2023

The Future Scope of the Character Evidence Prohibition: The Contextual Statutory Construction Argument that Could Finally Force the Policy Discussion

Paul F. Rothstein  
*Georgetown University Law Center*, rothstein@law.georgetown.edu

Edward J. Imwinkelried  
*University of California, Davis*

This paper can be downloaded free of charge from:  
https://scholarship.law.georgetown.edu/facpub/2532  
https://ssrn.com/abstract=4533870

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub  
Part of the Evidence Commons, Law and Society Commons, Legal History Commons, and the Legislation Commons
THE FUTURE SCOPE OF THE CHARACTER EVIDENCE PROHIBITION: THE CONTEXTUAL STATUTORY CONSTRUCTION ARGUMENT THAT COULD FINALLY FORCE THE POLICY DISCUSSION

Paul F. Rothstein*

&

Edward J. Imwinkelried**

*Carmack Waterhouse Professor of Law, Georgetown University.

**Edward L. Barrett, Jr. Professor of Law Emeritus, University of California, Davis.
“[T]he meaning of statutory language, plain or not, depends on context.”


The general prohibition of the use of character evidence is one of the most important doctrines in American Evidence law. The prohibition limits the ability of a proponent to introduce evidence in the form of reputation, opinion, or specific acts to prove a person’s character and then use that character as circumstantial proof of the person’s conduct—that is, to support the inference that on a particular occasion, the person acted “in character” consistently with their character. In short, the prohibition ordinarily bars the proponent from relying on the following theory of logical relevance:

THE ITEM OF EVIDENCE
(reputation, opinion, or specific acts) ———— INTERMEDIATE INference

(the person’s character) ———— FINAL INference
(conduct “in character”).

Federal Rule of Evidence 404(a) reflects the general common-law stance: “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”

The rationale for the prohibition consists of a combination of two probative dangers. Again, the first step in character reasoning is offering testimony about a person’s reputation, an opinion regarding the person, or the person’s specific acts in order to justify the inference that the person has a particular character. It is an axiom of American jurisprudence that “we try cases, rather than persons.” The Supreme Court has held that the Eighth Amendment prohibition of Cruel and Unusual Punishment forbids the creation of status offenses in adult prosecutions. Even apart from the constitutional consideration, in Justice Cardozo’s words character evidence poses a “peril to the innocent.”

2. Id.
person the accused is. As Justice Brennan once observed, when the jury is compelled to do so, there is a substantial risk that at a subconscious level they may be tempted to convict him or her for their past misdeeds “even if he [or she] is not guilty of the offense charged.” 7 The great utilitarian philosopher, Jeremy Bentham, referred to this danger as the risk of “misdecision,” 8 that is, the risk that the jury will convict on an improper basis. 9

Assume that the jury decides to infer that the accused possesses a certain character. Next, as the diagram indicates, the jury must proceed to determine whether to draw the second inference, namely, that the accused acted consistently with that character on the occasion alleged in the pleadings. The second inference gives rise to another probative danger, that is, overvaluation. The available psychological research tends to show that the constructs of a person’s general character or character traits are poor predictors of the person’s conduct on a specific occasion. 10 Situational factors tend to be more influential. 11 In a comprehensive survey of the published data, one researcher reported that when a decisionmaker attempts to infer a person’s character from a single instance of the person’s conduct, the level of predictability was “at best .30” 12 —less than random chance. Thus, by relying on character as circumstantial proof of conduct, the trier of fact can easily err.

To be sure, the prohibition is not absolute. Since the accused is the litigant most likely to be prejudiced by bad character evidence, the common law not only gave the accused a general veto over the admission of such evidence. The common law also recognized a “mercy rule,” allowing the accused to elect to waive the prohibition and use his or her good, law-abiding character as circumstantial proof of lawful conduct on the occasion alleged in the pleadings. 13 Federal Rule of Evidence 404(a)(2)(A) codifies the “mercy rule.” 14 If the accused elected to do so, at common law as a matter of fairness the prosecution was permitted to rebut. 15 Rule 404(a)(2)(A) recognizes that rebuttal right. 16 However, at common law, when the “mercy rule” and the prosecution’s rebuttal right came into play, both sides were limited to reputation or sometimes opinion testimony. 17 Federal Rule 405(a) is in accord. 18

Like reputation and opinion testimony, evidence of a person’s specific acts can be logically relevant to show the person’s character. However, both the common law 19 and the Federal Rules treat specific acts testimony differently than reputation and opinion testimony. Federal Rule 404(b) is in point:

---

8 6 Jeremy Bentham, The Works of Jeremy Bentham 105-09 (J. Bowring ed. 1962),
13 McCormick on Evidence, supra note 1, at § 191.
15 McCormick on Evidence, supra note 1, at § 191.
17 McCormick on Evidence, supra note 1, at § 191.
19 McCormick on Evidence, supra note 1, at §§ 190-190.11.
Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

Permitted Uses. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.  

Even states that have not modeled their evidence codes after the Federal Rules have enacted similar statutes. By way of example, like Rule 404(b)(1), California Evidence Code § 1101(a) announces a general rule that “evidence of a person’s character or a trait of his or her character . . . in the form of . . . evidence of specific instances of his or her conduct . . . is inadmissible when offered to prove his or her conduct on a specified occasion”;

and Evidence Code § 1101(b) is analogous to Federal Rule 404(b)(2). This sort of evidence is so potent that a judge’s ruling on a proffer of specific acts evidence can be the turning point in a trial.  

It should come as no surprise that trial court rulings on the admission of specific acts testimony proffered under Rule 404(b) are the most frequently litigated evidentiary issue on appeal in federal court.  

Rule 404(b) is cited on appeal more than any other provision of the Federal Rules of Evidence.

Although the general character evidence prohibition has an ancient lineage, commentators have challenged the breadth of the prohibition. In 1995, the lead author of this article contended that testimony about very particularized propensities can be so probative that such specific propensity testimony should be admissible.  

He reiterated that contention in 2015. Most recently, in 2021, Professor Steven Goode elaborated the policy argument that the prohibition ought to be narrowed and that evidence of “specific propensity” should not be subject to the prohibition. Building on the work of prior commentators such as Professor Rothstein, Professor Goode contends that properly defined, specific propensity is so highly relevant that its probative worth outweighs the probative danger of prejudice. 

He wrote that in order to characterize a behavioral pattern as “specific propensity,” the judge should find that: The pattern can be described with a high level of specificity, the pattern must

22 United States. Hawpetoss, 478 F.3d 820 (7th Cir. 2007)(“game over”).  
23 Capra & Richter, Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants, 118 Colum.L.Rev. 769, 771 (2018). See also McClennen, Admission of Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b)—It’s Time to Start Following the Rules, June 1990 Ariz. Attorney 13; Reed, Admitting the Accused’s Criminal History: The Trouble with Rule 404(b), 78 Temp.L.Rev. 201, 212 (2005); Sandler, Book Review: Trial Tactics by Stephen Saltzburg, 35 Litigation at 57, 59 (Wint. 2009).  
24 Capra & Richter, supra note 23, at 771 (“Rule 404(b) is ‘the most frequently utilized and cited rule of evidence and has generated more published opinions than any other subsection of the rules’”); Comment, They Did It Before, They Must Have Done It Again, the Seventh Circuit’s Propensity to Use a New Analysis of Rule 404(b) Evidence, 65 DePaul L.Rev. 1055, 1058, 1074 (2016)(“the most cited Rule of Evidence,” “the most challenged Rule of Evidence on appeal”).  
28 Id. at 787.
closely match the conduct alleged in the pleadings, the pattern should have been repeated with some frequency, and the conduct must be temporally proximate to the conduct alleged in the pleadings.  

In 2023, Professor Paul Rothstein and a colleague, Professor Ronald Coleman, made a different, but related argument, namely, a contextual statutory construction argument that can dovetail with the policy argument about specific propensity. Their article focused on the use of prior racist acts in hate crime prosecutions. Their article states that testimony about such acts can be critical in hate crime prosecutions because there is often little or no direct evidence on the central question of the crime’s racial motivation. In one part, the article identifies an original statutory construction argument that could push the law in the general direction as Professor Goode has proposed. The Rothstein/Coleman article points to a potentially significant linguistic difference between Federal Rules 404(a)(1) and (b)(1). As the article notes, while Rule 404(a)(1)’s statement of the general character prohibition includes both “character” and “character trait,” Rule 404(b)(1) mentions only “character.” The thrust of their argument is that in context, Rule 404(b)(1) could be construed narrowly as forbidding only the use of testimony about particular instances of conduct to show general character. The balance of their argument is that since unlike 404(a)(1), 404(b)(1) omits any mention of “character trait,” in context 404(b)(1) could be interpreted as allowing the proponent to introduce particular acts testimony to prove a specific character trait, in that article a racist character trait. The argument rests on the common sense notion that since 404(a)(1) and 404(b)(1) are situated so close together in the very same Rule, the drafters seemingly would have realized that they were using different wording in the two provisions.

The Rothstein/Coleman statutory construction argument is at the very least plausible; and, if anything, the current ascendance of the textualist school of statutory construction strengthens the argument. Professors Rothstein and Coleman do not describe themselves as textualists, and their article certainly does not state or imply that a judge may accept their argument only if he or she subscribes to textualism. Nevertheless, their argument rests on a contextual interpretation, reading Rule 404(b)(1)’s language in light of the wording of Rule 404(a)(1); and contextual arguments carry enhanced weight according to the now dominant textualist school. The textualist camp both questions the value of extrinsic legal history and elevates the importance of context, other provisions which like the text being

29 Id. at 788-801.
31 Id. In this respect, Rule 404(a)(1) is like California Evidence Code § 1101(a), explicitly applying the prohibition of evidence of both “character” and a “character trait.” Professor Imwinkelried is embarrassed to admit that although he has been studying Rule 404(b) for decades (E. Imwinkelried, Uncharged Misconduct Evidence (1984)), he had never noticed that difference in the wording of Rules 404(a) and 404(b). The observation of the difference between the wording of Rules 401(a) and 401(b) is a genuine insight and a contribution to the literature on the construction of Rule 404(b). Professors Rothstein and Coleman have to be commended for their careful parsing of the test of Rule 404.
32 Eskridge, Slocum & Tobia, Textualism’s Defining Moment (forthcoming)[“[d]espite the issues and criticism, the textualist momentum is not slowing, at least among the [federal] judiciary. Textualism is now clearly ascendant and will remain so for the foreseeable future”). Associate Justice Kagan has famously remarked, “We’re all textualists now.” Quoted in Garner, It Means What It Says, A.B.A.J., Apr. 2019, at 28.
interpreted enjoy the status of formal law. The textualist school cites separation of power concerns and urges courts to be wary of relying on extrinsic materials as a basis for rewriting statutes. Textualists point to substantial evidence that organized special interest groups often successfully manipulate extrinsic legislative history material such as committee reports. However, since the context (related statutes) also has the force of law, ascribing great weight to context does not raise separation of power concerns. Like the text being interpreted, contextual provisions are part of the “outcome” that the legislature as a whole has officially approved. If the courts were to adopt this contextual interpretation of Rule 404(b)(1), its adoption could dramatically liberalize the admissibility of specific acts testimony under the Rule. The proponent would not have to develop an argument that the testimony was logically relevant as circumstantial proof of conduct on a noncharacter theory such as identity or intent. Rather, the proponent could rely on the straightforward argument that the particular act testimony is relevant to show a specific relevant character trait of the accused.

Research reveals that to date, no federal court has approved of that argument and that there are no approved pattern jury instructions endorsing that interpretation of Rule 404(b). Again, though, that is understandable, since this is a truly novel argument. Remarkably, apparently no commentator had noticed the difference between the wording of Rules 404(a)(1) and (b)(1) until the Rothstein/Coleman article. As we shall see in Part II, this contextual statutory construction argument is potentially so

---


34 United States v. All Funds on Deposit in United Bank, 188 F.Supp.2d 407, 411 (S.D.N.Y. 2002).


37 King v. St. Vincent’s Hospital, 502 U.S. 215, 211 (1991)(“the meaning of statutory language, plain or not, depends on context”).

38 Easterbrook, Statutes’ Domains, 50 U.Chi.L.Rev. 533, 547 (1983)(“[t]he legislative body as a whole . . . has only outcomes”).

39 Believing that the identification of a noncharacter theory of admissibility was their only option, prosecutors have sometimes presented spurious noncharacter theories to the courts; and worse still, courts have sometimes accepted the theories. Rothstein, supra, notes 25-26; Imwinkelried, Criminal Minds: The Need to Refine the Application of the Doctrine of Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent, 45 Hofstra L.Rev. 851 (2017); Imwinkelried, The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting of an Accused’s Uncharged Misconduct, 59 Cath.U.L.Rev. 156 (2010). The upshot is that in numerous cases, although the courts purported to enforce the character prohibition, they sustained the admission of testimony which was logically relevant only on the assumption of the accused’s personal, subjective bad character.
important—and a departure from some of the received orthodoxy about the interpretation of Rule 404(b)—that it warrants careful discussion. It is true that the original 2023 article lists the argument as merely one of seven potential “gateways” for introducing evidence of prior racist acts.⁴⁰ However, that constructional gateway deserves special attention in the Age of Statutes.⁴¹ The purpose of this short article is to encourage and facilitate the discussion of that gateway.

Part I of this article describes the evolution of the character prohibition. Subpart I.A points out that in the United Kingdom, the birthplace of the prohibition, the courts no longer enforce a rigid character prohibition. Subpart I.B adds that in the United States many jurisdictions have adopted “rape sword” statutes such as Rules 413-15.⁴² These statutes lift the bar of the prohibition in a few, selected categories of cases. The overwhelming majority of courts have construed these statutes as permitting the prosecution to establish an accused’s propensity as a child molester or sexual predator and then treat the propensity as circumstantial proof of the accused’s commission of an alleged molestation or assault. In short, in both the United Kingdom and the United States the general prohibition has been gradually but significantly weakened.

Part II of the article then elaborates on the contextual statutory construction argument identified in the Rothstein/Coleman article. Part II restates the argument and assesses the impact that the adoption of the argument would have on the scope of the character prohibition.

Part III of the article offers an evaluation of the strength of the contextual argument. Part III reviews the relevant text, context, and legislative history. To begin with, Subpart III.A considers whether a proponent of the current broad prohibition could dismiss the omission of “character trait” from Rule 404(b)(1) as a mere scrivener’s error: Would a judge be justified in simply inserting or reading “or character trait” into Rule 404(b)(1)? Assuming that even in the textualist era the scrivener’s error doctrine would permit a court to “correct” an omission, Subpart III.A nevertheless concludes that in the instant case the doctrine would not justify rejecting the argument. Subpart III.B then turns to the context, the other formal Federal Rule provisions relating to character evidence. Subpart III.B acknowledges that the contextual argument is attractive; its proposed interpretation of Rule 404(b)(1) rests on the wording of Federal Rule 404(a)(1), a provision that quite close to Rule 404(b)(1) in the text of Rule 404. However, Subpart III.B also considers other parts of the context, Federal Rule provisions that weaken the contextual argument because of the provisions’ inconsistent use of the terms “character” and “character trait.” Finally, Subpart III.C shifts to the extrinsic legislative history, the Advisory Committee Notes to Rules 404, 405, 608, and 609. Like the other parts of the context of Rule 404(b)(1), the Notes demonstrate that the drafters made a somewhat loose use of the expressions, “character” and “character trait.”

The Conclusion is a recommendation to the Advisory Committee. As previously stated, to date no court has seized on the omission of “character trait” from the text of Rule 404(b) as a justification for permitting a proponent to introduce specific acts testimony to prove a character trait and treat that trait as circumstantial proof of relevant conduct. Moreover, there do not appear to be any approved pattern instructions that would allow that use. However, those gaps are to be expected, since the contextual

⁴⁰ Rothstein & Coleman, supra note 30.
statutory construction argument is a novel theory that has gone unnoticed until now. Albeit novel, the argument is logical and plausible enough that it would be helpful to the courts if the Committee clarified its position on the construction of 404(b)(1). As the Conclusion notes, the Committee has two options: (1) intervening only for the limited purpose of clarifying the meaning of the key terms, “character trait,” and “propensity”; or (2) inviting a full discussion of the policy questions that have been raised about the scope of the character prohibition. As Part I notes, as the years have passed, the character prohibition has weakened significantly. A 2023 report by the British Law Commission, articles such as Professor Goode’s, and the more recent Rothstein/Coleman article arguably make this an opportune time for the Committee to invite a full-blown discussion of the policy merits of relaxing the prohibition to allow proof of particular character traits and perhaps specific propensity. Even if the Committee is unwilling to go the length of selecting option (2), the Committee should give serious consideration to option (1). Subparts III.B and III.C demonstrate that the drafters of the original Rules and Notes used “character” and “trait” loosely and inconsistently. Given the frequency of appeals involving Rule 404(b), greater clarity would be welcome.

I. THE EVOLUTION OF THE GENERAL CHARACTER PROHIBITION: ITS GRADUAL WEAKENING AND NARROWING

Although the general character prohibition has a long history in English and American law, in recent decades the prohibition has been gradually but steadily weakened in both the United States and England, the prohibition’s country of origin.

A. The Evolution of the Prohibition in the United Kingdom

In 1894, the Privy Council rendered its advice in Makin v. Attorney-General for New South Wales.\textsuperscript{43} The Council affirmed the common-law prohibition on character evidence. However, in 1975, the House of Lords purported to relax the prohibition. The Lords recognized that in exceptional cases, character evidence can have enough probative value to warrant admission.\textsuperscript{44} In practice, though, in the majority of post-1975 English criminal cases tended to find that the proffered character evidence was insufficiently probative to overcome the concerns about misdecision and overvaluation.\textsuperscript{45}

Most recently, in 2023 the English Law Commission released Consultation Paper 29 dealing with character evidence in sexual offense prosecutions.\textsuperscript{46} The paper both charts the development of the prohibition in England but explains the gradual relaxation of the prohibition in that country. In the paper, the Commission acknowledges that “[h]istorically”\textsuperscript{47} at early common law,

> evidence of a defendant’s bad character could not be used against them in determining the likelihood of guilt. This is because such evidence can be unfairly prejudicial, potentially influencing a jury’s reasoning inappropriately . . . . The risk is that a jury may take the view that a

\textsuperscript{43} [1894] A.C. 57 (P.C).
\textsuperscript{46} Law Comm’n, Consultation Paper 259: Evidence in Sexual Offenses Prosecutions (2023)
\textsuperscript{47} Id. at 209.
person who has previously committed a crime is more likely to have committed the offence now charged, regardless of whether the previous offence was of a different type or committed long ago. There may also be a risk that a jury’s decision will be affected by “moral prejudice” leading to a finding of guilt on the grounds that a person who has previously committed a crime is more deserving of punishment . . . . The [traditional] rule excluding bad character evidence to some limited exceptions . . . . 

However, at the turn of the last century English law broke sharply from the traditional rule. The Commission explained:

Our 2001 report, Evidence of Bad Character in Criminal Proceedings, recommended that the general exclusion of bad character should be reversed. That is, whereas at common law evidence of the defendant’s bad character evidence was inadmissible subject to limited exceptions (primarily, similar fact evidence), our view was that it should be inadmissible provided it satisfied certain criteria (which were not limited to similar fact evidence) and subject to procedural safeguards. Our recommendations were given effect in the Criminal Justice Act 2003 . . . ; that statute is now the primary source of law regarding bad character evidence. The CJA 2003 sets out the legal framework governing the admissibility of evidence of bad character of . . . defendants . . . .

Section 101(1) of the CJA 2003, enacted by Parliament, reads:

In criminal proceedings evidence of the defendant’s bad character is admissible if, but only if:

(a) all parties to the proceedings agree to the evidence being admissible,
(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
(c) it is important explanatory evidence,
(d) it is relevant to an important matter in issue between the defendant and the prosecution,
(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
(f) it is evidence to correct a false impression given by the defendant, or
(g) the defendant has made an attack on another person’s character.

The English Court of Appeal characterized this provision as Parliament’s attempt “to assist” in providing evidence needed to “convict[,] . . . the guilty, without putting those who are not guilty at risk of conviction by prejudice.” On the one hand, other CJA provisions such as § 101(3) preserve the trial judiciary’s discretionary power to exclude otherwise admissible evidence when the judge concludes that the admission of the evidence will have “an adverse effect on the fairness of the proceedings . . . .”

Section 101(1) identifies several factors that the judge should consider in deciding whether it will

---

48 Id.
49 Id. at 210-11.
50 CJA 2003, § 101(1).
52 Law Comm’n, supra note 46, at 223.
53 Id. at 214-15, 223-24.
be unfair to admit the testimony. For example, § 101(1)(c) directs the trial judge to weigh whether the testimony amounts to “important explanatory evidence.” On the other hand, the Act sweeps away the early, rigid prohibition on bad character evidence. The tone of the Act is telling. Rather than negatively announcing a general prohibition on character evidence, the introductory sentence of § 101(1) affirmatively describes the situations in which “evidence of the defendant’s bad character evidence is admissible . . . .” Moreover, the wording of none of the subdivisions (a)-(g) explicitly forbids introducing the testimony to prove the accused’s character and then treat the character as circumstantial proof of the accused’s conduct. Quite to the contrary, at several points in its commentary the Commission makes it clear that § 101 contemplates allowing the prosecution to rely on “propensity” or “tendency” reasoning.

**B. The Evolution of the Prohibition in the United States**

*Legislation Selectively Repealing the Prohibition*

Like the English Parliament, Congress and numerous state legislatures have adopted statutes making inroads on the general character prohibition. The difference is that while Parliament’s 2003 Criminal Justice Act relaxed the prohibition across the board in all types of cases subject to the Act, the American legislation has targeted specific types of prosecutions. For the most part, the American statutes have carved out exceptions to the prohibition in only sexual assault and child abuse prosecutions. For example, one of the “rape sword” statutes, Federal Rule 413(a), provides:

In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

For its part, Rule 414(a) reads:

In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

Rule 415 completes the trilogy of provisions by prescribing the same norm for civil actions involving allegations of “sexual assault or child molestation.” Concededly, the wording of these statutes does not explicitly lift the bar of the character prohibition. However, the lower courts have uniformly construed the last sentence in Rules 413-14, “The evidence may be considered on any matter to which it

---

54 Id. at 211, 213, 222, 225.
55 Id. at 213 n. 23. The Commission notes that “[i]n Australia, the uniform evidence law uses ‘tendency’: eg, Evidence Act 1995 (Cth), Part 3.6.”
56 However, California has enacted a similar statute for crimes against elderly or dependent persons (Cal.Evid. Code § 1109); and Georgia has adopted a comparable statute for gang offenses. Ga. Code Ann. § 24-2-2.
58 Id. at Fed.R.Evid. 414.
59 Id. at Fed.R.Evid. 415.
is relevant,” as allowing the prosecution to rely on propensity theories of logical relevance and treat the accused’s propensity as circumstantial proof of conduct on the alleged occasion.60

Numerous states have followed suit. Legislatures in Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Oklahoma, Oregon, Texas, Utah, and Washington all have adopted statutes limiting the scope of the prohibition.61 Like the Federal Rules, these state statutes focus primarily62 on sexual assault and child abuse prosecutions. The parallel to the Federal Rules continues because, as in the case of the Federal Rules, even state statutes that do not explicitly repeal “character” rules have been construed as permitting prosecutors to resort to propensity reasoning. For example, the pertinent California rape sword statutes, Evidence Code §§1108-09, state only that the uncharged misconduct covered by those statutes “is not made inadmissible by Section 1101”63 codifying the general prohibition of reasoning based on “character or a trait” of character. Sections 1108-09 themselves make no mention of “character,” “character trait,” “propensity,” or “disposition.” Yet, numerous California courts have interpreted those statutes as legitimating disposition64 theories of logical relevance to prove the accused’s conduct circumstantially.

Scholarly Criticism of the General Prohibition

For decades, American scholars have questioned the wisdom of continuing to enforce a broad general prohibition. Some critics have contended that in many cases, the distinction between character and non-character theories of logical relevance breaks down.65 Like their English counterparts, a number of American scholars have argued that the prohibition is overbroad because it excludes too much probative evidence. For instance, in 1982 Professor Richard Uviller defended the common understanding that character can be useful, probative evidence of conduct.66 As previously stated, in both 199567 and 2015,68 the lead author of this article argued that evidence of very particularized propensities ought to be admissible. In a student Note, Ms. Lisa Marshall also attacked the general

---

60 E.g., United States v. Reynolds, 720 F.3d 665 (8th Cir. 2013); United States v. Sioux, 362 F.3d 1241, 1244 (8th Cir. 2010); United States v. Summage, 575 F.3d 864, 878 (8th Cir. 2009), cert.denied, 558 U.S. 1156 (2010); Seeley v. Chase, 443 F.3d 1290, 1294 (10th Cir. 2006).
62 See authorities cited in note 56, supra.
67 Rothstein, supra note 25.
68 Rothstein, supra note 26.
prohibition because, in her judgment, the rigorous application of the prohibition could exclude a good deal of evidence needed to vigorously enforce civil rights laws.\(^{69}\)

As the Introduction noted, leading Evidence scholars have taken up the theme that the prohibition exacts an unacceptably high toll by barring probative evidence that would be of genuine assistance to the trier of fact. Professor Goode made the most recent case for the more liberal admissibility of character evidence in the form of very specific propensities.\(^{70}\) As previously stated, he listed four factors that a judge should consider in determining whether a person’s personal characteristic qualifies as a specific propensity: The pattern can be described with a high level of specificity, the pattern must closely match the conduct alleged in the pleadings, the pattern should have been repeated with frequency, and the uncharged conduct must be temporally proximate to the conduct alleged in the pleadings.\(^{71}\) Professor Goode characterized the items in the list as factors rather than full-fledged criteria. He stopped short of elevating the frequency factor to the status of a requirement for finding specific propensity. If, though, a judge treated frequency as a requirement or at least assigned great weight to that factor, testimony about a specific propensity as Professor Goode defines it could be highly probative.\(^{72}\) If the proponent’s foundation showed that a person had frequently repeated a behavioral pattern involving a particular type of violent conduct such as racist attacks, that testimony would obviously possess more probative value than either a general propensity for law breaking or even a more specific propensity for breaking laws proscribing violence.

While Professor Goode’s article makes the policy case for the admission of evidence of specific propensities, the new contextual statutory construction argument focuses on “character trait[s].” In part, the Rothstein/Coleman article expresses sympathy with Professor Goode’s contention that testimony about specific propensities can be very probative.\(^{73}\) The article approvingly cites Professor Goode’s article, just as Professor Goode’s article approvingly cites Professor Rothstein’s prior articles about propensity.\(^{74}\) However, the 2023 article’s contextual statutory construction argument relates to a seemingly broader type of personal characteristic, namely, “a character trait.” The gist of the argument is that since the wording of Rule 404(a)(1) refers to both “character” and “character trait” while the wording of 404(b)(1) mentions only “character,” in context 404(b)(1)-(2) could be construed as allowing proof of character traits. The article cites the illustration of a propensity for violence,\(^{75}\) a more generalized personal characteristic than a propensity for a specific type of violent behavior such as the use of a certain type of weapon or targeting a particular class of victims such as the members of a certain racial group. The article characterizes a general propensity for violence as “character” and the

---


\(^{70}\) Goode, supra note 27.

\(^{71}\) Id. at 788-801.

\(^{72}\) Imwinkelried, Using the Concept of Specific Propensity to Reform the Administration of the Rape Sword Rules, Federal Rules of Evidence 413-15: An Exclusionary Rule Criticized as Too Broad with Exceptions Also Faulted as Too Broad, 58 Crim.L.Bull. 433 (2022).

\(^{73}\) Rothstein & Coleman, supra note 30.

\(^{74}\) Id. at n. 176.

\(^{75}\) Id.
latter as “character trait.” If a court accepted the contextual argument and agreed with that interpretation of “character” and “character trait,” such character trait evidence would not be barred by 404(b)(1) and instead would be admissible under 404(b)(2).

II. THE CONTEXTUAL STATUTORY CONSTRUCTION ARGUMENT THAT COULD COMPEL THE FURTHER NARROWING OF THE CHARACTER PROHIBITION

The Introduction and Subpart I.B described the novel statutory construction argument identified by the Rothstein/Coleman article. The basis of the argument is contextual interpretation. As the Introduction noted, in the textualist era contextual arguments carry special force. Like text and unlike extrinsic legislative history materials, contextual provisions have the force of law. Consequently, reliance on context as a basis for construction does not pose separation of power concerns. The article makes a straightforward, essentially contextual argument:

----Rule 404(a)(1) is part of the context of Rule 404(b)(1). Rule 404(a)(1) is the very first provision in Rule 404. The two provisions were enacted at the same time and are closely adjacent in the same Rule.

----Rule 404(a)(1), stating the character prohibition, explicitly refers to both “character” and “character trait.”

----However, Rule 404(b)(1), stating the application of the prohibition to specific acts evidence, refers only to “character.”

----Ergo, interpreted in the context and light of 404(a)(1), Rule 404(b)(1)’s prohibition applies only to testimony about general character and does not bar evidence of particular acts probative of a more specific, relevant character trait. Such evidence is consequently admissible under Rule 404(b)(2).

Given the proximity of 404(a)(1) and 404(b)(1), one would think that the drafters had not inadvertent forgotten about “character traits” when they crafted 404(b)(1). As previously stated, the contextual argument seems eminently plausible.

The Potential Impact of Adopting the Statutory Construction Argument

The contextual argument is not only tenable; it is also potent. If a court were to embrace the argument, at the very least that construction of Rule 404(b)(1) would pave the way for introducing testimony about specific acts probative of personal characteristics that qualify as a “character trait.” Rules 404(a)(2)(C) provides insight into the drafter’s concept of “character trait”; that provision refers to “a character trait of peacefulness,” a much more particular characteristic than general, moral, law-abiding character. Rules 608 and 609 provide other important clues to the drafters’ notion of the level

---

76 Id. (“It is possible to view ‘character’ as very general (a propensity for violence . . . ) and a ‘character trait’ as a slightly more specific subset of character (e.g., . . . violence of a certain kind, e.g. racism), but not so specific that we would call it ‘specific propensity’ . . . “).

77 Id.

78 As previously stated, in their article Professors Rothstein and Coleman do not label themselves textualists. Moreover, they do not believe that a judge may accept their argument only if the judge embraces textualism. Nevertheless, the contextual nature of their argument can make it especially appealing to a textualist judge.


80 Id.

of generality appropriate for a “trait.” Those Rules refer to “a . . . character [trait] for truthfulness or untruthfulness.” As we shall see in Subpart III.C, the accompanying Notes are replete with explicit references to character traits at the same level of abstraction—for instance, a “character trait” for “peacefulness” or its converse “violence.” At a minimum, the adoption of the contextual argument would clear the way for admitting specific acts to prove that a person possessed such traits.

However, the adoption of the argument might well have a greater impact. As previously stated, like several earlier commentators including Professor Rothstein, Professor Goode has called for the admission of testimony about acts probative of highly particularized propensities. However, the commentators have employed varying terminology. For their part, though Professors Rothstein and Coleman view a propensity for violence as general “character” while they characterize a propensity for “violence of a certain kind, e.g. racism”) as a character trait, which would be admissible under their statutory construction argument. In contrast, the Advisory Committee Note accompanying the 2000 amendment to Rule 404 refers to a “character trait” for “violence.”

In his article, Professor Goode makes it clear that his conception of a specific propensity is a more particularized behavioral pattern than a character trait. In Professor Goode’s view, to qualify as an admissible propensity, the behavioral pattern must be capable of being described specifically and concretely and closely resemble the conduct alleged in the pleading. A mere propensity for “violence” would fall short; to satisfy Professor Goode’s standard, the behavioral pattern would presumably have to involve a certain species of violent conduct such as stabbings or ambush attacks. Professor Goode believes that as a matter of policy such testimony should be admissible specific propensity evidence while the Rothstein/Coleman article contends that the courts can reach the same result by a different route; they urge that the testimony would be admissible as a “character trait” beyond the scope of Rule 404(b)(1)’s prohibition.

Of course, after the courts had embraced the contextual argument, an advocate of the character prohibition might attempt to limit the reach of the contextual argument; they might contend that the contextual argument allows the admission of testimony about only character traits but not specific propensity. After all, although Rule 404 refers to both “character” and “character trait,” the Rule makes no mention of “propensity,” specific or otherwise. Furthermore, to date the lower courts have implicitly assumed that outside the setting of Rules 413-15, Rule 404’s ban on character evidence prohibits the admission of testimony about specific acts to prove propensity. Until Congress’ enactment of the rape sword provisions, Rules 413-15, apart from decisions involving the application of Rule 404(a)(2)(A)’s “mercy” rule allowing the accused to offer proof of good character and admitting prosecution rebuttal proof, there were no opinions expressly allowing proponents to introduce

---

82 Id. at Fed.R.Evid. 608-09.
84 Rothstein & Coleman, supra note 30.
85 Id.
86 Goode, supra note 27, at 788-801.
87 Id.
testimony about specific acts to prove “propensity” or “disposition.” For that matter, the “mercy rule” cases involve reputation and opinion testimony, not specific acts.

This attempt to limit the impact of the adoption of the contextual argument has a superficial appeal. However, in the final analysis, the attempt would probably fail. As we have seen, Professor Goode conceives the notion of a specific propensity as more particularized and, hence, more probative than a character trait. It would be nonsensical to admit less probative testimony about traits while excluding more probative testimony about specific propensities. Nor could the differential treatment of character traits and specific propensities be defended on the ground that the admissibility of the two types of evidence depended on different underlying theories of logical relevance. Quite to the contrary, the underlying theories of logical relevance would be essentially indistinguishable. Both theories are variations of the diagram set out at the beginning of this article. In both cases, the finder would initially have to decide whether to draw a particular type of inference from the specific act testimony. In one case, the inference would be the existence of a character trait. In the other, it would be the existence of a specific propensity. Whether the intermediate inference was the existence of a trait or a propensity, the first step would present Bentham’s risk of “misdecision.” Whether the intermediate inference was trait or propensity, the starting point would be the very same; the starting point would be an item of evidence describing a specific act or acts that the jury might find repulsive.

After deciding whether to draw the intermediate inference of the existence of a trait or a propensity, the jury would then have to decide whether to treat the inferred trait or propensity as circumstantial evidence of consistent conduct on the occasion alleged in the pleadings. At this point the use of the circumstantial theory to allow proof of propensity is more defensible than the use of the same mode of reasoning to prove character trait. Again, as Professor Goode conceives it, specific propensity is more probative than a character trait. The greater particularity of the behavioral pattern gives the propensity evidence additional probative force. Propensity reasoning therefore presents less of a risk of overvaluation than reasoning based on a character trait and, for that matter, makes it more justifiable to conclude that the probative value of the evidence outstrips the potential prejudice. The upshot is that if the courts were to endorse the contextual statutory construction argument, as a matter of logic the courts would be hard pressed to limit the inroad to character trait evidence. The greater probative value of specific propensity evidence would cut in favor of taking the next step and narrowing the prohibition to permit evidence of specific propensity as well.

III. AN EVALUATION OF THE STRENGTH OF THE CONTEXTUAL STATUTORY CONSTRUCTION ARGUMENT

In textualist analysis, the judge considers primarily three types of material: the text to be construed; the context, other related statutes; and extrinsic legislative history materials such as committee reports and, in the case of the Federal Rules of Evidence, the accompanying Advisory Committee Notes. Of course, the starting point is the text. However, as previously stated, context also plays a vital role in

---

89 See the cases collected in note 60, supra. See also note 39, supra (both authors believe that in many past cases, while purporting to admit specific acts testimony on only a noncharacter theory, courts have in fact accepted propensity evidence).


the interpretive process. In making the interpretive decision, the judge may rely on text and context without triggering separation of powers concerns, since both have the formal status of law.

Extrinsic legislative history matters are qualitatively different. They do not constitute formal law; and if a judge were to erroneously premise a decision to in effect rewrite a statute in reliance on such material, that decision would violate separation of powers. The judge would have reached an outcome that the legislature had not authorized. Under the earlier plain meaning approach to statutory construction, initially the judge had to confine his or her analysis to the four corners of the statute. If the judge could discern a plain meaning there, he or she was prohibited from even considering extrinsic material. In other words, the judge’s conclusion that there was no plain meaning evident in the text and context was a condition precedent to resorting to extrinsic material.

Textualism has supplanted the plain meaning school, but there are at least two strands of textualism, a more extreme school and a more moderate camp. Judges subscribing to the more extreme school sometimes take the same position as the advocates of the earlier plain meaning school: The judge may not turn to extrinsic materials unless the consideration of text and context does not yield a leading candidate meaning for the text.

However, today most avowed textualists reject that rigid position. Following the position taken earlier by Justice Frankfurter, they allow the judge to routinely consider extrinsic materials. However, they caution the judge to review extrinsic material with a healthy dose of skepticism. According to the moderate textualist school, the critical question is now whether to consider extrinsic material. Rather, the decisive question is how much the material, realistically assessed, should “count” for. One of the foremost textualists, Justice Scalia, wrote that while it is often safe for a judge to rely on “the broad outlines of purposes” set out in a legislative committee report, it can be a grave mistake for the judge to attach significant weight to passages describing “the [fine] details.” In addition, in construing the

---

92 King v. St. Vincent’s Hospital, 502 U.S. 215, 221 (1991)(“the meaning of statutory language, plain or not, depends on context”).
93 Caminetti v. United States, 242 U.S. 470, 490 (1917)(“When [statutory] words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations from . . . any extraneous source”).
97 Nunez, The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Re-examination, 9 Cal.West.L.Rev. 128, 131 (1972)(the author quotes Justice Frankfurter as writing that “[n]othing that is logically relevant should be excluded”; Justice Frankfurter attached the plain meaning school for “shutting off access to the very materials that might show [a statute’s meaning] not to have been plain at all . . . .”).
99 Eskridge & Frickey, supra note 94, at 698.
Federal Rules in cases such as Tome v. United States,\textsuperscript{101} textualist justices, including Justice Scalia,\textsuperscript{102} were willing to ascribe great weight to the Advisory Committee Notes to the Rules.\textsuperscript{103} That willingness is understandable. The Notes accompanied the draft Rules during the entire two year period in which Congress deliberated over the Rules;\textsuperscript{104} and when Congress disagreed with the position the Committee staked out in a Note, Congress usually explicitly stated its disagreement.\textsuperscript{105} Thus, although not drafted by members of Congress, as a general proposition the Notes are trustworthy evidence of the collective will of the Congress that enacted the Federal Rules.

In effect, moderate textualists treat the apparent meaning, yielded by text and context, as creating a strong,\textsuperscript{106} albeit rebuttable,\textsuperscript{107} presumption that the judge should select that meaning to assign to the text being interpreted. The presumption can yield in two exceptional cases. The first is a situation in which that meaning would lead to an absurd or perhaps unconstitutional result.\textsuperscript{108} The second is a situation in which the extrinsic material makes out an extraordinarily powerful showing\textsuperscript{109} that that meaning is contrary to the legislature’s collective will.

Given this interpretive framework, we turn to an analysis of the statutory construction argument that the omission of “character trait” in Rule 404(b)(1) signals that although a proponent may not introduce specific acts testimony to prove a person’s general “character” and treat character as circumstantial proof of conduct, under 404(b)(2) the proponent may use evidence of a more specific “character trait” in that manner. In sequence, we shall review the text to be interpreted, related Rules that form the context, and then the extrinsic Advisory Committee Notes.

**A. The Text to be Interpreted**

Once again, this question turns on the interpretation of Rule 404(b)(1):

**Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.\textsuperscript{110}

\textsuperscript{101} 513 U.S. 150 (1995).
\textsuperscript{102} Justice Scalia wrote that “the Notes are assuredly persuasive scholarly commentaries—ordinarily the most persuasive—concerning the meaning of the Rules.” Id. at 167.
\textsuperscript{105} E.g., Federal Rules of Evidence 2020-2021 Edition 67-70 (2020)(setting out the original Advisory Committee Note to Rule 410 as well as the reports of the House Committee on the Judiciary, the Senate Committee on the Judiciary, and the Conference).
\textsuperscript{106} United States v. Koh, 199 F.3d 632, 637 (2d Cir. 1999), petit. denied, 530 U.S. 1222 (2000).
\textsuperscript{109} Imwinkelried, “Importing” Restrictions from One Federal Rule of Evidence Provision to Another: The Limits of Legitimate Context, supra note 32, at 251 (2020)(the courts have also used such expressions as very clearly expressed, compelling, and overwhelming).
A proponent of applying the prohibition to character trait evidence might contend that the omission of any reference to “character trait” in 404(b)(1) is a mere scrivener’s error that the judge has the power to correct.

The jurisprudence on statutory construction has long recognized the scrivener’s error doctrine. In one Louisiana case, the drafter had evidently inadvertently added the prefix “un” at the beginning of the word “lawful.” The court took “cognizance of the fact—which is obvious—that this substitution of the word ‘unlawful’ for the word ‘lawful’ was an accident.” In other cases, courts have asserted the power to correct what they deemed to be obvious errors in using “or” rather than “of” and “or” rather than “and.”

However, in the instant case, inserting “character trait” into Rule 404(b)(1) would not simply correct a clerical or typographical error such as changing “of” to “or.” Rather, the proposed insertion involves correcting a supposed omission, filling a claimed gap in the text. Some courts refuse to extend the doctrine to supplying omissions; one court refused to “venture upon the dangerous path of judicial legislation to supply omissions . . . in matters committed to a co-ordinate branch of government.” The court asserted that out of respect for separation of powers, it is “far better to wait for necessary corrections” by the legislature. The advent of textualism strengthens the argument that the judge should refrain from rewriting a statute by inserting words and adding to its substance. Yet, other courts still assert the power to correct inadvertent omissions.

Even positing the continuing existence of that power, there is a strong argument that it would be inappropriate to exercise that power to insert “or character trait” in Rule 404(b)(1). As recently as 2021, the Supreme Court cautioned that judges ought to apply the scrivener’s error doctrine only in exceptional circumstances. The lower courts have used various expressions to define those circumstances. For example, they have stated that a judge should invoke the doctrine only when, on its face, the seeming meaning of text of the statute is patently absurd, bizarre, nonsensical.

---


114 Dunn v. Mississippi State Dept. of Health, 708 So.2d 67 (Miss. 1998).

115 Fried, supra note 111, at 590, 593.


117 Id.


119 State v. Dunn, 591 N.W.2d 635 (Iowa 1999).

120 Niz-Chavez v. Garland, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021). See also United States v. Kempter, 29 F.4th 960 (8th Cir. 2022)(the doctrine is a narrow exception).

121 Fried, supra note 111, at 593, 600, 604.

122 Id. at 600, 604.

123 Id. at 595, 597 (quoting Justice Scalia), 598, 604. Some have used even more emphatic language, demanding that the result be completely (id. at 600) or extremely absurd. Id. at 606.

124 Id. at 592, 603.

125 Id. at 595, 600.
outlandish,\textsuperscript{126} or ridiculous.\textsuperscript{127} Of course, the rub here is that inserting “character trait” would not be absurd in that sense. Scholars such as Professors Rothstein and Goode have made the perfectly rational argument that in some cases it will advance the search for truth to admit testimony about specific acts which are probative of character traits and/or specific propensity. Adopting that argument might represent something of a departure from the traditional American antipathy to bad character evidence, but it cannot be said that doing so would be absurd, irrational, or ridiculous.

\textit{Summary}

In short, the proponents of the traditional broad prohibition cannot moot the contextual statutory construction argument by the expedient of invoking the scrivener’s error doctrine to read “or character trait” into the text of Rule 404(b)(1). Excluding evidence of character traits from the scope of 404(b)(1)’s prohibition may be debatable as a matter of policy; if a character trait were defined as a propensity for a large category of criminal conduct such as violence, an opponent of exclusion might argue that the evidence has insufficient probative value to run the risks of misdecision and overvaluation. However, it cannot be said that excluding testimony about traits from the scope of Rule 404(b)(1)’s prohibition is so irrational that a judge would be warranted in inserting “or character trait” into the text. Thus, the proponents of the traditional broad character prohibition cannot rely on the scrivener’s error doctrine to defeat the contextual statutory construction argument.

\textbf{B. The Context of the Text to be Interpreted}

As we have seen, the emergence of textualism has enhanced the importance of context in statutory construction while simultaneously reducing the weight ascribed to extrinsic legislative history material. As Part II pointed out, the Rothstein/Coleman article makes a classic contextual argument. The text to be interpreted is Rule 404(b)(1)’s language stating the application of the character prohibition to specific acts testimony. While the text of Rule 404(b)(1) omits any reference to “character trait,” Rule 404(a)(1)—a nearby part of the context of 404(b)(1)—includes the wording, “or trait.”\textsuperscript{128} The article therefore argues that read in context, the text of 404(b)(1) should not be interpreted as barring specific acts testimony relevant and sufficient to establish the existence of a character trait. This is an especially strong contextual argument. Not only were provisions 404(a)(1) and 404(b) written at the same time by the same drafters; they are also closely adjacent provisions in the very same Rule. If the court considered Rule 404(a) as the only relevant or most salient context, a court might well find the contextual statutory construction argument persuasive. After all, Rule 404(a)(1) is not only the very first provision in Rule 404; (a)(1) is also the purported definition of the scope of the character prohibition under the Federal Rules.

However, 404(a)(1) is not the only relevant context. There are other pertinent provisions in the Federal Rules’ scheme. First, Rules 404(2)(A)-(C) all explicitly refer to character “trait.”\textsuperscript{129} The common denominator of these provisions is that they all authorize the receipt of testimony relevant to establish the existence of a “trait” such as “peacefulness.”\textsuperscript{130} In all these instances, when the drafters wanted to

\textsuperscript{126} Id. at 605.
\textsuperscript{127} Id. at 604.
\textsuperscript{128} Fed.R.Evid. 404, 28 U.S.C.A.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
authorize the admission of testimony about a character trait, they did so expressly. They did not do so in Rule 404(b)(2). That observation somewhat weakens the contention that 404(b)(1)’s prohibition does not extend to “character trait” and that consequently, character trait evidence is admissible under 404(b)(2).

There is still more pertinent context. Like “peacefulness” mentioned in Rule 404(a)(2)(C), a witness’s credibility is a personal characteristic that is more particular than general, moral, law-abiding character. Yet, Rule 404(a)(3) authorizes the admission of “[e]vidence of a witness’s character” under Rules 608 and 609. When we turn to those Rules, we find references to “character for truthfulness.” Thus, even though in 404(a)(3) the drafters were obviously referring to Rules governing the admissibility of testimony about the character trait of truthfulness, 404(a)(3), 608, and 609 all use the broader term “character” as a synonym for character trait. The looseness of that usage calls into question the significance of the inclusion of only “character”—but not “character trait”—in Rule 404(b)(1). Rule 404(a)(3) is especially important. Physically, 404(a)(3) is even closer to Rule 404(b)(1) than Rule 404(a)(1), the primary basis of the contextual argument.

The references to “trait” in Rules 404(a)(2)(A)-(C) and treatment of “character for truthfulness” as a synonym for “character trait for truthfulness” in 404, 608, and 609 somewhat weaken the contextual argument that the omission of “character trait” in 404(b)(1) excludes character trait evidence from 404(b)(1)’s prohibition. However, those observations are not necessarily fatal to the contextual argument. Think back to the first argument about the express authorizations of “character trait” evidence in Rules 404(a)(2)(A)-(C). Rule 404(b)(2) precedes the list of permissible purposes of specific acts evidence with the two words, “such as.” The federal cases are legion holding that the use of “such as” signifies that the list of purposes is illustrative, not exhaustive. Thus, the drafters may have felt no need to explicitly list proof of character trait as a permissible use of specific acts testimony. One might think that if the drafters had wanted to deviate from the broad, common-law prohibition, they would have included proof of a character trait in the list of permissible uses in 404(b)(2). Yet, given the illustrative nature of the list, strictly speaking the wording of 404(b)(2) would not have required the drafters to do so.

Now revisit the second argument based on Rules 608 and 609. Those Rules appear in a different Article, Article VI, than Article IV, including Rule 404. Article VI is devoted to provisions related to witnesses’ credibility. In that Article the only portion of a witness’s character that can come into play is the character trait for truthfulness. That aspect of Article VI could help explain why in Article VI the drafters might have been content to use “character for truthfulness” as the equivalent of “character trait for truthfulness.” The drafters might not have felt compelled to explicitly mention the character trait for truthfulness because they could reasonably assume that the meaning of “character for truthfulness” was evident to the reader. Yet, the fact remains that the cross-reference to Rules 608 and 609 in Rule 404(a)(3) uses the expression, “character,” when the drafters clearly had in mind the character trait for truthfulness. Like Rule 404(a)(1), the wording of Rule 404(a)(3)’s cross-reference is part of the context of Rule 404(b)(1); and again, it is even closer to 404(b)(1) than 404(a)(1) is. (Of

_________________________

131 Id.
132 Id. at Fed.R.Evid. 608-09.
133 Id. at Fed.R.Evid. 404.
134 Uncharged Misconduct Evidence, supra note 61, at § 2:37 (collecting cases from every federal court of appeals).
course, the wording of the contextual provisions might matter less to the judge if the judge was not a textualist and did not feel as constrained by the legislature’s linguistic choices in the text and context.135

Summary

Subpart III.A demonstrated that the proponents of a broad prohibition cannot rely on the scrivener’s error doctrine to in effect amend the text of 404(b)(1) to include “or character trait.” This Subpart has shown that the proponents could use Rules 404(a)(2), 404(a)(3), 608, and 609 to muddy the contextual argument for 404(b)(1)’s interpretation. One of the underlying causes of the murkiness of the contextual provisions is that as Professor Goode has noted,136 neither the text of the Federal Rules nor the accompanying Notes provide definitions of the key terms, “character” and “character trait.” Courts and commentators have consequently been forced to craft their own definitions. For instance, Professors Rothstein and Coleman characterize a propensity to violence as general “character” and describe a propensity for “violence of a certain kind, e.g., racism” as a “character trait.”137 Or one could perhaps begin constructing definitions by recognizing three tiers of propensity: at the highest level of abstraction bad “character” meaning a general propensity toward criminal behavior,138 at the intermediate level a bad “character trait” a more specific propensity for a certain category of criminal behavior such as violence,139 and at the most particularized level “specific propensity” an inclination for a certain type of violent crimes such as the violent racist acts that are the focus of the Rothstein/Coleman article.140

However, even without the benefit of definitions provided by the F.R.E. text or Notes, it is by no means a foregone conclusion that these other parts of context would prompt a court to reject the contextual argument. Again, the court might accept the argument if it treated Rule 404(a)(1) as the most important part of the context for interpreting Rule 404(b)(1). As previously stated, Rule 404(a)(1) is the very first part of Rule 404 and the purported definition of the breadth of the character prohibition. Furthermore, even if the context is muddy, a textualist would not end his or her analysis there and reject the contextual argument. When the initial analysis of text and context do not yield a clear candidate meaning, textualists consult extrinsic materials in the hope of eliminating the ambiguity. In

135 See generally Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, supra, note 36. However, today textualism is clearly the dominant approach to statutory construction in federal court. See note 32, supra.
136 Goode, supra note 27. He has argued that “[e]vidence that a person is a racist, sexist, ageist, misogynist, or homophobe should not be categorically excluded by Rule 404(b). [T]hese can more appropriately be described as comprising a constellation of beliefs rather than anything we would typically think of as [moral] character.” Id. at 781. He notes that “diseases such as epilepsy or schizophrenia have traditionally not fallen under the character umbrella.” Id. at 783. Although he does not think that the view is flawless, he favors the view that “all mental disorders should be treated noncharacter.” Id. at 787.
137 Rothstein & Coleman, supra note 30.
138 Under the common law “mercy” rule, the accused was permitted to introduce evidence of his or her general, law-abiding character. United States v. Han, 66 F.Supp.2d 362, 367 (N.D.N.Y. 1999). A general propensity to violate the law would be the antithesis.
139 Federal Rule of Evidence 404(a)(2) expressly refers to the character “trait of peacefulness.” A character trait for violence would be the antithesis.
140 Rothstein & Coleman, supra note 30.
the mind of a textualist, the question that would arise next if whether the extrinsic legislative history, more specifically, the Advisory Committee Notes, would enable the courts to unmuddy the waters.141

C. Extrinsic Legislative History

Note Passages in Which the Committee Distinguished Character from Character Trait

There are two passages in the original Advisory Committee Notes that lend direct support to the contextual statutory construction argument. One is the fourth paragraph in the original Note to Rule 404(a). That paragraph refers to “[t]he limitation to pertinent traits of character, rather than character generally.”142 The second is the second paragraph in the Note to Rule 608(a). That paragraph asserts that under Rule 608(a), “the inquiry is strictly limited to [the] character [trait] for veracity, rather than allowing evidence as to character generally.”143 In these passages, the Committee appeared to distinguish between character in general and more particular relevant traits. If the drafters had that distinction in mind when they drafted Rules 404(a)(1) and 404(b)(1), the omission of any reference to character trait in 404(b)(1) is significant. As the Rothstein/Coleman article suggests, the omission can be a signal that the prohibition set out in 404(b)(1) does not bar the admission under 404(b)(2) of evidence of specific acts sufficient to prove the existence of a character trait.

Note Passages That Blur the Distinction

However, those two passages are isolated and significantly outnumbered by Note passages in which the drafters used “character” as a synonym for “character trait” or in a broad sense including as character traits. The Notes to Rules 404, 405, and 608 are illustrative.

Initially, consider the Note to Rule 404. In the second paragraph of the Note, the drafters repeatedly use the expression “character,” not “character trait.”144 However, they equate that expression with the personal characteristics of “chastity,” “competency,” “honesty,” and “violent disposition.”145 Those characteristics are arguably particular enough to be character traits; they certainly are not mere general, moral, law-abiding character.146 The same usage is evident in the third paragraph of the Note. Like the second paragraph, the third paragraph includes multiple references to “character” and not a single explicit reference to “character trait.”147 Yet, while using only the expression “character,” the paragraph discusses more particular tendencies to violence and untruthfulness.148 Again, those personal characteristics are specific enough to amount to character traits; the behavioral patterns in question are at a greater level of specificity than general character.

141 As previously stated, moderate textualists routinely consider extrinsic legislative history. Extreme textualists also do so when the text and context do not yield a definitive meaning. Given the inconsistent usage in the text of the Federal Rules, even an extreme textualist would proceed further and consult the Advisory Committee Notes.
145 Id.
146 As previously stated, in their article Professors Rothstein and Coleman describe violence as “character for violence,” not a character trait. Rothstein & Coleman, supra note 30.
148 Id.
The original Note to Rule 405 is even more revealing. Like the two paragraphs in the Note to Rule 404, the third paragraph of this Note consistently refers to “character” and makes no mention of “character trait.” However, the substance of the paragraph is devoted to the personal characteristics of chastity, peacefulness, truthfulness, honesty, and competency. The drafters may have used the expression “character.” However, as Professors Goode, Rothstein, and Coleman understand the terms “character trait” and “propensity,” perhaps the drafters instead meant “character trait.” The fifth paragraph of the Note is cast in the same mold. The paragraph uses only the term, “character.” There is not a single mention of “character trait.” Yet, the paragraph focuses on the portion of character that may be inquired about under 608(b), the particular character trait of truthfulness or untruthfulness.

The same usage is evident in the original Note to Rule 608(a). As previously stated, the second paragraph in this Note strengthens the argument for the contextual statutory construction argument because it explicitly distinguishes between general character and the character trait of “veracity.” However, the Note contains two other paragraphs which treat “character” as a synonym for “character trait.” For example, while the topic of the first paragraph is the character trait for untruthfulness, the paragraph twice uses the expression, “character evidence.” The same usage appears in the fourth paragraph of the Note. That paragraph is devoted to the question of when a witness’s proponent may rehabilitate the witness’s credibility. The paragraph is concerned solely about proof of the witness’s character trait for “credibility.” Yet, the paragraph never alludes to “character trait.” Rather, the paragraph includes three unadorned references to “character.”

Summary

Subpart III.A concluded that the proponents of retaining a broad character prohibition cannot defeat the contextual statutory construction argument by invoking the scrivener’s error doctrine. That doctrine applies only when the “correction” is necessary to remedy a patently absurd interpretation of the statute. The interpretation urged in the Rothstein/Coleman article is rational. Subpart III.B noted that if the court considers Rule 404(a)(1) as the most pertinent context for interpreting Rule 404(b)(1), the court well might adopt that interpretation. Rule 404(b)(1) is the very first provision in Rule 404. If Rule 404(b)(1) is the most salient context, there is a strong inference that the omission of any reference to “or character trait” in 404(b)(1) authorizes the receipt of specific acts testimony sufficient to prove the existence of a character trait under 404(b)(2).

However, Subpart III.B added that Rule 404(a)(1) is not the only pertinent contextual provision. Several Rules contain language indicating that the drafters used the term “character” inconsistently and often treated it as an expression including character traits, not merely general character. At the very end of Subpart III.B, we posed the question of whether the extrinsic legislative history, more specifically

150 Id.
151 Id.
152 Id.
154 Id.
155 Id.
156 Id.
the accompanying Advisory Committee Notes, would clear up the inconsistency. The answer to that question is No. If throughout the Notes the drafters had sharply differentiated between general character and more specific character traits, the Notes would bolster the argument that the omission of “or character trait” in 404(b)(1) means that character trait evidence is admissible under 404(b)(2). Subpart III.C pointed out that in two instances, the Notes do indeed explicitly distinguish general character from character traits. However, in a much larger number of instances the Notes fail to make that distinction. Quite to the contrary, in most cases the Notes say “character” when in fact they are discussing what could be considered more specific character traits. As in the case of the contextual provisions discussed in Subpart III.B, in some instances the drafters apparently used “character” to denote a particular level of behavioral pattern or personal characteristic. However, in other instances the drafters seemingly employed the term more broadly as a shorthand expression for the “mode of reasoning”\(^{157}\) applicable whenever the proponent wants to treat some behavioral pattern as circumstantial evidence of the person’s behavior on a specific occasion. Thus, at least if the court limits itself to a textualist analysis, the water is even muddier than it was at the end of Subpart III.B.

**IV. CONCLUSION**

Part I briefly traced the evolution of the character prohibition. That evolution has witnessed the steady narrowing of the scope of the broad common-law prohibition. As we saw, the United Kingdom no longer enforces a firm, rigid ban on character evidence in criminal cases. As Subpart I.A noted, the word “character” does not even appear in any of the seven provisions that describe the gateways to admissibility under § 101(1) of the 2003 Criminal Justice Act;\(^{158}\) and the Law Commission’s 2023 commentary expressly approves of reasoning based on propensity and tendency.\(^{159}\) In England, the judge’s decision whether to admit specific acts testimony showing character now turns on the quantum of probative value—whether the testimony is “important explanatory evidence”\(^{160}\)—not the form of the theory of logical relevance. The dispositive question is no longer whether the proponent is attempting to use the testimony as circumstantial proof of conduct on the alleged occasion.

American law has not gone as far as English law in relaxing the character prohibition. While § 101 of the 2003 CJA purports to apply across the board to all types of prosecutions, American jurisdictions have been content to carve out exceptions to the prohibition in a few, selected types of prosecutions. Subpart I.B described the rape sword provisions, Rules 413-15.\(^{161}\) Those provisions lift the bar of the prohibition to specific acts testimony showing character or disposition in sexual assault and child molestation cases. Subpart I.B also pointed out that three handfuls of the states have largely\(^{162}\) followed the federal example and created analogous, narrow exceptions.

---

157 McCormick, supra note 1, at § 186, at 1131.
158 Law Comm’n, supra note 46, at 212.
159 Id. at 214-15, 222-23, 225.
160 Id. at 212.
162 In addition to enacting a provision for sexual assaults, § 1108, California has a provision for domestic violence, including acts directed against the elderly and dependent persons. Cal.Evid. Code § 1109. Georgia has a unique exception for gang offenses. Ga. Code Ann. § 24-2-2.
After describing these legislative developments in the United States, Subpart I.B noted that numerous American Evidence scholars have urged that American law should move farther in the direction of the English position. Scholars, including Professor Rothstein and most recently Professor Goode in 2021, have contended that the prohibition could be reformed to permit the admission of specific acts testimony when the testimony is highly probative of a relevant character trait or propensity. Especially when the behavioral pattern in question is particularized, closely resembles the conduct described in the pleadings, and has been frequently repeated, the testimony can possess considerable probative worth. The 2023 Rothstein/Coleman article advances a new contextual statutory construction argument that could facilitate the reform Professor Goode called for. Part II reviewed that argument.

As Part II stressed, context has gained greater importance in statutory interpretation in the textualist era. The 2023 article observed that while Rule 404(b)(1) refers to both “character” and “character trait,” Rule 404(b)(1) mentions only “character.” If the drafters’ omission of any reference to “character trait” is purposeful, the text of 404(b)(1) is a signal that 404(b)(1)’s prohibition does not apply to character trait evidence. It would then follow that proof of a character trait—rather than general, law-abiding character—is a permissible purpose for admitting specific acts testimony under 404(b)(2). Given the proximity of 404(a)(1) to 404(b)(1), the argument has both viability and obvious appeal. If the courts treated 404(a)(1) as the most pertinent context for 404(b)(1), this contextual argument would carry the day. Rule 404(b)(1) should certainly play a major role in the interpretive analysis because it is both the first provision in Rule 404 and the purported definition of the scope of the character prohibition in the Federal Rules. The prominent position of 404(b)(1) at the very beginning of Rule 404 could persuade a judge to assign greater contextual weight to 404(b)(1) than some of the other provisions that form part of the larger context. As Part II explained, the adoption of that argument would permit the admission of particular acts testimony showing a character trait and well might also open the door to testimony about specific propensity, as Professor Goode conceives it.

However, if the contextual argument is subjected to textualist analysis, the key premise underlying the argument becomes the assumption that the drafters consistently used the expressions “character” and “character traits” to denote differing behavioral patterns or propensities. Subpart III.B pointed out that if the courts take a broader view of context, that assumption is debatable. Like Rule 404(a)(1), Rules 404(a)(2)-(3), 608, and 609 form part of the context for interpreting 404(b)(1). In those provisions, the drafters sometimes used the term “character” as the equivalent of “character trait.” Subpart III.C added that the same inconsistent linguistic usage is evident in the original Advisory Committee Notes to Rules 404, 405, and 608. In that light, it is debatable whether Rule 404(b)(1)

---

164 Goode, supra note 27.
165 Imwinkelried, supra note 72.
166 Rothstein & Coleman, supra note 30.
168 As previously stated, a judge who subscribed to a different school of interpretation might be less troubled by the inconsistent use of the terms “character” and “character trait” in the text of the relevant F.R.E. provisions and the Notes. Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, supra note 36. The judge might feel less constrained by the wording of the Rules. However, “Textualism is now clearly ascendant and will remain so for the foreseeable future.” Eskridge, Slocum & Tobia, supra note 32.
excludes character trait from its prohibition and therefore whether Rule 404(b)(2) classifies proof of a character trait as a “[p]ermitted [u]se.” As previously stated, research reveals no published federal opinion in which any court has seized on the omission of “character trait” in 404(b)(1) as a justification for excluding proof of character trait from the scope of 404(b)(1)’s prohibition. Neither does there appear to be any approved pattern instruction allowing proof of a character trait or propensity unless the case falls within the purview of one of the rape sword laws. However, since the Rothstein/Coleman article has identified a truly novel statutory construction argument, neither the courts nor the instruction drafters have had any occasion to consider the merits of the argument. Further, a given judge might decide not to use the textualist framework to evaluate the merits of the argument; the judge might choose to follow a different approach to statutory construction. If the judge elected to do so, the drafters’ inconsistent usage in the text and Notes might prove to be less of an obstacle to endorsing the contextual argument. However, as we have repeatedly noted, the reality is that textualism is now the dominant approach to statutory construction in federal court. By purporting to apply a different approach, the judge would be risking reversal.

The question of whether Rule 404(b)(1)’s prohibition extends or should extend to proof of character trait and specific propensity is a significant one. Again, Rule 404 is the most frequently cited Federal Rule provision on appeal, and the ban on status offenses under the Eighth Amendment’s prohibition of Cruel and Unusual punishment gives the question constitutional overtones. The question is as timely as it is important. In 2021, harking back to earlier commentators, Professor Goode constructed a persuasive policy argument that the prohibition should be relaxed to permit the admission of highly probative testimony of specific propensity. The 2023 Rothstein/Coleman article identified a contextual statutory construction argument that would move American law in that direction. The 2023 Law Commission report is a reminder that the country of origin of the prohibition has drastically loosened the constraints on bad character evidence—far more radically than in the United States. The controversy may have reached a tipping point in the United States, and lower courts might benefit from guidance from the Advisory Committee.

**Recommended Course of Action for the Advisory Committee**

At this point, what options does the Committee have for providing that guidance? There are at least two possibilities.

First, the Committee could intervene in a limited fashion and propose amendments clarifying the meaning of the key terms in the bad character controversy. Rule 404(a)(1) employs the terms “character, or trait,” Rules 404(a)(2)(A)-(C) use the term character “trait,” and the term “propensity” appears in many of the cases construing Rules 413-15. It seems clear that “character trait” represents a more specific behavioral pattern than general “character” and that in turn, specific “propensity” is a

---

170 Eskridge & Frickey, supra note 36.
171 See authorities cited in note 32, supra.
172 See authorities cited in note 24, supra.
174 Goode, supra note 27.
175 Rothstein & Coleman, supra note 30.
176 Law Comm’n, supra note 46.
more particularized pattern than “trait.” However, as we have seen, scholars have differed over such basic questions as whether violence is character or a character trait. That uncertainty is expectable. The Rules themselves leave those terms undefined. The analysis of the contextual argument in Part III highlights the root cause of the uncertainty, that is, the larger problem of the drafters’ loose usage of “character” and “trait.” Subparts III.B and III.C demonstrated that the drafters used the expressions, “character” and “character trait,” inconsistently in both the Federal Rules’ text and Notes. If the Committee could provide working definitions of “character,” “trait,” and “propensity,” those definitions would better enable the courts to apply Rule 404 as well as Rules 405, 608-09, and 413-15. To develop the necessary definitions, the Committee could draw on the writings of Professors Goode and Rothstein and consider the three propensity tiers approach (character, character trait, and specific propensity) mentioned earlier. A set of working definitions could prove to be extremely valuable. The provision of manageable definitions for these terms would improve the administrations of all seven rules. In addition, those definitions might well enable courts to rule more confidently on many of the hypothetical evidence proffers of specific acts evidence described in the articles by Professors Goode, Rothstein, and Coleman.

Second, the Committee could decide to take the more dramatic step of opening a discussion of the substantive policy questions that have made the character doctrine so controversial. It is certainly understandable why until now the Committee has been reluctant to wade into that controversy. In 2018 the Committee was developing the proposal that ultimately became the 2000 Rule 404(b) amendment toughening the pretrial notice requirement in Rule 404. Professor Duane described in detail the Committee’s decision to limit its proposal to a procedural change and stop short of recommending any “substantive amendment” to the rule. In its 2018 deliberations, the Committee recognized some of the complex, nuanced questions about the scope of the character prohibition such as whether the doctrine of objective chances, a supposed noncharacter theory of logical relevance, is “bound up with a propensity inference . . . .” Although the validity of the Rothstein/Coleman statutory construction argument is a question of legisprudence, the article also serves to pose the jurisprudential policy question whether, appropriately defined, character trait evidence should be formally exempted from the character prohibition. The resolution of those policy questions will not be easy and cannot be achieved quickly. However, the frequency of appeals involving bad character

---

177 Goode, supra note 27.

178 One version of a tier approach would be: A propensity to violate criminal laws would be character, at the next level a propensity to violate a particular category of law such as laws proscribing violence would be a character trait, and a propensity to commit a particular type of violent crime such as those that are racially inspired would be specific propensity. Rather than attempting comprehensive definitions of “character” and “character trait,” the Committee could provide several examples of behavioral patterns or propensities that would constitute “character” or and other illustrations of “a character trait.” By providing such examples, the Committee would give the reader a sense of the level of specificity that the pattern or propensity must achieve to fall within the definition of one term or the other.

179 Duane, The Imminent Changes to Rule 404(b) (Nov. 10, 2020), quoted in Uncharged Misconduct Evidence, supra note 58, at § 9:10, at 301-02.

180 Id. The lead author believes that the doctrine implicitly assumes the person’s bad character. Rothstein, supra note 25. The coauthor has a contrary view. Imwinkelried, A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused’s Uncharged Misconduct, 50 N.Mex.L.Rev. 1 (2020).
evidence—the sheer amount of judicial time devoted to Rule 404(b) issues—counsels that addressing those questions may be worth the effort.

If the Committee decides to open a discussion of these fundamental policy questions, it is hardly a foregone conclusion that the Committee would ultimately urge the Judicial Conference and Congress to follow the English lead and abandon the character prohibition. After a full airing and consideration of the issues, the Committee might decide to retain some version of the traditional prohibition, perhaps applicable only to general, law-abiding, moral character. Even if the Committee decided to narrow the traditional prohibition, it could propose a modest amendment admitting only testimony about highly probative specific propensities and prescribing rigorous foundational requirements for proof of the existence of a specific propensity.181 In drafting that amendment, the Committee could capitalize on the courts’ now considerable experience with proof of propensity under Rules 413-15. The Committee could proceed cautiously and incrementally, deferring even a decision on proof of character traits until the courts had accumulated more experience with proof of specific propensities.

The advent of this new contextual statutory construction argument will hopefully prompt the Committee to weigh its options and undertake to refine the law of character evidence in the United States. The 2023 Law Commission report presents a case for jettisoning a rigid character prohibition. American commentators including Professor Goode have echoed similar contentions about the American law governing character evidence. The 2023 Rothstein/Coleman article developed a powerful statutory construction argument that could lead to the narrowing of the prohibition in the United States. These three publications in 2021 and 2023 make this an appropriate time for the Committee to invite a critical evaluation of the American version of the common-law prohibition. Again, Rule 404(b) is “the most contested Federal Rule of Evidence.”182 If any Federal Rule of Evidence deserves a hard look by the Committee, it is Rule 404(b).

---

181 The lead author believes that specific propensity evidence should be admissible only under tightly circumscribed conditions. Rothstein, supra notes 25-26. The coauthor has written that propensity evidence ought to be admitted only if the proponent can show that the behavioral pattern in question has been frequently repeated. Imwinkelried, supra note 72. In addition, he thinks that testimony about specific bad acts can be so inflammatory that the normal Rule 403 balancing test should be reversed; in other words, the testimony ought to be admitted only if the proponent convinces the trial judge that the probative value of the testimony outweighs any attendant probative dangers. Capra & Richter, supra note 23; Rhode, Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishments, Prosecutors, and Parole, 45 Am.J.Crim.L. 353, 364 (2019); Imwinkelried, The Use of Evidence of an Accused’s Uncharged Misconduct Evidence to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition, 51 Ohio St.L.J. 575 (1990).  
182 Reed, Admitting the Accused’s Criminal History: The Trouble with Rule 404(b), 78 Temple L.Rev. 201, 212 (2005).