character witness testified that Michelson's reputation was that of an honest, truthful, and law-abiding citizen. That testimony on direct opened a wide field for the prosecutor. The Court held that the prosecutor was entitled to ask if the witness had heard that Michelson was once arrested for receiving stolen goods. Bribery and receiving stolen goods are dissimilar crimes, but both "proceed from the same defects of character which the witness said this defendant was reputed not to exhibit." *Michelson*, 335 U.S. at 483-84.

⁹⁵ In *Michelson* Justice Jackson explained: "Since the whole inquiry [to a reputation witness] is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed." *Michelson*, 335 U.S. at 482.

⁹⁶ *Government of Virgin Islands v. Roldan*, 612 F.2d 775, 780 (3d Cir. 1979), *cert. denied*, 446 U.S. 920 (1980). *People v. Hurd*, 5 Cal. App. 3d 865, 879-80, 85 Cal. Rptr. 718, 727-28 (1970), holds that questions to an opinion witness can also be in the "Have you heard . . . ?" form, since the opinion is probably based on a mixture of personal knowledge and hearsay. The Advisory Committee Notes to FED. R. EVID. 405(a) state that Rule 405(a) eliminates the traditional concern about the form of the questions. See FED. R. EVID. 405(a) advisory committee's note, 56 F.R.D. 183, 222 (1973). However, some commentators have expressed doubt. Compare 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5268, at 626-28 and Graham, *supra* note 83, at 245-46 with C. MCCORMICK, *supra* note 1, § 191, at 569. In *United States v. Curtis*, 644 F.2d 263, 269 (3d Cir. 1981), *appeal after remand*, 683 F.2d 769 (3d Cir.), *cert. denied*, 459 U.S. 1018 (1982), the Court of Appeals admonished trial judges that FED. R. EVID. 405(a) has not "effected a merger between reputation and opinion evidence," and that an opinion witness can be questioned "only on matters bearing on his own opinion, while a reputation witness can only be examined on matters . . . likely to have been known to the relevant community . . ." Given the law's uncertain state, perhaps a careful trial lawyer should follow tradition. Like the buttons on a coat sleeve,

Example: *D* is on trial for armed robbery of a bank. Invoking Rule 4, *D* offers the testimony of witness *W* that, among the people with whom *D* works, she enjoys a good reputation for honesty and peacefulness. On cross-examination of *W*, the prosecutor can ask: “*W*, have you ever heard that *D* was once arrested for larceny and assault with a deadly weapon?” The question is proper, even though it concerns an arrest rather than a conviction. An arrest can tarnish a person’s community reputation, even if it is not followed by a conviction.⁹⁷

Example: In a jurisdiction with a modern evidence code that permits opinion testimony, *D* is on trial for committing incest, oral copulation, and sodomy with his teen-age daughter. Invoking Rule 4, *D* offers the testimony of witness *W*, a priest. *W* testifies that he has known *D* for three or four years and that: “In my opinion, *D* has good moral character. He is honest, fair, upright, and has never done anything to indicate otherwise.” On cross-examination, the prosecutor asks the following questions: “Do you know that twenty years ago *D* was arrested for transporting a stolen car across state lines?” “Are you aware that ten years ago *D* was arrested for armed robbery?” “Are you aware that five years ago *D* was arrested for forcible rape?” “Do you know that two years ago *D* was arrested for child beating, in which the victim was the daughter involved in the present case?” Witness *W* responds that he had heard of some of these events but not others. Given the broad scope of *W*’s testimony on direct that *D* is “upright and has never done anything to indicate otherwise,” these questions are proper, even though some of the arrests occurred many years ago and relate to character traits not relevant to the crimes with which *D* is now charged.⁹⁸

it may do no good, but at least it will do no harm.

⁹⁷ *Cf.* *United States v. Evans*, 569 F.2d 209 (4th Cir.), *cert. denied*, 435 U.S. 975 (1978) (holding that in a bank robbery case, defendant’s good character witnesses could be asked about defendant’s convictions for larceny, assault with a deadly weapon, receiving stolen property, prior arrests for assaulting a female, failing to stop for a police car, and driving 110 miles per hour in a 55 miles per hour zone).

⁹⁸ *Cf.* *People v. Hurd*, 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970) (holding that when defendant was charged with various sex crimes against his daughter, and opinion witness testified in broad terms about defendant’s upstanding character, prosecutor could inquire about a series of arrests for auto theft offenses from 20 to 25 years in the past as well as more recent arrests for rape and child beating). *People v. Hempstead*, 148 Cal. App. 3d 949, 196 Cal. Rptr. 412 (1983) holds that opinion witnesses may be questioned about defendant’s past acts even if it is clear that the witnesses have no knowledge about such acts; the witnesses’ lack of knowledge is itself significant in assessing the worth of their opinion testimony.

4. Prosecution's Rebuttal Witnesses

Rule 6: In a criminal case, once the defendant offers evidence of her good character under Rule 4, the prosecutor can call rebuttal witnesses to testify that the defendant has a bad reputation (or, under most modern evidence codes, to testify that they have a bad opinion of the defendant's character).⁹⁹

A criminal defendant who chooses to take advantage of Rule 4 by offering evidence of his good character runs two risks. The first risk is the cross-examination described under Rule 5. The second risk is expressed in Rule 6 — the prosecutor can call rebuttal witnesses to testify that the defendant's character is bad. As Justice Jackson explained in *Michelson*, a part of "[t]he price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."¹⁰⁰ Like the cross-examination under Rule 5, the prosecutor's rebuttal under Rule 6 must be relevant to the character traits about which defendant's witnesses testified — the rebuttal cannot cover more ground than the testimony it is designed to rebut.¹⁰¹

Example: In a jurisdiction with a modern evidence code that permits opinion evidence, union official *D* is on trial for extorting money from nonunion truck drivers by refusing to unload their trucks unless they joined the union. After *D* offers witness *W*'s opinion that *D* is an honest, peaceful person, the prosecutor offers the reputation testimony of witness *Y* that *D* is known in the community as a coercive, dishonest person. Witness *Y*'s rebuttal testimony should be admitted.¹⁰² *Y*'s re-

⁹⁹ Under the Federal Rules of Evidence, Rule 6 is derived from FED. R. EVID. 404(a)(1): "Evidence of a pertinent trait of his character [is admissible when] offered by an accused, or by the prosecution to rebut the same," and FED. R. EVID. 405(a): "[When character evidence is admissible] proof may be made by testimony as to reputation or by testimony in the form of an opinion." Under the California Evidence Code, Rule 6 is derived from CAL. EVID. CODE § 1102(b) (West 1966): "[Reputation and opinion evidence are admissible when] offered by the prosecution to rebut evidence adduced by the defendant"

¹⁰⁰ *Michelson*, 335 U.S. at 479.

¹⁰¹ See *United States v. Reed*, 700 F.2d 638, 645 (11th Cir. 1983). See generally 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5236, at 395-96 (stating that rebuttal evidence should be regarded as relevant if it directly negates the character traits covered by defendant's character witnesses, or if it negates inferences that defendant seeks to have the jury draw from those character traits).

¹⁰² Cf. *United States v. Wilford*, 710 F.2d 439, 448-50 (8th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984) (holding that in Hobbs Act prosecution concerning *D*'s extortion

buttal testimony is limited to the character traits about which *W* testified. Also, *Y* rebutted with reputation testimony rather than opinion testimony. Opinion can be rebutted by reputation, and vice versa.

Example: In a jurisdiction with a modern evidence code that allows the use of opinion evidence, postman *D* is on trial for stealing letters containing checks. After *D* offered the testimony of three opinion witnesses concerning her honesty and candor, the prosecutor offers the testimony of a rebuttal witness that *D* is reputed to use marijuana. The court should exclude the rebuttal testimony because it is not pertinent to the character traits about which *D*'s character witnesses testified.¹⁰³

5. Evidence about the Victim's Character

*Rule 7: When the victim's conduct is relevant in a criminal case, the defendant can offer evidence of the victim's character to prove the victim's conduct, and the prosecution can rebut with like evidence. For this purpose, reputation evidence is proper (and also opinion evidence, under most modern evidence codes), and some jurisdictions also permit specific acts evidence. However, special rules apply in rape and sexual assault cases concerning evidence of the victim's prior sexual conduct.*¹⁰⁴

In some criminal cases the victim's conduct is relevant. For instance, in a murder or assault case, the defendant may contend that the victim

of money from nonunion truckers, prosecutor was entitled to rebut *D*'s good character witnesses by offering contrary evidence).

¹⁰³ *Cf. Reed*, 700 F.2d at 645 (when *D* was accused of theft of checks from the mails, prosecutor was not allowed to offer evidence about his use of marijuana to rebut the opinion testimony of *D*'s witnesses about his honesty); *State v. Kramp*, 651 P.2d 614, 618 (Mont. 1982) (when *D* was accused of stealing a large air compressor from a construction site, prosecutor was not allowed to offer evidence about *D*'s traffic violations or drunk driving to rebut the opinion testimony of *D*'s witness that *D* was a truthful, honest person).

¹⁰⁴ Under the Federal Rules of Evidence, Rule 7 is derived from two rules. FED. R. EVID. 404(a)(2) provides that:

Evidence of a pertinent trait of character of the victim of the crime [is admissible when] offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim [is admissible when] offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

FED. R. EVID. 405(a) provides that: "[When character evidence] is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." FED. R. EVID. 412 states the special rules that apply in rape and sexual assault cases. Under the California Evidence Code, Rule 7 is derived from CAL. EVID. CODE § 1103(a) (West Supp. 1987):

was the aggressor and that the defendant was merely responding to the victim's attack. Rule 7 allows the defendant to offer evidence of the victim's aggressive character to help prove that the victim was the aggressor. The prosecutor may then rebut with evidence that the victim was a peaceful, nonviolent person and would not have attacked the defendant.

However, evidence about the victim's character does have its costs. It consumes time, and it may divert the jury's attention from the case's main issues. Further, the jurors may be unduly lenient toward the defendant if they conclude that the victim was a bad person who "deserved what he got."¹⁰⁵ However, over the years, the courts have concluded that the probative value of such evidence outweighs its costs.¹⁰⁶ This judgment is reflected in modern evidence codes.¹⁰⁷

When the defendant in a homicide or assault case claims to have acted in self-defense, evidence concerning the victim's character can be relevant in two ways. First, the defendant may claim that the victim attacked him and may offer the victim's character as circumstantial evidence of that attack.¹⁰⁸ Under this theory of relevance, most modern evidence codes permit only reputation and opinion evidence — specific acts evidence is not allowed.¹⁰⁹ Second, the defendant may claim that

In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is . . . [admissible] if such evidence is:

- (1) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character[; or]
- (2) Offered by the prosecution to rebut evidence adduced by the defendant[.]

Notice that CAL. EVID. CODE § 1103(a) (West Supp. 1987) permits the use of specific acts evidence in addition to reputation and opinion evidence. CAL. EVID. CODE § 1103(b) (West Supp. 1987) states the special rules that apply in rape and sexual assault cases.

¹⁰⁵ C. McCORMICK, *supra* note 1, § 193, at 572.

¹⁰⁶ *See, e.g.*, *People v. Castain*, 122 Cal. App. 3d 138, 143-44, 175 Cal. Rptr. 651, 654 (1981) (holding that when defendant was accused of battering a police officer, the probative value of evidence about the officer's propensity to treat arrested persons violently clearly outweighed risks of time consumption and confusion of the issues). With respect to the discoverability of evidence about a police officer's prior acts of violence, see generally 3 J. HOGAN, *MODERN CALIFORNIA DISCOVERY* 3d §§ 20.01-.08 (1981).

¹⁰⁷ *See* FED. R. EVID. 404 advisory committee's note, 56 F.R.D. 183, 220 (1973); California Law Revision Commission Comments to CAL. EVID. CODE §§ 1102-1103 (West 1966 & Supp. 1987).

¹⁰⁸ *See* 1A J. WIGMORE, *supra* note 23, § 63, at 1350.

¹⁰⁹ *See* FED. R. EVID. 405(a); 2 J. WEINSTEIN & M. BERGER, *supra* note 1,

she knew the victim had a violent character, that she feared the victim, and therefore her act of self-defense was reasonable.¹¹⁰ Under this second theory of relevance, the victim's character is used to prove the defendant's state of mind, not the victim's conduct. Therefore, the general principle that evidence of a person's character cannot be used as evidence of that person's conduct¹¹¹ does not apply. The admissibility of the evidence is governed by the ordinary rules of relevance,¹¹² and the defendant can offer evidence of the victim's specific violent acts if defendant knew of those acts.¹¹³ Under some modern evidence codes, litigants can use specific acts evidence to prove either the victim's conduct or the defendant's state of mind.¹¹⁴

Ordinarily, the prosecution cannot offer evidence of the victim's good character until the defendant offers evidence of the victim's bad character.¹¹⁵ However, Federal Rule 404(a)(2) contains a special provision for homicide cases: the prosecutor can offer evidence of the victim's peaceful character "to rebut evidence that the victim was the first aggressor." For example, if the defendant offers his own testimony, or the testimony of an eye-witness, that the victim was the aggressor, the prosecutor can rebut with evidence of the victim's peaceful character.¹¹⁶

Example: In a jurisdiction with an evidence code based on the Federal Rules of Evidence, *D* is on trial for assault with intent to commit mayhem. The victim was *D*'s live-in girl friend, *V*. Prosecutor *P* offers evidence that *D* hit *V* with a stick and then pulled a pistol from his pocket and shot her. *D* contends that *V* attacked him with the stick, that

¶ 405[05] (summarizing state evidence codes patterned after the Federal Rules of Evidence); see also *People v. Jones*, 675 P.2d 9, 16-17 (Colo. 1984) (holding that the Colorado rule, identical to FED. R. EVID. 405(a), permits cross-examination of reputation or opinion witnesses using specific acts).

¹¹⁰ See 2 J. WIGMORE, EVIDENCE §§ 246-248 (Chadbourn Rev. 1979).

¹¹¹ See FED. R. EVID. 404(a); CAL. EVID. CODE § 1101(a) (West Supp. 1987); see also *supra* note 63.

¹¹² See 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5237, at 398.

¹¹³ See *id.* § 5266, at 600; see, e.g., *Government of Virgin Islands v. Carino*, 631 F.2d 226, 229 (3d Cir. 1980) (holding that when defendant knew of victim's prior conviction for voluntary manslaughter, conviction was admissible to prove defendant's fear of victim).

¹¹⁴ See CAL. EVID. CODE § 1103(a) (West Supp. 1987) (specific acts admissible to prove victim's conduct); MONT. R. EVID. 405(b) (1986) (specific acts admissible "where the character of the victim relates to the reasonableness of force used by the accused in self-defense"); WYO. R. EVID. 405(b) (1978) (specific acts admissible to prove victim's conduct).

¹¹⁵ See FED. R. EVID. 404(a)(2); CAL. EVID. CODE § 1103(a)(2) (West Supp. 1987).

¹¹⁶ See 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5237, at 404, 406-09.

V then reached into her pocket for a pistol, and that *D* shot *V* as he was attempting to take the pistol away from her. To support his contention, *D* offers the testimony of witness *W* that *V* is known in the neighborhood as a hot-tempered, violent person. Further, *D* offers a certified copy of an earlier judgment convicting *V* of voluntary manslaughter. *D* offers *W*'s testimony and the judgment of conviction on two different theories: first, to prove that *V* was the aggressor, and second, to prove that *D* (knowing of *V*'s reputation and her prior conviction) feared *V* and acted reasonably in attempting to defend himself. *W*'s reputation testimony is admissible on both theories. The judgment of conviction is admissible only on the second theory in a jurisdiction that follows the Federal Rules of Evidence. However, in a jurisdiction that allows specific acts as evidence of the victim's conduct, the judgment of conviction is admissible on both theories.¹¹⁷

Example: *D* is on trial in California for the homicide of *V*, the husband of *D*'s paramour. In support of *D*'s claim of self-defense, he testifies that he feared *V* because on several prior occasions *V* chased and violently threatened *D*. *D*'s testimony about *V*'s prior specific acts is admissible in California, both to prove *D*'s fear of *V* (*D*'s state of mind) and to prove that *V* attacked *D* on the occasion in question (victim's conduct). In a jurisdiction that follows the Federal Rules of Evidence, *D*'s testimony about *V*'s prior specific acts is admissible to prove *D*'s fear, but not to prove *V*'s conduct on the occasion in question.¹¹⁸ After *D* testifies, the prosecutor offers the rebuttal testimony of witness *W* that, in *W*'s opinion, *V* was "cordial, friendly, level-headed, and empathetic." The prosecutor's purpose is to prove *V*'s conduct on the occasion in question. *D* objects on the ground that *D*'s testimony was offered only to prove *D*'s fear, not *V*'s conduct. In California, *W*'s rebuttal testimony should be admitted because *D*'s specific acts evidence "was directly probative of the victim's character for violent behavior."¹¹⁹ It is unclear whether *W*'s rebuttal testimony should be ad-

¹¹⁷ Cf. *Carino*, 631 F.2d at 228-29 (holding that when *D* was charged with assault to commit mayhem, *V*'s prior conviction for involuntary manslaughter was admissible to prove *D*'s fear of *V*, but not to prove that *V* attacked *D*). A good illustration of the California rule is *People v. Castain*, 122 Cal. App. 3d 138, 142-44, 175 Cal. Rptr. 651, 654 (1981). *D* was charged with battering a police officer in the course of the officer's duties. *D* contended that the officer beat and threatened *D* when arresting him and that the officer was thus acting outside the scope of duty. The testimony of *D*'s witnesses about several other occasions when the officer had beaten and abused arrested persons was admissible to show the officer's propensity to use excessive force.

¹¹⁸ See *supra* text accompanying notes 111-17.

¹¹⁹ *People v. Clark*, 130 Cal. App. 3d 371, 383-84, 181 Cal. Rptr. 682, 689 (1982),

mitted in a jurisdiction that follows the Federal Rules of Evidence. The federal authorities do not clearly indicate whether *D*'s offer of specific acts evidence to prove *D*'s fear triggers the prosecutor's right to rebut with evidence of *V*'s good character.¹²⁰

Under Rule 7, special rules apply in rape and sexual assault cases. Traditional common law allowed the defendant in a sexual assault case to offer evidence of the victim's prior sexual conduct as circumstantial evidence of consent on the occasion in question.¹²¹ During the 1970s most states passed "rape shield" statutes.¹²² These statutes vary widely in form and content,¹²³ but generally they exclude evidence of the victim's prior sexual conduct with other persons when offered as circumstantial evidence of consent, thus reflecting the modern legislative judgment that the evidence's probative value is too low to counterbalance

noted in 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5237, at 364 n.44 (Supp. 1987) (noting that the California court either rejected or overlooked the distinction between proof of the defendant's fear and proof of the victim's conduct).

¹²⁰ Except for *Clark*, 130 Cal. App. 3d at 371, 181 Cal. Rptr. at 682, no case was found with authority on this point. However, Professors Wright and Graham state as follows: "[T]he character of the victim must be offered by the defendant to prove the conduct of the victim; if it is offered for some other purpose — e.g., to prove the defendant's state of mind — the prosecution cannot rebut under [Federal] Rule 404(a)(2)." 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5237, at 404-05. Further, when Wright and Graham discuss the special triggering provision of FED. R. EVID. 404(a)(2) that applies in homicide cases, they hypothesize a case in which the defendant offers evidence of the victim's character to show his own fear, but admits that he shot first. They state that the rationale of the special triggering provision suggests that the prosecutor should be allowed to rebut with reputation or opinion evidence of the victim's peacefulness, but they state that "the language of the special rule, if literally read, would appear to bar rebuttal since the defendant admits he was the first aggressor." *Id.* § 5237, at 408 n.64. Wright and Graham's careful reading of FED. R. EVID. 404(a)(2) cannot be faulted, but it is uncertain whether the distinction between proof of the defendant's state of mind and proof of the victim's conduct is important enough in this context to justify adding more gargoyles to the grotesque structure.

¹²¹ See 1A J. WIGMORE, *supra* note 23, §§ 62-62.2. The underlying chain of reasoning was bluntly stated by the California Supreme Court in 1895: "[I]t is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent" than one who has not. *People v. Johnson*, 106 Cal. 289, 293, 39 P. 622, 623 (1895). Indeed, Benjamin Cardozo once wrote that in a rape case the victim's prior sexual conduct is "the one thing that any sensible trier of fact would wish to know above all others in estimating the truth . . ." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 156 (1921).

¹²² See, e.g., FED. R. EVID. 412 (added in 1978); CAL. EVID. CODE § 1103(b) (West Supp. 1987) (added in 1974).

¹²³ 1A J. WIGMORE, *supra* note 23, § 63, at 1264-96 provides a convenient catalogue of the state rape shield statutes and key decisions.

the risk of intimidating or harassing rape and sexual assault victims.¹²⁴

Example: *D* is on trial in federal court for assault with intent to rape *V*. The prosecutor's evidence includes a photograph of *V*, taken shortly after the event, showing a laceration on her neck. *D* admits making a sexual advance on *V*, but he contends that *V* consented, or at least that he thought she consented, and that he had no intent to have intercourse without her consent. *D* further contends that he did not cause the laceration on *V*'s neck. Following the procedural requirements of Federal Rule of Evidence 412(c),¹²⁵ *D* attempts to use the following items of evidence. First, physician *W* expresses her expert opinion that, based on her physical examination of *V*, *V* led a sexually active life prior to the assault. If *W*'s opinion testimony is offered as circumstantial evidence that *V* consented to *D*'s sexual advance, it is inadmissible because Federal Rule 412(a) bars opinion evidence for this purpose.¹²⁶ Second, witness *X* will testify that he had voluntary intercourse with *V* six months before the event in question. If *X*'s specific acts testimony is offered as circumstantial evidence that *V* consented to *D*'s sexual advance, it is inadmissible because Federal Rule 412(b) bars *V*'s specific acts with other persons to prove consent.¹²⁷ Third, witness *Y* will testify that he had voluntary intercourse with *V* shortly before the event in question and that during the encounter he inadvertently scratched her neck. *Y*'s evidence is admissible under Federal Rule 412(b)(2)(A), but only to show that *D* was not the source of the injury to *V*'s neck.¹²⁸ The trial

¹²⁴ See *Doe v. United States*, 666 F.2d 43, 46-48 (4th Cir. 1981) (discussing rationale of federal rape shield statute); see also M. GRAHAM, EVIDENCE, *supra* note 1, at 473-79; C. McCORMICK, *supra* note 1, § 193, at 573-74; S. SALTZBURG & K. REDDEN, *supra* note 1, at 322-29; 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 412[01], at 412-9 to 412-12; 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5328.

¹²⁵ See FED. R. EVID. 412(c) (holding that proponent of evidence must obtain leave of court in advance, and court has discretion to exclude or limit the evidence to assure that probative value outweighs risk of prejudice).

¹²⁶ FED. R. EVID. 412(a) states that: "reputation or opinion evidence of the past sexual behavior of [the victim] is not admissible." See 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5385, at 556 (stating that "Rule 412(a) would seem to preclude a physician from testifying on the basis of a physical examination of the victim that in his opinion she had been sexually active prior to the rape; this would clearly be an opinion of her past sexual behavior.").

¹²⁷ FED. R. EVID. 412(b) provides that specific acts evidence is generally inadmissible, subject to some exceptions. One of the exceptions permits the defendant to prove consent by evidence of the victim's prior acts with the defendant himself. However, there is no exception that would allow the defendant to prove consent by evidence of the victim's prior acts with other persons.

¹²⁸ FED. R. EVID. 412(b)(2)(A) provides that evidence of the victim's specific acts with other persons can be used to prove whether the defendant was or was not the

judge should consider excluding that portion of *Y*'s testimony describing his encounter with *V* as sexual rather than something less intimate.¹²⁹ Fourth, witness *Z* will testify that *V* is known in the community as a promiscuous person. If *Z*'s reputation testimony is offered as circumstantial evidence that *V* consented to *D*'s sexual advance, it is inadmissible because Federal Rule 412(a) bars reputation evidence for this purpose.¹³⁰ Fifth, defendant *D* will testify that he knew of *V*'s reputation as a promiscuous person, that her reputation led him to believe that she was simply being playful when she resisted his advance, and that he had no intent to have intercourse against her will. *D*'s testimony about his own state of mind, the lack of intent, is not barred by Federal Rule 412. However, it is unclear whether the court will admit *Z*'s testimony about *V*'s reputation and *D*'s testimony that he knew of that reputation to substantiate *D*'s lack of intent.¹³¹

source of semen or of injury to the victim.

¹²⁹ FED. R. EVID. 412(c)(3) tells trial judges to exclude the evidence if its probative value is outweighed by the risk of prejudice. *See also* FED. R. EVID. 403; 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5392, at 628-30. Further, 412(c)(3) invites trial judges to tailor the evidence if the valuable parts can be segregated from the prejudicial parts.

¹³⁰ *See supra* note 126.

¹³¹ FED. R. EVID. 412(a) seems abundantly clear on its face: "reputation or opinion evidence of the [victim's] past sexual behavior . . . is not admissible." (emphasis added). The statute does not say "is not admissible to prove consent"; it says only "is not admissible." Nevertheless, when the issue arose concerning use of the victim's reputation to help prove the defendant's state of mind, the Fourth Circuit stated:

The legislative history discloses that reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victim's consent or her veracity. There is no indication, however, that this evidence was intended to be excluded when offered *solely to show the accused's state of mind*. Therefore, its admission is governed by the Rules of Evidence dealing with relevancy in general.

Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981) (citation omitted) (emphasis added). However, nothing in the legislative history suggests that Congress intended to say something other than what it said: "is not admissible." *See Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Committee on the Judiciary*, 94th Cong., 2d Sess. 1-84 (1976); *see also* 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5385, at 554 n.46. A basic purpose of the federal rape shield statute is to prevent the use of a rape victim's sexual past as a tool to intimidate or harass her as the complainant witness. *See* 124 CONG. REC. 30, 34, 912-13 (1978). This purpose could be frustrated if defense lawyers could evade the statute by offering the victim's reputation to prove, not consent, but the defendant's state of mind. But at least the Fourth Circuit's interpretation avoids the constitutional problem that could arguably arise if the defendant were forbidden from offering reputation evi-

V. TWO WAYS TO GET AROUND THE GROTESQUE STRUCTURE

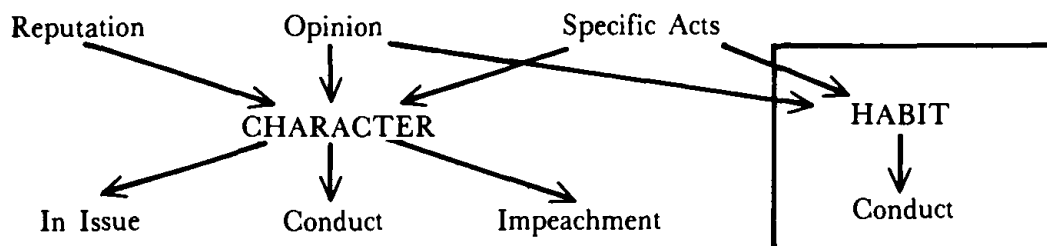
The common law and the modern evidence codes offer two detours around the grotesque structure of character evidence. First, a litigant can offer evidence of a person's habit (as distinct from his character) to prove the person's conduct on a particular occasion. Second, a litigant can offer evidence of a person's specific acts to prove, not character, but something else — anything else that is relevant to the case. These two detours are available in both criminal and civil cases.

A. *Habit as Evidence of Conduct*

*Rule 8: A litigant can offer evidence of a person's habit (as distinct from his character) to prove the person's conduct on a particular occasion.*¹³²

dence to back up his claim of lack of criminal intent. *See* *Davis v. Alaska*, 415 U.S. 308 (1974) (bias evidence admissible for impeachment despite state's rule of privilege); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (third party's declarations against penal interest admissible despite state's voucher rule and hearsay rule); *United States v. Hollimon*, 16 M.J. 164, 166 (CMA 1983) (stating that "[i]n a prosecution for assault with intent to rape, the victim's reputation, if known to the accused, might tend to negate the specific intent. In that situation the requirements of . . . the Fifth and Sixth Amendments would require admission of the evidence . . ."). *See generally* 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5387, at 563-72.

¹³² Under the Federal Rules of Evidence, Rule 8 is derived from FED. R. EVID. 406: "Evidence of the habit of a person . . ., corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . ." Under the California Evidence Code, Rule 8 is derived from CAL. EVID. CODE § 1105 (West 1966): "Any otherwise admissible evidence of habit . . . is admissible to prove conduct on a specified occasion in conformity with the habit . . ." Strictly speaking, the modern evidence code provisions about habit evidence are surplusage. The modern evidence codes make *all* relevant evidence admissible, unless a rule of law excludes it. *See supra* text accompanying note 15. Since no rule of law excludes habit evidence, it would be admissible under the general rules of relevance, even without the special provisions. Nevertheless, the special provisions are useful because they alert lawyers and judges to the distinction between character evidence and habit evidence. *See* California Law Revision Commission Comments to CAL. EVID. CODE § 1105 (West 1966). Federal Rule 406 and California Evidence Code § 1105 also provide that evidence of an organization's "routine practice" or "custom" can be used to prove what the organization did on a particular occasion. Custom evidence is not discussed further here since this Article is limited to evidence about human beings. *See supra* text accompanying notes 2-3. For useful discussions of custom evidence, see M. GRAHAM, *EVIDENCE*, *supra* note 1, at 485-88; 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5274; *see also* 1A J. WIGMORE, *supra* note 23, §§ 94-95; Graham, *Habit and Routine Practice*, 19 CRIM. L. BULL. 149 (1983).



Suppose that in a civil case it is important to know whether motorist *M* had her seat belt buckled on a particular occasion. Suppose we can prove that *M* is a careful, cautious, meticulous person, the sort of person who locks her medicine cabinet, never stores oily rags in the garage, and never touches an electric appliance while taking a bath. *M*'s carefulness is a trait of her *character*. Rule 2 tells us that we cannot use *M*'s character as evidence that she had her seat belt buckled on the occasion in question. But suppose we can also prove that whenever *M* gets into a car the first thing she does is buckle the seat belt. That is *M*'s *habit*. Rule 8 allows us to use *M*'s habit as evidence that she buckled the seat belt on the occasion in question.¹³³

Why in this context does the law permit habit evidence, but not character evidence? The answer lies in the now familiar balancing of probative value against cost.¹³⁴ Experience suggests that *M*'s seat belt buckling habit is far more probative evidence that she buckled up on the occasion in question than is *M*'s character, general carefulness, cautiousness, and prudence. As to cost, *M*'s habit respecting automobile seat belts opens a narrow, confined area of inquiry that can be covered in relatively little time with small risk of confusing the issues and distracting the jury's attention. In contrast, *M*'s general carefulness opens an unbounded area of inquiry that will consume more time and increase the risk of confusion and distraction.¹³⁵

¹³³ In some common-law jurisdictions, habit evidence was admissible only if there was no eyewitness to the event in question. Critics have denounced this restriction, and the modern evidence codes abandon it. See C. McCORMICK, *supra* note 1, § 195, at 576; FED. R. EVID. 406; California Law Revision Commission Comments to CAL. EVID. CODE § 1105 (West 1966).

¹³⁴ See FED. R. EVID. 406 advisory committee's notes, 56 F.R.D. 183, 223-25 (1973). See generally R. LEMPERS & S. SALTZBURG, *supra* note 20, at 249; C. McCORMICK, *supra* note 1, § 195, at 575-77.

¹³⁵ Consider the kind of character evidence it would take to prove that our hypothetical motorist *M* buckled her seat belt on the occasion in question. Reputation or opinion

Stated briefly, habit is a person's specific way of responding to a specific stimulus. Character is a person's general way of responding to a variety of stimuli.¹³⁶ The more specific the pattern of behavior, the more likely a court will regard the behavior as a habit.¹³⁷ Buckling one's seat belt is specific enough to be a habit, but taking care for one's personal safety is not.¹³⁸ Repeated abuse of alcohol is not specific enough to be a habit, although daily trips to a particular bar at a particular time may be specific enough to constitute a habit.¹³⁹

evidence are quick, but they provide no more than unconvincing generalizations about M's general carefulness and prudence. Specific acts are more persuasive, but that leads to evidence and counter-evidence about locking medicine cabinets, storing oily rags, and using electric appliances near the bathtub. All of that would consume time and might cloud the issues and distract the jury's attention.

¹³⁶ McCormick explains the distinction as follows:

Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit, in the present context, is more specific. It denotes one's regular response to a repeated situation. If we speak of a character for care, we think of the person's tendency to act prudently in all the varying situations of life — in business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seat belt. The doing of the habitual act may become semi-automatic, as with a driver who invariably signals before changing lanes.

C. MCCORMICK, *supra* note 1, § 195, at 574-75 (footnotes omitted).

¹³⁷ See E. IMWINKELRIED, *supra* note 2, § 7:12; 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5273, at 33-34.

¹³⁸ See C. MCCORMICK, *supra* note 1, § 195, at 575; FED. R. EVID. 406 advisory committee's note, 56 F.R.D. 183, 223-24 (1973); Annotation, *Admissibility of Evidence of Habit, Customary Behavior, or Reputation as to Care of Motor Vehicle Driver or Occupant, on Question of His Care at Time of Occurrence Giving Rise to His Injury or Death*, 29 A.L.R.3d 791 (1970).

¹³⁹ See FED. R. EVID. 406 advisory committee's note, 56 F.R.D. 183, 224 (1973); Annotation, *Admissibility of Evidence of Habit or Routine Practice Under Rule 406, Federal Rules of Evidence*, 53 A.L.R. FED. 703 (1981); Annotation, *Admissibility of Evidence Showing Plaintiff's Antecedent Intemperate Habits, in Personal Injury Motor Vehicle Accident Action*, 46 A.L.R.2d 103 (1956). Suppose we want to prove that litigant L was drinking before he drove his car into a tree one Wednesday evening at 5:30. If witnesses can establish that every weeknight L leaves work at 5:00, goes to the Old Poodle Dog and swills down four vodkas over ice before climbing into his car to drive home, that behavior pattern is specific enough to constitute a habit. Cf. *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1523 (11th Cir. 1985) (holding that evidence that injured tire mechanic regularly drank all day and he regularly carried a cooler of beer to work admissible as habit to help prove that mechanic was drinking at

The courts consider the frequency and regularity of the behavior pattern when deciding what is a habit.¹⁴⁰ For example, suppose that defendant *D* is charged with burglarizing *V*'s home and assaulting her with intent to commit rape. In defense, *D* claims that he lacked the necessary intent because he was drunk on the occasion in question, and that when he gets drunk he stumbles into people's houses to sleep it off. *D*'s witnesses testify that *D* got drunk quite regularly over an eight-year period and that on four occasions he entered various houses to sleep. This testimony is not admissible as habit evidence.¹⁴¹ Four repetitions of this behavior pattern over an eight-year period cannot be called frequent. Moreover, the testimony suggests that the behavior pattern was not regular. If *D* stumbled into other people's houses to sleep on only four occasions during eight years of regular binges, there must have been many other occasions when he did not follow the allegedly habitual behavior pattern.¹⁴²

Specific acts evidence and opinion evidence are the two most common methods of proving a person's habit.¹⁴³ For example, suppose *X* wants

the time he was injured on the job).

¹⁴⁰ See E. IMWINKELRIED, *supra* note 2, § 7:12; 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5273, at 34-35.

¹⁴¹ See *United States v. Pinto*, 755 F.2d 150, 151-52 (10th Cir. 1985) (holding that evidence that defendant stumbled into various stores and houses to sleep off his drinking on four occasions over eight years insufficient to establish habit).

¹⁴² *Id.*; see also *Reyes v. Missouri Pac. R.R. Co.*, 589 F.2d 791, 795 (5th Cir. 1979) (holding that four convictions for public drunkenness over a three and a half year period is not a sufficiently regular pattern of behavior). The ratio between responses and occasions for response is important. Therefore, if it is claimed that a person was in the habit of doing *X* when *Y* occurred, the court should compare the number of *X* responses to the number of *Y* occurrences. A high ratio suggests that the *X* response was habitual. See Lewan, *The Rationale of Habit Evidence*, 16 SYRACUSE L. REV. 39, 48-49 (1965); see also *G.M. Brod & Co. v. United States Home Corp.*, 759 F.2d 1526, 1533 (11th Cir. 1985) (holding that five breaches of contract within 18 months not a sufficient sampling and did not show enough uniformity to establish habit); *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511-12 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (holding that three default judgments against defendant, in three years, given the large number of suits against defendant, was insufficient to show a habit of "stonewalling" in discovery proceedings). Habits vary in nature from those that are almost automatic (for example, holding a dinner fork in a particular way) to those that require some degree of conscious choice (for example, following a particular route from home to work). The greater the degree of conscious choice, the more important it is for the litigant to demonstrate a high ratio of responses to occurrences. See 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5276, at 64-65.

¹⁴³ See C. McCORMICK, *supra* note 1, § 195, at 577; 1A J. WIGMORE, *supra* note 23, §§ 92-93; 2 J. WIGMORE, EVIDENCE §§ 375-376 (3d ed. 1940). For a detailed discussion of proof of habit under FED. R. EVID. 406, see 23 C. WRIGHT & K.

to prove that she did not leave her car keys in the ignition when her car disappeared. *X* can testify that it was her habit to remove the keys whenever she left her car (opinion), and she can recount a number of the many instances when she had done so (specific acts). Likewise, *X* can call witness *Y* who is a regular passenger in *X*'s car to recount instances when *X* removed the keys (specific acts) and to testify that, based on *Y*'s many observations, *X* habitually did so (opinion).¹⁴⁴

Example: Plaintiff *P* sued manufacturer *D* for personal injuries sustained when a can of *D*'s charcoal lighter fluid exploded in *P*'s hands. *D* claims that the explosion was *P*'s fault because *P* squirted fluid from the can onto already burning charcoal. *D*'s cans conspicuously warn consumers against this. As evidence of *P*'s conduct, *D* offers *W*'s testimony. *W* states that over several years he watched *P* light his charcoal cooker on dozens of occasions, and that whenever *P* thought the fire was not making satisfactory progress, he added more lighter fluid, causing the fire to blaze furiously. *W*'s specific acts testimony is admissible

GRAHAM, *supra* note 1, § 5276. As approved by the Supreme Court, FED. R. EVID. 406 included a provision stating that habit "may" be proved by specific act evidence or opinion evidence. Proposed FED. R. EVID. 406(b), 56 F.R.D. 183, 223 (1973). Congress deleted that provision without explanation. The House Committee on the Judiciary Report states:

The Committee deleted this subdivision believing that the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis. At the same time, the Committee does not intend that its action be construed as sanctioning a general authorization of opinion evidence in this area.

H.R. REP. NO. 650, 93d Cong., 1st Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7079. Since FED. R. EVID. 402 makes all relevant evidence admissible, unless it is excluded by a rule of law, the apparent effect of the deletion is to allow litigants to prove habit by any kind of evidence that is relevant. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5276, at 57.

¹⁴⁴ To be admissible, the opinion testimony of *X* and *Y* must comply with the two ordinary requirements for lay opinion. That is, the opinion will have to be "rationally based on the perception of the witness," and it must be "helpful to a clear understanding of his testimony." FED. R. EVID. 701; CAL. EVID. CODE § 800 (West 1966). The first requirement is satisfied if *X*'s opinion is based on what she repeatedly did, and if *Y*'s opinion is based on what *Y* saw *X* do time after time. One might quibble that the second requirement cannot be satisfied if *X* and *Y* are unable to recount at least some of the specific instances on which their opinion testimony is based — after hearing about the specific instances, the trier of fact can decide for itself whether the behavior pattern was a habit. *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5276, at 71-73. The quibble is no more than a quibble; the cross-examiner is always free to probe behind the opinion, to determine the number of specific instances the witness can remember, and to determine if there were other instances when the person did not behave in accordance with the habit.

to prove *P*'s habit and thus to prove *P*'s conduct on the occasion in question.¹⁴⁵

Example: Fishing boat captain *D* is on trial for smuggling marijuana. *D* claims that *X*, one of his crew members, coerced him to smuggle. In support of this coercion defense, *D* offers the testimony of witness *W* that when *X* was a crew member on *W*'s fishing boat, *X* once tried to convince *W* to dump a load of freshly caught fish and to take on a cargo of marijuana instead. *D* asserts that *W*'s testimony shows that *X* had a habit of forcing people to smuggle marijuana. *W*'s testimony should be excluded; one isolated incident does not establish a habit.¹⁴⁶

Even if habit evidence satisfies the requirements discussed above, trial judges have discretion to exclude it if its probative value is likely to be outweighed by the risks of prejudicing a litigant, consuming too much time, confusing the issues, or distracting the jury.¹⁴⁷

Example: Cocktail waitress *P* sued bar owner *D* for sexual harassment. *P* alleged that *D* fired *P* because she refused his sexual advances. *D* claims that he fired *P* because she repeatedly tried to pick up men in his bar. To prove that *P* did so, *D* offers evidence that *P* lived with three different men during a period of several years; *D* contends that this shows *P* had a habit of exchanging sexual favors for room and board. *D*'s evidence should be excluded. Even if the conduct is specific enough to constitute a habit, three instances during several years do not show frequency and regularity. Moreover, even if *P* is found to have

¹⁴⁵ Cf. *Halloran v. Virginia Chem., Inc.*, 41 N.Y.2d 386, 361 N.E.2d 991 (1977) (when plaintiff was injured by exploding can of freon, defense witness was allowed to testify that on many occasions he had seen plaintiff heat freon cans in a dangerous manner, despite warning labels on cans).

¹⁴⁶ *United States v. Holman*, 680 F.2d 1340 (11th Cir.), *reh'g denied*, 691 F.2d 512 (1982) (one incident of urging a boat captain to dump fish and take on marijuana does not show a habit of coercing people to smuggle marijuana); *see also* *Meyer v. United States*, 638 F.2d 155 (10th Cir. 1980) (habit evidence admissible to prove that dentist warned patient); *Wetherill v. University of Chicago*, 570 F. Supp. 1124 (N.D. Ill. 1983) (regular practice evidence admissible to prove that physicians obtained patients' consent to participate in drug research program). *But cf.* *Levin v. United States*, 338 F.2d 265 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 999 (1965), cited with approval in *FED. R. EVID.* 406 advisory committee's note, 56 F.R.D. 183, 223-24 (1973). *Levin* excludes evidence of the "religious habits" of the accused, offered to prove that he was home observing the Sabbath rather than out obtaining money through larceny by trick. The court observed that the "very volitional basis" of the activity raised serious questions about its invariable nature and hence its probative value. *See* R. CARLSON, E. IMWINKELRIED & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 389 (2d ed. 1986).

¹⁴⁷ *FED. R. EVID.* 403; *CAL. EVID. CODE* § 352 (West 1966); 23 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5277, at 82-83.

such a habit, the habit is weak evidence of *P*'s conduct on the job. Finally, by analogy to the rape shield statutes, the risk of prejudice to the plaintiff in a sexual harassment case is sufficient to outweigh the evidence's probative value.¹⁴⁸

B. Specific Acts Evidence to Prove Something Other than Character

*Rule 9: A litigant can offer evidence of a person's specific acts to prove, not character, but something else — anything else that is relevant to the case.*¹⁴⁹

Rules 2 through 7 teach that evidence of a person's character is generally not admissible to prove that person's conduct. Rule 2 provides that in civil cases character evidence is never admissible to prove conduct, and Rules 3 through 7 provide that in criminal cases, character evidence is not admissible to prove conduct except in limited situations and except when the criminal defendant initiates the inquiry into *D*'s character.

Rule 9 opens a detour around these restrictions. The detour is illus-

¹⁴⁸ Compare *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983) (denying defendant's discovery requests concerning plaintiff's sexual history in Title VII sexual harassment case) with *Vinson v. Superior Court*, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (granting defendant's request for psychiatric testing of plaintiff subject to limitations necessitated by plaintiff's right to privacy, in sexual harassment claim because plaintiff alleged specific mental and emotional ailments as a result of harassment).

¹⁴⁹ Under the Federal Rules of Evidence, Rule 9 is derived from FED. R. EVID. 404(b):

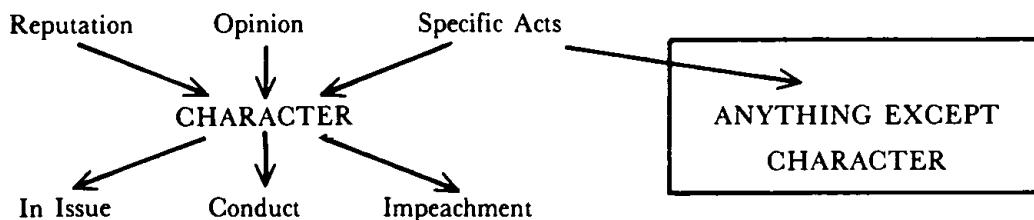
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under the California Evidence Code, Rule 9 is derived from CAL. EVID. CODE § 1101(b) (West Supp. 1987), which states that the general prohibition on using character evidence to prove conduct does not prohibit

admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sex act or attempted unlawful sex act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

See *People v. Perkins*, 159 Cal. App. 3d 646, 649-51, 205 Cal. Rptr. 625, 627-28 (1984) (holding that CAL. EVID. CODE § 1101 was not repealed by California's Proposition 8, CAL. CONST. art. I, § 28(d)).

trated below:



Suppose that *D* is on trial for armed robbery of a bank. The prosecutor's evidence clearly shows that the man who committed the bank robbery used a peculiar-looking pistol and made his getaway in a brown Ford. The brown Ford was found in a ditch at the edge of town, with the peculiar-looking pistol under the front seat. The key issue is to determine whether *D* was the armed robber. During the prosecution's case-in-chief, the prosecutor offers witness *W*'s testimony that the pistol found in the getaway car was part of *D*'s share of the loot from a house burglary that *W* and *D* performed several months before the bank robbery. Should *W*'s testimony be admissible to help prove that *D* was the bank robber?¹⁵⁰

W's testimony is relevant to the issue of identity by two chains of reasoning. First, the prosecutor can offer *W*'s testimony as specific acts evidence of *D*'s bad character. If *D* was involved in a house burglary, he is the kind of person who might also rob a bank. If that is the prosecutor's objective, then the trial judge should exclude *W*'s testimony because it clearly violates Rule 3 — the prosecutor cannot initiate an inquiry into *D*'s character to prove that *D* was the bank robber.¹⁵¹

Second, if *D* was in possession of the peculiar-looking pistol shortly after the house burglary, that is some circumstantial evidence that he still possessed it at the time of the bank robbery. The presence of this particular pistol in the getaway car thus helps to identify *D* as the bank robber.

Rule 9 does not forbid this second chain of reasoning. *W*'s testimony about *D*'s specific act (the house burglary) can be used to prove, not *D*'s character, but *something else* that is relevant — the connection

¹⁵⁰ The hypothetical is patterned after *United States v. Waldron*, 568 F.2d 185 (10th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

¹⁵¹ See *supra* text accompanying notes 65-71.

between *D* and the pistol that was used to rob the bank. The jury can use *W*'s testimony to help identify *D* as the bank robber without making the forbidden inference from *D*'s character to *D*'s conduct.

However, *W*'s testimony raises a problem. If the trial judge admits it to prove the connection between *D* and the pistol, the jury may be tempted to use *D*'s participation in the house burglary, not just as evidence of his connection with the pistol, but also as evidence that he is a bad person, the sort who would rob a bank.

The doctrine of limited admissibility provides a partial solution to this problem. If a piece of evidence is admissible for one purpose, but not for a second purpose, the trial judge can admit the evidence and instruct the jury to use it only for the first purpose, but not for the second purpose.¹⁵² Under the limited admissibility doctrine, the trial judge could admit *W*'s testimony and, upon request by *D*'s counsel, instruct the jury to use it only as evidence of *D*'s connection with the pistol, not as evidence that *D* has a bad character and is likely to be the bank robber.¹⁵³

Often the trial judge may believe that the jury will not be able to follow the limiting instruction and that *D* will be prejudiced if the jury draws the forbidden character inference. In that situation, the judge should balance the evidence's probative value (for its proper purpose, to prove *D*'s connection with the pistol) against the evidence's dangers, including the danger of prejudice if the jury does not follow the limiting instruction. If the dangers substantially outweigh the value, the judge has discretion to exclude the evidence entirely.¹⁵⁴

When a litigant in either a criminal or civil case seeks to offer specific acts evidence to prove, not character, but *something else*, the trial judge should consider three issues:

- 1) Is the specific acts evidence really relevant to prove something other than character? Or, is the proponent simply trying to smuggle in a piece of forbidden character evidence?
- 2) How strong is the proof of the specific acts? Is it strong enough to warrant letting the jury hear the specific acts evidence?
- 3) Is the evidence's probative value, used for its proper purpose, sub-

¹⁵² FED. R. EVID. 105 states: "When evidence which is admissible as to one party or for one purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." CAL. EVID. CODE § 355 (West 1966) has the same effect. See generally C. McCORMICK, *supra* note 1, § 59.

¹⁵³ See E. IMWINKELRIED, *supra* note 2, §§ 9:60-67 (1984).

¹⁵⁴ See FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966); FED. R. EVID. 404(b) advisory committee's note, 56 F.R.D. 183, 221 (1973); C. McCORMICK, *supra* note 1, § 59, at 152 n.5.

stantially outweighed by its dangers? The dangers include the risk that the jury may, despite a limiting jury instruction, misuse the evidence to prove character. They also include the risks of consuming undue time, sidetracking the jury, and confusing the case's issues.

1. Relevance to Prove Something Other than Character

Rule 9 is tricky and is frequently abused, particularly in criminal cases in which the defendant has a prior criminal record.¹⁵⁵ Rule 9 has spawned a massive body of appellate case law,¹⁵⁶ which alone should warn litigants and trial judges to tread cautiously.

Modern evidence codes list various ways that specific acts evidence is relevant to prove something other than character. Specific acts evidence can be used to prove, among other things, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹⁵⁷ Modern law considers the laundry list of uses "inclusionary."¹⁵⁸ Thus, the court can admit specific acts evidence if it is relevant in *any* way that does not require the trier of fact to draw the forbidden inference to a person's character and thence to that person's conduct.

The laundry list is unfortunate, because it tempts litigants, and sometimes judges, simply to recite a few items from the list, using incantation rather than analysis to justify admission of specific acts evidence.¹⁵⁹ When specific acts evidence is offered, the judge should *re-*

¹⁵⁵ See E. IMWINKELRIED, *supra* note 2, §§ 1:01-:04. Professor Imwinkelried points out that when the jury in a criminal case learns that a defendant has a prior criminal record, the chances of conviction rise significantly. In a sense, evidence of prior misconduct "strips the defendant of the presumption of innocence" and can "sink the defense without a trace." *Id.* § 1:02.

¹⁵⁶ 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 404[08], at 404-56 (noting that FED. R. EVID. 404(b) has generated more appellate cases than any other section of the Federal Rules); see *State v. Johns*, 301 Or. 535, 543, 725 P.2d 312, 317 (1986) (computer search of relevant case law produced 11,607 state cases and 1,894 federal cases).

¹⁵⁷ FED. R. EVID. 404(b); see also CAL. EVID. CODE § 1101(b) (West Supp. 1987).

¹⁵⁸ The list merely recites examples; it is not an exhaustive list. The federal courts are now virtually uniform in interpreting the laundry list as nonexhaustive. See cases collected in E. IMWINKELRIED, *supra* note 2, § 2:30, at nn.13-32. California law is in accord. See, e.g., *People v. Bigelow*, 37 Cal. 3d 731, 746-49, 691 P.2d 994, 1002-05, 209 Cal. Rptr. 328, 336-39 (1984); *People v. Alcalá*, 36 Cal. 3d 604, 629-36, 685 P.2d 1126, 1139-44, 205 Cal. Rptr. 775, 788-93 (1984). The history of the "inclusionary" view and its opposite, the "exclusionary" view, is explained in E. IMWINKELRIED, *supra* note 2, §§ 2:23-:30 and 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5239, at 427-35.

¹⁵⁹ For example, in *United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986), defendant was convicted of distributing cocaine. The trial judge admitted evidence that

quire the proponent to define its relevance.¹⁶⁰ What fact, other than character, is the proponent trying to prove? Is that fact "of consequence" in the case?¹⁶¹ Does the evidence really "help to prove" that fact?¹⁶² This simple requirement could help stem the tide of appellate litigation involving Rule 9.¹⁶³

Example: *D* is on trial for robbing a small country post office. After taking the money, the robber took the postmistress into the bathroom in back, forced her to disrobe, took her rings and watch, and left the post office. The prosecutor offers *W*'s testimony that she recognizes *D* as the man who robbed her small grocery store (30 miles from the post office) the day before the post office robbery. *W* testifies that after taking the money, *D* took her to the bathroom in back, forced her to disrobe, took her rings, and left the store. The specific acts evidence about the grocery store robbery is relevant to help prove that *D* robbed the post office. The method of operation is sufficiently similar to suggest that the person who committed the first robbery also committed the second. Further, the points of similarity are unusual enough to set these two robberies apart from other robberies of the same general class.¹⁶⁴ The

the defendant had furnished cocaine to a prosecution witness on many prior occasions. The appellate court reversed the conviction, partly because the prosecutor could not show how this specific acts evidence was relevant to the case, aside from the forbidden character inference.

¹⁶⁰ Ordinarily, the proponent of evidence does not have to explain why the evidence is relevant unless the opponent objects on relevance grounds. See FED. R. EVID. 103(a)(1); CAL. EVID. CODE § 353(a) (West 1966).

¹⁶¹ See FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966); *supra* text accompanying notes 9-14.

¹⁶² See FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966).

¹⁶³ As Professor Imwinkelried states: "[T]he requirement for specification of a theory of logical relevance can do much to improve the quality of analysis of uncharged misconduct issues The requirement will force . . . [litigants] to think through their theory of independent relevance before offering the evidence at trial." E. IMWINKELRIED, *supra* note 2, § 9:27.

¹⁶⁴ The theory of relevance used here has two elements. First, there must be significant *similarities* between the two events. Second, the points of similarity must be *unusual* enough to set these events apart from other events of the same class. See E. IMWINKELRIED, *supra* note 2, § 3:13; C. McCORMICK, *supra* note 1, § 190, at 560. For instance, suppose two robberies have the following similarities: (1) the robberies occurred in an all-night convenience store; (2) both convenience stores were located on a street corner; (3) both robberies occurred late on a Friday night; (4) both robberies involved three robbers; (5) in both cases, the robbers escaped in a car. The two robberies are significantly similar, but the points of similarity are not unusual enough to set these two robberies apart from other robberies of the same class. All-night convenience stores are often robbed, and many convenience stores are located on street corners. Many convenience store robberies occur on Friday nights, and the use of a getaway car

chain of reasoning does *not* require an inference to *D*'s character and thence to *D*'s conduct.¹⁶⁵

Example: *D* is on trial for the murder of his second wife, *X*. *D* contends that he returned home late one night, that *X* thought he was a burglar and shot at him with a pistol, that he struggled with *X* in the dark to take the pistol from her, and that he accidentally shot *X* during the struggle. The evidence shows that *X* was unhappy with her marriage and planned to leave *D*. Further, *D* was despondent because he could not find a job as a police officer. The prosecutor offers evidence about an event seven years earlier between *D* and his first wife, *Y*. *Y* was unhappy with her marriage and had left *D*. *D* was despondent because he could not find a job as a police officer. *D* went to *Y*'s apartment and threatened to kill her with a loaded rifle. *Y* struggled with *D* and was able to break away and run for help. The prosecutor's evidence is relevant to help prove that *D*'s shooting of *X* was intentional, not accidental.¹⁶⁶

This theory of relevance depends on the doctrine of chances — the more frequently an unusual event occurs, the less likely that it is accidental. Wigmore offers a simple illustration. If *A* and *B* go hunting, and *B* shoots once in *A*'s direction, we may easily conclude *B* stumbled and fired unintentionally. But if the same event occurs several times, each successive event reduces the chances that *B* acted unintentionally.¹⁶⁷ The doctrine of chances employs commonsense reasoning based on everyday experience, and it does *not* require an inference to the actor's character and thence to the actor's conduct.

Example: *D* is on trial for burglary of *S*'s home. When *D* was arrested, the police found in *D*'s car some jewelry burglarized from *T*'s home one year earlier. The prosecutor offered evidence of the jewelry and the burglary of *T*'s home, arguing that it was relevant to prove "knowledge, intent, style, and absence of mistake." As to "knowledge," the evidence does not help to prove that *D* knew anything about the burglary of *S*'s home. As to "intent and lack of accident," *D* was not contending that he was in *S*'s home by accident or without criminal intent. Rather, he was denying any connection with the burglary of *S*'s home. As to "style," the evidence does not show unique similarities be-

is common. See *People v. Rivera*, 41 Cal. 3d 388, 710 P.2d 362, 221 Cal. Rptr. 562 (1985).

¹⁶⁵ See *United States v. Moody*, 530 F.2d 809 (8th Cir. 1976).

¹⁶⁶ See *State v. Johns*, 301 Or. 535, 725 P.2d 312 (1986).

¹⁶⁷ 2 J. WIGMORE, *supra* note 110, § 302, at 241; see also E. IMWINKELRIED, *supra* note 2, §§ 5:04-:05.

tween the two burglaries. Therefore, this evidence is not relevant except to help prove that *D* burglarized *T*'s home and therefore probably burglarized *S*'s home as well. That is the forbidden character inference — the evidence should be excluded.¹⁶⁸

2. Strength of the Proof of the Specific Acts

After the trial judge concludes that specific acts evidence is relevant to prove something other than character, the trial judge faces a second issue. How strong is the proof that the specific acts occurred and that the person in question was the actor? Is the proof strong enough to allow the jury to hear the specific acts evidence?

Suppose that *D* is on trial for blackmailing *V* for \$10,000. The prosecutor offers evidence that *D* had earlier embezzled \$10,000 from his employer. The prosecutor argues that the embezzlement is admissible under Rule 9 to prove *D*'s motive for the blackmail — *D* wanted to restore the embezzled money before his employer discovered the loss, and *D* was attempting to obtain the money by blackmailing *V*. How firmly convinced must the trial judge be that somebody was embezzling, and that *D* was the embezzler, before deciding to let the jury hear the evidence?

Authorities are split on this point. A majority of federal and state courts hold that the trial judge should let the jury hear the embezzlement evidence only if *clear and convincing evidence* exists that someone was embezzling and that *D* was the embezzler.¹⁶⁹ However, at least

¹⁶⁸ See *State v. Gailey*, 301 Or. 563, 725 P.2d 328 (1986). In *Gailey* the court fails to discuss an additional, intriguing scrap of specific acts evidence. When *S* returned to her home, she saw a "turquoise" colored car in her driveway; she remembered the first three letters of the license plate as "GET." When *D* was arrested, he was driving an "aqua" colored car with the license "GET 678." One of *T*'s neighbors testified that when *T*'s house was burglarized she saw an unfamiliar "blue" car nearby with the license "GET 678." Query whether this evidence could be admitted to help connect *D* with the *T* burglary and thus with the *S* burglary. The Oregon Supreme Court decided *Gailey, Johns*, 301 Or. at 535, 725 P.2d at 312, and *State v. Allen*, 301 Or. 569, 725 P.2d 331 (1986) (in arson case, prior arson admitted to show knowledge and lack of accident) on the same day. Read together, the three cases form a useful study of the complexities that can arise under Rule 9.

¹⁶⁹ *United States v. Shackelford*, 738 F.2d 776, 779 (7th Cir. 1984) illustrates this view. Other recent federal cases include *Williams v. Mensey*, 785 F.2d 631, 638 (8th Cir. 1986); *United States v. Liefer*, 778 F.2d 1236, 1240-43 (7th Cir. 1985); *United States v. Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985); *United States v. Lavelle*, 751 F.2d 1266, 1276-77 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 817 (1985); *United States v. Gilmore*, 730 F.2d 550, 554 (8th Cir. 1984); *United States v. Bailleaux*, 685 F.2d 1105, 1109-10 (9th Cir. 1982). Recent state cases include *Diaz v. State*, 508 A.2d 861,

three federal circuits apply a lower standard. They hold that the issues of whether there was embezzlement and whether *D* was the embezzler are preliminary fact issues covered by Federal Rule of Evidence 104(b).¹⁷⁰ If Rule 104(b) applies, the trial judge decides only whether the prosecutor has produced *enough evidence to support a finding* that there was embezzlement and that *D* was the embezzler. If the prosecutor meets this standard, the trial judge admits the embezzlement evidence and allows the jury to decide whether embezzlement occurred and whether *D* was the embezzler.¹⁷¹ Perhaps these two views are not as different as they appear; even under the *clear and convincing evidence* standard, it takes little evidence to satisfy appellate courts.¹⁷²

865 (Del. 1986) ("plain, clear, and conclusive"); *State v. Emerson*, 375 N.W.2d 256, 260 (Iowa 1985) ("clear proof"); *State v. Lewis*, 385 N.W.2d 352, 355 (Minn. Ct. App. 1986) ("clear and convincing"); *Brewer v. State*, 718 P.2d 354, 362 (Okla. Crim. Ct. App. 1986), *cert. denied*, 107 S. Ct. 245 (evidence presented was "clear and convincing"). Additional cases are collected in M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.5, at 218 n.25 (1986); E. IMWINKELRIED, *supra* note 2, § 2:08, at nn.8-17; 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5249, at 472 n.552 (Supp. 1986).

¹⁷⁰ The leading case is *United States v. Beechum*, 582 F.2d 898, 909-13 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). According to *Beechum*, FED. R. EVID. 104(b) applies to the preliminary fact issues posed in our hypothetical. Rule 104(b) states: "When the *relevancy* of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence *sufficient to support a finding* of the fulfillment of the condition" (emphasis added). C. MCCORMICK, *supra* note 1, § 53 explains the difference between preliminary fact issues governed by Rule 104(b) and those governed by Rule 104(a).

¹⁷¹ *Beechum*, 582 F.2d at 913. The Fifth Circuit, the Eleventh Circuit, and more recently the Fourth Circuit follow the *Beechum* view. *See, e.g.*, *United States v. Merkt*, 794 F.2d 950, 962 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987); *United States v. Nahoom*, 791 F.2d 841, 845 (11th Cir. 1986); *United States v. Martin*, 773 F.2d 579, 582 (4th Cir. 1985); *see also* *People v. Simon*, 184 Cal. App. 3d 125, 228 Cal. Rptr. 855 (1986) (creating a mongrel of *Beechum* and the *preponderance of the evidence* standard used in prior California cases). *Beechum* is explained in E. IMWINKELRIED, *supra* note 2, §§ 2:06-:08, 9:47-:49, and is criticized in 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5249, at 547-56 (Supp. 1987).

¹⁷² *See, e.g.*, *United States v. Gilmore*, 730 F.2d 550, 554 (8th Cir. 1984) (clear and convincing evidence standard was satisfied by uncorroborated testimony of a single witness, a dope peddler who was promised lenient treatment in exchange for implicating other persons). Professor Calvin Sharpe recommends a sliding scale approach — the greater the danger of prejudice, the stronger should be the proof that the specific acts occurred and that the person in question was the actor. Sharpe, *Two Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556 (1984).

3. Balancing Probative Value Against Dangers

All courts agree that the trial judge's final step is to balance the specific acts evidence's probative value against its dangers.¹⁷³ The trial judge should consider several factors.¹⁷⁴ Is there a real need to prove the fact (the *something else*) or can the proponent prove the fact by other, less dangerous, evidence? How clearly do the specific acts prove the fact? How clearly does the evidence prove similarity, uniqueness, and proximity in time and space, when those elements are important to the chain of reasoning? How long will it take to present the evidence and how great are the dangers of sidetracking the jury's attention and confusing the issues? Will the jury be able to follow a limiting instruction to use the specific acts evidence only for its proper purpose and not as character evidence?

Example: *D* is charged with distributing a small quantity of cocaine to *X* on November 24th. The police found the cocaine in *X*'s possession. In return for lenient treatment, *X* agrees to implicate *D* as his source. At *D*'s trial, the prosecutor offers *X*'s testimony that *D* supplied him with cocaine on November 24th and "innumerable other occasions" over a four-year period when *X* was in high school. When asked to explain the relevance of these prior occasions, the prosecutor responds with the entire laundry list of uses stated in Federal Rule 404(b). *D*'s only defense is that he was not the source of the substance found on *X* on November 24th. Indeed, *D* offers to stipulate that, if the jury finds that he was the source, he will concede that the substance was cocaine, that he knew it was cocaine, and that he acted intentionally, not by accident. *D*'s offer to stipulate does not automatically make the specific acts evidence inadmissible. But the offer to stipulate, coupled with the prosecutor's failure to spell out a tenable theory of relevance, does affect the balancing process because it suggests that the prosecutor has no legitimate need for the specific acts evidence. Further, the offer of lenient treatment in exchange for testimony reduces *X*'s credibility, and the vagueness and generality of the specific acts evidence make it difficult for *D* to refute. Finally, the present charge

¹⁷³ Compare *Beechum*, 582 F.2d at 913-18 with *Gilmore*, 730 F.2d at 554. See also *United States v. DeCastris*, 798 F.2d 261 (7th Cir. 1986); *State v. Johns*, 301 Or. 535, 557-60, 725 P.2d 312, 325-27 (1986).

¹⁷⁴ The balancing process under Rule 9 is discussed in M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE*, *supra* note 1, § 404.5, at 215-23; E. IMWINKELRIED, *supra* note 2, §§ 8:01-32; C. McCORMICK, *supra* note 1, § 190, at 565; S. SALTZBURG & K. REDDEN, *supra* note 1, at 200-04; 2 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 404[18]; 22 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5250.

against *D* concerns one occasion and only a small quantity of cocaine, but the specific acts evidence suggests that *D* was a large-scale, long-standing supplier of cocaine to high school students. Thus, the evidence is likely to be more inflammatory than enlightening, and the trial judge should exclude it.¹⁷⁵

Example: *P* sued *D* Insurance Company to collect the fire insurance on his home. *D* contends that *P* burned the home. On the night in question, a mysterious fire broke out in the home. The fire department extinguished it. Several hours later, the home caught fire a second time; again the fire department extinguished it. The next day, the home caught fire a third time and was totally destroyed. To help prove that *P*'s home did not burn by accident, *D* offered evidence showing that *P* and *P*'s father, as a result of a failing family business, desperately needed money. After *P*'s home burned, *P* and his family moved into an insured mobile home that *P*'s father owned. The mobile home burned shortly after they moved in. *P* and his family then moved into an insured house *P*'s father also owned. Seventeen days later, that house also burned down. *D*'s evidence of the mobile home and the second house is relevant under the doctrine of chances. Three fires in one house within twenty-four hours could have a plausible physical explanation. But the three fires, coupled with two more in two different abodes, occurring within a short time period, appear more like arson than bad luck. The evidence of the subsequent fires in the mobile home and the second house has enough probative value to outweigh its dangers, and the trial judge should admit it.¹⁷⁶

Example: Retired police officer *D* is on trial for mail fraud. The

¹⁷⁵ See *United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986) (trial judge should have excluded evidence about prior distribution of cocaine). Compare *United States v. Scott*, 767 F.2d 1308 (9th Cir. 1985) (defendant's prior possession of equipment used to distribute cocaine held admissible to overcome defendant's contention that on the occasion in question he attempted to buy \$4,500 worth of cocaine "for personal use only") with *United States v. Alfonso*, 759 F.2d 728 (9th Cir. 1985) (when defendant was charged with conspiracy to possess cocaine with intent to distribute, trial judge should have excluded evidence that five years earlier defendant asked another person to help him unload some cocaine from a boat; the time lapse and lack of similar circumstances make the evidence of little value in proving intent).

¹⁷⁶ See *Dial v. Travelers Indemnity Co.*, 780 F.2d 520 (5th Cir. 1986) (evidence of two subsequent fires held admissible to prove that fire in question was not accidental); see also *United States v. Tomasian*, 784 F.2d 782 (7th Cir. 1986) (in a prosecution of *D* for stealing some valuable art objects, *D* contended that he was in possession of the objects with the consent of their owners; the trial court correctly admitted evidence that *D* stole other valuable art objects in two earlier burglaries, to help overcome *D*'s claim of consent).

prosecutor charges that once a month, for twenty-seven months, *D* signed and mailed a preprinted affidavit that enabled him to collect more police disability benefits than he was entitled to collect. *D* contends that he lacked the intent to defraud; the preprinted affidavit was phrased in opaque legal jargon, and the key statement was so ambiguous that he did not realize that he could not truthfully sign it. To prove *D*'s intent to defraud, the prosecutor offers ten other documents that *D* filled out over many years. Each of the ten documents contained at least one lie about *D*'s employment status, his educational qualifications, or the like. The prosecutor argues that the prior lies are relevant under the doctrine of chances; they reduce the likelihood of innocent mistake with respect to the affidavits.¹⁷⁷ Defense counsel responds that the ten documents are thinly disguised character evidence; they invite the jury to punish *D* because he is a "bad man who has been getting away with things for a long time." In the case from which this example is taken,¹⁷⁸ the trial judge and the appellate court recognized that it would be difficult for a jury to disentangle the legitimate use (based on the doctrine of chances) from the illegitimate use (once a liar, always a liar). Further, the appellate court recognized that any limiting jury instruction would not help much. The opinion states that to instruct the jury not to use the prior lies as character evidence "is like telling someone not to think about a hippopotamus. To tell someone not to think about the beast is to assure at least a fleeting mental image."¹⁷⁹ Nonetheless, the appellate court (over a strong dissent) sustained the trial judge's conclusion that the probative value of the specific acts evidence outweighed its dangers.

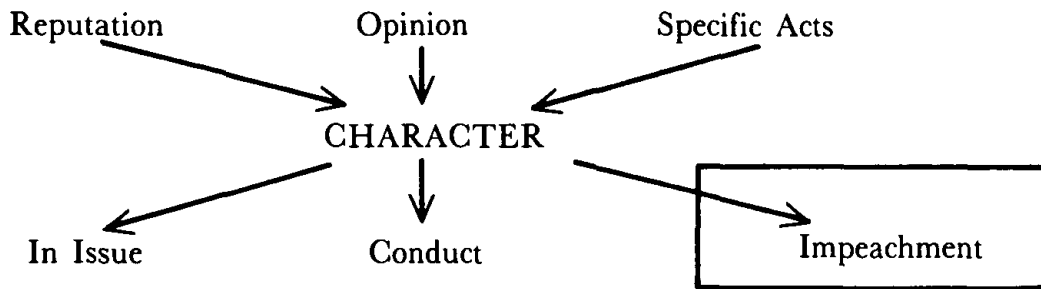
VI. WHEN CHARACTER IS USED FOR IMPEACHMENT

Part II of this Article explained that character evidence has three uses. Part III discussed the first use — when character itself is in issue. Part IV discussed the second use — when character is evidence of conduct. Part V discussed two detours — habit evidence, and specific acts evidence used to prove something other than character. Part VI considers the third use of character evidence — when character evidence is used to impeach a witness:

¹⁷⁷ See E. IMWINKELRIED, *supra* note 2, §§ 5:30, 5:37.

¹⁷⁸ United States v. DeCastris, 798 F.2d 261 (7th Cir. 1986).

¹⁷⁹ *Id.* at 264. For sample jury instructions, see 1 S. SALTZBURG & H. PERLMAN, FEDERAL CRIMINAL JURY INSTRUCTIONS 3.28A, 3.28B (1985).



Each time a new witness testifies in a case, a new issue enters the case. That new issue is the credibility of the witness.¹⁸⁰ From that point forward, any litigant¹⁸¹ can offer evidence designed to impeach the witness; that is, to cast doubt on the witness' credibility.¹⁸² Once the witness' credibility is attacked, any litigant can offer evidence designed to rehabilitate the witness' credibility.¹⁸³

One of the five principal ways to impeach a witness¹⁸⁴ is to attack the

¹⁸⁰ CAL. EVID. CODE § 780 (West 1966) offers a handy list of some factors that affect a witness' credibility. The list includes the witness' demeanor while testifying; the nature of his testimony; the extent of his capacity to perceive, remember, and communicate; his character for honesty or veracity, or their opposites; any bias, interest, or motive that might affect his testimony; the existence of prior statements made by the witness that are consistent or inconsistent with his testimony; the existence or nonexistence of any fact to which he has testified; his attitude toward the case and toward testifying; and his own admission of untruthfulness.

¹⁸¹ Under the modern evidence codes, any litigant can attack a witness' credibility, including the litigant who called the witness to the stand. *See* FED. R. EVID. 607; CAL. EVID. CODE § 785 (West 1966).

¹⁸² One commentator defines impeachment: "The term 'impeachment' is used loosely by the courts, but generally it refers to the introduction of evidence aimed at discrediting the testimony of a witness." G. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* § 8.1 (2d ed. 1987); *see also* R. LEMPert & S. SALTZBURG, *supra* note 20, at 282; 3A J. WIGMORE, *supra* note 88, § 874.

¹⁸³ CAL. EVID. CODE § 785 (West 1966) states: "The credibility of a witness may be attacked *or supported* by any party, including the party calling him" (emphasis added). This Article refers to character evidence used for impeachment, but the principles that apply to impeachment also apply to rehabilitation. *See* FED. R. EVID. 608-09; CAL. EVID. CODE §§ 780(e), 786-788 (West 1966).

¹⁸⁴ The five principal ways to impeach a witness are: (1) to show that the witness lacks the capacity to perceive, remember, or communicate accurately; (2) to show that the witness' testimony is affected by bias, corruption, or coercion; (3) to contradict the witness by showing that something to which he testified is very likely not true; (4) to show that the witness made a prior statement that is inconsistent with his present testimony; and (5) to show that the witness has bad character with respect to truthfulness. *See* M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE*, *supra* note 1, § 607.1; C. McCORMICK, *supra* note 1, §§ 33-34, 40-45, 47; 3 J. WEINSTEIN & M. BERGER, *supra*

witness' character. The relevant character trait is truthfulness.¹⁸⁵ If the trier of fact learns that the witness is prone to lie, that is some help in deciding whether to believe what the witness says on the witness stand.¹⁸⁶

A. Reputation and Opinion Evidence

*Rule 10: A litigant can impeach a witness by using reputation evidence (and also opinion evidence under most modern evidence codes) concerning the witness' character for untruthfulness.*¹⁸⁷

Reputation evidence is the usual method, but perhaps the least persuasive method of proving a witness' character for untruthfulness.¹⁸⁸ As previously mentioned, the orthodox common-law view did not permit the use of opinion evidence to prove a person's character.¹⁸⁹ Most modern evidence codes reject that view. They allow both reputation and opinion evidence to be used to prove a witness' untruthful character.¹⁹⁰

note 1, ¶¶ 607[02]-607[07].

¹⁸⁵ FED. R. EVID. 608(a) states that when character evidence is used to impeach a witness, "the evidence may refer only to character for truthfulness or untruthfulness." CAL. EVID. CODE § 786 (West 1966) states: "Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness."

¹⁸⁶ Character evidence used to impeach is simply one variety of character evidence used to prove conduct on a particular occasion. The chain of reasoning is this: If witness *W* has the character of a liar, that is some help in concluding that *W* lied on the witness stand. See R. LEMPert & S. SALTzBURG, *supra* note 20, at 304-05.

¹⁸⁷ Under the Federal Rules of Evidence, Rule 10 is derived from FED. R. EVID. 608(a):

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Under the California Evidence Code, Rule 10 is derived from CAL. EVID. CODE § 1100 (West Supp. 1987) (permitting use of reputation and opinion evidence to prove character) and § 786 (impliedly permits lack of honesty or veracity to be used for impeachment).

¹⁸⁸ See C. McCORMICK, *supra* note 1, § 44; 3A J. WIGMORE, *supra* note 88, § 920. The prevailing modern view limits the inquiry to truthfulness, or the lack of it. See, e.g., United States v. Greer, 643 F.2d 280, 283 (5th Cir.), *cert. denied*, 454 U.S. 854 (1981) (improper to inquire about general reputation in the community).

¹⁸⁹ See *supra* text accompanying notes 39-43; see also C. McCORMICK, *supra* note 1, § 44.

¹⁹⁰ See FED. R. EVID. 608(a) advisory committee's note, 56 F.R.D. 183, 268 (1973);

The trial judge has discretion to limit reputation or opinion evidence for impeachment when the evidence's probative value is substantially outweighed by its dangers.¹⁹¹

Example: At *D*'s trial for fraud, the prosecutor offers evidence that *D* telephoned numerous people who had advertised expensive automobiles for sale. *D* offered to exchange precious gemstones for their automobiles. Those who accepted *D*'s offer discovered later that the gems they received were worthless. *D* testifies on his own behalf at the trial. To impeach *D*'s credibility as a witness, the prosecutor offers the testimony of five witnesses that *D* has a bad reputation for truthfulness and that they would not believe *D* under oath. The reputation and opinion evidence is proper. When a criminal defendant elects to testify on his own behalf, he can be impeached by reputation and opinion evidence of his untruthful character, the same as any other witness. In the case on which this example is based, *D* argued that the testimony of the five witnesses was cumulative and unduly prejudicial. The appellate court rejected *D*'s argument, remarking that if *D* could convince numerous people to trade expensive automobiles for worthless gems, it might well take five witnesses to counteract *D*'s "obviously believable personality."¹⁹²

The trial judge must use care to prevent the process of impeaching and rehabilitating witnesses from becoming a distracting, time-consuming side show. Suppose that in a civil case plaintiff *P* offers the testimony of witness *X* about a key contested fact. Defendant *D* then impeaches *X* by offering witness *Y*'s testimony that *X* is known in the community as an untruthful person (reputation) and that *Y* would not believe *X* under oath (opinion). *P* then tries to rehabilitate *X* by offer-

California Law Revision Commission Comment on CAL. EVID. CODE § 1100 (West 1966). As mentioned *supra* note 41, some of the states that patterned their evidence codes after the Federal Rules of Evidence chose to adhere to the orthodox common law view and not to allow the use of opinion evidence to prove a witness' untruthful character. The various state code provisions are summarized in 3 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 608[09].

¹⁹¹ Compare *United States v. Tager*, 788 F.2d 349, 354 (6th Cir. 1986) (trial judge correctly excluded opinion testimony that would have been cumulative and that was based on a single remote incident) with *United States v. Davis*, 639 F.2d 239, 244-45 (5th Cir. 1981) (trial judge abused discretion by excluding reputation and opinion testimony of two defense witnesses concerning untruthful character of prosecution's key witness).

¹⁹² *United States v. Melton*, 739 F.2d 576, 579 (11th Cir. 1984); see also *United States v. Johnson*, 730 F.2d 683, 688 (11th Cir. 1984), *cert. denied*, 469 U.S. 867 (trial judge did not err in limiting to three the number of character witnesses defendant could call to impeach the prosecution's key witness).

ing witness *Z*'s testimony that *X* has an excellent reputation for truthfulness, and that *Z* would believe whatever *X* says.¹⁹³ *D* then cross-examines *Z* (by analogy to Rule 5),¹⁹⁴ asking whether *Z* has heard of specific acts in *X*'s past that might tarnish *X*'s reputation for truthfulness or that might affect *Z*'s opinion of *X*'s truthfulness. Federal Rule of Evidence 608(b)(2) permits this type of cross-examination,¹⁹⁵ but the trial judge should use discretion to prevent it from consuming too much time and distracting the jury's attention from the case's main issues.¹⁹⁶

B. Specific Acts Other than Conviction

*Rule 11: In a majority of jurisdictions, the trial judge has discretion to permit a litigant to impeach a witness by cross-examining her about specific acts (other than criminal convictions) that demonstrate the witness' untruthful character. A minority of jurisdictions prohibit such cross-examination.*¹⁹⁷

Rules 11 and 12 both concern the use of specific acts evidence to prove that a witness has an untruthful character and therefore should not be believed. Rule 11 concerns specific acts that have *not* resulted in a criminal conviction (for example, evidence that the witness once lied

¹⁹³ The rehabilitation evidence is proper under FED. R. EVID. 608(a) and CAL. EVID. CODE § 786 (West 1966).

¹⁹⁴ See *supra* text accompanying notes 82-98.

¹⁹⁵ FED. R. EVID. 608(b)(2) gives the trial judge discretion to permit the cross-examiner to inquire about specific acts "concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." See R. LEMPert & S. SALTzBURG, *supra* note 20, at 298 n.38.

¹⁹⁶ See M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, *supra* note 1, § 608.5.

¹⁹⁷ The majority view is reflected in FED. R. EVID. 608(b):

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness

The minority view is reflected in CAL. EVID. CODE § 787, which prohibits both extrinsic evidence and cross-examination concerning specific acts that have not resulted in a felony conviction: "Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." The California Supreme Court has not yet decided whether CAL. EVID. CODE § 787 (and related provisions) still apply in criminal cases after California's Proposition 8, CAL. CONST. art. I, § 28(d). The issue is noted, but not decided, in *People v. Taylor*, 180 Cal. App. 3d 622, 631-32, 225 Cal. Rptr. 733, 737-38 (1986).

on a job application). Rule 12 concerns specific acts that have resulted in a criminal conviction (for example, evidence that the witness was once convicted of perjury).

Rule 11 reflects a long-standing split of authority about the use of specific acts (other than criminal convictions) to impeach a witness.¹⁹⁸ A simple contract case illustrates the problem. Suppose that *A* sues *B* for breach of an oral contract. To prove the offer and acceptance, *A* offers the testimony of witness *W*, who was present and heard what *A* and *B* said. Through careful pretrial investigation, *B* has learned that *W* is an inveterate liar. For instance, *W* was expelled from school for lying about an honor code violation. He was also fired by an employer for lying about the number of hours he worked, and the local bank cancelled *W*'s line of credit because he lied on his financial disclosure statement. Should *B* be allowed to bring up these specific acts to prove that *W* has an untruthful character and that his testimony about the offer and acceptance should not be believed?

Common sense suggests that if *W* has lied repeatedly in the past, he may lie again on the witness stand.¹⁹⁹ However, this type of specific acts evidence raises significant dangers.²⁰⁰ If *B*'s impeachment is to be effective, *B* must explore several past occasions when *W* has lied. The more occasions *B* is allowed to explore, the more trial time is consumed and the greater the danger of distracting the jury's attention from the case's main issues. Further, the danger of undue prejudice exists. The tarnish on *W*'s character may rub off on *A*'s entire case. Moreover, non-party witnesses such as *W* may be reluctant to furnish evidence if

¹⁹⁸ See generally M. GRAHAM, EVIDENCE 610-17 (1983); R. LEMPert & S. SALTzBURG, *supra* note 20, at 297-302; G. LILLY, *supra* note 182, § 8.3, at 352-53; C. McCORMICK, *supra* note 1, § 42.

¹⁹⁹ Psychologists may doubt that *W*'s past lies are predictive of his veracity as a witness. See Leonard, *supra* note 8, at 25-31. Professor Leonard argues that the law of evidence is guided partly by common sense, or "hunch and intuition" as he puts it. *Id.* at 32-42. Many evidence students will recall the story of the rubber raincoat inspector, Charles Fuller, whose testimony against a government supplier was demolished by cross-examination that revealed his lies on a government job application. In his job application, Fuller claimed he had 20 years of experience in the manufacture of rubberware, but on cross-examination he admitted that during those 20 years he was employed under a different name, Charles Finkler, as a "stag entertainer in questionable houses," a barker at Coney Island, and an "advance agent for a cheap road show." F. WELLMAN, THE ART OF CROSS-EXAMINATION 56-60 (Collier ed. 1962); the story is repeated in J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 450-53 (5th ed. 1984), and R. LEMPert & S. SALTzBURG, *supra* note 20, at 299-302.

²⁰⁰ See FED. R. EVID. 608(b) advisory committee's note, 56 F.R.D. 183, 268-69 (1973); 3 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 608[05].

they know that their lives can be scrutinized at a public trial. The danger of prejudice is greater when the witness to be impeached is a party to the case, and the danger is greatest when the witness to be impeached is the defendant in a criminal case. Recall that Rule 3²⁰¹ forbids the prosecutor from initiating an inquiry into the defendant's character to prove that the defendant committed the crime with which he is now charged. But, if the defendant elects to testify on his own behalf, the prosecutor can then impeach his credibility by inquiring about a lifetime of lies, and the jury will probably be tempted, despite a limiting jury instruction, to use the impeachment evidence to infer that the defendant has a bad character, and thus to infer that the defendant committed the crime with which he is charged.²⁰²

In our hypothetical breach of contract case between *A* and *B*, the minority view mentioned in Rule 11 prohibits *B* from using *W*'s past lies to impeach *W*'s testimony. *B* cannot offer extrinsic evidence (for example, documents or the testimony of other witnesses) to prove *W*'s past lies, nor can *B* even cross-examine *W* about them.²⁰³ The minority view holds that the likelihood of danger outweighing probative value is high enough to justify a blanket rule of exclusion.²⁰⁴

The majority view mentioned in Rule 11, and incorporated in Federal Rule of Evidence 608(b), is something of a compromise. Under the majority view, the trial judge has discretion to allow *B* to cross-examine *W* about the past lies. However, if *W* persists in denying that he lied on those past occasions, *B* is stuck with *W*'s denials — *B* cannot use ex-

²⁰¹ See *supra* text accompanying notes 65-71.

²⁰² See M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, *supra* note 1, § 608.4, at 456; 3 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 608[05], at 608-35.

²⁰³ See CAL. EVID. CODE § 787 (West 1966); *People v. Wagner*, 13 Cal. 3d 612, 618, 532 P.2d 105, 108, 119 Cal. Rptr. 457, 460 (1975) (cross-examination held improper). For collections of state criminal cases that follow the minority view, see Annotation, *Right to Impeach Witness in Criminal Case by Inquiry or Evidence as to Witness' Criminal Activity Not Having Resulted in Arrest or Charge — Modern State Cases*, 24 A.L.R.4th 333, 348-52 (1983) and Annotation, *Right to Impeach Witness in Criminal Cases by Inquiry or Evidence as to Witness' Criminal Activity for Which Witness Was Arrested or Charged, But Not Convicted — Modern State Cases*, 28 A.L.R.4th 505, 518-23 (1984).

²⁰⁴ McCormick argues that the minority view

is arguably the fairest and most expedient practice because of the dangers otherwise of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse by the asking of unfounded questions, and of the difficulties, as demonstrated in the cases on appeal, of ascertaining whether particular acts relate to character for truthfulness.

C. MCCORMICK, *supra* note 1, § 42, at 91 (footnote omitted).

trinsic evidence to prove that *W* did lie on those occasions.²⁰⁵

Example: Defendant *D*, an attorney, is on trial for bankruptcy fraud. Ten years before the alleged bankruptcy fraud, the state bar disciplined *D* for violating the rules of legal ethics by lying to her clients about various matters. *D* elects to testify on her own behalf at the bankruptcy fraud trial. The minority view prohibits the prosecutor from impeaching *D*'s credibility either by cross-examination or by extrinsic evidence about the lies to clients. Under the majority view, the prosecutor cannot offer extrinsic evidence about the lies to clients. However, the trial judge has discretion to permit the prosecutor to cross-examine *D* about the lies to clients.²⁰⁶ In exercising this discretion, the trial judge should consider, among other things: the danger of diverting the jury's attention from the main issues; the amount of time consumed by the cross-examination and subsequent efforts to rehabilitate *D*; the extent to which *D*'s past lies to clients may reflect on her present truthfulness under oath; the long time lapse between earlier lies and the present trial; and the danger that the jury may misuse the impeachment evidence to infer that *D* has a bad character and therefore probably com-

²⁰⁵ A witness' initial denial of a past lie does not prohibit the cross-examiner from pursuing the matter with further questions. *See* *People v. Sorge*, 301 N.Y. 198, 200, 93 N.E.2d 637, 639 (1950). However, the cross-examiner must have a good faith belief that the witness did lie in the past, and the cross-examiner must not carry the cross-examination to the point of harassment. *See* FED. R. EVID. 611(a)(3) (trial court should control interrogation to "protect witnesses from harassment or undue embarrassment"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(2) and EC 7-25 (1984) (unethical to harass witnesses); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1983) (ethical duty to respect rights of third persons). The privilege against self-incrimination also helps curb over-zealous cross-examination. FED. R. EVID. 608 states: "The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility." *See* C. McCORMICK, *supra* note 1, § 42, at 92; 3 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 608[07].

²⁰⁶ *See also* *United States v. Weichert*, 783 F.2d 23 (2d Cir.), *cert. denied*, 107 S. Ct. 117 (1986). In *Weichert*, defendant was on trial for bankruptcy fraud. Some years earlier, he had been disbarred from the practice of law. He made a pretrial motion to preclude the prosecution from using his disbarment to impeach his credibility if he elected to testify on his own behalf. The trial judge denied the motion, and the defendant elected not to testify. The Second Circuit held that since the defendant did not testify, he could not appeal the denial of his pretrial motion. *Cf.* *Luce v. United States*, 469 U.S. 38 (1984) (under FED. R. EVID. 609 concerning prior convictions, denial of defendant's pretrial motion cannot be appealed unless defendant testifies and is impeached).

mitted the bankruptcy fraud.²⁰⁷

C. Specific Acts Resulting in Convictions

*Rule 12: A litigant can impeach a witness by showing that the witness was previously convicted of some types of crimes. The law varies from jurisdiction to jurisdiction concerning the types of crimes and the extent of the trial judge's discretion to limit such impeachment.*²⁰⁸

Rule 11 concerns specific acts for which the witness has *not* been criminally convicted. In contrast, Rule 12 concerns specific acts for which the witness *has* been criminally convicted. This difference suggests two reasons why Rule 12 allows impeachment more liberally than Rule 11. First, if the witness has been convicted, the conviction itself is strong evidence that the witness committed the acts in question. Second, the fact of conviction is easy to prove, either by simply asking the witness whether he was convicted, or by offering a certified copy of the judgment of conviction. Thus, the trier of fact is not likely to face a distracting, time-consuming dispute over whether the witness committed the acts or whether the witness was convicted.

Legal history offers a different reason for the liberality of Rule 12. In the earliest days of the common law, all felons were put to death, so

²⁰⁷ For discussions of factors that the trial judge should consider in exercising discretion under FED. R. EVID. 608, see C. MCCORMICK, *supra* note 1, § 42, at 91; 3 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 608[05], at 608-34 to 608-36. Professor Michael Graham argues that trial judges should seldom, if ever, allow impeachment of a criminal defendant under FED. R. EVID. 608 because of the high likelihood of undue prejudice. See M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, *supra* note 1, § 608.4, at 456.

²⁰⁸ The federal law on this subject is expressed in FED. R. EVID. 609(a), which permits a witness to be impeached by evidence of a criminal conviction "only if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment." FED. R. EVID. 609(b) through (e) explain how federal courts are to treat convictions over 10 years old; convictions that have been the subject of a pardon, annulment, or certificate of rehabilitation; juvenile adjudications; and convictions that are under appeal. The California law is stated in CAL. EVID. CODE § 788, which permits a witness to be impeached by showing "that he has been convicted of a felony." The California Supreme Court has limited § 788 to felonies that involve "moral turpitude," and has confirmed the discretion of trial judges to limit or forbid impeachment when the probative value of the conviction is outweighed by the dangers listed in CAL. EVID. CODE § 352. See *People v. Castro*, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).

they were not around to testify in later cases.²⁰⁹ Later, when death became a less certain consequence of crime, persons convicted of “infamous” crimes (generally meaning treason, any felony, or any crime involving dishonesty) were held *incompetent* to testify.²¹⁰ Later still, the bar of incompetence was lifted; a convicted person was competent to testify, but the prior conviction could be used to impeach his credibility.²¹¹ McCormick observes that both the incompetency rules and the later impeachment rules were uncertain in scope; that fact helps to explain the lack of uniformity in present-day law among jurisdictions that do not follow the Federal Rules of Evidence.²¹²

The probative value of a conviction offered for impeachment depends on a chain of reasoning that Oliver Wendell Holmes described:

[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the *general readiness to do evil* which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.²¹³

This chain of reasoning has at least two weak links. First, it asks us to infer that a witness has a “general readiness to do evil,” based on only one act in the witness’ past — the act for which he was convicted. Second, it asks us to infer that a convicted witness is likely to lie, even if his crime did not involve lying.²¹⁴

In addition to its questionable probative value, the use of convictions for impeachment raises the danger of undue prejudice. When the jurors learn that the witness is a convicted criminal, they may unfairly discredit his testimony. Worse, they may allow the tincture of criminality to color their view of the merits of the case. For example, if a criminal defendant calls a friend as an alibi witness, and if the friend is shown to have a criminal record, the jurors may suspect (consciously or not) that one who associates with criminals is likely to be a criminal

²⁰⁹ See R. LEMPERT & S. SALTZBURG, *supra* note 20, at 284-85.

²¹⁰ See Ladd, *Credibility Tests — Current Trends*, 89 U. PA. L. REV. 166, 174-75 (1940).

²¹¹ *Id.*

²¹² C. MCCORMICK, *supra* note 1, § 43, at 93.

²¹³ *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78, 50 Am. Rpts. 285, 286 (1884)(emphasis added).

²¹⁴ The weakness of these two links in the chain of reasoning is explored by Ladd, *supra* note 210, at 176-84.

himself.²¹⁵

The danger of prejudice is greatest when the witness to be impeached is himself the defendant in a criminal case. Suppose that *D* is on trial before a jury for forging checks. Seven years before, *D* was convicted of embezzlement, a felony, for which she served three years in prison. Rule 3 tells us that the prosecutor, in her case-in-chief, cannot use the embezzlement as evidence that *D* has a bad character and therefore probably forged the checks.²¹⁶ However, suppose *D* elects to exercise her constitutional right to testify on her own behalf.²¹⁷ At that point, the prosecutor can invoke Rule 12 and use the embezzlement conviction to impeach *D*'s credibility as a witness.²¹⁸ Although the trial judge will instruct the jurors to use the conviction only as evidence that *D* is a liar, not that she is a forger,²¹⁹ the jurors will probably not be able to follow the instruction.²²⁰

If *D* is less gullible than the law pretends to be²²¹ about the efficacy of the limiting jury instruction, she will think twice about testifying on her own behalf.²²² But, if she decides not to testify, she faces another rude fact. The jurors may, despite instructions to the contrary, infer

²¹⁵ See Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DE PAUL L. REV. 1, 7-8 (1968).

²¹⁶ See *supra* text accompanying notes 65-71.

²¹⁷ *Nix v. Whiteside*, 475 U.S. 157 (1986), holds that a criminal defendant does have a constitutional right to testify on her own behalf.

²¹⁸ See FED. R. EVID. 609(a); CAL. EVID. CODE § 788 (West 1966).

²¹⁹ 1 S. SALTZBURG & H. PERLMAN, FEDERAL CRIMINAL JURY INSTRUCTIONS 2.20, 3.05 (1985) provides one form of jury instruction:

Certain prior criminal convictions may be used as evidence to suggest that a witness should not be believed as readily as a person who has not been previously convicted. It is for you to decide whether this evidence affects the weight to be given to the testimony of a witness. A defendant's prior convictions may be considered when you examine his testimony. The law does not allow you to punish a defendant or to convict him simply because he has previously been convicted. You may only consider whether a conviction affects your willingness to believe the defendant's testimony.

²²⁰ See Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985). Based on their empirical study, Wissler and Saks conclude "that the presentation of the defendant's criminal record does *not* affect the defendant's credibility, but *does* increase the likelihood of conviction, and that the judge's limiting instructions do *not* appear to correct that error." *Id.* at 47 (emphasis added).

²²¹ See Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965).

²²² See H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160-61 (1966) (empirical study suggests that defendants with criminal records are less willing to testify than those without).

guilt from her silence.²²³ In short, if *D* testifies she may be damned by her record, and if she does not testify, she may be damned by her silence.²²⁴

1. Judicial Discretion: The *Luck* Case

In the mid-1960s the Court of Appeals for the District of Columbia found a way to ease the plight of the criminal defendant who wants to testify on her own behalf but who has a record of prior conviction. In *Luck v. United States*, the Court of Appeals held that the trial judge should exercise discretion and exclude the prior conviction if “the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction on the issue of credibility.”²²⁵ Under the *Luck* rule, the trial judge could consider the following factors:²²⁶ (1) Does the prior crime suggest a lack of veracity? Was it purely a crime of violence (such as murder or assault) or did it involve dishonesty, thus suggesting a propensity to lie? (2) Did the prior crime take place long ago, followed by a legally blameless life? (3) How similar is the prior crime to the crime with which the defendant is now charged? The closer the similarity, the more likely the jury will misuse the evidence. (4) Will the threat of impeachment keep the defendant from testifying, thus depriving the jury of her side of the story? (5) Is the defendant’s credibility an important issue in the case?

2. The Federal Rule

Federal Rule of Evidence 609 is a compromise between those who favored relatively free use of convictions for impeachment and those who favored *Luck*’s discretionary rule.²²⁷ The compromise is reflected in two key features of Rule 609. First, Rule 609(b) provides that a

²²³ If *D* elects not to testify, the judge will instruct the jury to draw no adverse inference from her silence. See *Carter v. Kentucky*, 450 U.S. 288 (1981). But the jurors may be less inclined to follow the judge’s instruction than to follow their own instincts. As Jeremy Bentham expressed it in his attack on the privilege against self-incrimination: “Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.” M. DUMONT, A TREATISE ON JUDICIAL EVIDENCE EXTRACTED FROM THE MANUSCRIPTS OF JEREMY BENTHAM 241 (1825).

²²⁴ See C. McCORMICK, *supra* note 1, § 43, at 99.

²²⁵ *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965).

²²⁶ See *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

²²⁷ The tortuous history of FED. R. EVID. 609 is set out in 3 J. WEINSTEIN & M. BERGER, *supra* note 1, at 609-2 to 609-43.

conviction over ten years old²²⁸ is inadmissible unless the trial judge concludes that its probative value for impeachment “substantially outweighs” its prejudicial effect.²²⁹ This grant of judicial discretion applies to *all* the types of convictions discussed in the following paragraphs. Second, Rule 609(a) grants the trial judge additional discretion to exclude some types of convictions but not others.

a. Felonies and Misdemeanors Involving Dishonesty or False Statement

Under Rule 609(a)(2), a criminal conviction that involved “dishonesty or false statement,” whether punishable as a felony or as a misdemeanor,²³⁰ can be used to impeach any witness, even a criminal defendant.²³¹ Except for the ten-year provision explained above, the trial judge has *no discretion* to exclude this type of conviction, not even the general Rule 403 discretion that applies to all other types of evidence.²³²

²²⁸ The age of a conviction is measured from the later of two dates: a) the date the witness was convicted; or b) the date the witness was released from confinement. *See* FED. R. EVID. 609(b). A litigant who seeks to use a conviction over 10 years old must give advance notice to the adversary. *Id.*

²²⁹ *See, e.g.,* United States v. Murray, 751 F.2d 1528, 1533 (9th Cir.), *cert. denied*, 474 U.S. 979 (1985) (trial judge did not err in permitting defendant to be impeached with old conviction of receiving stolen property, since that crime suggests lack of veracity and since defendant’s veracity was a key issue in the case).

²³⁰ This Article uses the term “felony” when referring to crimes described in FED. R. EVID. 609(a) as “punishable by death or imprisonment in excess of one year under the law under which he [the witness] was convicted.” This Article also uses the term “misdemeanor” when referring to crimes punishable by imprisonment of one year or less. *See* 18 U.S.C. § 1 (1982). Although convenient, this use of “felony” and “misdemeanor” is somewhat imprecise because the definitions of those terms vary from jurisdiction to jurisdiction. BLACK’S LAW DICTIONARY 555, 901-02 (5th ed. 1979).

²³¹ FED. R. EVID. 609(a)(2).

²³² The Conference Report on Rule 609(a) states:

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are always peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

Conference Report, H.R. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103 [hereafter *Conference Report*]. *See* United States v. Noble, 754 F.2d 1324, 1331 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985) (holding that since defendant’s prior conviction for counterfeiting involved dishonesty or false statement, the trial judge correctly declined to balance probative value against prejudicial effect); United States v. Leyva, 659 F.2d 118, 121 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982) (even the general discretion conferred by Rule 403

“Dishonesty or false statement” refers to crimes such as perjury, passing counterfeit money, receiving stolen goods, embezzlement, tax evasion, bribery, and other crimes that involve deceit or falsehood.²³³ It does not include violent crimes such as assault and battery.²³⁴ Crimes such as larceny, robbery, and drug offenses fall in a middle ground as they do not necessarily involve dishonesty or false statement. A litigant who proposes to use such a criminal conviction under Federal Rule 609(a)(2) must show that the witness used deceit or fraud to commit the crime.²³⁵

b. Misdemeanors Not Involving Dishonesty or False Statement

A misdemeanor conviction that did not involve dishonesty or false statement cannot be used to impeach any witness.²³⁶

c. Felonies Not Involving Dishonesty or False Statement When Offered to Impeach a Criminal Defendant or Criminal Defense Witness

Under Rule 609(a)(1), a felony conviction that did not involve dishonesty or false statement (for example, murder in the heat of passion) can be used to impeach a criminal defendant or criminal defense witness *only if* the trial judge concludes that its probative value for impeachment outweighs the danger of prejudice to the defendant.²³⁷ This

does not apply to prior convictions involving dishonesty or false statement).

²³³ The *Conference Report* explains that the phrase “dishonesty or false statement” was intended to refer to “crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of a *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.” *Conference Report, supra* note 232, at 9, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103. Illustrative cases are collected in M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, *supra* note 1, § 609.4, at 483-85; *see also* Annotation, *Construction and Application of Rule 609 (a) of the Federal Rules of Evidence Permitting Impeachment of Witness by Evidence of Prior Conviction of Crime*, 39 A.L.R. FED. 570, 596-601 (1978).

²³⁴ *See, e.g.*, *United States v. Harvey*, 588 F.2d 1201, 1203 (8th Cir. 1978).

²³⁵ *See United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984).

²³⁶ *See* FED. R. EVID. 609(a). FED. R. EVID. 402 makes all relevant evidence admissible unless specifically excluded, but Congress carefully worded Rule 609(a) to exclude all but two specifically described categories of convictions. *See United States v. Ortega*, 561 F.2d 803, 805-06 (9th Cir. 1977) (misdemeanor shoplifting conviction did not involve dishonesty or false statement and therefore could not be used for impeachment).

²³⁷ In FED. R. EVID. 609(a)(1), Congress was not concerned about prejudice to witnesses, nor to litigants generally; rather, it was concerned about prejudice *to the defendant* in a criminal case. *See Conference Report, supra* note 232, at 9-10, *reprinted in*

grant of judicial discretion evolved from *Luck*.²³⁸ Professor Michael Graham suggests ten factors that should guide the trial judge's discretion:²³⁹ (1) the nature of the prior crime; (2) the length of the defendant's criminal record; (3) defendant's age and circumstances; (4) the likelihood that the defendant would not testify; (5) the nearness or remoteness of the prior crime; (6) defendant's subsequent career; (7) whether the prior crime was similar to the one charged; (8) the centrality of the issue of credibility; (9) the need for the defendant's testimony; and (10) the facts surrounding the conviction, including whether the defendant pled guilty and whether the defendant testified at the trial.

d. Felonies Not Involving Dishonesty or False Statement When Offered to Impeach a Prosecution Witness or a Witness in a Civil Case

A prosecution witness in a criminal case, or any witness in a civil case, can be impeached with a felony conviction that did not involve dishonesty or false statement. Rule 609(a)(1) does not give the trial judge discretion to exclude such a conviction because that rule is concerned only with prejudice *to a criminal defendant*.²⁴⁰ The federal cir-

1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103. The danger of prejudice is most obvious when the defendant himself is impeached. But it can also arise when the prosecution impeaches a criminal defense witness who is a close associate of the defendant; the taint of criminality may rub off on the defendant. The judicial discretion granted in Rule 609(a)(1) applies in both situations. See C. MCCORMICK, *supra* note 1, § 43, at 94 n.9; 3 J. WEINSTEIN & M. BERGER, *supra* note 1, ¶ 609[04], at 609-81.

²³⁸ See *supra* text accompanying notes 230-31. *Luck* was cited in the advisory committee note to FED. R. EVID. 609, 56 F.R.D. 183, 270 (1973), and was discussed at length in the advisory committee note to an earlier draft of the rule, 51 F.R.D. 315, 393 (1971).

²³⁹ M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, *supra* note 1, § 609.3, at 476-77.

²⁴⁰ The *Conference Report* explains:

With regard to the discretionary standard established by paragraph (1) of rule 690(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgement of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

cuits are split over whether the trial judge can use the general discretion granted by Rule 403 to limit or prevent impeachment of a prosecution witness, or any witness in a civil case, by a felony conviction not involving dishonesty or false statement.²⁴¹

Example: Defendant *D* is on trial in federal court for arson. Prosecution witness *W* testifies that she saw *D* light the fire. *D*'s lawyer asks *W* two questions on cross-examination: (1) "Were you not convicted nine years ago of mail fraud, a felony?" and (2) "Were you not convicted one year ago of prostitution, a misdemeanor?" The mail fraud question is proper. Mail fraud involves dishonesty or false statement,²⁴² and the trial judge has no discretion to exclude the conviction under either Rule 609(a) or 609(b). The prostitution question is improper. Prostitution does not on its face involve dishonesty or false statement.²⁴³ Unless *D*'s lawyer can show that *W* used some deceit or fraud in this particular act of prostitution,²⁴⁴ Rule 609(a) precludes use of the misdemeanor conviction for impeachment.

Example: In the same arson case, defendant *D* testifies on his own behalf that at the time of the alleged arson he was 200 miles away on a fishing trip with his best friend, *F*. To impeach *D*, the prosecutor offers a certified copy of a judgment of conviction that shows that *D* was convicted of felony arson five years ago. Arson does not, on its face, involve dishonesty or false statement.²⁴⁵ Unless the prosecutor can show that *D* used some deceit or fraud in committing the prior arson, the prosecutor must rely on Rule 609(a)(1) rather than 609(a)(2). Under Rule 609(a)(1), the trial judge has discretion to exclude the prior conviction

Conference Report, supra note 232, at 9-10, 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103. See *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977) (Rule 609(a) did not give the trial judge discretion to prevent defendant from using a felony conviction to impeach a prosecution witness).

²⁴¹ Compare *Wierstak v. Heffernan*, 789 F.2d 968, 972 (1st Cir. 1986) (Rule 403 held applicable in civil case) with *Diggs v. Lyons*, 741 F.2d 577, 581-82 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985) (Rule 403 held inapplicable in civil case).

²⁴² *United States v. Brashier*, 548 F.2d 1315, 1326-27 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

²⁴³ *United States v. Walker*, 613 F.2d 1349, 1353-54 (5th Cir.), *cert. denied*, 446 U.S. 944 (1980).

²⁴⁴ *Cf. United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982) (drug smuggling does not on its face involve dishonesty or false statement, and proponent did not show that this particular act of smuggling involved fraud or deceit).

²⁴⁵ See, e.g., CAL. PENAL CODE §§ 451-452 (West Supp. 1987); *cf. United States v. Lane*, 708 F.2d 1394, 1398 (9th Cir. 1983) (witness could not be impeached when original felony arson charge was reduced to a misdemeanor, possession of combustibles with intent to commit arson).

and should probably do so. The prior conviction and the present charge are identical, thus creating a serious risk that the jury will misuse the prior conviction as evidence on the merits.²⁴⁶

Example: In the same arson case, *D*'s best friend, *F*, testifies as a defense witness that he and *D* were 200 miles away on a fishing trip at the time of the alleged arson. On cross-examination the prosecutor asks *F*: "Were you released from the state prison twelve years ago, after serving a two-year sentence for perjury?" Perjury involves dishonesty or false statement, so the trial judge has no discretion to exclude the conviction under Rule 609(a). However, the trial judge does have discretion under Rule 609(b), because the conviction is over ten years old. Therefore, the prosecutor cannot use it unless the trial judge concludes that its probative value for impeachment substantially outweighs its prejudicial effect.²⁴⁷

3. The California Law

As explained above, Federal Rule 609 reflects a compromise between those who favored relatively free use of criminal convictions for impeachment and those who favored judicial discretion.²⁴⁸ California law has developed a similar compromise.²⁴⁹

The present California law permits witnesses to be impeached with

²⁴⁶ In *United States v. Shapiro*, 565 F.2d 479, 481 (7th Cir. 1977), the court of appeals explained:

In exercising his discretion . . . the trial judge must consider several factors, most importantly the danger of unfair prejudice. When the prior conviction and the charged act are of a similar nature, the danger increases. The jury is more likely to misuse the evidence for purposes other than impeachment, that is, to regard the prior convictions as evidence of a propensity to commit crime or of guilt, despite instructions to the contrary.

²⁴⁷ See *United States v. Foley*, 683 F.2d 273, 277-78 (8th Cir.), *cert. denied*, 459 U.S. 1043 (1982); *United States v. Sims*, 588 F.2d 1145, 1147-51 (6th Cir. 1978). See generally Annotation, *Construction and Application of Rule 609(b) Federal Rules of Evidence, Setting Time Limit on Admissibility of Evidence of Conviction of Crime to Attack Credibility of Witness*, 43 A.L.R. FED. 398 (1979).

²⁴⁸ See *supra* text accompanying notes 231-45.

²⁴⁹ The story of the compromise begins with CAL. EVID. CODE § 788, which was enacted with the California Evidence Code in 1967. CAL. EVID. CODE § 12 (West 1966). In an early draft of § 788, the California Law Revision Commission proposed that only felonies involving dishonesty or false statement could be used for impeachment. See 7 CAL. LAW REV. COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES 141-43 (1965). However, law enforcement authorities convinced the legislatures to reject that limitation. See McDonough, *The California Evidence Code: A Precipit*, 18 HASTINGS L.J. 89, 105 (1966).

felony convictions for crimes that involve moral turpitude, whether or not the immorality involves dishonesty or false statement.²⁵⁰ However, the trial judge has discretion under California Evidence Code section 352 to exclude such a conviction if its probative value for impeachment is substantially outweighed by its dangers.²⁵¹ No type of misdemeanor conviction can be used for impeachment.²⁵²

California Evidence Code section 788 provides that a witness may be impeached by showing “that he has been convicted of a felony[.]”²⁵³ In a series of thirteen cases decided between 1967 and 1970, criminal defendants argued — just as in *Luck* — that trial judges should have discretion under section 352 to exclude felony convictions offered under section 788 if the danger of prejudice outweighs the probative value for impeachment. The California Courts of Appeal repeatedly rejected the argument, stating that section 788’s history indicated the legislature’s intent not to limit the use of felony convictions for impeachment.²⁵⁴

In a 1972 case, *People v. Beagle*, the California Supreme Court disapproved the thirteen Courts of Appeal decisions.²⁵⁵ The Supreme Court held that the general discretion granted in section 352 applies to evidence offered under section 788, just as to all other types of evidence.²⁵⁶ When a criminal defendant is the witness to be impeached, the court required that the trial judge consider the factors articulated under *Luck* — the extent to which the conviction indicates dishonesty, the age of the conviction, the similarity of the conviction to the present charge, and the likelihood that the threat of impeachment will keep the defendant from testifying.²⁵⁷

In the decade following *Beagle*, the California Supreme Court de-

²⁵⁰ See CAL. EVID. CODE § 788 (West 1966), as interpreted by *People v. Castro*, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985) (opinion by Kaus, J.).

²⁵¹ *Castro*, 38 Cal. 3d at 306-13, 696 P.2d at 113-18, 211 Cal. Rptr. at 721-25.

²⁵² CAL. EVID. CODE § 787 (West 1966) prohibits use of specific acts evidence to prove a witness’ character for purposes of impeachment; the sole exception to that rule is § 788, which allows use of *felony* convictions, not misdemeanor convictions.

²⁵³ CAL. EVID. CODE § 788 (West 1966).

²⁵⁴ See, e.g., *People v. House*, 12 Cal. App. 3d 756, 762-63, 90 Cal. Rptr. 831, 833-34 (1970); *People v. Kelly*, 261 Cal. App. 2d 708, 712-13, 68 Cal. Rptr. 337, 340 (1968). The other courts of appeal cases in the series of 13 are listed in *People v. Beagle*, 6 Cal. 3d 441, 451-52, 492 P.2d 1, 7, 99 Cal. Rptr. 313, 319 (1972).

²⁵⁵ *Beagle*, 6 Cal. 3d at 451-52, 492 P.2d at 7, 99 Cal. Rptr. at 319.

²⁵⁶ *Id.* at 452-54, 492 P.2d at 7-9, 99 Cal. Rptr. at 319-21.

²⁵⁷ *Id.* The court drew this list of factors from *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Other factors may also be considered. See *People v. Collins*, 42 Cal. 3d 378, 391-92, 722 P.2d 173, 182, 228 Cal. Rptr. 899, 908 (1986); see also *supra* note 226 and accompanying text.

cided the so-called “*Antick* line of cases,”²⁵⁸ which successively narrowed the ability of prosecutors to impeach criminal defendants and defense witnesses with felony convictions. At the end of that decade, California voters approved an initiative called Proposition 8, the “Victim’s Bill of Rights.”²⁵⁹ A subsection of Proposition 8 states that in criminal cases “any prior felony conviction of any person . . . shall subsequently be used without limitation for purposes of impeachment”²⁶⁰

In *People v. Castro*²⁶¹ the California Supreme Court interpreted Proposition 8. Upon close reading of its wording and of the information provided to California voters, the supreme court concluded that Proposition 8 did *not* overturn *Beagle* — trial judges still have discretion under California Evidence Code section 352 to exclude a felony conviction if its probative value for impeachment is outweighed by its dangers.²⁶² Rather than overturning *Beagle*, Proposition 8 expressed the voters’ disapproval of the *Antick* line of cases.²⁶³ *Castro* is, in essence, a pledge that California appellate courts will give trial judges freer rein

²⁵⁸ The title was bestowed by Justice Kaus in *People v. Castro*, 38 Cal. 3d 301, 309, 696 P.2d 111, 115, 211 Cal. Rptr. 719, 723 (1985). He was referring to *People v. Antick*, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975) (abuse of discretion to permit use of convictions that were remote in time). The *Antick* line included *People v. Rist*, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976) (abuse of discretion in a robbery case to permit use of prior robbery conviction when less similar prior convictions were available for impeachment); *People v. Rollo*, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977) (abuse of discretion to permit impeachment when prosecutor disclosed only the fact of conviction, giving defendant the option to disclose the nature of conviction); *People v. Woodward*, 23 Cal. 3d 329, 590 P.2d 391, 152 Cal. Rptr. 536 (1979) (abuse of discretion to permit defense witness to be impeached with prior convictions that did not show untruthfulness); *People v. Fries*, 24 Cal. 3d 222, 594 P.2d 19, 155 Cal. Rptr. 194 (1979) (abuse of discretion in a robbery case to permit impeachment by prior robbery conviction); *People v. Spearman*, 25 Cal. 3d 107, 599 P.2d 74, 157 Cal. Rptr. 883 (1979) (abuse of discretion in narcotics case to permit impeachment by identical prior conviction that did not show untruthfulness); *People v. Barrick*, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982) (abuse of discretion in auto theft case when trial judge “sanitized” prior auto theft conviction by calling it a “felony involving theft”).

²⁵⁹ The relevant portions of Proposition 8 were added to the California Constitution as CAL. CONST. art. 1, §§ 28(d), (f) (West 1983).

²⁶⁰ *Id.* § 28(f).

²⁶¹ 38 Cal. 3d 301, 306-13, 696 P.2d 111, 113-18, 211 Cal. Rptr. 719, 721-25 (1985).

²⁶² *Id.* The discretion applies to the impeachment of *all* witness, not just criminal defendants. *Id.*

²⁶³ *Id.*

to decide when felony convictions can be used for impeachment.²⁶⁴ However, *Castro* does impose one outer limit on the use of felony convictions for impeachment — the conviction must be for a crime involving moral turpitude, though not necessarily dishonesty or false statement.²⁶⁵ The court explained that the theory of impeachment by felony conviction depends on the following chain of inference: a person who has committed a felony has demonstrated a “general readiness to do evil,” and one who has a “general readiness to do evil” is likely to lie under oath.²⁶⁶ However, if the felony in question does not involve any “general readiness to do evil” — any moral turpitude — then the chain of inference is irrational.²⁶⁷ The due process clause of the fourteenth amendment of the United States Constitution prohibits the use of irrational inferences.²⁶⁸ Therefore, the court reasoned that only felony convictions that involve moral turpitude can be used for impeachment.²⁶⁹ By basing its decision on the fourteenth amendment, the court placed the moral turpitude limitation beyond the reach of further legislative or initiative changes.

Since felonies are generally regarded as serious crimes, one might think that all felonies involve moral turpitude, but the nation’s penal codes are filled with oddities. For example, in California it is a felony to conspire to commit a misdemeanor.²⁷⁰ Thus, it is a felony to conspire to tattoo a minor,²⁷¹ or conspire to deliver a taxi passenger to the wrong

²⁶⁴ See *People v. Collins*, 42 Cal. 3d 378, 389, 722 P.2d 173, 180, 228 Cal. Rptr. 906 (1986), in which the court said:

Under *Castro* the trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes, and must exercise that discretion on motion of the defendant. The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.

²⁶⁵ *Castro*, 38 Cal. 3d at 313-16, 696 P.2d at 118-20, 211 Cal. Rptr. at 725-28 .

²⁶⁶ *Id.* *Castro* relies on the opinion of Oliver Wendell Holmes in *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 50 Am. Rpts. 285 (1884).

²⁶⁷ *Id.* at 314-15, 696 P.2d at 118-19, 211 Cal. Rptr. at 726-27.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See *id.* at 314, 696 P.2d at 119, 211 Cal. Rptr. at 726; Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1143 (1973); see also CAL. PENAL CODE § 17(a) (West Supp. 1986) (defines felony as offense punishable by a term in state prison); CAL. PENAL CODE § 182 (West Supp. 1986) (conspiracy to commit a misdemeanor can be punished by a term in state prison).

²⁷¹ CAL. PENAL CODE § 653 (West 1970); see *Castro*, 38 Cal. 3d at 314 n.7, 696 P.2d at 119 n.7, 211 Cal. Rptr. at 726 n.7.

hotel,²⁷² or conspire to remove leaf mold from beside a public roadway.²⁷³

To decide whether a felony conviction does or does not involve moral turpitude, California courts must look at the felony "in the abstract,"²⁷⁴ not at the particular conduct for which the witness was convicted.²⁷⁵ A conviction can be used for impeachment only if the "least adjudicated elements of the conviction necessarily involve moral turpitude."²⁷⁶

Example: Defendant *D* is on trial in a California court for cashing stolen checks. *D* testifies on his own behalf that he did not know the checks were stolen. The prosecutor seeks to impeach *D* with a twenty-year-old felony conviction for statutory rape. *D* objects, arguing that statutory rape does not necessarily involve moral turpitude. At the time *D* was convicted, the crime of statutory rape consisted of three elements: (1) an act of sexual intercourse; (2) with a female to whom the accused was not married; and (3) the female was under age 18. The law at that time did *not* require that the accused be aware that the female was under age 18. Since the least adjudicated elements do not include a culpable mental state, the felony does not necessarily involve moral turpitude, and it cannot be used to impeach *D*. The same would be true even if *D* had in fact known that the female was under age 18.²⁷⁷

Example: Defendant *D* is awaiting trial in a California court on a charge of assault with a deadly weapon. *D* files a pretrial motion, asking the court to prohibit the prosecutor from impeaching her with a two-year-old felony conviction for voluntary manslaughter. Voluntary manslaughter is the unlawful, unjustified killing of a human being without malice aforethought. Although the crime does not require malice, it does require intent, and therefore it necessarily involves moral turpitude. The trial court thus has discretion to permit or forbid its use for impeachment.²⁷⁸ Among the factors the trial judge should consider are: (1) the extent to which voluntary manslaughter shows a propensity

²⁷² CAL. PENAL CODE § 649 (West 1970).

²⁷³ *Id.* § 384a (West Supp. 1987).

²⁷⁴ *People v. Collins*, 42 Cal. 3d 378, 390, 722 P.2d 173, 180, 228 Cal. Rptr. 899, 906 (1986).

²⁷⁵ *Castro*, 38 Cal. 3d at 316-17, 696 P.2d at 120, 211 Cal. Rptr. at 728. The reason for not looking at the particular conduct is to avoid confusion of the issues and unfair surprise. *Id.* In an analogous situation, the federal law does permit the court to consider the particular conduct for which the witness was convicted.

²⁷⁶ *Castro*, 38 Cal. 3d at 316-17, 696 P.2d at 120, 211 Cal. Rptr. at 728.

²⁷⁷ *See People v. Flanagan*, 185 Cal. App. 3d 764, 230 Cal. Rptr. 64 (1986).

²⁷⁸ *See People v. Coad*, 181 Cal. App. 3d 1094, 1104-11, 226 Cal. Rptr. 386, 391-96 (1986).

to lie; (2) the recency of the conviction; (3) the similarity of voluntary manslaughter to the present charge, assault with a deadly weapon; and (4) the likelihood that the threat of impeachment will keep the defendant from testifying on her own behalf.²⁷⁹

CONCLUSION

If you have come this far, patient reader, you will understand why Justice Jackson called the law of character evidence a “grotesque structure.”²⁸⁰ I promised you neither criticism, nor pleas for reform, nor any talisman to make it all consistent. Instead, this guided tour ends with a recapitulation of the twelve rules of character evidence, to serve as a reminder of the path you have traveled:

Rule 1: When character itself is in issue, a litigant can use specific act evidence and reputation evidence (and also opinion evidence under most modern evidence codes).

Rule 2: In a civil case, no type of character evidence is admissible to prove a person’s conduct on the occasion in question.

Rule 3: In a criminal case, the prosecutor cannot initiate an inquiry into character to prove a person’s conduct on the occasion in question.

Rule 4: In a criminal case, the defendant can offer reputation evidence (and also opinion evidence under most modern evidence codes) of her own character to prove that she did not commit the crime with which she is charged.

Rule 5: In a criminal case, once the defendant offers evidence of her good character under Rule 4, the prosecutor can cross-examine defendant’s character witnesses, and in so doing can ask them about specific acts in the defendant’s past that might tarnish her reputation (or, under most modern evidence codes, affect their opinions of her character).

Rule 6: In a criminal case, once the defendant offers evidence of her good character under Rule 4, the prosecutor can call rebuttal witnesses to testify that defendant has a bad reputation (or, under most modern evidence codes, to testify that they have a bad opinion of defendant’s character).

Rule 7: When the victim’s conduct is relevant in a criminal case, the defendant can offer evidence of the victim’s character to prove the victim’s conduct, and the prosecution can rebut with like evidence. For this purpose, reputation evidence is proper (and so is opinion evidence, under most modern evidence codes), and some jurisdictions also permit

²⁷⁹ See *Collins*, 42 Cal. 3d at 391-93, 228 Cal. Rptr. at 908, 722 P.2d at 182.

²⁸⁰ *Michelson v. United States*, 335 U.S. 469, 486 (1948).

specific acts evidence. However, special rules apply in rape and sexual assault cases concerning evidence of the prior sexual conduct of the victim.

Rule 8: A litigant can offer evidence of a person's habit (as distinct from his character) to prove the person's conduct on a particular occasion.

Rule 9: A litigant can offer evidence of a person's specific acts to prove, not character, but something else — anything else that is relevant to the case.

Rule 10: A litigant can impeach a witness by using reputation evidence (and also opinion evidence under most modern evidence codes) concerning the witness' character for untruthfulness.

Rule 11: In a majority of jurisdictions, the trial judge has discretion to permit a litigant to impeach a witness by cross-examining her about specific acts (other than criminal convictions) that demonstrate the witness' untruthful character. A minority of jurisdictions prohibit such cross-examination.

Rule 12: A litigant can impeach a witness by showing that the witness was previously convicted of some types of crimes. The law varies from jurisdiction to jurisdiction concerning the types of crimes and the extent of the trial judge's discretion to limit such impeachment.

