Stetson Journal of Advocacy and the Law

The first online law review designed to be read online

12 Stetson J. Advoc. & L. 275 (2025)

The Arrest Trap: Character Evidence, Race, & Hidden Bias in the Federal Rules of Evidence

Jules Epstein and Joe Waldman

Edward D. Ohlbaum Endowed Term Professor and Director of Advocacy Programs; and Student
Temple University Beasley School of Law
Philadelphia
Pennsylvania

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I. Introduction

275. A person's "character," the trait of how they generally behave, is presumptively inadmissible under the Federal Rules of Evidence to show whether they are liable for the act(s) on trial.[2] When that person is charged with a crime, the Federal Rules of Evidence again preclude character — how that person generally behaves — from being offered by the prosecution to prove criminal responsibility.[3] Yet the Rule offers one noteworthy exception — proof of the person's good character, for the trait pertinent to the crime on trial, is admissible to challenge the prosecution case and on its own establish a reasonable doubt of guilt.[4] If the crime is one of violence, the person may offer proof of being peaceful; and if the crime is of deception, proof that the accused is honest is admissible.[5]

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1 Jules Epstein is the Edward D. Ohlbaum Endowed Term Professor and Director of Advocacy Programs at Temple University Beasley School of Law in Philadelphia. Professor Epstein has published extensively in the area of Evidence Law and is co-author of two Evidence Texts, "Understanding Evidence, 6th edition" and "Principles of Evidence, 7th Edition." He regularly litigates Evidence issues before the Pennsylvania Supreme Court and teaches Evidence to lawyers and judges nationally.

2 Joe Waldman is a current student in the Class of 2026 at Temple University's Beasley School of Law. He holds a B.A. in political science from the University of Wisconsin-Madison. He wishes to thank his wife Megan for her feedback and support on this project.

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

3 Fed. R. Evid. 404(a).

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

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

276. This rule is seemingly one of equal availability, whether the accused is rich or poor, white or a person of color. However, that apparent neutrality disappears based on the peculiarity of how the 'good character' witness may be challenged on cross-examination. Anyone who offers evidence of their good character for the trait related to the crime on trial may see their character witness challenged by, among other things, being asked one question: "Did you know [the accused] was previously arrested?"

277. This "arrest trap" creates a tremendous problem, not merely because such knowledge tells too little about the witness' foundation for knowing the character of the accused and too much in terms of casting the accused in a bad light. It creates a problem because arrests are not spread proportionately across the population. Arrests are gerrymandered. Arrests may be racially biased. Arrests are based on the discretion of the police. The right to impeach a character witness with questions about the accused's arrest(s) disproportionately impacts people of color, either by dissuading them from presenting evidence of good character or presenting it and having it disproportionately devalued. Thus, the "arrest trap" reinforces systemic bias, ensuring a defendant's skin color may play an outsized role in how jurors perceive the content of their character.

II. The Love/Hate Relationship with Character Proof in the FRE

278. The Federal Rules of Evidence (FRE) have a love-hate relationship with character evidence. For witnesses, character counts — Federal Rules 608 and 609 place a great deal of trust in character as proof of an inclination to lie.[6] Under Rule 608(a), after a witness testifies, other witnesses may be called to give their opinion or the community's reputation as to whether the testifying witness is dishonest.[7]

279. Under Rule 608(b), on cross-examination, testifying witnesses may be asked about dishonest acts from their past if they "are probative of the character for...untruthfulness of the witness..."[8] Finally, Rule 609 allows prosecutors to introduce evidence of the witness's prior convictions, including (under certain conditions) from when the witness was a juvenile.[9] In cases that hinge on whether a witness is telling the truth, character evidence can thus be decisive.

280. Yet when it comes to the conduct of the main parties (including the defendant), the Federal Rules are largely to the contrary and almost categorically so, stating that

6 Fed. R. Evid. 608;Fed. R. Evid. 609(a)(1)–(2).

7 Fed. R. Evid. 608(a).

8 Fed. R. Evid. 608(b).

9 Fed. R. Evid. 609(d).

"[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion, the person acted in accordance with the character or trait."[10] Was the driver negligent? Did the doctor perform surgery safely or unsafely? Is the accused guilty? For these issues, character evidence is off limits, not because it is irrelevant but because it is likely to be too important to members of the jury. This prohibition seeks to counter "the deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught..."[11]

281. This prohibition includes two important exceptions — a criminal defendant may "open the door" to character evidence by showing they are not the kind of person to commit the crime in question or, on rare occasions, that the putative victim was the real wrongdoer.[12] The specific provisions are:

> (2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:
>
> (A) 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;
>
> (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant's same trait; and
>
> (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.[13]

282. When such character evidence is presented, the jury may then be instructed that "such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt..."[14]

III. Proving Good Character Under the Federal Rules

283. Rule 405 details the two methods by which the defendant can prove their character: "testimony as to reputation or by testimony in the form of an opinion."[15] For the

10 Fed. R. Evid. 404(a)(1).

11 1 WIGMORE, Evidence § 57, p. 272 (2d ed.).

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

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

14 *Michelson v. United States*, 335 U.S. 469, 476 (1948).

15 Fed. R. Evid. 405(a).

former, which entails repeating what others said, Rule 803(21) includes "reputation among a person's associates or in the community concerning the person's character"[16] as an allowable form of hearsay;[17] and for the latter, Rule 701 permits a witness to give opinions based on their own perceptions.[18]

284. The testimony is fairly limited, as no witness may use specific instances of conduct to support the claim of good character.[19] It often follows a formulaic approach:

> Q: How, and for how long, have you known [name of accused]?
>
> Q: And from knowing them have you formed an opinion as to whether they are [insert trait]?
>
> Q: And what is your opinion as to whether [name of accused] is [insert trait]?
>
> Where proof is by reputation, the formula varies slightly:
>
> Q: How, and for how long, have you known [name of accused]?
>
> Q: Do you know others who know [name of accused]?
>
> Q: Among the people who know my client, what do they say about whether he/she/they is [insert trait]?

285. Depending on the jurisdiction, a character witness may also provide their personal opinion of the defendant, again limited to the trait relevant to the offense.

286. This is not novel. The use of reputation as character evidence has a long history. In Classical Greece, the ancient Athenians relied heavily on character evidence for their criminal trials. Sometimes, they did so in ways that would be limited today, such as using the defendant's poor character to show their criminal propensity. Their use of reputation as character evidence might look more familiar. In one account, Lycophron, a defendant on trial for adultery, argued that his positive reputation in the community demonstrated his innocence, since "no one in the city, whether good or bad, can deceive the community in which [they] live."[20] Today, the FRE follows similar logic, in allowing a defendant to call a character witness to speak to their positive reputation in their community regarding the trait most relevant to the crime in question.

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16 Fed. R. Evid. 803(21).

17 To some, this is a lesser form of evidence – what Dean Wigmore referred to as "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.'" WIGMORE, EVIDENCE §1986 (Chadbourne rev. 1981).

18 Fed. R. Evid. 701(a).

19 Fed. R. Evid. 405(a).

20 Jeffrey Omar Usman, *Ancient and Modern Character Evidence: How Character Evidence Was Used in Ancient Athenian Trials, Its Uses in the United States, and What This Means for How These Democratic Societies Understand the Role of Jurors*, 33 OKLA. CITY U.L. REV. 1 (2008).

IV. Undermining Good Character Under the Federal Rules

287. Once the character door is opened, the prosecution can seek to undermine the defendant's claim of good character in multiple ways.[21] Where the witness offers their opinion of the defendant, the prosecutor may seek to show a limited foundation, as when the witness only knows the defendant from a specific context that is entirely separate from the one in which the alleged crime took place. For example, the defendant's boss might know the defendant as a model employee but be totally unfamiliar with the way he behaves when out at a bar with friends.

288. Second, the prosecution might seek to show the witness to be biased — perhaps the witness is a family member or a lifelong friend of the defendant. When the testimony involves reputation, the prosecutor may also try and show a limited foundation either in terms of the number of conversations that have addressed the trait or the number of people who have discussed it.

289. Last, the prosecution may question the witness as to their knowledge of the defendant's specific acts. Rule 405(a) states that "on cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct."[22] This derives from *Michelson v. United States*, where the Court held that "the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."[23] This includes not only conduct that resulted in convictions but questions about the defendant's prior arrests.

V. The Logic of Asking About Arrests

290. According to the *Michelson* majority,

> [t]he inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.[24]

21 See Fed. R. Evid. 405 (In addition to undermining the defendant's "good character" witnesses, the prosecution may also call "bad character" witnesses, who can speak only to their personal opinion or the defendant's reputation. This is limited to rebutting the claim of good character and is not affirmative evidence of guilt).

22 Fed. R. Evid. 405(a).

23 *Michelson v. United States*, 335 U.S. 469, 479 (1948).

24 *Michelson v. United States*, 335 U.S. 469, 483 (1948).

291. If the witness had awareness, it could call into question their standards for what good character is.

292. In other words, the purpose of allowing such questioning is not to introduce proof of the defendant's misdeeds but to test whether the witness is able to provide credible testimony. It allows the prosecution to weaken the defendant's positive character evidence, but it is not intended to prove negative character.

293. There are several reasons to doubt the probative value of this line of witness questioning. First, if a witness has not heard of the defendant's prior arrest, does that really show an inadequate basis for forming a valid opinion? If the witness worked with the accused and observed them over years of close contact, how is that opinion less valid because the witness never heard of an arrest?

294. The same concern arises when the character witness offers reputation evidence. There is no way of knowing whether an arrest is likely to be known by others, especially in a large, metropolitan community. The Court in *Michelson* effectively admits as much, noting "growth of urban conditions, where one may never know or hear the name of his next-door neighbor, have tended to limit the use of these techniques and to deprive them of weight with juries."[25] Yet, *Michelson* ultimately still allows arrests to be raised.

295. And if the witness has knowledge of the accused's prior arrest, yet maintains their opinion of the defendant's good character or claims the reputation to be good? In closing, the prosecution may again raise the issue of the defendant's arrest to discredit the witness as a judge of good character. "The defendant's witness says that the defendant is honest, despite knowing of her prior arrest for forgery. How can we trust the word of someone who believes a person arrested for forgery is honest?"

296. As a matter of law, this is permissible solely to weaken the defendant's claim of positive character, not to prove negative character. Yet allowing this line of argument in a closing argument runs counter to the principle that an arrest by itself is not admissible as evidence of guilt. Jurors are instructed before trial that an indictment, which requires more proof than an arrest, is not evidence of guilt.[26]

297. An even more confounding problem, one not acknowledged by courts, is what happens if the character witness responds "I didn't know that" or "I never heard that" to the prosecutor's question, "did you know that [name of accused] was arrested X years ago for the charge of Y?" Since the witness has said "no," there is no affirmative proof that the arrest occurred. Prosecutors may argue in closing only facts proved at trial and reasonable inferences therefrom. Yet here, with no proof, the prosecution is permitted

25 *Michelson v. United States*, 335 U.S. 469, 480 (1948).

26 U.S. Court of Appeals for the Third Circuit, MODEL CRIMINAL JURY INSTRUCTIONS, 1.11 (2024).

to repeat their questions to the defendant's character witnesses in closing to further weaken the defendant's positive character evidence.

VI. Comparing State & Federal Rules

298. States fall along a wide spectrum in how closely they follow the holding in *Michelson* regarding cross-examination of character witnesses. Delaware, for example, uses identical language to Federal Rule 405, and permits raising a defendant's prior arrests (even if unrelated to the offense on trial) to test a witness's familiarity with the defendant's character.[27] Other states provide limits on when arrests may be raised. In Virginia, where only reputation character testimony is permitted, the court must first conduct a hearing to ensure any past conduct that the prosecution wishes to raise with a character witness is not factually disputed, would be sufficiently well-known in the community, is not too remote, pertains to the relevant trait at issue, and is phrased as "have you heard," etc., not "do you know," etc.[28]

299. Other states, like Pennsylvania and Illinois, have stricter prohibitions on questioning witnesses regarding the defendant's prior conduct. Illinois prohibits questioning character witnesses about any specific instances of conduct by the defendant, including convictions.[29] Under Pennsylvania's Rule 405, "on cross-examination of a character witness, inquiry into allegations of other criminal conduct by the defendant, not resulting in conviction, is not permissible."[30] Pennsylvania's Supreme Court has long upheld this prohibition, since "an arrest is equally consistent with either guilt or innocence" and can be "so prejudicial to an accused that the prejudicial effect greatly outweighs the limited probative value..."[31]

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27 See *De Jarnette v. State*, 338 A.2d 117 (1975) (holding that the defendant's arrest for marijuana possession could be raised even though the defendant was on trial for an unrelated offense of kidnapping).

28 See *Weimer v. Commonwealth*, 5 Va. App. 47, 360 S.E.2d 381 (1987) (establishing test for whether a question is permissible during cross-examination of a character witness); see also *Argenbright v. Commonwealth*, 698 S.E.2d 294, 297 (2010) (upholding prohibition on opinion character testimony).

29 See *People v. Celmars*, 163 N.E. 421 (1928); *People v. Roberts*, 479 N.E.2d 386 (1985); See also 1 ILLINOIS EVIDENCE COURTROOM MANUAL § 405.4 (2024).

30 Pa. R. Evid. 405(a)(2).

31 *Commonwealth v. Scott*, 436 A.2d 607, 611–12 (Pa. 1981); see also *Commonwealth v. Morgan*, 739 A.2d 1033, 1036 (1999) (reaffirming prohibition on arrests and arguably excluding all prior acts, arrest or otherwise, that did not in a conviction).

VII. The Defendant's Dilemma

300. Allowing prior bad acts to be raised during witness cross-examination has been criticized as "pregnant with possibilities of destructive prejudice."[32] In his *Michelson* dissent, Justice Rutledge warns that the prosecution may raise arrests during witness cross-examination "not to call in question the witness' standard of opinion but, by the very question, to give room for play of the jury's unguarded conjecture and prejudice."[33] The fear was that cross-examination regarding the arrest(s) would introduce otherwise inadmissible proof.[34]

301. Justice Rutledge was right to be concerned. When jurors hear that a defendant has previously been arrested, they may be impacted by two forms of psychological bias.

302. First, the "just world" phenomenon refers to the tendency to believe that the world is fair and people get what they deserve. Although an arrest by itself is not supposed to carry evidentiary weight, many people (including jurors) assume that if someone has been arrested, it is because they have done something wrong. A YouGov survey conducted in 2021 asked respondents how common it was for innocent people to be arrested for crimes they did not commit. The survey reported that 31% of respondents thought that it was somewhat uncommon or very uncommon.[35] In other words, nearly a third of the public assumes that if someone is arrested, they are probably guilty of committing a crime.

303. Another revealing 2017 study by the Urban Institute examined how residents of high-crime, low-income neighborhoods in six American cities viewed police. Researchers deliberately selected neighborhoods which they predicted would have the lowest levels of trust in law enforcement and the highest degree of cynicism about the criminal justice system. Even there, 38% of respondents agreed that "when the police arrest a person, there is a good reason to believe that the person has done something wrong."[36]

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32 McCormick on Evidence, § 191, at 451 (2d Ed. 1972).

33 *Michelson v. United States*, 335 U.S. 469, 495 (1948). (Rutledge, J., dissenting).

34 "[I]t permits what the rule applied in the first stage forbids, trial of the accused not only for general bad conduct or reputation but also for conjecture, gossip, innuendo and insinuation." *Michelson v. United States*, 335 U.S. 469, 495 (1948). (Rutledge, J., dissenting). Arrests are not permitted under Evidence Rules 608 and 609. Fed. R. Evid. 608; Fed. R. Evid. 609. They may be admissible to show bias or for non-character purposes, pursuant to Fed. R. Evid. 404(b).

35 *The Economist/YouGov Poll*, YouGov (Nov. 27–30, 2021).

36 Nancy La Vigne, et al., *How Do People in High-Crime, Low-Income Communities View the Police?*, Urban Inst. Justice Pol'y Ctr. (Feb. 2017).

304. Second, the fundamental attribution error refers to the human tendency to overemphasize a person's personality in explaining their actions, while underestimating situational factors (i.e., the driver crashed because he was a bad driver, not because the sun got in his eyes).[37] Research shows that people also tend to give more weight to negative character information than to positive character information.[38] Thus, a defendant risks being judged as "bad" based on a single bad act.

305. Summarizing decades of research into prior crimes evidence, Professors Janice Nadler and Mary-Hunter McDonnell of Northwestern Law School found that empirical literature provides fairly robust proof that evidence of a defendant's prior crimes or character flaws can potentially influence judgments about whether the defendant committed the specific instance of the specific crime in question.[39]

306. The connection is stronger when the defendant's prior conduct is similar to the conduct for which they are on trial. Some studies have found that when a defendant's prior bad acts are revealed during cross-examination, a backlash against the defendant can lead jurors to view the defendant more negatively than if no character evidence had been admitted in the first place.[40]

307. For a defendant, this poses a dilemma. If they decline to open the character evidence door, they lose an important evidentiary tool for their defense. If they introduce character evidence, they risk falling into the "arrest trap," exposing the jury to their prior arrest and the potential for the jury to assume the worst about their character.

308. If character evidence is introduced and the prosecution then asks the witness about the defendant's prior conduct, the defendant is unable to respond by introducing contextual evidence regarding that conduct. Prof. Josephine Ross provides this helpful illustration of how this can place even the most reputable defendant in an impossible bind:

> [C]onsider a scenario where former President George Washington was charged with a crime of dishonesty when he was a young man. His defense lawyer would be able to find many character witnesses, but they would only be

37 John M. Doris, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 2 (Cambridge University Press 2002) ; Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. UNIV. L. REV. 1081, 1087, 1092-93 (2003); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 778 (1975).

38 John J. Skowronski & Donal E. Carlston, *Negativity and Extremity Biases in Impression Formation: A Review of Explanations*, 105 PSYCHOL. BULL. 131 (1989).

39 Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame,* 97 CORNELL L. REV. 255, 261 (2012).

40 Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. OF APPLIED PSYCHOL. 347, 350 (2004).

> permitted to attest to his general reputation for honesty and to his reputation as a law-abiding citizen. The prosecution could cross-examine in the following manner: 'Were you aware that the defendant [George Washington] committed a destruction of property, violently hacking a tree with an ax[e], just for fun — yes or no?' No evidence would be allowed to paint this event as proof of the man's honesty by exploring [the] defendant's forthright admission to his father. That would be considered extraneous information barred by the rules. If George Washington's reputation would have such a rough road, what chance have regular criminal defendants?[41]

309. When jurors hear only of the defendant's arrest and nothing else about the broader context of events, some will fill the gaps in their knowledge with stereotypes and assumptions. The context of an arrest can matter a great deal,[42] including if the defendant's prior arrest was unlawful and lacked probable cause, or if the defendant was subsequently shown to be innocent.[43]

VIII. What About Jury Instructions?

310. If a prosecutor raises a defendant's arrests when cross-examining a character witness, the jury will be instructed to only use this information to evaluate the character witness's credibility, not as evidence of the defendant's criminal propensity. In theory, this is supposed to limit the potentially prejudicial impact of allowing information about the defendant's prior arrests. However, even Justice Robert Jackson, the author of the Michelson majority opinion, elsewhere acknowledged that "the naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."[44]

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41 Josephine Ross, "*He Looks Guilty*": *Reforming Good Character Evidence to Undercut the Presumption of Guilt,* 65 UNIV. PITTSBURGH L. REV. 227, 244 (2004).

42 Consider one case from the DOJ report on Ferguson, Missouri police misconduct. A man was arrested for "making a false declaration" for "initially provid[ing] the short form of his first name (e.g., "Mike" instead of "Michael") and an address that, although legitimate, differed from the one on his license." If raised during character witness cross-examination, the jury would only hear of Michael's arrest for making a false declaration (a potentially devastating blow to Michael's credibility among jurors), not the ludicrous nature of the "offense." *Investigation of the Ferguson Police Department*, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION (March 4, 2015).

43 The majority in *Michelson* acknowledges the risk of a false arrest but ultimately decides the risk is worth taking to test the qualifications of the witness. *Michelson v. United States*, 335 U.S. 469, 482-83 (1948) ("Arrest without more may nevertheless impair or cloud one's reputation. False arrest may do that...The inquiry as to an arrest is permissible...because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion.").

44 *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

311. Psychology professor, Nancy Steblay, and her colleagues conducted a comprehensive review of 40 studies on jury limiting instructions and came to a similar conclusion: "[t]aken as a whole, it is clear that judicial instructions do not effectively eliminate jurors' use of inadmissible evidence."[45] Further research, by Professor Evelyn Maeder and Professor Jennifer Hunt, tested whether jury instructions could prevent improper use of information revealed during character witness cross-examination. The results showed "[m]ock jurors who were given instructions about the proper use of character evidence still misused cross-examination information to judge the defendant, leading to an increase in guilty verdicts."[46]

312. There are several possible reasons for this. When the stakes of a case are high, jurors may seek to use all of the information at their disposal in order to make a good decision.[47] "[L]imiting instructions may be especially hard for jurors to understand and follow, and jurors may question the need to exclude seemingly relevant evidence from consideration."[48]

IX. The Arrest Trap's Racial Disparities

313. Allowing a jury to hear about a defendant's arrests has the potential for prejudice regardless of who the defendant is. However, the mention of arrest can be even more damaging when it is layered on top of the system's existing racial disparities and racial/ethnic biases of portions of the general public.

314. During the last decade, advocates for reform have successfully brought increased attention to the widespread racial disparities throughout our criminal justice system, including in arrests. Although Black Americans were about 12.7% of the U.S. population in 2018, they were the subjects of 27.4% of all arrests that year.[49] Black and white Americans use illegal drugs at very similar rates, yet one in four people arrested for drug-related offenses are Black.[50]

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45 Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & HUM. BEHAV. 469, 487 (2006).

46 Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 260 (2017).

47 Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 481 (1990); See also Joel D. Lieberman & Jamie Ardnt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y L. 677, 678 (2000).

48 Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 265 (2017).

49 *2018 Crime in the United States, Table 43, Arrests by Race and Ethnicity*, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION (2018).

50 Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing*, THE SENTENCING PROJECT (Nov. 2, 2023).

315. Some courts have already ruled that relying on arrests in other contexts, such as, as during sentencing, is inherently unfair and racially biasing. In *United States v. Berry*, the U.S. Third Circuit Court of Appeals cited racial disparities in arrests in its decision to vacate the sentences of the two Black male defendants.[51]

> [R]eliance on arrest records may also exacerbate sentencing disparities arising from economic, social and/or racial factors. For example, officers in affluent neighborhoods may be very reluctant to arrest someone for behavior that would readily cause an officer in the proverbial 'high crime' neighborhood to make an arrest. A record of a prior arrest may, therefore, be as suggestive of a defendant's demographics as his/her potential for recidivism or his/her past criminality.[52]

316. In addition to the risks facing all defendants with prior arrests, Black defendants face another danger — the possibility that raising arrests in this context will prime the implicit biases of jurors. Professor Chris Chambers Goodman of Pepperdine Law School analyzed how juror biases can be activated by the introduction of prior acts evidence. In cases with a Black male defendant, "[e]vidence of prior violent acts will trigger the violent African American stereotype because they help to confirm the stereotype as it applies to the particular defendant."[53]

317. Jurors frequently use narratives and storytelling to make decisions. When there are gaps in the facts under consideration, they may fill in the gaps with their own assumptions and beliefs.[54] Studies of implicit bias among jurors have found "strong associations between Black and Guilty, relative to White and Guilty, and these implicit associations predicted the way mock jurors evaluated a case with otherwise ambiguous evidence."[55]

318. This problem is exacerbated by the imperfect memories of jurors. An experiment conducted by Professor Justin Levinson in 2007 asked participants to recall facts from a story65 U. Pitt. L. Rev. 227, 261–62 they had read minutes earlier. The study showed that "participants who read about an African American...were significantly more likely to misremember it in a manner that would be detrimental to the actor in a legal proceeding."[56] The combined research on implicit bias, fallible memory and the dubious

51 *United States v. Berry*, 553 F.3d 273, 285 (3d Cir. 2009).

52 *United States v. Berry*, 553 F.3d 273, 285 (3d Cir. 2009).

53 Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 MINN. J.L. & INEQUALITY 1, 43 (2007).

54 Josephine Ross, "*He Looks Guilty*": *Reforming Good Character Evidence to Undercut the Presumption of Guilt,* 65 U. PITT. L. REV. 227, 261–62 (2004).

55 Justin D. Levinson et al., *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010).

56 Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 401 (2007).

efficacy of limiting instructions ultimately leads Professor Demetria Frank to conclude that when uncharged act evidence is admitted, a "non-White accused is particularly disadvantaged."[57]

319. It is difficult to gauge the precise impact of allowing prior arrests to be raised during witness cross-examination. However, psychological studies on mock juries conducted by Maeder, Hunt, and their colleague Lee Budesheim showed that "impressions of the defendant were more negative and guilt and conviction ratings were higher when positive character evidence was introduced and cross-examined with specific negative acts than when no character evidence was given."[58]

320. There is also another, harder to measure impact to consider — how many defendants opt to forgo positive character evidence out of fear that their prior arrests might be raised? In the absence of character evidence, Budesheim, Maeder, and Hunt's mock juries were more likely to convict Black defendants as compared to otherwise identical white defendants. However, when positive character evidence was introduced, it "reduced guilt judgments for the Black defendant, but did not have a strong effect on the White defendant."[59] Budesheim, Maeder, and Hunt suggest that "jurors may be more influenced by character evidence when it challenges racial stereotypes, and positive character evidence may reduce racial bias in guilt judgments for Black defendants."[60]

321. Thus, if the prospect that the prosecution will raise a defendant's prior arrests dissuades many defendants from using character evidence, then it is Black defendants in particular who will suffer the loss of a powerful evidentiary tool to counter stereotypes and prejudice.

X. Fixing the Arrest Trap

322. There is a straightforward solution to the problems posed above — change the rules of evidence to prohibit prosecutors from asking character witnesses about a defendant's arrest(s). As discussed, some states, including Pennsylvania, already do this.[61]

323. This approach has garnered scholarly support. Professor Josephine Ross argues that the rules of evidence should be reformed to allow more good character evidence,

57 Demetria D. Frank, *The Proof is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom,* 32 HARV. J. RACIAL & ETHNIC JUST. 1, 25 (2016).

58 Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 259–60 (2017).

59 Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 261 (2017).

60 Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 283–84 (2017).

61 Pa. R. Evid. 405(a)(2).

including specific good acts, and end the prosecution's ability to inquire about arrests and unsubstantiated allegations not resulting in convictions.[62]

324. According to Ross, such a rule change would encourage the use of good character evidence and offset the impact of racial prejudice and juror implicit bias. Without the risk that the prosecution might raise a prior arrest, defendants of color could enlist "friends, family and co-workers who can help cross the divide" with white jurors.[63]

325. Character witnesses may have backgrounds that the jurors can relate to, either racial similarity to the jurors or middle-class indicia such as a job, family and home. The fact that they know, like, and interact with the defendant may dissipate the prejudice.[64]

326. The status quo instead unfairly discourages defendants (especially Black defendants) from using a critical evidentiary tool.

327. In "Toward a Critical Race Theory of Evidence," Professor Jasmine B. Gonzales Rose argues that Rule 403 is currently underutilized as a tool to exclude evidence that has a high risk of being racially prejudicial.

> Due to the prevalence of racism in our society, the prejudice it poses is as much — if not more — of a danger than the more commonly discussed risks under Rule 403, such as gruesome images or offensive conduct. Racism, in all its forms, is a manifestly improper basis that poses a substantial danger of prejudice within the meaning of Rule 403.[65]

328. Until a rule change occurs or a court decision bars the practice categorically, defense attorneys can and should move to exclude questions regarding a defendant's prior arrests under Federal Rule of Evidence 403. Under 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[66]

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62 Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt,* 65 U. PITT. L. REV. 227, 277 (2004).

63 Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt,* 65 U. PITT. L. REV. 227, 277 (2004).

64 Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt,* 65 U. PITT. L. REV. 227, 277 (2004).

65 Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2306 (2017).

66 Fed. R. Evid. 403.

329. In support, attorneys can use implicit bias research and cite the extensive data on racial disparities in arrest rates to show that this practice disproportionately penalizes Black defendants. They can argue that such inquiries are a waste of time and are not an accurate or effective way of determining how well a witness knows the defendant or assessing what "good" character is, all while reminding the court that there remain other, fairer and more potent methods of testing character witness credibility.

XI. Conclusion

330. Rev. Dr. Martin Luther King Jr. spoke of his dream that his children would "live in a nation where they will not be judged by the color of their skin but by the content of their character."[67] The use of arrests to test character witness testimony is one barrier to that goal.

331. In *Michelson*, the court did not cite science, research, or evidence to support the claim that raising arrests has evidentiary value.[68] The practice, later codified in Rule 405, rests solely on an assumption — that knowledge of a defendant's arrest is a reliable indicator of how well a witness knows the defendant or how appropriate their personal standards for judging character are. Race is also never mentioned in the U.S. Supreme Court's 1948 *Michelson* ruling. This is perhaps not surprising, considering that the defendant, Michelson, was a white man. Yet significant racial disparities in arrest rates already existed in 1948 — a time when Jim Crow segregation remained the law of the land in much of the country.[69]

332. The adoption of Rule 405 was no different. In 1965, the United States Supreme Court announced the members of a new advisory committee to draft what would later become the Federal Rules of Evidence. All fifteen members were white men.[70] The rules they drafted contained no mention of racial, ethnic, or national origin. Racial disparities in arrest rates were once again not considered.

333. In 1975, when President Gerald Ford signed legislation that established the Federal Rules of Evidence, the gap between Black and white arrest rates had already begun to widen.[71] This trend would accelerate in the decades to come, as the War on Drugs

67 Martin Luther King, Jr., *Read Martin Luther King Jr.'s 'I Have a Dream' speech in its entirety*, NPR (Jan. 16, 2023).

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

69 David J. Harding & Christopher Winship, *Population Growth, Migration, and Changes in the Racial Differential in Imprisonment in the United States*, 5 Soc. Sci. 32 1940–80 (2016).

70 Tiffany Hilton, *The Danger of Unfair Prejudice: Racial Disparities in the Federal Rules of Evidence*, 52 Stetson L. Rev. 153, 156 (2022).

71 *Historical Statistics of the United States, Colonial Times to 1970 Part 1*, U.S. Department of Commerce at 415 (1977).

brought more aggressive, often discriminatory policing to Black communities. During the 1970s, Black Americans were approximately twice as likely as white Americans to be arrested for drug-related offenses. By 1988, Black Americans were being arrested for drug offenses at five times the rate of whites.[72]

334. Today, racial disparities in arrest rates are pervasive and well-documented. Allowing arrests to be raised during witness cross-examination has minimal evidentiary value and amplifies the damage done by racially biased policing, disproportionately placing Black defendants at a disadvantage.

335. Fortunately, the "arrest trap" can be fixed. Across the country, policies and practices that are facially "colorblind" have come under scrutiny for their extreme racially disparate impact — from "stop and frisk" policing,[73] to sentencing disparities between crack and powder cocaine.[74] Since 2007, ten states have passed racial impact statement reforms, which require lawmakers to study the potential for racially disparate impact before voting on new criminal statutes.[75] As lawmakers revise their criminal laws to reduce racial disparities, they should take a close look at their rules of evidence. When the Federal Rules were adopted, racially disparate impact was not considered. Today, it should be.

72 *UNITED STATES: Punishment and Prejudice: Racial Disparities in the War on Drugs — Section VII: RACIALLY DISPROPORTIONATE DRUG ARRESTS,* HUMAN RIGHTS WATCH (May 2000).

73 Aline Ara Santos Carvalho, et al., *Racial Prejudice and Police Stops: A Systematic Review of the Empirical Literature*, BEHAV. ANNAL PRACT. 15, 1213–20 (May 28, 2021).

74 Jacob Knutson, *Garland orders end to cocaine sentencing disparities,* AXIOS (Dec. 16, 2022).

75 Aaron Gottlieb, et al., *Does racial impact statement reform reduce Black–White disparities in imprisonment: Mixed methods evidence from Minnesota*, 47 U. DEN. J.L. & POL'Y (July 12, 2024).