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INTRODUCTION

In modern criminal trials, juries often hear and evaluate evidence of the defendant's character. From the state's perspective, prosecutors will introduce details of the defendant's prior convictions as evidence of his *bad* character.[1] Prosecutors typically offer this evidence for a purpose other than proving character, such as to prove the defendant's motive or intent to commit the currently charged crime.[2] When the state uses the

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[1] *See infra* Part I.

[2] *See infra* Part I.A.

defendant's prior convictions this way, ostensibly for another purpose, it is called "character evidence in disguise."[3]

In other cases, the prosecutor need not bother with an end-around to get the details of the convictions in front of the jury; some statutes now permit the prosecutor to use the prior convictions as direct evidence of character.[4] In these situations, the convictions may legally be used "as evidence of the [defendant's] character in order to show that the [defendant] acted in conformity therewith" in the currently charged case, now pending before the jury.[5]

From the defense perspective, on the other hand, the defendant may wish to introduce evidence of his *good* character.[6] As one author has put it:

> In cases where identification is at issue, the physical evidence is not conclusive, or where credibility is central to determining guilt, juries often look at the character of the accused to help piece together what happened. . . . The concept of good character evidence is based on the premise that someone who has led a morally sound and lawful existence is less likely to have committed a crime than someone with a history of bad actions and an immoral or amoral approach to the world. Certainly we use good character information in everyday life to infer a lack of propensity.[7]

One way to prove good character is to inform the jury that the defendant has *never* been convicted of a crime.[8] It seems logical, of course, that a clean record "is the functional equivalent of evidence that [the defendant] is a law-abiding citizen."[9] Yet, despite this obvious connection between having a clean record and

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[3] People v. Crawford, 582 N.W.2d 785, 794 (Mich. 1998). *See also infra* Part I.A.

[4] *See infra* Part I.B.

[5] WIS. STAT. § 904.04(2)(b)2. (2019). *See also infra* Part I.B.

[6] *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 404.4 (3d ed. 2008) ("The vague nature of character encompasses such labels as 'law-abidedness,' 'peaceableness,' 'non-violence,' 'honesty,' and the ever probative 'good character.'").

[7] Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 227 (2004).

[8] See *infra* Part II.

[9] State v. Bedker, 440 N.W.2d 802, 806 (Wis. Ct. App. 1989). *See also infra* Part II.

being law-abiding, the widely imposed rule is that evidence of a clean record—that is, the absence of arrests, charges, or convictions—is *not* admissible at trial.[10]

Courts have offered two primary reasons for hiding clean-record evidence from juries. First, it does not necessarily follow from a clean record that the defendant is a good, law-abiding person; therefore, the reasoning continues, the idea is fundamentally flawed on a *theoretical* level and the evidence is not admissible.[11] Other courts have held that, while a clean record does demonstrate good, law-abiding character, such evidence is not a recognized *method* of proving character and, therefore, is once again not admissible.[12]

This Article demonstrates that both of these judicial claims fail and, in fact, create a double standard for the admission of evidence of the defendant's character: one for the prosecutor and a second, more demanding standard for the defense.[13] Consequently, this Article argues that a defendant's clean record—whether for convictions, charges, arrests, or accusations—should be admissible at trial as evidence of good, law-abiding character.[14]

This Article then proposes a simple legislative reform to ensure symmetry in the rules of evidence and protect a defendant's constitutional right to present a complete defense.[15] Finally, because legal reform comes slowly, if at all, this Article presents a practical strategy for defense counsel to potentially win admission of the defendant's clean record in order to demonstrate his good, law-abiding character at trial.[16]

I. CRIMINAL CONVICTIONS AS BAD CHARACTER EVIDENCE

Perhaps surprisingly, given the prevalence of such evidence at trials, the law of character evidence actually begins with the rule that a defendant's prior convictions are *not* admissible. "[I]n our system of jurisprudence, we try cases, rather than persons,

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[10] *See infra* Part II.
[11] *See infra* Part III.A.
[12] *See infra* Part III.B.
[13] *See infra* Part III.
[14] *See id.*
[15] *See infra* Part IV.
[16] *See infra* Part V.

and thus a jury may look only to the evidence of the events in question, not defendants' prior acts in reaching its verdict."[17]

The purpose behind this rule is to prevent jurors from "generalizing a defendant's earlier bad act into *bad character* and taking that as raising the odds that he did the later bad act now charged . . . ."[18] In other words, if a defendant is to be convicted at all, it must be "for what he did" on the day of the alleged crime, "not for who he is."[19]

But prosecutors and judges have never let grand pronouncements stand in their way of convictions. These government agents have developed many ways to introduce a defendant's prior conviction under the pretense of using it for other, permissible purposes.[20] And even more recently, legislatures have jumped into the game, dispensing with the need for such pretenses entirely. Today, some rules of evidence expressly permit the prosecutor to use a defendant's prior record as evidence of his character and, consequently, that he acted in conformity therewith on the day of the charged crime.[21]

A. Character Evidence in Disguise

Despite the general rule that a defendant's prior criminal record is not to be used as evidence of bad character, the rules of evidence still permit the prosecutor to use prior convictions as other-acts evidence, ostensibly for other purposes. The applicable Federal Rule of Evidence, which is adopted verbatim in many states, reads:

> (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.

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[17] People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988) (citing United States v. Mitchell, 2 U.S. (2 Dall.) 348, 357 (1795)). The prohibition "has its roots in Great Britain's Treason Act of 1695." Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 951 (1988).

[18] Old Chief v. United States, 519 U.S. 172, 180 (1997) (emphasis added).

[19] United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977).

[20] *See infra* Part I.A.

[21] *See infra* Part I.B.

> (2) 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.[22]

In theory, the use of prior convictions for "another purpose" is supposed to be very limited, as this so-called other-acts evidence should be used "sparingly and only when reasonably necessary."[23] But in reality, this presumption of excluding prior convictions "has been remolded and chiseled down in recent years to the point that this once well-settled exclusion now serves as more of an exception" to a new rule of admissibility.[24] Now, the details of the prior crime and the fact of conviction are routinely admitted for "another purpose," even when they are not "reasonably necessary" for that, or any legally recognized, purpose. For example:

> [I]n *State v. Datwyler*, a defendant was charged with conspiracy to manufacture meth. The defendant had essentially conceded that she was planning to manufacture meth—she had conceded, in other words, *attempted* manufacture, but she contested *conspiracy*, which carries a greater punishment. The State was allowed to present evidence of her prior conviction for manufacturing meth on the theory that it demonstrated her "knowledge of the manufacturing process." Her knowledge was *not disputed*, and in any event, it had *no tendency* to prove the agreement necessary to support the conspiracy charge. The court of appeals nonetheless upheld the admission of the [prior-conviction] evidence to show her knowledge.[25]

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[22] FED. R. EVID. 404(b) (emphasis added). A defendant's prior convictions may also be admissible under other rules of evidence, including FED. R. EVID. 609. This rule admits the fact of conviction, rather than its details, and for a different purpose and through a different method of proof. FED. R. EVID. 609.

[23] State v. Murphy, 524 N.W.2d 924, 928 (Wis. Ct. App. 1994) (discussing Wisconsin's landmark case Whitty v. State, 149 N.W.2d 557 (Wis. 1967)).

[24] Edward Pare III, Comment, *Restoring the Character Evidence Rule: Reconsidering Evidence of Crimes, Wrongs, and Other Acts in Rhode Island*, 21 ROGER WILLIAMS U. L. REV. 399, 399 (2016) (citing Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 776-77 (2013)).

[25] Ted Sampsell-Jones, *Spreigl Evidence: Still Searching for a Principled Rule*, 35 WM. MITCHELL L. REV. 1368, 1399-1400 (2009) (discussing State v. Datwyler, No. A04-

In other words, the only value to the state of the defendant's "prior conviction for manufacturing meth" was to demonstrate character or propensity: she did it before and therefore likely did it again.[26]

In light of pro-state rulings such as that, some defense lawyers, when faced with the state's motion to admit the details of the defendant's prior conviction, have offered to stipulate to the thing the state is ostensibly using the prior-conviction evidence to prove.

To illustrate, consider a hypothetical case of alleged sexual touching at a drinking party. The identity of the perpetrator is in question, and the state proffers the defendant's prior conviction for a similar touching to prove his identity in this case. The defendant agrees that he was, in fact, the person who was with the complaining witness, but contends that the touching never happened. He may therefore stipulate to identity—thus removing any imaginable, legitimate purpose for the state to introduce the details of his prior conviction to the jury.

Of course, our hypothetical prosecutor doesn't really want the prior conviction to prove identity. Rather, the state wants it to prove that the defendant has been convicted of a similar crime before, has a bad character, likely acted in conformity with that character, and therefore is guilty of the currently-charged crime. And many courts will allow the prosecutor to reject the defense stipulation under the theory that a defendant "may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."[27]

Such reasoning is nonsensical. In light of a defendant's stipulation to the *valid* purpose for which the prior conviction was offered, the "evidentiary force" the defendant seeks to "admit his way out of" is the force of *inadmissible* character evidence. By definition, the defendant has the right to evade the force of such

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2255, 2006 Minn. App. LEXIS 93, at *1 (Minn. Ct. App. Jan. 24, 2006) (emphasis added)).

[26] *See id.*

[27] State v. Veach, 648 N.W.2d 447, 472 (Wis. 2002) (quoting Old Chief v. United States, 519 U.S. 172, 186-87 (1997)). The court may require the prosecutor to accept a stipulation in some instances, however, particularly where the prior conviction goes to the defendant's legal status—for example, a felon in a felon-in-possession-of-a-firearm case. *See Old Chief*, 519 U.S. at 174.

evidence. It is, after all, inadmissible. In fact, it is the prosecutor who should not be allowed to evade the defendant's stipulation in the hope of winning a conviction based on character.

Courts then claim to remedy the damage inflicted by their nonsensical reasoning with an utterly ineffective, two-step approach. First, the court will read the jury a cautionary instruction such as this: "You must not consider this [prior conviction] to determine the defendant's character or character trait, or to determine that the defendant acted in conformity" with his bad character.[28] Second, based on this instruction, "prejudice to a defendant is presumed erased from the jury's mind."[29]

But telling jurors about the defendant's prior conviction and then instructing them not to use it to assess his character, but only to determine the identity of the perpetrator, is the equivalent of "throw[ing] a skunk into the jury box" and "instruct[ing] the jury not to smell it."[30] And the empirical evidence supports this commonsense conclusion.

For example, a recent controlled experiment used the case summary method to test mock juror conviction rates in a hypothetical criminal case—a drunken-party scenario similar to the one discussed above.[31] Study participants served as mock jurors and were divided into two groups.[32] Group A received a stipulation on identification, where a defendant denied that the alleged crime occurred but stipulated that he was the person in the room with the alleged victim, no one else was present, and no one else could have committed the crime (assuming a crime was, in fact, committed).[33]

Group B, on the other hand, did not receive a stipulation, but instead heard the details of the defendant's prior, similar crime as

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[28] STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) § 24 (4th ed. 2016).

[29] State v. Shillcutt, 341 N.W.2d 716, 721 (Wis. Ct. App. 1983) (citing State v. Williamson, 267 N.W.2d 337, 347 (Wis. 1978)). Other courts make similar, but slightly less incredible, assumptions about cautionary instructions. *See, e.g.,* State v. Wright, 719 N.W.2d 910, 918 (Minn. 2006) ("[A]ny potential prejudice was mitigated by the limiting instruction given to the jury.").

[30] Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

[31] Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 358 (2018).

[32] *Id.* at 359-60.

[33] *Id.* at 359.

evidence of his identity as the perpetrator of the currently charged crime.[34] Group B was then given a cautionary instruction, warning that the prior, similar conviction was to be used only as evidence of identity, not as evidence of the defendant's bad character or to conclude that he acted in conformity therewith on the night in question.[35]

If Group B's cautionary instruction worked, Group A would convict at a higher rate, as its stipulation *conclusively proved* identity. Yet, this is what the study found:

> Our findings, however, strongly support our hypothesis that such cautionary instructions for other-acts evidence are not effective, that *jurors will consider a defendant's other acts for impermissible purposes such as character*, and that such consideration will lead jurors to convict at a higher rate.
>
> More specifically, Group A in our study convicted at a rate of 33.1%, which should have served as a ceiling on the conviction rate, as this group received a stipulation that conclusively proved the defendant's identity. There is simply no better evidence to establish the defendant's identity than a clear, all-encompassing stipulation between the parties.
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> However, Group B, which received less-certain evidence on identity—the defendant's somewhat similar, three-year-old other act—convicted at a rate of 48.0%. Had the cautionary instruction been effective, i.e., had the jurors considered the other act only on the issue of identity as they were instructed, Group B's conviction rate should have been no higher than Group A's. Instead, it was much higher, and the difference was highly significant. Further, jurors in Group B, after learning of the defendant's prior conviction, were more confident in their verdicts.
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> This empirical evidence debunks the common judicial assumption that a cautionary instruction on other-acts evidence will erase all prejudice from the jurors' minds. Our findings demonstrate that other-acts evidence can lead jurors

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[34] *Id.* at 360.

[35] *Id.* at 360-61.

> to convict a defendant not for what he has done [on the day of the current, alleged crime], but for who he is.[36]

In other words, the above study demonstrates that when a prior conviction is offered ostensibly for a legitimate purpose—such as proof of identity, intent, motive, or any of the acceptable purposes delineated by statute—it is usually nothing more than "character evidence in disguise."[37]

B. Dropping the Pretense

When prosecutors attempt to use prior-conviction evidence in the manner discussed above, "[i]t does not matter that the [prior-conviction] evidence goes to the defendant's *character*; as long as the prosecutor is able to articulate one of the permissible purposes in addition to character, *the court will likely admit the evidence*."[38] Even a canned, boilerplate motion to admit the prior conviction will satisfy most courts; only the most blatantly deficient motions by the laziest of prosecutors will be rejected.[39]

However, the process does entail *some* work, as the prosecutor must at least draft a motion. Perhaps to save the prosecutor from this rigmarole—or to eliminate the small risk that a motion to admit prior conviction details could be denied—legislatures and rule makers have, in some cases, dispensed with this formality entirely.

For example, in Wisconsin, when a person who is charged with certain sex crimes also has convictions for similar crimes, the legislature declared that the prosecutor may use those prior convictions directly, "as *evidence of the person's character* in order

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[36] *Id.* at 364 (emphasis added) (statistical measures of significance omitted).

[37] People v. Crawford, 582 N.W.2d 785, 794 (Mich. 1998). *See also* Ross, *supra* note 7, at 246-54 (discussing prosecutors' use of other-acts evidence as character evidence, the scope of the problem, the ineffectiveness of cautionary instructions, and some recommended reforms).

[38] Cicchini & White, *supra* note 31, at 354 (emphasis added) (citing Sampsell-Jones, *supra* note 25, at 1385-86).

[39] *See, e.g.*, State v. Steinhauer, No. 2012AP189-CR, ¶ 15 (Wis. Ct. App. Nov. 27, 2012) (Westlaw) ("[T]he State submitted a nine-page police report describing a myriad of incidents spanning at least a decade. Faced with a nine-page narrative reciting numerous instances of sexual contact, the court reasonably concluded *it could not determine which acts the State was actually seeking to introduce*." (emphasis added)).

to show that the person *acted in conformity therewith*."[40] Similarly, the corresponding Federal Rule of Evidence reads: "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."[41]

(Interestingly, as an aside, what's good for the goose is not good for the gander, as the rules often anoint the complaining witness the "victim" before the trial begins, and prevent the defendant from introducing evidence "to prove a victim's sexual predisposition" and that he or she acted in conformity therewith—that is, engaged in *consensual* sex—on the day of the charged sexual assault.[42])

As another example, in California, when a person who is charged with domestic abuse crimes has prior convictions for similar crimes, the legislature "explicitly provide[s] for the admissibility of a defendant's prior acts of domestic violence *for propensity purposes* in domestic violence cases."[43] Similarly, in Alaska: "In a prosecution for a crime involving domestic violence . . . evidence of other crimes involving domestic violence by the defendant against the same or another person . . . *is admissible*."[44]

These rules specifically permitting prior convictions as character evidence undeniably violate—in fact, destroy—the time-honored principles that "we try cases, rather than persons,"[45] and that if a defendant is to be convicted at all it must be "for what he did" on the day in question, "not for who he is."[46]

On the plus-side, even though this new standard on character evidence knocks-out a pillar of our criminal justice system, it is, at

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[40] WIS. STAT. § 904.04(2)(b)2. (2019) (emphasis added).

[41] FED. R. EVID. 413(a) (emphasis added); *see also* FED. R. EVID. 414(a) (same rule but in the context of "child molestation").

[42] FED. R. EVID. 412(a)(2); *see also* WIS. STAT. § 972.11(2)(b) (2019) ("[A]ny evidence concerning the complaining witness's prior sexual conduct . . . shall not be admitted into evidence . . . .").

[43] Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 158 (2007) (citing CAL. EVID. CODE § 1109(a)(1) (West 2006)) (emphasis added).

[44] *Id.* at 167 n.85 (quoting ALASKA R. EVID. 404(b)(4)) (emphasis added).

[45] People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988) (citing United States v. Mitchell, 2 U.S. (2 Dall.) 348, 356 (1795)).

[46] United States v. Meyers, 550 F.2d 1036, 1044 (5th Cir. 1977).

least, refreshingly honest. No longer do prosecutors have to thinly disguise character evidence as identity, intent, or motive evidence, for example. And no longer must courts torture language and logic and strain to admit the defendant's prior convictions into evidence, ostensibly for one of those other purposes. Now, at least in some cases, the law is straightforward: defendants may be convicted based on their character, as measured by their prior record.

II. CLEAN RECORDS AS GOOD CHARACTER EVIDENCE

Just as prosecutors are eager to introduce evidence of the defendant's bad character, defendants often want to demonstrate their good character for the jury. This is a bit more straightforward procedurally and takes the form of a simple election: "a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it[.]"[47] Further, with regard to the character traits that may be introduced, "[a] few general traits, like being *law-abiding*, seem sufficiently relevant to almost any accusation."[48]

Good character evidence can be incredibly important and may even be intertwined with other constitutional principles such as the presumption of innocence. For example, even when prosecutors don't explicitly introduce bad character evidence in the formulaic ways discussed earlier, the defendant's character is still in play:

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[47] FED. R. EVID. 404(a)(2)(A). As the last part of this rule perhaps suggests, the election to present character evidence is a dangerous strategy in many cases. Introducing such evidence may, depending on the character trait put in play, open the door to a wealth of otherwise inadmissible and damning evidence against the defendant. *See* Ross, *supra* note 7, at 242-46.

[48] State v. Bedker, 440 N.W.2d 802, 806 (Wis. Ct. App. 1989) (emphasis added) (quoting D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 137, at 139 (Rev. ed. 1985)). *But see* Ross, *supra* note 7, at 241 (Some "courts have ruled that general good character is irrelevant to the charge."). For a discussion distinguishing between "good character" and "law-abiding," *see* State v. Bogle, 376 S.E.2d 745, 749 (N.C. 1989) ("Under the new rule, an accused may no longer offer evidence of undifferentiated, overall 'good character,' but may now only introduce evidence of 'pertinent' traits of his character. . . . [T]he character trait of law-abidingness is 'pertinent' in virtually all criminal cases. Evidence of law-abidingness tends to establish circumstantially that defendant did not commit the crime charged." (citation omitted)).

> [P]rosecutors are disparaging the character of the defendants in every trial. From the opening statement where the prosecutor sets forth his accusation, to the closing argument where the prosecutor tries to make the criminal charge stick, the accused is being labeled a criminal. . . . [T]he force of the accusation itself can counteract the presumption of innocence. Despite the judge's caution to the jury that the defendant is presumed to be innocent, there is always a danger that the jury will assume that the state would not have brought an indictment or complaint unless the defendant was probably guilty. . . . *Good character evidence should be understood as a defensive tool, designed to off-set the damage caused by the indictment and opening statement*.[49]

One way in which defendants may want to demonstrate their character is to do the reverse of what prosecutors do: use their own *clean record* as evidence of their good, law-abiding character; they then argue that they acted in conformity with their good character and did not commit the charged crime. For example, "[d]efendant cites various authorities for the proposition that the law-abiding character of a defendant is admissible. She argues that *a showing that she has never been convicted of a crime is the functional equivalent of evidence that she is a law-abiding citizen*."[50]

A person's good character, as demonstrated by a clean record, can be powerful—so powerful, in fact, that prosecutors frequently introduce their own witnesses' clean records to bolster their credibility in the eyes of the jurors. For example, one Florida prosecutor asked the state's star witnesses: "And at that time, had you ever been charged with a felony before?"[51] Even more persuasively, a California prosecutor asked one of the complaining witnesses: "You have no criminal history, do you?"[52] Similarly, a Wisconsin prosecutor was allowed to elicit testimony that the

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[49] Ross, *supra* note 7, at 229 (emphasis added). Ross points to several sources to demonstrate that character evidence is "deeply imbedded" in our system and takes on "almost constitutional proportions." *Id.* at 235, 235 nn.22-23.

[50] *Bedker*, 440 N.W.2d at 806 (emphasis added).

[51] Welch v. State, 940 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 2006).

[52] People v. Ortega, No. G050328, 2016 WL 6441168, at *3 (Cal. Ct. App. 2016).

state's complaining witness "had never been convicted of a crime."[53]

But when a defendant seeks to introduce evidence of a clean record—for example, that he or she has "never been previously arrested, charged, prosecuted or convicted of a crime"[54]— "[i]t appears to be the settled law . . . that the good character of the accused may *not* be proved by testimony that he has never been previously charged with or convicted of a criminal offense."[55]

Admittedly, this isn't quite as blatant a double standard as it first appears to be. In the previously discussed Florida, California,

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[53] State v. Daniels, No. 89-0702, at *3 (Wis. Ct. App. 1989) (holding that the lower court could allow the witness to testify that he has never been convicted of a crime but must have a rational reason for doing so).

[54] City of Chicago v. Lowy, 353 N.E.2d 208, 212 (Ill. App. Ct. 1976) (citation omitted).

[55] Smith v. State, 414 S.W.2d 659, 661 (Tex. Crim. App. 1967) (emphasis added). *See also* State v. Garcia, 453 N.W.2d 469, 474 (Neb. 1990) ("[T]estimony that [the defendant] had never been convicted of a felony" was properly stricken.); State v. Oliver, 174 So. 2d 509, 514-15 (La. 1965) ("[G]ood character cannot be shown by documentary or testimonial evidence that an accused has never been in trouble or arrested . . . ."); Hendricks v. State, 202 So. 2d 738, 740 (Ala. 1967) ("A defendant may not seek to prove his good character by his own testimony, to the effect that he has never been arrested nor prosecuted for any violation of the law . . . ."); State v. Bogle, 376 S.E.2d 745, 751 (N.C. 1989) ("[E]vidence of a lack of convictions should not have been admitted as character evidence."); Godsey v. State, 610 S.E.2d 634, 635 (Ga. Ct. App. 2005) ("[M]erely having no convictions or a clean record is insufficient to invoke good character."); *Bedker*, 440 N.W.2d at 806 (defendant not allowed "to testify that she had never been convicted of a crime"); *Lowy*, 353 N.E.2d at 212 (evidence of a clean record not admissible).

Conversely, without citation to legal authority, two coauthors wrote that, "[t]ypically, under the rules of evidence applicable in a criminal case, a defendant is entitled to put his character in issue by, for instance, *testifying that he has no prior criminal record*." Daniel Givelber & Amy Farrell, *Judges and Juries: The Defense Case and Differences in Acquittal Rates*, 33 L. & SOC. INQUIRY 31, 47 n.10 (2008) (emphasis added). Another set of coauthors then cited this claim in their own article. *See* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 508 (2011) (The defendant with a clean record "is free to announce that he has no prior convictions . . . ."). I have not found any legal authorities to support this claim; all authorities I have identified—including cases from Fla., Cal., Wis., Ill., Tex., Neb., La., Ala., N.C., and Ga.—contradict it. The closest I have come is a case permitting the lack of criminal record not for "character," but for "background evidence." *See* United States v. Blackwell, 853 F.2d 86, 88 (2d Cir. 1988). In another case, the defendant's predisposition (character) was an element of the defense, thus permitting specific instances of conduct (which included a lack of criminal record). *See* United States v. Thomas, 134 F.3d 975, 980 (9th Cir. 1998).

and Wisconsin cases where prosecutors introduced evidence of their own witnesses' clean records, the appellate courts acknowledged it was error for the trial courts to let them do so; however, the appellate courts found the errors were harmless.[56] The double standard is therefore more subtle—it is implemented with the help of a pro-state trial judge who is willing to commit the error by allowing the state to elicit such testimony from its witnesses in the first place.

But that particular double standard, whether it is considered blatant or subtle, is a sideshow; it is not the subject of this Article. Rather, the double standards of interest in this Article center on this question: Why is a defendant's prior conviction *admissible* as evidence of his bad character, but a defendant's clean record is *not* admissible as evidence of his good character?

III. THE DOUBLE STANDARDS

To prevent defendants from introducing their clean records at trial, courts have invoked both a theoretical and a technical objection. However, as the following sections demonstrate, neither is persuasive and both are built on double standards.

A. The Shifting Theory of Admissibility

In preventing defendants from introducing clean-record evidence to the jury, some courts reason, "it does not follow from the fact that [a] person has never been convicted of a crime that the person is law-abiding. Lawless persons may avoid convictions."[57] In other words, a lifetime of clean living is meaningless to a jury, as the defendant may just be a "clever criminal" who has "never be[en] caught."[58]

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[56] *Welch*, 940 So. 2d at 1246 ("[I]t was error for the trial court to allow the State to question the confidential informant . . . about her lack of felony charges. Nevertheless, we conclude that it was harmless error."); *Ortega*, No. G050328 at *6 ("[E]ven if the trial court abused its discretion in allowing [the state's witness] to testify that she had never been convicted of a crime, the error was harmless."); *Daniels*, No. 89-0702 at *3 (reversing the conviction on other grounds but restating the general rule prohibiting testimony about a witness's lack of prior record).

[57] *Bedker*, 440 N.W.2d at 806.

[58] *See id.* (citing Gov't of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985)). *See also Bogle*, 376 S.E.2d at 751 ("[A] lack of convictions addresses only the *fact* that one has not been convicted of a crime. Many clever criminals escape conviction.").

This is odd reasoning. It is undisputed that, in most states, a defendant *is* allowed to present at trial a character witness's *opinion* that the defendant is law-abiding.[59] Yet the clever-criminal reasoning should prohibit such testimony even more forcefully than it prohibits clean-record testimony. Why? Because it is even easier to fool a single person—the character witness who formed a good opinion of the defendant—than it is to fool the entire community, including law enforcement. Or, to adapt the court's own words to make this point: It does not follow from the fact that one witness thinks the defendant is law-abiding that the defendant is, in fact, law-abiding. Lawless persons may simply be clever criminals who have fooled their own, hand-picked character witness.

But even more significantly, since when is logical certainty—"it does not follow"—the test for admissibility of evidence? It is not. The test for admissibility is relevancy.[60] And "[e]vidence is relevant if it has '*any tendency* to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence.'"[61]

In fact, the above reasoning—that the conclusion does not necessarily follow from the evidence, and therefore the evidence (the defendant's clean record) is not admissible—has already been debunked. To illustrate this point by analogy, one Wisconsin defendant was accused of a drive-by shooting and wanted to introduce evidence that his hands tested negative for gunshot residue.[62] The trial court used this identical "it does not follow" argument to keep the test result from reaching the jury:

> [T]he trial court . . . explained that . . . these tests cannot prove that the defendant did not fire a gun and cannot help the defendant in any way. The trial court analogized the gunshot residue tests to fingerprint evidence; that is, the presence of a fingerprint (or gunshot residue) is proof that someone touched something (or fired a gun), but the absence

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[59] *See infra* Part III.B.

[60] *See* Ross, *supra* note 7, at 269 (explaining that relevance does not turn on scientific proof but rather common sense).

[61] State v. DelReal, 593 N.W.2d 461, 464 (Wis. Ct. App. 1999) (quoting WIS. STAT ANN. § 904.01) (emphasis added). *See also* FED. R. EVID. 401.

[62] *DelReal*, 593 N.W.2d at 465.

> of a fingerprint (or the absence of gunshot residue) does not prove that the person did not touch something (or did not fire a gun).[63]

The appellate court then debunked this reasoning by applying the *correct* legal test for admissibility: relevance, not logical certainty.

> [T]he gunshot residue tests of [the defendant's] hands were negative. That is, there were insufficient amounts of chemical elements present to yield a positive result. The defense certainly could argue from this result that the test reduces the probability that [the defendant] fired the gun. Similar to the fingerprint analogy, the test cannot conclusively prove that [the defendant] was not the shooter because he may have taken some action to eliminate any positive evidence, such as washing his hands to remove any residue, just as a defendant may take action to ensure his fingerprints do not remain at a scene by wearing gloves or wiping the surface clean. This, however, does not make the test or its results irrelevant or inadmissible. Rather, these factors are arguments with respect to the weight of the evidence. The negative evidence may not disprove a defendant's guilt, but it certainly has a "tendency" to make it "less probable."[64]

Similarly, an arrest-, charge-, and conviction-free life does not *necessarily* prove the defendant is law-abiding; he could, in theory, be a "clever criminal."[65] But a clean record does have a tendency to make it more probable that the defendant is law-abiding—something that the courts have already acknowledged is relevant. In a closely-related context, a federal court explained the significance of such evidence:

> [T]estimony that [the defendant] had no prior arrest or criminal record would have allowed a jury to infer that he had not engaged in prior bad acts or bad conduct. While it does not necessarily follow that a person with no prior criminal or arrest record has always behaved in a law-abiding manner,

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[63] *Id.* at 464-65.

[64] *Id.* at 465 (quoting WIS. STAT. § 904.01).

[65] State v. Bedker, 440 N.W.2d 802, 806 (Wis. Ct. App. 1989) (citing Gov't of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985)).

> evidence of the absence of a record is certainly relevant because it would tend to make it more probable that the person had not previously engaged in criminal conduct.[66]

Finally, courts further demonstrate their bad faith when they apply the erroneous logical-certainty test unevenly. While courts hold that a defendant's clean record does *not* demonstrate his or her good character, those same courts have also held that a mere accusation against a defendant—even one that resulted in acquittal—*is* sufficient to prove bad character. The courts justify this by placing the impossible burden of proof of logical certainty *on the defendant under both scenarios*. More specifically:

> When the script is flipped, prosecutors . . . argue that they should be "allowed to admit evidence of other criminal conduct for which the defendant *had been acquitted* in a prior action." And the courts are eager to agree, holding that it is error for a defendant to "equate his acquittal with innocence." Instead, "an acquittal only establishes that there was a reasonable doubt in the jury's mind as to whether the defendant committed the prior crime, not that the defendant is innocent."
>
> The result of this double standard is that prosecutors are able to use the defendant's alleged prior bad act—an act for which the jury found him not guilty after a supposed search for the truth—as evidence of guilt. Even more alarming, despite the mantra that trials are a search for the truth, many courts "do not allow the defendant to inform the jury of his prior acquittal." Their reasoning: the jury could be confused into

[66] United States v. Thomas, 134 F.3d 975, 979-80 (9th Cir. 1998). This case discussed the *relevancy* of a clean record as character evidence where the *form* of the evidence, i.e., the clean record itself, was not precluded by Fed. R. Evid. 405(b) as the defendant's predisposition to commit the crime charged was an element of the entrapment defense and, therefore, specific instances of conduct (as demonstrated by the clean record) were expressly permitted under the rules of evidence. *Id.* at 978-980. For more on the form of evidence, also known as the method of proof, *see infra* Part III.B.

> thinking that the defendant is not guilty of the prior allegation for which he was acquitted.[67]

In other words: heads the defendant loses, tails the state wins. The defendant is *not* permitted to introduce evidence of a clean record, as a clean record does not necessarily prove his law-abiding character. On the flipside of the coin, the state *is* permitted to introduce evidence of an allegation for which the defendant was acquitted, as the acquittal does not necessarily prove he was innocent of the charge.

B. Geese, Gander, and Methods of Proof

Other courts concede that a clean record *is* evidence of law-abiding character but prevent such evidence from reaching the jury because it is not an appropriate method of proof. The Federal Rule of Evidence reads: "When evidence of a person's character or character trait is admissible, it may be proved [1] by testimony about the person's *reputation* or [2] by testimony in the form of an *opinion*."[68]

Therefore, when a defendant seeks to introduce evidence of a clean record, courts routinely hold: the defendant's "testimony that she has never been convicted of a crime is not [1] reputation testimony or [2] testimony in the form of an opinion."[69] Consequently, "the trial court[s] . . . refuse[] to permit defendant[s] to testify that [they] had never been convicted of a crime."[70]

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[67] Michael D. Cicchini, *The Battle over the Burden of Proof: A Report from the Trenches*, 79 U. PITT. L. REV. 61, 101-02 (2017) (internal footnotes and minor text modification omitted).

[68] FED. R. EVID. 405(a) (emphasis added). Not all states adopt the federal rules. As of 2004, for example, eleven states permitted *reputation* evidence but not opinion testimony. *See* Ross, *supra* note 7, at 239.

[69] *Bedker*, 440 N.W.2d at 806.

[70] *Id. See also* State v. Williams, 524 So. 2d 1221, 1230 (La. Ct. App. 1988) ("The defendant's good character can only be established by proof of his general reputation in the community. . . ."); Wrobel v. State, 410 So. 2d 950, 951 (Fla. Dist. Ct. App. 1982) ("In Florida, the methods of presenting character evidence is limited to testimony of reputation." (citation omitted)); City of Chicago v. Lowy, 353 N.E.2d 208, 212 (Ill. App. Ct. 1976) ("[E]vidence tending to demonstrate good character must make reference to the general reputation . . . of the accused . . . .").

But what's good for the goose should also be good for the gander. "For an adversary system to operate fairly, there must be a certain equality between the accused and the prosecuting sovereign. There must be relatively evenhanded, symmetrical rules allowing both sides to effectively litigate the pivotal issues determining innocence or guilt."[71] This symmetry in the rules of evidence can be evaluated on multiple dimensions. For example, one author frames it this way within the context of a sexual assault allegation:

> [T]he rape sword laws allow the prosecution to bolster the *alleged victim's credibility* by presenting corroborating evidence sufficient to prove that in the past, the accused has committed similar sexual crimes. Positing the same premise, the rape shield laws should be construed to enable the defense to attack the *alleged victim's credibility* by presenting evidence sufficient to prove that in the past, the alleged victim has made similar, false accusations.[72]

This author has analyzed the rules through the lens of the alleged victim's credibility, and on that dimension his argument is a good one: if the state is allowed to bolster it with the defendant's prior conviction, then the defense should be allowed to attack it with the alleged victim's prior false allegations.

However, the true, and sometimes even expressly stated, purpose for introducing prior convictions is to establish the *defendant's character* "in order to show that [the defendant] acted in conformity therewith."[73] The defendant's character, therefore, is the relevant dimension. And because the state is allowed to prove bad character through prior convictions, charges, and mere accusations,[74] the defendant should be allowed to demonstrate good character through the absence of such evidence or, alternatively stated, a clean record.

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[71] Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. PAC. L. REV. 709, 738 (2016).

[72] *Id.* at 739 (emphasis added) (citing FED. R. EVID. 412, 413).

[73] WIS. STAT. § 904.04(2)(b)(2) (2019).

[74] *See supra* Part I.

In other words, these hyper-technical, asymmetrical rules that are imposed on the defendant[75] regarding the method or form of proof "fit poorly with the notion that good character evidence is a fundamental right."[76] Further, even putting aside whether these rules of evidence are symmetrical, they must still bow to the constitutional right to present a complete defense.[77]

> The various types of other evidentiary double standards are too numerous to itemize here. Nonetheless, virtually any rule of evidence . . . provides a tremendous opportunity for a court to limit or even exclude the . . . defendant's [evidence of innocence]. Alarmingly, most courts regularly elevate these rules of evidence—or, more accurately, their hyper-technical and often erroneous interpretation of the rules—above the defendant's constitutional right to present a defense, despite the Supreme Court's holding that the right to present a defense should trump the rules of evidence.[78]

Given the pervasive role that character plays in a trial, along with the impact that character evidence can have on a jury's verdict, a full and complete defense should include, if the defendant chooses, evidence of good character as demonstrated by a clean record of arrests, charges, or convictions. In fact, given that jurors are free to convict defendants based on a mere allegation without any corroborating evidence, character evidence may be so significant to the defense that it, along with the defendant's testimony, may constitute *the* defense.

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[75] *See* Ross, *supra* note 7, at 236 (arguing that "good character evidence and bad character evidence" are "asymmetrical," and that "the right of good character evidence is a mirage.").

[76] *Id.* at 242.

[77] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

[78] Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. C.R. L.J. 1, 22 (2013) (citing Brett C. Powell, Comment, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1029 (2001) ("[T]he Supreme Court affirmed the principle that . . . rules of evidence were subject to constitutional limitations."); Robert Hayes, Note, *Enough is Enough: The Law Court's Decision to Functionally Raise the "Reasonable Connection" Relevancy Standard in* State v. Mitchell, 63 ME. L. REV. 531, 534-35 (2011) (discussing numerous arbitrary rules of evidence that have been declared unconstitutional in their application)).

IV. A NEW RULE OF EVIDENCE

It is helpful when proposing a new rule to do so within the context of some facts. Suppose that a defendant is on trial for sexual assault of a child—the accusation is of the common variety: touching of the intimate parts over the clothing.[79] No witnesses were present for the alleged touching. The child testifies that the defendant committed the crime; the defendant denies it. Putting other matters aside, and assuming the applicability of the rules of evidence discussed in this article, the analysis regarding the defendant's character would include[80] the following.

First, if the defendant has been accused of a similar sexual touching in the past, the state may try to present the details of the allegation as other-acts evidence, even if the allegation was never charged or, if it was, resulted in a dismissal or acquittal.[81] The state would have to offer the evidence for a permissible purpose—such as evidence of identity, intent, or absence of mistake or accident. The prior allegation, however, is probably just "character evidence in disguise."[82]

Second, if the defendant has a prior conviction for a qualifying sex crime, the state may be permitted to use it as direct, rather than disguised, evidence of character.[83] That is, the prior conviction might be used "as evidence of the [defendant's] character in order to show that the [defendant] acted in conformity therewith"[84] at the time of the crime now alleged.

Third, the defendant may elect to introduce evidence of his or her good character under Federal Rule of Evidence 404.[85] For our

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[79] *See, e.g.*, WIS. STAT. § 948.02(2) (2019) ("Whoever has sexual contact . . . with a person who has not attained the age of 16 years is guilty of a Class C felony."); WIS. STAT. § 948.01(5) (2019) ("Sexual contact" includes "intentional touching, whether direct or through clothing, if that intentional touching is . . . for the purpose of . . . sexually arousing or gratifying the defendant" and is done "by the defendant . . . of the complainant's intimate parts.")

[80] I use the word "include" purposefully, as this Article presents only a narrow discussion of character evidence. By way of example only, character evidence for *truthfulness* may be governed by a completely different set of rules. *See* FED. R. EVID. 608, 609, which are not discussed in this Article.

[81] *See supra* Part I.A.

[82] People v. Crawford, 582 N.W.2d 785, 794 (Mich. 1998).

[83] *See supra* Part I.B.

[84] WIS. STAT. § 904.04(2)(b)(2) (2019).

[85] FED. R. EVID. 404(a)(2)(A).

purposes, we will focus on the character trait of being law-abiding, as discussed throughout this Article. Federal Rule of Evidence 405 presently limits the mode of admission of such evidence to opinion or reputation testimony.[86] While opinions and reputation may be compelling, depending on the stature of the character witness or the nature of the community in which the defendant enjoys his or her reputation, they are not very specific.

Therefore, Rule 405, or the state equivalent thereof, should be amended. This proposed amendment, *in italics*, would be incorporated into the existing rule as follows.

> When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. *When a defendant elects under Rule 404(a)(2) to introduce evidence of his own trait for being law-abiding, whether generally or within a narrow context, the defendant may also present the absence of criminal convictions, charges, arrests, or accusations to establish the character trait.* On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.[87]

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[86] FED. R. EVID. 405(a). Not all states follow the federal rule, and some permit reputation, but not opinion, evidence. *See* Ross, *supra* note 7, at 237.

[87] FED. R. EVID. 405(a) (italics added to indicate proposed amendment). A concurring Supreme Court Justice on the North Carolina Supreme Court wrote:

> I disagree with the majority as to its treatment of testimony that the defendant had no prior convictions. If this testimony had been in the proper form I believe it should have been considered as substantive evidence. I believe it is more likely that a person with no prior convictions will not commit a crime than a person who has prior convictions.

State v. Bogle, 376 S.E.2d 745, 752 (N.C. 1989) (Webb, J., concurring).

Josephine Ross has recommended a similar legal reform, advocating for the admission of "specific instances of good conduct" in addition to reputation and opinion evidence. Ross, *supra* note 7, at 270. In a sense, we are advocating for the same thing, as demonstrating the absence of prior convictions, charges, arrests, and accusations essentially proves ongoing or continuous "good conduct." Ross's proposal, however, is more wide-ranging, as hers would include the right to present evidence of specific, affirmative acts of "good conduct" that demonstrate a good character. By way of example, in a theft case, this might include presenting to the jury the defendant's prior act of returning lost property to establish her honest character. However, even without such legal reform, a prior good act could possibly be introduced by the defense as other

Returning, then, to the above hypothetical defendant who is accused of child sexual touching, assume that she is a forty-year-old woman who has worked at the same daycare facility for the past twenty years. A character witness could be called to testify on behalf of the defendant as follows, beginning with foundational testimony.[88]

> *Defense counsel*: How do you know the defendant?
>
> *Witness*: Through work at the daycare center.
>
> *Defense counsel*: And how long have you known her?
>
> *Witness*: Actually, since high school, even before we started working together.
>
> *Defense counsel*: Describe your professional relationship with her.
>
> *Witness*: I worked side-by-side with her for the first five years she was employed at the daycare, and I've been her supervisor for the past fifteen years. She's been there about twenty years, and I've been there a little bit longer.
>
> *Defense counsel*: Do you currently know the defendant in any other context?
>
> *Witness*: Yes, we both live in the same town, and I know her socially as well. We're not friends, but we are both active in the general community. I see her at school events for our children and at events for church.

After laying a sufficient foundation, above, defense counsel could then elicit the witness's personal opinion about the

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acts under FED. R. EVID. 404(b) as evidence of the defendant's intent or motive, for example, on the day of the charged crime.

[88] *See* BLINKA, *supra* note 6, at § 405.2 ("The foundation for opinion testimony, like that for reputation, is deliberately minimalist. It neither requires nor permits much beyond [a] handful of barebones questions . . . . []The foundation usually can be laid in less than a minute.").

defendant's character, which is permitted under the current version of the rule.[89]

> *Defense counsel*: And in that time you've known the defendant, have you formed an opinion about whether she is a law-abiding person—not only with regard to children, but in general?
>
> *Witness*: Yes, I have a strong opinion based on my firsthand knowledge.
>
> *Defense counsel*: And what is that opinion?
>
> *Witness*: Based on my experiences with her in all of these different settings, including high school, her work in the community, and her employment at the daycare, I believe she is very law-abiding. And she is excellent with children; she is diligent about all of the rules and laws and takes them very seriously.

The next line of testimony already permitted under the statute relates to the defendant's reputation in the relevant community.[90]

> *Defense counsel*: To your knowledge, does the defendant have a reputation in the community in which you work, the daycare center?
>
> *Witness*: Yes, the defendant has a great reputation at work. She is known as law-abiding and rule-abiding. She's very conscientious.
>
> *Defense counsel*: And does she have a reputation in the wider community in which you live, in your social circle?

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[89] *Id.* ("Opinion is more frequently used than reputation evidence if only because few persons have acquired true 'reputations . . . .'"). However, not all states follow the federal rule, and some states may prohibit such opinion testimony. *See* Ross, *supra* note 7, at 237 ("In eleven jurisdictions," at least as of 2004, "character witnesses may testify only to the defendant's *reputation*, not to their own *opinion* about her good character." (emphasis added)).

[90] BLINKA, *supra* note 6, § 405.2 ("The 'community' can take a plethora of forms, including home, work, or school.").

> *Witness*: Her reputation is the same: she's known as a straight arrow, a very law-abiding and responsible person, one you could trust to care for your own children.

Finally, under the amendment to the rule proposed above, defense counsel would also be able to elicit the most powerful evidence of all: the defendant's clean record of convictions, charges, and even accusations.[91]

> *Defense counsel*: You said you've worked with the defendant for twenty years and have been her supervisor for the last fifteen years, is that right?
>
> *Witness*: That's correct.
>
> *Defense counsel*: In your role as supervisor, are you aware of whether the daycare's employees have criminal records?
>
> *Witness*: Yes. We do a comprehensive search when we hire them and then each year we do ongoing reviews.
>
> *Defense counsel*: Does the defendant have a criminal record?
>
> *Witness*: No, she does not have any criminal conviction.
>
> *Defense counsel*: Would you also know if the defendant has ever been charged with a crime?
>
> *Witness*: Yes, we have access to that information, and she has never been charged with a crime.
>
> *Defense counsel*: What about arrests?
>
> *Witness*: Our search includes police databases which provide arrest records, and she has never been arrested.
>
> *Defense counsel*: In the course of your job duties, how many daycare workers have you supervised?
>
> *Witness*: Over the years, hundreds.
>
> *Defense counsel*: And how many children have you come in contact with over the last twenty years?

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[91] *See* Ross, *supra* note 7, at 238 ("It is no revelation that reputation is weaker than opinion evidence, and that both are weaker than evidence of conduct.").

> *Witness*: Many hundreds. More than a thousand, for sure.
>
> *Defense counsel*: In your role as supervisor, do you ever field or investigate complaints from these children or their parents?
>
> *Witness*: Yes, that's one of my duties. Children and their parents have complained about all types of things from the minor to the very serious. Every allegation is documented and investigated. It remains part of the employee's personnel file regardless of how the matter is resolved. It could be minor or serious, completely made up or real. It's all there.
>
> *Defense counsel*: Before this allegation that we're in court for today, have any of the thousands of children or parents *ever*, in the defendant's twenty years of employment, complained that she has violated any rule, policy, or law—anything?
>
> *Witness*: No, her record is spotless. Clean as a whistle for all twenty years that she's worked with the daycare.

This example demonstrates that a simple amendment to a single rule would level the playing field with regard to the defendant's character—and it would directly benefit those defendants *who are most likely to be innocent* of the charges against them.[92]

Just as the state can use prior accusations, formal charges, and convictions to indirectly and sometimes directly prove a defendant's bad character, so too should a defendant be able to use his or her clean record—with regard to accusations, charges, or convictions—to demonstrate good character. The principles of symmetry, the right to present a complete defense, and the trial as a supposed "search for the truth" require it.[93]

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[92] *See* State v. Bogle, 376 S.E.2d 745, 752 (N.C. 1989) (Webb, J., concurring) ("I believe it is more likely that a person with no prior convictions will not commit a crime than a person who has prior convictions."); Ross, *supra* note 7, at 227 ("Certainly we use good character information in everyday life to infer a lack of propensity.").

[93] Trials are often called a "search for the truth," despite the numerous evidentiary and other rules that often prevent defendants from introducing evidence of their innocence to the jury. *See* Cicchini, *supra* note 67, at 96-98 (discussing multiple truth-suppressing trial rules).

V. AN ALTERNATIVE DEFENSE STRATEGY

The legal system itself operates at a pace "somewhat faster than a tree grows but a lot slower than ketchup coming out of a bottle."[94] The pace of legal reform, of course, is even slower. Consequently, defense lawyers cannot wait around for a legislature to amend the applicable rule of evidence or for appellate courts to realize the logical and legal errors of their prior decisions—decisions which have unjustly morphed, through the mere passage of time, into "settled law."[95]

Therefore, in cases where a defendant has powerful character evidence and wants to establish it, in part or in whole, through evidence of a clean record of accusations, arrests, charges, or convictions, defense counsel should consider alternative routes to win admissibility of such evidence.

First, to recap, this Article demonstrated the folly of the two pillars on which the rule *prohibiting* clean-record evidence rests. It demonstrated by analogy that, while the absence of a conviction is not conclusive proof of law-abiding character, it is persuasive and should be admissible. It also invoked the principles of symmetry in the rules of evidence and the right to present a complete defense to argue that clean-record evidence should be an acceptable method of proof.

But the use of the analogy and the invocation of the other legal principles need not be limited to pursuing legal reform. These methods of argumentation are also valuable when advocating for the admissibility of clean-record evidence, at the trial-court level, on a case-by-case basis.

Second, in addition, there is an even more direct principle in favor of admissibility of clean-record evidence: it is called "negative reputation evidence" (not to be confused with *bad* reputation evidence).[96] It is very similar to the analogy and legal principles discussed above, and it single-handedly debunks the two pillars of reasoning on which the current rule of exclusion

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[94] MATTHEW STEWART, THE MANAGEMENT MYTH: WHY THE EXPERTS KEEP GETTING IT WRONG 241 (W.W. Norton & Co. 2009) (describing the author's personal experience in the legal system).

[95] Smith v. State, 414 S.W.2d 659, 661 (Tex. Crim. App. 1967).

[96] BLINKA, *supra* note 6, at § 405.2.

rests. The argument for using "negative reputation evidence" proceeds logically as follows.[97]

> A. It is undisputed that testimony about a defendant's reputation in the community is admissible,[98] at the defendant's election, to establish his law-abiding character.[99]
>
> B. Reputations are generally forged based upon the lack of accusations, "that is, proof that the witness has heard nothing bad about the subject."[100]
>
> C. "On the theory that people are more likely to remark on bad character than good, witnesses in a position to have heard *were permitted to testify that nothing bad had been said about the person*."[101]
>
> D. The fact that "nothing bad had been said" about the defendant is broader than, and necessarily includes, evidence that the defendant does not have any prior formal accusations, arrests, charges, or convictions. That is, one can have something bad said about them but *not* be arrested, charged, or convicted. However, one who has been arrested, charged, or convicted must necessarily have had something bad said about them.
>
> E. Finally, the defendant should therefore also be permitted to introduce these lesser-included forms of evidence—the absence of formal accusations, arrests, charges, and convictions—to the jury.

How would this apply to the above hypothetical example of the daycare-worker defendant? The questions about the lack of accusations, arrests, charges, and convictions would simply be asked when asking the witness about the defendant's reputation

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[97] Although prosecutors often sneak in clean-record evidence for their own witnesses in the middle of direct examination (*see supra* Part II), defense counsel should strongly consider raising this issue pretrial in the form of a motion in limine or other form of motion or notice depending upon the relevant jurisdictional rules and the individual court's practices.

[98] FED. R. EVID. 405.

[99] FED. R. EVID. 404(a)(2)(A).

[100] BLINKA, *supra* note 6, at § 405.2.

[101] *Id.* at § 405.2 n.7 (quoting WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5264 (1978 ed.) (emphasis added)).

in the daycare community. And even if this basic principle of "negative reputation evidence" cannot be read to permit such questioning, defense counsel can still make a strong argument that the principle should be read literally.

That is, after establishing that the character witness conducts annual records checks on the defendant, including records of conviction, charging, and even arrest, defense counsel could ask the witness: "Based on your experience with the defendant over the course of twenty years—including fielding complaints from children and parents, combined with your annual review of any arrest, charging, and conviction records—have you ever learned of anyone accusing the defendant of doing anything illegal or even improper with children?"

When the witness answers that she has not, the jury will understand, and defense counsel can further establish in closing argument, the incredible breadth of the testimony. This, defense counsel would then argue, is overwhelming evidence of good, law-abiding character with children. And good, law-abiding people don't suddenly, after twenty years of working with children, go against their character and sexually touch children.

CONCLUSION

The defendant's character plays a large role in many criminal cases. The rules of evidence permit prosecutors to present the defendant's prior convictions ostensibly for purposes other than character—such as identity, motive, or intent with regard to the charged crime—but the convictions are really just "character evidence in disguise."[102] In other cases, the rules of evidence permit prosecutors to present the defendant's prior convictions as direct evidence of his bad character.[103] Regardless of how the defendant's bad character comes into evidence, the prosecutor then urges the jury to conclude that the defendant acted in conformity with his or her character on the day of the charged crime and is, therefore, guilty.[104]

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[102] *See supra* Part I.A.
[103] *See supra* Part I.B.
[104] *See supra* Parts I.A and I.B.

Not surprisingly, defendants who have maintained a clean record—for accusations, arrests, charges, or convictions—often want to put that clean record in front of the jury as evidence of their good, law-abiding character.[105] Surprisingly, however, the law generally does not permit it.[106] Courts have developed two reasons for excluding this evidence from the jury, both of which are deeply flawed.[107]

First, courts often say it does not necessarily follow from a clean record that the defendant is law-abiding, as he could just be a clever criminal who has evaded detection for many years or even decades.[108] Yet logical certainty is not the test for admissibility. The evidence (here, a clean record) does not have to conclusively prove, as a matter logical or even scientific certainty, the claim (here, that the defendant is law-abiding). Instead, the test is the much lower threshold of relevance, and clean-record evidence easily clears that low hurdle.[109]

Second, other courts say that a clean record does not qualify as opinion or reputation testimony, which are the only two methods of establishing good, law-abiding character.[110] But prosecutors now routinely present evidence, both indirectly and directly, of defendants' bad character through prior convictions. (Prior-conviction evidence, of course, is not opinion or reputation testimony.) The principle of symmetry and the right to present a complete defense both mandate that defendants have the right to do the inverse: demonstrate their own law-abiding character through a clean record of accusations, arrests, charges, or convictions.[111]

Consequently, this Article proposes amending the rules to permit defendants to present their clean records to juries as evidence of defendants' law-abiding character.[112] Further, because legal reform is usually slow to materialize, if it materializes at all, this Article also presents the defense lawyer with an argument to

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105 *See supra* Part II.
106 *See supra* Part II.
107 *See supra* Parts III.A. and III.B.
108 *See supra* Part III.A.
109 *See supra* Part III.A..
110 *See supra* Part III.B.
111 *See supra* Part III.B.
112 *See supra* Part IV.

seek admissibility of clean-record evidence under the current rules.[113]

This argument has five steps: (1) testimony about the defendant's *reputation* as law-abiding is already admissible; (2) reputations are forged based upon the *absence* of accusations; (3) consequently, "witnesses in a position to have heard" have been allowed to testify that "nothing bad had been said" about the subject; (4) such testimony that "nothing bad had been said" about a person is broader than, and necessarily includes, evidence that the person does not have any convictions; and (5) the defendant should therefore be permitted to testify about this "lesser-included" form of evidence, i.e., clean-record evidence.[114]

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[113] *See supra* Part V.

[114] *See supra* Part V.