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Character Evidence Reconsidered:  
"People Do Not Seem to be Predictable Characters."

by
MIGUEL A. MÉNDEZ

Introduction

In commenting on the papers by Professors Roger Park and Peter Tillers, I have made several assumptions. One is that we are examining the wisdom of increasing the use of character evidence only in criminal trials. Although recent amendments to the Federal Rules of Evidence now allow propensity evidence in some civil cases, Park, Tillers, and I have proceeded on the assumption that its increased use in criminal trials is of greater concern. Another assumption is that the kind of character evidence that interests us the most is evidence of uncharged misdeeds. This assumption is consistent with recent amendments to the Rules. It also reflects the assessment of trial lawyers that character evidence, in the form of reputation or opinion, is not particularly useful.

Park and Tillers find many of the conventional reasons for excluding character evidence unconvincing. Though I agree with much of what they say, in the end, Tillers' views are closer to mine. For this reason, I comment first on Park's paper.

Inadequacies of A Priori Rules

One of Park's arguments for abolishing the ban on the use of character evidence is that the prohibition is aimed chiefly at preventing juror misdecision, not at controlling future conduct. Unlike

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* My thanks to Aviva Orenstein, a fellow panelist, for this wonderful quotation. It does not necessarily reflect her views about the value of character evidence as a basis for predicting behavior.

1. See, e.g., FED. R. EVID. 415.
2. See FED. R. EVID. 413-14.
3. As often happens in these conferences, scholars asked to present papers for comment provide more than one draft. Subsequent drafts modify, drop, or add arguments. I have tried to respond to the latest drafts submitted by Park and Tillers. Time constraints, however, may have led me to focus on points made in earlier drafts but dropped or modified in subsequent versions. My apologies to Park and Tillers for such oversights.
4. See Roger C. Park, Character at the Crossroads, 49 HASTINGS L.J. 717, 743-44
a rule that aims to shape behavior by announcing, for example, the penalties to be paid for the commission of certain harms, the prohibition simply seeks to withhold a category of evidence from the jurors.

Admittedly, the rule banning the use of character evidence does not alter behavior in the same way as does a criminal regulation. If the ban shapes behavior at all, it is that of the lawyers and the trial judge who must ensure the exclusion of character evidence, and that of the jurors who are deprived of the evidence in their deliberations. Though Park’s point is forceful, it helps shift the focus to the reasons for excluding character evidence. Those who believe that character evidence may lead jurors to decide the case inappropriately may also believe that reducing misdecision alone is justification enough for the rule. Altering the behavior of the courtroom actors is not an insignificant achievement: criminal verdicts—especially guilty ones—carry profound consequences.

It is one matter to withdraw character evidence from the jurors’ consideration. It is quite another to do so through a mishmash of rules and exceptions that challenge anyone’s intellectual abilities and perhaps even sanity. Allowing evidence that looks, feels, and smells like character evidence to be received under the rubric that it is being offered for a relevant non-character purpose tests the outer limits of our abilities to comprehend. “Mystification,” to use Park’s term, has its own costs, some of which can be seen simply by counting the pages in the law reports. This, then, is Park’s second argument for abolishing the rule.

No one, however, defends retention of the ban on the use of character evidence on the ground that the rules governing the evidence are easily understood or even clearly stated. More students encounter difficulties in understanding the rules governing character than any other evidentiary concept. They are not alone. To this very day, appellate judges continue to write opinions that betray their incomplete mastery of the rules.5

The rules governing the use of character evidence were not written for the lay person. They are not the equivalent of criminal rules whose infraction can subject its violator to fines, jail, or worse. The rules are not concerned with shaping human conduct in everyday affairs, but rather with the kinds of information jurors should consider in discharging their functions. The rules are directed at lawyers who try cases, judges who preside over those cases, and appellate judges who review those cases. They are directed at individuals trained in


the law. Although needless complexity and lack of clarity in statutes are surely undesirable, the chief focus in assessing the continued vitality of the character evidence rules must be on whether the benefits of excluding predisposition evidence are outweighed by the costs of withholding the evidence from the jurors.

The Costs of Exclusion

To Park, these costs are too high. He believes that other-crimes evidence is much too valuable to exclude categorically. To him, the fact that all of us use character reasoning in everyday decision-making must mean that it provides an adequate basis for making predictions about how others will behave or may have behaved. Like Park, I would not think of hiring a baby-sitter for my six- and eight-year-old daughters if I knew that the sitter had recently been accused of child abuse. I am risk averse in the extreme when it comes to my daughters’ welfare. But not hiring the baby-sitter on account of his history is different from convicting the sitter of child abuse on account of that history. I very much want to believe that I would not be moved to convict the sitter just because he has been accused of child abuse. But I am unsure whether the accusation would not tilt me against the sitter in a way that might prevent me from viewing all of the evidence with the detachment and consideration to which the sitter would be entitled were he on trial for the crime of child abuse.

That, of course, may be a reason for judges to exclude me from the jury. But unless we are confident that our jury selection procedures exclude potential jurors who might react at least as strongly as I think I would to the character evidence, the risk of misdecision can better be minimized by retaining the ban on the use of character evidence than by relying on voir dire.

Park’s appeals to recidivist studies do not entirely allay my concerns over the probative value of character evidence any more than does knowledge that all of us use character reasoning in everyday decision-making. We use character reasoning because it strikes us intuitively as a valid basis for making behavioral predictions about others. As Park points out, it’s just plain common sense. But intuitive insights, even when widely shared, are not necessarily accurate. Although I now know better, my intuition still tells me each day that the earth is flat and that the sun rotates around the earth, “rising” in the east and “setting” in the west. Science, however, has taught me otherwise.

Viewed from some perspectives, the recidivist studies do suggest that past misdeeds can serve as a basis for predicting future misdeeds.

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As Park reports, "Recidivism data... at a minimum shows that someone who has been convicted and imprisoned for a criminal offense is many times more likely to commit a similar offense than a person chosen at random." But, even setting aside questions about methodology, the recidivist studies can be read another way.

Park cites a study that shows that the recidivist rate for murderers is 6.6% within three years of release from prison. Park derives from this statistic an annualized recidivist rate of 2200 per 100,000 prisoners released following a sentence served for homicide. Because the base rate for murder in the general population is 9.8 per 100,000 per year, this study suggests that a person released from prison after serving a sentence for murder is more than 200 times more likely to commit a murder than someone randomly selected from the general population.

Focusing on the base rate can yield impressive numbers. Prosecutorial arguments based on such high probability estimates might indeed move some jurors well along the road to conviction. But the question is not just how much more likely the accused is to commit murder than someone selected randomly from the general population. It is also how much more likely it is that the accused will commit murder because he murdered before. Since the study found that only one in fifteen murderers murdered again, the defense could argue that, statistically speaking, there is but one chance in fifteen that the accused would murder again. Put another way, a prediction that he would do so (or did so) would be wrong fourteen out of fifteen times, a fact that the defense undoubtedly would elicit from the expert on cross-examination.

7. Id. at 721-22.
8. Park lists many of the deficiencies in the recidivist studies and the problems they pose in arriving at probability estimates. See id. at 768-72. Some of these deficiencies include the use of arrest as the measure of recidivism. See id. at 769-70. Some believe that arrests under report the true rate of reoffending, since some crime is unreported. See J. MONAHAN, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 52 (1981). The use of arrests, however, can cut in the other direction. Not everyone arrested for an offense has committed that offense or any offense. The use of convictions is subject to the same criticism; jurors and judges are sometimes wrong, and the innocent are convicted. Likewise, relying on guilty pleas can be misleading; some defendants, though innocent, will accept a plea bargain rather than run the risk of conviction by a jury and the imposition of a greater punishment.
9. See Park, supra note 726, at 11 n.24 (citing ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989)). The study focused on the commission of murder and non-negligent manslaughter. For simplicity's sake, I lumped the offenses into murder.
10. See id. at 11 n.28.
11. Though I don't think that the case has been made for repealing the ban on character evidence, this example illustrates the importance of giving jurors access to recidivist
Of course, as Dean McCormick put it, "A brick is not a wall."12 Statistical evidence that the accused is more likely than others to murder again (or commit some other offense) is only one brick among the many the prosecution might offer in constructing an unassailable wall of guilt. But the issue before us is not the relevance of that brick in a particular trial.13 It is whether the recidivist studies are so compelling as to justify, as a policy matter, repealing the ban on the use of character evidence in all criminal trials. I don't find the recidivist studies as convincing in that regard as does Park. If anything, these studies show that it is unlikely that a felon will commit the same

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13. Evidence that the defendant is many times more likely to commit murder than a person selected randomly from the population is still logically relevant under a Bayesian analysis. See RICHARD O. LEMPERT & STEPHEN A. SALTBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 159 (2d ed. 1982).
offense again.  

I am concerned also about the ability of jurors to give evidence of uncharged misdeeds the weight it deserves. I am not worried here about whether jurors can think in probabilistic as opposed to status terms. They can. I am concerned, instead, with whether jurors can assess correctly the probability that someone who has committed the uncharged misdeeds will commit the misdeed charged. In this respect, I am troubled by the findings of John Monahan. In his study of the efficacy of clinical (as opposed to actuarial) techniques in predicting violent behavior, he found that the best research in existence in 1981 indicated that "psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill." More recent research has not undermined his findings.

The belief that uncharged misdeeds can help jurors arrive at more accurate verdicts ultimately rests on the supposition that jurors are adept at estimating the defendant’s probable guilt from the uncharged misdeeds evidence. But if mental health professionals, using in-depth clinical examinations as well as "a meticulous reconstruction

14. See generally id. Park cites a Michigan study that focused on the accuracy of an instrument used to predict the recidivist rate of inmates released on parole. See Park, supra note 4, at 722 n.10. The instrument classified the inmates by five categories, from presenting a very low risk of re-engaging in assaultive behavior to a very high risk of doing so. The predictions were best for the high risk category. Forty percent of those predicted as posing a very high risk of committing another assault were arrested for a violent crime in the follow-up period. That means that 60% were not. That is another of way of saying that the predictions were wrong more than half of the time. The study is described in MONAHAN, supra note 8, at 68-71. Other predictions of the recidivist rate of released inmates have produced many more false positives than the Michigan study, some with a high of 19 false positives for every 20 predictions. See id. at 68.

Park also cites a North Carolina study that found that 45% of drivers killed in traffic accidents had an elevated level of blood alcohol and that drivers with one or more arrests for drunk-driving were eleven times more likely to have elevated levels of blood alcohol at the time of death than drivers with no arrests. See Park, supra note 4, at 726. Park then concludes that if all we know about a driver is that he had a prior arrest for drunk-driving at the time he died in a fatal accident, then we should conclude that there is a 90% probability that he had an elevated blood alcohol level at the time of death. See id. Alcohol, however, is believed by many to be a disease that, unless controlled, induces compulsive behavior. For this reason, I question whether recidivist data relating to chronic alcoholics say much about human behavior in general.

15. MONAHAN, supra note 8, at 47-49 (emphasis in the original). That Monahan’s conclusion is based on studies of the mentally ill is probably immaterial. Other studies indicate that the rate of mental illness among the jail population is about the same as in the general population. See id. at 78. Moreover, studies of mental patients suggest that past violence, not mental illness, is the best predictor of future violence. See id. at 80.

of the life history elicited from multiple sources—the patient himself, his family, friends, neighbors, teachers, employers, and court, correctional and mental hospital [records]—are wrong two out of three times in their predictions of violent behavior, then I think that it is prudent to pause before allowing jurors to make similar predictions on a much more abbreviated record.

My reluctance to be won over by the recidivist studies may stem in part from my unfamiliarity with statistics and probability theory. Others well-versed in these fields can better assess Park’s recidivist arguments. But my hesitation is also due to my inclination to give studies by personality experts (or at least some of them) more weight than does Park.

**Personality Theory**

I have written elsewhere about what personality theorists have to say about the value of character as a basis for predicting behavior. Here, I provide only a summary of my accounts in order to respond to Park’s criticism of personality theories.

Early psychologists believed that certain attributes or mental structures called “traits” comprised the personality and that it was a unique combination of these traits that set one personality apart from all others. Allport, one of the most influential founders of trait theory, believed that traits were the most fundamental “dispositions” or constituents of personality. Whether viewed as constructs created for explanatory convenience or as mental structures that exist in people, trait theorists came to believe “that traits are relatively stable and enduring predispositions” that exert sufficient influence to produce generally consistent behavior across widely divergent situa-

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17. **MONAHAN, supra note 8, at 44.**

18. **My misgivings about the jurors’ ability to estimate correctly the defendant’s probable guilt from the misdeed evidence are not allayed by suggestions that errors in estimates can be reduced by training the jurors to make Bayesian calculations. Commentators are divided on whether such training makes any difference. See David McCord, A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond, 47 WASH. & LEE L. REV. 741, 816 (1990).**


20. **G.W. ALLPORT, PERSONALITY—A PSYCHOLOGICAL INTERPRETATION 286 (1937). He defined a trait as “a generalized and focalized neuropsychic system (peculiar to the individual), with the capacity to render many stimuli functionally equivalent, and to initiate and guide consistent (equivalent) forms of adaptive and expressive behavior.” Id. at 295.**
The application of trait theory to the trait for honesty illustrates their view of how the theory operates:

The unidimensional approach holds that a person is, or strongly tends to be, consistent in his behavior over many different kinds of situations. Thus a person who lies in one situation is not only likely to lie in other situations, but is also highly likely to cheat, steal, not feel guilty, and so on.\textsuperscript{22}

The focus on the predictive value of traits was not accidental: the value of any personality theory depends in part on its ability to predict individual behavior as well as to identify the elements that make an individual personality. As the example shows, trait theorists assumed that traits and their behavioral expressions corresponded directly.

Subsequent empirical research, however, not only failed to validate trait theory, especially its predictive attributes, but generally rejected it. Walter Mischel in particular found that "[t]he initial assumptions of trait-state theory were logical, inherently plausible, and also consistent with common sense and intuitive impressions about personality. Their real limitation turned out to be empirical—they simply have not been supported adequately."\textsuperscript{23} Instead, research conducted for much of this century showed that behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior. Mischel, who became a leading exponent of the new theory of situational specificity, explains:

First, behavior depends on stimulus situations and is specific to the situation: response patterns even in highly similar situations often fail to be strongly related. Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories. The more dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the same individual. \textit{Even seemingly trivial situational differences may reduce correlations to zero.}\textsuperscript{24}

To me, these findings undermine not only "common sense" or intuitive notions of the predictive value of personality traits; they threaten also the law's assumption about the probative value of character evidence. If, as a scientific matter, even trivial situational differences can render behavioral predictions invalid, then in my judgment, character evidence should not serve as the basis for in-court

\textsuperscript{21} WALTER MISCHEL, PERSONALITY AND ASSESSMENT 6 (1968).
\textsuperscript{22} Burton, Generality of Honesty Reconsidered, 70 PSYCHOL. REV. 481, 482 (1963).
\textsuperscript{23} MISCHEL, supra note 21, at 147.
\textsuperscript{24} Id. at 177 (emphasis added).
predictions by experts or jurors about whether an individual engaged in specified behavior on a given occasion or was truthful as a witness.

Recent research by Mischel and his colleague, Yuichi Shoda, has not changed my opinion. Although Mischel generated much of the empirical evidence that individual differences in social behaviors tend to be surprisingly variable across different situations, he nonetheless did not conclude that all the assumptions underlying trait theory were false. Instead, after conducting additional research, Mischel and Shoda have proposed a new theory of personality that attempts to reconcile the paradoxical findings on the invariance of personality and the variability of behavior across situations. Their review of the empirical data convinces them that the very variability of behavior observed across situations reflects, rather than denies, "some of the essence of personality coherence."

In their new theory, Mischel and Shoda still reject Allport's theory that discrete predispositions or traits acting alone explain why individuals engage in certain behaviors across situations. Instead, they embrace and extend a competing theory that holds that personality is "a system of mediating processes, conscious and unconscious, whose interactions are manifested in predictable patterns of situation-behavior relations." But finding these predictable patterns requires more than resorting to recidivist studies or even to a complete history of the occasions in which a subject has engaged in the behavior of interest. As Mischel and Shoda acknowledge, "[t]o apply [their] theory to a particular substantive domain, one needs to identify the mental representations, and the interrelationships among them (i.e., their organization) in the processing system that underlie the behavior of interest."

If, for example, one wants to know whether a subject who cheats his clients is likely to understate his income, one would need to know how the subject perceives the two situations (cheating clients and cheating the government) psychologically: how he categorizes and encodes them cognitively and emotionally, and how those encodings activate and interact with other cognitions and affects in the subject's personality system. One would need to discover the active psychological ingredients in the two situations to begin to arrive at a valid personality profile or "if... then..." signature for the defendant.

26. Id. at 246.
27. Id. at 247.
28. Id. at 259.
Only by constructing such a personality profile could one predict with some confidence the likelihood that a particular defendant who cheats his clients also cheats on his taxes.

Mischel and Shoda acknowledge that their work is but a contribution toward a new conception of personality in which distinctive and stable patterns of behavioral variability are seen as reflecting essential expressions of an underlying stable personality system. It is thus doubtful that their findings can meet the tests for admitting expert testimony in a given case. More importantly, as intriguing as their findings may be, they do not make the case for repealing the ban on the use of character evidence. In its current stage of development, their theory cannot justify such a profound change.

Park and I differ in that Park does not think that the recent findings by Mischel and other leading personality theorists should prevent the repeal of the character evidence ban. Park underscores that their work was not directed at determining the probative value of character evidence (especially other-crimes evidence) and points to studies by others suggesting that "aggressive behavior, however engendered, once established, remains remarkably stable across time, situation, and even generations within a family."3

In particular Park cites the work of Susan Davies.31 After reviewing the psychological literature, Davies concluded that "most psychologists now recognize that, as a general matter, a lay person, given information about a subject's past behavior, can predict the subject's future behavior with a significant degree of accuracy."32 The degree of accuracy, however, is unclear, since Davies admits that "[c]ontemporary trait theorists willingly concede that they are unable to predict a single instance of behavior on a particular occasion with confidence."33 This admission is especially troubling since making these kinds of predictions is precisely what the reformers would have the jurors do.

Moreover, Davies' conclusion about the abilities of lay persons to predict a subject's future behavior with a high degree of accuracy contrasts sharply with John Monahan's finding that mental health experts are wrong two out of three times in their predictions of violence.34

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29. See Park, supra note 4, at 730-31.
30. Id. at 735 n.60 (citing MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 50 (1990)).
31. See id. at 728.
33. Id.
34. See supra text accompanying notes 15-17 (citing MONAHAN, supra note 8, at 44).
Unlike the lay persons Davies may have in mind, the mental health experts Monahan studied had extensive information about their subjects. Their predictions were based on in-depth clinical examinations as well as "a meticulous reconstruction of the life history elicited from multiple sources—the patient himself, his family, friends, neighbors, teachers, employers, and court, correctional and mental hospital [records]." The richness of this life history stands in stark contrast with the paucity of information the reformers would put before the jurors. Evidence of uncharged misdeeds does not amount to a life history. Even Davies concedes that a "generalized trait of character cannot be inferred from one or two instances of a person's behavior." Her assessment notwithstanding, therefore, the psychological literature at best suggests that social scientists are in disagreement about the value of past behavior in predicting future behavior. They disagree about the probative value, if any, of other misdeeds in fixing the responsibility for the misdeed charged. Since in addition there are reasons rooted in intuition as well as in social science for believing that evidence of other misdeeds may give rise to a different kind of inferential error, I do not think that Davies' assessment of the psychological literature makes a convincing case for repealing the ban on the use of character evidence.

Attributional Error

Park points out that a principal argument against repealing the ban on character evidence is the fear that jurors might give character evidence undeserved weight. Indeed, I have argued that studies by social scientists indicate that this might well be the case. Park suggests that psychologists have also found that people give greater weight to unfavorable, unpleasant, or socially derogatory information about a person than to information of equal intensity but of a positive nature. See, e.g., Hamilton & Huffman, Generality of Impression—Formation Processes for Evaluative and Nonevaluative Judgments, 20 J. Personality & Soc. Psychol. 200, 201, 204 (1971); Schneider, Implicit Personality

35. MONAHAN, supra note 8, at 44.
36. Davies, supra note 32, at 519.
37. See Park, supra note 4, at 738.
38. See Méndez, California's New Law on Character Evidence, supra note 19, at 1044. Psychological studies confirm the law's intuitive belief that character evidence can be highly prejudicial. One reason for the prejudice is the setting—the courtroom—in which the character evidence is heard. Gustav Ichheiser found that, in classifying others, people are motivated by two factors: "by the attitude of the person performing the classificatory act and by the situation in which this act is being performed. However, as a rule, the situation seems to be the dominant factor." Gustav Ichheiser, Misunderstandings in Human Relations—A Study in False Social Perception, 55 AM. J. SOC. 1, 34 (Supp. 1949). Because an accused is tried in a setting where wrongdoing is explored, Ichheiser's findings suggest that jurors are more likely to be receptive to character evidence suggesting guilt than to character evidence suggesting innocence.
gests that one way to remedy the attributional error is by providing the jurors with more, not less, character evidence:

Consider a consent defense rape case in which the complainant testifies that she was raped, the defendant claims that she consented, there are no eyewitnesses other than the two principals, and the circumstantial evidence is equivocal. . . . Excluding other act evidence does not prevent jurors from making character attributions. It merely means that the character attributions will be based on trivial and misleading data . . . , such as the attractiveness of the defendant and complainant, the coherence of their stories (which have been polished extensively by lawyers), . . . stereotypical thinking about characteristics such as race, gender, and social class, [and] demeanor evidence.

Character attributions are unavoidable. The question is whether accuracy would be promoted by admitting other-acts evidence . . . . Merely pointing out the phenomenon of lay dispositionism does not provide an answer to [that] question. 39

Park's argument that attributional error can be reduced or eliminated by furnishing the jurors with more character evidence, including the personal histories of the major players, rests on a presupposition I do not share, namely, that character has been shown to be a good predictor of conduct. Moreover, it assumes that jurors will be adept in making predictions from the evidence if only given more.

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39. Park, supra note 4, at 741.

*Theory: A Review, 79 PSYCHOL. BULL. 294 (1973). But see Weinstein & Crowdus, The Effects of Positive and Negative Information on Person Perception, 21 HUM. REL. 383, 389 ("The basic hypothesis that negative information has greater saliency than positive information for person perception was generally not supported [by the study].").

This finding suggests that jurors are likely to give greater weight to bad character than good character evidence, especially given the setting where the evidence is heard. But perhaps the factor that most induces jurors to overestimate the probative value of character evidence is what psychologists call the "halo effect." ALLPORT, supra note 20, at 521. The term refers to the propensity of people to judge others on the basis of one outstanding "good" or "bad" quality. Id. Combined with the tendencies to see others as simple people whose behavior is easily predictable and to give greater weight to negative information, bad character evidence can induce jurors to reach unfavorable conclusions about a person's behavior which the evidence simply cannot support.

As Park correctly notes, the psychological studies did not test the prejudicial effects of bad character evidence directly. See Park, supra note 4, at 739-40. Yet they do support the law's intuitive judgment that character evidence is unduly prejudicial.

Attributional error can also result because jurors may assign an incorrect probability estimate to the uncharged misdeeds. Jurors who conclude that a defendant is guilty because "if he did it once, he did it again" are in essence saying that if he committed the uncharged misdeed, there is a 100% probability that he committed the charged misdeed. Furnishing the jurors with the correct probability estimates and the appropriate base rates may not eliminate the risk that jurors will engage in unsupported probability estimates in determining the defendant's guilt. Research by Tversky and Kahneman indicates that people often ignore base rates even when available. See Tversky & Kahneman, supra note 11, at 4-5.
character evidence. As I have pointed out, however, studies show that mental health experts (with much more information about the "players" than Park suggests jurors should have) are wrong two out of three times in their behavioral predictions.\(^40\) Moreover, the call for more, not less, character evidence raises troubling questions concerning the retention of rape shield laws\(^41\) and the ability of trial judges and appellate judges to administer a rule calling for the discretionary admissibility of a great deal of character evidence.\(^42\)

**Nullification**

Just because Park rejects the claim that inferential error justifies retaining the ban on the use of character does not mean that Park calls for the unregulated admission of the evidence. He would empower trial judges to exclude the evidence on the grounds of cost and surprise, as well as the danger of jury nullification.\(^43\) As Park explains: "If character could be explored freely, triers would be tempted to give litigants what they deserve, not what the law requires under the particular facts of the case."\(^44\)

One of Park's most valuable contributions to the debate on character evidence is helping us see more clearly the dangers of jury nullification. For those of us with serious reservations about repealing the ban on the use of character evidence, Park's concerns about jury nullification supply an additional reason for retaining the status quo. To Park, however, the concern with jury nullification makes the case only for excluding the character evidence in a particular trial and not in all trials. Judges, Park believes, can be trusted to exclude the

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40. *See supra* note 15 and accompanying text.
41. Whatever changes may be made to the rules governing the use of character evidence, Park does not favor weakening the rape shield laws. I raise the rape shield laws, not as a red herring, but because neither Park nor I can guarantee that some legislators favoring the repeal of the character evidence ban would not also favor repealing these laws.

That the evidence excluded by the rape shield laws is irrelevant is by no means settled. The California Constitution mandates the use of all relevant evidence in criminal trials subject to certain exceptions. The sponsors of the initiative that gave rise to this constitutional provision made sure that the rape shield laws were expressly exempted from the mandate. *See* CAL. CONST. art. I, § 28(d).

42. One of Park's concerns is with regard to giving judges discretion to exclude character evidence on the ground of attributional error, i.e., the risk that the jurors might give the evidence undeserved weight. To Park, judges, like jurors, are also subject to attributional error and may wrongfully withhold character evidence from the jurors by giving undeserved weight to the scientific evidence about how jurors might give excessive weight to bad character evidence. *See* Park, *supra* note 4, at 744-45. But Park's concern will remain academic as long as the ban on the use of character evidence is retained.

44. *See* Park, *supra* note 4, at 745.
evidence on this ground when necessary. Unlike jurors, they can better appreciate why it would be wrong to punish a defendant for his uncharged misdeeds.\textsuperscript{45} I do not disagree with Park's assessment of judges in this respect. His observation accords generally with my experiences as a criminal defense lawyer. Others with different experiences may not agree. There is no need to resolve this controversy, however. So long as we retain the ban, we will not have to worry about whether judges can or cannot appreciate the importance of not punishing defendants on account of who they are.

**Limited Discretion**

Park's conclusion is that we should consider committing the use of other-crimes evidence to the discretion of the court.\textsuperscript{46} That discretion would not be unbridled; he would require the trial judge to apply specific guidelines in determining whether the probative value of the evidence is substantially outweighed by its costs. Among the factors the judge would have to consider in assessing its probative value are method, frequency, and temporal proximity.\textsuperscript{47}

My objection to this approach is that it is tantamount to the virtual free admissibility of character evidence. Given the prevailing get-tough-on-criminals attitude, I am concerned whether judges subject to election are likely to exercise their discretion to exclude evidence of other misdeeds by the accused. As for appointed judges, as Park acknowledges, "[a]ppointment by the governor does not convey immunity to flaws in reasoning about behavior."\textsuperscript{48} In any case, most sitting judges in California have been appointed by conservative governors who have made fighting crime a major theme. Many appointments not all former prosecutors are incapable of rising to the standards of impartiality demanded of judges. But especially in these days when criminal defendants have replaced the Communists as the principal bogeymen, appointment by the governor, as Park cautions, is no guarantee of impartiality.

Another reason for believing that reform would result in the almost free admissibility of bad character evidence is the virtual unreviewability of a trial judge's decision to admit the evidence. The judge's decision, though guided, still would be discretionary. Appellate judges are loathe to second guess and reverse discretionary rulings by trial judges. Their reluctance is enshrined in appellate rules that require the appealing party—the criminal defendant in this

\textsuperscript{45} See id. at 30-31.
\textsuperscript{46} See Park, supra note 4, at 777-79.
\textsuperscript{47} See Park, supra note 4, at 736-38 and accompanying notes.
\textsuperscript{48} See Park, supra note 4, at 744.
case—to show not only that the ruling was wrong, not only that it prejudiced him in the conventional sense, but that the judge's call amounted to an abuse of discretion. In terms used by the California courts, the abuse must be "palpable," meaning that the appealing party must convince the appellate judges that the trial judge exercised his or her discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." Since there will always be some evidence independent of the bad character evidence to support the guilty verdict, appellate judges simply will not find that the trial judge's ruling rises to the kind of arbitrary conduct that results in a violation of the standard.

In addition, the California experience with detailed rules designed to regulate judicial discretion has yielded mixed results. As in many jurisdictions, the use of convictions to impeach witnesses, especially the accused, has been controversial. Almost thirty years ago the California Supreme Court laid down rules to guide trial judges in determining under what circumstances to admit convictions. Despite their clarity and sensibility, the rules have spawned so much appellate litigation that the California courts may have devoted as much time to reviewing rulings admitting convictions as to reviewing rulings allowing uncharged misdeeds to be used for a non-character purpose.

It might be argued that the more liberal admission of character evidence would reduce the amount of judicial resources devoted to determining the admissibility of past misdeeds to prove a non-character purpose. Since the evidence in most instances would be admissible for a character purpose in the first place, the controversies over its admission for a non-character purpose would disappear. That indeed might be the case. But given the powerful inducements which the adversarial system gives to parties to raise all issues that plausibly could affect appellate judges, there is every reason to believe that any savings in judicial resources would be offset partially, if not entirely, by appellate attention to disputes over whether trial judges properly exercised their discretion under the guidelines.

52. Compare the large number of appellate decisions reviewing the use of convictions to impeach discussed in Mendez, California Evidence, supra note 5, at § 15.07, with Professor Imwinkelried's finding that the use of other crimes evidence has been the subject of more published opinions than any other provision of the Federal Rules of Evidence. Miguel A. Mendez & Edward J. Imwinkelried, People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct, 28 Loyola L. Rev. 473, 475 (1995).
Adversarial Fairness

If we permit evidence of bad character to be offered against the accused to prove his guilt, then adversarial fairness mandates that the accused be allowed to use both good and bad character evidence to show the improbability of his guilt. If his misdeeds can be used to prove his propensity to commit the misdeed charged, then his good deeds should likewise be admitted to prove his propensity to refrain from committing the misdeed charged. More importantly, evidence of his accusers' propensity to engage in conduct which under the substantive criminal law excuses or mitigates the misdeed charged, should likewise be admissible. Self-defense in assault and homicide prosecutions would open the door to this kind of victim character evidence. But character evidence about the victim's propensities would also extend to crimes in which the victim's consent is an issue. The implications for the rape shield laws are grave.53

Free admissibility also means giving the accused an opportunity to use bad character evidence to prove that someone else committed the crime. In a bad check prosecution, if the prosecutor may now offer evidence that the accused passed another bad check a year earlier, then the accused should be given an equal chance to prove that someone else committed the offense by evidence that that individual also had access to the victim's store and passed similar bad checks there and elsewhere during the period in question.

Opening the gates to more character evidence means opening them up to more evidence of uncharged misdeeds. Such evidence will consist of specific misdeeds, which, like criminal misdeeds tried in American courts, will require their own proof and disproof under the rules of evidence. Thus, a trial on whether the accused assaulted the victim could degenerate into a series of trials on whether the accused committed other assaults on other occasions and on whether the victim was the first aggressor on other occasions. If the lighting conditions make it impossible for the victim to positively identify the accused as his attacker, there could also be an additional trial on whether someone else could have been the attacker. That might entail a trial on whether that person committed assaults on other occasions.

Of equal concern, the free admissibility of uncharged misdeeds to prove the elements of a crime necessarily raises questions about

53. The rape victim's propensity to engage in assaults or deadly conduct would not. of course, be at issue. But the victim's propensity to engage in consensual sex would. Park, however, makes it clear that he disfavors any changes that would weaken the rape shield laws. Moreover, he bases his arguments for change in part on the recidivist studies of violent behavior. There are, of course, no recidivist studies of rape victims.
the wisdom of restraints on using past deeds to attack or support the veracity of the witnesses called at the trial. Under the California Evidence Code, only convictions can be used as evidence of a witness's propensity to lie under oath.54 The Federal Rules are more liberal and allow a party also to impeach a witness through that witness's "prior bad acts."55 The character theory of impeachment is the same, however: convicts and people who engage in dishonest acts are not the kind of people who should be believed under oath, and jurors, therefore, should treat their testimony with caution. The California Evidence Code expressly prohibits the use of prior bad acts,56 and the Federal Rules limit their use by binding the examiner to the witness's answer.57 Accordingly, if on cross-examination a witness denies having cheated on the evidence final, the impeaching party cannot call the witness's professor to disprove the witness's answer.

Free admissibility of character evidence means allowing the professor to testify. It also means allowing a convict whose testimony is needed to prove why the conviction shouldn't count against his credibility. If he was wrongfully convicted or if he pled guilty, though innocent, to avoid the risk of a heavier penalty upon conviction after a trial,58 then the conviction would say nothing about his propensity to lie under the oath and the jurors should know that. But that would entail retrying the case in the middle of someone else's trial. It might also mean calling witnesses to establish the victim's predisposition to identify others accurately or inaccurately.

The limitations on impeachment are said to be justified by the desirability of preventing "sideshows" on credibility from taking over the "main show," i.e., the issues raised by the pleadings.59 But sideshows have the power to distract precisely because of an inescapable dynamic of adversarial trials. Trial lawyers know that whether they win or lose almost always depends on which witnesses the jurors choose to believe and which ones they elect to ignore. Since credibility almost always determines the outcome, good lawyers will do all they can to support their witnesses and to undermine the opposing witnesses. Trial lawyers know that misdeeds that are probative of mendacity are at least as valuable as misdeeds that are probative of the elements of the offense charged. Since credibility plays such a decisive role, shouldn't the per se rules prohibiting or limiting the use of uncharged misdeeds also be replaced by a rule committing their

54. CAL. EVID. CODE § 788 (West 1998).
55. FED. R. EVID. 609(b).
56. CAL. EVID. CODE § 787 (West 1998).
57. FED. R. EVID. 609(b).
59. MCCORMICK, supra note 1212, § 41.
admissibility to the judge's guided discretion?

If the answer to this question is "yes," then we can expect even more character evidence to be offered in criminal trials. Some character evidence will be directed at proving or disproving the elements of the offense. Other character evidence will be offered to support or impeach the witnesses called to prove the misdeed charged as well as other misdeeds offered to prove that the accused or someone else committed the misdeed charged, or that the victim engaged in misconduct that excuses or mitigates the harm allegedly caused by the accused. The potential for extended inquiry into "collateral" matters is mind-boggling. Confusion about the issues to be decided, I suggest, is a reason, though by no means the only one, for continuing the ban on the use of character evidence.

Another is the potential effect on adversarial fairness of extended inquiry into good and bad deeds. Park enumerates many of the claims on scarce judicial resources that might be made in the event the ban on the use of character evidence is lifted. Having been a member of the tribe, I want to focus on one constituency that may be especially disadvantaged by the freer use of character evidence. It is no secret that public defenders or appointed counsel serve as the defense lawyers in most prosecutions. Yet, in the competition for scarce resources, publicly funded defense lawyers have lost the race to prosecutors. I was a public defender in the mid-1970s, at a time when public support for defense work was at its most generous. Even then, prosecutors in my county outnumbered us by more than two to one and by more than three to one in investigators, although prosecutors had the support of the law enforcement personnel assigned to the case. Even in those comparatively good times we would have been hard-pressed to find resources to investigate misdeeds by crime victims and by individuals who might have committed the offense charged. In today's climate, where publicly funded lawyers have less resources, I worry whether the freer administration of other-crimes evidence may not turn out to be a one-way street open mainly to prosecutors.

Guidelines v. Rules of Thumb

Discussions about whether to retain or abolish the rule banning character evidence should take the concerns of trial lawyers into account. Nothing makes the planning of a trial more difficult than uncertainty about the judge's rulings on the admissibility of the evidence. Rules of thumb that call for the exclusion of evidence simplify the planning task. Committing the admissibility of the evidence to

60. See Park, supra note 4, at 744-45.
the judge's discretion complicates the task and also makes more uncertain one's assessments about whether the case should proceed to trial.

Replacing the rule banning the use of character evidence in criminal trials with one calling for its discretionary admission raises all of these concerns. Moreover, if the reform also includes abolishing the limits on the use of character evidence to support and attack the credibility of witnesses and committing the admissibility of such evidence to the judge's discretion, the uncertainties can only be compounded.

For over ten years, California lawyers trying criminal cases faced some of these uncertainties. As a result of a proposition approved by the electorate in 1982, it was unclear whether the ban on the use of character evidence had been repealed. Until the California Supreme Court ruled that the effects of the initiative had been (inadvertently) overridden by an amendment to the Evidence Code, it was uncertain whether the use of character evidence was committed to the judge's discretion. How did the bench and bar deal with this uncertainty? To my knowledge no studies are available to answer this question. But friends who are judges, prosecutors, and criminal defense lawyers report that there seemed to be a tacit agreement among the courtroom players to ignore the character effects of the initiative. That some judges and lawyers found the ban on the use of character evidence useful, if not indispensable, in the administration of criminal trials is worth pondering.

My reservations notwithstanding, Park presents a forceful case. It is characteristic of the care and reflection that we associate with his work. He looks at the evidence and concludes that the ban on the use of character evidence should be reconsidered, perhaps even relaxed, though probably not abolished at this time. I look at the same evidence and reach a different verdict. Clearly, Park has made the case for re-examining the validity of the assumptions underlying the ban. Just as clearly, he has established the need for a more focused scientific inquiry into these assumptions. I no longer embrace the view that character evidence is without value as a basis for predicting behavior in all circumstances, or that it invariably moves the trier to give the evidence undeserved weight. But neither am I convinced that doubts about the predictive value of character evidence or about the inferential errors it gives rise to have been satisfactorily dispelled. At

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61. Proposition 8 amended the California Constitution by mandating the admission of all relevant evidence, subject to certain exceptions, such as the discretionary exclusions. CAL. CONST. art. I, § 28 (d).
times, I simply don't know whether the proponents or opponents of change are right. Since I charge the proponents with the burden of persuasion, my ambivalence tells me that we should resist lifting the ban on the use of character evidence until we have better answers to our questions.

**Jurors v. Judges**

Tillers shares much of Park's skepticism of the reasons advanced for excluding character evidence. He is not convinced that all character evidence will invariably move jurors to decide the case on an emotional basis instead of by detached consideration of all of the evidence. Nor does he believe that jurors will consistently accord undeserved weight to character evidence, at least not any more than do judges who preside over bench trials. Tillers is concerned that character evidence might invite jurors to substitute their preferences for the law's, but, like Park, does not find the danger of jury nullification a sufficient justification for the categorical exclusion of the evidence.

Tillers' skepticism stems in part from his belief that even under the present system jurors are exposed to much character evidence. A realist, he shares trial lawyers' suspicions about the efficacy of instructions limiting the jurors' consideration of other-crimes evidence to some relevant non-character purpose. He doubts, as do I, whether misdeed evidence that might lead jurors to inferential error can somehow be cleansed of that contagion if repackaged under a non-character purpose label.

Tillers' skepticism is also rooted in the law's inconsistent treatment of jurors and judges as fact finders. Of all evidentiary prescriptions, the ban on the use of character evidence best reflects the law's distrust of the jurors' ability to handle relevant evidence with the detachment and reflection we expect of impartial fact finders. Though in theory the rules of evidence apply equally in bench and jury trials, appellate review rules betray a double standard. In reviewing rulings erroneously admitting evidence, appellate judges will assume that their trial brethren are capable of ignoring inadmissible evidence. Consequently, it is much more difficult to reverse a verdict reached by a judge than one rendered by a jury. Yet, there is nothing in the

64. See id. at 787.
65. See id. at 785-86.
66. See id. at 787-88.
67. See id. at 788.
68. See MCCORMICK, *supra* note 12, § 60.
training and work of judges that confers upon them a special immunity to the deleterious effects of character evidence. Thus, if jurors cannot be trusted to handle character evidence with the care it requires, neither can judges. Or put another way, if judges can be trusted with the evidence, so can the jurors.

Tillers' argument is appealing. But it is not as pertinent to criminal proceedings as one might think. Defendants who choose to place their fate in verdicts usually choose jurors, not judges, as their final arbiters. To be sure, strategic considerations sometimes do favor bench trials, but the circumstances giving rise to those considerations are rare. Still, the use of a double standard in assessing the capacity of jurors and judges to handle character evidence does leave me with a sense of unease.

Character v. Autonomy

Of Tillers' many contributions to the debate on the wisdom of banning character evidence, one of the most valuable is his insight into the connection between character and human autonomy. Tillers believes that respect for human dignity requires the law to treat human beings as autonomous, self-governing creatures. In his view, the use of character evidence is inconsistent with this model. Character evidence invites jurors to treat human conduct as the product of traits, instead of free will; consequently, respect for human autonomy requires the law to exclude uncharged misdeeds when offered to prove the defendant's predisposition to commit the charged misdeed.

Tillers cites Herbert Packer in support of his thesis. In his classic work on the nature and limits of the criminal sanction, Packer notes that our criminal model assumes free will, not because it has been proven that humans in fact have the capacity to choose between good and evil, but because in the absence of a practical alternative, this model allows us to locate that point before which the individual

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69. See Tillers, supra note 63, at 795.
70. An example of the kind of behavior Tillers may have in mind is illustrated by research on the effects of child abuse on later violent behavior. According to Kaufman and Zigler, about 30% (plus or minus 5%) of all children who are physically abused, sexually abused, or extremely neglected will subject their offspring to one of these forms of maltreatment. Kaufman & Zigler, Do Abusive Children Become Abusive Parents?, 57 AMERICAN J. ORTHOPSYCHIATRY 186, 190 (1987) cited in J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW 369-70 (1990). Since the 30% who become abusive parents did not choose to be abused as children, under Tillers' autonomy model, it would be inappropriate to use their inclination to abuse as the basis for predicting their likelihood to abuse their own children.
71. See Tillers, supra note 63, at 794 n. 27.
is free from societally imposed constraints. The evolution of the insanity defense exposes some limitations on Packer’s claim. One would think that lack of volition resulting from mental illness should result in an acquittal by reason of insanity (I knew I was squeezing her neck, I knew that it was wrong, but I couldn’t help myself.). Though the American Law Institute definition of insanity includes lack of volition, that prong has now been repealed in those jurisdictions that came to accept it. Moreover, despite its consistency with first principles of criminal law, that prong was never accepted by those jurisdictions that retained only the traditional definition of insanity.

Still, inconsistencies between basic criminal law assumptions and current criminal doctrines do not drain Tillers’ point of all its vitality. But as a good scholar, Tillers points out several possible weaknesses in his argument. One of the more interesting is the question of whether character is necessarily inconsistent with autonomy. If character is not inherited, if it consists of traits that are self-imposed, then traits are the product of autonomy, and behavior shaped by such traits in the final analysis is the product of free choice.

A difficulty with this explanation is the lack of evidence that the mental qualities that define us and differentiate us from others are the result of free choice. Moreover, as Tillers seems to suggest, if having killed in the past is evidence of an inclination or propensity to kill, one has to ask how free the actor was in “electing” to kill in the first place. If he killed under coercion, then the example would not be illustrative of choosing to have a trait predisposing one to kill.

Tillers’ response is to appeal to Hegelian logic: that free choice is not synonymous with unconstrained choice and that free choice acquires meaning only in light of limitations that may be imposed upon a particular choice. But if this is true, one still has to worry about the nature of the “limitations.” If one chooses to kill in order to save one’s self, that “choice” could hardly serve as persuasive evidence that the actor has chosen to respond with deadly force in other situations. Whether one has chosen to acquire a particular trait seems to require an assessment of whether the past misdeeds evidencing the trait were themselves the product of free choice. Still, the need for such an inquiry argues against the categorical exclusion of character

73. AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01 (Tentative Draft No. 4) (1955).
75. See Tillers, supra note 63, at 794.
76. See id.
77. See id. at 808.
evidence. A rule of exclusion would have to be case specific. It would apply only if the judge were satisfied that the past acts offered as evidence of a freely acquired trait were not themselves the product of free choice. Interesting as this point is, I do question whether even a legislature that is not biased in favor of crime victims and against criminal defendants would approve of a rule requiring such high administrative costs.

What is Character?

Tillers makes another important contribution to the debate on the wisdom of retaining the ban on the use of character evidence by raising an issue that often is ignored. What does the law mean by "character evidence"? Tillers argues that character, as conceptualized by legislators, judges, codifiers, and legal commentators, is merely a fortuitous aggregation of attributes and propensities. To Tillers, such a conception is nonsense, as it is but a reflection of Hume's assertion that human knowledge consists essentially of information we acquire through our senses and that information so acquired does not lend itself to determinations about the causes of events (including a determination about why we may behave in specific ways on particular occasions).

Tillers maintains that the human personality has more substance. He believes that "human creatures have an internal system of rules, principles, procedures, or operations that regulates, directs, or organizes their behavior and activity ..." To understand what people are like, it will not do merely to describe their tendencies or dispositions.

The only reason that a description of a person's dispositions or tendencies ever works—the only reason that such a description ever "says" anything about a person's likely behavior—is that either the person providing the description or the person receiving it implicitly provides or infers the rules and operations that "cause" the described disposition or tendency. There must be some rule or principle or set of rules or principles that "generates" the disposition. Otherwise, there is no basis for making any judgments about when—under what circumstances—the disposition in question might swing into action.

Mischel would not disagree. Individuals do possess such a sys-

78. See id. at 818.
80. See id. at 825.
81. See id. at 827.
82. Id. at 827-28 (emphasis in the original).
tem, one that helps explain behavioral choices. Individuals possess personalities, not in the static sense contemplated by the trait theorists, but a dynamic though "stable system that mediates how the individual selects, construes, and processes... information and generates social behaviors..."\(^8\) It is the stability of the system that, with proper testing, can allow an expert to predict a subject's behavior with some degree of confidence.

Should we retain, abandon, or reform the rules governing the use of character? Tillers thinks that in light of the complexities attending the nature of character, it would be prudent "to pause before performing radical surgery on the remnants of the character evidence rule."\(^9\) Tillers also believes that some of the nonconventional reasons he advances for retaining the ban warrant further study. I agree. Values beyond misdecision and adversarial fairness may justify the ban. Tillers' insights into the relationship between character and autonomy especially merit more attention.

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83. Mischel & Shoda, supra note 26, at 246.
84. See Tillers, supra note 63, at 831.