UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 91 | Number 4 Article 3

5-1-2013

Justice of the Peace: Why Federal Rule of Evidence 404(A)(2)(C) Should Be Repealed

Colin Miller

JUSTICE OF THE PEACE?: WHY FEDERAL RULE OF EVIDENCE 404(A)(2)(C) SHOULD BE REPEALED*

COLIN MILLER**

Federal Rule of Evidence 404(a)(2)(C) and its state counterparts are the one exception to the general "Pandora's Box" theory regarding the admissibility of propensity character evidence in criminal cases. Under Federal Rule of Evidence 404(a)(2), sometimes dubbed the "mercy rule," propensity character evidence is generally inadmissible in any criminal trial unless the defendant decides to inject character evidence into the trial by presenting evidence of his good character under Rule 404(a)(2)(A) and/or evidence of the victim's bad character under Rule 404(a)(2)(B). Choosing to do so, however, opens the proverbial Pandora's Box because it allows for the prosecution to respond in kind by presenting evidence of the defendant's bad character and/or the victim's good character.

This Article argues that the same reasoning that has been used to justify Rule 404(a)(2) as a whole is directly at odds with the authorization given to the prosecution under Rule 404(a)(2)(C) to present evidence of the alleged victim's peacefulness in a homicide case in which the defendant claims that the victim was in fact the first aggressor but does not attack the victim's general character for violence. Moreover, Rule 404(a)(2)(C) is antithetical to our evidentiary and constitutional framework that almost always treats criminal defendants at least as well as, and usually better than, their civil counterparts. Instead, the Rule places a criminal defendant who claims that he acted in self-defense in response to initial aggression by the alleged victim in a no-win situation in which he must open the door to the admission of propensity character evidence or forgo his best and maybe his only defense. Accordingly, Rule 404(a)(2)(C) and state counterparts should be repealed.

** Associate Professor, University of South Carolina School of Law; Blog Editor, EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/.

INTRODUCTION 1163
I. FEDERAL RULE OF EVIDENCE 404, PROPENSITY CHARACTER EVIDENCE, AND THE "MERCY RULE" 1166
A. *A Definition of Propensity Character Evidence* 1166
B. *The General Inadmissibility of Propensity Character Evidence* 1167
C. *The Character Evidence "Mercy Rule" for Criminal Trials* 1167
D. *The Rationales for the "Mercy Rule" and Rule 404(a)(2)(C)* 1169
II. PROPENSITY CHARACTER EVIDENCE IN QUASI-CRIMINAL CASES, FORFEITURE BY WRONGDOING, DYING DECLARATIONS, AND THE CRIMINAL/CIVIL DIVIDE 1174
A. *Propensity Character Evidence in Quasi-Criminal Trials, the 2006 Amendment to Rule 404, and How the Rationale for the "Mercy Rule" Cuts Directly Against Rule 404(a)(2)(C)* 1175
B. *No Coherent Rationale Explains Rule 404(a)(2)(C)* 1178
1. Forfeiture Does Not Provide a Coherent Rationale for Rule 404(a)(2)(C) 1178
2. Waiver Does Not Provide a Coherent Rationale for Rule 404(a)(2)(C) 1181
3. Evidentiary Need Does Not Provide a Coherent Rationale for Rule 404(a)(2)(C) 1187
a. Dying Declarations Are Admitted Based on Evidentiary Need and *Reliability* 1188
b. Dying Declarations Merely Place Both Parties in the Same Position They Would Have Occupied Had the Victim Survived 1190
c. Dying Declarations Do Not Solely Benefit the Prosecution 1192
d. The Dying Declaration Exception Applies in All Homicide Trials 1194
i. First Type of Case: Communicated Withdrawal 1195
ii. Second Type of Case: Escalation by the Victim 1195
iii. Comparing These Two Cases with "First Aggressor" Cases 1196

iv. Fourth Type of Case: Self-Defense Based upon Past Acts by the Victim 1198
e. The Dying Declaration Exception Applies in Civil and Criminal Cases 1200
III. RULE 404(A)(2)(C) IS INCONSISTENT WITH AN EVIDENTIARY SCHEME THAT ALMOST ALWAYS TREATS CRIMINAL DEFENDANTS AS WELL AS, AND USUALLY BETTER THAN, THEIR CIVIL COUNTERPARTS 1202
A. Facially Neutral Rules of Evidence 1202
B. Constitutional Provisions That Favor Criminal Defendants 1204
C. Rules of Evidence That Facially Favor Criminal Defendants 1205
D. Rules of Evidence That Arguably Treat(ed) Criminal Defendants Less Favorably 1213
CONCLUSION 1217

INTRODUCTION

In *Commonwealth v. Bedford*,[1] Duane Bedford performed some construction work for his neighbor, Sam Brown, until a dispute arose between the two men before the job was completed.[2] That dispute escalated when Brown suspected that Bedford smashed his car windows.[3] Brown went to confront Bedford, with that confrontation ending with Bedford shooting Brown three times, causing Brown's death.[4] Bedford subsequently went incognito, leading to a year-long search for him, an appearance on *America's Most Wanted*, and, ultimately, his apprehension.[5]

Charged with first-degree murder, Bedford claimed self-defense and specifically that Brown was the first aggressor who came looking for him "with hardness of heart."[6] Notably, Bedford did not present any propensity character evidence tending to show that he was generally a peaceful person or that Brown had generally been a

1. 50 A.3d 707, *appeal denied*, 57 A.3d 65 (Pa. 2012).
2. *Id.* at 709–10.
3. *See id.* at 710.
4. *See id.*
5. *See id.*
6. *Id.* at 711. The phrase "hardness of heart" is one that courts often use in describing the state of mind of a murderer. *See* Nancy Cook, *A Few Words About Women in the Discourse of Criminal Law upon Reading Martha Grace Duncan's Essay,* Beauty in the Dark of Night, 59 EMORY L.J. 1245, 1247 (2010).

violent person.[7] Bedford simply claimed that Brown attacked him first in the encounter that ended with Brown's death.[8]

In response to this defense, the Commonwealth called Sergeant Sean Butts as a character witness, leading, inter alia, to the following exchange:

> [THE COMMONWEALTH]: Do you know [Victim] to be a violent individual?
>
> [SGT. BUTTS]: No.
>
> [THE COMMONWEALTH]: [Why] do you say "no"?
>
> [SGT. BUTTS]: [Victim] was a very soft-spoken, meek person, very subdued. Never really raised his voice around me or in public. There have been some instances at his employment where he could have gotten upset or violent, but he didn't.[9]

After Bedford was convicted of first-degree murder and sentenced to a mandatory term of life imprisonment without the possibility of parole, he appealed, claiming that Sergeant Butts's testimony was improperly admitted.[10] Bedford's claim, however, was not that evidence concerning Brown's character was generally inadmissible; instead, he merely (and unsuccessfully) objected to the *form* of Sergeant Butts's testimony.[11] This makes sense because challenging the content of the testimony would almost certainly have been fruitless. Like Federal Rule of Evidence 404(a)(2)(C), Pennsylvania Rule of Evidence 404(a)(2)(ii) clearly allows for the admission of evidence of the victim's character for peacefulness when the defendant in a homicide case claims that the victim was the first aggressor, even if the defendant presents no character evidence concerning the victim.[12] Moreover, these rules are not a modern creation. Instead, the Advisory Committee's Note accompanying the original enactment of Federal Rule of Evidence 404 in 1975 makes it clear that evidence of the victim's character for peacefulness under such circumstances was admitted "[i]n most jurisdictions today."[13]

---

7. *See Bedford*, 50 A.3d at 714.

8. *See id.*

9. *Id.* at 715.

10. *See id.* at 710, 713.

11. *See id.* at 5 ("In Appellant's third issue, he objects to the *form* of character testimony offered by Sgt. Sean Butts . . . .").

12. *See* PA. R. EVID. 404(a)(2)(ii) ("In a homicide case, where the accused has offered evidence that the deceased was the first aggressor, evidence of a character trait of the deceased for peacefulness is admissible when offered by the prosecution to rebut the same . . . .").

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

Federal Rule of Evidence 404(a)(2)(C) and its state counterparts are thus the only exceptions to the general "Pandora's Box" theory regarding the admissibility of propensity character evidence in criminal cases.[14] Under Federal Rule of Evidence 404(a)(2), sometimes dubbed the "mercy rule,"[15] propensity character evidence is generally inadmissible in any criminal trial unless the defendant decides to inject character evidence into the trial by presenting evidence of his good character under Rule 404(a)(2)(A) and/or evidence of the victim's bad character under Rule 404(a)(2)(B).[16] Choosing to do so, however, opens the proverbial Pandora's Box because it allows for the prosecution to respond in kind by presenting evidence of the defendant's bad character and/or the victim's good character.[17]

This Article argues that the same reasoning that has been used to justify Rule 404(a)(2) as a whole is directly at odds with the authorization given to the prosecution under Rule 404(a)(2)(C) to present evidence of the alleged victim's peacefulness in a homicide case in which the defendant claims that the victim was in fact the first aggressor but does not attack the victim's general character for violence. Moreover, Rule 404(a)(2)(C) is antithetical to our evidentiary and constitutional framework that almost always treats criminal defendants at least as well as, and usually better than, their civil counterparts. Instead, the Rule places a criminal defendant who claims that he acted in self-defense in response to initial aggression by the alleged victim in a no-win situation in which he must open the door to the admission of propensity character evidence or forgo his best and maybe his only defense. Accordingly, Rule 404(a)(2)(C) and state counterparts should be repealed.

Part I of this Article addresses Federal Rule of Evidence 404 and the explanations given by the Advisory Committee for the inclusion of the mercy rule. Part II discusses the later decision to limit the mercy rule to criminal cases and preclude its application in civil cases that are quasi-criminal in nature (e.g., wrongful death cases). It notes

14. *See infra* notes 24–28 and accompanying text.

15. *See, e.g.*, Celaya v. Stewart, 691 F. Supp. 2d 1046, 1056 n.2 (D. Ariz. 2010) ("The so-called 'mercy rule' permits a criminal defendant to introduce evidence of pertinent character traits of the victim because the accused, whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government.' " (quoting Belardo v. Virgin Islands, No. CRIM.A. 2006/023, 2009 WL 1106937 (D.V.I. Apr. 22, 2009), *aff'd*, 385 F. App'x 149 (3d Cir. 2010))), *aff'd sub nom.* Celaya v. Ryan, No. 10-15935, 2012 WL 5505736 (9th Cir. Nov. 14, 2012).

16. *See* FED. R. EVID. 404(a)(2)(A)–(B).

17. *See id.*

how this decision was based upon the recognition that both the stakes and the power and resource imbalance can be significantly higher in a criminal case, with the mercy rule partially allowing criminal defendants to level the playing field. This Part argues that Rule 404(a)(2)(C) is directly antithetical to this rationale and that it should be abolished unless there is some alternate rationale for its existence. The rest of the Part then considers and rejects forfeiture, waiver, and evidentiary need as alternate justifications for the Rule. Finally, Part III discusses how Rule 404(a)(2)(C) is inconsistent with the rest of the Federal Rules of Evidence, which almost always treat criminal defendants the same as, and usually better than, civil defendants.

I. FEDERAL RULE OF EVIDENCE 404, PROPENSITY CHARACTER EVIDENCE, AND THE "MERCY RULE"

A. A Definition of Propensity Character Evidence

Propensity character evidence is "evidence of a person's character or trait of character to prove that he has a propensity to act in a specific manner and thus that he likely acted in conformity with that propensity at the time of an alleged pre-trial wrong."[18] More simply, it is evidence whose probative value is dependent on the aphorism, "Once a criminal, always a criminal."[19] For instance, in the *Bedford* case from the Introduction, if Bedford, the homicide defendant, had committed a prior murder, the prosecution might have wanted to present evidence of this prior crime as propensity character evidence to prove, "Once a murderer, always a murderer."[20] Alternately, the prosecution might have wanted to call Bedford's neighbors to testify that they thought Bedford to be a generally violent person to prove, "Once a violent thug, always a violent thug."[21]

---

18. Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1002 (2009).

19. *See, e.g.*, United States v. Mare, 668 F.3d 35, 39 (1st Cir.) ("The concern is that, upon learning of that prior conduct, the jury might think worse of the defendant's character out of some 'rel[iance] on the aphorism "once a criminal, always a criminal." ' " (alteration in original) (quoting United States v. Rubio-Estreada, 857 F.2d 845, 852 (1st Cir. 1988) (Torruella, J., dissenting))), *cert. denied*, 132 S. Ct. 2758 (2012).

20. *See, e.g.*, David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 527 (2001) (" 'Once a murderer, always a murderer' is precisely the type of reasoning forbidden by the character rule.").

21. *See* Michelson v. United States, 335 U.S. 469, 475 (1948) ("The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his

B. *The General Inadmissibility of Propensity Character Evidence*

Propensity character evidence, however, is generally inadmissible under Federal Rule of Evidence 404(a)(1), which simply states that "[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."[22] There are three main reasons why Rule 404(a)(1) and state counterparts deem propensity character evidence generally inadmissible:

> First, there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable.... Second, there is a "possibility that a jury will overvalue the character evidence in assessing the guilt for the crime charged." ... Third, it is unfair to require a defendant to defend not only against the crime charged, but moreover, to disprove the prior acts or explain his or her personality.[23]

C. *The Character Evidence "Mercy Rule" for Criminal Trials*

But let's say that it was Bedford who wanted to call neighbors to testify that (a) they thought that Bedford was a generally peaceful person and/or (b) they thought that Brown, his victim, was a generally violent person. Under Federal Rule of Evidence 404(a)(2), the so-called "mercy rule," Bedford would have been able to have the neighbors offer their opinions of both individuals involved in the fatal shooting. First, Rule 404(a)(2)(A) provides that in any criminal case "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."[24] Second, Rule 404(a)(2)(B) provides that in any criminal case,

> 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

---

neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.").

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

23. Kaufman v. People, 202 P.3d 542, 552 (Colo. 2009) (quoting Masters v. People, 58 P.3d 979, 995 (Colo. 2002)).

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

(ii) offer evidence of the defendant's same trait . . . .[25]

In other words, Rule 404(a)(2) works like Pandora's Box. If a criminal defendant wants to prevent propensity character evidence from infecting his trial, he merely needs to refrain from presenting any propensity character evidence on his own behalf.[26] The defendant can, however, choose to present evidence of his good character for a pertinent character trait, which then opens the door for the prosecution to introduce evidence of the defendant's bad character for the same trait.[27] Moreover, the defendant can choose to present evidence of the victim's bad character for a pertinent character trait, which then opens the door for the prosecution to present not only evidence of the victim's good character for the same trait but also evidence of the defendant's bad character for the same trait.[28]

Then there is Federal Rule of Evidence 404(a)(2)(C), the federal counterpart to the Pennsylvania rule applied at Bedford's trial. Rule 404(a)(2)(C) provides that "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."[29] Therefore, even if a defendant like Bedford merely presents evidence that the victim was the first aggressor in the case at hand and does not present evidence that the victim *generally* had a character for being violent, the prosecution can present evidence concerning the victim's *general* character for peacefulness.[30]

As in *Bedford*, the defendant in *United States v. Weise*[31] was charged with murder.[32] The murder in *Weise* occurred after a night of heavy drinking, with Simon Weise fatally stabbing Alan Maxwell twice in the chest with an eight-inch butcher knife.[33] Like Bedford, Weise claimed self-defense and alleged that his victim was the first aggressor but did not present any evidence concerning his victim's character for violence.[34] The prosecution's response was to call Maxwell's brother as well as "several other witnesses to testify about

25. *Id.* 404(a)(2)(B).

26. *See* FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

27. *See id.* 404(a)(2)(A).

28. *See id.* 404(a)(2)(B).

29. *Id.* 404(a)(2)(C).

30. *See id.*

31. 89 F.3d 502 (8th Cir. 1996).

32. *Id.* at 504.

33. *Id.*

34. *Id.*

Maxwell's peaceful character."[35] In rejecting Weise's appeal from his murder conviction, the Eighth Circuit quickly concluded that under Rule 404(a)(2)(C) "[t]he Government properly offered this testimony to rebut Weise's claim that Maxwell was the aggressor."[36]

Like Pennsylvania, most states have counterparts to Federal Rule of Evidence 404(a)(2)(C) and similarly admit evidence of the victim's character for peacefulness when the defendant claims that the victim was the first aggressor but does not attack his general character for violence.[37] For instance, in *Goff v. State*,[38] the Court of Appeals of Mississippi found no problem with testimony by character witnesses that the victim "wouldn't harm a fly," "never really bothered anybody," and "was a kind, gentle man" because a homicide defendant alleged that the victim struck him first.[39]

D. The Rationales for the "Mercy Rule" and Rule 404(a)(2)(C)

What accounts for the three exceptions to the general proscription on the admissibility of propensity character evidence contained in Rules 404(a)(2)(A)–(C)? According to the Advisory Committee's Note accompanying the original version of Rule 404, the main answer is inertia. The Advisory Committee simply notes that the three types of evidence admitted under what are now Rules 404(a)(2)(A)–(C) were previously common law exceptions to the propensity character evidence proscription "[i]n most jurisdictions" and that "[t]his pattern is incorporated in the rule."[40] According to the Committee, while the basis for these exceptions "lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations."[41] Moreover, the Committee found that these exceptions were "so deeply imbedded in our

35. *Id.*

36. *Id.*

37. *See, e.g.*, Austin v. State, 492 S.E.2d 212, 213 (Ga. 1997) (finding no problem with four character witnesses testifying that the victim was peaceful because the homicide defendant claimed that the victim was the first aggressor); State v. Faison, 330 N.C. 347, 354–55, 411 S.E.2d 143, 147 (1991) ("Regardless of how this exception is *generally* used, the plain meaning of the 'first aggressor' exception is abundantly clear: if a defendant presents evidence that the victim was the first aggressor in the confrontation which led to the victim's death, the State can offer evidence of the victim's peacefulness.").

38. 98-KA-00723-COA, 778 So. 2d 779 (Miss. Ct. App. 2000).

39. *Id.* (¶ 22), 777 So. 2d at 785.

40. FED. R. EVID. 404 advisory committee's note.

41. *Id.*

jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence."[42]

On the one hand, the Committee's words are almost critique-proof. The Committee claims that the drafters of Rule 404 are simply carrying the old common law practice into the new Federal Rules and that this practice is based more upon history and experience than logic.[43] However, the Committee's other rationales belie the simplicity of this argument, which falls apart under further inspection.

Initially, in other contexts relating to character evidence, the drafters of the Federal Rules saw no need to be beholden to old common law practices. Assume first that in *Bedford*, Brown, the victim, had a juvenile adjudication for perjury. Second, assume that (a) Brown did not die and Bedford was charged with attempted murder, or (b) Brown did die after making a dying declaration to an EMT that Bedford shot and killed him. Under the common law, in most jurisdictions, Bedford would not have been able to use evidence of the juvenile adjudication (a) to impeach Brown's testimony at the attempted murder trial, or (b) to impeach his dying declaration at the murder trial. Instead, at the time of the adoption of the Federal Rules of Evidence, "[t]he prevailing view ha[d] been that a juvenile adjudication [was] not usable for impeachment."[44]

The drafters of the Federal Rules, however, decided to adopt a different approach by creating Federal Rule of Evidence 609(d), which allows for the admission of evidence of a juvenile adjudication for impeachment purposes when such impeachment, inter alia, "is necessary to fairly determine guilt or innocence."[45] As noted by the Advisory Committee,[46] this change was influenced in large part by the Supreme Court's 1974 opinion in *Davis v. Alaska*,[47] in which the Court found that a trial court denied the defendant his constitutional right to confrontation by precluding him from impeaching a key witness for the prosecution through evidence of his juvenile adjudication for burglary.[48]

Davis thus provides a useful analogue to the Advisory Committee's rationale that the "mercy rule" exists because it is so

42. *Id.*

43. *See supra* notes 40–41 and accompanying text.

44. FED. R. EVID. 609 advisory committee's note.

45. *Id.* 609(d).

46. *See id.* 609 advisory committee's note ("*Davis* involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias.").

47. 415 U.S. 308 (1974).

48. *Id.* at 318.

imbedded as to assume almost constitutional proportions.[49] It could be said that a court precluding a defendant from presenting evidence of the victim's character for violence similarly deprives the defendant of his right to confrontation.[50] Furthermore, the preclusion of such evidence or evidence of the defendant's good character could deprive the defendant of his right to present a defense or his right to due process.[51] An analogy can be drawn to *Dickerson v. United States*,[52] in which the Supreme Court refused to overrule *Miranda* because "*Miranda* has become embedded in routine practice to the point where the warnings have become part of our national culture."[53]

All of this makes sense because the purpose of the *Miranda* warnings, the Confrontation Clause, the Compulsory Process Clause, and the Due Process Clause is to protect citizens from arbitrary exercises of power by the government.[54] In finding a constitutional violation in its aforementioned opinion in *Davis v. Alaska*, the Supreme Court cited *Greene v. McElory*[55] for the proposition that

---

49. *See supra* note 42 and accompanying text.

50. For instance, in *State v. Rice*, No. 58643, 1991 WL 97412 (Ohio Ct. App. June 6, 1991), a defendant convicted of murder claimed on appeal that the trial court violated his right to confrontation by precluding him from presenting evidence of the victim's violent character. *Id.* at *2.

51. *See* United States v. Drapeau, 644 F.3d 646, 660 (8th Cir. 2011) (Bright, J., concurring in part and dissenting in part) (finding that that the exclusion of evidence of the alleged victim's character for violence violated the defendant's right to present a defense); State v. Carter, 636 A.2d 821, 829–30 (Conn. 1994) (finding that the trial court's exclusion of evidence of the alleged victim's violent character violated due process and the right to present a defense).

52. 530 U.S. 428 (2000).

53. *Id.* at 443.

54. *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 104 (2009) (Souter, J., dissenting) ("Substantive due process expresses the conception that the liberty it protects is a freedom from arbitrary government action, from restraints lacking any reasonable justification . . . ." (citing Poe v. Ullman, 367 U.S. 487, 541 (1961) (Harlan, J., dissenting))); Virgin Islands v. Mills, 956 F.2d 443, 445 (3d Cir. 1992) ("The Compulsory Process clause protects the presentation of the defendant's case from unwarranted interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge."); John Robert Knoebber, Comment, *Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of* Crawford v. Washington, 51 LOY. L. REV. 497, 500 (2005) ("Further, such an approach would serve the goal of the Framers in drafting the Confrontation Clause—to protect citizens from arbitrary judicial determinations."); Trisha Choksi, *The Scope of* Miranda *Rights in Prison: When Is Someone in Custody "In Custody"?*, DCBA BRIEF, Nov. 2011, at 22, 27 ("The inherent secrecy surrounding interrogation inside of a prison lends itself to the kind of improper police conduct and arbitrary use of power that *Miranda* was meant to protect.").

55. 360 U.S. 474 (1959).

> [c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination . . . .[56]

Of course, the serious injury in *Davis*, as in *Bedford*, was the criminal prosecution of the defendant, and Rule 609(d) and Rules 404(a)(2)(A) and (B) are valuable tools for the defendant to test the veracity of witnesses for the prosecution. But what about Rule 404(a)(2)(C)? .

That Rule is a windfall for the government, allowing it to prove the victim's character for peacefulness even without the defendant asserting that the victim was generally a violent person.[57] It thus subverts the general understanding that the Constitution is designed to protect the people from the government rather than the other way around.[58] Even a governmental power such as eminent domain, which some courts discuss in a way that makes it seem like it protects the government from the people, requires that the government give "just compensation" for its taking of a citizen's property.[59]

---

56. 415 U.S. 308, 317 n.4 (1974) (quoting *Greene*, 360 U.S. at 496).

57. *See* FED. R. EVID. 404(a)(2)(C).

58. *See, e.g.*, Associated Press v. Bd. of Pub. Educ., 804 P.2d 376, 379 (Mont. 1991) ("The protections guaranteed by the constitutional right to due process were designed to protect people from governmental abuses. They were not designed to protect the government from the people.").

59. *See* Gideon Kanner, *That Was the Year That Was: Recent Developments in Eminent Domain Law*, SE45 A.L.I.-A.B.A. 571, 578 (2000) ("First, eminent domain proceedings are a judicial implementation of a vital constitutional guarantee (the 'just compensation' clause of the Fifth Amendment) and in that context it is remarkable, to put it with restraint, that some courts act and speak as if the function of that constitutional provision were to protect the government from the people, rather than the other way around."). As Randy Barnett has noted, "[W]e must never forget that the rule of law is meant to protect the people from the government, not to protect the government from the people." Randy E. Barnett, *Foreward: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 642 (1991); *see also* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 47 (1997) ("It distorts constitutional provisions that protect the people from the government into provisions that protect the government from the people.").

However, under Rule 404(a)(2)(C), the defendant gets nothing. Indeed, the Rule places the defendant in a no-win situation. Recall that under Rule 404(a)(2)(B), if the defendant attacks the character of the victim, it opens the door for the prosecution to attack the character of the defendant.[60] This portion of Rule 404(a)(2)(B) was added in 2000, with the Advisory Committee giving the following reasoning for the amendment: "If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor."[61] Therefore, "the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim."[62]

By looking at this analysis from the defendant's perspective, we can see the conundrum faced by the accused under Rule 404(a)(2)(C). Assume that a homicide defendant has a colorable claim that he acted in self-defense and that the victim was the first aggressor. If that defendant wants to prevent propensity character evidence from pervading his trial, he needs to refrain from claiming that the victim was the first aggressor because doing so automatically opens the door for the prosecution to present evidence of the victim's peacefulness under Rule 404(a)(2)(C).[63]

Now, assume that the defendant rolls the dice and does claim at trial that the victim was the first aggressor, prompting the prosecution to present good character evidence about the victim. If the defendant has evidence tending to indicate that the victim in fact had a bad character for violence, he faces another quandary. At this point, in the words of the Advisory Committee, "the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor."[64] The defendant of course can correct this information imbalance by presenting his character evidence concerning the victim, but, by doing so, he opens his own character to attack under Rule 404(a)(2)(B).[65] In other words, when a homicide defendant has a colorable claim of self-defense that the victim was the first aggressor, Rule 404(a)(2)(C) immediately puts

60. *See* FED. R. EVID. 404(a)(2)(B).
61. FED. R. EVID. 404 advisory committee's note to 2000 amendment.
62. *Id.*
63. *See id.* 404(a)(2)(C).
64. *Id.* 404 advisory committee's note to 2000 amendment.
65. *See id.* 404(a)(2)(B).

him behind the eight ball and forces him to make Solomonic choices regarding whether he should even present his defense or whether he can rebut the saintly image of the victim presented by the prosecution.

Consider this from the perspective of the innocent defendant. If the victim really was the first aggressor, and the defendant honestly and reasonably responded with lethal force, self-defense is not merely a potentially viable defense; it is almost certainly his *only* defense. Rule 404(a)(2)(C) thus forces the innocent defendant either to avoid raising his only available defense or to raise that defense but lose his ability to prevent propensity character evidence from pervading his trial.

As the previous reference to Rule 609(d) makes clear, Rule 404(a)(2)(C) cannot be defended as a mere extension of the common law when the drafters of the Federal Rules clearly made a course correction regarding the admissibility of somewhat similar evidence—juvenile adjudications—in order to protect the constitutional rights of defendants.[66] Additionally, Rule 404(a)(2)(C) cannot be defended as a rule of quasi-constitutional proportions because it protects the government from the people rather than the people from the government.[67] Thus, if Rule 404(a)(2)(C) is defensible at all, it is based upon what the Advisory Committee referred to as the "relative presence and absence of prejudice in the various situations."[68] The following Part addresses those situations.

II. PROPENSITY CHARACTER EVIDENCE IN QUASI-CRIMINAL CASES, FORFEITURE BY WRONGDOING, DYING DECLARATIONS, AND THE CRIMINAL/CIVIL DIVIDE

This Part will first discuss the reasons why the "mercy rule" was limited to criminal cases and how those reasons cut directly against the existence of Federal Rule of Evidence 404(a)(2)(C) and, then, explain why neither the doctrine of forfeiture by wrongdoing, nor the dying declaration exception to the Rule against hearsay, provides a coherent rationale for the Rule.

---

66. *See id.* 609 advisory committee's note ("The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion.").

67. *See supra* notes 57–59 and accompanying text. The relevant question in this regard is, "What constitutional principle could allow the prosecution to present evidence possessing such dubious reliability and such certain prejudice against a criminal defendant who merely asserts a potentially viable defense?"

68. *See supra* note 41 and accompanying text.

A. *Propensity Character Evidence in Quasi-Criminal Trials, the 2006 Amendment to Rule 404, and How the Rationale for the "Mercy Rule" Cuts Directly Against Rule 404(a)(2)(C)*

In the wake of the passage of Federal Rule of Evidence 404, courts split on the issue of whether the "mercy rule" applied solely in criminal cases or whether it also applied in quasi-criminal cases, i.e., civil proceedings involving acts that are also punishable under criminal law.[69]

For instance, in *Crumpton v. Confederation Life Insurance Co.*,[70] a daughter, the beneficiary of an accidental death policy that covered her father, brought a civil action against the insurer for refusing to pay her the proceeds of the policy after her father died.[71] The company's defense was that a neighbor shot and killed the father because he raped her, rendering the policy inapplicable because the father's death was not accidental.[72] In response, the daughter presented character evidence indicating that her father did not act violently or aggressively toward women.[73]

In affirming the admission of this evidence, the Fifth Circuit found that while the "mercy rule" generally only applies "to criminal cases, the unusual circumstances here place the case very close to one of a criminal nature."[74] The court held that "[t]he focus of the civil suit on the insurance policy was the issue of rape, and the resulting trial was in most respects similar to a criminal case for rape."[75] Accordingly, it concluded that the character evidence was admissible, because, "[h]ad there been a criminal case against [the father], evidence of his character that was pertinent would have been admissible."[76]

Other courts, however, concluded that the "mercy rule" applied only in true criminal cases.[77] In 2006, Rule 404 was amended to make clear that the "mercy rule" only applies "in a criminal case."[78] According to the Advisory Committee, this amendment was "consistent with the original intent of the Rule, which was to prohibit

69. Miller, *supra* note 18, at 1001.
70. 672 F.2d 1248 (5th Cir. 1982).
71. *Id.* at 1250–51.
72. *See id.* at 1251.
73. *See id.* at 1251–52.
74. *Id.* at 1253.
75. *Id.*
76. *Id.*
77. *See* Miller, *supra* note 18, at 1016 ("[T]he majority of courts found that those Rules were solely applicable to criminal cases and *per se* inapplicable in civil cases.").
78. FED. R. EVID. 404(a)(2).

the circumstantial use of character evidence in civil cases, even where closely related to criminal charges."[79]

Specifically, the Committee noted that "[t]he circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay."[80] That said, "[i]n criminal cases, the so-called 'mercy rule' permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim."[81] But, according to the Committee, "that is because the accused, whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government.' "[82] As support for this claim, the Committee cited to an article contending that "the rule prohibiting circumstantial use of character evidence 'was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.' "[83] Conversely, the Committee found that "[t]hose concerns do not apply to parties in civil cases."[84]

Apparently then, the "situations" referenced in the Advisory Committee's Note accompanying the original Rule 404 were civil and criminal trials. Propensity character evidence is too prejudicial, confusing, and time consuming to be admitted at a civil trial in which the stakes are generally lower and both parties can possess commensurate resources.[85] However, in a criminal trial, where both the stakes and the power imbalance can be significantly higher, the defendant should be able to present propensity character evidence as a counterweight so that the scales of justice are not tipped so strongly in the government's direction.[86]

This explanation gives a coherent rationale for Rules 404(a)(2)(A) and (B). Conversely, this rationale seemingly drives a stake through the heart of Rule 404(a)(2)(C). Rather than allowing a defendant, however slightly, to level the playing field in a criminal trial, the Rule gives prosecutors one more weapon in their vast

79. *Id.* 404 advisory committee's note to 2006 amendment.

80. *Id.*

81. *Id.*

82. *Id.* (quoting C. MUELLER & L. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES 264–65 (2d ed. 1999)).

83. *Id.* (quoting Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 855 (1982)).

84. *Id.*

85. *See supra* notes 79–80 and accompanying text.

86. *See supra* notes 82–83 and accompanying text.

arsenal. Rule 404(a)(2)(C) is thus directly antithetical to the stated purposes of the "mercy rule."

Most disturbingly, Rule 404(a)(2)(C) gives a strategic advantage to the State in the very type of case "to which the greatest police resources are assigned and which often leads to intensive and long-term investigations."[87] This, of course, makes sense: "Because homicide is the worst of all crimes, it is easy to understand why a single homicide investigation is given much greater resources than the investigation of a single robbery, a single burglary, and so on."[88] Moreover, as the "worst of all crimes," murder is the only crime, besides crimes against the state such as treason, that is eligible for the death penalty, and "a capital trial consumes significantly more resources than a noncapital trial."[89] Capital defendants are also more likely than regular defendants to be indigent and require the services of a public defender,[90] which increases the power and resource disparity given the current public defender crisis.[91]

This strategic advantage can be exacerbated by the fact that capital defendants have no right to bail; "federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail"[92] while there is no "federal constitutional right to bail in capital cases in this country."[93] Additionally, "twenty-seven states retain statutes, constitutional provisions, or criminal rules that define capital offenses generally as being non-bailable."[94] This means that the resource gap in capital

87. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 32 (1999).

88. David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 162 (2007).

89. State v. Flores, 2004-NMSC-021, ¶ 12, 135 N.M. 759, 93 P.3d 1264.

90. *Compare* Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 139 (2010) ("[T]he truth remains that 'approximately ninety percent of capital defendants are indigent' and thus receive the services of each state's public defender system." (quoting Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001))), *with* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 50 (2010) (noting that "80 percent of criminal defendants are represented by public defenders").

91. For instance, "in November 2008, public defenders' offices from seven states either refused to take on new cases or sued to limit them, citing overwhelming workloads that prevented defendants from receiving adequate attention, time, and representation." Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 769 (2010).

92. Stack v. Boyle, 342 U.S. 1, 4 (1951).

93. United States v. Ghailani, 751 F. Supp. 2d 515, 527 n.71 (S.D.N.Y. 2010).

94. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 750 n.160 (2011).

cases can be especially large because a defendant who cannot procure pretrial release is limited in his ability to "consult with counsel, gather evidence and confer with witnesses."[95]

These last points, of course, underscore the fact that a homicide defendant has much more at stake than the typical criminal defendant. A federal homicide defendant faces the very real specter of death at the end of his trial, as do many homicide defendants in state court.[96] Additionally, even when a homicide defendant does not face the specter of the literal loss of his life as the result of a death sentence, he faces the chance of life imprisonment without the possibility of parole, as was the case in *Bedford*.[97]

In sum, a defendant charged with murder (and especially a capital defendant charged with murder) faces much higher stakes and a significantly larger deployment of state investigatory and prosecutorial resources than the typical defendant. The Advisory Committee has claimed that two factors support the "mercy rule": (1) the fact that a criminal defendant typically has more at stake than a civil defendant and (2) the fact that the resource gap between criminal defendant and prosecution is typically larger than the resource gap between civil defendant and civil plaintiff.[98] Because these two factors directly cut against the viability of Rule 404(a)(2)(C), the Rule and state counterparts should be repealed unless a defense for it can be hypothesized.

B. No Coherent Rationale Explains Rule 404(a)(2)(C)

1. Forfeiture Does Not Provide a Coherent Rationale for Rule 404(a)(2)(C)

A first possible alternate rationale for Rule 404(a)(2)(C) is forfeiture: that, by causing the death of the victim, the defendant forfeits his right to object to the admission of evidence of the victim's character for peacefulness. Before 2008, those defending Rule 404(a)(2)(C) could have found an analogue in the way that some

95. *In re* Extradition of Smyth, 976 F.2d 1535, 1536 (9th Cir. 1992).

96. *See, e.g.*, Richard C. Alexander, *"Cost Savings" as Proceeds of Crime: A Comparative Study of the United States and the United Kingdom*, 45 INT'L LAW. 749, 754 (2011) ("[T]he death penalty exists not only in U.S. federal law but also in the state laws of the majority of the U.S. states . . . .").

97. *See* James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 321 (2011) ("[T]he only choice prosecutors and jurors have in real capital murder cases, in every state in the nation, is between death and life without parole.").

98. *See* FED. R. EVID. 404 advisory committee's note to 2006 amendment.

courts interpreted the doctrine of forfeiture by wrongdoing.[99] As previously noted, criminal defendants have the right to confront witnesses against them.[100] This right, conferred by the Confrontation Clause, inter alia, generally precludes the admission of "testimonial" hearsay against an accused unless (1) the hearsay declarant is "unavailable" and (2) the defendant previously had the opportunity to cross-examine the declarant.[101]

In some cases, however, a criminal defendant forfeits his right to object to the admission of such "testimonial" hearsay under the Confrontation Clause and the Rules of Evidence pursuant to the doctrine of forfeiture by wrongdoing. This doctrine provides that a party who causes the unavailability of a prospective witness at trial forfeits his objection to the admissibility of hearsay statements made by that prospective witness.[102] Before 2008, courts primarily applied this forfeiture doctrine in two types of cases.

One type of case was the witness tampering case. For instance, in *United States v. Battle*,[103] the United States District Court for the District of Florida deemed hearsay statements by a prospective witness admissible under the doctrine of forfeiture by wrongdoing after determining that the defendants caused the witness to flee by threatening his life.[104]

The second type of case involved a defendant killing a victim who was not at the time a prospective witness against the defendant. In such a case, if the victim had made prior statements of fear regarding the defendant, some courts would allow for the admission of those statements under the doctrine. For example, in *State v. Jensen*,[105] a wife gave a letter to a neighbor with the instruction that she turn it over to the police if anything happened to her.[106] When the wife later turned up dead and her husband was charged with the

99. *See, e.g.*, State v. Jensen, 2007 WI 26, ¶ 57, 299 Wis. 2d 267, 727 N.W.2d 518 ("In short, we adopt a broad forfeiture by wrongdoing doctrine, and conclude that if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness, the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant.").

100. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

101. Crawford v. Washington, 541 U.S. 36, 68 (2004).

102. *See* FED. R. EVID. 804(b)(6) (providing a hearsay exception for "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result").

103. 473 F. Supp. 2d 1185 (S.D. Fla. 2006).

104. *See id.* at 1195.

105. 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518.

106. *Id.* ¶ 5.

murder, the trial court found that letter admissible under the doctrine, and the Supreme Court of Wisconsin affirmed.[107]

In 2008, however, the Supreme Court deemed the doctrine on forfeiture by wrongdoing inapplicable in this second type of case. In *People v. Giles*,[108] Dwayne Giles shot and killed his long-time girlfriend, Brenda Avie.[109] At trial, Giles argued that the shooting was in self-defense after Avie "charged" him.[110] In response, the prosecution called a police officer, who testified about statements Avie made to him after he responded to a report of domestic violence involving Giles and Avie a few weeks before the fatal shooting.[111]

After Giles was convicted of murder, he appealed, claiming that the admission of Avie's testimonial hearsay statements to the officer violated his right of confrontation.[112] The Court of Appeal of California disagreed, finding that the doctrine of forfeiture by wrongdoing applies as long as a defendant causes the unavailability of a hearsay declarant through an intentional criminal act; the defendant "need not additionally possess the purpose of rendering the witness unavailable for trial."[113] In other words, the court found that forfeiture applies even when the criminal act causing the declarant's unavailability is the same criminal act for which the defendant is being prosecuted.

The Supreme Court of California later affirmed this opinion, in compliance with the interpretation of forfeiture by wrongdoing in a number of jurisdictions.[114] Meanwhile, several other jurisdictions *did* require a criminal defendant to cause the declarant's unavailability while possessing the intent to render the declarant unavailable to testify at trial for forfeiture to apply.[115] For these courts, the forfeiture by wrongdoing doctrine operated as a witness-tampering rule, with forfeiture only applying when the defendant's act of killing (or

107. *See id.* ¶ 58.

108. 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004), *aff'd*, 152 P.3d 433 (Cal. 2007), *vacated sub nom.* Giles v. California, 554 U.S. 353 (2008).

109. *Id.* at 845.

110. *Id.* at 846.

111. *See id.*

112. *See id.* at 845.

113. *Id.* at 850.

114. *See* People v. Giles, 152 P.3d 433, 441–42 (Cal. 2007) (noting that "[s]ome federal and state courts" did not require that defendant possess the purpose of rendering the witness unavailable for trial for forfeiture by wrongdoing to apply), *vacated sub nom.* Giles v. California, 554 U.S. 353 (2008).

115. *See id.* at 442 ("Other courts have stated that the intent-to-silence requirement is an element of their forfeiture by wrongdoing doctrines, although stopping short of holding that the intent requirement is constitutionally compelled.").

incapacitation) came *after* the instigation of legal proceedings, not when the act of killing is what led to the instigation of legal proceedings.[116]

Because of this split in authority, the United States Supreme Court granted certiorari in *Giles v. California*.[117] The Court ultimately disagreed with California's interpretation of forfeiture by wrongdoing and found that the doctrine only applies when the defendant caused a witness to be unavailable at trial *and* "intended to prevent a witness from testifying."[118] Accordingly, forfeiture by wrongdoing is, in essence, a witness-tampering rule and would not apply to a defendant who kills the victim, is charged with her murder, and claims self-defense. To wit, on remand, the Court of Appeal of California reversed Giles's conviction, finding that "the prosecutor presented no evidence that [Giles] killed Avie with intent to prevent her from testifying or cooperating in a criminal prosecution."[119]

The factual context in *Giles* was the same as the factual context in *Bedford* and other first aggressor cases. Therefore, if Giles did not forfeit his right to object to the admission of Avie's statements by killing her, there is no reason to think that Bedford forfeited his right to object to the admission of evidence of Brown's character for peacefulness by killing him. The same, of course, should apply in any murder trial. Just as a defendant does not forfeit his right to object to the admission of a victim's hearsay statements by killing him, a defendant should not forfeit his right to object to the admission of character evidence regarding a victim simply because he killed the victim.

2. Waiver Does Not Provide a Coherent Rationale for Rule 404(a)(2)(C)

Of course, a defendant triggers Rule 404(a)(2)(C) not merely by killing the victim but also by claiming self-defense and that the victim was the first aggressor. The question thus becomes whether a defendant arguably waives his ability to object to the admission of evidence of the victim's character for peacefulness by claiming that the victim was the first aggressor.

---

116. *See id.*

117. 552 U.S. 1136 (2008).

118. *Giles*, 554 U.S. at 361.

119. People v. Giles, No. B166937, 2009 WL 457832, at *4 (Cal. Ct. App. Feb. 25, 2009). Giles was afforded a new trial and again found guilty, and this conviction was affirmed on appeal. *See* People v. Giles, No. B224629, 2012 WL 130659 (Cal. Ct. App. Jan. 18, 2012).

Such waiver would not be unusual under the Rules of Evidence, which allow certain evidentiary protections to be waived when parties make claims or defenses that place certain facts "in issue." For instance, under the attorney-client privilege, a client has the ability to prevent his attorney from testifying regarding confidential communications between the two relating to representation.[120] When, however, the client sues his attorney for malpractice or claims that he received the ineffective assistance of counsel, "he puts communications between himself and his attorney directly in issue, and thus by implication waives the attorney-client privilege with respect to those communications."[121]

In the character evidence context, the relevant rule is Federal Rule of Evidence 405(b), which states: "When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct."[122]

Rule 405(b) applies in a small universe of cases. The most typical Rule 405(b) cases involve issues such as defamation, entrapment, and negligent hiring, entrustment, or supervision.[123] In a defamation case, a politician might sue a newspaper for libel, claiming that it published a false article stating that he was an adulterer. In response, the newspaper could claim the absolute defense of truth. In this case, the politician's character for adultery would be "in issue" and an essential element of the newspaper's truth defense because the newspaper could not prove its defense without proving that the politician was an adulterer. There would be no other way to prove the truth of the story. Accordingly, under Rule 405(b), the newspaper could present evidence of specific instances of adultery by the politician in addition to opinion and reputation testimony.[124]

Similarly, assume that an injured bus passenger sued a city for negligent hiring after a city bus driver got into an accident while driving drunk. If the passenger's claim was that the city was negligent

120. *See, e.g.*, *In re* Grand Jury Proceedings, 417 F.3d 18, 21 (1st Cir. 2005) ("Familiarly, the attorney-client privilege—somewhat simplified—is a privilege of a client to refuse to testify or to have his counsel testify as to confidential communications between the two made in connection with the rendering of legal representation . . . .").

121. United States v. Pinson, 584 F.3d 972, 977–78 (10th Cir. 2009).

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

123. *See* Miller, *supra* note 18, at 1024.

124. *See, e.g.*, United States v. Manfredi, Crim. No. 07-352, 2009 WL 3762966, at *4 (W.D. Pa. Nov. 9, 2009) (noting that Rule 405(b) applies in "a defamation case where the plaintiff's claim is that the defendant's defamatory statements harmed his reputation for good character").

in hiring the driver because of his history of DUIs, the driver's character for drunk driving would be "in issue" and an essential element of the passenger's claim. The passenger could not prove the city's negligence without proving the *reason* for that negligence: hiring a driver with a history of DUIs. For the same reason, if customers sued a store for negligent supervision after a security guard allegedly falsely imprisoned them, evidence of prior acts of job-related misconduct by the guard would be admissible to prove *why* the store was negligent in not previously firing or disciplining the guard.[125]

Finally, if a defendant charged with a crime claims entrapment as a defense, the defendant (in many jurisdictions) has to prove, inter alia, that he was not predisposed to commit the crime charged.[126] This means that the prosecution has to rebut the defendant's evidence with evidence of predisposition, meaning that the defendant's character is "in issue" and an essential element of an entrapment defense. Accordingly, under Rule 405(b), the prosecution can prove the defendant's predisposition to commit the crime charged by presenting evidence of the defendant's prior, similar crimes.[127]

So, is evidence of the victim's character "in issue" and an essential element of a homicide defendant's claim of self-defense when the defendant claims that the victim was the first aggressor? That was certainly the understanding of the trial court in *Bedford* as revealed by the following exchange that preceded the introduction of Sergeant Butts' character evidence:

> [THE COMMONWEALTH]: Sergeant [Sean] Butts [whom] I indicated to counsel before for purposes of discovery that he knew [Victim] personally for 13 years, and he would just testify that he had never known [Victim] to be a violent person, never to carry a weapon, never to be physical, and that's it.
>
> [DEFENSE COUNSEL]: I would object to it. I don't think it's relevant. If you want me to expand on his prior history in terms of whether he was a nice guy or a peaceful person, I don't think

125. *See* Panas v. Harakis, 529 A.2d 976, 989 (N.H. 1987) (finding that under Rule 405(b), customers claiming false imprisonment by a K-Mart guard could present evidence that the guard had previously represented himself as a police officer to a customer to prove negligent supervision).

126. *See* United States v. Bek, 493 F.3d 790, 800 (7th Cir. 2007).

127. *See, e.g.*, United States v. Manzella, 782 F.2d 533, 546 (5th Cir. 1986) ("When entrapment is raised as a defense, the criminal defendant makes his own character an essential trial issue. The government may therefore introduce proof of his prior wrongs. Fed. R. Evid. 405(b).").

> it's of [any] moment at this point. We're dealing with what happened on that particular day.
>
> [THE COMMONWEALTH]: *[Appellant] has put it at issue* by making a claim that he was violent and overly aggressive or physical. It's simply to rebut that.
>
> [THE COURT]: Response[?]
>
> [DEFENSE COUNSEL]: Again, I believe it's of no moment as to his prior history. There's no evidence in this record to indicate that [Victim] had any violent propensities in the past. All we're talking about is that particular day at that particular time. That's what [Appellant] testified to, that he was assaulted at that time. Whether this man may have never assaulted anybody in his life before or was a peaceful person, never carried a gun, I don't believe is relevant to the issues . . . which is what happened on that moment, on that date.
>
> [THE COURT]: We'll allow it and just address it with the appropriate point for charge if you feel it necessary. The [c]ourt has determined [Victim's] character was brought into issue during the course of the trial, specifically in [Appellant's] case.[128]

Yet, is the victim's character really "in issue" for evidentiary purposes when the defendant in a homicide case claims that the victim was the first aggressor? The answer among courts is a near-categorical "no." For instance, in *State v. Prtine*,[129] Andy Prtine stabbed Brent Ward at least sixty-three times, causing his death.[130] Prtine claimed self-defense at trial and that Ward was the first aggressor after a drug deal, with Ward hitting him in the face and grabbing the murder weapon before Prtine wrested it away from him and stabbed him to death.[131]

In response, the prosecutor asked a character witness whether Ward was a violent person, and the witness responded, "No."[132] The prosecutor then asked the witness what she meant by this response, and the witness responded (1) "that she once saw Ward get punched in the face while at a bar and refuse to fight back" and (2) "that on another occasion, Ward was slapped in the face and Ward's only

128. 50 A.3d 707, 714 (Pa. Super. Ct.) (emphasis added), *appeal denied*, 57 A.3d 65 (Pa. 2012).

129. 784 N.W.2d 303 (Minn. 2010).

130. *Id.* at 308.

131. *See id.* at 309.

132. *Id.* at 314.

reaction was to turn to his friends and say, '[l]et's get out of here.' "[133] On appeal to the Supreme Court of Minnesota, both sides agreed that these responses were improper because the victim's character is not an essential element of a defendant's claim that the victim was the first aggressor.[134] Specifically, the defendant cited to the Supreme Court of Minnesota's prior opinion in *State v. Bland*,[135] in which it cited Louisell and Mueller for the proposition that

> [it cannot be said] that specific instances of past violence by the victim may be proved where these are relevant solely as tending to show his probable actions at the time of the alleged crime. Rule 405(b) allows evidence of specific instances only where these amount to an "element of a charge, claim, or defense": It is clear that specific instances of the victim's past conduct do not amount to such an element in cases of homicide or criminal assault—they amount at most to circumstantial evidence that the victim was the first aggressor, and it is *this latter fact* which amounts to an element of the defense of self defense.[136]

Many other courts have employed similar reasoning in concluding that a victim's character is not an essential element of a defendant's claim that the victim was the first aggressor.[137] This of course makes sense "because it is just as unlawful to murder a violent person as it is to murder a nonviolent person."[138]

The case that best explains this reasoning is *Allen v. State*.[139] In *Allen*, Albert Allen stabbed Devron Labat to death and claimed at

---

133. *Id.* (alteration in original).

134. *Compare* Appellant's Brief at 36, *Prtine*, 784 N.W.2d 303 (No. A09-0702) ("[T]his Court has long recognized that specific instances of the victim's past conduct do not amount to . . . an element of the defense of self defense for purposes of Rule 405(b)." (internal quotation marks omitted)), *with* Respondent's Brief and Appendix at 32 n.10, *Prtine*, 784 N.W.2d 303 (No. A09-0702) ("Respondent acknowledges that specific-instance testimony was likely objectionable as to this witness under Minn. R. Evid. 405 . . . ."). The only issue on appeal was whether the prosecutor committed misconduct by eliciting these responses. *See Prtine*, 784 N.W.2d at 315.

135. 337 N.W.2d 378 (Minn. 1983).

136. *Id.* at 383 (quoting 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 150 (1978)).

137. *See, e.g.*, State v. Sheahan, No. 25224, 2002 WL 31186625, at *8 (Idaho Ct. App. 2002) ("Rule 404(a)(2) does not permit the admission of specific acts to show a victim's nature."); State v. Olander, 575 N.W.2d 658, 666–67 (N.D. 1998) (finding that the prosecution would not be able to present specific acts of the victim's good character on remand in a homicide case in which the defendant claimed that the victim was the first aggressor); State v. Fondren, 701 P.2d 810, 815 (Wash. Ct. App. 1985) ("Furthermore, evidence of a peaceful character is presented through testimony of reputation, not specific instances of conduct.").

138. Milton v. State, 262 S.E.2d 789, 791 (Ga. 1980).

139. 945 P.2d 1233 (Alaska Ct. App. 1997).

trial that Labat was the first aggressor.[140] Allen bolstered his claim through evidence of prior, specific acts of violence by Labat, and the prosecution responded with evidence of prior, specific acts of violence by Allen.[141] In finding on appeal that the evidence offered by both sides was improperly admitted, the Court of Appeals of Alaska relied upon substantial federal and state authority to conclude that

> neither Labat's character for violence nor Allen's character for violence was "an essential element" of the State's murder charge or of Allen's self-defense defense. The jury could adopt Allen's self-defense theory even if they concluded that Labat was not a characteristically violent man; that is, a characteristically peaceful person may yet be an aggressor. Similarly, the jury could acquit Allen under a self-defense theory even if they concluded that Allen was characteristically given to violence; the defense of self-defense is available to all, even to characteristically violent people. By the same token, the jury could reject Allen's claim of self-defense and convict Allen of murder even if they disbelieved the State's evidence of Allen's violent character and instead concluded that Allen was, by nature, a peaceful man.
>
> In sum, when a defendant raises a claim of self-defense and the court admits evidence of either the victim's or the defendant's character for violence or non-violence, this evidence is not admitted to prove an essential element of the crime or of the defense. The character evidence is relevant, not because character is an essential element of self-defense, but because the participants' character is circumstantial proof of the participants' likely conduct during the episode in question.[142]

Because the victim's character is not an essential element of a criminal defendant's claim that the victim was the first aggressor, evidence sought to be admitted under Rule 404(a)(2)(C) is governed by Federal Rule of Evidence 405(a), not Federal Rule of Evidence 405(b).[143] Federal Rule of Evidence 405(a) states that

> [w]hen evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-

140. *See id.* at 1234.

141. *See id.* at 1240.

142. *Id.*

143. *See* State v. Fondren, 701 P.2d 810, 815 (Wash. Ct. App. 1985) ("Furthermore, evidence of a peaceful character is presented through testimony of reputation, not specific instances of conduct." (citing WASH. R. EVID. 405(a))).

> examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.[144]

Rule 405(a) thus explains the result in *Prtine* and similar cases. Because the victim's character in *Prtine* was not an essential element of the defendant's claim that the victim was the first aggressor, the character witness could give opinion and/or reputation testimony concerning the victim's character for peacefulness under Rule 405(a).[145] But, on direct examination, that witness could not testify regarding specific acts of peacefulness by the victim because Rule 405(b) was inapplicable, which is why her testimony about the victim twice turning the other cheek was improperly admitted.[146] Therefore, because a defendant does not place the victim's character for peacefulness "in issue" for evidentiary purposes by claiming that the victim was the first aggressor, waiver does not provide a coherent rationale for Federal Rule of Evidence 404(a)(2)(C).

3. Evidentiary Need Does Not Provide a Coherent Rationale for Rule 404(a)(2)(C)

There is one final hypothetical rationale that could support the existence of Rule 404(a)(2)(C): the exceptional need for evidence of the victim's character for peacefulness in a homicide case. Federal Rule of Evidence 801(c) defines hearsay as a statement that:

> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.[147]

In turn, Federal Rule of Evidence 802 deems hearsay "generally inadmissible precisely because it is considered unreliable."[148]

When the declarant is unavailable, however, Federal Rule of Evidence 804(b)(2) provides an exception to the rule against hearsay "[i]n a prosecution for homicide or in a civil case, [for] a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."[149] As noted by the Supreme Court of Alaska, "Two basic reasons have been advanced

144. FED. R. EVID. 405(a).
145. *See* State v. Prtine, 784 N.W.2d 303, 314 (Minn. 2010).
146. *See id.*
147. FED. R. EVID. 801(c).
148. United States v. Smalls, 605 F.3d 765, 780 (10th Cir. 2010).
149. FED. R. EVID. 804(b)(2).

for admission of such testimony: necessity, because of the witness's death, and a belief that the approach of death removes ordinary motives to misstate."[150] According to the Advisory Committee, Rule 804(b)(2) is an extension of the common law exception for dying declarations, which "no doubt originated as a result of the exceptional need for the evidence in homicide cases."[151]

So, can an analogy be drawn between Rule 804(b)(2) and Rule 404(a)(2)(C) because they both allow for the admission of evidence concerning a victim who cannot take the witness stand and defend his actions in the events giving rise to the commencement of legal proceedings? For five reasons, the clear answer is "no": (a) dying declarations are admitted based on evidentiary need *and* reliability; (b) dying declarations merely place both parties in the same position they would have occupied had the victim survived; (c) dying declarations do not solely benefit the prosecution; (d) the dying declaration exception applies in all homicide trials; and (e) the dying declaration exception applies in civil and criminal cases.

a. Dying Declarations Are Admitted Based on Evidentiary Need and *Reliability*

First, as noted, dying declarations are admitted not only because of the exceptional need for their admission but also because they are thought to be reliable as the dying declarant lacks the "ordinary motives to misstate."[152] Many, including the Advisory Committee,[153] believe that the exception is religious in origin, with the reliability of a dying declaration being based upon the belief that " '[n]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.' "[154] Accordingly, some believe that the exception is outdated, especially in light of scientific evidence concerning the deficits of "perception, memory, comprehension, and clarity of communication" suffered by those that have experienced trauma that brought them to the brink of death.[155]

The key question, though, is not whether dying declarations are *actually* reliable but whether the drafters of Federal Rule of Evidence

150. Johnson v. State, 579 P.2d 20, 24 (Alaska 1978).

151. FED. R. EVID. 804 advisory committee's note.

152. *Johnson*, 579 P.2d at 24.

153. *See* FED. R. EVID. 804 advisory committee's note.

154. Idaho v. Wright, 497 U.S. 805, 820 (1990) (quoting Queen v. Osman, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L.J.)).

155. Peter Nicolas, *'I'm Dying to Tell You What Happened': The Admissibility of Testimonial Dying Declarations Post-*Crawford, 37 HASTINGS CONST. L.Q. 487, 549 (2010).

804(b)(2) were justified in asserting that they are reliable. According to the Advisory Committee, "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present."[156] Under this reasoning,

> [a]t the moment wherein the deceased realizes his own death is imminent there can no longer be any temporal self-serving purpose to be furthered regardless of the speaker's personal religious beliefs. Indeed, given the physiological revulsion peculiar to the moment and common to all men, an express showing of the declarant's theological beliefs is immaterial.[157]

As with many rules of evidence, reasonable minds could attack the soundness of this exception, but as long as reasonable minds could also believe that dying declarations are reliable, reliability is part of the justification for Rule 804(b)(2).[158] Moreover, the requirement that a dying declaration be made about the "cause or circumstances" of what the declarant believes to be his impending death means that a dying declaration is direct evidence of the events giving rise to the trial against the defendant.[159] Furthermore, when, as is often the case, the declarant identifies the accused as the one who injured him, that declaration is "sufficient, in itself, to justify submitting the case to the factfinder."[160]

Conversely, it is generally understood that character evidence is especially *unreliable* for a variety of reasons, including the usual sources of character evidence. "Numerous courts have expressed the same opinion as that espoused by the Vermont Supreme Court"[161] in *Wright v. McKee*,[162] in which it held that character evidence "is uncertain in its nature—both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors,—especially if they are wealthy, influential, popular, or even only

156. FED. R. EVID. 804 advisory committee's note.

157. People v. Calahan, 356 N.E.2d 942, 945 (Ill. App. Ct. 1976).

158. *See, e.g.*, Smith v. Bunnell, No. 92-55471, 1992 WL 276937, at *1 (9th Cir. Oct. 9, 1992) ("Where reasonable minds differ about the weight to be attached to a particular kind of evidence, we can't say that instructing the jury one way or the other renders the trial fundamentally unfair.").

159. *See* Nelson v. State, 623 So. 2d 432, 435 (Ala. Crim. App. 1993).

160. *Id.*

161. Katherine J. Alperin, Comment, *Character Evidence in the Quasi-Criminal Trial: An Argument for Admissibility*, 73 TUL. L. REV. 2073, 2082 (1999).

162. 37 Vt. 161 (1864).

pleasant and obliging."[163] Of course, when character evidence does not come from neighbors, it often comes from family members, who are especially unreliable given their biases in favor of (and sometimes against) their children, parents, and siblings.[164]

Moreover, while a dying declaration is direct evidence of the events giving rise to the action against the defendant (and usually direct evidence that the defendant killed the victim), as noted, evidence of the victim's character for peacefulness amounts at most to circumstantial evidence that the victim was not the first aggressor.[165] This is because the jury has to infer how the victim acted at the time of his death based upon his character on other occasions, which causes unwanted side effects. As the Advisory Committee noted, "The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay."[166]

In conclusion, it is not merely the evidentiary need for dying declarations that allows for their admission;[167] instead, it is that need coupled with the arguable reliability of such declarations and their direct bearing on the events giving rise to the action against the defendant. While the prosecution possibly has the same need for evidence of the victim's character for peacefulness in a homicide case in which the defendant claims that the victim was the first aggressor, the unreliability and circumstantial nature of such evidence significantly weakens the case for its admission.

b. Dying Declarations Merely Place Both Parties in the Same Position They Would Have Occupied Had the Victim Survived

Second, dying declarations are admitted as a substitute for the testimony that the victim would have offered at trial had he not died. If a victim thinks that he is dying and tells medical personnel,

163. *Id.* at 163.

164. *See, e.g.*, Hudson v. Quarterman, 273 F. App'x 331, 338 (5th Cir. 2008) ("The court also found that the evidence of positive character traits from Hudson's family would have appeared biased and of minimal benefit."); State v. Kimbrell, No. M2000-02925-CCA-R3-CD, 2003 WL 1877094, at *15 (Tenn. Crim. App. 2003) ("White testified that he decided not to use other family members as character witnesses due to similar concerns of perceived bias . . . .").

165. *See* State v. Bland, 337 N.W.2d 378, 383 (Minn. 1983) (citing 2 LOUISELL & MUELLER, *supra* note 136, § 150).

166. *See* FED. R. EVID. 404 advisory committee's note to 2006 amendment.

167. *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 276, at 243–45 (4th ed. 1992) ("[N]eed alone has never been thought sufficient to support a hearsay exception.").

"[Defendant] shot me," the statement would be admissible as a dying declaration at the defendant's murder trial because the victim could have made the same statement on the witness stand if he survived and the defendant were charged with attempted murder.[168] In other words, the evidentiary need for a dying declaration exists because the victim died and could not testify at trial, and Rule 804(b)(2) puts both parties in the same position they would have occupied had the victim survived.

What this means is that a purported dying declaration is *inadmissible* when the victim could not have repeated the declaration on the witness stand had he survived. For example, in *State v. Motley*,[169] Vernon Motley was charged with murder after allegedly shooting and killing his ex-girlfriend's new boyfriend.[170] Motley's ex-girlfriend was Shaka Jones, and, as the victim was dying, a witness asked him what happened, prompting him to respond, "V shot me."[171] When the witness then asked the victim why Motley shot him, the victim responded, "Over Shaka."[172] At trial, the witness repeated both of the victim's statements.[173]

After he was convicted, Motley appealed, claiming, inter alia, that the second statement was improperly admitted because "the victim's dying declaration should not have been allowed to include speculation as to the defendant's motive."[174] The Court of Criminal Appeals of Tennessee found that the issue was governed by *State v. Lewis*,[175] in which the Supreme Court of Tennessee held that " '[b]ecause a dying declaration is essentially a substitute for the testimony of the victim, the admissible evidence is limited to that to which the victim could have testified if present.' "[176] Under this test, the court in *Motley* found that the victim's second statement was improperly admitted because it could not "conclude that the victim's opinion of the defendant's motive for the shooting was admissible under the *Lewis* standard, i.e., that the victim would have been able to testify to such if present at the trial."[177]

168. Commonwealth v. Priest, 18 A.3d 1235, 1240 (Pa. Super. Ct. 2011).
169. No. W2010-01989-CCA-R3-CD, 2012 WL 1080479 (Tenn. Crim. App. 2012).
170. *Id.* at *1.
171. *Id.* at *2.
172. *Id.*
173. *See id.*
174. *Id.* at *8.
175. 235 S.W.3d 136 (Tenn. 2007).
176. *Motley*, 2012 WL 1080479, at *8 (quoting *Lewis*, 235 S.W.3d at 150).
177. *Id.* at *9.

As previously noted, Federal Rule of Evidence 404(a)(2)(B) provides that evidence concerning the character of a victim for a pertinent trait is inadmissible in a criminal trial unless the defendant opens Pandora's Box and presents evidence concerning the victim's bad character for that trait.[178] So, assume that a defendant shoots the victim, the victim survives, the defendant is charged with attempted murder, and the defendant claims that the victim was the first aggressor but does not present any evidence concerning the victim's character for violence. At the trial for attempted murder, the victim could not testify that he is a peaceful person because such testimony would be inadmissible propensity character evidence under Rule 404(a)(1).[179] But if the victim dies from the gunshot wound and the defendant is charged with murder and claims that the victim was the first aggressor, the prosecution can present evidence of the victim's character for peacefulness under Rule 404(a)(2)(C). Therefore, the Rule is not a rule of substitution like Rule 804(b)(2) because it allows for the admission of evidence that the victim could not have given on the witness stand had he survived. Unlike Rule 804(b)(2), Rule 404(a)(2)(C) thus does not put both parties in the same position they would have occupied had the victim survived but instead inexplicably puts the prosecution in a more advantageous position.

c. Dying Declarations Do Not Solely Benefit the Prosecution

Third, like the doctrine of forfeiture by wrongdoing,[180] Rule 804(b)(2) is not a rule that solely benefits the prosecution (or civil plaintiffs). Instead, "[d]ying declarations are as admissible to exonerate an accused as they are to convict, and rightly so."[181] For instance, in *Mattox v. United States*,[182] the Supreme Court found that a statement by a dying victim to the defendant's mother, " 'I know

178. *See* FED. R. EVID. 404(a)(2)(B).

179. Rule 404(a)(1) covers not only testimony by character witnesses but also testimony by parties or victims themselves concerning their own character. *See, e.g.*, United States v. John, 309 F.3d 298, 303 n.9 (5th Cir. 2002) ("We have located no authority stating that a defendant's own testimony cannot be considered character evidence within the meaning of rule 404(a)(1)."); Hinnant v. Holland, 92 N.C. App. 142, 151, 374 S.E.2d 152, 157 (1988) (finding that a civil defendant's testimony about his own character was inadmissible character evidence); State v. Oden, No. 48066-9-I, 2002 WL 31082064, at *4 (Wash. Ct. App. 2002) ("And if we were to accept Oden's argument that the evidence constituted character evidence, then his own testimony must be similarly characterized-in which case the State is entitled to rebut under ER 404(a).").

180. *See* FED. R. EVID. 804 advisory committee's note to 1997 amendment (noting that forfeiture by wrongdoing "applies to all parties, including the government").

181. State v. Woodard, 499 S.W.2d 553, 557 (Mo. Ct. App. 1973).

182. 146 U.S. 140 (1892).

Clyde Mattox, your son, and he was not one of the parties who shot me,' " was admissible as a dying declaration at Mattox's homicide trial.[183]

On the other hand, Federal Rule of Evidence 404(a)(2)(C) solely benefits the prosecution, allowing it to present evidence of the victim's character for peacefulness when a homicide defendant merely claims that the victim was the first aggressor. The only other Federal Rules of Evidence that solely allow the prosecution or the civil plaintiff to admit evidence are Rules of Evidence 413 through 415, which allow for prosecutors and civil plaintiffs to admit (a) evidence of prior acts of sexual assault by sexual assault defendants and (b) prior acts of child molestation by child molestation defendants.[184] Congress enacted Rules 413 through 415 as part of the Violent Crime Control and Law Enforcement Act of 1994 by circumventing the normal rulemaking process,[185] with "[t]he overwhelming majority of judges, lawyers, law professors, and legal organizations" who submitted comments on the Rules opposing them.[186] Essentially, these Rules were a blatant attempt by Congress to increase conviction rates in sexual assault and child molestation cases without any nuanced consideration of the probative value and prejudicial effect.[187]

To this point, Rule 404(a)(2)(C) has not engendered the same level of criticism or even any criticism at all. Perhaps this is because many view Rule 404(a)(2)(C) in the context of the rest of Rule 404(a), which does allow the criminal defendant to present good character evidence about himself and bad character evidence about the victim,[188] making the Rule appear more evenhanded. But, as with Rules 413 through 415, which the Standing Committee thought should be added to Rule 404(a) rather than becoming separate rules, there is little reason to view Rule 404(a)(2)(C) in the context of the rest of Rule 404(a). Rule 404(a) provides for the general inadmissibility of propensity character evidence in all trials, with

183. *Id.* at 142.

184. *See* FED. R. EVID. 413–15.

185. *See* Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 731.

186. *Advisory Committee Notes–FRE 412, 413, 414, 415*, FED. EVIDENCE REV., http://federalevidence.com/node/1121#leg_hist_rules (last visited Apr. 13, 2013) (discussing Judicial Conference report submitted to Congress on February 19, 1995).

187. *See, e.g.*, Colin Miller, *Bullshit!: Why the Retroactive Application of Federal Rules of Evidence 413–414 and State Counterparts Violates the Ex Post Facto Clause*, 4 NEB. L. REV. BULL. 3 (2012), http://lawreviewbulletin.unl.edu/?p=1060.

188. *See* FED. R. EVID. 404(a)(2)(A)–(B).

Rules 404(a)(2)(A) and (B) allowing for the potential admission of such evidence by both the defense and the prosecution in *any* criminal trial.[189] Conversely, Rule 404(a)(2)(C), like Rules 413 through 415, sets forth a singular power for one side to admit evidence in a particular type of criminal case, with the admission of such evidence triggering no new power for the other side.[190] Rule 404(a)(2)(C) is thus nothing like Rule 804(b)(2) in this regard.

d. The Dying Declaration Exception Applies in All Homicide Trials

Fourth, the dying declaration exception applies in all homicide trials, which is consistent with the evidentiary need rationale.[191] Rule 804(b)(2) is most typically used in cases in which the defendant denies killing the victim, with the prosecution having a strong evidentiary need to use the dying declaration to prove the identity of the murderer.[192] But, if the defendant claims self-defense, the prosecution might have a similar evidentiary need to use a dying declaration to contradict the defendant's version of events. For instance, in *Hamric v. Bailey*,[193] the Fourth Circuit found no problem with the district court's admission of a neighbor's dying declaration that he was on his side of the fence and ten feet away from the defendant's property to rebut her claim that she shot him because he was raising the window to her house.[194]

Rule 404(a)(2)(C), however, only applies in cases in which the defendant "coupl[es] self-defense with evidence of first aggression by the victim in a homicide case."[195] This means that the Rule is inapplicable in cases in which the defendant claims self-defense but does not claim that the victim was the first aggressor. This limitation is illogical if the rationale for the Rule is evidentiary need.

There are three primary types of cases in which a homicide defendant claims self-defense but does not allege that the victim was the first aggressor:

189. *See id.* 404(a).
190. *See id.* 404(a)(2)(C).
191. *See id.* 804(b)(2).
192. *See, e.g.*, People v. Clay, 926 N.Y.S.2d 598, 611 (App. Div. 2011) (finding no problem with the admission of the dying declaration "Tom shot me" to prove the defendant's identity as the victim's murderer).
193. 386 F.2d 390, 391 (4th Cir. 1967).
194. *Id.* at 391.
195. State v. Austin, 686 N.E.2d 324, 326 (Ohio Ct. App. 1996).

i. First Type of Case: Communicated Withdrawal

The first type of case is one in which the defendant is the first aggressor but then attempts to withdraw and communicates his intention to withdraw from further conflict. If the victim persists in attacking the defendant with attempted lethal force, the defendant can claim self-defense if he responds with his own lethal force and kills the victim.[196]

For example, in *State v. Slert*,[197] Kenneth Slert and John Benson got into an argument in a truck at a hunting campsite.[198] According to Slert, events then unfolded as follows: Slert first punched Benson a few times, and Benson then reached for Slert's throat.[199] Slert responded by getting out of the truck and walking fifty yards to his tent.[200] Benson, however, followed Slert to his tent and began choking him again, prompting Slert to grab his gun and shoot and kill Benson.[201] After Slert was convicted, he appealed, claiming, inter alia, that he was denied a fair trial because his attorney failed to request an instruction regarding "the revival of an aggressor's right to self-defense" when he attempts to withdraw and communicates that attempt to the victim.[202] The Court of Appeals of Washington agreed and reversed Slert's conviction and remanded for a new trial, finding that "Slert's actions clearly communicated to Benson his intention to withdraw from further conflict."[203]

ii. Second Type of Case: Escalation by the Victim

The second type of case is one in which the defendant is the first aggressor using nonlethal force, the victim escalates the encounter by attempting lethal force against the defendant, and the defendant, with no reasonable alternative, responds with lethal force and kills the victim.[204] In *Watkins v. State*,[205] one version of events had Bruce

196. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/7-4(c)(2) (West 2006) ("The justification described in the preceding Sections of this Article is not available to a person who . . . [o]therwise initially provokes the use of force against himself, unless . . . [i]n good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.").

197. No. 31876-8-II, 2005 WL 1870661 (Wash. Ct. App. Aug. 9, 2005).

198. *Id.* at *1.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at *4.

203. *Id.*

204. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/7-4(c)(1) (West 2006) ("The justification described in the preceding Sections of this Article is not available to a person

Watkins first attacking Kenneth Gardner with non-deadly force (punches), Gardner responding by grabbing a knife and advancing upon Watkins, and Watkins taking the knife from Gardner and stabbing him to death.[206]

At trial, Watkins unsuccessfully "requested an instruction to the effect that even if he were found to be the initial aggressor at the nondeadly level but it was the victim who escalated the fight to the deadly level, he would still be entitled to invoke the law of self-defense."[207] In reversing Watkins's conviction and remanding for a new trial, the Court of Special Appeals of Maryland found that such an instruction should have been given because it was "a correct statement of the law."[208]

iii. Comparing These Two Cases with "First Aggressor" Cases

As noted, in a first aggressor case like the *Bedford* case from the Introduction, the prosecution uses evidence of the victim's character for peacefulness circumstantially.[209] In effect, the prosecution is asking the jury to infer from the victim's general character for peacefulness that he was not the type of person who would have initiated an attack against the defendant.

In cases like *Slert* and *Watkins*, the prosecution might seek to use similar evidence for a similar purpose. On remand in *Slert*, the prosecution might have wanted to call a witness to testify to the victim's character for peacefulness. By doing so, the prosecution would be asking the jury to infer from the victim's character for peacefulness that he was not the type of person who would have responded to a few punches by pursuing the retreating defendant fifty yards and attempting to choke him to death. On remand in *Watkins*, the prosecution similarly might have wanted to call a witness to testify to the victim's character for peacefulness. Again, the prosecution's goal with this testimony would be for the jury to infer that the victim

---

who . . . [o]therwise initially provokes the use of force against himself, unless . . . [s]uch force is so great that he reasonably believes that he is in imminent danger of death or great bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant . . . .").

205. 555 A.2d 1087 (Md. Ct. Spec. App. 1989).

206. *Id.* at 1088.

207. *Id.*

208. *Id.*

209. *See* Commonwealth v. Bedford, 50 A.3d 707, 709–10 (Pa. Super. Ct.), *appeal denied*, 57 A.3d 65 (Pa. 2012).

was not the type of person who would respond to a few punches by grabbing a knife and advancing upon the defendant.

Under the plain language of Rule 404(a)(2)(C), however, the prosecution in *Slert* and *Watkins* would not have been able to present this character testimony because the defendants claimed self-defense but not that their victims were the first aggressors.[210] Unless the prosecution in *Bedford* had a meaningfully greater need for evidence of the alleged victim's character for peacefulness than the prosecutors in *Slert* and *Watkins*, it is difficult to defend evidentiary need as the rationale for Rule 404(a)(2)(C).

In fairness, in some first aggressor cases, there could indeed be a greater evidentiary need. In *Watkins*, for instance, there were several eyewitnesses to the fatal stabbing, meaning that there was likely less evidentiary need for evidence of the victim's character for peacefulness than there was in *Bedford*, where there were no eyewitnesses. But by no means does Rule 404(a)(2)(C) only apply in first aggressor cases in which there are no eyewitnesses.[211] Moreover, if we are viewing evidentiary need in terms of the relevance and probative value of the evidence, it is easy to envision cases in which evidence of the victim's character is less valuable in a first aggressor case than in other self-defense cases.[212] Of course, character testimony in a self-defense case in which the defendant does not claim that the

210. *See* State v. Slert, No. 31876-8-II, 2005 WL 1870661, at *1 (Wash. Ct. App. Aug. 9, 2005); *Watkins*, 555 A.2d at 1088.

211. For instance, in *State v. Williams*, No. 96813, 2012 WL 1454159 (Ohio Ct. App. Apr. 26, 2012), a member of a motorcycle club shot and killed a member of a rival motorcycle club. *Id.* at *1, *4. Several members of both clubs testified as eyewitnesses at trial. *Id.* at *4–5. Because the defendant claimed that the victim was the first aggressor, the appellate court found no problem with the admission of evidence concerning the victim's character for peacefulness, despite the eyewitnesses being able to describe the fatal incident. *See id.* at *2 (noting that the member of a motorcycle club testified that the victim "was a good person"). In *Williams*, there was undoubtedly less evidentiary need for evidence of the victim's character than there was in *Slert*, the non-first aggressor case in which there were no eyewitnesses to the fatal campsite encounter that ended with the victim's death. *See Slert*, 2005 WL 1870661, at *1.

212. In several first aggressor cases, a character witness will testify that the victim was a peaceful person based upon the simple fact the witness had never seen the victim act violently. *See, e.g.*, State v. Campbell, 359 N.C. 644, 671, 617 S.E.2d 1, 18 (2005) (noting that a character witness testified "that she had never known the victim to be violent"). Such testimony of course has some relevance and probative value, but it is not that valuable "[b]ecause behavior depends on stimulus situations." David Ring, Comment, *Rush to Judgment: Criminal Propensity Clothed as Credibility Evidence in the Post-Proposition 8 Era of California Criminal Law*, 15 WHITTIER L. REV. 241, 246 (1994). Maybe the character witness is correct that the victim was not the type of person to act violently, or maybe the witness merely had never seen the victim confront a set of stimuli that would push his particular buttons and cause him to react in a violent manner.

victim was the first aggressor can similarly be lacking in much relevance or probative value. But, in the right type of case, such evidence can be more valuable than usual. Recall the *Prtine* case in which the homicide defendant claimed that the victim, Brent Ward, was the first aggressor, prompting the prosecution to call a character witness, who testified that in her opinion, the victim was not a violent person.[213] The basis for this testimony was (1) "that she once saw Ward get punched in the face while at a bar and refuse to fight back" and (2) "that on another occasion, Ward was slapped in the face and Ward's only reaction was to turn to his friends and say, '[l]et's get out of here.' "[214]

In deciding whether to admit the character witness's opinion testimony, the trial judge surely found that the testimony had some relevance and probative value on the issue of whether Ward was the first aggressor. But this opinion testimony would have had more relevance and more probative value in a case like *Watkins* or *Slert*, in which the defendants claimed that their victims responded to their punches with attempted lethal force. Needless to say, it is likewise easy to imagine a first aggressor case in which character evidence concerning the victim is more relevant and probative than in other types of self-defense cases. The point, though, is that Rule 404(a)(2)(C) per se precludes prosecutors from presenting such character evidence in non-first aggressor self-defense cases even when the evidentiary need for such evidence is at its apex.

iv. Fourth Type of Case: Self-Defense Based upon Past Acts by the Victim

Arguably, that apex is reached in the third principal type of self-defense case in which the defendant does not claim that the victim was the first aggressor: the case in which the defendant alleges that he feared the victim because of the victim's past violent act(s). As an example, in *State v. Copenny*,[215] Amos Copenny shot and killed the victim, Bobby Wilson.[216] At trial, Copenny claimed self-defense but did not allege that Wilson was the first aggressor.[217] Instead, he

213. *See Prtine*, 784 N.W.2d at 309, 314.

214. *Id.* at 314 (alteration in original). As noted, the court found that it was improper to inquire into the specific instances of peacefulness that formed the basis for the character witness's opinion. *See supra* note 134 and accompanying text. That said, judges can and should evaluate such specific instances when determining whether to admit character evidence.

215. 888 S.W.2d 450 (Tenn. Crim. App. 1993).

216. *Id.* at 452.

217. *See id.* at 455.

claimed that he was fearful of Wilson based upon a prior incident in which Wilson attacked him while holding a gun.[218]

> Testifying for the appellant, Aliscia Patillo stated that she and [Copenny] were at Larry's Lounge about four weeks before the shooting when [Wilson] came in and told [Copenny], "You and your bitch can go down." [Wilson] then left and [Copenny] followed him out the door. Ms. Patillo watched [Copenny] walk towards his car and saw [Wilson] run past him with a gun. Two other men surrounded [Copenny] with guns. [Copenny] tried to get into his car, but [Wilson] began to fight with him. One of the other men hit [Copenny] in the head with the butt of a pistol, and the gun discharged.[219]

In response, the prosecution called Lawanda Hughley to testify that Wilson, the victim, had been a peaceful person.[220] After Copenny was convicted, he appealed, claiming, inter alia, that the trial court erred in admitting Hughley's testimony.[221] The Court of Criminal Appeals of Tennessee agreed, finding that Copenny did not claim that Wilson was the first aggressor, rendering Hughley's testimony inadmissible under Tennessee's counterpart to Federal Rule of Evidence 404(a)(2)(C).[222]

Implicit in the court's conclusion was the fact that Patillo's testimony was not character evidence concerning Wilson's propensity for violence, which would have allowed for the admission of Hughley's testimony under Tennessee's counterpart to Federal Rule of Evidence 404(a)(2)(B). Instead, Copenny presented Patillo's testimony "to show the 'reasonableness of [his] claim of apprehension of danger' from the victim."[223] Some courts call the use of such evidence " 'communicated character' because the defendant is aware of the victim's violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not."[224] Accordingly,

---

218. *Id.* at 453–54.
219. *Id.*
220. *See id.* at 455.
221. *Id.*
222. *Id.*
223. *Ex parte* Miller, 330 S.W.3d 610, 618 (Tex. Crim. App. 2009). Many states have the defense of imperfect self-defense, in which a defendant honestly but unreasonably believes that he needs to use lethal force against a victim. *See, e.g.*, Commonwealth v. Sepulveda, 55 A.3d 1108, 1124–25 (Pa. 2012). This is an incomplete defense that merely allows a jury to find a defendant guilty of manslaughter. *See id.*
224. *Miller*, 330 S.W.3d at 618.

> [t]his theory does not invoke Rule 404(a)(2) because Rule 404 bars character evidence only when offered to prove conduct in conformity, *i.e.*, that the victim acted in conformity with his violent character. Here, the defendant is not trying to prove that the victim actually is violent; rather, he is proving his own self-defensive state of mind and the reasonableness of that state of mind.[225]

Because evidence such as Patillo's testimony is admissible for one purpose—to prove Copenny's fear of Wilson—and inadmissible for another purpose—to prove "once a violent thug, always a violent thug"—it is susceptible to a limiting instruction informing jurors how and *how not* to use the evidence.[226] But given the empirical evidence on the ineffectiveness of limiting instructions in the character evidence context, it is likely that jurors (mis)use evidence such as Patillo's testimony as propensity character evidence regarding the victim.[227]

Given this likelihood, evidence such as Hughley's testimony would be highly relevant and probative in a "communicated character" case to rebut the jury's likely presumption that the victim had a propensity to act violently. Moreover, in such cases, the prosecution might very well like to prove that the victim did not in fact commit the prior act(s) of violence, such as the gun incident in *Copenny*. Again, evidence such as Hughley's testimony would be highly relevant and probative to prove that the victim was not the type of person who would commit the claimed act(s) of violence. And yet, as was the case in *Copenny*, the prosecution cannot present such evidence because the defendant in a "communicated character" case does not claim that the victim was the first aggressor. This again cuts against the argument that Rule 404(a)(2)(C) can be validated on grounds of evidentiary need.

e. The Dying Declaration Exception Applies in Civil and Criminal Cases

Fifth, when the Advisory Committee recognized that the dying declaration exception is based in large part upon the "exceptional

---

225. *Id.* at 618–19.

226. *See* FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

227. *See* Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 419–20, 422 (1995).

need for the evidence," it accordingly realized that the exception could not be limited to criminal cases. The Advisory Committee specifically noted that "[w]hile the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases."[228] Therefore, dying declarations are now admissible in civil cases, such as wrongful death actions.[229]

Conversely, Rule 404(a)(2)(C) only applies in criminal trials, which makes no sense if the rationale for the Rule is evidentiary need. Assume that Defendant allegedly kills Victim, the prosecution charges Defendant with murder, and Victim's family brings a civil wrongful death action against Defendant. If Defendant claims that Victim was the first aggressor at both trials, the prosecution will be able to present evidence of Victim's character for peacefulness at the criminal trial, but the family will not be able to present the same evidence at the civil trial.[230] If evidentiary need is the rationale for Rule 404(a)(2)(C), the disparate operation of the Rule in these two cases makes no sense because the family in the wrongful death trial has just as much need for the evidence as the prosecution in the murder trial.[231]

Moreover, recall the rationales given by the Advisory Committee for limiting Rule 404(a)(2) to criminal trials and precluding its application to quasi-criminal cases like the family's wrongful death action against Defendant. According to the Committee, the Rule is in place "because the accused, whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government.' "[232] These rationales render the Rule's limitation to criminal homicide cases nonsensical. In the second case above, the civil wrongful death action, merely the defendant's wallet

228. FED. R. EVID. 804 advisory committee's note.

229. *See, e.g.*, Michael J. Polelle, *The Death of Dying Declarations in a Post*-Crawford *World*, 71 MO. L. REV. 285, 304 (2006) ("[T]he Federal Rules of Evidence . . . now apply the rule to civil wrongful death cases as well as criminal homicide cases . . . .").

230. *See* FED. R. EVID. 404(a)(2).

231. It could be argued that the reason for the limitation is that civil defendants cannot present character evidence, so a rule allowing civil plaintiffs to admit such evidence in wrongful death cases would be inequitable. But if Rule 404 were amended to allow civil plaintiffs in wrongful death actions to present evidence of the victim's character, there is no reason why the rule could not also be amended to allow civil defendants to rebut such evidence. A counterargument to this argument would be that prosecutors have a greater need for such evidence than civil plaintiffs because of the higher burden of proof that they must overcome (beyond a reasonable doubt vs. by a preponderance of the evidence).

232. FED. R. EVID. 404(a)(2) advisory committee's note to 2006 amendment (quoting MUELLER & KIRKPATRICK, *supra* note 82, at 264–65).

and not his liberty is at stake, and the defendant does not face "the strong investigative and prosecutorial resources of the government," but instead whatever resources the family of the victim can muster.[233] It thus defies logic that Rule 404(a)(2)(C) applies in criminal, but not civil, cases if evidentiary need is the rationale for the Rule.

III. RULE 404(A)(2)(C) IS INCONSISTENT WITH AN EVIDENTIARY SCHEME THAT ALMOST ALWAYS TREATS CRIMINAL DEFENDANTS AS WELL AS, AND USUALLY BETTER THAN, THEIR CIVIL COUNTERPARTS

As the last point from the previous Part makes clear, Rule 404(a)(2)(C) places a criminal defendant in a worse position than his civil counterpart—a civil wrongful death defendant who claims that the victim was the first aggressor. This arguably makes it different from any other Federal Rule of Evidence. For mainly the same reasons cited by the Advisory Committee in connection with the 2006 amendment to Rule 404(a)(2)—the higher stakes and the potentially higher resource imbalance—criminal defendants are generally treated at least as well as, and usually better than, their civil counterparts under the Rules of Evidence.[234] This is apparent when considering the way that criminal and civil defendants are treated under both the Rules of Evidence and constitutional provisions.

A. Facially Neutral Rules of Evidence

Articles I,[235] V,[236] IX,[237] X,[238] and XI,[239] some of Article IV,[240] and most of Articles VI,[241] VII,[242] and VIII[243] of the Federal Rules of

233. *See supra* note 82 and accompanying text.

234. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 328 (1999) (noting that one "reason for treating civil and criminal cases differently is that 'the stakes are higher' in criminal cases, where liberty or even life may be at stake, and where the government's 'sole interest is to convict' " (quoting Baxter v. Palmigiano, 425 U.S. 308, 318–19 (1976))).

235. *See* FED. R. EVID. 101–06.

236. *See id.* 501–02.

237. *See id.* 901–03.

238. *See id.* 1001–08.

239. *See id.* 1101–03.

240. *See id.* 401–03, 405–11. Federal Rules of Evidence 413 and 414 treat criminal defendants the same as civil defendants are treated under Federal Rule of Evidence 415. *See id.* 413–415. Federal Rule of Evidence 407 precludes the admission of subsequent remedial measures by defendants when offered for certain purposes. *See id.* 407. Several federal courts have, in unpublished opinions, found that this rule applies in criminal cases while, other federal courts have implied as much in published opinions. *See* Colin Miller, *I Need a Remedy: Court of Appeals of Wisconsin Finds Subsequent Remedial Measure Rule Inapplicable in Criminal Cases*, EVIDENCEPROF BLOG (Sept. 28, 2009), http://lawprofessors.typepad.com/evidenceprof/2009/09/407-criminal--state-v-conleyslip-

Evidence facially treat criminal defendants no differently from their civil counterparts. Although these Rules are facially neutral with regard to civil and criminal defendants, courts often interpret them in a way that favors criminal defendants. For example, while Federal Rule of Evidence 404(a) precludes the admission of propensity character evidence, Federal Rule of Evidence 404(b) provides in relevant part that, in a criminal or civil case, character evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[244]

For instance, in a drug cooking prosecution, the prosecutor might use Rule 404(b) to introduce evidence that the defendant had previously "cooked" methamphetamine, not to prove his propensity to cook drugs, but instead to prove that he knew how to cook drugs and that he thus had the requisite knowledge to commit the crime charged.[245] In other cases, a criminal defendant seeks to present evidence under Rule 404(b) to prove that an alternate suspect was guilty of the crime charged. As an example, in *Stevens v. Stevens*,[246] the Third Circuit found that the district court erred in precluding the defendant from having a witness testify that he "was the victim of a crime [by another individual] which was so similar to the instant crime that the investigating officers believed that the same individual had committed both."[247]

Courts deem such alternate suspect evidence "reverse-404(b) evidence," and many courts conclude "that a lower standard should be utilized when evaluating the admissibility of other acts evidence when offered by the defendant."[248] This is because of the recognition that, "[i]n a criminal case, a defendant is entitled to all reasonable opportunities to present evidence which might tend to create a doubt as to his guilt."[249] Conversely, in a civil case, no court has ever treated

---

copy-2009-wl-3018121wisapp2009.html. Other state courts have reached similar conclusions. *See id.* That said, at least two courts have found that Rule 407 applies in civil but not criminal cases. *See id.* There is, however, nothing in the language of Federal Rule of Evidence 407 or its state counterparts that compels this conclusion.

241. *See* FED. R. EVID. 601–608, 610–611, 613–615.
242. *See id.* 701–704(a), 705–706.
243. *See id.* 801–803(9), 803(11)–807.
244. *id.* 404(b).
245. *See, e.g.*, United States v. Deninno, 29 F.3d 572, 577 (10th Cir. 1994).
246. 935 F.2d 1380 (3d Cir. 1991).
247. *Id.* at 1383.
248. State v. Jolley, 2003 SD 5, ¶ 12 n.2, 656 N.W.2d 305, 308 n.2 (citing multiple cases).
249. People v. Bueno, 626 P.2d 1167, 1169 (Colo. App. 1981).

a civil defendant more favorably under Rule 404(b) than a civil plaintiff because the same considerations are not at play.[250]

B. *Constitutional Provisions That Favor Criminal Defendants*

Even when a court does not apply a facially neutral Rule of Evidence in a way that favors a criminal defendant over his civil counterpart, constitutional protections often result in preferential treatment for the criminal defendant. Recall *Giles*, in which the Supreme Court found that the defendant did not forfeit his Confrontation Clause objection to the admission of hearsay statements regarding domestic abuse made by his wife weeks before her death, meaning that the statements were improperly admitted.[251] The wife's statements were admitted under a hearsay exception under California's Evidence Code and would have been perfectly admissible against the defendant at a subsequent civil wrongful death trial.[252] This is because the Confrontation Clause only applies in criminal cases.[253]

Moreover, under another provision of the Sixth Amendment, the Compulsory Process Clause, courts have recognized that criminal, but not civil, defendants have the constitutional right to present a defense.[254] Accordingly, a court's application of a rule of evidence to preclude a criminal defendant from presenting evidence can constitute a constitutional violation under the Compulsory Process Clause while the same application would not violate a civil defendant's constitutional rights.[255]

---

250. *See, e.g.*, Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir. 1999); Rivera v. Rivera, 262 F. Supp. 2d 1217, 1225 n.15 (D. Kan. 2003).

251. Giles v. California, 554 U.S. 353, 368 (2008).

252. The statements were admitted under California Evidence Code section 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury upon the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy. People v. Giles, 19 Cal. Rptr. 3d 843, 846 n.1 (Cal. Dist. Ct. App. 2004), *aff'd*, 152 P.3d 433 (Cal. 2007), *vacated sub nom. Giles*, 554 U.S. 353.

253. *See, e.g.*, *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 373 n.31 (3d Cir. 2004) ("We note that the Confrontation Clause raises some additional issues about admissibility of such testimony in a criminal case, but those concerns are irrelevant in this civil case.").

254. *See, e.g.*, McCulsion v. Wash. State Attorney Gen.'s Office, No. C06-5329RBL, 2007 WL 1059942, at *9 (W.D. Wash. Apr. 6, 2007) ("While the Supreme Court has established a Sixth Amendment right to present a defense in a criminal trial, the Supreme Court has not extended this right to civil commitment proceedings.").

255. *See id.*

C. *Rules of Evidence That Facially Favor Criminal Defendants*

In other cases, the Rules of Evidence do explicitly treat criminal defendants more favorably than their civil counterparts. This subsection will detail each of the various Federal Rules of Evidence that fall into this category.

For example, under Article II, Federal Rule of Evidence 201 deals with judicial notice, with Rule 201(f) providing that "[i]n a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive."[256] According to the House Report accompanying Rule 201, the reason for this distinction was because the Judiciary Committee was "of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial."[257]

Under Article III, Federal Rules of Evidence 301 and 302 deal with presumptions in civil cases, including mandatory presumptions that shift the burden of production or the burden of persuasion to the civil defendant.[258] Conversely, proposed Federal Rule of Evidence 303 provided in relevant part that "[t]he judge is not authorized to direct the jury to find a presumed fact against the accused."[259] And while the Committee on the Judiciary ultimately decided "not to deal with the question of presumptions in criminal cases" by not enacting Rule 303,[260] "several states, following the example set forth in proposed Federal Rule of Evidence 303, have enacted Rules of Evidence which expressly prohibit the use of all mandatory presumptions in the criminal context, both those that shift the burden of persuasion and those that shift the burden of production" to the criminal defendant.[261] Moreover, the Supreme Court consistently has found that mandatory presumptions against criminal defendants are unconstitutional.[262]

As noted, under Article IV, Rules 404(a)(2)(A) and (B) treat criminal defendants more favorably than civil defendants under the

256. FED. R. EVID. 201(f).

257. H.R. REP. NO. 93-650, at 7 (1973).

258. *See* FED. R. EVID. 301–02.

259. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 3:21 (3d ed. 2007).

260. FED. R. EVID. 301 advisory committee's note.

261. People v. Watts, 692 N.E.2d 315, 322 (Ill. 1998).

262. *See* Hicks *ex rel.* Felock v. Felock, 479 U.S. 1305, 1306 (1986) ("The court relied on this Court's decisions involving the use of mandatory presumptions in criminal prosecutions.").

Pandora's Box theory.[263] A civil defendant is precluded from presenting propensity character evidence, but the "mercy rule" gives a "special dispensation" to a criminal defendant to present evidence of his good character and/or the victim's bad character.[264] Of course, those Rules allow the prosecution to counter this evidence with evidence of the defendant's bad character and/or the victim's good character.[265] But because Pandora's Box is firmly in the defendant's hands, he is in a better position than his civil counterpart because he has the choice of whether to inject propensity character evidence into his trial.[266]

Furthermore, under Federal Rule of Evidence 412(a), the Rape Shield Rule, civil and criminal defendants are generally precluded from presenting evidence of the victim's other sexual behavior or sexual predisposition.[267] In either a civil or a criminal case, however, a defendant can seek to present such evidence for a permissible purpose under an exception to the Rape Shield Rule.[268] If a criminal defendant offers such evidence for a permissible purpose, it is admissible as long as it satisfies the traditional balancing test prescribed by Federal Rule of Evidence 403, which provides that "[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."[269]

Conversely, if a civil defendant offers such evidence for a permissible purpose, Federal Rule of Evidence 412(b)(2) provides that it is admissible only "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[270] Moreover, Rule 412(b)(2) states that in a civil case "[t]he court may admit evidence of a victim's reputation only if the victim has placed it in controversy."[271]

Thus, in addition to placing restrictions on the admission of reputation evidence in civil cases, Rule 412(b)(2) makes it more difficult for a civil defendant to admit evidence under an exception to the Rape Shield Rule in three ways. First, it "raises the threshold for

263. *See supra* notes 24–28 and accompanying text.
264. *See supra* note 78–79 and accompanying text.
265. *See* FED. R. EVID. 404(a)(2)(A)–(B).
266. *See supra* notes 24–28 and accompanying text.
267. *See* FED. R. EVID. 412(a).
268. *See id.* 412(b).
269. *Id.* 403.
270. *Id.* 412(b)(2).
271. *Id.*

admission by requiring that the probative value of the evidence substantially outweigh the specified dangers."[272] Second, it "shift[s] the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence."[273] Third, it puts "harm to the victim" "on the scale in addition to prejudice to the parties."[274] Therefore, the Rape Shield Rule treats criminal defendants more favorably than civil defendants.

As noted, under Article VI, Federal Rule of Evidence 609(d) allows for the admission of evidence of a juvenile adjudication for impeachment purposes when such impeachment, inter alia, "is necessary to fairly determine guilt or innocence."[275] By its plain terms, Rule 609(d) is only applicable "in a criminal case," meaning that criminal defendants can impeach witnesses for the prosecution while civil defendants cannot impeach plaintiffs' witnesses.[276] That said, while Rule 609(d) was initially crafted based upon *Davis v. Alaska* to protect the constitutional rights of the defendant, its drafters recognized that it could not be a rule (like Rule 404(a)(2)(C)) that solely benefits one party. Accordingly, "Rule 609(d) also allows the judge to permit impeachment of a defense witness," meaning that "*Davis v. Alaska* acts as a two-way street."[277]

Criminal defendants, however, are still in a better position under Rule 609(d) than prosecutors because Rule 609(d)(2) per se precludes the prosecution from impeaching a criminal defendant with evidence of his juvenile adjudications.[278] Therefore, criminal defendants can potentially impeach any witness for the prosecution, including the alleged victim, while the prosecution can potentially impeach defense witnesses but not the defendant himself.[279] Thus, the powers granted by Rule 609(d) place criminal defendants in a better position than both their prosecutors and their civil counterparts.

Furthermore, criminal defendants are in a better position than their civil counterparts with regard to Federal Rule of Evidence 609(a)(1), which governs impeachment of witnesses through evidence

---

272. *Id.* 412 advisory committee's note.
273. *Id.*
274. *Id.*
275. *Id.* 609(d).
276. *Id.* 609(d)(1).
277. Col. Francis A. Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 OHIO ST. L.J. 595, 608 (1985).
278. *See* FED. R. EVID. 609(d)(2) (providing that impeachment through evidence of a juvenile adjudication is only permissible if "the adjudication was of a witness other than the defendant").
279. *See id.*

of adult felony convictions not involving dishonest acts or false statements. Rule 609(a)(1) provides that, for impeachment purposes, evidence of such a conviction:

> (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
>
> (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.[280]

Thus, when a party seeks to impeach any witness besides a criminal defendant with evidence of a prior felony conviction not involving a dishonest act or false statement, the conviction is admissible as long as it satisfies the liberal Rule 403 balancing test, under which evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice.[281] Conversely, when the prosecution seeks to impeach a criminal defendant with evidence of such a conviction, the burden shifts to the prosecution to affirmatively prove that the probative value of the conviction outweighs its prejudicial effect.[282]

The Advisory Committee Note to the 1990 amendment to Rule 609 explains the reason for this more stringent balancing test applying to the impeachment of criminal defendants. According to the Committee,

> the Rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—*i.e.*, the danger that convictions that would be excluded under Fed.R.Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the Rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.[283]

Federal Rule of Evidence 612 governs the use of writings to refresh the recollection of witnesses.[284] Rule 612(b) provides that if a party is using a writing to refresh the recollection of a witness, "an adverse party is entitled to have the writing produced[,] . . . to inspect

280. *Id.* 609(a)(1).
281. *Id.* 609(a)(1)(A).
282. *Id.* 609(a)(1)(B).
283. *Id.* 609 advisory committee's note to 1990 amendment.
284. *Id.* 612.

it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony."[285] In turn, if the opposing party does not produce the writing, Rule 612(c) states that "the court may issue any appropriate order."[286] The Rule then notes, though, that "if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial."[287] Accordingly, if a civil plaintiff refreshes a witness's recollection and fails to comply with Rule 612(b), the court need not strike the witness's testimony while the court must do so in a criminal case and must often declare a mistrial, providing more protections to criminal defendants.

Also, under Article VII, Federal Rule of Evidence 704(b) provides that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."[288]

This Rule has two primary effects. First, it prevents both the prosecution and the criminal defendant from presenting expert testimony to prove that the defendant possessed or did not possess the requisite mens rea to establish a defense or be found guilty of the crime charged, such as psychiatric testimony that a defendant charged with first-degree murder acted with premeditation or without premeditation.[289] Second, in a case in which a criminal defendant raises an insanity defense, it prevents a prosecutor or a criminal defendant from calling an expert witness to testify that the defendant's mental disease or defect did or did not "prevent the defendant from appreciating the wrongfulness of his actions."[290]

This latter effect means that prosecutors and criminal defendants are treated equally under Rule 704(b) in insanity cases. The Rule

285. *Id.* 612(b).

286. *Id.* 612(c).

287. *Id.* 612(c).

288. *Id.* 704(b). As the Supreme Court recently noted, there is some variation between jurisdictions regarding the admissibility of capacity evidence when the defendant's sanity is at issue. *See* Clark v. Arizona, 548 U.S. 735, 758–59 n.30 (2006) (discussing Arizona's rules for admissibility of such evidence as articulated in *State v. Mott*, 931 P.2d 1046 (Ariz. 1997), *cert. denied*, 520 U.S. 1234 (1997)). The Court upheld the Arizona trial court's application of the state's restriction barring "opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends under the Arizona rule" against a due process challenge. *Id.* at 760.

289. *See, e.g.*, United States v. Watson, 260 F.3d 301, 308 n.1 (3d Cir. 2001) (citing S. REP. NO. 98-225, at 230 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3412–13).

290. *Clark*, 548 U.S. at 758–59 n.30 (quoting United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999)).

limits a criminal defendant in proving an insanity defense, but it also limits the prosecution from disproving such a defense. Because Rule 704(b) equally limits both sides from presenting evidence in a criminal case, criminal defendants are likely treated equally to their civil counterparts, who are not governed by Rule 704(b) and who can admit more evidence but have more evidence admitted against them.[291] It should be noted, however, that in many jurisdictions, insanity is not a defense in a civil tort suit such as a wrongful death action,[292] making the comparison impossible.

The same argument could be made with regard to the first effect. Under Rule 704(b), a criminal defendant cannot present evidence that he lacked the mens rea of the crime charged, but the prosecution also cannot present evidence that he possessed the requisite mens rea.[293] This could mean that criminal defendants are in no better or worse position than their civil counterparts who can admit mental state evidence but also have such evidence admitted against them.

Rule 704(b), however, had an "unintended consequence."[294] When Congress amended Rule 704 to add Rule 704(b), it "was clearly focused on the perceived problems of medical experts testifying regarding legal conclusions, [but] the amendment to the rule was drafted so that its reach extended beyond mental health experts."[295] Therefore, "[t]he Rule . . . has been applied to non-medical testimony, such as law enforcement officers offering expert testimony as to whether a defendant acted with the intent or knowledge required to commit the crime charged."[296] The Rule thus prevents the prosecution from presenting testimony that police officers "routinely offered" prior to adoption of the Rule.[297] Thus, because Rule 704(b) disproportionately favors criminal defendants, it seemingly places them in a better position than their civil counterparts.

Additionally, under Article VIII, Rule 803(8) provides an exception to the Rule against hearsay for

> [a] record or statement of a public office if:

---

291. *See, e.g.*, Yancey v. Carson, Nos. 3:04-CV-556, 3:04-CV-610, 2007 WL 3088232, at *3 (E.D. Tenn. Oct. 19, 2007) ("Rule 704(b) of the Federal Rules of Civil Procedure applies only to criminal cases, not civil . . . .").

292. *See, e.g.*, Dougherty v. Cole, 934 N.E.2d 16, 22 (Ill. App. Ct. 2010).

293. *See supra* notes 288, 290 and accompanying text.

294. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 191 (2008).

295. *Id.*

296. *Id.*

297. *Id.*

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.[298]

Under Rule 803(8)(A)(ii), then, a police report is potentially admissible at a civil trial but per se inadmissible at a criminal trial.[299] The Advisory Committee Note to Rule 803 makes clear that Rule 803(8)(A)(ii) is designed to protect criminal defendants more than their civil counterparts. According to the Committee,

> the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.[300]

Meanwhile, under Rule 803(8)(A)(iii) an evaluative report, such as a certificate of the Director of Prisons, is admissible by both the plaintiff and the defendant in a civil trial but only admissible by the defendant in a criminal trial.[301] This means that civil plaintiffs and defendants are on equal footing while criminal defendants have an advantage over their prosecutors and are thus treated more favorably under the Rule. According to the Advisory Committee, evaluative reports "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case."[302]

Also, Federal Rule of Evidence 803(22) provides an exception to the Rule against hearsay for evidence of a final judgment of conviction if four conditions are met, including the condition that

298. FED. R. EVID. 803(8).
299. *See id.*
300. *Id.* 803 advisory committee's note.
301. *See id.* 803(8)(A)(iii).
302. *Id.* 803 advisory committee's note.

"the judgment was against the defendant" if the conviction is "offered by the prosecutor in a criminal case for a purpose other than impeachment."[303]

Therefore, a civil plaintiff, civil defendant, or criminal defendant can introduce evidence of a final judgment of conviction for non-impeachment purposes against any party or witness.[304] Conversely, the prosecution can only introduce evidence of a final judgment of conviction against the defendant and cannot offer such evidence against any other witness, no matter how much it would advance its case. According to the Advisory Committee, "[T]he exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction" because "[a] contrary position would seem clearly to violate the right of confrontation."[305] Therefore, Rule 803(22) is another rule that treats criminal defendants better than their civil counterparts.

Finally, as noted, civil plaintiffs can use the dying declaration exception contained in Rule 804(b)(2) in any type of case while prosecutors can only use the exception in homicide cases.[306] Therefore, the Rule is arguably a final rule that treats criminal defendants more favorably than civil defendants.[307]

Overall, then, under the vast majority of the Rules of Evidence, criminal defendants are treated as well as, or better than, their civil counterparts. This, of course, makes sense, given that the criminal justice system requires that a criminal defendant be presumed innocent until the prosecution can prove his guilt beyond a

303. *Id.* 803(22).

304. *See id.*

305. *Id.* 803 advisory committee's note.

306. *See id.* 804(b)(2).

307. Assume that a defendant shoots the victim, and the victim (1) makes a dying declaration while believing he is about to die, (2) miraculously survives, and (3) is unavailable for the defendant's trial. Olin Guy Wellborn III, *Article VIII: Hearsay*, 30 HOUS. L. REV. 897, 1020–21 (1993). At the defendant's criminal trial for attempted murder, battery, or some other non-homicide offense, the dying declaration would be inadmissible while the declaration would be admissible at a civil trial for battery or some similar tort. *See id.* Because it is usually the prosecution or the plaintiff offering a dying declaration to incriminate the defendant, Rule 804(b)(2)'s more limited application in criminal cases provides more protection to criminal defendants. *See, e.g.*, Justice v. Commonwealth, 108 S.W.2d 1011, 1012 (Ky. 1937) ("[U]sually it is the commonwealth that offers the dying declaration . . . ."). Sometimes, however, a criminal defendant does seek to introduce an exculpatory dying declaration, and there is precedent supporting the proposition that "[t]he court should be more lenient when the [criminal] defendant wants the statements in because they are exculpatory." Watts v. State, 492 So. 2d 1281, 1288 (Miss. 1986).

reasonable doubt.[308] Such an evidentiary structure also coheres with the oft-repeated notion that it is "better that ninety-nine guilty escape rather than one innocent man be convicted."[309] Conversely, there is no similar maxim in the civil justice system.

D. Rules of Evidence That Arguably Treat(ed) Criminal Defendants Less Favorably

On the other hand, there is only one Federal Rule of Evidence that used to treat criminal defendants worse than civil defendants, and there is only one current rule that, like Rule 404(a)(2)(C), arguably places criminal defendants in a worse position than their civil counterparts. The rule that used to treat criminal defendants worse was Federal Rule of Evidence 804(b)(3), which, prior to 2010, provided a hearsay exception for a

> statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[310]

In other words, if a criminal defendant wanted to introduce a declarant's statement against penal interest to exculpate himself (e.g., by proving that the declarant actually committed the crime charged), he had to prove that there were "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement."[311] But if the prosecution wanted to introduce a declarant's statement against penal interest to incriminate the criminal defendant (e.g., if the declarant allegedly committed the crime with the defendant), it did not have to prove such "corroborating circumstances."[312]

---

308. *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 766 (2006) ("[T]he force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt . . . .").

309. United States v. Miller, 411 F.2d 825, 833 (2d Cir. 1969) (Moore, J., concurring in the result).

310. *See* Williamson v. United States, 512 U.S. 594, 611 (1994) (Kennedy, J., concurring in the judgment) (quoting former FED. R. EVID. 804(b)(3)).

311. FED. R. EVID. 804(b)(3)(B).

312. *See id.*

Recognizing the inequity of this Rule, "[a] number of courts . . . applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the rule did not so provide."[313] Ultimately, in reliance upon these opinions, Rule 804(b)(3) was amended in 2010 so that any proponent of a statement against interest must support the statement with corroborating circumstances if the statement "is offered in a criminal case as one that tends to expose the declarant to criminal liability."[314]

Therefore, under the new Rule 804(b)(3)(B), both the criminal defendant and the prosecution must prove corroborating circumstances clearly indicating the trustworthiness of a declarant's statement against penal interest, regardless of whether the statement incriminates or exonerates the defendant.[315] According to the Advisory Committee, the change was made because "[a] unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under the exception."[316]

Facially, then, Rule 804(b)(3) currently provides similar levels of protection to civil and criminal defendants. Under Rule 804(b)(3), it is more difficult for criminal defendants to admit statements against penal interest than their civil counterparts, but the Rule also makes it more difficult for prosecutors to admit such statements while placing no similar restriction on civil plaintiffs. In practice, however, Rule 804(b)(3) provides more protection to criminal defendants than to civil defendants because courts frequently find that the prosecution's introduction of statements against penal interest violates the Confrontation Clause, which applies in criminal, but not civil, cases.[317]

The one rule that currently arguably treats criminal defendants worse than civil defendants is a relatively recent rule: Federal Rule of Evidence 408(a)(2).[318] Federal Rule of Evidence 408 used to per se preclude the admission of evidence of conduct or statements made during compromise/settlement negotiations "to prove or disprove the

313. *Id.* 804 advisory committee's note to 2010 amendment.

314. *Id.* 804(b)(3).

315. *See id.* 804(b)(3)(B).

316. *See id.* 804(b)(3) advisory committee's note to 2010 amendment.

317. *See, e.g.*, Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409, 2437–38 (2005) (noting that Rule 804(b)(3) is the hearsay exception that leads to the most Confrontation Clause challenges).

318. *See* FED. R. EVID. 408(a)(2).

validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."[319] In 2006, however, the Rule was amended so that it now precludes the admission of such evidence for such purposes "except when offered in a criminal case and when the negotiations [are] related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority."[320] As with Rules 413 through 415, Rule 408(a)(2) was met with universal disdain and criticism.[321]

This Rule potentially treats criminal defendants worse than civil defendants, who can use Rule 408 to preclude the admission of their incriminatory "[s]tatements made in compromise negotiations of a claim by a governmental agency."[322] Of course, the flip side of the coin is also true. If, during such negotiations, an agency official makes a statement exonerating the defendant or demonstrating the weakness of the agency's case, Rule 408(a)(1) allows a criminal, but not a civil, defendant to introduce such evidence.[323] It seems, however, that the former scenario is likely to recur more often than the latter scenario, which is why the Rule arguably favors civil defendants.

That said, there are several ways for a future criminal defendant to protect himself under Rule 408(a)(2). First, of course, the defendant can simply refrain from engaging in such compromise negotiations. Second, the Advisory Committee Note accompanying the 2006 amendment indicates that "[t]he individual can seek to protect against subsequent disclosure through negotiation and

319. *See* FED. R. EVID. 408(a)(2) (repealed 2006).

320. FED. R. EVID. 408(a)(2).

321. *See* Miller, *supra* note 240 ("This is one of the many reasons (there are others) why this aspect of the 2006 amendment to Rule 408 was a bad idea and very poorly reasoned, and why it was opposed in the public comments submitted by literally every professional and judicial and academic observer other than the United States Department of Justice—the only party in the nation which benefited from the adoption of this particular provision." (quoting e-mail from Professor James Duane to Evidence Professor listserv)); *see also* Email from David P. Leonard, Professor of Law and William M. Rains Fellow, Loyola Law School Los Angeles, to Peter G. McCabe, Sec'y of Comm. on Rules of Practice and Procedure (Feb. 9, 2005, 5:53PM), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Evidence%20Comments/04-EV-011.pdf (arguing on behalf of several law professors against some amendments to Rule 408); Letter from Judge Jack Weinstein, Senior U.S. Dist. Judge, E. Dist. of N.Y., to Jerry E. Smith, Chair of the Advisory Comm. on Evidence Rules (Nov. 3, 2004), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Evidence%20Comments/04-EV-002.pdf ("I am dubious about allowing any conduct or statement made in compromise negotiations to be used in criminal cases . . . .").

322. FED. R. EVID. 408 advisory committee's note to 2006 amendment.

323. *See id.* 408(a)(2).

agreement with the civil regulator or an attorney for the government."[324] Third, even without such an agreement, the defendant can engage in such negotiations with counsel present to advise him of how to answer (and not answer) certain questions to avoid incriminating himself. Fourth, the defendant can engage in such negotiations without counsel present. The Advisory Committee Note provides that

> [s]tatements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.[325]

In other words, a future criminal defendant has numerous options to prevent the application of Rule 408(a)(1). Moreover, if this future criminal defendant is actually innocent of the crimes charged, there is a high likelihood that the statements made by both sides during compromise negotiations with the governmental agency will be more helpful than harmful to him.

This can be contrasted with the homicide defendant who claims that he was acting in self-defense and that the victim was the first aggressor. Such a defendant does not have the options of a defendant in a Rule 408(a)(1) case. The only way he can preclude the admission of evidence of the victim's character for peacefulness is by foregoing what is likely his only viable defense. Moreover, consider the actually innocent defendant. That defendant not only has no real choice at trial but he also had no choice in the events giving rise to his prosecution. If the victim was in fact the first aggressor who attacked the defendant with attempted lethal force, the defendant had no choice but to respond with lethal force and then had no real choice but to claim self-defense at trial.

In sum, only one prior rule of evidence, former Rule 804(b)(3), did not treat criminal defendants at least as well as their civil counterparts, and that Rule was amended to provide a facially "unitary approach" that now actually favors criminal defendants given the Confrontation Clause.[326] Furthermore, there is only one other current rule of evidence, Rule 408(a)(2), that arguably does not

---

324. *Id.* 408 advisory committee's note to 2006 amendment.
325. *Id.*
326. *See supra* notes 310–17 and accompanying text.

treat criminal defendants at least as well as civil defendants, and it was met with universal criticism, just like Rules 413 through 415, which are unique in giving a power to admit evidence solely to prosecutors and civil plaintiffs.[327] Rule 404(a)(2)(C) is thus the only rule that combines these two aberrational aspects in that it treats civil defendants better than criminal defendants and rests a power solely in the hands of the prosecution. And yet, before this Article, this Rule has not been subjected to criticism despite it being antithetical to the rationales supporting the "mercy rule" in which it is contained.

CONCLUSION

The main goal of the propensity character evidence proscription is the prevention of jurors convicting a criminal defendant based upon his criminal *past* rather than his criminal *present.* In deeming propensity character evidence generally inadmissible, Rule 404 recognizes the danger that jurors will use a party's prior bad acts and his reputation to conclude, "Once a criminal, always a criminal," or, in a homicide case, "Once a murderer, always a murderer." The "mercy rule" strengthens, rather than weakens, these rationales by allowing criminal defendants facing the loss of liberty, and maybe life, as well as the strong resources of the prosecution to either (a) introduce propensity character evidence concerning themselves and their victims, or (b) refrain from presenting such evidence and maintain the propensity character evidence proscription.

Rule 404(a)(2)(C), however, is diametrically opposed to the aims of the propensity character evidence proscription. It vests a singular power in the prosecution's hands that triggers no new power for the criminal defendant. It places criminal defendants in a worse position than their civil counterparts. And finally, it does so in the very type of case in which a criminal defendant has the most at stake and faces the largest deployment of prosecutorial resources. Rule 404(a)(2)(C) thus cannot be defended under the rationales supporting the mercy rule, and it cannot be defended through analogy to any other evidentiary rule or principle. Instead, the Rule violates the general understanding that criminal defendants be treated at least as well as their civil counterparts. As such, Federal Rule of Evidence 404(a)(2)(C) and its state counterparts should be repealed.

327. *See* supra note 320 and accompanying text.