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by
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Introduction

Fifty years after Justice Jackson wrote of the "grotesque structure" of the character evidence rules,[1] American courts, legislatures, and scholars are still struggling with them. Their complexity is legendary, their origins obscure, and their rationales controversial. Until recently, legislatures had largely heeded Justice Jackson's warning that "[t]o pull one misshapen stone" from the complex rules governing the use of defendant's character in criminal cases[2] "is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."[3] That situation changed dramatically in 1994 when Congress enacted three new Federal Rules of Evidence[4] that blew away the character ban in a select class of cases and opened for examination whether the rule should be abolished entirely. Because it is inevitable that many states will consider adopting the new rules,[5] a close look at the character ban is more urgently needed than ever.

In commenting on the fine papers written by Professors Park and Tillers, I will confine myself primarily to a few issues common to both. I will also advance my own reasons for believing that reform of the type exemplified by the new federal rules is ill-advised.

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

2. *See, e.g.*, FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .").

3. *Michelson*, 335 U.S. at 486.

4. FED. R. EVID. 413-15.

5. The states clearly take their cues from the Federal Rules of Evidence. Forty states have adopted evidence codifications based on the Federal Rules. *See* 6 WEINSTEIN'S FEDERAL EVIDENCE T-1 (Joseph M. McLaughlin ed., 2d ed. 1997).

I. The Definition of "Character"

Any effort to reform the character evidence rules must be rooted in an acceptable definition of "character." Unfortunately, neither psychologists nor legal commentators have yet provided one, and Park and Tillers only further highlight the definitional controversy. Park, for example, employs McCormick's definition of character as "'a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness.'"[6] Based on this definition, one could assert that evidence of a person's being a "drunkard" is character evidence. Whether this is valid, however, depends on whether "character" has a moral component[7] and whether physical and mental conditions wholly or partly beyond a person's control are properly classified as character traits. If the condition of alcoholism does not reflect a person's morality and is beyond her control, it is at least worth questioning whether classifying one as a "drunkard" speaks to her morality. My own sense is that people should be neither praised nor blamed for characteristics over which they have no control.

Tillers rejects the traditional definition of character as "nonsense,"[8] and radically reformulates the concept as a sort of "internal operating system" that influences a person's behavior.[9] Applying a

6. Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 718 (1998) (quoting 1 MCCORMICK ON EVIDENCE § 195, at 825 (John W. Strong ed., 4th ed. 1992)). This definition, which conceives of character as a series of relatively stable "traits," has long been the foundation for the character evidence rules, though psychological research has cast doubt on its validity. For legal scholarship discussing relevant psychological data, see Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504 (1991); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986-87); Miguel Angel Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221 (1996); Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984).

7. Wigmore wrote that "[c]haracter . . . is to be considered . . . as the actual moral or physical disposition or sum of traits . . . ." 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §52, at 1148 (Peter Tillers rev. 1983). Few people would disagree, for example, that classifying a person as "honest" or "kind" speaks to her character. What McCormick meant by "temperance" is unclear. If he meant simply a person's "moderation in action, thought or feeling," (WEBSTER'S TENTH NEW COLLEGIATE DICTIONARY 1213 (1993)), perhaps the label is properly one of character.

8. Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 818 (1998).

9. Tillers writes: "Human creatures have an internal system of rules, principles, or operations that regulates or organizes their behavior." *Id.* at 825. Elsewhere, he writes: "Our intuitions and common sense tell us that there is within each one of us some set of principles and operations—some kind of a structure or 'logic'—that influences how we behave." *Id.* at 828.

theory of human autonomy, he sees character as at least partly a matter of choice or decision.[10] Thus, he would include such things as a person's motivations within the definition of character.[11] This, of course, is contrary to conventional doctrine, which classifies "motive" evidence as non-character.[12]

Clearly, we lack consensus about the proper definition of character. Until agreement is reached, rational reform of the character evidence rules cannot proceed.

II. The Adversary System and Problems of Prejudice

The problem of unfair prejudice has long been offered to support the character evidence ban. Both Park and Tillers highlight precisely what kinds of prejudice are involved and how they are thought to operate. The authors are correct that the prejudice takes two forms: inferential error prejudice and nullification prejudice.[13]

Tillers[14] and Park[15] also correctly assert that even with a ban on "character evidence," the typical trial is rife with indications of character, and that the adversary system as practiced in the United States tolerates—and even encourages—attorneys to expose the jury to evidence of character through other means, thus inviting both types of prejudice. Certainly, any reform of the character rules must take into account the reality that attorneys often deliberately incite prejudice. Nor should we doubt that in criminal trials, the prejudice is almost all one way; though the prosecution often must rely on unsavory witnesses, it is the defendant who usually bears the weight of unfavorable character assumptions, if only because she stands charged with the crime.[16]

10. "[I]t is logically permissible to suppose that 'character' is 'caused' by matters such as 'choice' and 'decision,' and . . . that being so, it is logically permissible to take 'character' as evidence of some 'choice' or 'decision.'" *Id.* at 810. Elsewhere, Tillers makes clear that behavior is not governed solely by conscious thoughts. *Id.* at 823.

11. *See id.* at 38-39.

12. *See, e.g.*, FED. R. EVID. 404(b) (defining "motive" as a proper non-character use of other misconduct).

13. *See* Park, *supra* note 6, at 720, 725. Tillers uses the term "juror-inflation-of-probative-value" to describe the first type of prejudice. Tillers, *supra* note 9, at 788. He uses the terms "the sentiment that subverts and nullifies the authority of legal reason and rules" to describe the second type. *Id.* at 786.

14. *See* Tillers, *supra* note 8, at 811-15. Tillers refers not only to formal evidence offered ostensibly for non-character purposes but likely to be used for forbidden character purposes, but also to arguments inviting character-based prejudice and other non-evidentiary tactics. *Id.*

15. See Park, *supra* note 6, at 754-55 (referring to evasions of the supposed ban on general propensity evidence and to the use of "unintelligible limiting instructions").

16. I recognize that as a practical matter, it is not possible to prevent all uses of character in a trial. Some of the more blatant adversarial misconduct can be controlled, how-

I am also convinced that problems of prejudice are only marginally less tangible in bench trials than in jury trials. There is no reason to believe that judges evaluating character evidence are any less likely to commit inferential error than are jurors. And while judges' understanding of and commitment to legal rules protects many defendants from nullification prejudice in bench trials, some such prejudice certainly occurs.[17] I am reminded of the documentary *The Thin Blue Line*,[18] in which the judge who had presided over the trial of a man for murdering a police officer showed emotion when discussing the case, even years later.[19] His desire to convict cop killers undoubtedly bled into his evidentiary rulings, many of which went against the defendant on crucial points. Character evidence rules must apply as much to bench trials as to jury trials.

III. Reform

Some uses of character "evidence" in daily life are unavoidable. It is natural, for example, to consider what one has heard about an individual before entrusting her with the care of one's children. Any effort to control such behavior would fail in any event. But trials are not natural events. They are highly stylized presentations conducted pursuant to strict procedural rules and designed to answer specific

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ever.

17. *See* Tillers, *supra* note 8, at 787-88.

18. (Miramax 1988). The defendant, Randall Adams. was convicted and sentenced to death. Largely as a result of the documentary casting grave doubt on his guilt, he was later freed. *See* Hugo Adam Bedau, *The Case Against the Death Penalty* (last modified Dec. 5, 1996) <http://ethics.acusd.edu/Bedeau.html>.

19. Judge Donald Metcalf, whose father was a Chicago police officer during the difficult years of prohibition, stated to the interviewer, "I grew up in a family where I was taught a great respect for law enforcement and became acutely aware of the dangers that . . . law enforcement officials go through that I think much of the public is not really sensitive to." *Id.* Later, he said,

> I always try very hard, every judge I know of does, to not show emotion on the bench. The reason if you do show emotion, the jury might take it that you're favoring one side or another. So you try to remain passive, emotionless, objective. I do have to admit that in the Adams case, and I've never really said this, [the prosecutor's] final argument was one I had never heard before about the thin blue line of police that separated the public from anarchy, and I have to concede that my eyes kind of welled up when I heard that. It did get to me emotionally but I don't think I showed it.
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> You can understand why a man might steal if he needs money to put food on the table. You . . . I can understand why a 17-year-old boy who doesn't have a car would steal one to ride around in. I can understand why a heroin addict needs heroin. But I . . . it's very hard to understand why anybody has to kill a police officer. It just doesn't have to be.

Id.

questions of fact fixed by discrete legal standards. Whether civil or criminal, a great deal is at stake, perhaps even the life of a party. Trials are also a representation of self-government in its most public sense, brought down from the level of the general and abstract to that of the individual. What happens in courts reflects both our commitment to the rule of law and our most basic values about *how* disputes *should be* resolved. Trials, therefore, must reflect our highest aspirations about the search for truth and the protection of individual dignity.

Dignitary rights are, of course, difficult to define, and it would be foolish to claim social consensus for any particular view of behavior that offends them. Nevertheless, I have been deeply persuaded of the wisdom of a rule arising in Jewish Talmudic tradition. That rule forbids *loshon hora* (literally, evil tongue).[20] According to the doctrine, except in the most narrow of circumstances, it is forbidden to speak of others in a derogatory or harmful way.[21] The purpose of the rule is to protect personal dignity. *Shmiras HaLoshon* (guarding of the tongue), on the other hand, expresses the quality of exercising caution in speech.[22] The two concepts recognize the importance of expression, and the view that words can both help and harm. The very act of speech, in fact, is seen as the essential determinant of how people relate to each other in society.[23] Though it is difficult to con-

20. This principle can be traced to Psalm 34, in which David states:

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

Psalms 34:13-14.

21. *See* SHIMON FINKELMAN & YITZCHAK BERKOWITZ, A LESSON A DAY: THE CONCEPTS AND LAWS OF PROPER SPEECH ARRANGED FOR DAILY STUDY xvi (1995). (The book is based on the writings of Chofetz Chaim). There are exceptions to the prohibition of *loshon hora*, the most common of which is when relating such information serves a constructive purpose. Even then, there are strict limits. One may speak negatively about a person only to help him or another that person has victimized, to resolve major disputes, or to enable others to learn from the person's mistakes. Even then, several preconditions must each be satisfied: The remarks must be based on first-hand information and careful investigation; it must be clear that the person is wrong; the person has been confronted but refuses to change his behavior; the statement will be accurate; the speaker's intent is solely constructive, and there is a reasonable chance that the intended goal will be achieved; there is no alternative means of achieving the goal; and the statement will not cause undue harm. *See id.* at 148. The narrow exceptions to the prohibition of *loshon hora* do not track perfectly those that apply in contemporary evidence law.

22. *See id.*

23. "The Torah's laws of speech, whose observance is capsulized by the timeless term *Shimras HaLashon*, constitutes God's plan for how people should live with each other." *Id.* at xxi. "When one guards his speech and engages others in conversations that are positive and constructive, the merit of *Shmiras HaLashon* is multiplied many times

trol one's hurtful thoughts, it is the expression of those thoughts that does the real harm.[24] Even accurate information can do unwarranted harm.[25] By giving voice to our petty daily character judgments, we encourage the kind of hatreds that divide us. Our judgmental words deny the goodness and value of others.[26]

To speak ill of others not only hurts the subject, but also the speaker. To demean others is to demean oneself; though there might be momentary gratification in passing along derogatory information, to do so leads ultimately to unhappiness and bitterness in the speaker.[27] To hold one's tongue, or to speak well of others, expresses the unity of people,[28] engenders mutual respect,[29] and draws people closer together.[30]

The doctrines of *loshon hora* and *Shmiras HaLashon* support the exclusion of character evidence, particularly in criminal cases. By forbidding the use of bad character to prove guilt, the law prevents the prosecution from calling witnesses to speak ill of others, even when the information is accurate. On the other hand, it is permissible for the defendant to call witnesses to attest to qualities that would make criminality less likely. Only then may the prosecution respond with contrary evidence, to correct injustice that might result from the jury's lack of balance in understanding the defendant's character.

The crime-by-crime approach to character evidence which Park explores[31] is fundamentally inconsistent with these concepts. Even when allowed in prosecutions for crimes with particularly high rates of recidivism (properly measured), character evidence causes unnecessary harm.[32] There are practical and political considerations as

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because, by exercising restraint in speech, one draws others to their *mitzvah* as well." *Id.* at xxxiv.

24. *See id.* at xxvii-xxviii.

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

26. *See id.* at xxxvi.

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

28. *See id.* at xxxii.

29. *See id.* at xxxv.

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

31. Park, *supra* note 6, at 756-74.

32. Forbidding the character-based use of other misconduct evidence does not mean the evidence is entirely excluded. Where evidence of a person's other wrongdoing is truly needed in order to prove a relevant fact, it can frequently be admitted on a non-character theory. *See* FED. R. EVID. 404(b) (allowing evidence of "other crimes, wrongs or acts" to prove such facts as "motive, opportunity, intent, preparation, plan, knowledge, identity,

well; it is difficult to defend the admissibility of character in sexual assault cases,[33] but not in murder cases. Perhaps more importantly, if evidence rules are made to conform to the pressures of the political forum, principle is certain to yield to the pursuit of votes.[34] This is not a prudent way to reform evidence rules that have long been structured to apply equally in virtually all types of cases.[35]

Conclusion

Trials should seek both determination of truth and protection of individual dignity. Though serving these values sometimes leads to conflicting evidentiary rules, the character ban represents a reasonable accommodation. By forbidding the reporting of vague rumor or personal opinion of character, and by protecting a defendant from having to explain all the deeds of her past, the law eliminates one type of dangerously prejudicial evidence and affirms the dignity of all defendants, even those accused of heinous crimes. Though character evidence—particularly in large, detailed amounts—can have substantial probative value,[36] we affirm our better instincts and our highest aspirations when we resist the temptation to permit trial by character. Any effort to reform the character rules must take account of this fundamental truth.

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or absence of mistake or accident").

33. *See* FED. R. EVID. 413.

34. This was certainly the case in the enactment of Rules 413-15, which became a part of the 1994 crime legislation primarily to obtain the favorable votes of two key members of Congress. *See* Anne Elsberry Kyl, *The Propriety of Propensity: The Effects and Operations of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 659-60 (1995) (noting "extensive negotiations between Reps. Molinari and Kyl and the House Democratic leadership" over the inclusion of the rules); Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence With Supporting Commentary*, 171 F.R.D. 330, 476 (1997) ("Rules 413-15 are a part of the 1994 Crime Bill because the Clinton administration needed a few more votes in the House of Representatives.").

35. *See* David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 341 (1995) (discussing the unitary nature of evidence law).

36. Both Park and Tillers argue persuasively that character evidence *can* have substantial probative value. Park, *supra* note 6, at 721-27; Tillers, *supra* note 8, at 783.