ARTICLES

CHARACTER EVIDENCE AND THE OBJECT OF TRIAL

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Evidence of an individual's character may not in general be offered to prove that the actor acted in conformity with that character on a particular occasion. Most analyses of this general rule—and its many exceptions—start from the premise that trial is at heart an exercise in finding facts. Yet a clear and robust rationale for the rules governing character evidence has yet to be found on this basis. This Article views trial and character evidence in a different light. Trial is regarded as but one part of the overall mechanism by which the state regulates behavior in the larger world outside the courtroom. The Article focuses specifically on trial’s role in the provision of incentives that induce individuals to account for the welfare of others in their daily activities. It is shown that the rules governing character evidence are much easier to explain—and so more fruitfully evaluated—when trial is explicitly placed in this broader context. From this finding the Article draws the larger lesson that the real object of trial lies more in shaping events than in sorting them out after the fact.

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INTRODUCTION

Most evidence scholarship takes as given that trial is at its core a search for truth, a sorting out of past events. Although commentators emphasize that truth seeking competes with other considerations, such as the sanctity of certain privileged relationships, the dignity of the parties.
and the opportunity costs of process, few would consider these rival claims part of the purpose of trial. They are rather constraints, to be accommodated or compromised. The reason to encroach at all upon these competing principles lies, by most accounts, in the value—inherit or instrumental—of discovering what really happened.1

1. See, e.g., William Twining, Evidence and Legal Theory, 47 Mod. L. Rev. 261, 272 (1984). Twining wrote:
The most striking feature of the specialized literature on judicial evidence in the Anglo-American tradition is how homogeneous it is. Nearly all of the Anglo American writers from Gilbert to Cross have shared essentially the same basic assumptions about the nature and ends of adjudication and about what is involved in proving facts in this context. There is undoubtedly a dominant underlying theory of evidence in adjudication, in which the central notions are truth, reason, and justice under the law. It can be restated simply in some such terms as these: the primary end of adjudication is rectitude of decision, that is the correct application of rules of substantive law to facts that have been proved to an agreed standard of truth or probability. The pursuit of truth in adjudication must at times give way to other values and purposes, such as the preservation of state security or of family confidences; disagreements may arise as to what priority to give to rectitude of decision as a social value and to the nature and scope of certain competing values. . . . But the end of the enterprise is clear: the establishment of truth.

Id.; see also H. Richard Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. Pa. L. Rev. 845, 845 (1982) [hereinafter Uviller, Illusion] ("The process of litigation is designed for the reconstruction of an event that occurred in the recent past. And for the most part, the rules by which a trial is conducted are supposed to enhance the accuracy of the synthetic fact."); Dale A. Nance, The Best Evidence Principle, 75 Iowa L. Rev. 227, 252-53 (1988) ("The reasonably accurate determination of disputed factual issues is . . . the pivotal task to be performed at trial [and allocated to] the 'kernel of fact' . . . . The best evidence principle . . . expresses the obligation of litigants to provide evidence that will best facilitate this central task of accurately resolving disputed issues of fact."); David P. Leonard, The Use of Character to Prove Conduct: Rationality and Causation in the Law of Evidence, 58 U. Colo. L. Rev. 1, 2-3 (Winter 1986-87) (stating that "clearly dominant" and "properly dominant" paradigm underlying modern trial is "rational truth-seeking" (emphasis omitted)); Roger C. Park, Character at the Crossroads, 49 Hastings L.J. 717, 740-54 (1998) [hereinafter Park, Character at the Crossroads] (arguing that truth seeking is the primary goal of trial). This orientation toward truth seeking is apparent in self-referential portions of the Federal Rules of Evidence. What the rules actually call for is another issue.) Fed. R. Evid. 102 (entitled "Purpose and Construction") reads: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined" (emphasis added). A majority of the states have adopted this rule verbatim. See, e.g., Conn. Code Evid. 1-2; Mich. R. Evid. 102; Pa. R. Evid. 102; Tex. R. Evid. 102.

Important portions of evidence scholarship would not regard truth seeking as the object of trial. These scholars go beyond arguing that truth seeking is subject to important constraints, denying that it is, or is even coincident with, the real underlying objective to be maximized. Professor Nesson, for example, argues that the purpose of judicial process is to induce individuals to internalize the instruction of the law in their primary activities. Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357, 1359 (1985). To this end, the object of process is to produce "accessible verdicts," which are not necessarily "credible verdicts." Id. at 1378.
This Article examines the implications of an apparently similar, but importantly distinct, view about the purpose of trial. This view rests on the methodological premise that rules governing what happens inside the courtroom can be understood adequately only in the context of the state's central project of regulating behavior outside the courtroom—on the road, in the home, at the office, in the marketplace—where most of life takes place.

More specifically, the Article focuses on trial's role in the provision of incentives—perhaps the most important means by which the state regulates such "primary" activities. The incentive setting approach begins

1578. The former are verdicts that the public will regard as "statements about what happened," as opposed to statements about what evidence was presented at trial. Id. at 1558. These concepts diverge, argues Nesson, is several important areas of evidence law, including use of statistical evidence and hearsay. Id. at 1575, 1578. For critiques of Nesson's position, see Ronald J. Allen, Comment, Rationality, Mythology, and the 'Acceptability of Verdicts' Thesis, 66 B.U. L. Rev. 541 passim (1986); Roger Park, The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson, 70 Minn. L. Rev. 1027, 1027 (1986) [hereinafter Park, Hearsay Rule]; Park, Character at the Crossroads, supra, at 51–54.

For an idea that is related to Nesson's, see Leonard, supra, at 5, 39–43 (pointing to trial's role is producing social and individual "catbalists," which is achieved partly through a vicarious satisfaction with legal process that may contradict the implications of rational truth seeking). For other non truth seeking approaches, see, for example, Stephan Landsman, The Adversary System: A Description and Defense 3 (1984) (emphasizing importance of dispute resolution, as separate from truth seeking) and Mirjan Damatka, Truth in Adjudication, 49 Hastings L.J. 289: 303–04 (1998) (discussing both the lawmaking role of legal process and the dispute resolution function in civil actions, in which too much "truth" may backfire).

Those who adhere to one or more of these alternative paradigms may find interest in the proposition put forward in this Article that incentive setting—which is usually thought to be an ally of, rather than a rival for, truth—is yet another social goal that diverges significantly from truth seeking. In any event, as will be clear from the discussion in Part I of this Article, the existing explanations for the rules governing character evidence are firmly cast within the truth seeking paradigm.

2. See, e.g., Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 378–70, 422–23 (1994) (citing deterrence as primary rationale for tort law among mainstream legal scholars, finding sustainable the view that current tort law does significantly debar in light of institutions detail and empirical studies, but discounting the possibility of fine tuning); Isaac Effrich, Crime, Punishment, and the Market for Offenses, 10 J. Econ. Persp. 43, 55 (1996) ("Taken as a whole, . . . studies offer a mountain of evidence consistent with the hypothesis that both negative and positive incentives have a deterrent effect on crime."); Steven D. Levitt, Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error?, 36 Econ. Inquiry 553, 553–55 (1998) (presenting empirical evidence that the association between arrest rates and reported crime rates is due in large part to deterrence effects); Daniel Kessler & Steven D. Levitt, Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation, 42 J. & Econ. 343, 352–59 (1999) (presenting empirical evidence that sentencing enhancements have a significant deterrent effect, as distinguished from their incremental incapacitative effect); Haseem Deshmukh, Paul Rubie and Joanna Mehlpop Shephard, Does Capital Punishment Have a Deterrent Effect?, New Evidence from Postmitramorium Panel Data 25 (Emory Univ. Dept'ly Econ. 9901) (filed with the Columbia Law Review) (suggesting societal evidence that while
with the premise that, left to her own devices, the individual may fail to adequately account for the welfare of others—may in fact use violence and aggression as a means of achieving her own selfish ends. In order to prevent this sort of behavior, society sets before the individual an additional type of consequence—a legal sanction or reward—to counterbalance pure self interest in the rough calculus of choice. To work properly, these sanctions and rewards must be connected appropriately to the individual's actual behavior, and the individual must anticipate this association. An individual who is never punished or is punished regardless of her actions has no incentive to refrain; an individual who is never rewarded or is rewarded regardless of how she acts has no incentive to engage. Creating the necessary association between actions and legal consequences is the role of evidence in the overall mechanism by which the state sets primary activity incentives.

At first glance, linking consequence to conduct seems perfectly aligned with uncovering truth. If the object is to punish the individual if and only if she commits the crime, wouldn't trial have to be an exercise in determining whether she did in fact commit the crime? If the object is to hold individuals accountable for accidents when they are careless but not when they have exercised reasonable precaution, shouldn't trial be structured in a way that best determines the truth about the defendant's degree of care? In fact, the implications for trial of primary incentive setting often do correspond to those of truth seeking. But not always.

Character evidence—at once the most derogated, legislated, and increase in any of the three probabilities of arrest, sentencing, or execution tends to reduce the crime rate," with the caveat that "deterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs . . . initiating the regret associated with the irreversible decision to execute an innocent person"; Joanna Mekikop Shephard, Fear of the First Strike: The Fall Deterrent Effect of California's Two- and Three-Strike Legislation 3 (Emory Univ. Dep't Econ. Apr. 2001) (on file with the "California Law Review") (demonstrating the full deterrent effect from California's three strike legislation on all offenders, not just "last strike offenders," and finding a significant deterrent effect).

3. See Michelson v. United States, 355 U.S. 469, 486 (1948) ("We concur in the general opinion of courts, textbooks and the profession that much of this law (of character evidence) is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned countervalue to the other."). This sense of dissatisfaction persists in modern scholarship. See, e.g., Park, Character at the Crossroads, supra note 1, at 754 (noting "the horrifying complexity of the character evidence rules"); Ullier, Illusion, supra note 1, at 848 (same).

litigated aspect of evidence law—is one area in which the truth seeking approach and the primary incentives approach to trial point in very different directions. This Article makes use of that divergence to advance our understanding of both character evidence and trial. It demonstrates that many of the rules governing character evidence—so difficult to rationalize when trial is regarded as an isolated exercise in sorting out past events—fall easily into place when trial is viewed as but one component of the larger system by which the state regulates everyday out of court behavior. The Article draws from this stark disparity in explanatory power the important lesson that, despite most of what is said about the object of trial, our desire to find the truth is subordinate to our desire, in effect, to shape it through the provision of incentives. Finally, the Article employs this revised understanding of trial and evidence to shed new light on several prominent controversies in the modern character evidence debate.

McCormick defines “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.” The baseline rule, which has broad application despite its many exceptions, is that evidence of an individual’s character may not be offered to prove that she acted in conformity with that character on a particular occasion. Thus, evidence that the

Fed. R. Evid. 404(b) was amended to add a pretrial notice requirement in criminal cases when the prosecutor intends to use the accused’s other acts to prove state of mind, connected acts, identity or opportunity—as opposed to the acts res. Amendment to Federal Rules of Evidence, 134 F.R.D. 717, 717-23 (1991). These “other uses” are discussed in Parts V.B-D and V.I.A. The year 1994 saw much legislative activity regarding the use of character evidence in sex offense cases. The rape shield provision was significantly amended. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, § 40143(b), 108 Stat. 1918, 1919 (1994). And special rules regarding defendant’s prior offenses of sexual assault and child molestation, Fed. R. Evid. 413-415, were also added by the same act. Pub. L. No. 103-322, tit. XXXII, § 320955(a), 108 Stat. 2125, 2136–37 (1994). See infra Part VLA for a discussion of these special sexual offense provisions. Most recently, Fed. R. Evid. 404(a)(1), the so-called “mercy rule,” was amended so that an accused’s offering evidence of a given trait of the victim open the door to the prosecutor’s offering evidence that the accused possesses the same trait. Amendments to the Federal Rules of Evidence, 199 F.R.D. 398, 399-400, 405 (2000). See infra Part VI.B for a discussion of the “mercy rule.” Other provisions of the Federal Rules of Evidence have also been amended, but none as extensively. See, e.g., 3 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence §§ 801 App.01-04; 802 App.01-100; 805 App.01-05; 804 App.01-05; 805 App.01; 806 App.01-02; 807 App.01-03 (Joseph M. McLaughlin ed., 2d ed. 2001) (listing the less significant set of amendments to Article VIII of the Federal Rules of Evidence, which governs the admissibility of hearsay).

5. See Fed. R. Evid. 404 advisory committee’s note to 1991 amendments: “Rule 404(b), [‘Other crimes, wrongs, or acts,’] has emerged as one of the most cited Rules in the Rules of Evidence.”


7. Fed. R. Evid. 404(a). Many states have similar rules. Unlike state rules differ substantially, only the federal rule will be cited in this Article. See generally Graham C.
defendant was negligent on prior occasions is not admissible to prove carelessness in general and, therefore, in the case at hand.

The rules restricting character evidence pose serious difficulties for any analysis, but especially for the conventional truth seeking approach to trial. Personality psychologists are now in general agreement that individuals do have identifiable cross situational attributes that, along with situation specific factors, help to determine individual behavior. Moreover, if character is determinative of conduct, it follows that it is also informative of whether conduct has occurred. But then, how can one rationalize prohibiting character evidence for proof of conduct, if gleaned information about past conduct is an important purpose of trial?

The fact that the prohibition is categorical and a priori is what makes the question difficult. One can understand the need to balance the probable value of any given piece of character evidence against the risk of prejudice, confusion, and waste—the usual list of competing considerations. And one can imagine deciding that a given piece of character evidence fails the balancing test just as any piece of evidence might fail the test. The question is: What is so different about character evidence that justifies bypassing the usual case by case balancing and rejecting en masse this large and diverse collection of potentially probative evidence?

As if answering this question were not difficult enough, it is only the first of many obstacles. In steering clear of the fact that character is indeed probative of conduct in explaining the general prohibition, one must not turn so sharply as to be incapable of also explaining the several circumstances in which character evidence is allowed. Consider two of the most important and perplexing examples.

Although rarely mentioned and almost never analyzed in character evidence scholarship,10 evidence of a defendant's other acts11 is routinely admitted for sentencing and the determination of punitive damages.12 Thus, the same other acts that may not be used to determine conduct—

Lill, An Introduction to the Law of Evidence §§ 5.9, 5.4–5.6 (3d ed. 1996) (reviewing the baseline rule in state and federal courts). Exceptions to Rule 404(a) are discussed throughout, especially in Parts V and VI. Many are listed in summary fashion infra note 14.


10. It appears that only one previous article in evidence scholarship compares the use of character for conduct with the use of other acts evidence for sentencing. James Landon, Note, Character Evidence: Getting to the Root of the Problem Through Comparison, 24 Am. J. Crim. L. 381, 397 (1997) (ruling out "efficiency concerns and the increased burden on the defendant to prove his entire life history in issue" as rationale for character evidence ban, based on liberal use of other acts evidence in sentencing).

11. Arguably, all character evidence is ultimately other acts evidence. In particular, opinions and reputation testimony, generally favored over explicit testimony regarding specific instances of conduct, see Fed. R. Evid. 405, are summary forms of evidence about the specific instances of the subject's behavior that produced the opinion or the reputation.

12. See infra Part III.C.1 for more discussion of sentencing and Part III.C.2 for more on the determination of punitive damages.
that is, to determine whether there will be no punishment or some punishment—may be used to determine whether punishment for that conduct will be modest or severe.

Almost as puzzling is the fact that character evidence is rather liberally allowed for the purpose of impeaching witnesses.13 Thus, while character evidence may not in general be used to prove conduct outside the courtroom, it may be used to prove conduct inside the courtroom when that conduct happens to be the act of lying on the stand. Consequently, a witness's past perjury conviction may be introduced for the inference that she is now lying under oath, and yet may not be introduced against that same individual, as a defendant, in a subsequent perjury action based on that lie.14

Most evidence scholars would agree that the conventional truth based approach to evidence has had serious difficulty completing the explanatory slalom posed by the rules governing character evidence; some might even say it misses all the gates from start to finish.15 In contrast, the primary activity incentives approach to evidence weaves through the rules with relative facility. Consider the use of character evidence for the three purposes just mentioned: proof of conduct, sentencing, and impeachment.

From a primary incentives perspective, the key to understanding the general prohibition on using character to prove conduct is to recognize that evidence can be informative of conduct and yet not be affected by such conduct. "Trace" evidence such as fingerprints and eyewitness recollections are both informative of the act and are byproducts of the act. In contrast, character evidence, though it may rationally change our assessment of the likelihood that defendant acted in a particular way, is the

13. See Fed. R. Evid. 404(a)(3), 608, 409; infra Part V.A.

14. The list of perplexing "exceptions" continues. "Habit," as somehow distinguished from "character," is admitted to prove conduct. Fed. R. Evid. 406; see infra Part V.C.2. Evidence of other crimes, wrongs, or acts is admissible for purposes other than proving conduct, including knowledge, intent, plan, preparation, opportunity, absence of mistake, identity, or absence of accident, Fed. R. Evid. 404(b); see infra Parts V.B, V.C.1., and V.D. Character evidence may of course be offered when character is an element of a claim or defense, as when the defendant raises the defense of truth in a libel case. Fed. R. Evid. 405(b). The accused may offer evidence of her own good character in order to disprove that she committed the charged crime; but if she does, she opens the door to the prosecutor's character based rebuttal. Fed. R. Evid. 406(a)(1); see infra Part VI.B. The accused may also prove a pertinent trait of the victim, such as a violent disposition when the accused claims self defense. Fed. R. Evid. 406(a)(2); see infra Part VI.A. But see the "rape shield" provision, Fed. R. Evid. 412 (restricting admissibility of evidence on victim's sexual predisposition or other sexual behavior in sexual misconduct cases). And by recent amendment to the Federal Rules, evidence of the defendant's commission of other sex offenses is admissible for any purpose in sex offense cases. Fed. R. Evid. 415-415; see infra Part VI.A; see generally Lilly, supra note 7, §§5.3, 5.7-5.19 and accompanying chapter notes (reviewing exceptions to the general ban on character evidence).

15. See Walker, supra note 1, at 866.
same whether or not defendant actually did act in that way. If the object were to guess whether the defendant engaged in the conduct, both types of evidence would be appropriate. But because the object is to affect whether defendant engages in the conduct, only trace evidence of that conduct is appropriate. Only trace evidence changes with conduct. Thus, keying penalties and rewards to the production of trace evidence is the only way to make penalties and rewards change with conduct. And making penalties and rewards change with conduct is the only way to create incentives.

6. Professor Ullman may have been the first to pose this distinction. But consistent with his view that truth seeking is the object of trial, he argues that the distinction is irrelevant. Id. at 447–48.

17. Most of the economics literature on evidence also assumes that truth seeking is the object of trial—this despite the fact that applications of economics to the substantive law are often focused directly on incentive setting. See, e.g., Paul Milgrom & John Roberts, Relying on the Information of Interested Parties, 17 RAND J. Econ. 18, 30 (1986) ("We have used game theory to examine the logic of the argument that when all interested parties have access to complete and verifiable information, competition among them in attempting to influence a decision leads to the emergence of 'truth.'"); Masahiro Okuno-Fujii, Andrew Postlewaite & Kosuke Suzumura, Strategic Information Revelation, 57 Rev. Econ. Stud. 25, 25–27, 50–57 (1990) (analyzing augmented asymmetric information model in which agents can announce their private information beforehand, and providing conditions for the full revelation of agents’ private information when some of agents’ announcements are exogenously “certifiable”); Barton L. Lipman & Diane J. Seppi, Robust Inference & Communication Games with Partial Observability, 56 J. Econ. Theory 370, 384 (1989) (finding that “with more than one speaker, conflicting preferences can lead to the revelation of a surprising amount of information—even with only very limited provability and with limited information on the part of the decision maker about the speaker’s preferences or strategies’’); Luke M. Froeb & Bruce H. Kobayashi, Naïve, Biased, yet Bayesian: Can Judges Integrate Selectively Produced Evidence?, 12 J.L. & Econ. & Org. 257, 257 (1996) (arguing that the legal system is likely to generate unbiased estimates of liability and damages despite the jury’s biased and unequal information); Andrew P. Doughty & Jennifer F. Reingansum, On the Economics of Trials: Adversarial Process, Evidence, and Equilibrium Bias, 16 J.L. & Econ. & Org. 565, 365–66 (2000) (arguing, in contrast to Froeb & Kobayashi, infra, that the legal system is unlikely to generate unbiased estimates of liability and damages); Joel Sobel, Disclosure of Evidence and Resolution of Disputes, in Game-Theoretic Models of Bargaining 341, 551–59 (Albin Roth ed., 1985) (analyzing a model with no element of moral hazard in the primary activity, in which, as a result, maximizing social welfare is equivalent to minimizing loss-weighted trial error plus evidence costs); Daniel L. Rubinfeld & David E.M. Sappington, Efficient Awards and Standards of Proof in Judicial Proceedings, 18 RAND J. Econ. 508, 509 (1987) (positioning as the social objective the minimization of the sum of loss-weighted false convictions, lose-weighted false acquittals, and litigation effort of defendants); Stephen Breyer, Randy Bundy & Einer Richard Elhaug, Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation, 79 Cal. L. Rev. 315, 381 (1991) ("Under a theory of adjudication that emphasizes deterrence, [an] unskewed increase in favorable and unfavorable information presented ought to improve the tribunal’s ability to distinguish desirable from undesirable conduct. This in turn increases expected sanctions for those who act undeterred at the same time that it decreases sanctions for those who act desirably."); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1480–84 (1999). Posner says: If we were... trying to design a system for the resolution of factual disputes in litigation that would be economically efficient in the broadest sense...
we frame our inquiry? I propose...to model factfinding as a problem in search. The search process, which in the litigation setting is the process of obtaining, sifting, marshaling, presenting, and (for the tiniest of facts) weighing evidence, confers benefits and incurs costs. Benefits are a positive function of the probability (p) that the evidence is considered by the trier of fact the case will be decided correctly, and of the stakes (S) in the case.

Id.

Several exceptions are worth mentioning. For a game theoretic analysis of evidence production that explicitly places evidence production in the context of regulating out of court behavior and also explicitly considers various incentives to omit and upsurge, see Chris Sanchirico, Relying on the Information of Interests—And Potentially Dishonest—Parties, 5 Am. L. & Econ. Rev. 530, 521–22 (2003) [hereinafter Sanchirico, Relying], and its extension, Chris Sanchirico, Games, Information and Evidence Production: With Application to English Legal History, 5 Am. L. & Econ. Rev. 342, 343–44 (2000) [hereinafter Sanchirico, Games]. Both of these papers spring from an earlier working paper first circulated and presented in 1995: Chris Sanchirico, Enforcement by Hearing: How the Civil Law Sea Incentives (1995) (Columbia Economics Dep't, Discussion Paper No. 95-9008). See also A. Mitchell Polinsky & Steven Shavell, Legal Error, and the Incentive to Obey the Law, 5 J.L. Econ. & Org. 99, 100 (1989) (demonstrating in a civil law setting that chance of legal error generally reduces incentive to obey the law, but that this effect is complicated by the possibility that legal error will affect plaintiffs' incentives to file suit); Joel Schrag & Suzanne Scotchmer, Crime and Prejudice: The Use of Character Evidence in Criminal Trials, 10 J.L. & Econ. & Org. 319, 329 (1994). Schrag and Scotchmer find in the context of their model that the optimal threshold quantity of evidence for guilt is systematically lower when the object is taken to be error minimization, rather than maximal deterrence. Id. at 329–32 (Propositions 1 and 2). This distinction between error minimization and maximal deterrence is orthogonal to the distinction between truth seeking and incentive seeking put forth in the present Article. The conflict identified by Schrag and Scotchmer pertains even in a system that admits only trace evidence of conduct. For further discussion of Schrag and Scotchmer, see infra note 139.

See also Louis Kaplow, The Value of Accuracy in Adjudication: An Economic Analysis, 23 J. Legal Stud. 307, 312–14 (1994), and Louis Kaplow & Steven Shavell, Accuracy in the Assessment of Damages, 89 J.L. & Econ. 101, 105, 109, 114, 201–02 (1996), for articles asserting that accuracy in the assessment of damages has zero impact (as opposed to the potentially negative impact identified in this Article) on incentives. The specific claim is that in a world in which actors injure each other, one cannot perfect information about accidents or not, there is no incentive difference between charging the injurer with the harm that she expected to cause or the harm that she actually did cause, even though the legal assessment of damages is in a sense "more accurate." Aside from this argument, these two papers and their third companion by Kaplow & Shavell adopt and expand upon the conventional view of the relationship between accuracy and incentives. Louis Kaplow & Steven Shavell, Accuracy in the Determination of Liability, 37 J.L. & Econ. 1, 1–5 (1994). None of the three papers discusses the differing incentive effects of trace and predictive evidence of conduct.

It is also worth noting that a fair portion of the economics analysis of procedure does ground itself in primary activity incentives. However, this literature does not consider how accuracy is proven. Instead it assumes exogenous probabilities for various trial outcomes and focuses instead on filing, settlement, and fee shifting provisions. See, e.g., Janusz A. Ordover, On the Consequences of Costs and Litigation in the Model of Single Activity Accidents: Some New Results, 10 J. Legal Stud. 269, 269–71 (1981) (considering the effect of litigation costs on optimal due care standard); A. Mitchell Polinsky & Daniel L.
Trace evidence of conduct is, therefore, the sine qua non of incentives.\textsuperscript{18} Arguably, however, there are circumstances—most in the criminal realm—in which character evidence has an ancillary role to play in “tailoring” the incentives (created in the first instance by hanging legal consequences on trace evidence) to the intensity of individual propensities.\textsuperscript{19} Perhaps those with poor “self-control”\textsuperscript{20} are deterred from committing robbery only by a particularly swift, likely, and steep reduction in their personal welfare following commission—a prospect which for various reasons we might prefer to apply only selectively. It is true that tailoring incentives in this way requires that the court hear evidence on propensity (and that parties anticipate this fact). But this does not detract from the incentives argument against admitting character for conduct. Rather, it allows the incentives approach to explain the seeming inconsistency of admitting other act evidence for sentencing and punitive damages and not for proving conduct. As we shall see, fine tuning incentives to propensity is a tricky business. Attempting to do so by admitting character for conduct turns out to be particularly prone to backfire, dampening rather than intensifying incentives for those who need them most. In contrast, admitting other act evidence for sentencing and punitive damages—and not for proof of conduct—turns out to be a simple and almost foolproof way of providing higher powered incentives for higher propensity offenders.\textsuperscript{21}

The admission of character evidence for impeachment is also much easier to rationalize within the prima facie incentives approach. Under that approach, conduct on which character evidence lies an ancillary benefit from the primary conduct that is the target of the substantive law. In order to set incentives for primary conduct successfully, the law must be sufficiently capable of discerning whether what is offered as trace evi-

\textsuperscript{18} Legal Stud. 151, 151-55 (1988) (examining how litigants cost affect the optimal level of damages); A. Mitchell Polinsky & Daniel L. Rubinfeld, The Determinant Effects of Settlements and Trials, 8 J. Legal Stud. 159, 195-198 (1980) (arguing that trials may be more effective than settlements in inducing injurers to take socially appropriate levels of care); Kathryn L. Spier, Settlement Bargaining and the Design of Damage Awards, 10 J.L. Econ. & Org. 34, 54-86 (1994) (analyzing the effect of fine tuning damage awards on the likelihood of settlement and the injurer’s level of care).

\textsuperscript{19} The issue here is proving conduct. In terms of proving other issues, like the circumstances of conduct, trace and predicive evidence are indeed on equal footing. See infra Part V.A, V.B, V.B.3 & V.B.4.

\textsuperscript{21} See infra Part V.A for a discussion of those circumstances.

\textsuperscript{20} See infra note 31 for theories of crime based on self control.

\textsuperscript{21} The extent to which individuals anticipate that their sentence will be tailored to their propensity is open to question. This may be precisely the kind of fine tuning that Schwartz, supra note 2, at 378-79, 444 warns against. But if the tailoring goal is indeed so much as to ask of a practical system, then this is all the more reason not to admit propensity evidence for conduct. How then can we explain sentencing enhancements based on other acts evidence? Two possibilities are incapacitation and the dynamic effects of propensity evidence. Both are considered in Part IV.
dence of primary conduct is really that. In particular, the law must be proficient at distinguishing actual recollections from fabricated accounts. Thus, the central object of affecting—not necessarily guessing—primary conduct implies a subsidiary interest in both affecting and guessing the secondary conduct of witnesses on the stand. The law does not just want to prevent lying on the stand, it also wants to know whether the witness has in fact lied.

In addition to shedding light on why character evidence should be permitted for impeachment and sentencing and yet not for proof of conduct, the incentives approach also helps to elucidate several other puzzling aspects of the rules governing character evidence. And it is safe to say that its account of the rules governing character evidence is more plausible—often much more so—than that offered by the conventional truth seeking approach to trial. But not every aspect of the rules governing character evidence is consistent with the primary incentives approach. With respect to some areas of current law, the incentives approach provides the basis for criticism rather than explanation. Some of these areas—notably, the new federal exceptions for prior sex offenses—have also been roundly criticized within the conventional truth seeking analysis of character evidence. But unlike the conventional approach, the incentives approach is grounded by its ability to accommodate comfortably the bulk of extant law. And this may lend additional authority to its criticism of the areas that it regards as anomalous.

Part I of the Article adds this author’s voice to the chorus of criticism directed at existing explanations for the rules governing character evidence—explanations grounded in the view that trial is an exercise in truth seeking. Part II lays out the basic argument for the general prohibition on using character to prove conduct in terms of the primary incentive setting approach to trial. Parts III and IV explain why various ancillary considerations—including tailoring, incapacitation, and dynamic effects—do not upset the conclusion of the basic story laid out in Part II. Along the way, these Parts also examine the liberal use of character evidence in sentencing, the determination of punitive damages, and police investigation. The primary incentives framework is employed in Part V to explain—or perhaps recast and refine—several of the other “exceptions” and apparent inconsistencies regarding the admission of character evidence under the rules. Lastly, Part VI argues against aspects of the law that remain at odds with the incentive setting framework—in particular, the disguised admission of character for conduct under the rubric of

22. This argument also applies to elements of the claim other than primary conduct.
23. See the internal references at supra note 74.
"other uses," the recent amendment to the Federal Rules of Evidence for prior sex offenses, and the ancient "mercy rule" for criminal defendants.

I. EXISTING EXPLANATIONS

This Part of the Article examines the existing arguments for excluding character evidence for proof of conduct. All of these arguments start with the premise that trial is at its core a truth seeking exercise.26 None appear to provide an adequate basis for the blanket prohibition. Given the large number and impressive authorship of these arguments, one may fairly extrapolate that it is simply not possible to construct a viable argument for the character evidence prohibition within the truth seeking paradigm.

The arguments in this Part are evaluated on their own terms; the assumption that trial is a truth seeking exercise is maintained throughout.

A. Probative Value

The most basic argument against admitting character evidence to prove conduct is that an individual’s other behavior is too weakly probative of whether the individual acted as alleged on the occasion in question. As late as the 1980s, this view held significant sway within evidence scholarship.27 Proponents rooted their stance in the "Situationist" school.

26. Park, Character at the Crossroads, supra note 1, at 750.
27. See, e.g., Martin F. Kaplan, Character Testimony, in The Psychology of Evidence and Trial Procedure 150, 151 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (noting that "general character" is "not probative for the specific instance at issue"); Leonard, supra note 1, at 25–26 ("[A]ssumptions [about the predictive value of personality] adopted by the law of evidence are largely invalid."); Robert G. Lawson, Credibility and Character: A Different Look at an Imponderable Problem, 50 Notre Dame Law. 758, 786–89 (1975) (discussing the low probative value of character evidence); Miguel Angel Mendez, California’s New Law on Character Evidence: Evidence Code Section 852 and the Impact of Recent Psychological Studies, 81 UCLA L. Rev. 1005, 1005, 1050–59 (1984) (arguing from a psychological perspective that character evidence possesses little or no probative value); Robert C. Spector, Rule 609: A Last Plea for Its Withdrawal, 52 Okla. L. Rev. 334, 343 (1979) (contending that evidence of prior convictions has little probative value). But see Miguel A. Mendez, The Law of Evidence and the Search for a Stable Personality, 45 Emory L.J. 221, 234 (1996) (noting new research on relative stability and invariance of basic personality structure). Much of this literature was focused on the specific issue of the use of prior crimes to impeach a witness. See infra Part V.A. The view that character evidence has little probative value extends beyond this scholarly literature. The view was sufficiently prominent to find expression in the Advisory Committee’s notes to the Federal Rules of Evidence, which asserted that using character for conduct "raises questions of relevancy." Fed. R. Evid. 404 advisory committee’s note (paragraph 2). Since primary conduct is a fact "of consequence to the determination of the action," Fed. R. Evid. 401, we may deduce that in questioning the relevance of character evidence, the advisory committee was specifically questioning whether it has the "tendency to make the existence of [conduct] more probable or less probable" than it would be without the evidence. Fed. R. Evid. 401 advisory committee’s note (paragraph 4) (internal quotation omitted). That is the Committee was questioning
of social psychology, which emphasized the importance of circumstance on behavior and deemphasized the role of "cross-situational" attributes—often to the point of complete disregard.28

Situationism (in an extreme form) has faded from view in both personality psychology and evidence scholarship.29 Current research sug-

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character's probative value. See id; see also Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, Cal. Law Revision Comm'n, Rep., Rec., & Studies 615 (1964), quoted in Fed. R. Evid. 404 advisory committee's note ("Character evidence is of slight probative value ... ."); McCormick on Evidence § 186 (John W. Strong ed., 5th ed. 1999) ("Evidence of the general character of a party or witness almost always has some probative value, but in many situations, the probative value is slight . . . .").

There have always been those, including the U.S. Supreme Court, who have not taken this position. Michelson v. United States, 355 U.S. 469, 475-76 (1948) ("The state may not show defendant's prior trouble with the law, specific 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."). According to Wigmore:

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

1A John Henry Wigmore, Evidence in Trials at Common Law § 55, at 1157-59 (Tillers rev. 1933).

28. Situationism's chief tract is Walter Michels, Personality and Assessment (Lawrence Erlbaum Associates, Inc. 1965) (1968). Support for Situationism was gleaned in part from a series of experiments conducted early in the last century on school children. These experiments purported to show that dishonest behavior was only mildly correlated across different experimental conditions. These children who stole coins in the morning were not necessarily more likely to be the ones cheating on the test later in the day. Hugh Huthorse & Mark A. May, Character Education Inquiry in Cooperation with the Institute of Social and Religious Research, 1 Studies in Deceit 385-84 (1998).

29. Arguably, Situationism's role in the history of psychological thought was to critique a perceived tendency among some researchers to attribute too much of human behavior to cross-situational dispositions, and not enough to situation. Having played out this role, Situationism has retreated from view within the field of psychology. See Edward E. Jones, Major Developments in Five Decades of Social Psychology, in 1 The Handbook of Social Psychology 3, 7-8 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (noting the decline of pure Situationism); Walter Michels & Yuichi Shoda, Reconciling Processing Dynamics and Personality Dispositions, 49 Ann. Rev. Psychol. 229, 255 (1998) (noting that some Situationists and dispositional theorists are now integrating the two. Michels himself now advocates a more eclectic approach focusing on the stability of the "cognitive-affective processes" that individuals bring to varying situations. Id. at 233, 237 ("Dispositions . . . are key aspects of the personality construct. The point is that personality theory needs to analyze dispositions in a way that allows us to understand how individuals interact with situations and, most importantly, to identify and assess the dynamic intra-individual processes that underlie these interactions.").

Within legal scholarship, Susan Davies's watershed survey of psychological research played a large role in bringing the emerging eclectic view to the attention of legal scholars. Susan Marlene Davies, Evidence of Character to Prove Conduct: A Reassessment of Relevance, 97 Crim. L. Bull. 504, 533 (1991) ("[T]he character evidence . . . is not probative of conduct can no longer draw support from the case. These materials have been obtained from the US Supreme Court Electronic docket and are not official documents. The goal is to provide easy access to as much of the public record as possible, while ensuring that the content is accurate and reliable. The information presented here is for research and educational purposes only.

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gests that a defendant’s cross situational attributes, as evidenced by past acts, may be quite probable of her conduct in the case at hand. Most researchers would now agree that past criminal behavior, for example, is quite predictive of future criminal behavior. Several influential studies specifically maintain that the stability of criminal and tortious behavior is due to the stability of certain personality features, such as “low empathy” or lack of “self-control.”

30. See, e.g., 1 Criminal Careers and “Career Criminals” 75 (Alfred Blumstein et al. eds., 1986) (“High levels of criminal activity in the past are a good indicator of continued future offending at high frequencies. This relationship has been observed for various offense types, for both juveniles and adults . . . .”); John Monahan, The Clinical Prediction of Violent Behavior 71 (1981) (“If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act”); John Monahan et al., Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence 47 (2001) (“The data suggest quite clearly that . . . prior violence and criminality are strongly associated with the post-discharge violent behavior of psychiatric patients.”); Understanding and Preventing Violence 861 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993) (“Many projects show significant stability and continuity for aggressive behavior after ages 7–8.”).

In interpreting recidivism data, it is important to note that the predictive force of past behavior persists even when the analysis controls for other observable attributes. The naked correlation of past and future behavior by itself indicates only that some fixed attribute, not necessarily anything akin to disposition, correlates with criminal behavior. For example, gender may be correlated with criminal behavior. Since gender does not change over time, it by itself produces a correlation between past and future behavior. If the real source of stability is, like gender, otherwise observable and potentially accounted for, then there is no reason to consider past acts as a proxy. Yet, past behavior remains predictive even among individuals that are observationally identical. See infra note 31 (discussing the existence of stable within-cohort differences in criminal propensity). And it is this qualified result that points to the existence and importance of the sort of internal personal attributes, not otherwise observable, that the layperson might call “character.”

It is also important to keep in mind when interpreting recidivism data that predicting the commission of any future similar crime by a particular individual within a given time period is not the same as “predicting” whether the individual before the court will commit the particular crime in question. Nevertheless, recidivism data indicate that a criminal record is indeed useful information in making the latter determination, especially when combined with other evidence linking the individual to the incident. See Park, Character at the Crossroads, supra note 1, at 723 (“When determining what did happen, evidence about a person’s propensity can link up with incident-specific evidence in a way that makes it highly probable that the person committed an unusual act.”).

31. Understanding and Preventing Violence, supra note 30, at 566–67 (“Violent offenders tend to have certain personality features as children. In particular, they are high on hyperactivity-impulsivity-attention deficit, tend to be restless and lacking concentration, take risks, show a poor ability to defer gratification, and have low empathy. They also tend to have particularly low IQ scores . . . .” (citation omitted)).


People who lack self-control tend to be impulsive, insensitive, physical (as opposed to mental), risk-taking, shortsighted, and nonverbal, and they tend therefore to engage in criminal and analogous acts. Since these traits can be...
Notwithstanding these findings, it is undoubtedly true that one can rarely deduce an individual's present conduct from her past behavior. For obvious reasons, though, admissibility has never been predicated on whether an item of evidence is on its own sufficient to support a finding. Rather, legal proof is a cumulative process, and the issue—in terms of probative value—is whether the evidence adds or detracts from the running sum. Current psychological research clearly indicates that character evidence, though it may not be conclusive, is quite often capable of altering the evidentiary tally.

That said, it is also undoubtedly possible to construct or uncover specific examples wherein character evidence in fact contributes little or nothing to proof of conduct. But while this may be grounds for excluding these particular pieces of character evidence, it does not justify a categorical exclusion. Were the existence of specific examples of justifiable inadmissibility the standard for categorical exclusion, few forms of evidence would ever make their way into the jury room.

B. Cognitive Error

Another attempt to justify the character evidence ban relies on cognitive rather than behavioral science. According to this view, juries are systematically prone to give dispositional evidence more weight than it deserves. Most often cited in this regard are two cognitive errors: 1)
fundamental attribution error, defined as "[p]eople's inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior"; and 2) the representation heuristic, one application of which is the "common tendency to exaggerate the consistency and the predictive value of personality traits."

Michelson v. United States, 355 U.S. 469, 475-76 (1948) (quoted in Old Chief v. United States, 519 U.S. 172, 181 (1997)). A reference to this argument also appears in IA Wigmore, supra note 27, § 582, at 1212. According to Wigmore:

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.


The sort of inferential error we should worry about is not one that arises from a snobbish perception that jurors cannot evaluate evidence. . . . Instead, the real dangers relate to the handlings that the trial process places on jurors. Jurors cannot acquire additional information without help from the court and, in all likelihood, from the parties. This dependency creates the implication that the court would provide them with all necessary information. The jurors might take admission of the evidence as an implicit assurance of relevance . . .

Id.

34. Lee Ross & Richard E. Nisbett, The Person and the Situation: Perspectives of Social Psychology 4, 125-36 (1991). In the classic experiments supporting fundamental attribution error, subjects were shown speeches favoring Fidel Castro and told that the authors of these speeches had no choice in writing them. Nevertheless, the subjects tended to ascribe a pro-Castro position to the speechwriters. The conclusion was that individuals are too ready to attribute cross situational attributes to the speechwriters despite the obvious situational constraint.

Note, however, that this experiment, like much of this literature, deals directly with only half of the character evidence inference: the inference from past conduct to cross situational attribute, not the subsequent inference from cross situational attribute to present conduct. Thus in the Castro experiment conduct (the speech) is a fait accompli and the issue is the extent to which the subject ascribes this to cross situational attributes (a pro-Castro attitude). Yet, the fact that subjects overattribute conduct to cross situational traits does not necessarily imply—especially in the context of the literature on cognitive error—that they overweight the probative value of traits for conduct.

There are several reasons why these findings form an inadequate basis for the rules restricting character evidence. First, although both of these errors have been carefully documented in laboratory settings, the implications for law of laboratory error are far from clear. Through a process of trial, error, and adaptation, individuals develop reasonably successful heuristics for solving the sorts of problems that they tend to encounter repeatedly—like predicting partners' and colleagues' future behavior from past behavior. These are heuristics, though, not comprehensive algorithms. While they may apply well to the bulk of situations, they may mislead in areas inadequately tested by common human experience. Laboratory experiments are often deliberately targeted to these untested regions. The subject may even be presented with a circumstance that appears to be similar to one frequently encountered, but is in fact different. Thus, while laboratory experiments are well suited to mapping the limits of a heuristic's useful application, they may have little to say about the heuristic's usefulness within those limits.

Yet, even if we assume arguendo that laboratory error is broadly applicable to evidence law, the cognitive error argument for exclusion of

36. In an early and influential article, Professor Funder disputes the relevance of attribution experiments to the accuracy of social judgments in the real world. David C. Funder, Errors and Misakes: Evaluating the Accuracy of Social Judgment, 101 Psychol. Bull. 75, 84 (1987). He also cites several specific real world studies that contradict the findings of the laboratory experiments: 1) studies in industrial psychology that show peer ratings to be successful predictors of actual job performance; 2) studies in which those acquainted with the subject in real world interaction provided descriptions of the subjects' personalities that were consistent with the subjects' subsequent laboratory behavior; and 3) studies in which parents and teachers successfully predict a child's ability to delay gratification. Id. at 84-85. Indeed, Kahneman and Tversky, who have been so instrumental in pointing out cognitive error in the laboratory, themselves display a similar optimism about the bulk of human judgment: "[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors." Tversky & Kahneman, Heuristics and Biases, supra note 35, at 1774 (emphasis added). On the general issue of the adaptive success of heuristics, see Gerd Gigerenzer & Peter M. Todd, Fast and Frugal Heuristics: The Adaptive Toolbox, in Simple Heuristics That Make Us Smart 3, 21-22, 29-34 (Gerd Gigerenzer et al. eds., 1999).

For the expression of similar views in legal scholarship, see Davies, supra note 29, at 596-98, and sources cited in nn.144-52. Davies also asserts that "the notion that jurors overvalue the probative value of character or make errors because of their inability to make accurate assessment of character gains little reinforcement from contemporary work in the social sciences." Id. at 599; see also Park, Character at the Crossroads, supra note 1, at 738-41, 738 n.69. Park notes that "recent studies seem to be more favorable to lay reasoning than those studies relied upon by legal scholars in the 1970s and 80s." Id. at 788.

37. Consider, for example, the optical illusion whereby one horizontal line set above another of the same length appears to be larger because the two lines are framed by two vertical lines that angle toward each other at the top. The association between the angle of the vertical lines and the perception of depth is a useful heuristic. In the laboratory, though, the usual situation in which such "lines" occur to the eye is turned on its head and the normally helpful heuristic hils the subject. Funder, supra note 36, at 19.
character evidence proves too much. Research on cognitive error is broad ranging and the list of identified errors dauntingly long,38 with implications for almost every task facing the jury. The experimental evidence on lay assessment of demeanor, for example, casts serious doubt on the ability of human subjects to assess witness credibility.39 Indeed, the representativeness heuristic itself, so often cited in support of the rules restricting character evidence, extends far beyond the judgment of conduct from propensity.40 Under the rubric of representativeness falls the inability to properly account for "base rates"41 and sample size,42 even the basic logic of conjunction.43 And the representativeness heuristic is just one source of cognitive bias. Tversky and Kahneman, the authors of the representativeness heuristic, themselves also identify several other

38. Id. at 75 ("[T]he psychology of social judgment has been dominated in recent years by a flood of research on the subject of 'error.' Studies of error appear in the literature at a prodigious rate, are disproportionately likely to be cited, and fill whole books." (citation omitted)).
40. See, e.g., Korobkin & Ulen, supra note 33, at 1086 ("The persuasiveness of the representativeness heuristic can help justify a set of rules of evidence law frustrating to rational choice theory [namely, the general ban on character evidence to prove conduct].").
41. In one experiment, subjects were given an individual's personality traits and asked to judge his profession. In doing so, they failed to adequately account for information on the proportion of individuals in the relevant population that practiced each profession. "Apparently, subjects evaluated the likelihood that a particular description belonged to an engineer rather than to a lawyer by the degree to which this description was representative of the stereotype, with little or no regard for the prior probabilities of the categories," Tversky & Kahneman, Heuristics and Biases, supra note 55, at 1194-95. Although this experiment concerns judgment of behavior from traits, the error elucidated by the experiment is applicable to any categorization of any object. And indeed Tversky and Kahneman deliberately describe representativeness in terms of abstract categories that extend well beyond judgments of conduct from character. Tversky & Kahneman, Representativeness, supra note 55, at 86.
42. In judging the number of days during the year that each of two hospitals—one large, one small—had at least sixty percent male births (given that male and female births are equally likely and statistically independent across months), subjects failed to account for the differing number of births per day in each hospital. Yet, by the law of large numbers, the chance of so deviating from fifty percent would be smaller for the larger hospital.

Another manifestation of the fallacy to account for sample size is what Kahneman and Tversky call the "law of small numbers". Individuals overestimate the chance that a small sample will be representative of the full population. In one experiment, for instance, experienced researchers failed to adequately account for sample size in their prediction of whether a valid hypothesis about a given population would be reflected in statistically significant results. Tversky & Kahneman, Heuristics and Biases, supra note 55, at 1125.
43. For instance, Tversky and Kahneman provide by way of explanatory example the possibility that a jury will have the mistaken belief that it is more likely that "the defendant left the scene of the crime for fear of being accused of murder" (the compound event) than that "the defendant left the scene of the crime" (a single component of the compound event). Tversky & Kahneman, Representativeness, supra note 55, at 98. It is informative that Tversky and Kahneman's only example of jury error in that paper concerns something other than judgments of behavior from propensity.
heuristics, including "availability," whereby "people assess the . . . probability of an event by the ease with which instances or occurrences can be brought to mind" and "anchoring," whereby subjects' ultimate assessment of an issue is influenced by irrelevant aspects of the manner in which the problem is presented to them.55

Selectively reading the literature on cognitive error to justify a particular exclusionary rule provides a shaky basis for evidence law. What is needed and what has never been provided is a comprehensive argument that judging conduct from character is susceptible to errors that are systematically different from and substantially worse than those affecting tasks that we currently assign to the jury. Judging from the apparent plethora of such errors, this may well be an impossible task.

And yet, even if such a task could be accomplished, it does not follow that the best solution is to exclude propensity evidence.66 If character evidence has probative value—as most now seem to agree it does—then to exclude it is necessarily to underweight it relative to how it should properly be regarded. And this raises the question: Why would the consequent underweighting caused by exclusion necessarily be better than the over weighting of inclusion plus cognitive error? It may be possible to make a compelling case of this sort in a particular instance. The argument for a categorical ban, however, must put forward the fairly audacious claim that the over weighting of character evidence due to cognitive error is almost always worse than giving such evidence no weight at all.

C. Jury Nullification

It has long been argued that admitting character evidence for conduct would inspire a particular form of jury nullification. Were character evidence freely admitted, the argument runs, juries would be tempted to convict defendants for their "bad character" or for their prior wrongs, rather than on the basis of whether they had actually committed the act that is the subject of the current action.68

44. Tversky & Kahneman, Heuristics and Biases, supra note 35, at 1127.
45. Id. at 1128.
46. Park, Character at the Crossroads, supra note 1, at 739.
47. See supra Part I.A.
48. United States v. Moccia, 681 F.2d 61, 68 (1st Cir. 1982) ("Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."); cited with approval in Old Chief v. United States, 519 U.S. 172, 181 (1997). An early argument to the argument appears in 1A Wigmore supra note 27, § 58.2, at 1212. Wigmore observed:
The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime than exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.
Id. (emphasis added), cited with approval in People v. Zackowitz, 254 N.Y. 192, 198 (1930). For a more recent manifestation of the argument in evidence scholarship see Park, Character at the Crossroads, supra note 1, at 740 ("The rules against character
Like the cognitive error argument, the jury nullification argument alleges merely the existence of a cost to admitting character evidence. It does not make the necessary (and more difficult) claim that this cost of admission is systematically greater than the cost of exclusion. Perhaps excluding negative character evidence may save the ex-convict from excessive punishment in the current case. In other cases, excluding negative character evidence may produce acquittal even though an assessment of all relevant evidence would point to the defendant’s guilt. Those who would justify a blanket ban on character evidence on the basis of its prejudicial effect are effectively making the categorical ex ante statement that right outcomes are more important in the first kind of case. Yet no supporting argument is provided to the effect that the first kind of case is more numerous, or that false acquittal and exonerations are never worse than false conviction and liability.49

Second, the jury nullification argument is as overbroad as the cognitive error argument. Perusal of Kalven and Zeisel’s classic study of the jury easily could lead to the impression that for every task in the sacred trust of the jury, there is some form of jury insouciance to give one pause about continuing the assignments.50 Proponents of the jury nullification argument fail to explain why one sort of nullification risk is met with a shake of the head, and the other with a blanket ban on evidence that would otherwise be quite probative.

evidence make more sense if one considers them to be aimed at preventing nullification of the substantive law than if one sees them as directed against inferential error.”). For a variation on the jury nullification argument based on psychological theories of communication, see Calles, supra note 33, at 784-85 (“When the instructions given to the jury, or the legal rule on which those instructions are based, are vague or open-textured, receipt of evidence that lacks sufficient likely impact on the dispute may lead the jury to an erroneous conclusion about the content of the legal criteria,” which is a different but not contradictory “form of what Professor Park calls ‘nullification-prejudice’.”)

A variant on this general theme is that juries might view punishment as less severe for those who have already been convicted once, on the theory that the effects of a wrongful conviction would not be as great. 655 CHIEF, 519 U.S. at 192 (“Evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case.” (quoting McCormick on Evidence, supra note 32, at 780 (quotation marks omitted))); Lempert et al., supra note 33, at 325.

49. Indeed, the argument would have to be that false acquittal and exonerations are never worse than false conviction and liability to an extent that cannot be accounted for in the allocation of trial burdens.

50. Harry Kalven, Jr. & Hans Zeisel, The American jury 221-347 (1966). Kalven and Zeisel found that juries tend to acquit for violations of game laws, gambling, liquor laws, and drunken driving. Id. at 287-97. They interpret self defense more liberally than the law allows. Id. at 222-23. They excuse murder for defense of property and for the victim’s insults and harassment. Id. at 226, 229. They take into account the victim’s “contributory” fault in criminal actions, as well as whether the defendant suffered injuries, the severity of the penalty facing the defendant, and the possibility that the defendant’s accomplice will escape punishment. Id. at 948 n.3 and 946.
Third, even if character evidence does have a prejudicial effect when considered in isolation, admitting more of it may well lead to less prejudice overall when the full context of trial and full range of potential prejudice are taken into account. Character evidence, for example, may serve to counteract other prejudices.51 If, for instance, one Enrico Buttarico appears before the jury with a certain appearance and accent, these attributes may lead the judge to make inferences, consciously or subconsciously, about the likelihood that Enrico has violated the so called "RICO" statute. The same applies in reverse to the party with a well-tailored suit, a sensible haircut, and anchormanperson. Arguably, when we ask the jury to consider a defendant's "demeanor," what we are really doing is inviting them to employ their stereotypes. If preventing "prejudice" is the real concern, then, perhaps character evidence should be encouraged, not prohibited. Additional information about individual character might counteract the coarse group character judgments that the jury is likely to be making already.

Last, the jury nullification argument is incomplete because it provides no explanation for why the jury's supposed desire to punish for past bad acts is a bad thing. Lest the question seem heretical or the answer self-evident, let us keep in mind that no more than a few months after a determination of guilt or liability, these same prior acts will be freely admitted to determine sentence or perhaps to set punitive damages.52 The fora of jury nullification at issue here is in a sense just a matter of timing. The very "prejudice" that we instruct the judge to prevent in jury deliberations will be practiced by the judge herself (or perhaps even the jury) in subsequent proceedings—albeit under a more dignified name.53

51. See Uviller, Illusion, supra note 1, at 854; Davies, supra note 29, at 532-33. In particular, see Professor Park's discussion of interview error. Park, Character at the Crossroads, supra note 1, at 740-41.
52. See Parts III.C.1 & III.C.2.
53. One might argue that if we allowed character evidence for conduct as well as for sentencing and damages, then the system would double count past acts. But an instance of double counting may always be solved by removing either one of the two times the thing is counted. The double counting response begs the question of why we should not, in reverse of current law, allow past acts for conduct and disallow it for sentencing and damages. Assuming fact finding to be the object of trial, this might even be the superior alternative. If we instead allow other acts only later in the process, we forego their beneficial probative effect in determining guilt or liability.

One might also argue that more is at stake in the determination of guilt or liability than in the determination of sentence and damages. In the first place, this is not at all clear. The guilt or liability phase of trial may, it is true, determine whether the individual is stigmatized as a criminal, tortfeasor, trespasser, or promise breaker. But the sentencing phase can determine the very concrete difference between a fine and jail, or between a few years in a jail and a lifetime behind bars. Likewise, it is not uncommon for compensatory damages to be measured in the thousands, while punitive damages are measured in the millions. In any event, even if the guilt/liability phase were clearly more important, this would have an ambiguous impact on the exclusion issue within the context of the truth seeking approach to trial. While it would be more important to avoid prejudice, it would also be more important to obtain accurate outcomes.
D. Judicial Efficiency

Some would argue that admitting character evidence would be an inefficient use of judicial resources, because it would cause the court to become hopelessly entangled in the details of the parties’ past lives.

In the first place, this argument seems to rely on the fallacy that evidence of other acts exists only in large, indivisible chunks. True, it would be expensive essentially to retry the defendant for all her past crimes and arrest. But, it is not at all expensive to introduce an official copy of her criminal record. Similarly, while it might be expensive to review all of the defendant’s interactions within her community in the past ten years, it is relatively inexpensive to have a witness encapsulate her perception of the defendant’s reputation and character. In this regard, evidence of a particular character trait is like any form of evidence: The different ways in which it can be introduced run the gamut from exceedingly expensive to extremely cheap with protative value typically varying inversely with cost.54

Second, it is again important to avoid “trial-phase myopia” and to recognize that this supposedly inefficient form of evidence is indeed used in determining sentence and punitive damages.55 Thus, when the judge in Harrison’s trial famously asks: “Are you going to arraign his whole life? Our system must answer, ‘quite possibly.’”56 Given its employment in the later phases of process, could character evidence really be that prohibitively expensive? Even more, if character evidence may well be used in a later phase anyway, why not introduce it now and “double dip” on the costs? That would be efficient.57

54. One might attempt to account for divisibility by making the more elaborate argument that for nearly every particular piece of character evidence there is another piece of incident-specific evidence that is both less expensive and more probative. A claim of this nature might plausibly be made for a specific evidentiary offering in a specific case. But a categorical proposition to this effect would be nearly impossible to sustain. More likely, character evidence is occasionally best, occasionally worst, and most often neither.

55. Landon, supra note 10, at 607 (saying that because character evidence is permitted and required in the sentencing phase in the same delay inducing fashion it would be during the guilt/innocence phase, inefficiency cannot be a “key reason for excluding” it during the latter).

56. Harrison’s Trial, 12 How. St. Tr. 834, 864 (1822). In that ancient case, the prosecution offered witness testimony regarding the defendant’s prior crimes to prove that the defendant had committed the murder in question. The judge’s reaction—in full: “Hold, what are you doing now? Are you going to arraign his whole life? Away, away! That ought not to be; that is nothing to the matter”—has come to symbolize the judicial efficiency argument against character evidence. Id.

Ironically, and apropos of the point in this paragraph, one ancient meaning of the word “arraign” is to sentence.

57. This point is tempered by the fact that if the defendant is exonerated or acquitted there will be no sentencing or punitive damages phase. Even so, the potential use of character evidence at the later phase still raises the marginal expected net benefits of admitting character evidence over the record now.
E. "Best Evidence"

Some commentators claim that disallowing character to show conduct forces the parties to seek "better" evidence—usually thought to be incident specific—such as finger prints, DNA evidence, or eyewitness testimony. Arguments of this kind presuppose a definition of "better" under which character evidence is nearly always "worse." In accord with the truth seeking approach to trial, one possibility is that "better" means "more probable." Yet, it is not at all clear that character is categorically less probative than all manifestations of the forms of evidence implicitly favored by proponents of this argument. Is a record of five past convictions for the same crime less probative than a smudged print, data from a lab of disputed quality, or the testimony of a forgetful eyewitness with an obstructed line of vision?

In any event, given that there is essentially no limit to how much one could spend proving a case, probative value taken alone hardly seems like a sensible basis for defining "better" evidence—even within the confines of the truth seeking approach to trial. A better definition of "better" might turn on some rough comparison of probative benefits and production costs.59

58. See e.g., Lemert et al., supra note 33, at 539 ("By excluding evidence that is easy to obtain but less reliable than it is persuasive, [the probity rule] encourages the police to conduct more thorough investigations."). It is interesting to note that although this argument is often made in conjunction with the efficiency argument just discussed, the two are not entirely consistent. The efficiency argument rested on the premise that character evidence is relatively expensive. The "better evidence" argument rests on the premise that the parties regard character evidence as relatively cheap; that character evidence is, for example, the lazy prosecutor's assistant. To the extent that parties' own evidence production costs comprise the social costs of evidence production, the two positions are difficult to reconcile.

59. But see infra note 60.

60. Nance, for one, defines "best evidence" as "the set of information, reasonably available to the litigants, that a rational trier of fact, expert or nonexpert, would find most helpful in the resolution of the factual issue." Nance, supra note 1, at 240. The issue of cost enters here by way of the phrase "reasonably available to the litigants." Nance elaborates: "[T]he countervailing notion of not putting the parties or the tribunal to unreasonable expense or inconvenience should be considered intrinsic to the best evidence principle." Id. at 241-42 (emphasis omitted). Apparently, the idea is that best evidence is that which maximizes probative value subject to the constraint that costs do not exceed some threshold level associated with "reasonableness." Two issues arise with respect to this definition. Presumably, whether a given level of expense is reasonable depends on a comparison of the marginal costs and benefits of adding or removing evidence on the margin—which is to say that the optimal level of total costs should itself be determined within the system. This determination presupposes that we know the marginal value of probative value. Furthermore, the marginal probative value and the marginal presentation cost of a given piece of evidence will typically depend on what other evidence is also being presented, both by the party herself and by her opponent. It is not clear how and whether we are to take this into account. A more precise notion of "best evidence" begins with 1) a function relating probative value to social value; 2) a function relating
But while refining the criterion makes the argument more coherent, it does not help the case against character evidence. A record of five past convictions for the same crime is not only more probative than a set of smudged prints, it is probably also less expensive to produce. Not surprisingly, it is even more difficult to make comparative categorical statements about "probative bang for the buck" than it is about probative value alone.

The "better evidence" argument also neglects the fact that the parties' interests in choosing what evidence to produce are, over a significant range, aligned with those of society. The parties themselves bear a significant portion of the cost of investigation and evidence production. Presumably, they have some understanding of the limits of human attention. And according to some practitioner-scholars, they even understand that "piling on" ostensibly expensive, relatively unpersuasive evidence may express an insecurity about, and so detract from, the probative force of the strongest evidence for one's case. Thus, to the extent that the sponsoring party's benefit and costs from evidence production correspond to those of society, we can expect that were a piece of character evidence not worth the effort for all involved, it would not be put forward.

...bundled of evidentiary presentation to total social cost. The best evidence is then that bundle of evidence that maximizes the excess of social value over social costs.

Robert H. Klonoff & Paul L. Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials 65, 81-82 (1990). For the specific application of this point to a defendant's introduction of evidence of her good character, see id. at 68. Klonoff and Colby observe:

Character witness testimony often constitutes less-than-strong evidence once sponsorship costs are assessed. Such a witness typically cannot testify to the facts of the case. Rather, the proof of a party's good character is made in the hope that the jury will find that the conduct alleged in the suit would have been so "out of character" that the party could not have committed it. Jurists, however, normally do not view good character as a bar to the commission of bad acts. Moreover, they may be particularly skeptical when the character witness is a relative of the person whose behalf to which he is testifying or is otherwise biased in favor of that person. Even in the case of an ostensibly unbiased witness, the jury is likely to think that virtually anyone can find witnesses who will swear to a person's good character. The message of the advocate who introduces character evidence is apt to be that he lacks confidence that his other evidence, standing alone, is sufficient to prove his case. Once that message is communicated, it is extremely unlikely that the character evidence will bridge the gap in the jury's eyes. Indeed, based on the cost of overplaying alone, the character testimony may be received by the jury as harmful to the overall presentation. To be sure, character evidence may sometimes be strong. For example, the jury might be persuaded when the character testimony comes from someone who would not be apt to lie, such as a priest or a nun. As a general rule, however, character evidence will rarely qualify as strong and thus should seldom be used.

M. (emphasis added). Presumably, the same logic would apply to introducing evidence of an opponent's bad character.
Of course, this reasoning only goes so far. While private and social costs overlap by a large range, they do not completely correspond.\(^\text{62}\) Thus, a more sophisticated version of the "better evidence" argument highlights this residual divergence between the private and social costs of evidence production. But if the divergence of public and private interests is a problem for character evidence, it is also a problem for all forms of evidence. The proper solution, then, is not to target character evidence arbitrarily, but to impose special damage and cost shifting rules that cut across all modes of evidence production.

Indeed, a too narrowly targeted solution is prone to backfire. If the problem is that parties do not bear the full opportunity costs of their evidence production, for instance, then restricting one particular form of evidence (i.e., character evidence) in order to prevent general overproduction will likely induce parties to shift more effort toward other forms of evidence, leading to even more overproduction in those areas. Albeit, in the end, the restriction will likely result in less evidence production overall. But what overproduction remains will be more harmful. The parties will have been induced to produce evidence that they considered undesirable absent the restriction. As a result, the totality of evidence production may well be "worse," not "better."\(^\text{63}\)

F. Trial Bias

Professors Lempert and Saltzburg propose that although character evidence may be probative of guilt among the general population, it may not be as probative among the set of defendants whose cases actually

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62. Whether they are greater or less, and what response parties have to any divergence, is open to debate. See the conceptually related debate regarding the incentive to bring suit in the first place among Steven Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. Legal Stud. 183, 335-34 (1982) (explaining that in her decision whether to file suit plaintiff fails to account for 1) defendant's litigation expenses, and 2) the primary incentives created by law suits, and suggesting that this divergence can result in too many or too few law suits); Peter S. Menell, A Note on Private Versus Social Incentives to Sue in a Costly Legal System, 12 J. Legal Stud. 411, 411 (1983) (arguing that externality due to plaintiffs' failure to account for defendants' legal expenses will be mitigated by defendants' ability to avoid suit by ensuring that damages they cause do not exceed plaintiffs' costs of suit); Louis Kaplow, Private versus Social Costs in Bringing Suit, 13 J. Legal Stud. 371, 374 (1986) (arguing that the filing decision still presents a litigation cost externality, notwithstanding Menell's argument); Susan Rose-Ackerman & Mark Geistfeld, The Divergence between Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow, 16 J. Legal Stud. 483, 484 (1987) (placing Menell, Kaplow, and Shavell in a general framework and demonstrating that without legal uncertainty a negligence standard coupled with a loser pays system for litigation expenses produces the social optimum); Keith N. Hylton, The Influence of Litigation Costs on Deterrence under Strict Liability and under Negligence, 10 Int'l Rev. L. & Econ. 161, 166 (1990) (concluding that "[a]lthough Shavell's incentive divergence theorem remains valid . . . treating the typical victim's loss as random does disturb some of the results presented in the Menell, Kaplow, and Rose-Ackerman and Geistfeld papers").
make it to trial. The mechanism by which cases are selected for trial, these scholars argue, produces a bias that dampens the inferential value of character evidence. In fact, the argument ventures that the bias may be so severe that among defendants actually tried, prior bad acts are actually probative of innocence. 

1. Fragility of the Bias. — What sort of bias in trial selection would be capable of dampening or reversing the probative value of character evidence? The two extreme cases are easiest to see. Imagine that in the general population of cases the existence of a past record may be probative of guilt on the current charge. But suppose we happen to know that among the truly guilty, those with a past record never end up at trial, while among the truly innocent, those with a past record sometimes end up at trial. It follows that any defendant exhibiting a past record at trial must be innocent. While a past record tends to make guilt more likely among the general population of cases, it is conclusive of innocence among the subset of cases that go to trial. Conversely, if innocent defendants that have a past record never go to trial, but guilty defendants with a past record sometimes do, then a past record exhibited at trial is conclusive of guilt. In this latter case, trial selection amplifies, rather than dampens, the probative value of the past conviction.

Lempert and Salzburg claim that the actual situation is more like the former extreme than the latter. They assert that possession of a past record means something about the defendant, but their claim seems to say more about trial selection than about character evidence. Their claim is that possession of a past record means something about the defendant, but it is not clear what that something is. It is not clear whether the claim is that possession of a past record means something about the defendant or whether the claim is that possession of a past record means something about the defendant and something about the trial selection process.

Lempert et al. observe:

Trials, particularly criminal trials, create their own set of cognitive biases. Jurors, for example, might accurately conclude that a high proportion of guilty robbery defendants have committed past robberies. . . . [A]ssessing the probative value of that assumption requires jurors to estimate an additional probability, namely, the likelihood that innocent robbery defendants have committed past robberies. Jurors might try to answer this question by estimating the proportion of, say, all adult citizens with robbery convictions. Because that proportion is very low, and the proportion of guilty robbery defendants with prior records is quite high, the jurors will conclude that a prior record is highly probative of guilt. In fact, the evidence is not very probative because police and prosecutors do not pluck robbery defendants randomly from the adult population . . . .

Lempert & Salzburg, supra note 64, at 217; Allen et al., supra note 64, at 203.

Throughout this discussion I assume, as do Lempert and Salzburg, that we have a statistical knowledge of how underlying guilt is correlated with various other observable variables like a prior record or the occurrence of trial. Whether a particular defendant is innocent or guilty, however, is not known (unless this may be logically deduced from
record has a larger proportional impact on the chance that a case goes to trial for the innocent than it does for the guilty.67 A past record, then, will be somewhat more associated with innocent defendants within the subset of cases that make it to trial than within the full population of cases. Consequently, a past record exhibited at trial will be less indicative of guilt (and perhaps, if this effect dominates, indicative of innocence). If, conversely, and in contrast to Lempert and Salzburg’s assertion, possession of a past record has a larger positive impact on the chance that a case goes to trial for the guilty than for the innocent, then a past record would be even more probative of guilt at trial than in the general population of cases.68

The fact that this effect can go either way raises the question of why one way is more plausible than the other. But before specifically addressing this question, it is worth making a general point about the nature of the entire enterprise. Trial selection bias is literally a "second order effect," concerning the difference between two primary differences. There is, first, the difference that a past record makes for the occurrence of trial among the innocent. Then there is the difference that a past record makes for the occurrence of trial among the guilty. Lempert and Salzburg’s trial selection bias resides in the difference between these two differences. Arguably this complexity in and of itself calls into question whether the trial selection bias argument could possibly be sufficiently

67. Lempert & Salzburg, supra note 64, at 217.
68. See Appendix Section A for an explanation of these points in formal terms.

It is worth distinguishing Lempert and Salzburg’s claim from a simpler and more general claim about the relationship between trial and guilt, independent of the existence of a past record. In making their trial bias argument, Lempert and Salzburg are effectively asserting that in assessing trial evidence of a defendant’s past record, juries will fail to take into account how that evidence’s probative value is affected by the context (trial) in which it is presented. Conceivably, juries could also fail to account for how the bare fact that the individual is standing trial for the crime affects the assessment that he is guilty. In this case, not only would the jury fail to interpret the defendant’s record in the context of trial—as suggested by Lempert and Salzburg—but it would also fail to account for the simple and no doubt informative fact that the prosecutor has brought the defendant to trial.

This mistake goes generally to jury error and is orthogonal to the issue of admiring past records, the target of the trial selection bias argument. If the problem of interpreting the fact of trial taken alone exists, it exists whether or not past records are admissible. Furthermore, the problem applies equally to any form of evidence. We could substitute "identified by an eyewitness" for "possessing a guilty record" in the trial selection bias story and the jury would overestimate the chance of guilt just the same. Conversely, even if the jury understands the information value of trial taken alone, this does not logically preclude the jury’s misinterpreting the joint information value of a record and the event of trial. See Appendix Section B for a formal presentation of the distinction between these two kinds of error. For more on the significance of the distinction, see Letter from Chris Sanchirico, Associate Professor of Law, University of Virginia School of Law, to Richard O. Lempert, Francis A. Alles Collegiate Professor of Law & Professor of Sociology, The University of Michigan Law School 1-2 (Mar. 18, 2001) (on file with the Columbia Law
systematic and robust to form a basis for the categorical inadmissibility of character evidence.

2. Source of the Bias. — In fact, the trial selection bias argument becomes even less plausible when one examines the proffered reasons for why the two implicated differences might have the relative magnitudes required. Far from establishing a systematic association between innocence and past bad acts among the cases that reach trial, each proffered reason does as much to suggest and support its opposite.

a. Plea Bargaining. — The first proposed source of bias centers on the dynamics of plea bargaining.69 The idea proceeds in two steps corresponding to the two primary differences at issue: one for the guilty, one for the innocent.

The first claim is that a guilty defendant with a past record is more likely to accept a plea bargain than a guilty defendant in general. The reason given is that a guilty individual with a past record expects to fare worse at trial. Yet, it is not at all clear that a party with a worse case is more likely to settle (or plea). It is certainly true that the worse a party expects to fare at trial the more likely she is to accept any given settlement offer from the other side. But whether the party actually settles depends also on what offers are made. And if the other side believes that the party expects to fare badly at trial, the other side will make less favorable settlement offers.70 In the end the net effect on settlement is uncertain, though certainly far from systematic.

69. Lempert & Salzburg, supra note 94, at 917. Lempert and Salzburg have said: [An individual with a past record is severely disadvantaged if he chooses to go to trial. Thus we can expect that guilty individuals with past records are disproportionately likely to take advantage of any leniency associated with pre-trial guilty pleas. However, the innocent with past records are probably more likely to stand trial, since there are issues of principle and basic justice involved and since the fact of innocence suggests the prosecutor’s case will be weak.

Id. This argument is qualified at id. at 917 n.45. And the new edition of this text (without Professor Salzburg and with the new authors, Professors Gross and Liebman) significantly expands this qualification. See Lempert et al., supra note 33, at 329 n.1 ("This general argument breaks down where the bargains available to first offenders reflect substantially more inducement to plead guilty than the bargains available to those with records."); see also Allen et al., supra note 64, at 338. Allen et al. hypothesize that:

Most cases are disposed of by guilty pleas, and it may be that defendants who have committed known prior bad acts and who do not plead guilty are disproportionately innocent. The fact that prior bad acts may be admissible against a defendant for non-character purposes may encourage guilty (and even some innocent) bad acts defendants to plead guilty. On the other hand, the guilty defendant who has not committed prior bad acts can go to trial without risking the possibility that the jury will be (improperly) influenced by such evidence.

Id.

70. In a perfect information setting, the likelihood that two parties will settle is not a matter of how either expects to do at trial, but rather turns on the consistency of the opponents’ expectations. In particular, parties will tend to settle unless both are inconsistently confident about how well they each will do at trial, and the confidence is lower in magnitude relative to the trial costs for each. See, e.g., Robert Cooter & Thomas
The second step in the plea bargaining argument concerns the effect of a past record on the chance that an innocent defendant will go to trial. The claim here is that innocent defendants with past records are less likely to accept plea bargains than innocent defendants in general. The reasoning is that an innocent defendant who knows that her risk of conviction derives from past act evidence will be so affronted by the injustice of this possibility that she will refuse plea offers that she otherwise might take. Yet, even if it is true that principle regularly trumps practicality in plea bargaining, why would setting to avoid the detriment of past act evidence be any more of an affront to the innocent's sense of justice than setting to avoid the detriment of whatever erroneous (by definition) evidence threatens her? Wouldn't the defendant also have a keen "sense of

Uten, Law and Economics 955–59 (2d ed. 1997). No one has argued that the existence of a defendant's past record causes expectations to diverge in this manner.

The story is somewhat different with asymmetric information. But the story is at the same time much less applicable. Many models of settlement under these conditions follow Lucian Arye Bebchuk, Litigation and Settlement under Imperfect Information, 15 RAND J. Econ. 404, 406–09 (1984), wherein the uninformed party makes a take it or leave it offer to the informed. For example, in many models a plaintiff makes a single take it or leave it offer to a defendant who has private information about the likelihood she will be held liable at trial. It is true that in these models, defendants who have unfavorable private information take the plaintiff's offer, while defendants who know that they will do well at trial decline the offer. But the very special structure of these models does not fit the case at hand. These models predict only that parties with unfavorable private information are more likely to settle. Yet, the extent to which a defendant will do worse at trial by virtue of the prosecutor's prior record is essentially common knowledge as between the defendant and the prosecutor. Thus, whoever makes the offer, we can expect that it will in fact be adjusted downward to the extent that the defendant's past record can be used against him.

In any event, Andrew Daughety and Jennifer Reinganum show that the results of the Bebchuk model are highly sensitive to the interaction between informational structure and the bargaining mechanic. See Andrew Daughety & Jennifer Reinganum, Settlement Negotiations with Two-Sided Asymmetric Information: Model Duality, Information Distribution, and Efficiency, 14 Int'l Rev. L. & Econ. 283, 284 (1994).

71. Lemper & Salzburg, supra note 64, at 217 (stating that for innocent defendants with a record "issues of principle and basic justice [are involved]").

To be sure, Lemper and Salzburg also offer another explanation for why innocent defendants with past records are less likely to accept a plea bargain than innocent defendants in general. Id. But, as best this author can tell, this second basis seems to make the wrong comparison. The idea appears to be that the prosecutor's case will tend to be weaker for innocent defendants with a record, and so such defendants will be unlikely to plea. At first glance, this assertion would seem to be subject to the same objection regarding settlement dynamics. But there appears to be another even more fundamental problem. Logical consistency requires that comparison of the strength of the prosecutor's case be done along the dimension of past record unless the case of innocent defendants. Thus, when we say that the case against innocent defendants with a record will be "weaker" we must mean relative not to guilty defendants with a record, but to innocent defendants without a record. Yet if this is the right comparison, the argument seems incorrect on its face. Why would the case against the innocent still a record be weaker than the case against the innocent without a record?
injustice if she faces conviction on the basis of biased or dishonest testimony?

b. The Usual Suspects. — In addition to the dynamics of plea bargaining, Lempert and Salzburg find a source for trial bias in the tendency of the police to round up the "usual suspects." Given its frequent and effective association in the literature and in the classroom with the last moments of the movie Casablanca, the usual suspects story is undeniably palatable. But associating trial bias with the bare assertion that the police round up the usual suspects is somewhat glib. The claim cannot be merely that those with records are more likely to be arrested. This by itself says nothing about the difference in this likelihood across the innocent and the guilty. Rather, if the usual suspects argument is to produce the bias it advertises, it must lend support to the much more boring, technical, and unintuitive claim that an individual's status as a "usual suspect" increases the chance that he will stand trial for this crime (via increasing the chance of his being charged) by a larger amount if the individual is innocent than if he is guilty.

The story that Lempert and Salzburg provide for this more pertinent comparative claim centers on the picture book of mug shots that the police typically place before the victim during investigation of the crime. Having one's picture in this book increases one's chance of ar-

78. Id. at 217 n.45.
79. (Warner Bros. 1942). This movie is frequently cited in explanations of the usual suspects argument. See, e.g., Allen et al., supra note 64, at 303; Lempert et al., supra note 55, at 327.
80. Cf. Allen et al., supra note 64, at 303 ("The investigatory process tends to focus on 'known' criminals—the usual suspects. Unless the jury realizes that any criminal defendant is much more likely to have committed prior bad acts than a randomly selected person from the general population, it may overestimate the probative value of specific acts evidence."); Lempert et al., supra note 55, at 327–28. Lempert et al. note: In fact, the evidence [of a prior record] is not very probative because police and prosecutors . . . concentrate . . . instead on the goal of known robbers. Like Claude Rains in the closing scene of Casablanca, the police may, for good and obvious reasons, focus their attention on the "the usual suspects" . . . A particularly important aspect of this process is that the photographs shown to crime victims and other eyewitnesses for the purpose of identifying the criminal usually come from files on people with records for similar crimes.

Id. Lempert et al. go on to discuss in more detail the effect of showing crime victims the picture book, as discussed in the next paragraph of the main text. Id. at 328–29. Their analysis of the picture book does go beyond the bare assertion that the police round up the usual suspects by specifically positing a differential effect across innocent and guilty individuals. Id. Nevertheless, one can certainly read the section just quoted as asserting that the fact that the police round up the usual suspects is itself sufficient for the existence of the trial bias that they posit, the dynamics of the picture book being but one example of the general phenomenon.

Neither can the usual suspects claim be a statement solely about the innocent, i.e., claims such as "persons mistakenly charged are likely to have criminal records." Lempert & Salzburg, supra note 64, at 217. Persons properly charged are also likely to have criminal records.

75. The same argument applies to the police lineup.
rest for both innocent and guilty. But the increase is larger for the innocent—so the argument goes—because other "incident-specific" evidence is more likely to be available for the guilty. For the guilty, then, the police need not rely as much on the picture book, and so having one's picture in the book (i.e., having a record) has less of an impact on whether the case reaches trial.

This is a plausible story. Yet, it is no more plausible than other stories that point in the opposite direction. For instance, we might well suppose that having one's picture in the book has a greater proportional impact on the chance of standing trial for the guilty than for the innocent because, by definition, the guilty individual always exactly resembles the actual perpetrator of the crime.

Alternatively, we might imagine that photo identification is rarely definitive76 and that enforcement resources are scarce, so that the picture book's main effect is to help the police target further investigation.77 The victim's picture book ID tells them whom to ask about in the neighborhood, whose apartment to visit, whose police records to peruse. Targeting an individual for investigation uncovers new information about the individual's relationship to the crime. And this new information—though subject to error—is not random. More often for the guilty than for the innocent, targeted investigation uncovers incident-specific evidence of guilt that would not otherwise be found, thus leading to prosecution. More often for the innocent than for the guilty, targeted investigation uncovers exonerating evidence that counteracts the victim's uncertain identification and convinces the police to look elsewhere. Consequently, although the victim's picture book identification increases the chance of standing trial for both innocent and guilty, there are good reasons to think that the effect on the guilty is far more pronounced.

Which view of the picture book is correct? It is impossible to say on the basis of theory alone. More than this, there is no reason to believe that empirical analysis, were it feasible, would uncover any systematic effect. But whereas this ambiguity significantly detracts from any argument for categorical exclusion of criminal records, it nonetheless leaves my criticism intact. My point is not, and need not be, that the usual suspects argument always gets it wrong. My point is only that the inability of the usual suspects argument to ensure that it always (or even usually) gets it right casts serious doubt on the wisdom of using it to found a categorical, a priori rule of exclusion.78

76. See, e.g., H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police 38-46 (1988) [hereinafter Uviller, Tempered Zeal] (claiming in chapter entitled "The Fallible Facetful: Description and Recognition," that "[m]ost people, particularly when under severe stress, do not obtain an accurate or durable impression of the facial features or identifying characteristics of strangers").

77. See id. at 47-50.

78. I take up the usual suspects argument again—in the context of incentive setting—in Part III.C.3.
3. "Even If" Issues. — Even if a systematic trial selection bias were firmly established, its presence would not necessarily imply that character evidence should be excluded. The trial bias argument relies on the implicit assumption that the jury is either unaware or incapable of correcting for the supposedly significant and systematic bias produced by trial selection. This is another appeal to jury fallibility that seems unjustifiably discriminating. The task of discounting for the fact of trial is no more difficult than other tasks we ask of the jury, like evaluating testimony of informers in witness protection programs. Indeed, the assumption that a systematic bias would not be accounted for is particularly untenable in light of the adversarial nature of litigation. Faced with trial evidence of past crimes, what self respecting defense lawyer would not paint his client as the victim of lazy police work—a merely plausible, but nonetheless innocent scapegoat, rounded up just because a few past mistakes (for which he has already paid dearly) have branded him a "usual suspect," just like in that famous movie?

Moreover, even if we accept the existence of a trial bias that is both systematic and uncorrectable, the trial bias story does not speak to the fact that character evidence is also prohibited in civil actions, which make up the majority of the trials in courts of general jurisdiction. Indeed, the applicability of the trial bias argument across the criminal/civil boundary is exactly backwards from the applicability of the ban on character evidence. While the trial bias story applies most readily (and perhaps only) to the criminal arena, the character evidence ban is more pervasive in civil trials, where fewer exceptions apply.

II. THE BASIC POINT: TRACE EVIDENCE V. PREDICTIVE EVIDENCE

The truth seeking approach to trial has had serious difficulty explaining the rules restricting the admission of character evidence for conduct. The previous Part reviewed the list of conventional rationales in light of their shared premise that the purpose of trial is to uncover the truth about past events. Even taken as whole, these arguments fall far short of justifying a categorical ex ante restriction on a source of evidence that is potentially quite useful in sorting out what actually happened on the occasion in question—if that is the aim.

If, however, we focus on the objective of influencing what happens in the future rather than discovering what happened in the past, the rules

79. Park, Character at the Crossroads, supra note 1, at 742.
80. See, e.g., Neal Kauder, National Criminal Justice Measures Affecting State Courts, Caseload Highlights (National Center for State Courts, Williamsburg, Va.), April 1996, at 1 (showing for state courts in 1994, 14.5 million civil cases and 13.5 million criminal cases).
81. Consider the criminal exceptions to the ban in Fed. R. Evid. 404(a)(1) and (2), as discussed in Parts III.B and IV.B, respectively. Consider also that state of mind is often less of a factor in civil cases. Therefore, in the civil arena other act evidence is less frequently admissible for other uses under Fed. R. Evid. 404(b)'s second sentence (as discussed throughout Part V). See infra Part V.B.4.a for more on the civil/criminal distinction.
restricting character evidence make more sense. This Part of the Article sets out the basic incentives based argument for disallowing character evidence to prove conduct. Subsequent Parts explain why adding realistic complications to this basic story does not change its basic conclusions. Following this, the Article shows how the various "exceptions" to the rules restricting character for conduct also fit well within the primary incentives setting approach to trial.

A. Punchline

To focus the analysis let us imagine that sometime acquaintances P and D find themselves sitting on adjacent stools at a local bar. P lights a cigarette and begins blowing smoke in D's face. D asks him, not so politely, to desist. P continues purposefully, now staring mockingly at D through the smoke. D gets up off his stool, sets his feet, clenches his fist...and there we stop action: in the split second during which D decides whether to throw the punch.82

At the beginning of his classic and scathing critique of the rules governing character evidence, Professor Uviller makes a crucial and natural distinction—one which, nonetheless, has never taken root in evidence scholarship.83 This is the distinction between "trace" and "predictive" evidence. To recite Uviller's analogy, on the question of whether a particular individual hammered a nail, the scratch left on the head is trace evidence—evidence produced as a byproduct of hammering. That the individual is a carpenter or owns a hammer, and so is more likely to have hammered a nail, is predictive evidence.

More generally, predictive evidence of conduct describes the setting—broadly defined to include characters, props, and scenery—in which the conduct may or may not have occurred. Certain circumstances, including not only the actual physical situation but also the character or disposition of the parties involved, may be "fertile ground" for conduct; other settings may be particularly inferable. Evidence of the defendant's propensity to be violent, for example, is predictive evidence for

82. For a similar real-world example, see Peter Savodnik, Man Files Assault Charge against Scotiaville Mayor, The Daily Progress, Sept. 26, 2000, at B1. The story reported: Local businessman Steven Meeks has charged [Scotiaville] Mayor Christopher J. Long with assault and battery, contending that the mayor shoved him after a dispute Friday about a table outside Long's restaurant, Caffe Bocce.

Long countered Monday that "there's no credibility to this story" and insisted that he not, in fact, touched Meeks.

Meeks said Monday that...Long had set up a table outside Caffe Bocce, despite town regulations curbing that kind of activity. . . .

"I consider him a threat to me," said Meeks, who ran unsuccessfully for the Town Council. . . .

Meeks was previously charged with election fraud. Those charges were dropped . . . .

Id.

83. Uviller, Illusion, supra note 1, at 847.
his alleged act of assault. Thus, for predictive evidence the direction of causation runs from the evidenced phenomena to the act in question.

For trace evidence, on the other hand, the causal relationship runs in the opposite direction, from the act to the evidenced phenomena. Trace evidence is evidence that is generated (or, more realistically, tends to be generated) by the conduct in question. Such evidence includes the consistent and "cross-resistant" testimony of multiple eyewitnesses of commission or its likely aftermath, authenticated documentation, fingerprints, changes in bank account balances, DNA evidence, etc. The evidentiary byproducts of assault and battery, for instance, might include eyewitnesses' testimony. Trace evidence also would include evidence that is generated by the performance of alternative actions that tent to preclude the act in question. Eyewitness reports supporting a defendant's alibi that he was in Berkeley on the evening of the murder in Brooklyn are the byproducts of defendant's choosing not to commit the act.84

Part of the reason this simple classification scheme never became standard may be that Uviller himself argues so convincingly that the distinction lacks a difference. He invites us to consider that both trace and predictive evidence have probative value: Both are useful in determining whether the individual did indeed hammer the nail on the occasion in question. In particular, predictive evidence is probative because information that the setting was conducive (or not) to the act is indeed evidence about whether the act actually did occur. If one learns that conditions were ripe for an event, one thinks the event more likely to have occurred.

In arguing for the irrelevance of this distinction, Uviller—like almost all evidence scholars—touts his analysis on the premise that trial is at its core a truth-probing exercise. He is clear about this from his first sentence: "The process of litigation is designed for the reconstruction of an event that occurred in the recent past. And for the most part, the rules by which a trial is conducted are supposed to enhance the accuracy of the synthetic fact."85 In contrast, when the evidentiary rules governing character evidence are explicitly analyzed within the context of the overall system of state regulation—and in particular, the state's provision of legal incentives for primary activities—the distinction between trace and predictive evidence goes to the heart of the matter.

The law provides incentives to forego committing an act, only if committing the act tends to make the actor worse off under the law than she would be had she not committed the act. If the individual is just as likely to be punished whether or not she engages in the conduct she has no incentive to refrain. This is true regardless of how likely it is that this unconditional punishment is imposed. Thus, legal incentive setting requires changes in an individual's anticipated "legal payoffs," driven (per-

84. More precisely, the evidentiary byproduct of the act is the fact that mastering these forms of evidence (for either side) is less expensive as a result of the act. See Sanchirico, Relying, supra note 17, at 527–39; Sanchirico, Games, supra note '7, at 547–48.
85. Uviller, Illusion, supra note 1, at 845.
haps probabilistically) by the individual's choice of whether to commit the act. In setting such legal payoffs, the law relies on the evidentiary performance of the parties. Therefore, any change in payoffs triggered by whether the act is committed ultimately must derive from parallel changes in the sort of evidence that parties can muster for their side. Trace evidence of conduct is precisely this sort of act dependent evidence. Such evidence is a byproduct of the act and so by definition its existence depends (albeit probabilistically) on whether such conduct actually occurred. Predictive evidence, on the other hand, exists whether or not the act is actually committed. Though it is information about whether the act was committed, its existence is not altered by actual commission. Therefore, on its own it cannot be used to alter the legal consequences that the individual faces based on whether she commits the act. While predictive evidence has probative value, it has no "incentive value."

Back to the barroom. Imagine first the extreme case in which P is permitted to prove D's conduct only by establishing that D has a propensity for violence, trace evidence of the punch being inadmissible. 86 Trial here would be to some extent probative of whether assault and battery had occurred that night; 87 D's propensity for violence would be probative of his conduct in the barroom. But the system would to no extent provide incentives for D to refrain from assaulting P. If, on the other hand, D has no evincible propensity for violence, he can punch away without legal consequence. Given the hypothesized rules of evidence, P could never sustain his burden of proof. On the other hand, if D enters the current situation with a demonstrable propensity for violence that can be established in court, he might as well swing away, because P can recover against him the same whether or not he actually punches.

Now imagine the same scene in a regime in which conduct in assault and battery cases may also be proved by offering trace evidence of the act. If D punches P, there is a fair chance that traces of this incident will be left in the memories of multiple eyewitnesses, whose stories—for the fact that they are woven together by the physical laws of time and space—will tend to be mutually consistent under cross examination. To the extent that the law hangs penalties on this trace evidence, D will indeed face different legal consequences depending on whether he actually punches P. As a result, an incentive to refrain from assault and battery will be created.

These examples demonstrate that conditioning penalties on trace evidence is a necessary and sufficient condition for incentive setting. In particular, without such conditioning, there are no incentives. The implication for predictive evidence is that if it is to play any role whatsoever in which it is to have any role at all, it must be a byproduct of the act. 88

86. The effect on current incentives of admitting propensity evidence in future actions is discussed infra Part IV.A.
87. Plaintiff's incentive to file suit and both parties' incentives to settle can be easily accommodated in this analysis, since both proceed in the shadow of what would happen if the case reached trial.
incentive setting, this role must be secondary and derivative of the primary role played by trace evidence. At best, predictive evidence of conduct might be employed to modulate the intensity of the incentive created in the first instance by conditioning on trace evidence—a possibility to which we turn in Part III.

B. Knowledge of the Rules

But first it is worth considering a potential objection to the foregoing analysis. Is it really reasonable to suppose that individuals account for, or even have knowledge of, evidentiary rules in making out-of-court decisions? Professor Schwartz asks a similar question for substantive legal rules and finds that while fine tuning is likely ineffective, broad brush effects are well confirmed. Safe to say, most students of the law would now agree that incentive setting, in various forms, is an important and real purpose of substantive legal rules—that tort law inspires precaution, that contract law induces performance, that criminal law prevents crime.

The incentives impact of evidentiary law is in turn an implication of the proposition that the substantive law has behavioral effects. The incentive effects of the substantive law rely on the population’s belief that there is a connection between choosing to break the law and suffering the legal penalty for doing so. Evidence law is a critical link in this connection. When we say that an individual is sanctioned for negligence, for breach, or for criminal conduct, what we really mean is that the individual is sanctioned for the existence of what is deemed evidence of negligence, breach or crime. And the choice of what is considered evidence is far from inconsequential for the incentive effects of substantive doctrine—as the foregoing analysis of character evidence makes clear. Admitting character evidence for conduct—while it might increase the accuracy of trials—attenuates the connection between actions and consequences. The population may not understand how the connection between actions and consequences is maintained in the current system, nor the particular role played by prohibiting evidence of character. Yet it is easy to imagine that were character evidence freely admitted, the resulting disjunction between actions and assigned penalties would eventually become apparent. And this would seriously impair the effectiveness of substantive doctrine.

III. Tailoring Incentives to Propensity

If character evidence, as well as trace evidence, is admissible against D in the barroom example, won’t D be especially deterred from throwing the punch if he has an evincible propensity to violence—and isn’t this appropriate? In general, if those with criminal or tortious dispositions know that evidence of their disposition can be used against them in court, won’t they have a greater incentive to avoid producing byproduct

88. See Schwartz, supra note 2, at 422-23.
evidence of prohibited conduct? And wouldn't the resulting additional deterrent be desirable, even necessary, in deterring those who are prone to misfeasance by nature?

The more general notion behind these intuitions is that character evidence may be of use in tailoring incentives to individual characteristics. If people are not all alike, the argument would run, then presumably some must be more forcefully deterred than others. Perhaps the law should attempt to fit the intensity of the disincentive to the intensity of the desire it must counter. Character evidence would be of use in determining defendants' propensity so that punishments could be appropriately adjusted.89

This Part of the Article explains why the desire to tailor incentives does not justify the admission of propensity evidence in the determination of guilt or liability. In the first place, tailoring incentives is desirable only in certain circumstances, which tend to revolve around the criminal law. Moreover, even when tailoring is desirable, admitting character evidence to prove conduct is not the right way to accomplish the task. Attempting to tailor incentives by allowing character to prove conduct, though theoretically possible, is especially prone to error. As likely as not, the result will be the opposite of that intended, dampening rather than amplifying incentives for high propensity individuals. Moreover, a more robust means of tailoring is readily available. Admitting past act evidence only for sentencing and punitive damages is a natural and almost failsafe means of accomplishing the same end. Moreover, police investigative techniques also serve a tailoring function.

A. When to Tailor: Criminal versus Civil

It is not as obvious as it may seem that a higher propensity should be met with a stiffer deterrent. Abundant propensity evidence—in the form of, for instance, many prior acts—may be a sign that the defendant enjoys large private benefits from the conduct. For many activities regulated by legal process, especially in the civil arena, such private benefits from the act are a legitimate positive input into the social choice problem that the law is meant to solve.

This helps to justify the fact that in much of the civil law, the legal consequences of the act are not keyed to the size of the benefits that it affords the individual, but to the size of the costs that it imposes on others. Doing so delegates to the individual the decision of how to trade off private gain with these (now internalized) social costs. The idea is that if an

89. For the economic analysis of past act tailoring in a setting in which commission may be by accident, see George J. Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526, 528–29; Ariel Rubinstein, An Optimal Conviction Policy for Offenses That May Have Been Committed by Accident, Applied Game Theory 406, 406–09 (S.J. Brams et al. eds., 1979); Roy Radner, Repeated Principal-Agent Games with Discounting, 53 Econometrica 1173, 1173–74 (1985). Compare this literature to that cited infra note 124, which describes the economic analysis of dynamic incentive effects.
individual's private benefits exceed social costs, she will find it worthwhile to commit the act and suffer the legal consequences—and this is precisely what we would want her to do in this case. To impose a greater disincentive on higher propensity individuals would more intensely deter precisely the group whose commission of the act we would be willing to tolerate. 90

Nevertheless, in many circumstances, especially in the criminal arena, there is at least a colorable argument for tailoring incentives. Such an argument has two steps. First, for serious felonies such as homicide or rape, for instance, the private benefits of the act—if they even deserve the label “benefits”—are not socially cognizable, and inducing universal deterrence is the essential aim of the law. 91 Second, imposing a punishment for the act that is large enough to deter all (or almost all) individuals, however large their desire, is far from ideal. Criminal punishment, especially when it comes in the form of incarceration, often entails deadweight social loss. Moreover, as the cost of keeping a prisoner increases with the length of his incarceration, this social loss generally increases with the severity of the punishment imposed. Thus, significant cost savings may accrue if the law is at least roughly tuned to provide greater punishments only when necessary. 92

B. The Importance of Complementarity

Assuming that tailoring punishments to propensities is a worthwhile objective, let us be clear about what we would be asking propensity evidence to do—and the possible pitfalls of making that request. Consider the overall association between evidence and penalties, encompassing both the determination of guilt or liability and the determination of sentence or damages. If propensity evidence is to be used to intensify the disincentive faced by high propensity offenders, the system must be designed so that propensity evidence is a complement to, not a substitute for, trace evidence in this association. 93 Propensity evidence must magnify the effect of trace evidence on penalties, not be another means of creating the same effect.

90. More precisely, the socially optimal amount of deterrence depends not just on the balancing of its public and private net benefits but also on system costs. The cost of the legal system is the “third part” in the balance.

91. Even in this case, however, there may be other related, but innocent, acts that are deterred due to their complementarity in the individual’s decision problem with the criminal act. For a formal analysis of this kind of side effect, see Bengt Holmstrom & Paul Milgrom, Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design, 7 J.L. Econ. & Org. 24, 25–28 (1991) (Special Issue).

92. Note that if the reader does not accept the argument that punishments should be tailored to propensities, then the argument against using character evidence at the guilt/liability phase of trial for this purpose is even stronger.

Propensity evidence complements trace evidence only when, in the presence of more propensity evidence, a given increase in trace evidence is likely to result in a greater increase in penalty.\textsuperscript{94} Only then do higher propensity individuals anticipate a greater negative change in their well being for having committed the act compared to the negative change anticipated by low propensity individuals. Only then is the disincentive more intense for high propensity individuals.

Conversely, if the system is designed so that propensity evidence may be used in lieu of trace evidence—that is, as a substitute for, rather than a complement to, trace evidence—the effect reverses direction. Suppose, for example, that the rules of evidence are written so that propensity evidence is a perfect substitute for trace evidence in the link from evidence to penalty. Then low propensity individuals who generate no propensity evidence face penalties only when they commit the act—substitution of propensity evidence is not an option in their case. High propensity individuals, on the other hand, find themselves in the classic position of being “damned if they do, damned if they don’t.” Propensity evidence sufficient to support a finding against them is available whether or not they commit the act. This limiting case illustrates a more general proposition: The more propensity evidence acts as a substitute for, rather than a complement to, byproduct evidence, the more it dampens, rather than amplifies, incentives for high propensity offenders.

\textsuperscript{94} The issue is even more complex than this, because the precise probabilistic relationship between conduct and trace evidence is also material. It is sufficient to note, then, that it is even more difficult for a practical system to navigate tailoring than the main text of this Article makes it seem. The remainder of this note reviews some of the relevant considerations in mathematical language.

Consider the special case in which both forms of evidence are isomorphic to the real line. Let $RT(P)$ be the penalty stated as a continuously differentiable function of trace evidence $T$ and propensity evidence $P$. Trace evidence is a random variable whose distribution depends on whether the defendant engaged in the subject conduct. For risk neutral individuals the intensity of the incentive is the change in expected penalty due to conduct: $I = E[RT(P|NC) - E[RT(P|NC)]$, where $C$ stands for conduct and $NC$ for no conduct, and where $T$ is the random variable over which expectations are taken. We are interested in conditions under which $I$ increases in $T$. Thus, applying Fubini's theorem, we are interested in conditions under which $E[E[RT(P|NC)] - E[RT(P|NC)]]$ is a random variable, and the random variable argument in $T$. Plausibly, the distribution of $T$ given $C$ stochastically dominates the distribution of $T$ given $NC$. In this case, to be sure that we are intensifying the incentive for higher propensity offenders, we need $SRT(P|AP)$ to increase in $T$, which is to say (by Young's theorem) that we need propensity evidence to complement trace evidence in the map from evidence to penalties.
C. Other Acts in Other Places

To be sure, complementarity, like Lempert and Saltzburg’s trial selection bias, is a subtle concept, residing in the high altitude realm of second order differences. Complementarity concerns not just differences (in anticipated penalties caused by commission), but differences in these differences (across individuals, keyed to their varying propensities). The management of second order differences is a lot to ask of any practical system. Throw onto the pile the risk of mistakenly producing substitutability when complementarity is intended—and thus having the opposite effect from what is desired—and the strain seems even greater.

Fortunately, there is a simple and elegant way of creating the requisite complementarities between propensity evidence and byproduct evidence. This method is to bifurcate trial into two phases, the first for the determination of guilt (liability), and the second, contingent phase for the determination of sentence (damages). Complementarity is ensured as long as propensity evidence is used only in the later proceeding to increase penalties. Given the same quantum of trace evidence (that necessary for conviction or liability), the negative impact of this trace evidence on defendant’s well being (via the imposition of sentence or punitive damages) is more severe for higher propensity offenders than for low.

The manner in which this system produces the requisite complementarity between trace and propensity evidence may be illustrated by analogy to the operation of a dining room dimmer switch. If there is sufficient trace evidence in the guilt/liability phase, we push the knob in to turn on the light (we find guilt or liability). At the sentencing or damages phase, we turn the dial for brightness in proportion to the quantum of past act evidence. The end result: The effect of turning on the light (the effect of the existence of trace evidence, hence of commission) as measured by the difference between the initial darkness and the light now filling the room (this difference being the strength of the incentive), increases with how far the dimmer is turned up (the quantum of propensity evidence) after it is turned on. In particular, high propensity offenders produce a greater increase in candle power whenever they generate sufficient trace evidence to trip the light.

This method of allowing propensity evidence for determination of penalty and not guilt or liability is, as a matter of mathematical logic, the very simplest way of producing the sort of complementarity between trace and propensity evidence required to set stronger incentives for higher propensity offenders. Whether by conscious design or trial and error, this also happens to be the method that the system employs. Though many other considerations are at play, one can see in the existing system for both sentencing and the award of punitive damages a reflection

95. See supra Part I.F.
96. See infra Part IV for a discussion of incapacitation and dynamic effects.
of the desire to tailor penalty to propensity. Police techniques are also fruitfully evaluated in this light.

1. Sentencing — In most jurisdictions the criminal law separates determination of guilt from determination of sentence. Indeed, in most cases, sentencing is determined by the judge at a subsequent hearing, even though a jury has made the determination of guilt.97 In setting the sentence, the judge exercises varying amounts of discretion within the bounds of legislative authority. But regardless of the degree of judicial discretion, evidence of a defendant’s character, in particular evidence of his other crimes, wrongs, or acts, plays an important role. In the federal system, 18 U.S.C. § 3561 (1994) states that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense” for the purpose of determining sentence. Federal Rule of Evidence § 702(d) makes clear that none of the Federal Rules of Evidence, including those that prohibit character evidence, apply to sentencing. And the Federal Sentencing Guidelines lay out an elaborate system under which the “guideline range” for a sentence (from which the judge may deviate) is based on two dimensions: offense characteristics98 and a defendant’s “criminal history category.”99 Further, unadjudicated prior bad acts may also be taken into account in the judge’s exercise of discretion.100 Many states have similar rules and procedures.101 The reasons given for allowing use of a defendant’s characteristics and criminal history are many and varied. But they do occasionally approximate the desire to tailor deterrence to propensity.102

97. There is no Sixth Amendment right to sentencing by jury. McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986). However, some states allow jury sentencing (or at least jury recommendations) in capital cases. E.g., Fla. Stat. Ann. § 921.141(1) (West 2001) (requiring sentencing proceeding before jury in capital cases). Others even provide for jury sentenced for all felonies. E.g., Va. Code Ann. § 19.2-295.1 (Michie 2000) ("Upon a finding that the defendant is guilty of a felony, a separate proceeding limited to the ascertainment of punishment shall be held ... before the same jury"). When the jury handles sentencing, this part of the proceeding may or may not be separated from the determination of guilt. If it is not, jury sentencing tends to be based more on an aggravating factor relating to the crime itself, as opposed to the convicted’s other crimes wrongs, or acts.
99. Id. § 4.
100. Id. § 4A1.3.
102. For example, the source point for much of the current system of sentencing is the case of Williams v. New York, 337 U.S. 241 (1949). The convicted defendant in that capital case was sentenced to death by the judge based in part on his involvement in thirty other unconvicted, unrelated burglaries in the area, as well as other, but necessarily criminal, activities that indicated to the judge that defendant was a "menace to society" and in possession of a "moral vacuity." Id. at 244. In ruling that the judge’s use of this evidence did not violate due process, the Supreme Court gave assent to the "modern philosophy of penology that the punishment should fit the offender and not merely the
2. Punitive Damages. — Punitive damages are not generally awarded in civil cases, and compensatory damages are set without regard to a defendant's other acts. Consequently, incentives tailoring is the exception rather than the rule in the civil arena. This is consistent with the point made above that tailoring itself is often unwarranted in civil actions. Tailoring becomes a valid ancillary objective only when the act to be deterred is of the sort that society would fully prohibit (and punishment is costly). For the most part, the set of such actions is contained within the criminal arena. Nonetheless, some of these criminal-like acts—such as willful disregard, assault and battery, and fraud—have over time made their way into the civil law, as if the civil law were a backstop for gaps in the criminal law.

When they are awarded, punitive damages are often determined in a manner parallel to the determination of sentence—both substantively and procedurally. Substantively, most jurisdictions stipulate that the level of punitive damages should reflect, among other things, the "reprehensibility" or "culpability" of defendant's act. Most often, these concepts go to the defendant's state of mind. But courts also determine "reprehensibility" according to "the existence and frequency of similar past conduct," where such past conduct is used in a manner that implicates not so much state of mind as a desire to tailor penalty to propensity.

103. 1 James D. Chiarl & John J. Kircher, Punitive Damages Law and Practice § 2.02 (1999) ("[T]hose who favor the concept of punitive damages in civil law are arguing that the doctrine serves to fill gaps in the criminal law by punishing conduct which, although it deserves punishment, is not being punished through the criminal law [due, for instance, to prosecutorial discretion].")

104. For examples of states that require bad conduct for punitive damage awards, see Id. § 5.01 (noting Alabama requires that defendant's conduct must be marked by "malice, willfulness or wanton and reckless disregard for the rights of others"); Id. (noting Colorado requires "fraud, malice or willful and wanton conduct"); Id. (noting Mississippi requires that defendant must show "deliberate disregard for the rights or safety of others"); Id. (noting Missouri requires that defendant's act be "a willful and intentional wrong").

105. Green Oil Co. v. Hornby, 559 So. 2d 218, 222 (Ala. 1989), cited with approval in Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991). The Alabama Supreme Court instructs that in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider, among other factors "the existence and frequency of similar past conduct," which is cast as a component of reprehensibility. Id. The U.S. Supreme Court has explicitly noted the analogy between punitive damages and sentencing in this regard. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996) ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.").

106. In Swann v. City of Lansing, Swann's estate sought punitive damages against the defendant Detention Officer Moore, among others, for use of excessive force and denial of medical care. 65 F. Supp. 2d 625, 631 (W.D. Mich. 1999). Moore and his fellow officers had used the "kick-stop restraint" system on the violently schizophrenic Swann at the city jail, whereby Swann's legs and arms were tied behind his back to a strap on his waist. Contrary to the strap manufacturer's instructions, the offices had applied the restraint while Swans was face down on the floor, which caused Swans to suffocate. Important to the 1999 decision, the officer who helped to administer some hand-to-hand combative
call an ambulance, instead leaving Swans alone in his cell for 4½ hours after applying the restraint. Plaintiff offered evidence that Moore had on a previous occasion left another inmate to die unheeded in his cell despite the inmate’s announcement that he had ingested methyl alcohol. Apparently, Moore had been punished under the law for this conduct. Id. at 65-56. The court allowed evidence of the previous incident. But this was not for the purpose of showing conduct, which was essentially out of context given that the episode had occurred under video surveillance. Swans v. City of Lansing, No. 596 CV 56, 1997 U.S. Dist. LEXIS 17584, at *2, *6 (W.D. Mich. Aug. 21, 1997). Rather, the evidence was admissible “in order to assess the appropriate amount of punitive damages against [Moore] to prevent a similar occurrence in the future, considering that the past judgment against Moore had been ineffective in preventing misconduct as to Swans.” Swans, 65 F. Supp. 2d at 646. This is precisely the sort of incentive tailoring discussed above.

The same sort of tailoring purpose appears in Castro v. Sebastian. 808 S.W.3d 189 (Tex. App. 1991). While under the influence of marijuana, Sebastian drove head on into Castro’s car, leaving Castro permanently disabled. Given Sebastian’s stipulations, the only issue was the proper size of actual and punitive damages. Id. at 191. At trial Castro was prevented from introducing evidence that “defendant, by repeatedly violating laws designed to protect the public, showed a disregard for the safety of others, and thus was responsible for punitive damages.” Id. at 192. Accepting Castro’s implicit theory of punitive damages, the Texas Court of Appeals held the trial court in error for not admitting evidence of Sebastian’s prior drug use. Id. at 194. The Court of Appeals couched its tailoring motive in terms of culpability, but implicated a tailoring motive:

The limitation on the evidence imposed by the court did not allow the plaintiff to show defendant’s actual level of culpability. That defendant regularly smoked marijuana while driving a car was relevant to the determination of punitive damages. To determine if an award for punitive damages was appropriate, plaintiff should have been able to show the jury just how indifferent the defendant was to the danger of driving a car while smoking marijuana.

Id. at 194. Indeed, in a true approximation of criminal sentencing, the Texas Court of Appeals even ruled the trial court in error for excluding the defendant’s driving record, arguing that such record showed the “context of [the defendant’s] actions on the night of the accident.” Id. at 195. Similarly, in Tull v. Graham, the Georgia Court of Appeals noted that:

The extent of the defendant’s willful misconduct, wantonness and entire want of care in driving under the influence cannot be gauged solely by focusing on the incident in issue. Accordingly, in such cases, evidence that the defendant pled guilty to driving under the influence prior to or even after the incident in issue would be admissible as relevant to the issue of punitive damages.


The primary rationale for bifurcation is that some evidence presented for the determination of punitive damages may be irrelevant, confusing, or prejudicial to the determination of liability for compensatory damages. For example, evidence regarding a defendant’s wealth or other bad acts committed by the defendant may be admissible and relevant to the issue of punitive damages, but irrelevant and highly prejudicial in the jury’s determination of compensatory damages. Bifurcation allows a court to keep this sort of information away from the jury during the compensatory phase.
dure 42(b), for instance, generally allows the trial court to order a separate trial for any claim or issue. The rule has been consistently deployed to separate the determination of punitive damages awards from the determination of liability. 108 The procedural rules of many states contain an analogue to Federal Rule 42(b). Furthermore, at least thirteen states go beyond the general rule for trial separation to permit or require a separate proceeding specifically for punitive damages. 109

5. Police Procedures: Not the Usual Suspects Argument.—At one point in his account of a year spent with New York City's Ninth Precinct, Professor Uviller reports being at first puzzled when an officer hands the picture book of mug shots to three young suspects in an open and shut street robbery. After observing their behavior, though, he suggests a rationale:

The three ... immediately became a group of high school chums laughing over their friends' pictures in the yearbook. Each page was turned with glee; each of the many photos they recognized got a little description: "Hey that's my aunt's old man! Ain't he the baddest?" "Look, there's Chinko. He's chilling out now." "What do you know. They got Blueboy. Wait'll Junior hear this."

...[Says Uville: to the officer:] "Maybe these people will convince their friends that with their photos on file here, they're sitting ducks." [The officer] agreed. Word would travel back to the streets—it always does. Maybe some predator might think twice before pointing a blade if he knows his victim will come straight up to our office and look through a book containing a good, clear, photograph of him front and profile. As [the officer] knew well, while capture and conviction are the duty mission, deterrence is the object. 110

This and other accounts of police procedures indicate that past offenses do play a role in how the police direct their efforts in investigating crime. 111 The police are more likely to ask around about an individual,
interrogate him in person, search his person, his house and his car, call him in for a lineup and show his picture to victims, if he already has a criminal record.

Lempert and Saltzburg were perhaps the first to emphasize that police investigative techniques—including the tendency of the police to round up the usual suspects—are importantly relevant to a consideration of evidentiary rules. But in the end, their analysis is limited by its attachment to the conventional premise that trial is fundamentally a truth seeking exercise. As argued in Part I.F.2.b, Lempert and Saltzburg's hypothesis that rounding up the usual suspects produces appearance at trial more often for the innocent than for the guilty is ultimately no more plausible than its logical inverse.

The analysis is quite different, however, when one views trial in the larger context of reducing crime. The question changes from whether the use of past acts in investigation produces an irreparable trial selection bias to whether the use of past acts in investigation complements or substitutes for trace evidence of the current act in the ultimate association between current conduct and sanctions—i.e., whether police techniques create stiffer or lighter disincentives for higher propensity offenders. The answer also becomes more definitive: There is good reason to think that police use of past records systematically complements trace evidence of conduct.

The conclusion that the effect is complementary rests on two almost definitional premises about the nature of investigation. The first premise is that police investigation is generally neither futile nor fraudulent: It tends to reveal new information and this new information tends to incriminate the guilty more often than the innocent and exculpate the innocent more often than the guilty. If this is not the case—if, for instance, the police investigate as zealous advocates ignoring what exonerates and overemphasizing or perhaps fabricating what incriminates—then the story will not hold. Of course, if this darker picture of police behavior is more in line with general reality, it is hard to see what if anything can be said about criminal evidence of any kind.

The second premise is that investigation's effect on the imposition of sanctions (via proof of conduct) operates through the revelation of additional trace evidence. Support for this premise starts at trial and moves upstream. First, the imposition of sanctions ultimately depends on proving conduct at trial, and trace evidence thereof is the generally permitted
come from files on people with records for similar crimes.

112. Lempert & Saltzburg, supra note 64, at 217; Lempert et al., supra note 33, at 609, 627.
method of doing so. Second, prosecutors ultimately determine which cases go to trial, and they do so against the backdrop of the rules of evidence just described, presumably declining to waste time on cases lacking sufficient admissible evidence of conduct. Lastly, it is reasonable to suppose that the police develop some understanding of what induces prosecutors to either press or ignore a case that they have labored to investigate. Accordingly, it is also reasonable to suppose that police tend to focus their investigative efforts on uncovering admissible trace evidence of conduct.\footnote{Uvlir's account provides a clear example of how targeting those with a past record for investigation—when investigation is a sincere and purposeful attempt to uncover trace evidence of conduct—enhances the disincentive for repeat offenders. Uvlir's compact claim is that those in the picture book face a stronger deterrent. Because one gets in the picture book by having a past record, Uvlir is implicitly claiming complementarity between past acts and current sanctions. Further unpacking his example, we can see how it is a special case of the general points just made. First, the book is a form of targeted investigation. The police could conceivably show victims a picture of everyone in New York City. But they do not. They target their efforts at obtaining a victim ID to those with mug shots, and so those with past records. Second, Uvlir is indeed assuming that picture book identification by victims, as a form of investigation, tends to be sincere and effective. If victims were as likely to finger the innocent—whether out of encouragement from police, personal bias, or simple mistake—then those on the street would see less of a relationship between actually committing the crime and becoming a suspect. What makes the pictured subject "think twice before pointing a blade," while the rest of us are presumably thinking only once, is that having his picture in the book makes it more likely that he will be correctly identified. Lastly, in Uvlir's example the targeted investigation (showing the victim the picture book) leads to trace evidence of conduct. The trace evidence consists of traces in the victim's memory of the perpetrator's facial features, evidence that will be admissible for conduct at trial in the form of the victim's testimony. The general case, of which Uvlir's account is a special example, is perhaps best illustrated by reference to the hypothetical extreme in which investigation always reveals perfectly accurate and conclusive trace evidence.}

method of doing so. Second, prosecutors ultimately determine which cases go to trial, and they do so against the backdrop of the rules of evidence just described, presumably declining to waste time on cases lacking sufficient admissible evidence of conduct. Lastly, it is reasonable to suppose that the police develop some understanding of what induces prosecutors to either press or ignore a case that they have labored to investigate. Accordingly, it is also reasonable to suppose that police tend to focus their investigative efforts on uncovering admissible trace evidence of conduct.\footnote{Prosecutors may use character to prove the accused's criminal conduct if the accused opens the door by introducing evidence of his own character to show that he did not commit the crime. Fed. R. Evid. 404(b)(1). Presumably, only defendants who are not vulnerable to the prosecutor's counter attack will tend to go this route. For more on this see infra Part VI.B. Prosecutors may also use evidence of past sexual offenses (inclusive of child molestation) to prove currently charged sexual offenses. Fed. R. Evid. 413-14. For more on this see infra Part V.A.}

\footnote{\textit{See Uvlir, Tempered Zeal supra note 76, at 21-22 (discussing relationships between police and prosecutors).}
evidence of whether the investigated suspect actually committed the crime. In this artificial world, an individual is convicted for the crime if and only if he is both guilty and investigated. (Those not investigated are, of course, not indicted. The innocent who are investigated are always exonerated; the guilty who are investigated are always indicted and convicted.) Thus, if the individual refrains from the act, he is certain not to be convicted for it; and if the individual commits the act, whether he is sanctioned depends entirely on whether he is investigated. As a result, the change in legal consequence from committing the act is more intensely negative the more likely one is to be investigated. Therefore, those with past records, because they are by hypothesis more likely to be investigated, face a stiffer disincentive.

This same basic story holds in a world in which investigation, though not perfect, tends to constitute a sincere and purposive search for trace evidence of conduct. Even if being targeted for investigation increases the chance of conviction regardless of whether one actually commits the crime, the increase is far steeper if one has in fact engaged in the investigated criminal conduct. On the one hand, investigation may well uncover exonerating trace evidence—alibis—for the innocent.118 On the other hand, true evidentiary byproducts of the individual's criminal activity are more likely to be found if the individual is specifically investigated.

D. Attempting Complementarity via Proof of Conduct

We have shown that using propensity evidence to determine the intensity of the sanction or to target investigation is an effective way to tailor incentives. But this analysis does not rule out the possibility that the system would function as well or even better in this regard were propensity evidence also employed in the guilt/liability phase of trial.

In fact, it would function much worse. To be sure, it is theoretically possible to tailor incentives by means of manipulating the determinants of guilt or liability. But in stark contrast to the simplicity and robustness of using propensity evidence in sentencing, for example, the proper employment of propensity evidence at trial is counterintuitive, epistemologically demanding, and dangerously prone to error.

Suppose, for instance, that propensity evidence becomes admissible for conduct and so counts toward meeting trial burdens on that issue. For high propensity offenders, such a policy change does increase the effect of the lesser quantum of trace evidence that is now, in conjunction with propensity evidence, sufficient for conviction. On the other hand, the policy change decreases the penalty leverage of the additional amounts of trace evidence that were formerly necessary for conviction. Thus, while admission of propensity evidence to show conduct amplifies the effect of the newly sufficient amount of trace evidence, it also dampens the impact of the newly excessive amount. The net effect of this trade

118 For more on "exonerating trace evidence" see infra, note 925.
off on the strength of the incentive facing the high propensity individual is virtually impossible to predict in practice.

Returning to the barroom scenario, we can easily construct an example wherein allowing propensity evidence for conduct actually dampens the disincentive for violent individuals. Suppose that liability in such cases requires at least two eyewitnesses if D has no demonstrable propensity to violence, but only one eyewitness if D has a demonstrable history of physical aggression. Let us suppose, as in Table 1, that the chance of at least one eyewitness is twenty percent if D punches P and ten percent if he does not, whereas the chance of at least two eyewitnesses is nineteen percent if D punches P and one percent if he does not. (Obviously, in some cases, these "eyewitnesses" will be mistaken or mendacious.)

Whether or not D punches P, the event "there is at least one eyewitness to D's punch" is, as it must be, more likely than the subset event "there are at least two eyewitnesses." What matters for incentives, however, is how much punching increases the probability of each of these two events. Importantly, D's punch increases the chance of at least two eyewitnesses by a greater amount (one percent up to nineteen percent) than it increases the chance of at least one eyewitness (ten percent up to twenty percent).  

<table>
<thead>
<tr>
<th>Eyewitnesses</th>
<th>D Punches</th>
<th>D Refrains</th>
</tr>
</thead>
<tbody>
<tr>
<td>At Least 1</td>
<td>20%</td>
<td>10%</td>
</tr>
<tr>
<td>At Least 2</td>
<td>19%</td>
<td>1%</td>
</tr>
</tbody>
</table>

By hypothesis, if D has no demonstrable propensity for violence, then he is held liable only if at least two eyewitnesses testify that they saw him punch P. On the other hand, if he has a demonstrable propensity for violence, he is held liable if there is at least one eyewitness to his punch (the first row). Consequently, if D has no demonstrable propensity toward violence, then punching P increases the chance that he will be punished by eighteen percentage points (nineteen minus one). However, if D does have a demonstrable propensity toward violence, punching P increases the chance that he will be punished by only ten percentage points (twenty minus ten). Thus, allowing P to offer propensity evidence as proof of D's conduct provides weaker disincentives to D's with a higher propensity for violence.

117. For purposes of this example, hold the remedy constant.
118. This constellation of probabilities was chosen to make a point, but nonetheless reflects a natural phenomenon. The fact that the probability increase is greater for at least two witnesses marks that the event "at least two eyewitnesses" is a more precise signal of commission.
This kind of reversal need not always occur. But my argument does not rest on the claim that it always will. The point is that the effect on incentives of admitting character for conduct can go either way depending on magnitudes that cannot be reliably measured. In contrast, increasing sentences or punitive damages for high propensity offenders, while biasing guilt and liability solely on trace evidence, is almost structurally guaranteed to produce the requisite complementarities necessary to intensify, not dampen, incentives for high propensity offenders.

E. Knowledge of the Rules—Reprise

It is worth pausing again to consider whether the incentives stories just told ask too much of individuals’ knowledge of the law. Is it reasonable to suppose that individuals understand and anticipate the manner in which the legal consequences of their actions are tailored to their personal characteristics via sentencing, punitive damages, and police procedures? Is it one thing to accept that evidentiary rules have broad brush incentive effects—like those identified in Part II. But perhaps this sort of fine tuning to personal characteristics is too much to ask of a practical system.

For some forms of tailoring, this objection could be addressed directly. One could point to Uviller’s account of the picture book described in Part III.C.3, or the pervasiveness of lineups, finger prints, and mug shots in popular culture. One might also point to the recent salience of “three strikes and you’re out” laws. If more systematic evidence is

119. If the chance of at least two eyewitnesses is eleven percent with commission and nine percent without, then the high propensity will be more strongly deterred.
120. The point of this Section’s inadvertently corroboration by Professors Schrag and Scutchmer. They build their analysis of character evidence on a combination of the conflict they identify—between error minimization and maximal deterrence as discussed at supra note 17—and the questionable assumption that the jury itself sets the evidentiary threshold (or thresholds, when the defendant’s propensity is observed) in order to minimize trial error. Schrag & Scutchmer, supra note 17, at 327. Given Schrag and Scutchmer’s prior findings comparing error minimization to maximal deterrence, juries who behave in this way will be lenient relative to the objective of maximizing deterrence. Id. at 329-38 (Proposition 1 and 2). Schrag and Scutchmer prove in the context of their model that admitting character evidence mitigates this tendency with respect to high propensity individuals, but exacerbates it with respect to low propensity individuals. Id. at 333-34 (Proposition 5). The net effect on crime is uncertain, as highlighted in this Section. Instead of drawing lessons from this uncertainty, as I do here, Schrag and Scutchmer choose to emphasize that if the effect on high propensity individuals is more important, admitting character evidence will increase deterrence. They give the appropriate condition within their “crime opportunities” framework for this phenomenon. Id. at 336 (Proposition 4). Schrag and Scutchmer also consider how their findings change with the introduction of jury or prosecutor prejudice. Id. at 335-40 (Propositions 5-7).

121. This Section continues the discussion began at the end of Part II.
122. See Schwartz, supra note 2, at 579 (arguing against plausibility of fine tuning tort liability rules).
required, some recent studies show that sentencing enhancements do have real deterrent effects.125

But while these responses may help to shore up the tailoring explanation for sentencing, punitive damages, and police techniques, they are actually unnecessary for the more central claim of this Part of the Article—namely that tailoring does not justify the admission of propensity evidence in the determination of guilt or liability. For if tailoring is impractical at any level, then certainly it provides no reason to admit propensity evidence in determining guilt or liability. The hard case for my central argument: against admitting character evidence for guilt or liability is the case in which individuals do clearly anticipate the manner in which legal consequences will be tailored to their personal characteristics. That is the case that I have considered and rejected in this Part of this Article.

IV. Dynamic Incentives and Incapacitation

The law creates primary activity incentives by hanging legal consequences on the production of trace evidence. If character evidence has a role to play in the regulation of conduct, that role is at best ancillary. In Part III of this Article, we examined one potential ancillary role—the tailoring of incentives to propensity—concluding that if and when tailoring is warranted, it should be accomplished by admitting other act evidence for sentencing and the determination of punitive damages, not by allowing character evidence to contribute toward meeting trial burdens in the determination of guilt or liability. This Part takes up two other potential uses for character evidence and reaches a similar conclusion with respect to each.

A. Dynamic Incentive Effects124

The prospective admission of propensity evidence in future legal actions arising from other future conduct affects the incentive to engage in

125. See, e.g., Kasler & Levitt, supra note 2, at 945 (arguing that "by looking at changes in crime immediately following the introduction of a sentence enforcement, it is possible to isolate a pure deterrent effect that is not contaminated by incapacitation").

current conduct to the extent that today’s bad conduct becomes tomorrow’s “prior wrong.”\textsuperscript{125} If D does punch P, for instance, this will affect the propensity history that D carries into future legal actions. D will more likely be held liable or guilty in situations perhaps similar to, but not arising from, the present circumstance in the bar. This unfavorable prospect adds an additional deterrent to anticipated penalties from suits arising directly from the punch. But the fact that admitting propensity evidence in future actions can affect current conduct does not mean that it should be employed to such effect.

As a preliminary matter, it is important to be clear about the particular purpose of admitting propensity evidence that is currently under consideration. The goal is not to learn more about the individual’s propensity by watching her behavior over time. This motive for considering propensity has already been examined in this Article under the rubric of “tailoring.”\textsuperscript{126} The object now under consideration is simpler: to increase the disincentive for current conduct across the board (i.e., irrespective of individual propensity) by recourse to how guilt or liability is determined in future legal actions.

It is also worth clarifying the means by which this new goal is meant to be accomplished. The method is essentially to delay the legal effect of trace evidence of current conduct. The idea is that the witnesses who see D punch P today may, in relating the event within the community, affect D’s reputation for violence, which may in turn come back to haunt D in future legal actions. Alternatively, these witnesses may themselves be called to testify in future actions to D’s violent temperament on the basis of their memory of that night in the bar.\textsuperscript{127} Essentially, then, part of the effect on penalties of the trace evidence of D’s current punch is being postponed until future actions regarding different but similar conduct. Trace evidence of the original punch is still doing the work of incentive setting: the future admission of character evidence is just the means by which this trace evidence of current conduct affects future penalties.\textsuperscript{128}

But if the object is just to increase the current deterrent, it is unclear what delay adds to the pursuit of this goal. A simpler, more direct, and thus more fail-safe alternative is to simply increase penalties in actions

\textsuperscript{125} Similarly, the admission of propensity evidence in the current action will have affected the individual’s incentives in the past.

\textsuperscript{126} See supra Part III.

\textsuperscript{127} In fact, testimony as to specific acts would be prohibited under Fed. R. Evid. 405.

\textsuperscript{128} If the law grounds a current conviction on the bare fact of past convictions, rather than the underlying facts, it risks creating a sort of “propensity bubble.” Suppose an individual is convicted once, perhaps correctly. Suppose that the next time, however, he actually did not commit the crime, but his past record leads to a new conviction. Now he has two past convictions and is an easy mark for prosecutors, which leads to a third conviction, which makes him an even easier mark for a fourth, etc. This feedback loop is avoided if the court refers to the evidence that produced each conviction, not just the fact of conviction. The discussion in the text assumes that the law does not make this even greater mistake.
arising from the current conduct itself. Instead of fining the individual $1000 now and possibly $1000 later, fine her $1500 now (or however much she regards as equivalent to the two parts, semicontingent fines). Instead of sentencing the individual to six months now and possibly six more months later, sentence her to eight months now. But even if there were good reasons to lag penalties for current wrongs, the future admission of character evidence to prove conduct would not be the best way to accomplish this. When we attempt to increase current deterrence via the future admission of propensity, we are essentially asking future proceedings to influence both future and cur-

129. One might assert that wealth constraints prevent higher fines in the current action, and that therefore, some deterrence must be accomplished by admitting propensity evidence derived from the current act in future legal actions, when the individual has more cash on hand. But if we believe that the individual will have additional cash on hand in the future then we can always attach this as part of the current fine. Indeed this is to some extent accomplished in current law by means of garnishing future wages. Note in this regard that the paper listed in note 124 that advocate punishing repeat offenders more severely impose separate wealth constraints on each time period, which is to say that they do not allow this kind of "borrowing" of penalties from the future. See, e.g., Polinsky & Shavell, Offense History, supra note 124, at 308 (requiring that first period sanctions not exceed first period wealth); Chu et al., supra note 124, at 136 (same).

Of course, the state and federal statutes governing garnishment except, as they should, the portion of wages necessary for the basic support of the individual and her dependents. See, e.g., 15 U.S.C. § 1679 (1994) (exempting a portion of an individual's gross income from garnishment, which portion is adjusted upwards when the individual has dependents); N.Y. C.P.L.R. § 5231(g) (McKinney 2001) (same). But the fact that not all of future wages can be currently fixed is not an argument against front loading what can be. The currently untouchable portion of future wages will be just as untouchable in the future.

A secondary objection to front loading the fine might be that if we attach future resources now, there will not be anything left for the individual to lose in the future. As a result, future incentives will suffer. This is certainly a problem, but not a problem solved by linking current punishment to future legal actions. Such linkage consumes future resources in deterring current conduct in essentially the same way. If we charge the individual $100 more in the future action on account of his propensity, this is $100 of future resources that is not contingent on current conduct and so is not helping deter future conduct.

The general point is this: Either the individual has enough lifetime resources sufficient for setting fines to deter the prohibited conduct throughout her lifetime, or she does not. If the individual does not, the solution is either to give up on deterrence or resort to an alternative form of penalty, such as incarceration. The solution does not lie in some form of sophisticated intertemporal accounting.

130. In this case, diminishing marginal utility does not provide the usual argument against bunching. The object is not to allocate real punishment over time in a way that minimizes utility loss for the offender—if this were the case then we would indeed want to spread punishment over time. The object is to produce a given utility loss for the offender at the least cost to society.

Further, the fact that future punishment is only probabilistic, and so might not have to be imposed, also does not provide an argument against front loading. The fact that it is probabilistic means not only that it is of lower expected cost, but also that it has a lower effect on currently expected utility. To the extent that the punishment is probabilistic, then, it must be of greater magnitude (and so of greater expense) when actually imposed.
rent behavior. Such procedural multipasking is delicate and risky, as
modifications meant to move toward one goal may detract from accom-
plishing the other, with indeterminate net effect. In particular, to the
extent that propensity evidence grounded in past conduct crowds out
trace evidence of future conduct in the determination of future penalties,
the attempt to discourage current conduct via the future admission of
propensity evidence will detract from the disincentive to engage in future
conduct.

If, instead, propensity evidence deriving from past conduct is used
only in future sentencing or the determination of punitive damages, this
unfavorable trade off between present and future incentives is replaced
by a favorable synergy. In this case, current bad conduct still produces
lower future welfare: If the individual is convicted or held liable in the
future, his punishment is greater for having currently engaged in bad
conduct. At the same time, the individual's incentive to refrain from bad
conduct in the future is also strengthened as a result of her commission
of past wrongs: Trace evidence of future wrongs now triggers greater
fines. Indeed, if the fact that this behavior is being repeated indicates
that the individual needs a greater disincentive, then the incentives tailor-

B. Incapacitation

The premise of this Article is implicitly two tiered: First, that evid-
ence law needs to be evaluated in the context of the regulation of pri-
mary activities; and second, that this regulation is accomplished mainly by
providing individuals with incentives to think beyond their own personal
interest. There is room in this conjunction to recognize that the regula-
tion of primary activities does not and could not proceed solely by means
of incentive setting. The population is vast and diverse, and there is no
reason to think that everyone in it can be effectively influenced by threat
of penalty or promise of reward. Some individuals may be incapable of
comprehending future consequences; others may lack suitable control
over their impulses. In such cases, the only option, short of abandoning
the regulatory exercise, is to take the matter out of the individual's hands
by rendering her incapable of such conduct.131 Thus we commit, incar-

131. Implicit in this discussion is the premise that, among the various means of social
regulation, incapacitation is a last resort. Part of the reason for this is fairly mundane, as
compared to incentive setting, incapacitation is an expensive means of regulating behavior. Disen-
ment, execution, and incarceration require significant resources. Further, each of these alternatives
removes from circulation a potentially productive individual (or at the very least an individual capable of
adding to the collective welfare through expression of her own preference to avoid incapacitation). In
contrast, the expenses of regulation by incentive setting are greatly leveraged. For every hearing that
must be held, for every punishment that must be meted out, there are many more cases in
which an individual decides not to commit the act, thus avoiding such costs for herself and
for society.
cerate, in some cases even execute, not just to deter, but also to incapacitate.\textsuperscript{132}

At first glance, the evidentiary task of determining the identity of the “undeterrollable” would seem to implicate the liberal admission of past act evidence. Whether the person has committed many prior wrongs of similar quality is certainly indicative of whether she can be effectively deterred. Importantly, propensity evidence would not in this case be admitted for the purpose of tailoring incentives; discovering the intensity of the propensity would itself be the aim.

Under the truth seeking approach to trial, the goal of incapacitation is but one more reason to allow propensity evidence to prove conduct. Proving propensity per se is in complete harmony with using propensity to prove conduct ex post. But when incapacitation is partnered instead with the goal of incentive setting, a conflict arises that calls for exercising the same sort of care required in the tailoring of incentives and the management of dynamic incentives effects.

Consider, for example, those individuals who, if they were convicted of one more “last straw” offense, would be properly regarded as targets for incapacitation rather than deterrence. Some of these individuals are presumably still responsive to incentives—otherwise one more offense is at least one too many. But if past offenses may be brought in to convict these individuals the next time they are indicted, they make an easy target for prosecutors, who may see no reason to wait for clear trace evidence of conduct. With that much less to lose, such individuals might as well engage in the prohibited conduct—which will, of course, appear to confirm that they should be incapacitated.

As with tailoring and dynamic incentives, the potentially hazardous trade off between the goals of incapacitation and incentive setting is largely avoidable by containing the evidentiary task of incapacitation to the sentencing phase of adjudication. Once the individual is found guilty of child molestation, for example, the sentencing judge could review present and past acts not for the purpose of tailoring incentives, but to determine whether incapacitation is in order. This preserves incentives for that “last straw” conviction, while at the same time using that conviction as data for determining the necessity of resorting to incapacitation.\textsuperscript{133}

\textsuperscript{132} For two studies assessing the relative importance of deterrence and incapacitation in the current criminal law, see Levitt, supra note 2, at 355, and Kessler & Levitt, supra note 2, at 343.

\textsuperscript{133} But what if the individual’s past record really does warrant incapacitating him, yet without past act evidence he cannot be convicted in the present case? By refusing to admit propensity evidence for conviction, doesn’t the law miss this chance to justifiably incapacitate? If the problem here is with the reasonable doubt standard, then we should examine that directly. But if we accept the reasonable doubt standard, then the answer must be “no.” For then the details of the new acquittal add no new legally cognizable information to the determination of whether the individual should be incapacitated. And if the individual’s list of past convictions is on its own enough to warrant incapacitation, then he should have been incapacitated the last time he was convicted.
The analysis so far explains why the law prohibits character evidence to prove conduct, while at the same time allowing past act evidence for sentencing and punitive damages. To bring out the basic concepts, the analysis has been kept simple, with no consideration of the many complications that a practical system actually faces in influencing individual behavior through the substance and procedure of law. But far from fouling the analysis, introducing these complications enriches its explanatory power. Many of the puzzles that so bedevil the truth seeking approach to trial flow naturally from introducing realism-enhancing extensions to the basic primary incentives paradigm.

A. Conduct on the Stand: Impeachment

The rules generally prohibit the use of character evidence to prove action in conformity therewith on a particular occasion—that is, if the occasion was the circumstance of primary conduct, such as rape, murder, negligence, assault, etc. If the occasion happens to be in-court testimony and the conduct in question lying, the rule will generally allow propensity evidence to show present conformity.

Thus, a party may impeach a witness by cross-examining her about specific instances of prior conduct that may be probative of her current veracity. The party may, for instance, ask the witness to admit having made false statements on an employment application, or to acknowledge a past conviction for tax evasion, counterfeiting, or perjury. The party may even question the witness about felonies, such as murder and rape, which do not directly implicate veracity. Furthermore, the party may.

To take a stark example, if five convictions are to be the standard for incapacitation, then incapacitation is properly determined in sentencing after the fifth conviction. If we allow use of the first four convictions to get to sentencing for the fifth, then five convictions is not really the standard. The standard is rather four convictions and some amount of trace evidence insufficient to eliminate a reasonable doubt.

154. The Federal Rules governing the introduction of prior bad acts for impeachment pance according to the criminal status of the act. First, regarding prior conduct not involving conviction of a crime, but which nevertheless goes to the witness's character for untruthfulness, the court may in its discretion allow questioning. Fed. R. Evid. 608(b)(1). The examiner must, however, take the witness's answer, and may not resort to proving the prior bad act by "extrinsic evidence"—which is to say evidence other than the witness's admission. See, e.g., United States v. Busey, 942 F.2d 1741, 1253 (8th Cir. 1991) ("Rule 608(b)'s plain language prohibits the use of extrinsic evidence for such purposes."). Second, the court apparently must allow questioning and accompanying documentary evidence of convictions involving false statement or dishonesty (such as perjury, fraud, embezzlement, counterfeiting, and perhaps tax evasion). Fed. R. Evid. 609(a)(2). Third, evidence of felonies may be admissible even if the crime does not directly involve dishonesty. Fed. R. Evid. 609(a)(1). Admission of prior felony convictions is, however, subject to a balancing test that pits the risk of prejudice against probative value. As least as written, this test leaves more toward inadmissibility when the current action is a criminal prosecution and the witness is the accused. Compare Fed. R. Evid. 609(a)(1) ("crime shall be admitted if the court determines that the probative value of admitting [the] evidence
go beyond cross examination and introduce secondary opinion or reputation witnesses to cast doubt on the principal witness’s credibility. The opposing party may then cross examine these veracity witnesses about specific instances of either their own conduct or that of the principal witness regarding whose truthfulness the veracity witnesses have testified. A party may also call reputation or opinion witnesses to support a witness’s credibility after it has been attacked.

The apparent inconsistency of allowing character evidence for impeachment but not primary conduct has never been satisfactorily explained within the truth seeking paradigm. Some commentators suggest that whether a witness is lying is somehow particularly important to the law—that such behavior goes directly to the integrity of the process—and that this extra significance is enough to justify tolerating the difficulties thought to adhere generally to the use of character evidence. But could testimonial conduct really be more important than primary conduct? More plausibly, the importance of the witness’s veracity is derivative of the importance of what her testimony is being used to prove. It is perhaps myopic to value the integrity of legal process above the goal of ensuring that individuals treat each other with integrity in the course of their daily lives outside the comparatively rare circumstance of courtroom testimony.

The incentives approach to evidence offers a more compelling explanation. The explanation arises from the need to verify that what is offered as trace evidence of primary conduct is in fact just that. This is a crucial requirement of incentive setting. If the actual evidentiary traces of conduct are regularly disregarded, while spurious trace evidence often produces penalty, the law cannot successfully influence primary conduct. Eyewitness testimony is a form of trace evidence. Using it as such to influence primary conduct requires making an accurate assessment of whether the witness has lied. Courtroom testimony is thus an occasion

outweighs its prejudicial effect to the accused), with Fed. R. Evid. 403 (“evidence may be excluded if is probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”).

136. This is the essential concept of Fed. R. Evid. 608(a)(2).
137. Perhaps the most sophisticated version of this argument, appears in Edward J. Imwinkelried, The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law, 46 U. Miami L. Rev. 1089, 1070–79, 1086 (1992). There it is maintained that the organizing principle for the law of evidence is neither the jury control principle, nor Professor Nance’s best evidence principle, Nance, supra note 1, at 231–33, but rather the prevention of perjury. To the extent that this argument is normative, the criticisms in the text are relevant. It appears, however, that Professor Imwinkelried is making a positive historical statement, rather than a normative statement: “The judges [in eighteenth century England] were acutely interested in both deterring and exposing perjury. The liberal admissibility of character evidence of untrustworthiness advanced both objectives.” Imwinkelried, supra, at 1086. In a system that evolves by trial and error (i.e., mutation and persistence of success), the reason that a rule arises initially is likely to differ from the reason that it continues to survive.
where the incentives based approach coincides with the truth seeking approach. The law cares not only about deterring the witness from lying but also about determining whether the witness has in fact lied on this particular occasion. The latter concern justifies admitting evidence of a witness’s veracity on the basis of probative value. Character evidence, being probative of veracity, is properly admitted for impeachment.

Returning again to the barroom, what would be the effect on D’s decision to throw the punch if he knew that, should he find himself charged with assault and battery, both he and P would be entitled to impeach the credibility of adverse witnesses by means of evidence of the witnesses’ character for untruthfulness? How does this differ from telling him that already existent evidence of his character for violence may be used to prove that he threw a punch?

First, the announcement that he will be able to impeach based on character will further secure D’s belief that he will not be held liable if he refrains from punching. If he refrains, the only witnesses that will testify otherwise are those who are willing to lie on the stand. If character is indeed probative, then those willing to lie against him then and there are more likely to have lied elsewhere and so are more likely to be impeachable based on past dishonest conduct.

To be sure, even if D refrains from punching P, he must worry about the chance that witnesses on his side will also have a record of or reputation for untruthfulness. The witnesses on his side, however, would be selected by circumstance and coincidence—they happened to be watching the back down and peacefully went his way—and not by their willingness to lie. They are thus less likely to be impeachable by evidence of past lies.

Conversely, D can feel more certain that if he does throw the punch, he will be convicted for it. The logic here is similar. Any false witnesses that he may be able to garner will tend to be more readily impeachable— their current willingness to lie tending to indicate that they may have a legally cognizable history of dishonesty. On the other hand, P will likely have access to true witnesses of D’s punch. For these witnesses, the fact of their testimony indicates only where they were looking when the fight broke out, and thus provides no special reason to think that they can be shown to have been dishonest in the past.

Thus, allowing P and D to offer propensity evidence of the truth telling conduct of testifying witnesses furthers the project of providing D with an incentive to refrain from punching P. In contrast, allowing P to prove D’s conduct in the barroom by means of proving D’s violent character may well dampen D’s disincentive to the extent that it crowds out trace evidence of the punch in determining D’s penalty. This is easiest to see in the extreme case wherein D’s penalty is based entirely on dispositional evidence. Violent Ds will be punished whether or not they punch; peaceful Ds will be exonerated whether or not they punch; neither has any incentive to refrain. In the less awesome case, admissions of bed-wetting character evidence is more probative.
evidence may dampen the incentive effect of the law by making penalties less sensitive to actual conduct.

B. The Character of Conduct

Conduct per se is rarely the only issue at trial; the circumstances of conduct often determine conduct's legal status and are often in dispute. Thus, the state of mind under which actions are taken often has important legal consequence. Similarly, whether the defendant is held negligent for leaving some potentially hazardous situation unattended will depend on whether it was reasonable to do so, a determination that turns on circumstance. Further, violence perpetrated in self-defense is not among the acts that the law discourages.

The law admits evidence of other acts for proof of the circumstances surrounding conduct, but not for proof of conduct per se. Yet other acts evidence would appear to be as probative of the circumstances of conduct as it is of conduct itself. Consequently, the truth seeking approach to trial—focused as it is on probative value—has always had difficulty explaining the distinction. The lack of a sharp conceptual distinction in the dominant paradigm has led in turn to a blurring of the distinction in practice, as judges sometimes allow what is essentially proof of conduct by character under the rubric of proof of some relevant circumstance.

Under the primary incentives approach, however, conduct and circumstance are fundamentally different; only conduct is subject to individual choice. The ramifications of this difference are easy to see in the following stylized example, to which I will refer throughout this Section.

139. Ulitzer, Illusion, supra note 1, at 577-79; Park, Character at the Crossroads, supra note 1, at 721-25.
140. See Park, Character at the Crossroads, supra note 1, at 754-55. Park observes: The complexities and confusion attending the character bar are enhanced by numerous evasions, even in published appellate cases, of the supposed bar on general propensity evidence. In applying Rule 404(b) and its state analogues, some judges act as if... had intent on one occasion is always admirable to show had intent on another, even if the bad intent's inferred from general propensity to commit a type of crime.

141. See also 2 Weinstein & Berger, supra note 4, § 404.22[1][c][2] (Joseph M. McLaughlin ed., 2d ed. 2001) ("In the trial of narcotics offenses, some courts display a particularly wide latitude in admitting evidence of other crimes in the name of knowledge. This was more the result of current social problems than the result of logic." (citation omitted)). Compare this point about the socially charged nature of narcotics offenses to the new rules for sex offense cases discussed in infra Part VI.A.

142. It should be noted that the biggest difficulties in this area of evidence law concern the practical feasibility of restricting the jury's inference to the other purposes, as opposed to conduct. This is a problem for any purpose based principle of admissibility in a world where an item of evidence may have more than one potential use. As such, this article does not address this issue.
1. *Weather v. Whether.*—Imagine that our substantive objective is to discourage people from opening umbrellas on sunny days without also discouraging them from opening umbrellas in other weather. We choose to accomplish this aim by making it a crime to open an umbrella when the sky is blue. The prosecution must prove each of the two elements—umbrella opening conduct and sunny weather—beyond a reasonable doubt. In light of this objective, what is the consequence of allowing the prosecution to offer predictive evidence to prove the weather? And how is this different from allowing predictive evidence to prove that the defendant opened the umbrella?

To answer the first question, suppose that trace evidence of whether the umbrella is opened is always so plentiful that the only issue is the circumstance accompanying such conduct. Imagine the thought process of an individual on a sunny day who is contemplating opening an umbrella (e.g., for shade). If she believed that the law would know for sure that it was sunny, she would not open the umbrella (assuming the penalty were sufficient). If she thought that the law had no way of establishing that the day was sunny, she would open the umbrella. In general, the more likely it is, in her mind, that the law will be able to determine that the day was sunny, the less apt she is to open the umbrella. Conversely, on a cloudy day, the more certain she can be that the law will correctly discern ex post that the day was in fact cloudy, the more apt she is to open the umbrella.

Thus, the more accurately the law can assess ex post whether these circumstances actually obtained at the time of conduct, the better job it does in preventing a person from opening an umbrella in the circumstances in which the act is prohibited. It follows that the law should allow any evidence that has probative value in determining what the weather was on the day in question (subject to the usual balancing test). This includes not just trace evidence of the weather, such as eyewitness reports or rainfall measurements for the day, but also predictive evidence, such as the fact that the event occurred during monsoon season or during a drought.

To see the value of predictive evidence, imagine that trace evidence of the weather is never available. All the court has at its disposal are rainfall patterns from previous years. These are determined to be reasonably predictive, though not perfectly so. Under these conditions, the goal of discouraging umbrellas on sunny days without also discouraging them on rainy days will be only imperfectly attained. But there will be some success. To the extent that past rainfall patterns are predictive, individuals will refrain from using umbrellas, not on sunny days per se, but on days that past weather patterns predict will be sunny. If this predictive evidence is probative, the result will be right on average, the negative correlation between umbrella usage and sunshine deriving from the serial correlation between past and current weather. More generally, to the extent that predictive evidence is a fact informative of actual weather conditions,....
other trace evidence—will improve the incentive setting performance of the law.\textsuperscript{142}

Now contrast the use of precondition evidence in determining not weather, but whether the individual opened an umbrella. For symmetry assume that the weather can be perfectly determined, that there is no trace evidence of conduct, and that there are historical data on each individual indicating with reasonable accuracy whether she is prone to open umbrellas on sunny days. The individual knows that the legal consequences she faces on a sunny day are a foregone conclusion. Individuals deemed unlikely to open umbrellas on such days escape penalty regardless of their current behavior; they feel free to open their umbrellas for shade. Conversely, individuals deemed likely to open umbrellas on sunny days will be punished even if they do not open their umbrella on this particular occasion. Having nothing to lose, they too open their umbrellas. The result: No progress whatsoever is made toward achieving the state's policy goal.

The fundamental distinction here is between those aspects of the world that are subject to the targeted individual's choice and those that are not. Not coincidentally, this corresponds to the law's distinction between use of character for conduct and use of past crimes, wrongs, or acts for several of the so called "other purposes":\textsuperscript{148} namely those that concern the conditions of conduct, rather than conduct per se. The difficulty in application is deciding what should be regarded as circumstance and what is under individual control and properly influenced by the state.

\textit{2. State of Mind.}

\textit{a. Knowledge.} — A defendant may acknowledge accepting stolen property but claim she did not know the goods were stolen. For the purpose of rebutting this defense, most courts would admit evidence that the defendant had recently received similar property that she knew to be stolen.\textsuperscript{144} As most commentators emphasize, the prior had act here is not being used to show that the defendant is the type of person who is prone

\textsuperscript{142} Of course, the law may decide to abandon the project altogether on the basis of the fact that the full quantum of probative evidence—trace and predicte—is too often insufficient to determine the relevant conditions with enough accuracy. But there is no reason to treat predictive evidence any differently from trace evidence either in making this determination, or in carrying out the incentive setting project.

\textsuperscript{144} See, e.g., id. ("Evidence of other crimes, wrongs, or acts [may be admissible to prove] knowledge . . . ."); United States v. Robinson, 587 F.2d 359, 360-61 (11th Cir. 1979) (upholding admission of testimony of silver burglars that they had formerly used defendant as a "fence," given that defendant, charged with the knowingly interstate transport of a stolen "soup to nuts array of fine hibit silver," claimed not to have known the silver was stolen).

Other acts offered to prove knowledge need not be criminal. When criminal in character, they need not have resulted in conviction. Indeed, acquittal does not necessarily bar admission. Other acts are not admissible unless the judge determines that a
knowingly to receive stolen goods. The evidence is being used to show that the defendant was likely to have been on notice that the goods were stolen. If, conversely, the defendant had stipulated to knowing that the goods were stolen, but claimed not to have actually received them, most courts would not allow the prior act evidence.\footnote{145}

To the extent that an individual’s knowledge is beyond her control, the effect of admitting prior acts to prove knowledge that the goods were stolen is identical to allowing prior evidence of the weather in the umbrella example. The defendant will tend to decline to take the goods, not based on whether she actually knows they are stolen, but based on whether the conditions exist for a reasonable person in her position to have knowledge. If such preconditions are indeed predictive of actual knowledge, defendants will on average tend to receive goods only when they know they are not stolen.

Of course, unlike the weather, knowledge is in part affected by senti- est choice: While some of what we know simply becomes apparent to us, other knowledge, or lack thereof, follows from a conscious decision to investigate or ignore. The incentive to ignore, for one, may be mitigated by making the standard not actual knowledge, but whether a reasonable person would have knowledge under the circumstances. Such circum- stances are indeed beyond the individual’s control at the time she is de- ciding whether to take possession of the goods.

If, on the other hand, the law wishes to impose an affirmative duty to investigate before receiving goods,\footnote{146} then we must recognize that two types of conduct are now the target of the incentive setting project: the knowing receipt of stolen goods and investigative effort. As with any con- duct, inducing the desired amount of investigative effort implicates conditionin g penalties or rewards on trace evidence thereof.

But even when the state wishes to induce appropriate investigative effort, there will still be a need to establish the exogenous circumstances of knowledge. The appropriate amount of investigation depends on rea-

\footnote{145} Some commentators maintain that in narcotics cases some courts have admitted other acts evidence for a propensity inference under the guise of establishing knowledge. See supra note 140; United States v. Chaides, 919 F.2d 1193, 1206 (7th Cir. 1990). The court in Chaides said: \[Defendants\] contends that his conviction must be reversed because drug records bearing his fingerprints were erroneously admitted against him. The drug records were ten years old and pertained to transactions unrelated to those charged in the indictment. Since the defendant denied knowingly possessing the drugs (found by police in a stash house leased by defendant), the records are admissible under Fed. R. Evid. 404(b) to prove such knowledge.

\footnote{146} On the topic of inducing self-investigation in the environmental law setting, see Alexander S. Pfaff \\& Chris William SanChirico, Environmental Self-Auditing: Setting the Proper Incentives for Discovering and Correcting Environmental Harm, 16 J.L. Env’t. \\& Pub. Pol’y 61 (2004).}
sonable suspicion, which in turn depends on knowledge of circumstance. When a doctor prescribes an expensive test of a patient's respiratory system, this is usually on the basis of results from a less accurate but less expensive test. This test was itself prescribed based on observation of evident symptoms. And these symptoms were themselves interpreted in light of the existing store of basic medical knowledge. Thus even when investigative effort is directed at incentives, there will still be a base amount of knowledge that is beyond the individual's control. However deep this base knowledge lies, it should indeed be treated like the weather, and predictive evidence should be admitted for proof thereof.

b. Intent and Absence of Mistake or Accident.— Though knowledge and intent are commonly "lumped together" in principle and in application,\(^{147}\) intent often denotes something more of purpose than mere awareness. Yet even where intent differs from knowledge, the admissibility\(^ {148} \) and analysis of past act evidence is similar. To the extent that intent is either beyond individual control or beyond what the law hopes to control, it should be provable by predictive evidence.

Again, there may be a sense in which an individual chooses his intention. There may even be circumstances wherein the law desires to influence the choice of mindset, as separate from action. To be sure, such influence is less plausible and far more controversial for intent than it is for knowledge. But if this is indeed the object, the law must ultimately rely on trace evidence of mindset, including evidence of planning or casual admission, as separate from execution. Furthermore, there will still be some base layer of intent that is beyond individual control. Does an individual choose her intention to choose a particular intention? It is up to the substantive law to determine where choice of intent begins, and the extent to which thought patterns are appropriate targets for state influence. The part of intention that lies outside these two boundaries should be provable by predictive evidence, including evidence of other acts.

c. Motive.— Motive is relevant to knowledge and intent, which, unlike motive,\(^ {149} \) are often elements of the crime or cause of action. If a defendant who fired a gun at a victim claims that she did not intend to kill the victim, then an explanation of why she might have wanted to kill the victim may be used as predictive evidence of intent or knowledge. In this capacity, evidence of motive is essentially predictive evidence of these related and elemental states of mind.

\(^{147}\) See, e.g., Weinstein & Berger, supra note 4, § 404.22[2], at 404-93 ("Knowledge and intent are commonly lumped together in criminal cases by the courts, because in many instances both are disputed and must be proved by the prosecution.").

\(^{148}\) Fed. R. Evid. 404(b); see, e.g., United States v. Hillsberg, 812 F.2d 328, 334 (7th Cir. 1987) (upholding admission of evidence that defendant had fired same gun twice earlier in the day in order to show intent to fire at victim).
However, motive has also been invoked to prove conduct. The fact that there is evidence of a reason that the defendant may have wanted to kill the victim is predictive evidence that she did. In this sec-

150. It is difficult to know just how frequently this occurs. Although some commentators and courts may speak as if evidence of motive is being employed to prove conduct, often this is not really the case. Instead, prior acts are in fact being used to show intent or knowledge, or as analyzed below, connected acts. For example, Christopher B. Mueller & Laird C. Kirkpatrick, Evidence 292 (3d. ed. 1999), summarizes current law this way: "[M]otive ... may be relevant in proving an actor's intent or identifying the defendant as the one who committed the crime." Support for this proposition is supposedly provided by United States v. Bradshaw, and the statement therein that "[m]otive is evidence of the commission of any crime." 690 F.2d 704, 708 (9th Cir. 1983). The dispute in Bradshaw, however, was over whether the alleged kidnapping victim had given informed consent—an issue of circumstance, not of conduct. Id. That the defendant had in fact transported the victim across state lines was not in dispute. The defendant in Bradshaw was charged with kidnapping a nine-year-old boy with whom he had an ongoing relationship. Id. at 706-07. The boy and he had lived nearby in California. They were found together in Oklahoma and it was apparently stipulated that they had made the trip together. The particular evidentiary question was whether it was proper to admit evidence of other acts, involving sex and drugs, engaged in by the defendant and the boy in motels along the way from California to Oklahoma and at their final destination. Id. at 708-09. The court considered and approved several theories for admission, none of which in the end implicated proof of the acts reas of kidnapping. To be sure, the court held that the sex and drug acts did indeed go to motive and did indeed say, as quoted in Mueller & Kirkpatrick, supra, § 4.17, at 299 n.1, that motive is admissible as "evidence of the commission of any crime." Bradshaw, 690 F.2d at 708. But it is important to understand what precisely the court meant by "motive" and "commission" in this phrase. The court elaborated by citing to another case, which held that: the subsequent conduct (i.e., sex and drug activity) does tend to present a picture, the whole of which indicates guilt. . . . The picture of a kidnapping is not complete unless all of the relationships of the defendant to the victims, from the beginning of the illegal detention to the end of it, are shown. Id. at 708-09 (citing United States v. Gibson, 625 F.2d 887, 888 (9th Cir. 1980)). Yet with this clarification the court seemed to be discussing not motive to prove conduct, but proof of competent context and perhaps mens rea. In any event, it is clear that the court was not inferring the fact that the defendant acted to detain the boy from the defendant's having a reason to do so. Thus, it is apparently only in the sense that "motive" describes circumstances (however that might be) and "commission" encompasses not just conduct, but conduct under particular circumstances, that "motive is evidence of the commission of any crime." Id. at 708 (emphasis added). Properly interpreted, then, the statement is almost a truism: Evidence of A is evidence of the commission of A and B. Another similar example is United States v. Gilbert, 181 F.3d 102 (1st Cir. 1999). The case is cited in Weinstein & Berget, supra note 4, § 404.22(5) n.33, under the heading of motive because the court ruled that the fact that the nurse defendant was being investigated by the Veteran's Administration went to her motive in making the alleged bomb threat to the VA hospital where she worked. Gilbert, 181 F.3d at 161. But in contrast to his order the judge's actual jury instruction, reproduced in the appellate opinion, shows a very different purpose.

The fact that there was an investigation, however, and that for some time it included the defendant, among other persons and things within its scope, is part of the background of this case. You may hear references to that investigation, and I am therefore permitting you to know of the fact of that separate investigation. . . .
ond capacity, evidence of motive is difficult to distinguish in any meaningful way from the use of propensity evidence to show primary action in conformity therewith.

Critics of the current rules governing character evidence have been quick to point out the inconsistent treatment of motive and propensity with regard to proof of conduct. But lacking a compelling reason not to use propensity for conduct, the truth seeking approach gives no coherent instruction on what is and is not a proper use of motive evidence. The incentives approach, on the other hand, is clearer on the issue. Similar to propensity evidence, motive exists whether or not the individual chooses to follow through on it. As such, it is prone to foul incentive setting if used to establish conduct, and so should be employed, if at all, only in sentencing. I return to this issue in Part VI.A.

5. Similar Happenings. — The admission of so called "similar happenings" evidence—though not character evidence per se—is another example of using other events or acts to determine the character of the event or act in question, rather than to determine whether the choice was made to engage in particular conduct. If a plaintiff claims that she tripped over a bump in the rug at the defendant's cinema, and the defendant admits the existence of the bump, how are we to tell whether the bump was truly hazardous and its neglect legally negligent? The unpredictable variety of the physical and social world simply does not allow construction of a list of all circumstances constituting negligent behavior for cinema carpet-

You should not, as a matter of law and as a matter of fundamental fairness, assume in any way that Ms. Gilbert is or might be guilty of phoning in a bomb threat simply because she happened to fall within the scope of a separate investigation involving something entirely different. The fact that she was included for a time in that separate investigation is simply not evidence against her in this case in any way.

As I have said, I am permitting the evidence of the existence of that separate investigation to come in this limited form simply to give you the background and context out of which the evidence in this case partly arises. Consider this evidence only in this light.

Id. at 159-60.

Consider also Wayne R. LaFave, Criminal Law § 3.6, at 246 (5th ed. 2000), which specifically implicates proof of conduct in discounting motive evidence: "[T]he fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the factfinder to conclude that he did in fact commit the crime . . . ." The cases cited for this proposition, however, go more to intent than to conduct. In State v. Miller, for example, one of only two post war cases cited by the authors, the defendant admitted shooting the victim, but claimed that the gun went off accidentally. 448 A.2d 906, 907 (Conn. 1982).

These examples are meant to establish that use of motive for conduct is not as prevalent as it may seem, not that it is nonexistent. See, e.g., United States v. Benson, 637 F.2d 1052, 1057 (5th Cir. 1981) (allowing evidence of defendant's prior conviction, which had been obtained with the cooperation of the victim, to show that defendant had a motive to murder the victim in order to show defendant's "participation").

151. See, e.g., Usititz, Illusion, supra note 1, at 879 ("Does it make sense . . . to admit evidence of a previous knife fight to show defendant's motive to commit the assault in issue (which has not been charged but was elaborated here) but not the conclusion of the assault?")
ing. Instead, we must make this determination case by case on the basis of general guidelines that are subject to revision as new conditions arise. In making this congenerially ad hoc determination, it is indeed helpful to know whether others have tripped over the same bump and with what consequences in terms of physical injury. Courts have accordingly been willing to admit such evidence where the circumstances are close enough to those in the case under consideration. 152

Similarly, a written contract may not on its face be determinative of whether a given act or omission by one of the parties constitutes breach. It may then be useful to investigate past acts of the agents in order to piece together the broader and more complex understanding between the two parties that the written contract only imperfectly indicates. Accordingly, courts often allow evidence of the past course of dealing between two parties for precisely this purpose. 153

4. The Character of the Victim.

a. Self Defense in Civil v. Criminal Actions. — Among the legally significant circumstances of an individual’s conduct are related actions taken by other individuals, including the alleged victim or plaintiff. Conduct that may be tortious or criminal in other settings may be excused when taken in self defense. The question is: When should the victim’s conduct be provable by offering evidence of victim’s character? While it is clear that the victim’s conduct is beyond the control of the defendant, the question is complicated by the possible necessity of considering the victim’s incentives, in terms of both the victim’s own primary conduct and the victim’s instigation of legal action.

The ancient rule, adopted in most jurisdictions and under the Federal Rules, is that the accused in a criminal action may offer evidence of the victim’s propensity for aggression to support a claim of self defense. 154 Further, in the special case of homicide, the prosecutor may offer evidence of the victim’s trait of peacelessness to rebut any evidence

152. See generally 2 Weinstein & Berger, supra note 4, § 404.22[6][b], at 404-129. Weinstein and Berger observe:

In a negligence case, evidence of other accidents in the same place or involving the same machinery or instrumentality is often admissible, not because it shows that the defendant has a general tendency to be negligent, but because it tends to prove either: (1) the existence of a dangerous or defective condition if that is an issue, or (2) that defendant knew or should have known of the dangerous or defective condition.

Id.


154. Fed. R. Evid. 404(a)(2). The accused’s witness may not testify as to specific instances of victim’s character. Fed. R. Evid. 404(b). However, the prosecutor may ask about specific instances on cross examination. Id. Moreover, if the accused “opens the door” by presenting character evidence of the victim’s character, the prosecutor may offer rebuttal witnesses on the victim’s character and, as of December 1, 2000, on the same trait
from the defendant that the victim was the first aggressor, whether or not the defendant's evidence relates to the victim's character. 156

Even though there are similar actions under civil law for the punishment of physical violence—e.g., civil assault and battery—evidence of the victim's character enjoys no parallel exception. 156 This differential treatment is hard to justify from the perspective of pure probative value. If evidence of the victim's character is sufficiently probative for self defense in the criminal context, why not in the civil context? 157

The differential rule for civil and criminal assault is much easier to rationalize in terms of incentive setting. It has long been recognized in the analysis of civil law that the "victim's" incentives must be placed on par with those of the "injurer." 158 In a civil case, we are not only deciding whether to penalize the defendant, but also explicitly deciding whether to reward the plaintiff. To the extent that the plaintiff's award is based on her past acts of aggression, and to the extent that this evidence crowds out the effect on her award of her current aggressiveness, we would be telling her that her current aggression is of no legal consequence. We also would be telling victims with an aggressive past that there is no benefit to expending private resources to act as the law's enforcer by bringing suit.

In the criminal arena, however, the victim's incentives are usually more attenuated. Although the victim may have an interest in seeing the defendant punished for a host of reasons including spite and revenge, criminal penalties lack the direct zero sum quality of civil law damages.

156. Fed. R. Evid. 404(a)(2).

156. A minority of courts have chosen to treat civil and criminal assault and battery cases alike in this regard, in some cases despite the explicit wording of the relevant evidence statute. In particular, twelve jurisdictions including Alabama, Arizona, Hawaii, Kansas, Kentucky, Maryland, Nevada, Oklahoma, Oregon, Rhode Island, Vermont, and Washington D.C., allow evidence of the plaintiff's character in civil assault and battery cases. See Charles C. Marvel, Annotation, Admissibility of Evidence of Character or Reputation of Party in Civil Action for Assault on Issues other than Impeachment, 91 A.L.R. 3d 718 (1979 & Supp. 1999). This group should be distinguished from those states that allow evidence that the defendant knew of the victim's violent character in order to prove the reasonableness of the defendant's conduct. See supra Part V.B.2. for a discussion of state of mind issues.

157. One might try to claim that since criminal penalties are stiffer than civil penalties, the threshold for probative value should be higher in a criminal case. But given that a prosecutor's burden of persuasion is already higher in criminal cases, such a justification would have to explain the need for a very specific form of additional dispensation to apply only in certain circumstances and only for certain defendants (i.e., those whose victims are prone to violence). The mere statement that the criminal defendant deserves general dispensation is by itself no explanation.

b. The Character of the Victim: Rape Shield. — That said, there are occasions in the criminal law where the victim's incentives are of great concern. The most prominent and well recognized of these centers on the victim's incentive to press charges where those charges implicate details of her private sexual life that she has a special interest in keeping out of the public sphere.\(^{159}\) Thus, in many jurisdictions, an exception to the accused's ability to present evidence of the victim's character is carved out for prosecutions involving rape and sexual assault.\(^{160}\)

Three broad characteristics of these "rape shield laws" clarify their incentives based role. First, they create an exception in precisely the sort of criminal case—one involving alleged sexual misconduct—in which the victim's incentives to report and prosecute are powerfully implicated.\(^{161}\) Sex occupies a special place in our sociology. In other cases, such as non-sexual assault, the victim is likely to have much less at risk. Even if the defendant succeeds in showing that the victim has a violent disposition, this is not likely to be as embarrassing or intuitive as evidence of sexual activity.

Secondly, rape shield laws such as Federal Rule of Evidence 412 are often broad in application, reaching beyond primary conduct to all cir-

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159. In the case of rape shield provisions, the implications of the incentives based approach correspond to the most prominent explanation for the rule in the literature, the notes, and the legislative history. See, e.g., 124 Cong. Rec. 34,519 (1978) (statement of Rep. Holtzman). In the words of Representative Holtzman: Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapists is ever reported. Id; see also Fed. R. Evid. 412, advisory committee's note. The Advisory Committee commented that: The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of misconduct to instate and to participate in legal proceedings against alleged offenders. Id. Even though the approach taken in this Article follows the conventional explanation, it is useful to rehearse the incentives logic of the rule in order to securely place it within the broader framework of this Section on the "character of conduct."

160. Different rape shield provisions of similar purpose apply in civil cases. See Fed. R. Evid. 412(a)(2). In the majority of jurisdictions that do not allow evidence of the victim's character for proof of primary conduct in civil actions in the first place, see supra note 156, the civil rape shield provision has less of a role to play than its criminal counterpart.

161. It should be noted that the protections of Rule 412 apply as well to nonparty witnesses. But the protections of Rule 412 do not apply at all if the case does not involve alleged sexual misconduct, nor if the individual concerned cannot be described as a victim of sexual misconduct. Fed R. Evid. 412 advisory committee's note.
circumstances in which the victim's character may be admissible, including for an impeachment purpose. This implies that the rationale for rape shield laws cannot rest on the usual argument that past sexual behavior is not probative of current conduct—even if true, this would explain only part of the broad prohibition. In contrast, the incentives approach to rape shield laws accommodates the rules' full breadth. The argument that admitting evidence of the victim's sexual behavior may stifle the reporting and prosecution of rapes applies to any use of such evidence.

Lastly, rape shield provisions, such as Federal Rule of Evidence 412, are themselves subject to exceptions. These exceptions make sense under the incentives setting approach as attempts to balance the victim's incentives to press charges against the desire to deter individuals from committing rape in the first place. The federal exceptions, for example, are essentially two-fold. One goes to the use of the victim's prior sexual behavior in clarifying and testing the alleged rape evidence of the rape: Evidence of prior sexual behavior may be used to show that the source of semen or injury was other than the accused. Another exception goes to the necessity of identifying the circumstances under which the accused's conduct was performed, the subject of the current Part of the Article. Thus evidence of the victim's prior sexual relations with the accused may be used to show consent.

C. Connected Acts

1. Plan, Preparation, Eve Gestae, Identity, and Modus Operandi. — Other conduct can facilitate the primary conduct targeted by the substantive law. This connection between ancillary and subject conduct can come

162. Lilly, supra note 7, § 5.9. See supra Part. VA for a discussion of impeachment. The breadth of the rule is tempered by the accused's right to confront adverse witnesses and some courts have allowed evidence that the alleged victim has a history of making false or subsequently retracted accusations. 2 Weinstein & Berger, supra note 4, § 412.35[4][b]; infra note 165; see also supra note 141 (discussing scope of Federal Rule of Evidence 412 along other dimensions).

163. This position is taken by some commentators, including McCormick, Handbook, supra note 6, § 193 and perhaps even Wolman, Illusion, supra note 1, at 857–58 n.40, despite the general position of that article.

164. The following exceptions are not explicitly applicable to civil cases. In civil cases, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is subject to a balancing test that, at least as worded, is tilted toward inadmissibility, as compared to the test in Fed. R. Evid. 403. Fed. R. Evid. 412(b)(2).

165. Fed. R. Evid. 412(b)(1)(A)–(B). A third catchall exception, which in some sense is superfluous, exempts evidence whose exclusion would violate the accused's constitutional rights to confrontation and to a fair trial. Again, in civil cases, such evidence is subject to a balancing test that is, at least as worded, tilted toward inadmissibility, as compared to the test in Fed. R. Evid. 403. Fed. R. Evid. 412(b)(1)(C).


167. The prosecutor may also make use of this exception. Fed. R. Evid. 412(b)(1)(B). For example, according to the Advisory Committee, the prosecutor may introduce such evidence in a child abuse case to show a "pattern of behavior" under Fed. R. Evid. 404(b).

End of Part 410 advisory committee's note.
through explicit planning, through conscious practice and learning, or through subconscious habit-forming repetition. Thus other acts evidence is admissible when it shows "preparation [or] plan,"168 or when it is "inextricably intertwined" with the subject conduct in question.169 Prior act evidence may also be used to prove "identity," where proving identity in this context means associating the defendant with the current crime by pointing out that it has the defendant's "signature" as determined by evidence of prior crimes.170

This use of other acts evidence accords with the incentives based approach. Attaching punishments to the byproducts of ancillary acts that are necessary for or facilitate the subject act to be deterred is an effective way of deterring the act itself. The possibility that trace evidence of these ancillary, connected acts will be used against the defendant raises the cost of the subject act and so makes it less attractive to perpetrate. For example, if having firearms facilitates robbery and evidence of procurement of firearms in the days before a robbery can be used against a defendant, then robbery is all that much more "expensive" to the potential perpetrator.171 The individual faces the choice between committing the robbery without firearms or risking that the purchase of firearms can be used against him. The analysis applies generally to evidence that a defendant possesses the special "tools of the trade."172

Sometimes the mere repetition of the subject act facilitates later commission through the phenomenon of "learning by doing." If the in-

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169. Whether this use is permitted by virtue of Fed. R. Evid. 404(b)'s second sentence or by the common law doctrine of res gestae ("things done") is open to question. 2 Weinstein & Berger, supra note 4, § 404.20[2][c].
170. Fed. R. Evid. 404(b) (second sentence); see, e.g., United States v. Robinson, 161 F.3d 463, 470 (7th Cir. 1999) (upholding admission of prior bank robbery, which was perpetrated with same equipment and technique, and to which defendant pled guilty, having been apprehended in the act). For other examples see 2 Weinstein & Berger, supra note 4, § 404.20[4]. Use of other acts to establish modus operandi also falls in this category.
171. The general point here is again one of complementarity, but in a somewhat different sense. These other acts are complements to the subject act in the individual's decision problem. Using these other acts to meet trial burdens for the subject act will then complement trace evidence of the subject conduct in the setting of rewards and punishments. This will aid and not hinder deterrence of the ultimate conduct.
172. United States v. Manley, No. 98-10033, 1999 U.S. App. LEXIS 31568, at *9 (9th Cir. Nov. 29, 1999) (upholding admission of evidence that defendant possessed a pager to show intent to distribute illegal drugs); United States v. Ford, 22 F.3d 374, 381 (1st Cir. 1994) (upholding admission of written instructions how to manufacture methamphetamine); United States v. Tuttven, 40 F.3d 1, 7 (1st Cir. 1994) (upholding admission of defendant's possession of tools for use in altering vehicle identification numbers, when defendant claimed no knowledge that vehicle he said was stolen); United States v. Nason, 9 F.3d 135, 162 (1st Cir. 1993) (upholding admission of scales, bags, and baggies); State v. Romano, 456 A.2d 746, 760 (R.I. 1983) (upholding admission of burglary tools as evidence of defendant's role in breaking and entering). Note that courts often justify admitting "tools of the trade" evidence exclusively in terms of proving knowledge or
dividual learns a particular technique for committing the act in the process of actually committing it, then attaching punishments to the byproducts of prior occurrences deters the later commission as well. Here the connection between the prior act and the subject act is not planning per se, but rather practice. 173

Similar to the law itself, this conceptual approach to connected acts is not limited to integral equipment or complicated technique. True, a ski mask is not a gun. And a bank robbery may not use any complicated maneuvers. But if the color of the defendant’s ski mask, the way he vaults over the counter, the particular canvas bag into which he stuffs the money, the particular car he uses to get away—if all of these details of his particular bank robbing "style" can be used against him, then he faces a dilemma. 174 Either he suffers the inconvenience and uncertainty of tampering with his past success by having to meticulously alter the details of his plan after each successive heist, or he remains susceptible to a damaging extrapolation from offenses he is thought to have committed.

2. Habit and Organizational Practice. — Many evidence codes, including the Federal Rules, treat character evidence differently from evidence of "habit." Evidence of the habit of an individual or the routine practice of an organization is admissible to prove action in conformity therewith on a particular occasion. 175

What is the difference between habit and character? Most cases and commentators, including the advisory committee notes to the Federal Rules, quote McCormick on this issue:

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. . . . Thus, a person may be in the habit of bounding down two certain stairways two or three times at a time, of patronizing a particular pub after each day’s work, or of driving his automobile without using a seatbelt. The doing of the habitual act may

173. Some commentators bemoan the fact that the connected acts uses of other acts evidence is often a vehicle for inferring conduct from propensity. 2 Weinstein & Berger, supra note 4, § 404.22[5][a] ("Under the rubric of ‘common scheme,’ other-crimes evidence sometimes has been admitted when in actuality the evidence served little purpose other than to inform the jury that the defendant was a bad person, the precise result that Rule 404 [first sentence] is designed to prevent."); supra note 140.

174. In Robinson the jury was permitted to extrapolate from defendant’s guilty plea on a later bank robbery that he also committed an earlier bank robbery. 161 F.3d at 470. Both robberies were perpetrated in much the same style. The defendant wore an orange ski mask with a single oval opening and brown work coveralls, he carried a particular handgun and a large and distinctive “Louis Vuitton” duffle, he brandished the gun on entering the bank, sprinted to the teller counter, vaulted over the counter while demanding money, personally gathered money from the two teller stations after placing the handgun on an adding machine, vaulted back over the counter, exited the bank, and made his get away in a Cavalier. Id.

become semiautomatic, as with a driver who invariably signals before changing lanes.\textsuperscript{176}

Why should this distinction make a difference? McCormick himself proposes that because habit evidence is more situation specific than general character evidence, habit evidence is both more probative and less prejudicial.\textsuperscript{177}

The incentives approach, on the other hand, emphasizes the automatic, reflexive, mechanistic nature of habit. When an action is automatic, it is not by definition subject to conscious choice at the time it is made. Rather the real choice is made earlier on, when the individual decides to form the habit. The individual decides to teach himself the habit of signaling before changing lanes. He does not consciously decide to signal on the occasion of each subsequent lane change throughout his driving career; that he is currently signaling may not even register in his mind.\textsuperscript{178}

Observed repetitive conduct of this kind is trace evidence that the individual has made the initial choice to form the habit. If the object of the law is to influence the individual's initial choice of habit, it does indeed make sense to admit repetitions of that habit other than the particular incident at issue in the case. By way of analogy, if we for some reason wanted to discourage a programmer from building software to do a particular task—and we could not directly observe the code itself—then it would make sense to consider evidence of the program's repeated operation as trace evidence of the programmer's conduct.

The point is even clearer when the issue involves organizational custom and practice. The incentives target should be the original choice to establish or eschew the business practice. Specific instances, including those unrelated to the current incident, are trace evidence of the practice's existence. Thus evidence that the store was swept every morning was admissible to show that the plaintiff could not have tripped on debris on the floor.\textsuperscript{179} And evidence of how the plaintiff firm routinely handled purchased eggs was admissible to show that the low hatching percentage of eggs purchased from the defendants was not the defendants' fault.\textsuperscript{180}

\textsuperscript{176} McCormick on Evidence, supra note 32, \S 195 (emphasis added); Fed. R. Evid. 406 advisory committee's note; Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971).

\textsuperscript{177} McCormick on Evidence, supra note 32, \S 195.

\textsuperscript{178} True, a habit may "depreciate" and the individual may notice and be faced with the choice of whether to replenish it with conscious self-direction. But that replenishment is then the point of rediscernment, not each subsequent incident of conduct.

\textsuperscript{179} Hambrice v. F.W. Woolworth Co., 290 F.2d 557, 558-59 (5th Cir. 1961).

\textsuperscript{180} Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214, 219 (5th Cir. 1975) ("The crucial factor mandating admissibility of the evidence in question is that it was not introduced to show that [plaintiff] Spartan had acted negligently on other occasions, but rather to show that Spartan conducted this aspect of its business in a certain routine fashion.").
D. Opportunity

Prior acts will be admitted to rebut the defendant's contention that she could not have committed the subject act for lack of opportunity.\textsuperscript{181} For instance, evidence that the defendant attempted to rob a liquor store in location X at time T may be admitted to rebut the defendant's claim that he was not in location X on or around time T, where and when it is charged that he committed criminal assault.

Under the incentives based approach, such evidence constitutes rebuttal of the defendant's "negative" trace evidence. To keep the analysis simple, most of this Article has focused on the evidentiary byproducts of actual commission. Equally important for incentives are byproducts of not committing the act: that is, trace evidence of acts that tend to be mutually exclusive of the act in question. Such evidence concerns by definition "other acts." Yet its admissibility helps in incentive setting because it makes clearer to the defendant that she will be acquitted if she chooses to do something else. Similarly, the prosecution's use of other acts to rebut alibi evidence helps to ensure that this avenue is likely to be available only when the defendant truly refrains.

VI. "Exceptions" to Which Exception is Taken

A. Sex and Drugs

The general ban on using character to prove conduct is as time honored as any evidentiary rule.\textsuperscript{182} Yet, as argued in Part I of this Article, never in its long history has its rationale been clear. And tradition on its own—without the self renovating force of conscious good reason—can provide only so much support, for only so long. With character evidence the edifice has already started to crumble. As is to be expected, the greatest structural damage has occurred in areas of law most exposed to the weather of politics and the public eye. The list of these areas reads like a catalogue of the most highly charged issues of the time: narcotics use, sexual assault, and child molestation.

As noted in Part V.B, courts will often use other acts evidence to establish the circumstances rather than the existence of conduct. But as many commentators have noted, the admission of other acts evidence for these "other uses" has also served as something of a loophole for the admission of propensity evidence to prove conduct per se. According to

\textsuperscript{181} Fed. R. Evid. 404(b).

some commentators, narcotics cases are particularly notorious in this regard.\textsuperscript{183}

The new sex offense exceptions to the Federal Rules of Evidence are just one phase ahead of the narcotics "exceptions." The sex offense exceptions were once themselves "other acts" loopholes.\textsuperscript{184} But a recent amendment to the Federal Rules carves out a specific exception to the general ban on admitting character to prove conduct.\textsuperscript{185} In sexual assault and child molestation cases, evidence of a defendant's commission of other similar offenses is admissible for any purpose.\textsuperscript{186}

The legislative justifications for this special treatment of sex offense cases have been roundly criticized, and these criticisms seem correct—at least in so far as they go. Thus, Representative Molinari, the House sponsor of the new provision, argued that propensity evidence is more probative in sex offense cases than in other crimes.\textsuperscript{187} As several commentators

\textsuperscript{183} 3 Weinstein & Berger, supra note 4, § 404.22(2) ("In the trial of narcotic offenses, some courts display a particularly wide latitude in admitting evidence of other crimes in the name of knowledge. This may be more the result of current social problems than the result of logic.").

\textsuperscript{184} Lilly, supra note 7, §§ 5.15-5.16.

\textsuperscript{185} A similar phenomenon has arisen with respect to another highly charged social issue: drug offenses. While there has been no explicit mention of the rules of evidence to permit character inferences for conduct, some courts have essentially crafted a new exception for character evidence in cases by widening the latitude of several "other purposes," referred to in the second sentence of Fed. R. Evid. 404(b). See supra note 140.

\textsuperscript{186} Fed. R. Evid. 413-15. Rule 413 pertains to criminal sexual assault cases, as defined therein. Rule 414 applies to criminal child molestation cases, as defined therein. Rule 415 extends Rules 413 and 414 to civil cases. These Rules encompass admission of prior convictions, as well as uncharged conduct. It has been suggested that admission of evidence of uncharged conduct is subject to the same rule as in\textsuperscript{188} United States. 455 U.S. 681, 689-91 (1988) (holding prior acts admissible to show knowledge that goods were stolen under Fed. R. Evid. 404(b)'s second sentence according to a Fed. R. Evid. 104(b) conditional relevance standard, i.e., whether a reasonable jury could conclude by a preponderance of the evidence that the offenses had occurred); Senior Cuts., Off. of Pol'y Dev., U.S. Dep't of Justice, Statement to the Evidence Section of the ABA's of Am. Law Schools (Jan. 9, 1995), reprinted in David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Chi.-Kent L. Rev. 15, 19 (1994).

It appears generally settled that evidence admissible under these rules is indeed subject to the usual balancing test in Fed. R. Evid. 403. See, e.g., 140 Cong. Rec. 9890-93 (1994) (statement of Rep. Molinari) [hereinafter Statement of Rep. Molinari] (Rep. Molinari was principal House sponsor of the provisions in the Violent Crime Control and Law Enforcement Act of 1994 which enacted Rules 413 and 414); 2 Weinstein & Berger, supra note 4, § 41304(2) (citing cases). This is actually a puzzling outcome if one regards, as does the Advisory Committee, Rule 403 as subsuming the general character prohibition, of which Rules 413-415 are exceptions. Applying Rule 403 as usual would appear to leave Rules 413-415 without effect.

\textsuperscript{187} Statement of Rep. Molinari, supra note 186; see also 140 Cong. Rec. 24799-24800 (1994) (Statement of Sen. Daley) [hereinafter Statement of Sen. Daley] ("In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant...that simply does not exist in ordinary people."). Sen. Daley was the Senate sponsor of the bill.
have noted, this assertion is actually inconsistent with the data. Past conviction is far more predictive of future conviction for larceny, for instance, than for sex offenses. Representative Molinari also argued that because sex offenses are "private crimes" that pit the defendant's word against the victim's, they pose "unique difficulties of proof." But compared to homicide, in which the victim is obviously not available to say anything at all, the "he said, she said" aspect of sex offenses seems more like a blessing than a problem.

These criticisms of the sex offense exception are compelling, but in an important sense they are not compelling enough—and perhaps this helps to explain why such arguments did not carry the day. At best, these criticisms are arguments against treating sex offenses differently. And in principle they are disarmed either by removing the new exception for sex offenses or by making this exception the rule for all conduct. What these criticisms lack, and what the conventional truth seeking approach to trial has never been able to supply, is a viable argument for retaining the general ban. Absent this additional step, proponents of the sex offense exception always have available the counter posture that, even though their solution introduces some inconsistency, at least it is a step in the right direction.

The concept of evidence advocated in this Article supplies this missing step. Allowing past acts to substitute for trace evidence of sex offense conduct dampens the disincentive to commit sex offenses. The sex offense exception may improve trial accuracy, but it is as likely to increase as to decrease the incidence of sex offenses. And even though the desire to provide further incentives for those whose past acts exhibit a high propensity may be laudable in this case, this aim is best accomplished by

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188. Baker, supra note 25, at 578; Bryden & Park, supra note 25, at 578; James M.H. Gregg, Other Acts of Sexual Misbehavior and Persecution as Evidence in Proximity to Sexual Offenses, 6 Artic. L. Rev. 212, 253 (1963).


180. Congress short-circuited the usual Judicial Conference rulemaking procedure by passing Rules 415-415 on its own initiative as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Thirty-nine of the forty members of the Advisory Committee, composed of judges, practicing lawyers and academicians, signed on to a report recommending against the change. Only the representative from the Justice Department, wherein the amendment was drafted, voted in favor. Based on this report, the Judicial Conference urged Congress to reconsider the amendments. Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51, 54 (1996). According to the Judicial Conference, the Advisory Committee argued that the other rules in Rule 414(b)’s second sentence already adequately addressed Congressional concerns. See supra Part V.B. It also employed the usual jury nullification and efficiency arguments. See supra Part I.C. and I.D., respectively. Lastly, it mentions that the new rules "are not supported by empirical evidence." 159 F.R.D. at 53. This may be a reference to claims regarding the relative probative value of past acts in sexual offenses cases, as noted in the text, or it may in fact be a statement regarding the level of probative value in sex offense cases in absolute terms. For the latter see supra Part I.A.
considering past act evidence only at sentencing. Further, sentencing is also the proper place to determine whether to resort in the case of this defendant to incapacitation, rather than deterrence.191

A similar warning might be made—to courts as much as to Congress—about the slow leak of 404(b) "other uses" by which character is sometimes effectively admitted for conduct. Currently, this leak is at least partly obstructed by the necessity of packaging the evidence for some plausible "other use," by the possibility of limiting instructions admonishing the jury to avoid the prohibited character inference,192 and by the more ready possibility of Rule 403 inadmissibility.193 But the flow continues to swell and it is plausible that a full bore exception may someday be considered for certain salient areas of law, like drug enforcement. The conventional analysis of character evidence offers courts little reason to be vigilant about the seepage, and Congress little reason to resist sanctioning the leak with a full fledged amendment. The analysis provided in this Article suggests that while admitting character for conduct may help convict perpetrators, it is just as likely to increase their number, thus exacerbating the problem it was meant to solve.

B. The "Mercy Rule"

The accused in any criminal trial may call reputation or opinion witnesses to testify to a pertinent trait of his character for the purpose of establishing reasonable doubt that he committed the crime charged.194 However, such witnesses may only state whether, not why, they possess this opinion or perceive this reputation. In particular, they may not elaborate by testifying to specific instances of the accused's conduct.195 Moreover, if the accused chooses this line of defense,196 he opens the door to the prosecutor's character based rebuttal.197 The prosecutor may then offer her own opinion or reputation witnesses to dispute the defendant's

191. See supra Part III & IV.B.
194. Fed. R. Evid. 404(a)(1); United States v. Stagg, 553 F.2d 1073, 1075 (7th Cir. 1977), overruled on other grounds by United States v. Ricketts, 146 F.3d 492, 497 (7th Cir. 1998). Though the rules specifically limit its application to the "accused," the mercy rule has on occasion been extended to quasi-criminal civil cases, such as assault and battery. See, e.g., Or. Rev. Stat. 40.170(2)(d) (1988) (invoking mercy rule for plaintiffs and defendants in civil assault and battery).
196. The accused may also be deemed to have chosen this line of defense if his own testimony references his character.
197. Michelson v. United States, 335 U.S. 469, 479 (1948) ("The 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."). As of December 1, 2000, the accused also opens the door to evidence that he possesses a particular character trait if he presents evidence that the crime resembles the same trait. Fed. R. Evid. 404(a)(1).
possession of the exonerating trait.\textsuperscript{198} Even more damaging to the accused, the prosecutor may ask the accused's witnesses whether they know of, or have heard about, specific instances of the accused's past conduct that may be inconsistent with their positive testimony.\textsuperscript{199} For example, the accused's attorney in a homicide trial may ask a witness whether in her opinion the accused possesses a peaceful disposition; the witness may answer yes or no. On cross examination, however, the prosecutor is free to test the basis of the witness's opinion by asking whether she knows that the accused was once arrested for assaulting a novice of the Little Sisters of St. Clare.

The sex offense exception, criticized in the previous section, has not had a chance to prove itself in practice, and perhaps we have failed to understand its profundity. But in the case of the so called "mercy rule," as just described, the history runs as deep as the justifications run thin. One correspondingly detects a "we've just always done it this way" quality in scholarly discussions of this rule. Even the Advisory Committee to the Federal Rules seems to throw its hands up: "[The mercy rule's] basis lies more in history and experience than in logic.... In any event, [the rule] is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions ... ."\textsuperscript{200}

When commentators offer specific justifications for the rule, the most commonly heard is that the mercy rule affords special dispensation to the defendant: "with so much at stake and so little available by way of conventional proof."\textsuperscript{201} But let us dissect this sentiment. Presumably, the object is not to offer dispensation to all defendants, innocent and guilty. If we wanted to favor all defendants, we would just reduce this ominous "stake" (i.e., sentence) and be done with the problem. With respect to innocent defendants, moreover, the concern appears specifically directed at those with "little available by way of conventional proof." Presumably, we do not mean to include Clause Von Bulow in this group. Rather, we mean those who lack the wherewithal to compete effectively with the state.

\textsuperscript{198} Fed. R. Evid. 404(a)(1).

\textsuperscript{199} Fed. R. Evid. 405(a). The prosecutor may not ask about prior specific incidents unless she has a good faith basis for believing that they did actually occur as characterized in her question.

\textsuperscript{200} Fed. R. Evid. 404 advisory committee's note. Note that the Advisory Committee is commenting here on all of 404(a)(1)-(3), which also includes the exception for the victim's character and for impeachment of witnesses. Also, the quote ends with the phrase "and to override doubts of the basic relevancy of the evidence." With regard to this last phrase, see supra note 27.

\textsuperscript{201} Greer v. United States, 245 U.S. 559, 561 (1918) ("[T]he right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners...."); Udall, Illusion, supra note 1, at 854-55 ("Just why the defendant in a criminal case should enjoy the exceptional opportunity... is far from clear."). Possibly a dispensation for the criminal "with so much at stake and so little available in the way of conventional proof."
If this is what really lies behind the desire to offer dispensation, the mercy rule is badly crafted. In the first place, the mercy rule is, in practice, of greatest benefit to those with reputable friends and those who would themselves not be subject to a damaging counterattack by the prosecutor (because, for example, they are being accused both officially and unofficially for the first time). Yet, impressive friends and a clean record are likely correlated with possessing sufficient resources to make an effective defense. Of course, these attributes are also correlated with innocence. But a second aspect of the rule’s real effect overwhelms this second correspondence. The mercy rule only has bite when trace evidence taken alone would be sufficient to convict. Those for whom trace evidence leaves reasonable doubt are not much helped by the option to launch a character based defense. In the end, then, the mercy rule offers dispensation to those whom we would not have predicted would have committed this crime, but who, looking just at the trace evidence marshaled against them, appear to have done so beyond a reasonable doubt.

Thus the mercy rule is a sloppy way to help the resource constrained innocent. If helping these individuals is really the aim, a better solution would be to provide greater need based subsidies for legal and investigative services. Such a policy would target those whose resources are

202. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence: Practice Under the Rules § 4.12, at 271 (3d ed. 1999) (“Because [the prosecutor’s] cross-examination can be devastating, obviously defendants seldom raise the issue of character unless full investigation of the likely counterproof persuades defense counsel that there is little in defendant’s past that could be damaging or, if there is, character evidence is nonetheless critical to the defense.”).

203. Park, Character at the Crossroads, supra note 1, at 755, offers this example of realpolitik:

If that explanation for the “mercy rule” does not satisfy, then . . . [the] alternative that seems most appealing to me is [that]. . . . Rulers tend to be respectable and well-connected, and hence have a bias toward sympathizing with the sort of respectable and well-connected defendant who is likely to benefit from the rule.

294. Other commentators justify allowing the accused to present character evidence on the basis of the fact that since such character evidence is positive, it is less prone to the usual list of dangers. Wigmore, for example, suggests that the policy issues of confusion of the issues, unfair surprise, and undue prejudice are not present with respect to accused’s offer of his own character. 1A Wigmore, supra note 27, § 66.1, at 1174-80. See Park, Character at the Crossroads, supra note 1, at 755 for a modern manifestation of this sort of argument.

The claim that positive character evidence is less prejudicial is not at all clear in its own right. In any event, any justification based on the reduced prejudice of positive character evidence seems to neglect the possibility that negative character evidence will be offered in rebuttal. Of course, if the prosecutor could initiate evidence on the accused’s character, the accused could and probably would rebut. In this respect, the only possible difference between the mercy rule and a general allowance of character evidence is the order in which the evidence is allowed. The mercy rule insists that the accused move first. It is difficult to see why this matters for prejudicial effect. The claim that unfair surprise is not present with respect to the accused’s offer of his own character fails to account for the fact that it need not be present with respect to the
dwarfted by what the state has set against them. And because such subsidies will likely have a greater impact where exonerating evidence is there to be uncovered, the additional resources will help the innocent more than the guilty.

The incentives approach advocated in this Article cannot accommodate the "mercy rule." The rule may dampen incentives for those who can make use of it. And even if this group were seen as worthy of "dispensation," a better option would be to simply reduce sentences for first time offenders. From an incentives perspective, it may well be time to put the mercy rule out of its misery. 205

CONCLUSION

The law's treatment of character evidence is better understood and evaluated when it is examined directly under the light of the state's central purpose of regulating primary activities. While the rules restricting character evidence appear jumbled and desultory when viewed according to the conventional truth seeking approach to trial, they display a surpris-

prosecutor's offer of bad character either. The rules could prevent surprise by requiring the prosecutor to notify the defendant of the identity and testimony of the character witnesses who will be marshaled against him for proof of conduct. Indeed, such a rule already exists with respect to the prosecutor's offer of character evidence for "other uses" under the second sentence of Fed. R. Evid. 404(b) and with respect to the offer by the prosecutor or a private opposing party of similar crimes evidence in sexual offense and child molestation cases under Fed. R. Evid. 415(b), 414(b), and 415(b).

205. Should the Advisory Committee's intimation that the mercy rule, inter alia, has aged to "constitutional proportions" give us pause? Probably not. The mere antiquity of the rule is by itself a dubious basis for constitutional stature. Constitutional jurisprudence is littered with abandoned rules of ancient vintage. To be sure, it is sometimes said that "traditional notions of fair play and substantial justice" provide a lower bound for individual rights, the implication being that the only ancient rules that go stale are those that do not protect individuals. Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (abandoning quasi in rem jurisdiction). It is not at all clear that this distinction bears out in the cases, however. The Supreme Court itself acknowledges that historical protections have been rolled back on occasion. Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994) "[M]ost of our due process decisions involve arguments that traditional procedures provide too little protection and . . . additional safeguards are necessary to ensure compliance with the Constitution. . . . Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure.").

One example from evidence law is Doremus v. United States, 243 U.S. 657 (1918). In that case, defendants were indicted in the Eastern District of New York for tampering with the mail. A third coconspirator pleaded guilty and afterwards testified against defendants—a typical pattern. Id. at 669-70. Defendants objected that the coconspirator was incompetent to testify as a result of his just obtained conviction. They cited as authority an earlier case interpreting the Judiciary Act of 1789 as requiring that, in the absence of congressional modification, each district adopt the evidence law of its home state as that law existed in 1789. Id. at 669-70 (citing U.S. v. Reid, 53 U.S. (12 How.) 361, 366 (1851)). In 1789, in New York, those convicted of crimes were incompetent to testify. Id. at 470. The Court allowed the third coconspirator's testimony, however, concluding on the basis of gradually shifting authority that "the dead hand of the common law rule of 1789 should no longer be applied in such cases as we have here. . . ." Id. at 471.
ing amount of rationality and order when considered in terms of the somewhat different project of influencing individual behavior by promise of reward or threat of punishment.

For proof of conduct, the incentive setting approach distinguishes trace evidence—evidence that is the likely byproduct of conduct—from predictive evidence—evidence of conditions that tend to produce the conduct itself. Trace evidence is the linchpin for incentive setting. Predictive evidence, including character evidence, plays at best a secondary role, and this under the imperative that it keep out of the way, lest attempts at refinement foul the basic incentive setting mechanism.

This is essentially the attitude that the law displays toward character evidence. It allows character evidence for the secondary purpose of impeaching the witness who purports to offer trace evidence of primary conduct. It allows other acts evidence for the parallel task of proving the circumstances of primary conduct. It even allows other acts evidence for sentencing and punitive damages, once primary conduct has been proven. But, for the most part, it insulates the determination of primary conduct itself from the inference, reasonable as it may be, that individuals often act in conformity with identifiable propensities.

What should we make of the fact that the rules, the notes, and the cases all recite that the underlying purpose of trial is to find the truth? What of the fact that evidence is said to be tested on the basis of its "probative value," that the jury is called the "fact finder," that the facts found are called the "verdict," or "truth statement"? Perhaps the notion that trial is a truth finding exercise is a kind of collective heuristic—a working explanation that buys simplicity and serviceability at the price of coherence and breadth. For the practical operation of the law, the fact that character evidence lies well out of the range of this heuristic may not even be a serious problem: Amendment by the addition of "exceptions" cannot do much violence to central principles when these are vague to start with.

In scholarship, however, we care about why an institution works in a sense quite separate from the kind of practical understanding that helps to keep it going. We care just for the sake of knowing, and also because a deeper understanding is likely to help us evaluate whether and when change is needed. The legal scholarship on character evidence, therefore, would do best to eschew the short cut conception of trial as an isolated, micro historical exercise and instead place trial explicitly within the overall system by which government seeks to influence the day to day interaction of its citizens. If this broader view is taken, the seemingly arbitrary rules governing character evidence are seen to possess a coherent core, and arguments for or against changes to the rules draw upon a potential energy never available within the truth seeking paradigm.
This Appendix lends formal support to Part I.F.'s analysis of the trial bias argument for the general ban on character evidence to prove conduct.

A. The Fragility of Trial Bias

According to the trial bias argument, possession of a past record will be less indicative of guilt among the cases that make it to trial than among the full population of cases. This section of the Appendix recasts the trial bias argument in formal terms. The mathematics show precisely how the probative value of a past record for guilt may be either reduced or enhanced by accounting for the event of trial depending on whether possession of a past record has a larger or smaller impact on the chance that a case goes to trial for the innocent than it has for the guilty.

Fix an individual and an alleged crime. Let \( R \) be the event that the individual has a criminal record, let \( G \) be the event that he is guilty of the crime, \( I \) that he is innocent of the crime, \( T \) that he stands trial for the crime. The prior odds that the individual is guilty may be expressed as:

\[
\frac{\Pr(G)}{\Pr(I)}
\]

where \( \Pr(A) \) denotes the probability of event \( A \). The prior odds reflect our subjective assessment of guilt before accounting for additional information such as the existence of a past record and the fact that the individual is now standing trial for this crime. For example, if we put the prior odds of guilt at .00001, then we think that the odds that the individual is guilty are "a million to one" (more precisely, one over one million), as when the individual is pulled randomly from a large population.

Bayes' Rule tells us how to adjust our prior odds to account for new information in a manner that is logically consistent given the axioms of probability theory. For example, on learning that the individual has a criminal record our updated assessment of the odds that he is guilty of the present crime (i.e., our posterior odds of guilt) should be:

\[
\frac{\Pr(G \mid R)}{\Pr(I \mid R)} = \frac{\Pr(R \mid G)}{\Pr(R \mid I)} \times \frac{\Pr(G)}{\Pr(I)}
\]

where the notation \( \Pr(A \mid B) \) means "the probability of event \( A \) given that event \( B \) is true." In other words, to account for the information that the individual has a past record, we multiply the prior odds of guilt by the likelihood ratio

\[
L^p = \frac{\Pr(R \mid G)}{\Pr(R \mid I)}
\]
to obtain the posterior odds of guilt. The likelihood ratio represents our assessment (gleaned from experience, introspection and/or data) of the “information value” of a past record with respect to determining guilt. If a past record is informative of guilt, then the likelihood ratio is greater than one, so that our assessment of the odds that the defendant is guilty increases on learning of the existence of the criminal record. The more informative the record is of guilt, the larger is the likelihood ratio. For instance, if our prior odds are one over a million (.000001), we learn that an individual has a past record, and our likelihood ratio for a past record with respect to guilt is 2, then after learning of the individual’s past record we believe that the odds of guilt are one over 500,000.

Similarly, Bayes’ Rule tells us how to account for the information that the individual is now standing trial for the crime:

\[
\frac{P(G|T)}{P(G)} = \frac{P(G)}{P(T)} \times \frac{P(T|G)}{P(T)}.
\]

For example, we might believe that (notwithstanding the dynamics of plea bargaining) the conjunction of police investigation and prosecutorial discretion makes trial informative of guilt to such an extent that individuals on trial for a crime are equally as likely to be guilty as to be innocent—i.e. that our posterior odds are one to one. (Note that these odds are calculated based on the bare fact of trial and do not reflect the information value of any evidence presented (here.) If the prior odds are, as above, one over one million, this implies that the likelihood ratio for trial is one million.

Lempert and Saltzburg focus on how the individual’s past record affects the odds of guilt given that the individual now stands trial for the crime. We are thus interested in a statement of Bayes’ Rule that shows how the existence of a past record converts the odds of guilt given trial into the odds of guilt given trial and a past record. As may be easily confirmed, this can be written as:

\[
\frac{P(G\wedge T)}{P(T)} = \frac{P(G\wedge T)}{P(G\wedge T)} \times \frac{P(T|G)}{P(T)}
\]

where, for example, \(G \wedge T\) is the conjunction event that the defendant is guilty and appears at trial. Thus, when we account for trial, the likelihood ratio of a past record for guilt becomes:

\[
L_e = \frac{P(G\wedge T)}{P(G\wedge T)}.
\]

Comparing statement (3) to (2), we see that what plays the role of the prior odds in (3) plays the role of the posterior odds in (2). Thus in (3) we are applying Bayes’ Rule to the new information that the individual has a record having already accounted for the fact that he now stands trial for the crime.

Comparing (3) to (1), we see that the likelihood ratio in (3) is similar to that
in (1), except that in (5) the likelihood ratio denotes the information value of a past record for determining guilt among defendants who appear at trial, rather than among all potential defendants. More generally, the reader will notice that the two statements of Bayes' Rule, (5) and (1), are the same but for the fact that in (3), the event \( T \) always appears in each probability as a conditioning event. This signifies that the new information about a defendant's criminal record is being updated against the backdrop of the event that the individual is standing trial for the crime.

We can see in (3) the two extreme cases discussed in the text. In the first extreme case, the guilty with a record never go to trial, but the innocent with a record sometimes do. Assuming that some guilty defendants (without a record) go to trial,\(^{206}\) this means that the numerator of the likelihood ratio in (3), and so the ratio itself, is zero. This implies zero posterior odds of guilt.

In the second extreme case considered in the text, the guilty with a record sometimes go to trial and the innocent with a record never go trial. Assuming that some innocent defendants (without a record) sometimes go to trial,\(^{207}\) then the denominator of the likelihood ratio in (3) is zero and the ratio is infinite, implying that the posterior odds are also infinite, which means that guilt is certain.

Lempert and Saltzburg's more moderated claim is that a record, though generally informative of guilt, is not as informative of guilt—and may be informative of innocence—when such evidence is presented in the context of trial. The extent to which a record is informative of guilt in the two settings—i.e., with and without the backdrop of trial—is reflected, as noted, in the likelihood ratios for a past record in (1) and in (3). Thus, Lempert and Saltzburg's assertion is that while \( L^g \) may be larger than one, \( L^g \) is less than \( L^e \) (and possibly even less than 1). It is easy to confirm that the two likelihood ratios—describing the information value of a past record with and without trial—are related as:

\[
L^e = \frac{\frac{m(y|y \wedge x)}{m(y|y)}}{\frac{m(y|y \wedge \neg x)}{m(y|\neg y)}}
\]

Lempert and Saltzburg's assertion, then, is equivalent to the assertion that the double ratio in brackets is less than one (and possibly even less than \( \frac{1}{y^e} \)). This double ratio is less than one if and only if its denominator (itself a ratio) exceeds its numerator (also a ratio):

\(^{206}\) If no guilty defendants of any stripe go to trial, then the fact that the posterior odds of guilt are zero is obvious without resort to Bayes' Rule, which is in its present form is in any event undefined.

\(^{207}\) See supra note 206.
\[ \frac{p_1(f|\neg a)}{p_0(f|\neg a)} > \frac{p_1(f|a)}{p_0(f|a)} \].

This inequality is perhaps more easily interpreted in slightly different notation:

\[ (4) \quad \frac{p_1(f|\neg a)}{p_0(f|\neg a)} \geq \frac{p_1(f|a)}{p_0(f|a)}. \]

Inequality (4) is a symbolic statement of the key condition for the existence of Lempert and Salzburg's trial bias, as described informally in the text. Having a past record must increase the individual's chance of standing trial for this crime by a greater proportion if the individual is innocent than if he is guilty.

For example, inequality (4) would hold if having a record increases by 50% the chance of standing trial for this crime for an innocent individual, but perhaps only 10% for a guilty individual. In this case inequality (4) would be:

\[ 1.5 = \frac{p_1(f|\neg a)}{p_0(f|\neg a)} > \frac{p_1(f|a)}{p_0(f|a)} = 1.1. \]

Consequently, a past record would be less indicative of guilt among those standing trial than among those in the general population, as Lempert and Salzburg assert. The text surrounding note 75, however, gives plausible reasons why the proportional effect on the probability of trial for the guilty individual may be greater than for innocent individuals. Thus, while having a record may increase the innocent individual's chance of standing trial by 50%, it may well double the chance for the guilty individual. In this case the inequality would be reversed:

\[ 1.5 = \frac{p_1(f|\neg a)}{p_0(f|\neg a)} < \frac{p_1(f|a)}{p_0(f|a)} = 2 \]

and a past record would be more indicative of guilt among those standing trial than among those in the general population.

B. Distinguishing the Trial Bias Argument Against Character Evidence from the Jury's Potential Failure to Account for the Bare Fact of Trial

As discussed supra note 68, the trial bias argument must be carefully distinguished from an orthogonal claim about jury fallibility that applies to any form of evidence, and so can not be the basis for a specific prohibition against character evidence. The formal analysis provided above in Appendix Section A helps to make this distinction clear.

According to the trial bias argument, in assessing trial evidence of a defendant's past record, juries will fail to take into account how that evidence's probative value is affected by the context (trial) in which it is presented. Conceivably, juries could also fail to account for the manner in which the bare fact that the individual is now standing trial for the crime affects the assessment that he is guilty. In terms of the formal analysis in Appendix Section A above, this would mean that juries would be applying the likelihood ratio in (3) to their unconditioned prior odds of guilt, where they should be applying that likelihood
ratio to odds that are already conditioned on trial. That is, they would be using $\frac{p(q)}{p(q|T)}$ in (3) instead of $\frac{p(q|T)}{p(T|q)}$. For more on the significance of this distinction for the character evidence debate, see supra note 68.