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## AN EDIFICE OF MISSHAPEN STONES: INTERPRETING FEDERAL RULE OF EVIDENCE 404(A)

*David Crump\**

### I. INTRODUCTION

*Michelson v. United States*<sup>1</sup> must be one of the U.S. Supreme Court's most astute decisions about evidence. The defendant in that case asked the Court to prohibit customary kinds of prosecution responses to character testimony.<sup>2</sup> The evidence in question contained undeniable prejudice, and perhaps an appearance of irrationality when viewed in isolation, but a long tradition supported its admissibility.<sup>3</sup> In *Michelson*, the Court upheld the use of the evidence.<sup>4</sup>

At the same time, the Justices recognized the seeming inconsistency in this area of the law:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow, it has proved a workable even if clumsy system.<sup>5</sup>

And, in a metaphor more felicitous than judicial opinions usually offer, the Court called the character rules a "grotesque structure," but reasoned that the law was so constructed that "[t]o pull one misshapen stone

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1. 335 U.S. 469 (1948).

2. *Id.* at 472-75; see Stephen A. Saltzburg, *Guilt Assuming Hypotheticals: Basic Character Evidence Rules*, CRIM. JUST., Winter 2006, at 47, 47-48.

3. Daniel D. Blinks, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 U. SEATTLE L. REV. 87, 97-99, 136-38 (2013).

4. *Michelson*, 335 U.S. at 483-85. The Court said that it was deferring to "accumulated judicial experience," instead of "abstract logic." *Id.* at 487.

5. *Id.* at 486.

out . . . is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”<sup>6</sup>

In other words, the Federal Rules of Evidence (“Rule(s)”),<sup>7</sup> particularly the “character evidence rules,”<sup>8</sup> are irrational, if taken singly. But, the development of their structure was inevitable. It would have been difficult for the courts to resist including any of the elements that make up these rules.<sup>9</sup> Taken one by one, the pieces are indeed “misshapen,” but they fit together in a way that the law could not have avoided.

Part II of this Article explains the rational motivations that brought about these odd rules and their equally odd interrelationships.<sup>10</sup> Part II also supports the claim that the development of the structure was inevitable.<sup>11</sup> Part II then proceeds to identify current issues that concern the interpretation of the Rules, and to consider how, in light of their overall structure, each misshapen stone should be interpreted.<sup>12</sup> In pursuit of this analysis, this Article examines the manner in which the chain of rules gets set in motion,<sup>13</sup> which almost always starts with an initiative undertaken by the criminal defendant.<sup>14</sup> Part III of this Article discusses that the defendant may offer exculpatory evidence in the form of a witness’s testimony about a “pertinent trait” of his character.<sup>15</sup> The latitude that this window of opportunity provides to the defendant is not always clear.<sup>16</sup> And, since the defendant’s use of the window permits the opposition (the Government) to counter the defendant’s gambit with potentially prejudicial evidence,<sup>17</sup> there are sometimes questions about

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6. *Id.*

7. FED. R. EVID.

8. *Id.* 404–405.

9. *See infra* Part II.A (justifying the conclusion that the character evidence rules were inevitable).

10. *See infra* Part II.A.

11. *See infra* Part II.A.

12. *See infra* text accompanying notes 27–42.

13. *See infra* text accompanying notes 31–41.

14. The Rules allow the prosecution to initiate character evidence in relatively narrow instances. *See* FED. R. EVID. 404(a)(2)(C) (allowing the Government to show the peaceable character of the alleged victim in response to the defense’s claim that the victim was the first aggressor); *id.* 404(a)(3) (allowing either party to attack the character of any witness for veracity). These rules, however, are outside the scope of this Article. In addition, the invocation by the defendant of certain substantive defenses allows the prosecution to use character evidence, *see* *United States v. Franco*, 484 F.3d 347, 351–52 & n.4 (6th Cir. 2007) (involving entrapment), as does a crime element that requires proof of character, *see* *Carbo v. United States*, 314 F.2d 718, 739–41 (9th Cir. 1963) (involving violent reputation as a relevant trait to extortion).

15. FED. R. EVID. 404(a)(2)(A).

16. *See infra* Part III (discussing the meaning of “pertinent trait”).

17. FED. R. EVID. 404(a)(2)(B) (permitting the Government to “rebut” with witnesses attesting to the bad character of the defendant); *id.* 405(a) (enabling the Government to cross-

whether the window has been opened, and if so, how widely. Each of these questions is analyzed later in this Article.<sup>18</sup>

Part IV of this Article deals with the prosecution's response.<sup>19</sup> If the defendant chooses to offer character testimony, the Rules allow the prosecution to ask questions about "specific instances" of the defendant's conduct that are in opposition to the vision offered by the character witnesses.<sup>20</sup> Issues then arise about the limits of this allowance, which is a dispensation to inject matter that the prosecution otherwise would be forbidden to raise.<sup>21</sup> The prosecution also may offer rebuttal evidence by calling "bad" character witnesses,<sup>22</sup> a possibility that is also the subject of Part IV of this Article.<sup>23</sup> Part V expresses the Author's conclusions, which include: an argument that the Supreme Court was right; that interpretation of the character rules should be informed by consideration of how the full structure fits together; and that fiddling with the resulting edifice by pulling out a misshapen stone is more likely to upset the present balance than to establish a rational edifice.<sup>24</sup>

## II. THE INEVITABLE (BUT CONFUSING) RULES FOR CHARACTER EVIDENCE

### A. *The Defendant's Decision to Offer Character Evidence*

The development of the character evidence rules was inevitable, in the sense that each sequential step in the point and counterpoint is supported by appealing arguments. Imagine a defendant accused of a serious crime. Unlike many defendants whose criminal record is lengthy, this particular defendant has led an exemplary life. He has a virtual army of people who would be pleased to testify about his charitable activities, his pleasant disposition, and his avoidance of harmful conduct. But the court rules, let us suppose, that this testimony is inadmissible. None of these character witnesses can testify to the defendant's good character. This holding would be consistent with the usual approach to

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examine character witnesses with questions about "specific instances" of defendant's misconduct).

18. See *infra* Parts II–IV.

19. See *infra* Part IV.

20. FED. R. EVID. 405(a).

21. See *id.* 404; see also *infra* Part II.B–C (describing the usual exclusions of character evidence offered to prove action in conformity).

22. FED. R. EVID. 404 & advisory committee's note; see also *infra* Part II.C.

23. See *infra* Part IV.

24. See *infra* Part V.

character evidence offered to prove propensity, which is that the evidence is excludable.<sup>25</sup>

But, the ruling seems unfair. The defendant would say, in response: “This is important evidence! My life itself speaks loudly, and it says that I could not have committed this dastardly act. It just isn’t in my character. You are denying me the right to defend myself.” And in close cases, the addition of character evidence can turn the tide in favor of acquittal.<sup>26</sup>

The complaint of this hypothetical defendant has had enough resonance to get the law’s attention.<sup>27</sup> As a consequence, it seems inevitable—or at least highly probable—that the Rules will allow, or will be adjusted to allow, character evidence of some kind. This possibility raises a set of other issues. Will all of the possible character testimony that the defendant might desire to inject, on every subject, become admissible? Will the jury have to listen to evidence about the defendant’s attendance at Sunday school, behavior at work, and conduct in walking away from fights? And, if the law permits these kinds of evidence, will it also allow rebuttal evidence showing that the incidents cited by the defendant’s witnesses are not true, so that the trial gets taken over by sideshows? The reception of unlimited character evidence would turn a criminal trial into a diffuse series of mini-trials about issues distant from the question of guilt or innocence.

The answers to these problems is found in Rule 404(a)<sup>28</sup> and Rule 405(b).<sup>29</sup> Rule 404(a)(1) allows “evidence of the defendant’s pertinent trait.”<sup>30</sup> In other words, the defendant is permitted to offer character evidence, but it must be limited to coverage of a “pertinent trait,” and it

25. See FED. R. EVID. 404(b)(1) (prohibiting character evidence offered to prove action in conformity); see also *Old Chief v. United States*, 519 U.S. 172, 181-82 (1997) (explaining exclusion of evidence and its rationale); *Huddleston v. United States*, 485 U.S. 681, 685-88 (1988) (explaining both the exclusion and the admissibility of evidence offered for another purpose).

26. In general, the inference of innocence in one particular situation from character evidence is unsound, according to psychological science. See David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 29 (1986-1987). Nevertheless, a widely shared view of character evidence tends to produce belief in the inference of innocence. *Id.* at 17-18. But “character witnesses generally play a very small role in deciding the main issues at trial.” *Ex parte Miller*, 330 S.W.3d 610, 621-22 (Tex. Crim. App. 2009).

27. See generally David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279 (1987) (providing commentary on Professor David Leonard’s analysis of the use of character evidence); Leonard, *supra* note 26 (explaining both the “rational truth-seeking” paradigm of evidence law, which sees admissibility of character evidence as relevant to possible innocence, and the paradigm of “catharsis,” which deals with “legitimizing” criminal trials by providing a sense that justice has been served).

28. FED. R. EVID. 404(a).

29. *Id.* 405(b).

30. *Id.* 404(a)(1)(A).

cannot include everything in the defendant's life story that might depict him in a positive light.<sup>31</sup> Rule 405(a) provides that character evidence can consist only of "testimony about the person's reputation or by testimony in the form of an opinion."<sup>32</sup> The defendant's witnesses can say what the defendant's reputation is with respect to the pertinent trait, or the witnesses can give their own opinions of the defendant's character with respect to that trait.<sup>33</sup> The inquiry, thus, becomes focused and one-dimensional.

These rules limit the length of time that character evidence consumes, and they prevent it from creating a mass of mini-trials.<sup>34</sup> In other words, they balance the desire for fairness to the defendant against a recognition that the evidence is of marginal value. The soft-focus testimony of friends of the defendant, who were not present at the events comprising the alleged crime, does not detract much from the hard evidence that the prosecution has to offer as its proof. It is only in close cases that character evidence is likely to help the defendant, and only if the defendant's character is relatively free from known blemishes. In cases that are not so close, character evidence serves only what Professor David Leonard has aptly described as a "cathartic" function; a function, that is, that gives both parties the satisfaction of being heard on a point that is largely irrelevant.<sup>35</sup> Since the appearance of fairness calls for this kind of evidence to be admissible, the Rules admit it—but they define the permitted testimony so that the defendant's friends can get on and off the witness stand quickly.<sup>36</sup> Ideally, they should be able to deliver their direct evidence in one-sentence responses to three or four questions.<sup>37</sup>

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31. *Id.* & advisory committee's note.

32. *Id.* 405(a).

33. *Id.* & advisory committee's note.

34. *Id.*

35. Leonard, *supra* note 26, at 39-41.

36. See FED. R. EVID. 405 advisory committee's note; Leonard, *supra* note 26, at 41.

37. The set of questions and answers might fit a paradigm somewhat like the following:

Q: Do you know the reputation of Dan Defendant for being peaceable and nonviolent in the community in which he resides and among those with whom he associates?

A: Yes, I do.

Q: And what is that reputation?

A: He has an excellent reputation for being peaceable and nonviolent.

Q: Do you also, yourself, have an opinion about his character for being peaceable and nonviolent?

A: I do.

Q: And what is your opinion?

A: He certainly is peaceable and nonviolent.

Some of this questioning, such as the insertion of "among those with whom he associates," is verbose, but the phrase is traditional. Also, the witness may embroider the testimony by adding, "Yes, I see him nearly every day," or "Everyone knows that he has an unblemished record," and the defense lawyer sometimes invites such details. Even so, the testimony is usually brief.

The Rules leave the decision of whether to offer this kind of testimony solely to the defendant.<sup>38</sup> The pertinent trait must be offered by the accused.<sup>39</sup> The Government cannot offer pertinent-trait evidence unless and until the defendant has done so.<sup>40</sup> Again, the issue is one of fairness, or perceived fairness. The prosecution cannot initiate an attack on the defendant with evidence as tangential as character testimony—it must stick to evidence proving the crime at issue.<sup>41</sup> This principle has a major consequence for the defendant’s decision. As Subpart II.B explains, the prosecution can counter an offer of character evidence in ways that are harmful to the defendant.<sup>42</sup> But, the defendant can avoid unleashing this harm by the simple expedient of not calling character witnesses.

*B. The Prosecution’s Cross-Examination of the Character Witnesses:  
How Can Their Credibility Be Tested?*

And so, when new lawyers first encounter the rules that govern character evidence, they seem to resemble *Alice’s Adventures in Wonderland*.<sup>43</sup> But the paradox of the Rules, to paraphrase the Supreme Court, is just beginning.<sup>44</sup> The prosecution’s cross-examination of the character witnesses will take the new lawyer into the crazier realm that Alice visited after Wonderland in *Through the Looking Glass*.<sup>45</sup>

Rule 405(a), as is indicated above, confines character evidence to reputation or opinion.<sup>46</sup> Then, however, the Rule goes on to say: “On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.”<sup>47</sup> What this sentence means is that although the defendant is limited to asking a soft and general question about reputation or opinion on a pertinent trait, such as peacefulness and nonviolence, the Government can ask about

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38. See FED. R. EVID. 404(a)(2) (allowing a criminal defendant to introduce evidence of a pertinent trait).

39. *Id.*

40. *Id.* (allowing the Government to offer character evidence only “to rebut” character evidence offered by the defendant); *id.* 405(a) (permitting inquiry about “specific instances” only on cross-examination of the defendant’s character witnesses).

41. See *id.* 401, 403 (indicating that evidence must be relevant and non-prejudicial to be admissible); Leonard, *supra* note 26, at 18-19.

42. See *infra* Part II.B.

43. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* (London, MacMillan & Co. 1865).

44. *Michelson v. United States*, 335 U.S. 469, 475-99 (1948) (“When the defendant elects to initiate a character inquiry, another anomalous rule comes into play.”).

45. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* (London, Macmillan & Co. 1871).

46. FED. R. EVID. 405(a); see *supra* text accompanying notes 32-33.

47. FED. R. EVID. 405(a).

specific instances involving violent acts of the defendant, including murders, robberies, and assaults.<sup>48</sup> And, the specific instances need not be supported by convictions; they can be raised by arrests that resulted in nothing but releases, or, for that matter, by simple reports without arrests.<sup>49</sup> The prosecutor need not be able to prove the specific instances. A good-faith basis for believing that they occurred is enough.<sup>50</sup>

Why should this kind of inquiry by the prosecution be allowed? The answer lies in the possibility that the defendant's character witnesses are misinformed, have bad judgment, or are simply testifying falsely. Any witness can be mistaken or lying, and the Rules are set up to allow both sides to expose this possibility.<sup>51</sup> Imagine that the defendant's witnesses, in a trial concerning an accusation of violence, testify solemnly that his reputation for peacefulness is "good," or even "excellent." But, the prosecution is holding a report of the defendant's criminal history—commonly referred to as a "rap sheet"—which shows a series of arrests and convictions for violent crimes that is as long as the defendant's arm, to adopt the well-worn phrase. It would be surprising if the law did not allow the opposing side, the prosecution, to test the credibility of the defendant's witnesses. A response indicating ignorance of the defendant's record exposes the witness as lacking the knowledge that a character witness should have, and answers showing that the witness knows about the defendant's many prior assaults, but still considers him peaceful, suggest that the witness has bad judgment. The Rules usually do not limit the jury to false impressions, and so, the "specific instances" kind of cross-examination fulfills the usual purpose of cross-examination: that of testing the witness's credibility.<sup>52</sup>

The usual form of the cross-examination consists of "have you heard" or "did you know" questions.<sup>53</sup> Imagine that a character witness

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48. See *id.* 405 & advisory committee's note; *Michelson*, 335 U.S. at 479.

49. FED. R. EVID. 405 advisory committee's note. In fact, it need not even involve criminal conduct, so long as it is responsive to the "pertinent trait" raised by the defendant. See, e.g., *United States v. Bah*, 574 F.3d 106, 117-18 (2d Cir. 2009) (upholding the trial court's allowance of a Government question about a noncriminal act of dishonesty during the cross-examination of witnesses who testified to the defendant's character for truthfulness in a trial involving a business crime).

50. *United States v. West*, 58 F.3d 133, 141 (5th Cir. 1995); *United States v. Brown*, 503 F. Supp. 2d 239, 245 (D.D.C. 2007).

51. See *Brown*, 503 F. Supp. 2d at 245.

52. FED. R. EVID. 405 advisory committee's note; *Brown*, 503 F. Supp. 2d at 245.

53. See, e.g., *West*, 58 F.3d at 141 ("Massey argues on appeal that the district court erred when it ruled that the government could cross-examine the character witnesses . . . with 'have you heard' questions . . ."). Theoretically, "have you heard" questions would most properly be used for reputation witnesses, who testify from what they have heard, and "did you know" questions for opinion character witnesses, who form opinions from what they know; but this distinction is too fine to be an issue most of the time. Cf. *United States v. Damblu*, 134 F.3d 490, 494-95 (2d Cir. 1998).



has just testified that the defendant's character is peaceful. The prosecution seeks to test the knowledge (or the judgment) of the witness. "Did you know that he was convicted last year of aggravated assault?" "No, I did not know that." "Did you know that the year before that, he was arrested for another assault?" "No." "And did you know that ten years before that, he was convicted of manslaughter, for which he served a stretch of time in the state prison?" "Well, yes, I knew about that, but he told me he was innocent, and I believe he was railroaded; therefore, that instance does not affect my opinion."

Notice that the prosecutor does not offer proof of the specific instances. The prosecutor does not even assert that they are factually true, or that they happened. Rule 405(a) does not allow this kind of proof.<sup>54</sup> It permits only an "inquiry" into specific instances.<sup>55</sup> The theory is that the prosecutor is cross-examining the witness to show that the witness is unreliable, not to show that the specific instances actually occurred.<sup>56</sup> A believable character witness would know about relevant specific instances, and would be able to treat them rationally in forming an opinion about the defendant's character.<sup>57</sup> This is the essential purpose of cross-examination, and it is difficult to see how it could be conducted as effectively as the hypothetical rap sheet demands, without "have you heard" and "did you know."

But more is going on during the specific-instances inquiry than this, of course. In addition to testing the witness's credibility, the "have you heard" simultaneously suggest to the jury that the defendant did, indeed, commit these horrible acts.<sup>58</sup> A skillful prosecutor might enhance this effect by holding the rap sheet before him in the view of the jury, and by including dates of offenses and other details in the questions. "Have you heard that on May 27, 2014, this defendant was convicted right here in Capital City of the crime of aggravated assault, committed on a victim named Ollie Holmes?" The suggestion of the offense bleeds into the jury box.<sup>59</sup> It is an instance of a phenomenon well known to the

54. FED. R. EVID. 405(a).

55. *Id.*

56. *Cf.* United States v. Russo, 110 F.3d 948, 952-53 (2d Cir. 1997) (suggesting that cross-examination is designed "to elicit how much, if anything, [the witness knows]"); United States v. Nektalov, No. S203CR.828, 2004 WL 1637010, at \*2 (S.D.N.Y. July 21, 2004) (stating that the inquiry is "to show that the character witness is not fully familiar with, or truthful about, the defendant's reputation").

57. *Cf.* sources cited *supra* note 56.

58. *See* Michelson v. United States, 335 U.S. 469, 481 n.18 (1948) ("[T]he jury is pretty certain to infer that defendant had in fact been arrested . . ."). Nevertheless, the Supreme Court stated: "[W]e approve the procedure as calculated in practice to hold the inquiry within decent bounds." *Id.*

59. *See id.*; Russo, 110 F.3d at 952-53; Nektalov, 2004 WL 1637010, at \*2.

law of evidence, namely, the problem of information that is relevant for more than one purpose.<sup>60</sup> The official, proper purpose of the inquiry is to test the credibility of the character witnesses. The unofficial effect is the suggestion that the defendant is actually a bad person. In fact, the defendant may be entitled to an instruction under Rule 105,<sup>61</sup> to caution the jury to avoid this unofficial inference.<sup>62</sup> But, the two uses of the evidence are intertwined, and it is hard to see how one can be separated completely from the other.

In summary, it was inevitable that the Rules would permit the defendant to offer character evidence. But, the Rules that permit character evidence give rise to the possibility of witnesses who testify in a manner that leaves a false impression, and therefore, it was probably also inevitable that the Rules would empower the prosecution to counter the evidence by inquiry into “relevant specific instances” of the defendant’s conduct.<sup>63</sup> The kind of cross-examination allowed by Rule 405(b) may seem a misshapen stone if viewed in isolation, but it dovetails with Rule 404(a)’s allowance of character evidence.<sup>64</sup> The only reason the two rules seem fair is because the defendant has a ready means of preventing the Government from using this form of cross-examination: do not call character witnesses in the first place. The defendant is in the driver’s seat. The Rules give the defendant, and only the defendant, the power to decide to offer character witnesses, or not to offer them.<sup>65</sup> Thus, the defendant has the ability to prevent this sequence of evidence, including the specific-instances inquiry, from happening at all.

### C. *The Prosecution’s Rebuttal with “Bad” Character Witnesses*

The Government has another arrow in its quiver. Rule 404(a)—the same Rule that permits the defendant to call pertinent-trait witnesses—also provides that the prosecution may call character witnesses to rebut the defense’s character witnesses.<sup>66</sup> In other words, the prosecution can wait until the defendant has finished presenting his evidence, and then it can offer witnesses who will provide testimony contrary to the evidence

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60. *Michelson*, 335 U.S. at 481 n.18.

61. FED. R. EVID. 105.

62. *Id.*; *Ex parte Miller*, 330 S.W.3d 610, 621 (Tex. Crim. App. 2009); *see State v. Timmendequas*, 737 A.2d 55, 127 (N.J. 1999) (Stein, J., concurring in part and dissenting in part).

63. *See* FED. R. EVID. 405 & advisory committee’s note.

64. *Id.* 404(a)–(b).

65. *Id.* 404(a)(2)(A).

66. *Id.*

given by the defendant's witnesses.<sup>67</sup> The prosecution's witnesses will say that the defendant's character or reputation is bad.

This evidence, like cross-examination on specific instances, is potentially devastating. The prosecution may, for example, call three police officers, who will testify in uniform about their acquaintance with the defendant, perhaps by saying that "he is well known." With their badges gleaming, the three officers will each opine that the defendant's character is "terrible," or "bad," or something synonymous with these words. All but the densest jurors will infer that the defendant has been handled multiple times.

Again, this part of the Rules seems inevitable. Rule 404(a) allows the defendant to call character witnesses.<sup>68</sup> If the defendant does so, Rule 405(a) allows the prosecution, first, to cross-examine the character witnesses with inquiry into relevant specific instances.<sup>69</sup> Second, the Rules usually allow a party to introduce evidence that contradicts opposing evidence,<sup>70</sup> and so perhaps the prosecutor's calling of rebuttal witnesses is in line with the rest of the adversary system.<sup>71</sup> All of the misshapen stones fit together, and they form an edifice that would not remain structurally sound if any stone were removed. This is so, at least, if one remembers that the defendant can prevent the prosecution from offering this harmful evidence by the simple expedient of refraining from calling character witnesses.<sup>72</sup>

Thus, the Rules create an edifice of various parts that fit together, even if they seem misshapen when each is viewed in isolation. But when interpretive issues arise, they usually feature only one strange principle: a single misshapen stone. The key to sensible interpretation of the character rules, however, is to keep in mind the function of each rule in the overall structure whenever any of the related processes are at issue.

### III. WHAT IS A "PERTINENT TRAIT," AND HOW IS IT RAISED?

Rule 404(a)(2) limits admissible character evidence to "pertinent traits."<sup>73</sup> The meaning of this phrase controls the permissible scope of proper defense testimony. Some of the cases are relatively easy to

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67. See *United States v. Clark*, 26 F. App'x 422, 426-28 (6th Cir. 2001) (explaining this procedure).

68. FED. R. EVID. 404(a)(2).

69. *Id.* 405(a).

70. See, e.g., *id.* 608, 806.

71. See generally *Michelson v. United States*, 335 U.S. 469 (1948).

72. See *Clark*, 26 F. App'x at 426-28.

73. FED. R. EVID. 404(a)(2).

understand.<sup>74</sup> For example, a defendant accused of an offense of violence is unlikely to be within the Rules if he offers testimony about his reputation for honesty and fair dealing, and instead should ask about nonviolence.<sup>75</sup> And, similarly, a defendant charged with fraud is unlikely to be acting properly if he offers testimony about his character for peacefulness, but rather, he should ask about honesty and fair dealing.<sup>76</sup> Introduction of testimony that is off the point invites the defendant to follow the non-pertinent question with a pertinent one—e.g., the assault defendant asks first about honesty and fair dealing, and then, after obtaining an answer asserting that his character on that trait is “good,” he asks whether he has good character for peacefulness and nonviolence, and obtains a favorable answer to that question, too. The first response, on the non-pertinent trait, has the potential for confusing the issue, and it lengthens the inquiry in violation of the policy of the rules, which favors the briefest kind of testimony.<sup>77</sup> For example, in *United States v. Jackson*,<sup>78</sup> the court concluded: “Since evidence of the trait of truthfulness is not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin, Rule 404 forbids its introduction as circumstantial evidence of innocence of those crimes.”<sup>79</sup>

But, some kinds of offenses do not lend themselves easily to identification of single pertinent traits. An example is distribution of contraband, such as drugs. “Sobriety” is a trait responsive to offenses involving intoxication or possession for personal use, but this dimension of character may not seem relevant to the commercial activity involved in dealing drugs.<sup>80</sup> While “honesty” could be a pertinent trait on the theory that an honest person does not deal in illegal drugs, some courts have interpreted Rule 404(a) to exclude this kind of inquiry.<sup>81</sup> The exclusion of evidence about honesty in response to a drug conspiracy indictment seems to be an excessively narrow interpretation of the

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74. See *Russ v. State*, 934 So. 2d 527, 531-32 (Fla. Dist. Ct. App. 2006) (holding that nonviolence is not a pertinent trait where the crime charged was molestation of a minor); *State v. Martinez*, 679 N.W.2d 620, 625 (Iowa 2004) (holding that traits of “honesty, trustworthiness, and dependability—are [not sufficiently] pertinent to crimes of delivery of methamphetamine”).

75. *Martinez*, 679 N.W.2d at 625.

76. Cf. *Russ*, 934 So. 2d at 531-32.

77. See FED. R. EVID. 405 advisory committee’s note (discussing the methods of proving character by specific evidence). The committee note states: “[I]t possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.” *Id.*

78. 588 F.2d 1046 (5th Cir. 1979).

79. *Id.* at 1055.

80. See, e.g., *Pennington v. Beto*, 437 F.2d 1281, 1282, 1285 (5th Cir. 1971) (suggesting that sobriety was pertinent to a theft charge, where intoxication was allegedly involved, and could be dispelled by this trait).

81. *Jackson*, 588 F.2d at 1055; *Russ*, 934 So. 2d at 531-32; *Martinez*, 679 N.W.2d at 625.

pertinent trait limitation. If that were a correct view of the rules, it would be unfair to the defendant.

Even aside from the pertinent trait Rule, the courts seem particularly reluctant to permit character witnesses to testify that a defendant is honest or truthful.<sup>82</sup> The reason probably lies in principles that prevent the bolstering, by one side, of its own witnesses' credibility, unless that credibility is attacked by the other side first.<sup>83</sup> An opponent can impeach any witness by offering a rebuttal witness to say that the first witness has a bad reputation (or bad character) for truth, but it is then, and only then, that the party impeached may defend its witness by rebuttal character witnesses, who will say that the first witness is, instead, truthful.<sup>84</sup> The formal rationale for excluding a witness who merely bolsters credibility is that all witnesses are presumed truthful until attacked.<sup>85</sup> This is an excessive formality, however; the real reason is reluctance to extend the trial with marginal character issues.<sup>86</sup>

The trouble arises when there is no obvious pertinent trait that contradicts the crime, other than honesty. In a case involving fraud, for example, the defendant reasonably can claim that the pertinent traits are "honesty and fair dealing," as the traditional way of asking the question would go. In *United States v. Bah*,<sup>87</sup> the court permitted the defendant to counter a fraud accusation with character witnesses who testified in terms of "truthfulness."<sup>88</sup> This result seems sensible. In fact, in a drug case like *Jackson*,<sup>89</sup> it is not easy to say what the pertinent trait indicating innocence would be. It is possible to ask the question by literally invoking the crime that is charged: "Do you know his reputation or character for avoiding participation in drug conspiracies?" But, that is an awkward way to phrase a question in a trial, where we hope to communicate to jurors in straightforward language. It seems, contrary to *Jackson*, and as is implied by *Bah*, that the defendant should be able to ask about the defendant's reputation for honesty in this situation, on the theory that honest people do not engage in drug conspiracies.<sup>90</sup>

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82. See sources cited *supra* note 78.

83. FED. R. EVID. 608(a).

84. *Id.* 608 advisory committee's note; *United States v. Pruitt*, 43 M.J. 864, 868-69 (A.F. Ct. Crim. App. 1996).

85. See H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 781 (1993).

86. See *supra* text accompanying notes 31-35.

87. 574 F.3d 106 (2d Cir. 2009).

88. *Id.* at 117-18. Other courts have approved questions about "lawfulness" or "law-abidingness." *United States v. Angelini*, 678 F.2d 380, 382 (1st Cir. 1982); *United States v. Hewitt*, 634 F.2d 277, 279-80 (5th Cir. 1981).

89. *United States v. Jackson*, 588 F.3d 1046, 1048-50 (5th Cir. 1979).

90. *Bah*, 574 F.3d at 118; *Jackson*, 588 F.2d at 1055.

But there is another problem. Defense counsel may challenge the limits of the rules by asking what are really character questions, but by asking in informal ways that do not directly refer to any pertinent traits. This strategy particularly seems to work with witnesses who are also knowledgeable about something related to the alleged crime. If the defendant's employer (or his father, or his minister) is an alibi witness, for example, the defense may first establish the alibi, and then ask the seemingly innocent question: "Was, or is, he a good employee (or son, or parishioner)?"<sup>91</sup> This really is a character question that is not about a specific trait, and if it is analyzed this way, it is not admissible.<sup>92</sup> But it may be impractical for the Government to exclude it. The question is so brief that it provides little time to act even for the quickest lawyer, and the answer is one word—"Yes"—and it can be uttered before the objection can be stated. In addition, a prosecutor often sees objecting as tactically unwise, because the evidence threatens little harm to the evidence of guilt, and because overly-frequent objections communicate a bad impression to the jury. Besides, there is the question of whether this really is character evidence or something else; maybe it is relevant to the alibi in some unusual cases, because a good employee, or son, or parishioner would be present at work, at home, or at religious services.<sup>93</sup>

Permitting brief questions of this kind seems consistent with the basis for admitting character evidence,<sup>94</sup> and it also conforms to the policy of keeping the inquiry short.<sup>95</sup> The testimony probably should be cut off if it begins to recount multiple acts by which the defendant has shown himself to be a good employee. And, if it really injects character evidence rather than speaking to a substantive issue, it ought to trigger permission for the prosecution to use "have you heards" and bad-character evidence.<sup>96</sup>

In summary, the phrase "pertinent trait" should be interpreted liberally. First, a liberal interpretation would facilitate the offer of character evidence in those cases in which the policy of the rules is to allow it, especially in those cases in which pertinent traits are difficult to

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91. *E.g.*, *People v. Woodard*, No. 247182, 2004 WL 2827668, at \*2 (Mich. Ct. App. Dec. 9, 2004) (holding that when the defendant "intentionally elicited opinion testimony . . . regarding his character as a good employee" in a prosecution for sexual assault, the prosecution properly cross-examined with specific instance inquiry).

92. *Id.*

93. *See State v. Maske*, 591 S.E.2d 521, 527 (N.C. 2004) (holding that evidence to the effect that the crime victim "was a conscientious employee who would call if she was going to be late" was not impermissible character evidence but was "relevant to establish the time of the offense").

94. *See* FED. R. EVID. 404 advisory committee's note.

95. *See supra* text accompanying note 77.

96. *See generally* *Michelson v. United States*, 335 U.S. 469 (1948).

specify.<sup>97</sup> Second, the testimony does not need to be lengthy, even if pertinent traits are defined broadly. It can be limited to a brief question and brief answer, and the trial judge should make sure that it is. Third, this evidence does not inject an inference that is harmful enough to justify fights about admissibility. In fact, it may be that the further the inquiry distances itself from the most pertinent traits, the less it interferes with the prosecution's legitimate interests. The courts should prevent the defendant, however, from rephrasing and repeating character testimony on differing traits and from converting the inquiry into a contest about specific instances.

Fourth, and finally, the misshapen stone that the pertinent trait limitation represents lies close to other misshapen stones. The defendant should not be able to inject what is really character evidence, but disguise it so that it appears to be something else, and thus, exempt it from testing by cross-examination and rebuttal. If the inquiry really is about character, as it often will be when it takes the form of a question to an employer about whether the defendant "was a good . . . employee," it should be treated as a question that asks about character.<sup>98</sup> That is to say, it should cause the court to look to the neighboring misshapen stone, which is misshapen only because it is designed to fit the pertinent-trait stone. The question should enable the prosecution to ask questions of the "have you heard" type about specific instances, if it really is a character question. This is an additional reason for broadly interpreting the defendant's license to offer character testimony: the prosecution will have the means to respond to a false impression conveyed to the jury.<sup>99</sup> This point, in turn, requires exploration of the limits of the prosecution's ability to cross-examine.

#### IV. CROSS-EXAMINATION OF CHARACTER WITNESSES: HOW WIDE IS THE PROSECUTION'S LATITUDE?

If the defendant initiates the use of character evidence, the prosecution can test the knowledge and ability of the character witnesses with questions about specific instances.<sup>100</sup> The prosecutor cross-examines the witnesses by asking them questions such as: "Have you heard that he was convicted of assault last year?" or "Did you know that he committed a murder the year before?"<sup>101</sup> Therefore, the questions

97. See *supra* text accompanying notes 84-89.

98. See *People v. Woodard*, No. 247182, 2004 WL 2827668, at \*2 (Mich. Ct. App. Dec. 9, 2004).

99. See FED. R. EVID. 405(a).

100. *Id.* 404-405.

101. See *id.* 405 (allowing inquiry with specific instances).

arise: How broad is the prosecution's latitude?; Can the Government's attorney bring up events twenty years old?; From another jurisdiction?; Concerning wrongdoing of a different kind than the offense on trial?

Some cases from an earlier era, such as *Awkard v. United States*,<sup>102</sup> confine the prosecution's cross-examination relatively narrowly.<sup>103</sup> In *Awkard*, the court held that the Government should not have been able to ask about events that occurred in another part of the defendant's life several years after the character witnesses had known the defendant, and in another jurisdiction.<sup>104</sup> The theory of exclusion was that the defendant's witnesses could not have been expected to know of these specific instances.<sup>105</sup> In addition, the court labeled the character evidence "weak," pointed out that the prosecution had impeached the character evidence by its time-remoteness, and argued that it could have been stricken as inadmissible.<sup>106</sup> The decision also seems to imply that the later instances, even though they were closer to the date of the crime on trial, did not pertain to the defendant's relevant character because of the time and location difference between the instances and the character witnesses.<sup>107</sup> The court continued by stating:

This jurisdiction . . . has endorsed the general rule that the prosecutor can . . . inquire on cross-examination whether a defendant's character witness "has heard" of defendant's prior arrests or convictions . . . . Nonetheless, the risks of undue prejudice to the defendant are great . . . .<sup>108</sup>

Strangely, the court's grudging acknowledgment of the prosecution's usual ability to cross-examine, and its exclusion of the "have you heards," did not mention the defendant's initiation of character evidence in the first place.<sup>109</sup> Nor did it point out that the character testimony was misleading, since events closer to the crime on trial showed that the defendant's reputation was much worse than the character evidence indicated.<sup>110</sup>

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102. 352 F.2d 641 (D.C. Cir. 1965).

103. *Id.* at 642-43; see *United States v. Lewis*, 482 F.2d 632, 641-42 (D.C. Cir. 1973).

104. *Awkard*, 352 F.2d at 644-46.

105. *Id.* at 644-45.

106. *Id.* at 644.

107. See *id.* at 644-45.

108. *Id.* at 642-43 (footnotes omitted).

109. *Id.* at 644-46.

110. *Id.* at 644-45.



These exclusionary decisions<sup>111</sup> seem misconceived. Character evidence is usually weak evidence, and that fact should not prevent the prosecution from pointing out its weakness. The idea that the evidence could have been stricken did not remove the fact that the jury had heard it, and it did not negate the defense attorney's having chosen to initiate the use of this (weak) evidence, knowing the likelihood that specific-act evidence would become admissible. But, most importantly, if the character witnesses whom the defendant has chosen to call are not well-informed about his character, the jury should be informed on cross-examination. In fact, it should be expected that character witnesses from the defendant's place of employment, family, or house of worship do not follow the defendant to places where he demonstrates bad character, and therefore, they will frequently not know of whatever wrongdoing he may have committed.

The character witness who does not know about the defendant's recent trespasses because he lives in a remote place, where the defendant lived once before, does not differ from other unaware character witnesses. He merely claims a peculiar reason for his ignorance. The same is true of the witness whom the defendant met only this year, who has not heard of his activities five years ago. The witness's poor credentials for giving his testimony is exactly the point, and the Government should be able to expose the weakness of the evidence. Worse yet, cases like *Awkard* invite the defendant to mislead the jury and to insulate the falsehood from testing by cross-examination.<sup>112</sup> All that is necessary is for the defense lawyer to call character witnesses who knew the defendant at a time in his life before he committed his transgressions. The *Awkard* holding means that a serial murderer can offer glowing character testimony, and keep it unblemished from cross-examination by using only witnesses whose knowledge of the defendant is confined to the period of time before he started his crime spree.<sup>113</sup>

The idea that the wrongdoing is no longer relevant to the defendant's character because it is remote in time is arguably a better reason for a court's intervention, but it still is not a persuasive basis for the narrow approach exemplified by *Awkard*.<sup>114</sup> First, reputation is a long-range phenomenon. As William Shakespeare put it: "The evil that

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111. *E.g.*, *United States v. Lewis*, 482 F.2d 632, 641-42 (D.C. Cir. 1973) (holding that inquiry into acts committed after the crime on trial is improper); *Ex parte Miller*, 330 S.W.3d 610, 620-21 (Tex. Crim. App. 2009) (suggesting that the remoteness of time probably would have led to the exclusion of the inquiry).

112. *See, e.g.*, *Awkard*, 352 F.2d at 644-45.

113. *Id.*

114. *Id.*

men do lives after them, [t]he good is oft interred with their bones . . . .”<sup>115</sup> The reputation of a murderer, for example, remains after he has served the sentence. Second, science knows little about predicting future violations of the law. We do not know how to tell when time remoteness of wrongdoing means that it is a poor indication of character.<sup>116</sup> Third, the appeal of the argument that time remoteness is irrelevant is well within the competence of the jury to evaluate. Jurors can be informed, on redirect, that the allegations of evil acts that the Government has suggested arose many years ago, and that the defendant has not repeated them since. A skillful defense lawyer, in fact, can make a remote allegation seem like a good-conduct medal, if the specific incident really is of little weight.<sup>117</sup> Fourthly, Rule 405(b) contains no time limitation on specific-instances inquiries.<sup>118</sup> The relevant exclusion-only principle would be Rule 403,<sup>119</sup> and it excludes the evidence only if the probative value is “*substantially* outweighed” by prejudice.<sup>120</sup> But the *Awkard* case never discusses Rule 403, and it neglects to analyze the prejudice created by misleading character evidence.<sup>121</sup> Fifth, and finally, the defendant can be certain of excluding all inquiries into his specific misconduct by the simplest possible technique: by not calling character witnesses in the first place.

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115. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2.

116. See Leonard, *supra* note 26, at 25-29 (discussing psychological studies in relation to character evidence).

117. The defensive gambit in this situation may take a form somewhat like the following:

Q: The prosecutor asked you whether you knew that the defendant had been convicted of theft ten years ago. Did you know that?

A: Yes.

Q: And did you know that he pleaded guilty, honestly, unlike in this case, because he *was* guilty ten years ago?

A: Yes. I knew that.

Q: And did you know that he received probation, because it was not an aggravated case?

A: Yes.

Q: And did you know that he was ordered to follow a long list of conditions of probation, and his supervision made his life like walking on eggshells, because he could be sent to jail for a violation without any right to a jury trial?

A: Yes.

Q: And did you know that he served out five years of probation honorably?

A: Yes.

Q: And he has never been convicted or even suspected, since?

A: Yes.

Q: And is that why you say that his character is excellent?

A: Yes. He’s been tested, and it’s excellent.

118. FED. R. EVID. 405(b).

119. *Id.* 403.

120. *Id.* (emphasis added); see Rosanna Cavallaro, *Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 57 (2007).

121. *Awkard v. United States*, 352 F.2d 641, 644-46 (D.C. Cir. 1965).

Most cases today are different from the narrow-minded reasoning in *Awkard*.<sup>122</sup> They tend to allow the prosecution a great deal of room in cross-examining character witnesses. For example, in *Bah*, the court began by pointing out that the defendant can “choose” whether to offer character evidence, and that if he does, “the government may question the defendant’s witnesses regarding ‘relevant specific instances of conduct.’”<sup>123</sup> In doing so, said the court, the Government’s attorneys have “substantial latitude” for cross-examination.<sup>124</sup> The defendant argued that the prosecutor should not be allowed to ask about any event unless it is “likely to have become a matter of general knowledge, currency or reputation in the community.”<sup>125</sup> The court rejected this argument under the circumstances, pointing out that the event in question was not secret and was the subject of an effort to publicize it.<sup>126</sup>

Some courts have imposed the limit that *Bah* advocated, by restricting specific-act questions to events of general knowledge, or at least those that are public.<sup>127</sup> For example, in *United States v. Monteleone*,<sup>128</sup> the specific act in question concerned the defendant’s alleged perjury before a grand jury.<sup>129</sup> “Because grand jury proceedings are required by law to be kept secret,”<sup>130</sup> the *Monteleone* court decided that the government lacked a good faith basis for believing that the defendant’s alleged perjury was likely to have been known in the witness’s community.<sup>131</sup> But even this limitation is not universally shared. In *Bah*, the court pointedly observed that *Monteleone* was decided in another circuit, and therefore, it was not binding authority.<sup>132</sup> Furthermore, it distinguished that decision on grounds that would make it inapplicable in most cases:

*Monteleone*, of course, is not binding in our circuit, but even if it were, this case is distinguishable for three reasons. First, the evidence presented on cross-examination did not derive from a secret proceeding; to the contrary, the [person who objected to it] expressed a

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122. A recent exception can be found in *Ex parte Miller*, 330 S.W.3d 610, 620-21 (Tex. Crim. App. 2009). The *Miller* opinion differs from the *Awkard* opinion, however, in citing Rule 403, although it did not conduct a Rule 403 balancing analysis. *Id.*

123. *United States v. Bah*, 574 F.3d 106, 117 (2d Cir. 2009) (quoting FED. R. EVID. 405(a)).

124. *Id.*

125. *Id.*

126. *Id.*

127. See *Michelson v. United States*, 335 U.S. 469, 479 (1948); *United States v. Monteleone*, 77 F.3d 1086, 1090 (8th Cir. 1996).

128. 77 F.3d 1086 (8th Cir. 1996).

129. *Id.* at 1088-89.

130. *Bah*, 574 F.3d at 118.

131. *Id.*; *Monteleone*, 77 F.3d at 1090.

132. *Bah*, 574 F.3d at 118.

desire that Bah's actions be widely publicized . . . . Second, the challenged evidence did not involve criminal conduct, but dishonesty in Bah's business dealings—information closely related to the subject of [the character witness's] direct testimony, and far less inflammatory (and potentially prejudicial) than the evidence at issue in *Monteleone*. Third, we have previously observed that the Eighth Circuit has limited *Monteleone* to cases involving reputation evidence and that it has been more permissive in admitting evidence to impeach opinion testimony. In this case, [the witness] testified as to his personal opinion of Bah [as well as Bah's reputation]. For these reasons, *Monteleone* is unpersuasive.<sup>133</sup>

The court nevertheless vacated the conviction on other grounds, thus having addressed the character evidence issue for retrial.<sup>134</sup>

The wide latitude afforded for cross-examination by modern cases like *Bah* is appropriate. It was inevitable that, if the defendant chose to present character evidence, the law would afford the prosecution the ability to test that evidence by asking questions of the character witnesses. Taken in isolation, the latitude to ask these kinds of questions seems strange. It is like a misshapen stone. But, that is true only if one ignores the first misshapen stone: the character evidence offered in the first place by the defendant, which ought to be examined for misleading tendencies. Courts that have taken a narrow view of this kind of cross-examination, like the court in *Awkard*, tend to ignore the misleading impression that is left if the character evidence is not challenged by “have you heard.”<sup>135</sup> They also tend to ignore the fact that the only way this kind of evidence can become admissible is for the defendant to have initiated character evidence.

#### V. THE PROSECUTION'S REBUTTAL: “BAD” CHARACTER EVIDENCE

Fewer questions arise about the prosecution's offer of rebuttal character evidence. Rule 404(a)(2)(A) provides that if the defendant offers character evidence, the Government may respond with evidence “to rebut it.”<sup>136</sup> In other words, if the defendant has chosen to raise the character question, says the Rule, rebuttal evidence is also admissible.<sup>137</sup> This approach is consistent with the philosophy of the Rules, which is to

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133. *Id.* (citation omitted).

134. *Id.* at 118-19.

135. *Awkard v. United States*, 352 F.2d 641, 646 (D.C. Cir. 1965).

136. FED. R. EVID. 404(a)(2)(A).

137. *Id.*

allow each side to inform the jury about its view of the opponent's evidence.<sup>138</sup>

The most significant issue that arises in connection with rebuttal evidence concerns what might be called "camouflaged" character evidence. Sometimes, defensive character testimony appears in phraseology different from the usual wording.<sup>139</sup> Sometimes, the evidence comes from witnesses whose ostensible function is to provide testimony about more direct issues in the case.<sup>140</sup> One can readily imagine a defense attorney who perceives that the witness is friendly, and who adds a softball question about how good a son, employee, or citizen the defendant is, but without using easily recognized character terminology. Or, one can envision a witness who is a family member or employer telling the jury about an alibi: the defendant was at home watching television, or was at work, at the time of the offense, and adds that "he is a good person." Or, one can imagine someone who saw the alleged assault and testifies to self-defense, but who also is asked: "Is he the kind of person who tries to start fights, or does he keep away from them?" These kinds of questions can be phrased so that they really call for character evidence, but they enable the defendant to argue that the prosecutor should not be able to cross-examine the witnesses as character witnesses, or to offer bad-character evidence in rebuttal.

The judge's ruling in this situation is heavily contextual. It depends upon deciding whether the evidence is truly relevant to the substantive issue of alibi or self-defense, or whether, instead, it really is disguised character evidence that has little to do with those issues. This is a fact-bound determination.<sup>141</sup> A question such as, "Is he consistent about

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138. See *id.* 404 advisory committee's note.

139. This issue can arise in an infinite variety of ways. For example, in *People v. Woodard*, the testimony alluded that the defendant was a "good employee." No. 247182, 2004 WL 2827668, at \*2 (Mich. Ct. App. Dec. 9, 2004). Although this was not usual character evidence terminology, the court held that the defendant had injected character evidence and that the prosecution could make specific-instance inquiries. *Id.* In *United States v. Diaz*, the trial court sustained an objection to a question asked of the defendant's pastor about the defendant's "character traits for being prone to criminal activity or conduct." 961 F.2d 1417, 1419 (9th Cir. 1992). The court of appeals held that this question raised proper character testimony. *Id.* The trial court also sustained an objection to a question about the defendant's "character trait for being prone to large-scale drug dealing;" the court of appeals, however, held that this question did not raise the general character issue. *Id.* at 1419-20.

140. In *United States v. Jenkins*, the defendant's offer of evidence denying that he had ever sold drugs was held not to raise character evidence sufficiently to allow rebuttal. 7 F.3d 803, 805-07 (8th Cir. 1993); see also *United States v. Vega-Penarete*, No. 91-5902, 1992 WL 212142, at \*3-5 (4th Cir. Sept. 1, 1992) (holding that the defendant's self-portrayal as helpless and passive throughout a series of encounters did not raise character evidence).

141. For an example of evidence that bordered on character evidence, but was, instead, relevant to a substantive issue, see *State v. Elmer*, 21 F.3d 331, 335 (9th Cir. 1994) (discussing the

being present during working hours?” or “Does he watch that particular television program every week?” is one thing—it sounds more like an inquiry into evidence relevant to an alibi than a character question. On the other hand, “Is he a good employee?” presents a closer question; depending on the precise context, it sometimes should allow the prosecutor to use “have you heards” and rebuttal character witnesses, particularly since it is likely to bear only the most tangential relationship to the alleged alibi. And, an invitation to the witness to deny that the defendant would commit this kind of crime seems even more like character evidence. “Would you even keep him as an employee, if you thought he was capable of committing the crime of robbery?” for example, would be camouflaged character evidence, and it should prompt the judge to permit the Government to cross-examine accordingly, and to offer rebuttal character witnesses.

## VI. CONCLUSION

As the Supreme Court has said, character evidence under Rule 404(a) and Rule 405 is like an edifice of misshapen stones.<sup>142</sup> But, as the Court also has recognized, the stones fit together, and the system created by these oddly shaped principles has proved workable, even if clumsy.<sup>143</sup> An attempt to rationalize any single piece of the structure is likely to create unfairness instead. As the Court said: “To pull one misshapen stone out . . . is more likely simply to upset its present balance . . . than to establish a rational edifice.”<sup>144</sup>

And so, the character evidence rules are confusing and counterintuitive. But, perhaps, their development in their present form was inevitable. The first step, allowing a defendant with an exemplary life to present evidence of his good character, seems a simple matter of fairness to the defendant. It makes sense to allow the defendant the option of initiating this evidence or choosing not to, and its shortness of life dictates that it be limited to reputation or opinion about a pertinent

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various uses of character evidence under Rules 404 and 405). The defendant, a border patrol agent prosecuted for assault—because of his act of shooting at illegal immigrants—asserted immunity under federal statutes allegedly authorizing his actions. *Id.* at 333-35. This immunity depended upon his “honest and reasonable belief” that his actions were “necessary in the performance of his dut[ies].” *Id.* at 335. The State of Arizona argued that Elmer’s raising of a defense depending on honesty had “placed his character for honesty in issue,” allowing for specific instances in cross-examination and rebuttal bad-character evidence. *Id.* The testimony at issue, said the court, was, instead, direct evidence of a substantive element of the defense, and not character evidence. *Id.*

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

143. *Id.*; see *supra* text accompanying notes 68-72.

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

trait, so that the trial does not disintegrate into a mass of mini-issues.<sup>145</sup> But, if the first step of allowing the defendant to use this kind of evidence is undertaken, the next steps—cross-examination and rebuttal by the Government—seem equally necessary as a matter of fairness.<sup>146</sup> A character witness who blesses the defendant may be misinformed, affected by poor judgment, or merely lying, and it is easy to see that the Rules should, therefore, enable the Government to confront the witness with evidence showing the unreliability of the favorable testimony the witness has given. And because the Rules usually permit a party to rebut opposing evidence, it follows that the Government should be allowed to call bad-character witnesses if the defendant chooses to raise the issue.<sup>147</sup>

The Rules create a number of interpretive issues, and those issues should be addressed with the whole structure in mind. Some cases have confined the “pertinent trait” to which the defendant is limited too narrowly by, for example, prohibiting defendants from offering testimony about honesty in drug conspiracy cases.<sup>148</sup> These decisions seem inappropriate for two reasons. First, some kinds of crimes, including drug conspiracy offenses, do not bring to mind a clear contrary trait that can be expressed in short and understandable language. Perhaps honesty is as close as one can come, on the theory that honest people do not participate in drug conspiracies. Courts also have approved questions phrased in terms of “lawfulness” and “law-abidingness.”<sup>149</sup> Second, a liberal interpretation of the phrase “pertinent trait” seems appropriate given the reason for the Rule—fairness to the defendant—and it is consistent with the policy that confines the evidence to a brief statement of opinion or reputation.<sup>150</sup>

If the defendant exercises the option to offer character evidence, the Rules allow the Government to challenge the testimony,<sup>151</sup> and this allowance, too, should be interpreted according to its purpose. Decisions that prohibit the Government from offering “have you heard” questions, after character evidence is undeniably in the record, are misconceived. Sometimes, these decisions reason that the particular wrongdoing targeted by these questions is unlikely to have been known to the particular witnesses presented, but this justification is grossly inadequate for excluding the cross-examination.<sup>152</sup> The ignorance of the witnesses is

145. See FED. R. EVID. 405 advisory committee’s note; *supra* text accompanying notes 34-37.

146. See *Michelson*, 335 U.S. at 479-80; *supra* Part II.B-C.

147. See *supra* Part V.

148. See *supra* notes 78-79 and accompanying text.

149. See *supra* note 88.

150. See FED. R. EVID. 404 advisory committee’s note.

151. *Id.* 404(a)(2)(A).

152. See *supra* Part IV.

exactly the point, and whether it results from the witnesses's lack of awareness, lack of temporal acquaintance with the defendant, ignorance of nonpublic events, or simply ostrich-like blindness, is beside the point. Character evidence is weak evidence, and it has been offered only because the defendant has opted to do so in the first place. The jury should not be deprived of information pointing out that it is misleading, when it is. Decisions holding that the Government has "substantial latitude"<sup>153</sup> seem more nearly correct, and the cross-examination should not be excluded unless a Rule 403 balancing analysis shows that the probative value of impeaching the character witnesses is greatly exceeded by an unfair kind of prejudice.<sup>154</sup>

Rebuttal character evidence, or "bad" character evidence, raises fewer questions. The Rule that permits the prosecutor to respond to good-character witnesses by calling other witnesses of different opinions is straightforwardly written, and makes intuitive sense.<sup>155</sup> But, issues sometimes arise when character evidence comes before the jury in camouflaged form.<sup>156</sup> A skillful defense lawyer may ask an alibi witness or a self-defense witness, or a witness to a substantive defense a character question, too, but may disguise it so as to be able to argue that the prosecutor should not be able to respond. This kind of evidence presents a heavily contextual, fact-bound issue for the judge to resolve. If the evidence is truly relevant to the substantive defense—if it tends to show that an alibi is probable, or that the defendant's conduct really was an exercise of self-defense—then it should not trigger "have you heard" questions or rebuttal bad-character testimony.<sup>157</sup> But, if the evidence is only tangentially related to the substantive defense, and if it tends more to claim that the defendant is a good person who would not have committed this offense, then it is merely character evidence in camouflage and should enable the Government to let the jury know of its limitations.<sup>158</sup>

In other words, like every issue that arises in this confusing area, questions about rebuttal witnesses should not be viewed in isolation. They should be addressed in a way that recognizes the interconnections

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153. See *supra* text accompanying notes 122-35.

154. FED. R. EVID. 403.

155. *Id.* 404(a)(2)(A).

156. See *supra* text accompanying notes 139-41.

157. See *supra* Part V.

158. See *supra* Part V.



of the individually misshapen stones that are carefully fitted together to make the edifice, or structure, of character evidence under the Rules.