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# The Liar and the Loophole

## CORPORATE CHARACTER EVIDENCE AND IMPEACHMENT

### INTRODUCTION

The modern corporation has the potential to wield tremendous power and influence, and as the American legal system has increasingly treated corporations as legal persons,<sup>1</sup> that potential has grown. But this trend has led to uncertainty about whether certain rights and regulations should be applied to corporations under corporate personhood principles.<sup>2</sup> One such uncertainty relates to whether the rules governing the admissibility of character evidence should apply equally to corporations and individuals. The Federal Rules of Evidence narrowly limit the use of evidence of a person's character to show propensity, but they do not discuss the admissibility of evidence of a corporation's character.<sup>3</sup> Likewise, the character evidence ban's exceptions—which allow a witness to be impeached by evidence of his untruthful character—are silent on corporate impeachment.<sup>4</sup> The Rules should thus be amended to clarify whether corporate character evidence should receive the same treatment as character evidence for natural persons.

To illustrate the need for increased clarity in the Rules' treatment of corporate character evidence, consider the following

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<sup>1</sup> Beth Stephens, *Are Corporations People? Corporate Personhood Under the Constitution and International Law: An Essay in Honor of Professor Roger S. Clark*, 44 RUTGERS L.J. 1, 4 (2013); see, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding that the “[g]overnment may not suppress political speech on the basis of the speaker’s corporate identity”).

<sup>2</sup> See generally Stephens, *supra* note 1 (discussing the inconsistency between the Supreme Court’s treatment of corporations as people under constitutional law and the Second Circuit’s failure to do so under international law); see also Allan G. King & Syeeda S. Amin, *Social Framework Analysis as Inadmissible “Character” Evidence*, 32 LAW & PSYCHOL. REV. 1, 25 (2008) (“For example, corporations enjoy a Fourth Amendment right against unreasonable searches and seizures, but they do not have a Fifth Amendment right against self-incrimination.”); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441 (1987) (“[A] modern lawyer knows only that a corporation is considered a legal person but finds that terminology devoid of content.”).

<sup>3</sup> See FED. R. EVID. 404.

<sup>4</sup> See FED. R. EVID. 608, 609.

example: a car manufacturer is the defendant in a class action in which the plaintiffs allege that the company negligently failed to recall a defective model that caused many accidents and injuries. The company argues that it had no knowledge of the defect at the time of the accidents. At trial, the company testifies, through a corporate representative, that none of its employees had knowledge of the defect. The plaintiffs would like to impeach the corporate representative with evidence of the company's prior untruthful acts, such as the destruction of evidence in recent cases. The plaintiffs would also like to call a former employee of the company to testify—based on the employee's opinion and the company's reputation—to the company's character for untruthfulness. Due to the Federal Rules' focus on individuals, it is unclear (1) whether the plaintiffs are prohibited from introducing evidence of the company's character to show a propensity for untruthfulness, and (2) if so, whether the corporate representative may be impeached by such evidence under the exceptions to the character evidence ban.

It is a core principle of modern jurisprudence that the goal of the trial process is to try cases, not people,<sup>5</sup> and the limitation of character evidence is in line with that aspiration. Courts have long acknowledged the prejudicial dangers of character evidence,<sup>6</sup> which can influence jurors to make decisions based on their perception of a person's character, rather than on the merits of the case at issue.<sup>7</sup> This common law aversion to character evidence is codified in Rule 404, which prevents the use of various types of character evidence "to prove that on a particular occasion

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<sup>5</sup> Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 533 (1992) (explaining that "a jury must consider only the facts of a particular case, not a defendant's general character or prior bad acts, in reaching a proper verdict"); see also *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) ("It is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'" (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977))); *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988) ("[I]n our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendants' prior acts in reaching its verdict.").

<sup>6</sup> See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); see also *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1252 (5th Cir. 1982) ("[C]haracter evidence is generally excluded because it is viewed as having slight probative value and yet may be very prejudicial." (citing *Reyes v. Mo. Pac. R.R.*, 589 F.2d 791, 793 n.4 (5th Cir. 1979))).

<sup>7</sup> David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1184 (1998).

the person acted in accordance with the character or trait.”<sup>8</sup> Subsection (a) contains a general prohibition on the use of character evidence to prove propensity, and subsection (b) prohibits the use of a person’s prior crimes, wrongs, or other acts to prove propensity.<sup>9</sup>

The Rules do allow for the use of character evidence to prove propensity in limited circumstances. Rules 608 and 609, for example, allow character evidence to be admitted for purposes of impeachment.<sup>10</sup> The Rule 608 exception is commonly utilized to introduce evidence of a witness’s untruthful character—in the form of opinion, reputation, or prior bad acts—to attack a witness’s credibility.<sup>11</sup> The character evidence exceptions have created controversy among legal scholars, who have questioned whether evidence of a person’s character for truthfulness should be admissible to call into question the person’s likelihood of testifying truthfully.<sup>12</sup> On one hand, it seems intuitive that someone who has acted untruthfully in the past is more likely to lie during testimony than someone with an unblemished record. And informing a jury of a witness’s tendency to lie may properly lead the jury to take an untrustworthy witness’s testimony with a grain of salt. On the other hand, evidence about bad acts or character for truthfulness may not provide significant information about a witness’s likelihood of telling the truth in a particular case.<sup>13</sup> Because there are arguments to be made for and against the existence of the impeachment exceptions, complete consensus is unlikely.

The issue of whether character evidence should be admissible for impeachment increases in complexity when it is adjusted to ask whether a *corporation’s* vicarious testimony through a corporate representative should be impeachable by

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<sup>8</sup> FED. R. EVID. 404(a)(1).

<sup>9</sup> FED. R. EVID. 404.

<sup>10</sup> FED. R. EVID. 608, 609.

<sup>11</sup> FED. R. EVID. 608 (“A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.”).

<sup>12</sup> See, e.g., Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 4 (1988) (arguing “that the practice of using convictions for impeachment in the civil setting be abolished”); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian[!?!] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 638 (1991) (arguing that “an accused ought not be subjected to impeachment offered to show that he has a poor general character for truthfulness”); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 992 (2006) (“If [a criminal defendant] is guilty of a serious charge, the situational pressures to lie are so strong that even a generally honest person likely would lie to escape punishment; learning the fact that he was dishonest on an earlier occasion does not change the odds much.”).

<sup>13</sup> Friedman, *supra* note 12, at 638.

evidence of the corporation's character for untruthfulness. As one court noted, "a corporation cannot testify as a witness but through testimony of its employees and representatives."<sup>14</sup> But it is unclear whether the Rules allow for a corporate representative to be impeached with evidence of a corporation's untruthful character, without regard to the witness's truthfulness.

An analysis of whether the character evidence rules should apply to corporations involves answering several underlying questions. First, can a corporation even possess a "character" for the purposes of Rule 404? Second, under what circumstances should evidence of a corporation's character for truthfulness be admissible at trial? Third, do the rationales for prohibiting evidence of a person's character apply with equal force to corporations? Fourth, does the rationale for allowing character evidence for impeachment purposes apply when a corporation is testifying through a witness whose personal character is not at issue?

This note argues that based on the traditional rationales for the limitation of character evidence, courts are likely to continue to apply Rule 404 to corporations. While commentators have questioned the adequacy of the traditional rationales and argued that courts should freely admit corporate character evidence,<sup>15</sup> the fact that these long-standing rationales are widely accepted suggests that they will continue to prevail. Operating on the assumption that Rule 404 applies to corporations, this note argues that Rule 608 should also apply to corporations. This would allow a corporate representative to be impeached by evidence of a corporation's untruthful character, and corporations would thereby be held responsible for their dishonest acts.

Part I of this note provides a general discussion of corporate personhood and character. It examines how a corporation testifies vicariously through corporate representatives and how that process affects impeachment. It then analyzes whether a corporation's tendency to lie in the past, or its prior bad acts, increase the likelihood of a corporate representative lying while testifying. Part II outlines the character evidence rules—the character evidence ban in Rule 404 and the exceptions in Rules 608(a) and 608(b). It examines the history and policy

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<sup>14</sup> *Stone v. C.R. Bard, Inc.*, No. 02 CIV 3433 WHP, 2003 WL 22902564, at \*3 (S.D.N.Y. Dec. 8, 2003).

<sup>15</sup> See, e.g., Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 778, 811 (2000) (arguing that the only adequate rationale for the character evidence prohibition—"the law's commitment to regard each person as 'mentally free and autonomous at every point in his life'"—does not apply to corporations); Robert E. Wagner, *Criminal Corporate Character*, 65 FLA. L. REV. 1293, 1328 (2013).

behind the rules and summarizes arguments for and against their existence. Part III discusses how courts have applied the character evidence rules to corporations—namely, that courts have discussed the application of Rules 404 and 609, but not Rule 608, to corporations. Part IV considers whether Rules 404 and 608 should apply to corporations. It argues that courts will likely continue to apply Rule 404 to corporations because the traditional rationales justifying the rule’s application to individuals apply with equal force to corporations. It then argues that Rule 608 should also apply to corporations, based on the rationales for the character evidence exceptions—that prejudice is lower and probative value is higher when character evidence is used to show that a witness has a character for untruthfulness. Finally, the note concludes that if Rule 404 continues to be applied to corporations, then Rule 608 should be amended to explicitly include corporations, and in the meantime, that courts should “read in” Rule 608’s applicability to corporations.

## I. CORPORATE CHARACTER EVIDENCE AND VICARIOUS TESTIMONY

### A. *Corporate Character Evidence*

It is well known that corporations today are afforded many of the same legal protections as natural persons.<sup>16</sup> In fact, Title 1 of the U.S. Code states that “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>17</sup> Corporations “can own property, participate in binding legal contracts, can be sued in court (and in turn sue others), and can be prosecuted and held responsible for criminal actions.”<sup>18</sup> Moreover, corporations “have both responsibilities and rights that are independent of, and usually equal to, those of the individuals who fund, work for, or manage the corporation.”<sup>19</sup> Defenders of corporate personhood argue that corporations are multidimensional entities that arise from human interactions and play important social, economic, and political roles and accordingly should be granted constitutional rights.<sup>20</sup> Opponents

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<sup>16</sup> Stephens, *supra* note 1, at 4; *see, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

<sup>17</sup> Dictionary Act, 1 U.S.C. § 1 (2012).

<sup>18</sup> Wagner, *supra* note 15, at 1307.

<sup>19</sup> Stephens, *supra* note 1, at 4.

<sup>20</sup> *Id.*

argue that corporate personhood can be more harmful to society than beneficial.<sup>21</sup>

While there is ongoing disagreement about whether a corporation should be legally defined as a “person,”<sup>22</sup> it is perhaps less controversial that a corporation can legally possess a “character.” Still, the word “character” evades a simple definition, and as a result, the character evidence prohibition has been described as “one of the great enigmas in the law of evidence.”<sup>23</sup> While it is tempting to equate propensity with character, the Federal Rules of Evidence indicate that this is improper.<sup>24</sup> Some propensity evidence—for example, evidence of a person’s habit—is admissible.<sup>25</sup> Some might argue that corporations possess the propensity to behave in predictable ways, but this is probably not enough to justify a conclusion that a corporation can possess a “character” for the purposes of the Rules.

To date, “there is no general agreement about the precise meaning of [character].”<sup>26</sup> Courts and commentators have put forth a variety of definitions of character that range from general to specific. For example, it has been proposed that character is simply a “bundle of traits.”<sup>27</sup> Similarly, and in the context of character evidence, character has been defined to include “a person’s general traits such as honesty, temperance, or peacefulness” and to exclude more specific traits.<sup>28</sup> By contrast, Professor Susanna Kim has more narrowly defined character as “a reflection or expression of a set of internal principles and operations.”<sup>29</sup>

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<sup>21</sup> See, e.g., *id.*

<sup>22</sup> See *id.*; see also Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <http://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/> [<http://perma.cc/FR8U-P9MM>] (discussing the backlash to corporate personhood in the wake of *Citizens United*).

<sup>23</sup> Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1919 (2012).

<sup>24</sup> David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 450 (2001).

<sup>25</sup> See FED. R. EVID. 406.

<sup>26</sup> Leonard, *supra* note 24, at 450.

<sup>27</sup> Kim, *supra* note 15, at 779.

<sup>28</sup> 5 KARL B. TEGLAND, EVIDENCE LAW AND PRACTICE § 404.2 (5th ed. 2007).

<sup>29</sup> Kim, *supra* note 15, at 783. Despite firmly arguing against extending the character evidence protections to corporations, Professor Kim admits that corporations can possess character as defined this way. *Id.* at 803 (“As independent persons and moral actors, corporations have the capacity to develop a certain character.”). Professor Kim argues that “[a] corporation is a unified and distinctive social person with an existence that is separate from the human beings that compose it.” *Id.* at 789. She argues further that “[t]he character of the corporation is part of its identity and remains distinct from the identity of the corporation’s members.” *Id.* at 803-04.

While these attempts to define legal “character” are not without merit, the likelihood of consensus seems low.<sup>30</sup> Indeed, the Rules’ omission of a definition may have been an acknowledgement of the difficulty of creating one.<sup>31</sup> It is impossible to say whether a corporation can possess “character,” because doing so would require choosing arbitrarily from the differing definitions that have been put forth. Rather than seeking an exact definition of character, it is more productive to focus on the Rules’ treatment of *character evidence*. While character can fit varying definitions from a general perspective—anything from a “bundle of traits” to a “reflection of internal principles”—a definition of character evidence can be more narrowly approximated based on its treatment in the Federal Rules.

Due to the obvious difficulty of defining character and the conspicuous absence of a definition in the Rules, character evidence must be defined separately from the definition of character. Fortunately, defining character evidence based on the purpose and function of the character evidence rules makes this possible. Character evidence is information about a “person’s or entity’s past conduct”<sup>32</sup> that may indicate propensity but that carries with it a high risk of prejudice.<sup>33</sup> In other words, the character evidence rules represent the view that when a person or entity has done something in the past, it can, but does not always, mean that the person or entity is likely to act similarly in the future. Evidence of such past behavior, whether through opinion, reputation, or specific examples, is the target of the character evidence rules; the purpose of excluding the majority of propensity character evidence is to prevent juries from incorrectly assuming that character evidence actually indicates propensity. When character evidence is defined with respect to its function, corporations seem to fall within the definition’s

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<sup>30</sup> Anderson, *supra* note 23, at 1920 (“Unfortunately, as courts have recognized, finding a judicially manageable definition of character is likely impossible.”); *see also* United States v. Doe, 149 F.3d 634, 638 (7th Cir. 1998) (“We doubt that a fully satisfactory, comprehensive definition of ‘character evidence’ is possible . . .”).

<sup>31</sup> Anderson, *supra* note 23, at 1923.

<sup>32</sup> Wagner, *supra* note 15, at 1310.

<sup>33</sup> Leonard, *supra* note 24, at 450 (“The primary reason evidence rules restrict character evidence is the danger of unfair prejudice it engenders.”); *see* Anderson, *supra* note 23, at 1920 (“In short, whether or not a proof involves character in the metaphysical sense is unimportant; what actually matters is the proof’s logical relevance and prejudicial effect on the jury.”). A growing number of scholars argue that character evidence by definition includes a moral component. *E.g.*, Anderson, *supra* note 23, at 1936; Kim, *supra* note 15, at 793; 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5233 (1978). This note will assume that corporations can act morally and immorally.

purview. Hence, it is necessary to look further into the implications of regulating corporate character evidence.

### B. *Vicarious Testimony*

Assuming that corporate character evidence exists, the next question is whether a corporation's past truthfulness or untruthfulness is relevant to a corporate representative's likelihood of testifying truthfully. By its plain language, Rule 608 allows character evidence that is probative of a "witness's . . . character for truthfulness or untruthfulness."<sup>34</sup> But when a corporation is testifying vicariously through a corporate representative, it is not clear whether that witness may be impeached by the corporation's prior acts, without regard to the witness's character for truthfulness.

Consider the car manufacturer example from the introduction.<sup>35</sup> Suppose the company is testifying through an employee who is not connected to the company's prior untruthful acts, which include the destruction of evidence in an unrelated case. Further suppose that there is no evidence to suggest that the witness has ever been dishonest. Should the company be permitted to suppress its prior dishonest acts of destroying evidence simply by selecting a witness with no connection to the acts and with no history of dishonest behavior? While justice seems to be at odds with this tactic, an argument can be made that this strategy is implicitly encouraged by Rule 608.

The central question regarding vicarious corporate testimony is whether and to what extent a corporation's character for dishonesty actually affects the veracity of a corporate representative's testimony. It has been argued that a corporate representative should only be impeached by evidence of a corporate conviction<sup>36</sup> when there is some linkage—whether direct or indirect—between the witness and the prior corporate conviction.<sup>37</sup> Indirect linkage may exist when, for example, the conviction was related to a corporate policy and a corporate policymaker is testifying.<sup>38</sup> When the linkage is indirect, it is argued, the witness's position in the corporate hierarchy is relevant to a determination of whether the

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<sup>34</sup> FED. R. EVID. 608 (emphasis added).

<sup>35</sup> See *supra* intro.

<sup>36</sup> This type of impeachment is governed by FED. R. EVID. 609, which allows for the introduction of evidence of a witness's prior criminal conviction to attack the witness's character for truthfulness.

<sup>37</sup> *E.g.*, Steven L. Friedlander, *Using Prior Corporate Convictions to Impeach*, 78 CALIF. L. REV. 1313, 1337-38 (1990).

<sup>38</sup> *Id.* at 1323.

impeachment is proper.<sup>39</sup> This makes sense when a corporate policy is at issue: witnesses who rank highly in the corporate hierarchy are more likely to have been involved in the creation of an illegal policy, and they are, therefore, stronger candidates for impeachment than those lower on the totem pole.<sup>40</sup>

But when impeachment evidence is related to a general corporate character for untruthfulness, rather than a specific corporate policy, the witness's position in the corporate hierarchy is less relevant. More relevant is whether the company is predisposed to influence its employees to act untruthfully on the company's behalf. Commentators have discussed the existence of corporate "ethos," which "arises out of the dynamic of the corporation's individual members working together toward corporate goals . . . [and] reflects an organizational personality that is independent of the individuals who work within the organization."<sup>41</sup> Not only can a corporate ethos influence employees to commit dishonest acts, but it can also be specifically designed to produce criminal activity.<sup>42</sup> Pressures and incentives are often built into the corporate system to influence employees to commit illegal acts or even "take the fall" for the company in a criminal prosecution.<sup>43</sup> It stands to reason that such pressures and incentives could just as easily influence a corporate representative to lie on the stand. The corporate representative may have a clean criminal record and a sterling reputation for truthfulness but may also be facing significant pressure to testify favorably for the corporation.

So it follows that a witness testifying on behalf of a dishonest corporation is likely affected by the company and cannot testify with complete autonomy. And in cases of corporate criminality, "[t]he corporation should be held accountable under the criminal law if the corporation, by establishing organizational cultures that tacitly countenance crime, is the real party-in-

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<sup>39</sup> *Id.* at 1338.

<sup>40</sup> *Id.* at 1323 ("[I]t is legitimate to impeach corporate policymakers based on the presumption that they either acquiesced in or authorized the behavior leading to the prior crime. This presumption depends on the manager's position in the corporate hierarchy, and on the relationship of her position to the crime committed."); *see also* *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972) ("[I]t is generally true that high management officials, for whose conduct the corporate directors and stockholders are the most clearly responsible, are likely to have participated in the policy decisions underlying [violations] . . .").

<sup>41</sup> Kim, *supra* note 15, at 798; *see also* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991) (arguing that a corporate ethos "results from the dynamic of many individuals working together toward corporate goals").

<sup>42</sup> Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1289 (1990).

<sup>43</sup> *Id.*

interest rather than the so-called ‘bad apple.’”<sup>44</sup> Moreover, “[c]haracter evidence may be quite useful in determining if the corporation has established this type of culture, potentially making the evidence very probative.”<sup>45</sup> By the same token, when corporations establish organizational cultures where dishonest or evasive acts are a common practice, those corporations should be held accountable in the form of impeachment of the corporation itself, regardless of the individual witness who testifies on the corporation’s behalf.

Having established, based on the foregoing discussion, that corporations can possess character for the purposes of the character evidence rules and that corporate forces can influence a corporate representative’s testimony, the following issues emerge: *should* the character evidence rules be applied to corporations, and—considering the lack of clarity in the Federal Rules—how likely is it that courts will do so? Answering these questions requires an analysis of the policy rationales for the character evidence rules. This analysis indicates that, although commentators have put forth arguments against the prohibition of corporate character evidence, the applicability of the traditional rationales for the rules suggests that courts will continue to prohibit such evidence. Accordingly, courts must allow for impeachment of corporations’ vicarious testimony by recognizing that Rule 608 applies to corporations.

## II. THE HISTORY AND POLICY BEHIND THE FEDERAL CHARACTER EVIDENCE RULES

Rule 404, also known as the propensity rule, serves as the primary limitation on character evidence by preventing the use of character evidence to prove a defendant’s propensity to act in accordance with the alleged conduct.<sup>46</sup> Because Rule 608 functions as an exception to Rule 404’s character evidence prohibition, an inquiry into whether Rule 608 applies to corporations requires first asking whether Rule 404 applies to corporations. If Rule 404 did not exist—that is, if character evidence was generally permissible—there would be little use for a rule that specifically allows the use of character evidence to impeach a witness.

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<sup>44</sup> Wagner, *supra* note 15, at 1322 (quoting Charles R.P. Pouncy, *Reevaluating Corporate Criminal Responsibility: It’s All About Power*, 41 STETSON L. REV. 97, 110 (2011)).

<sup>45</sup> *Id.* at 1322.

<sup>46</sup> RICHARD O. LEMPET ET AL., *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 345 (5th ed. 2014).

Despite the fact that character evidence is often relevant and can lead to sound inferences about a person's tendency to behave a certain way,<sup>47</sup> there are several policy issues that compelled the creation of the propensity rule. One issue is the need to prevent juries from approving or disapproving of a person or entity based on certain evidence of past behavior.<sup>48</sup> Another issue is that jurors may overestimate the probative value of evidence of prior bad acts or criminal behavior.<sup>49</sup> These rationales exhibit the basic principle in the modern legal system that "a defendant must be tried for what he did, not for who he is."<sup>50</sup>

The drafters of the Federal Rules of Evidence recognized that in some circumstances, the use of character evidence is appropriate. For example, the Rules allow a criminal defendant to bring evidence of his own good character to suggest that his present conduct conformed to that character.<sup>51</sup> And in criminal cases where a defendant claims he acted in self-defense, the defendant may present evidence of a victim's bad character in an attempt to demonstrate that the victim's conduct conformed to that character.<sup>52</sup> The Federal Rules also allow the use of character evidence to attack a witness's credibility.<sup>53</sup> Rule 609 allows for impeachment by evidence of a criminal conviction,<sup>54</sup> and Rule 608 allows for impeachment based on evidence of reputation, opinion, or specific instances of conduct.<sup>55</sup>

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<sup>47</sup> Anderson, *supra* note 23, at 1926 ("Using propensity reasoning, character evidence would be logically relevant in a trial if offered to show that an individual acted in conformity with their character or to attack a witness's credibility on the stand. Courts have long assumed that character evidence 'is essentially relevant' because of propensity reasoning, as Wigmore claimed."); *see also* *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) ("The [character evidence] inquiry is not rejected because character is irrelevant . . ."). The *Michelson* court goes on to state that character evidence possesses "admitted probative value." *Michelson*, 335 U.S. at 476.

<sup>48</sup> LEMPERT ET AL., *supra* note 46, at 349.

<sup>49</sup> *Id.* at 350.

<sup>50</sup> *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *see also supra* note 5 and accompanying text.

<sup>51</sup> FED. R. EVID. 404(a)(2)(A).

<sup>52</sup> FED. R. EVID. 404(a)(2)(B).

<sup>53</sup> *See* LEMPERT ET AL., *supra* note 46, at 346.

<sup>54</sup> *See* FED. R. EVID. 609.

<sup>55</sup> *See* FED. R. EVID. 608. Rule 608 states:

(a) REPUTATION OR OPINION EVIDENCE. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) SPECIFIC INSTANCES OF CONDUCT. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be

The principle behind Rule 608 stems from the assumption that a witness's past behavior is indicative of present truthfulness or untruthfulness. For example, the Rule reflects the idea that "because a witness has acted in certain ways in the past, she is more likely to lie in her testimony."<sup>56</sup> This rationale appears to be at odds with one of the primary rationales for Rule 404: that character evidence is often prejudicial and only minimally indicative of the conduct at issue. Why should evidence of prior lying be admissible to prove a propensity to lie if prior conduct is inadmissible to prove a propensity to engage in similar conduct?

The common law that led to the drafting of the federal character evidence rules helps answer this question. The perceived need to exclude character evidence has existed for centuries in both English and American law,<sup>57</sup> and the permissibility of character evidence to call into question a witness's veracity also has roots in English law.<sup>58</sup> Considering the history and policy of character evidence rules is thus helpful in determining the principles that inform our modern federal rules limiting the admission of character evidence.

#### A. *The Character Evidence Ban: Rule 404*

While character evidence was readily used to prove conforming conduct in early English common law, there are indications that limitations were placed on this practice as early as 1692.<sup>59</sup> With the Enlightenment came a desire to conduct trials as "scientific" . . . search[es] for truth."<sup>60</sup> The concept of "proof" moved away from a demonstration of the relative merits of parties' characters and toward a system of establishing facts,

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inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

<sup>56</sup> Friedman, *supra* note 12, at 645.

<sup>57</sup> See Leonard, *supra* note 7, at 1164-65.

<sup>58</sup> Janeen Kerper & Bruce E. MacDonald, *Federal Rule of Evidence 608(b): A Proposed Revision*, 22 AKRON L. REV. 283, 285 (1989).

<sup>59</sup> Leonard, *supra* note 7, at 1168.

<sup>60</sup> *Id.* at 1195.

separating public and private lives, and judging people by their acts and not by who they are.<sup>61</sup>

Eighteenth- and nineteenth-century philosophy reflected this idea that society should focus on a person's acts, rather than his inner character.<sup>62</sup> Immanuel Kant wrote in 1797 that a court should only punish a person who committed a crime and not to "promote some other good for the criminal himself or for civil society."<sup>63</sup> In America, the political philosophies embedded in the text of both the Declaration of Independence and the Fourteenth Amendment of the U.S. Constitution embrace similar principles.<sup>64</sup> The Declaration of Independence's proclamation that "all men are created equal"<sup>65</sup> and the Fourteenth Amendment's requirement that no state may "deny to any person within its jurisdiction the equal protection of the laws"<sup>66</sup> both encompass the notion that a person should be judged based on his actions and not his character.<sup>67</sup>

This growing animosity toward the use of character evidence coincided with—and was likely related to—industrialization.<sup>68</sup> Prior to industrialization, society was largely agrarian, families were self-sustaining, and people maintained fewer connections outside the home.<sup>69</sup> The relationships that did exist were more personal, and people relied on knowledge of the character of those they worked and lived with.<sup>70</sup> Because people felt able to determine the character of the people they frequently interacted with, the common law trial frequently made use of character evidence.<sup>71</sup> But with industrialization came more frequent but less personal human interaction.<sup>72</sup> "Ironically, though urbanization brought a growing percentage of the population together into closely packed cities, the very fact that it was necessary to deal with so many people and business entities on a day-to-day basis made it impossible to know very many people very well."<sup>73</sup> The complexities of urban relationships thus mandated a movement away from using

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<sup>61</sup> *Id.* at 1196.

<sup>62</sup> *Id.* at 1199.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1200 n.170.

<sup>65</sup> THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

<sup>66</sup> U.S. CONST. amend. XIV, § 1.

<sup>67</sup> Leonard, *supra* note 7, at 1200 n.170.

<sup>68</sup> *Id.* at 1193.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1196.

<sup>72</sup> *Id.* at 1193.

<sup>73</sup> *Id.*

character analyses to determine personal responsibility,<sup>74</sup> and as close personal relationships became less common, character testimony became disfavored.<sup>75</sup>

By the early nineteenth century, the character evidence prohibition was well established in England. An early nineteenth-century evidence treatise discussed an 1810 case in which an English court prohibited evidence that a defendant had previously committed a crime similar to the one for which he was being tried.<sup>76</sup> Later in the nineteenth century, the rule had been firmly established in American law, but it had already proved controversial. In 1872, for instance, the New Hampshire Supreme Court expressed disapproval of the character evidence rule but acknowledged its existence and universal acceptance.<sup>77</sup>

Beyond the general philosophies and historical trends that led to limitations on the use of character evidence, there are also several practical rationales for the limitations. Although character evidence easily clears the low hurdle of relevancy,<sup>78</sup> significant obstacles remain, the most important of which is the danger of unfair prejudice. The admission of character evidence triggers two types of unfair prejudice. The first type is “inferential error prejudice,” where a juror is likely to overestimate the degree to which the evidence is probative of guilt of the present charge.<sup>79</sup> The second type is “nullification prejudice,” where a juror “might take the proof of [character] as justifying a condemnation irrespective of guilt of the present charge.”<sup>80</sup> For example, a jury influenced by nullification prejudice might convict a defendant because the defendant’s prior acts indicate he is a bad person who deserves to be punished—and not

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1196.

<sup>76</sup> *Id.* at 1170 (citing SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 70 n.b. (J. Butterworth & Son eds. 1814) (discussing *Rex v. Cole*)).

<sup>77</sup> Leonard, *supra* note 7, at 1172 (citing *Darling v. Westmoreland*, 52 N.H. 401 (1872)).

<sup>78</sup> Irrelevancy is not a primary rationale for excluding character evidence. The Federal Rules set a low bar for establishing relevancy: Rule 401 deems relevant material having “any tendency to make a fact more or less probable than it would be without the evidence.” FED. R. EVID. 401 (emphasis added). Moreover, scholars have long argued that reliable inferences can be drawn from acts that conform to character. *E.g.*, Leonard, *supra* note 7, at 1182; JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 57, at 1180-81 (3d ed. 1940). As a result, if not for the character evidence ban, such evidence would readily be introduced and easily admitted under Rule 401.

<sup>79</sup> Leonard, *supra* note 7, at 1184.

<sup>80</sup> *Id.* (internal quotation marks omitted); *see also* *United States v. Carrillo*, 981 F.2d 772, 774 (5th Cir. 1993) (“Character evidence is not excluded because it has no probative value, but because it sometimes may lead a jury to convict the accused on the ground of bad character deserving punishment regardless of guilt.” (citing *United States v. Anderson*, 933 F.2d 1261, 1268 (5th Cir. 1991))).

because the jury is certain that the defendant committed the crime at issue.

Additional rationales for excluding character evidence are the dangers of surprise, complication, and confusion.<sup>81</sup> Although modern notice requirements eliminate most surprise in trials,<sup>82</sup> a party may introduce character evidence in a way that catches the opposing party off guard. For example, a defendant may have withheld information about prior bad acts, expecting that the prosecution would not discover them, only to be surprised by the prosecution's introduction of the evidence at trial.<sup>83</sup> Dangers of complication and confusion also serve as rationales for the ban on character evidence.<sup>84</sup> The introduction of evidence of prior acts, crimes, or other character evidence can distract jurors from the issues at hand.<sup>85</sup>

Many of the dangers that the character evidence rules seek to eliminate are addressed by Rule 403, which calls for the exclusion of relevant evidence when "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."<sup>86</sup> This balancing test, if conducted properly, should eliminate most problematic character evidence. But the drafters apparently considered Rule 403 to be an insufficient filter and believed that character evidence's probative value is *always* outweighed by these balancing factors. Rather than allowing character evidence to be introduced and evaluated under a 403 balancing test, the drafters chose to prohibit the evidence altogether.

### B. *The Impeachment Exception: Rule 608*

Although the use of character evidence to show propensity is barred in most situations,<sup>87</sup> the Federal Rules allow for the use of character evidence to impeach a witness's credibility if the character evidence demonstrates the witness's propensity to be untruthful. Rule 608(a) states that "[a] witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness."<sup>88</sup> Rule

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<sup>81</sup> Leonard, *supra* note 7, at 1185.

<sup>82</sup> *Id.* at 1185 n.103.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1185-86.

<sup>86</sup> FED. R. EVID. 403.

<sup>87</sup> See FED. R. EVID. 404.

<sup>88</sup> FED. R. EVID. 608(a).

608(b) allows for the use of evidence to prove specific instances of a witness's conduct to impeach the witness on cross-examination.<sup>89</sup> The admissibility of character evidence for impeachment purposes—despite Rule 404's general ban—has been attacked as “anomalous.”<sup>90</sup> Indeed, it does appear to be contradictory to allow for impeachment by evidence of a witness's character for truthfulness in light of the rationales for the general exclusion of character evidence under Rule 404.<sup>91</sup>

Rule 608(b)'s authorization of impeachment by prior bad acts reflects the English common law tradition that permitted a barrister's inquiry into a witness's past to expose prior conduct and attack the witness's character by questioning the likelihood that the witness's testimony was truthful.<sup>92</sup> There was always the risk that counsel, in attacking a witness's character, would be tempted to bring up conduct that was not relevant.<sup>93</sup> English courts “trusted the gentlemanly discretion of the members of the bar to avoid abuses of [impeachment].”<sup>94</sup> American courts, however, felt the need to establish a set of rules aimed at reducing the risk that lawyers would abuse the right to introduce prior bad acts.<sup>95</sup> It is likely that prior to the enactment of the Federal Rules of Evidence in 1975, federal courts generally prohibited impeachment by prior bad acts and only allowed impeachment by prior criminal conviction.<sup>96</sup> Most states, however, permitted the use of prior bad acts to impeach.<sup>97</sup> Rule 608 was an attempt to incorporate the majority rule among states into the Federal Rules.<sup>98</sup>

The drafters of the Federal Rules believed that the rationales for Rule 404's prohibition of the use of character evidence to prove conforming conduct did not apply in the case of impeaching a witness. There are several traditional justifications for the allowance of character evidence for impeachment purposes where it is otherwise disallowed to prove conduct. For example, the Rule 608 exception is based in part on the belief that there is a lower risk of prejudice when evidence of truthfulness is used to attack credibility than when general character evidence is used

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<sup>89</sup> FED. R. EVID. 608(b).

<sup>90</sup> H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 789-90 (1993).

<sup>91</sup> See *infra* Section III.A.

<sup>92</sup> Kerper & MacDonald, *supra* note 58, at 285.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 286.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

to prove conforming conduct.<sup>99</sup> This is because evidence of credibility should only impact the jury's belief of a witness's testimony and should not speak to the substance of the claims.<sup>100</sup> Moreover, a witness whose credibility is being questioned is often not a party to the dispute and thus will not be legally impacted by the case's outcome.<sup>101</sup>

Another justification for Rule 608 is based on the inapplicability of one of the traditional rationales for Rule 404: that prohibiting character evidence to prove conduct incentivizes the finding of better evidence.<sup>102</sup> Character evidence, regardless of its relevance, is an inherently weak form of evidence relative to other types.<sup>103</sup> Prohibiting character evidence gives lawyers the incentive to introduce better forms of evidence, which leads to more accurate fact finding. This is not necessarily the case, however, when the goal is impeachment. The search for better evidence is arguably more important and productive when its goal is to find noncharacter evidence of a fact at issue, rather than to find noncharacter evidence of truthfulness or untruthfulness.<sup>104</sup>

Despite the rationales for Rule 608's existence, there are those who strongly disfavor the character evidence exceptions. While character evidence used for impeachment may be less prejudicial than character evidence used to show conforming conduct, the probative value of impeachment character evidence may still be too low to justify the existence of the Rule 608 exceptions.<sup>105</sup> Professor Richard Uviller criticized the impeachment exceptions, calling into question three assumptions central to Rule 608. First, Rule 608 assumes that a witness who has been somehow dishonest in the past has demonstrated such disrespect for truth that the witness's propensity to testify honestly has been forever diminished.<sup>106</sup> Uviller illustrates the weakness of this assumption, stating that under Rule 608, "a bystander who once falsified an unrelated insurance claim is more likely to lie about whether the getaway car contained two blacks or two whites than is a witness of unblemished career."<sup>107</sup> Uviller's scenario

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<sup>99</sup> LEMPERT ET AL., *supra* note 46, at 416.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See, e.g.,* Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1252 (5th Cir. 1982) ("[C]haracter evidence is generally excluded because it is viewed as having slight probative value . . .").

<sup>104</sup> *Id.*

<sup>105</sup> Uviller, *supra* note 90, at 791-93.

<sup>106</sup> *Id.* at 791.

<sup>107</sup> *Id.*

illustrates Rule 608's failure to account for dissimilar instances of untruthfulness where there is little common motivational ground.

Second, Rule 608(a) assumes that truthfulness and untruthfulness are character traits that can be readily detected by community observers and that a reliable community consensus results from such observations.<sup>108</sup> Here, Uviller questions Rule 608's assumption that one's *reputation* for truthfulness—as attested to by a supposedly reliable witness—always reflects on one's *actual* truthfulness. This assumption, too, seems suspect, and perhaps, as Uviller puts it, “more suitable to the nursery than the courtroom.”<sup>109</sup>

Finally, Uviller argues that Rule 608 is dangerous when the target of impeachment is also a criminal defendant: Rule 608 incorrectly assumes that jurors are always capable of recognizing the dishonesty's probative value with respect to a defendant's *testimony*, without giving the dishonesty any weight with respect to the criminal *conduct* at issue.<sup>110</sup> Uviller highlights the tension between Rules 608 and 404: Rule 404 aims to eliminate prejudicial evidence, but Rule 608 carves out an exception for evidence that may be highly prejudicial. Courts admit Rule 608 impeachment evidence, assuming—perhaps mistakenly—that jurors will consider the evidence of truthfulness or untruthfulness with respect to testimony and not criminal conduct. Uviller questions whether that assumption is valid.<sup>111</sup>

### III. COURTS' APPLICATION OF THE CHARACTER EVIDENCE RULES TO CORPORATIONS

Courts have rarely addressed the issue of whether Rule 608 applies to corporations. Courts have, however, applied Rules 404 and 609 to corporations. In cases where Rule 404 has been applied to corporations, courts have not provided much enlightening discussion. Thus, it would appear that the courts simply assumed that (1) corporations can possess character, and (2) evidence of that character should not be admitted to prove propensity. Where courts have applied Rule 609 to corporations, the cases are even more telling: in invoking Rule 609 to allow evidence of prior corporate convictions, courts have focused on the vicarious nature of the testimony rather than the existence of corporate character. These cases, along with the courts' rationales

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 792.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

and subsequent scholarly analysis, suggest that Rule 608 would likely also be applied to corporations.

### A. Courts Applying Rule 404 to Corporations

Courts have addressed corporate character evidence in a variety of ways.<sup>112</sup> Some courts have prohibited such evidence without explanation.<sup>113</sup> For example, in *American National Watermattress Corp. v. Manville*,<sup>114</sup> the plaintiff sued a waterbed manufacturer after sustaining injuries caused by the company's product.<sup>115</sup> The plaintiff attempted to introduce evidence that the company made no effort to recall the product after the injury occurred, arguing that the company demonstrated "a pattern of callous and indifferent conduct towards that rights of others."<sup>116</sup> The Alaska Supreme Court cited Alaska's character evidence prohibition<sup>117</sup> and held that the evidence should not have been admitted.<sup>118</sup> Yet the court made no mention of the fact that it was applying the character evidence ban to a corporation and not a person.<sup>119</sup> The court's application of a state law version of Federal Rule 404 with virtually no discussion of the "corporation vs. person" debate indicates that the court assumed that the rule should apply.

Other courts have acknowledged that it is unclear whether Rule 404 applies to corporations but have failed to come to a conclusion one way or the other. In *Colley v. CSX Transportation, Inc.*,<sup>120</sup> for example, a Mississippi district court stated simply, "[i]t is not clear that Rule 404(b) applies to corporations."<sup>121</sup> The court, in concluding that the issue was unclear, cited an analysis in Wright and Graham's evidence

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<sup>112</sup> This Section discusses state court cases where the applicable evidence rules are the state versions of Rule 404.

<sup>113</sup> Kim, *supra* note 15, at 766; *see, e.g.*, *Am. Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1336 (Alaska 1982); *Stafford v. United Farm Workers of America, AFL-CIO*, 656 P.2d 564, 568 (Cal. 1983) (prohibiting evidence that invited a jury to infer a union's present negligence based on the union's prior negligent act); *Bexar Cty. Appraisal Review Bd. v. First Baptist Church*, 846 S.W.2d 554, 562 (Tex. Ct. App. 1993). Other courts have freely allowed propensity character evidence to be used against a corporation. *See, e.g.*, *Allard v. Church of Scientology of Cal.*, 129 Cal. Rptr. 797, 802 (Cal. Ct. App. 1976) (allowing the introduction of a church's policy statements—which permitted members to "trick, sue, lie to, or destroy 'enemies'"—to suggest that respondents acted in accordance with the policy).

<sup>114</sup> *Am. Nat'l Watermattress Corp.*, 642 P.2d at 1331.

<sup>115</sup> *Id.* at 1331-32.

<sup>116</sup> *Id.* at 1335.

<sup>117</sup> ALASKA R. EVID. 404(a), 404(b).

<sup>118</sup> *Am. Nat'l Watermattress Corp.*, 642 P.2d at 1336. Alaska's character evidence rules closely resemble the Federal Rules. FED. R. EVID. 404; ALASKA R. EVID. 404.

<sup>119</sup> *Am. Nat'l Watermattress Corp.*, 642 P.2d at 1335.

<sup>120</sup> *Colley v. CSX Transportation, Inc.*, No. 1:07CV1175HSOJMR, 2009 WL 1515524 (S.D. Miss. May 27, 2009).

<sup>121</sup> *Id.* at \*1.

treatise, which discusses the ineffectiveness of both textual and originalist approaches to corporate character evidence.<sup>122</sup> The treatise's authors argue that the absence of clear definitions for the words "character" and "person," in addition to the lack of any source from which to discover the intent of the Framers, results in an analytical impasse.<sup>123</sup>

Unfortunately, an answer to the question of whether Rule 404 applies to corporations does not appear to be imminent. As recently as 2012, the court in *Ross v. American Red Cross*<sup>124</sup> cited *Colley* for its conclusion that it is unclear whether Rule 404(b) applies to corporations.<sup>125</sup> The courts in both *Ross* and *Colley* did not need to make a decision about whether Rule 404 applied because they were able to resolve the cases on different grounds. Because it seems as though courts tend to favor applying Rule 404 to corporations, however, doing so appears to be the status quo for the time being. As a result, Rule 608's application to corporations is of great importance if corporations are to be held accountable for dishonest behavior.

### B. *Courts Applying Rule 609 to Corporations*

Although there is a lack of case law regarding Rule 608's application to corporations, Rule 609, which operates as a companion exception to Rule 608, has been applied to corporations. Rule 609 governs the impeachment of a witness by evidence of a prior criminal conviction. Entire corporations have successfully been impeached under Rule 609(a), which, like Rule 608, is traditionally used to impeach a single witness, not a corporation. Rule 609(a)(2) states: "evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."<sup>126</sup> There is some variation among circuits in the few cases that have addressed the issue of whether a corporation's vicarious testimony can be impeached under Rule 609(a).

Where courts have justified allowing corporate impeachment under Rule 609(a), they have focused on the relationship between the corporation and corporate representative

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<sup>122</sup> *Id.*; WRIGHT & GRAHAM, *supra* note 33, § 5233.

<sup>123</sup> WRIGHT & GRAHAM, *supra* note 33, § 5233.

<sup>124</sup> *Ross v. Am. Red Cross*, No. 2:09-CV-00905-GLF-MRA, 2012 WL 2004810 (S.D. Ohio June 5, 2012), *aff'd*, 567 F. App'x 296 (6th Cir. 2014).

<sup>125</sup> *Id.* at \*4.

<sup>126</sup> FED. R. EVID. 609(a)(2).

who is testifying. For example, in *Stone v. C.R. Bard, Inc.*,<sup>127</sup> the court allowed for corporate impeachment under Rule 609.<sup>128</sup> The defendant argued that Rule 609 did not allow for impeachment of a corporation—rather, it only allowed for the use of prior convictions of “the witness,” and because the witness that the plaintiff was trying to impeach was not convicted of a crime, the impeachment was invalid. The court disagreed with the defendant and noted that “a corporation cannot testify as a witness but through testimony of its employees and representatives.”<sup>129</sup> The court held that the corporate representative’s testimony concerning the corporation’s reputation was “fairly considered the testimony of [the corporation] itself, and therefore was subject to impeachment by [the corporation’s] prior felony convictions.”<sup>130</sup>

If the impeachment evidence in *Stone* was the corporation’s prior dishonest behavior rather than a prior criminal conviction, the *Stone* court’s line of reasoning would result in the application of Rule 608 to the defendant corporation. This is because the court did not focus on whether the corporate representative was linked to the prior corporate criminal conviction, but instead focused on the fact that the witness’s testimony was the testimony of the corporation itself—thus, the corporation’s prior acts, and not the witness’s, were relevant to impeachment.<sup>131</sup>

In *Hickson Corp. v. Norfolk Southern*, a court again allowed impeachment of a corporation’s vicarious testimony through Rule 609(a).<sup>132</sup> The court was unable to locate a case that had dealt with the applicability of Rule 609 to a corporation but stated:

[A] corporation can only act through the words and actions of its officers, agents, and employees. When such [representatives] testify on behalf of the corporation, in reality it is the corporation testifying. In such cases it would be reasonable to allow impeachment just as if the corporation was a person. Any other ruling would give the corporation an unreasonable advantage under Rule 609 as compared to a natural person.<sup>133</sup>

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<sup>127</sup> *Stone v. C.R. Bard, Inc.*, No. 02CIV3433 WHP, 2003 WL 22902564 (S.D.N.Y. Dec. 8, 2003).

<sup>128</sup> *Id.* at \*1.

<sup>129</sup> *Id.* at \*2; *see also* *Braswell v. United States*, 487 U.S. 99, 110 (1988) (“Artificial entities such as corporations may act only through their agents . . .”).

<sup>130</sup> *Stone*, 2003 WL 22902564, at \*3. The court went on to state, “Any other result would permit [the corporation] through its agent [], to put its credibility at issue through testimony about its alleged stellar reputation in the industry, without an opportunity for plaintiffs to impeach that credibility.” *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Hickson Corp. v. Norfolk S.*, 227 F. Supp. 2d 903 (E.D. Tenn. 2002).

<sup>133</sup> *Id.* at 905-06.

Like the court in *Stone*, the *Hickson* court was mainly concerned with the fact that the testimony was that of the corporation and not of the witness. The court said nothing to suggest that this rationale—that the corporation’s vicarious testimony justified application of Rule 609—applies only when the impeachment evidence is a prior conviction. Thus, the court would likely have applied Rule 608 had it been implicated in *Hickson*.

#### IV. APPLYING RULES 404 AND 608 TO CORPORATIONS

##### A. *Applying the Rule 404 Rationales to Corporations*

As the existing case law demonstrates, there is no consensus among courts about whether Rule 404’s character evidence ban applies to corporations.<sup>134</sup> Nor is there consensus among courts about whether the ban *should* apply to corporations.<sup>135</sup> Generally, “courts simply assume that Rule 404 applies to corporations without analyzing the merits of that position.”<sup>136</sup> Although historical clues provide some guidance, the traditional rationales for the character evidence rules that have persevered for more than a century are even more useful to an analysis of the applicability of the character evidence rules to corporations. These rationales do not lose effect when the party at issue is a corporation.

As discussed in Part II, the primary purpose of Rule 404 is to eliminate two types of prejudice—inferential error prejudice and nullification prejudice.<sup>137</sup> Recall that inferential error prejudice “occurs when the factfinder assigns undue weight to the evidence as evidence of guilt of the present charge.”<sup>138</sup> In other words, the danger is that “if [a jury] learn[s] that a party has engaged in the misconduct charged on other occasions, they may jump to the unwarranted conclusion that the party committed the misconduct charged, regardless of the strength or weakness of the noncharacter evidence on the same

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<sup>134</sup> See, e.g., *Colley v. CSX Transp., Inc.*, No. 1:07CV1175HSO-JMR, 2009 WL 1515524, at \*1 (S.D. Miss. May 27, 2009) (“It is not clear that Rule 404(b) applies to corporations . . .”); WRIGHT & GRAHAM, *supra* note 33, § 5233 (concluding that a textual analysis of Rule 404 is not helpful to determining whether the character evidence rule applies to corporations); Wagner, *supra* note 15, at 1318 (“It is currently unclear whether a corporation’s past misconduct can be admitted to show the corporation’s bad character and that it acted in conformity with that character on a specific occasion.”).

<sup>135</sup> Wagner, *supra* note 15, at 1318.

<sup>136</sup> *Id.*; see *supra* note 117 and accompanying text.

<sup>137</sup> Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 720 (1998); see also *supra* Section II.A.

<sup>138</sup> Leonard, *supra* note 7, at 1184.

question.”<sup>139</sup> This risk is not diminished when a jury is considering character evidence about a corporation. There is nothing about inferential error prejudice that makes it unique to situations where the subject of the character evidence is a natural person—its definition focuses entirely on the fact-finder’s inferential capabilities, rather than the party whose character is in question. A juror is no less likely to assign undue weight to a corporation’s prior bad act than to make a misjudgment based on a natural person’s past behavior.

Similarly, nullification prejudice focuses on the fact-finder, rather than the party whose character is at issue, and thus is equally applicable to corporations. Recall that nullification prejudice refers to “the danger that jurors could use proof of character to justify a verdict irrespective of guilt.”<sup>140</sup> The likelihood of nullification prejudice is especially high in criminal cases, where “a major concern is that character evidence will tempt jurors to apply a theory of culpability that is based on character rather than on the commission of a punishable act.”<sup>141</sup> The worry is that character evidence tempts jurors “to give litigants what they deserve, not what the law requires.”<sup>142</sup> Like inferential error prejudice, nullification prejudice has little to do with the party whose character is at issue—it is instead concerned with the fact-finder’s proclivity for emotional bias. When a corporation’s character is being attacked, the danger of nullification prejudice remains. In fact, nullification prejudice may be even more likely when a corporation’s character is in question, as “[i]t was pointed out almost a hundred years ago that juries are more likely to find corporations guilty than they are to find individuals guilty.”<sup>143</sup> Indeed, when a jury knows that a corporation possesses a bad character, the jury may be even more likely to make a decision based on that character and not on the facts of the case.

Despite the apparent applicability of Rule 404’s traditional rationales to corporations, some commentators argue that the character evidence ban should only apply to natural persons.<sup>144</sup> For example, Professor Robert Wagner argues that Rule 404 should not apply to corporations because corporate character evidence is “generally more probative than prejudicial for reasons

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<sup>139</sup> Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 223-24 (1996).

<sup>140</sup> Anderson, *supra* note 23, at 1929.

<sup>141</sup> Mendez, *supra* note 139, at 223.

<sup>142</sup> Park, *supra* note 137, at 745.

<sup>143</sup> Wagner, *supra* note 15, at 1306.

<sup>144</sup> *E.g.*, Kim, *supra* note 15; Wagner, *supra* note 15.

ranging from the reliability of the evidence due to the corporate structure, to the historical oddity that resulted in the initial ban, to the increased ability of the corporation to defend itself, and to corporations' intentional development of their character."<sup>145</sup> Wagner argues that "it is possible that past acts are more reliable indicators for corporations than they are for people."<sup>146</sup> While Professor Wagner seems to give credence to the traditional prejudice rationales, he argues that prejudice is outweighed by the probative value of corporate character evidence.

Professor Susanna Kim, on the other hand, argues that Rule 404 should not apply to corporations because the traditional rationales for the character evidence prohibition "do not constitute entirely adequate justifications for the ban."<sup>147</sup> Kim argues that the only adequate rationale is the "human autonomy rationale," which by definition applies only to natural persons.<sup>148</sup> The human autonomy rationale, Kim argues, is that "the use of character evidence to prove individual conduct violates the law's commitment to regard each person as 'mentally free and autonomous at every point in his life.'"<sup>149</sup> The proper reason for disallowing character evidence, Kim argues, is that the use of character evidence to prove a person acted in accordance with that character implies that humans are not able to control their own behavior and instead that their character determines how they will act.<sup>150</sup> Kim concludes that although corporations are "persons" that can possess character, Rule 404 should not be applied to corporations because the human autonomy rationale does not apply to corporations.<sup>151</sup>

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<sup>145</sup> Wagner, *supra* note 15, at 1322-23. Professor Wagner argues that the Federal Rules should be changed to clarify that the character evidence ban does not apply to corporations. *Id.*

<sup>146</sup> *Id.* at 1328.

<sup>147</sup> Kim, *supra* note 15, at 774-75.

<sup>148</sup> *Id.* at 768. Professor Kim argues that the inferential error prejudice rationale is weak because it underestimates the inferential ability of jurors. *Id.* at 775. She voices her faith in juries' ability to properly weigh the probative value of character evidence, arguing that "[i]t is questionable whether any one individual is better positioned than another to know that jurors are making more out of character evidence than they should." *Id.* at 775-76. Kim also disposes of the nullification prejudice rationale, arguing that any fear of nullification prejudice cannot be significant in light of the Rules' exception for character evidence that is used to prove facts other than conforming conduct. *Id.* at 776. Kim argues that when character evidence is admitted to prove motive or intent, the danger of a juror convicting based on the character evidence is the same as when it is introduced to show conforming conduct. *Id.* Finally, Kim argues that rationales grounded in efficiency and avoidance of complication of the issues are without merit. *Id.* Kim argues that the frequent allowance of character evidence in other parts of criminal proceedings "indicates that inefficiency itself is not the key rationale for the rule banning character evidence." *Id.* at 777.

<sup>149</sup> *Id.* at 778.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 804.

These commentators' arguments are compelling and present interesting reasons for limiting Rule 404's application to corporations; however, it remains unclear whether courts will actually continue to apply Rule 404 to corporations. Kim's argument requires disposing of the traditional and widely accepted rationales for the character evidence rule<sup>152</sup> and therefore represents a somewhat drastic approach. While Kim's human autonomy rationale may be the best reason for the character evidence rule's continued existence, it is unlikely that courts will reject the traditional rationales and adopt Kim's rationale. Wagner's argument, while recognizing that the prejudice rationales may be valid when it comes to human character evidence, gives a great deal of weight to the probative value of corporate character evidence. It is unclear whether courts will do the same.

Despite commentators' arguments for the admissibility of corporate character evidence, courts may be inclined to prohibit such evidence in lieu of a textual change to the Rules. The enduring nature of the inferential error and nullification prejudice rationales weighs in favor of their continued application, and courts may hesitate to adopt commentators' arguments discrediting them. Because it remains unclear whether courts will continue applying Rule 404 to corporations, Rule 608's application to corporations is of great importance. If corporations cannot be impeached under Rule 608, then Rule 404's application will offer corporations more character evidence protection than is afforded to individuals.

### *B. Applying the Rule 608 Rationales to Corporations*

The likelihood that courts will continue to apply Rule 404 to corporations does not indicate that Rule 608 will receive the same treatment. If, however, courts continue to apply Rule 404 to corporations, it must be made clear that Rule 608 also applies to corporations so that corporations are not able to manipulate an impeachment "loophole" by testifying through a witness who is unconnected to the corporation's prior dishonest acts. The plain language of Rule 608 does not make clear that corporations that testify vicariously through witnesses may be impeached by prior acts, opinion, or reputation. Because the rule instead focuses on the *witness's* reputation or prior conduct,<sup>153</sup> it is not clear that a corporation—when vicariously testifying through a witness with a

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<sup>152</sup> *Id.* at 775-77.

<sup>153</sup> FED. R. EVID. 608(a).

clean record of truthfulness—can be impeached with character evidence. Fortunately, because the rationales behind Rule 608 apply with equal force to corporations and individuals, and because courts have applied the similar Rule 609 to vicarious corporate testimony, there is good reason for courts to apply Rule 608 to corporations to prevent corporate manipulation of the impeachment loophole.

As a threshold issue, a corporate representative's testimony should be considered the testimony of the corporation itself, because the corporate structure creates the potential for dishonesty. As discussed in Section I.B, a corporation can possess an "organizational culture" that breeds dishonesty and pressures employees to testify favorably for the company. And a corporation's "ethos" can not only influence its employees to commit dishonest acts but can also be specifically designed to produce criminal activity.<sup>154</sup> This justifies the use of Rule 608 to allow evidence that calls into question the general truthfulness of a corporation, regardless of whether the corporate representative is directly and personally tied to such untruthfulness.

When courts treat a corporate representative's testimony as the testimony of the corporation itself, there are several justifications for applying Rule 608. First, the rationales for allowing impeachment under the character evidence rules are just as pertinent (if not more pertinent) for corporate impeachment. One of the primary rationales for Rule 608 is that probative value is higher, and risk of prejudice is lower, when character evidence is used for impeachment.<sup>155</sup> This effect is only amplified for corporations—as Professor Richard Wagner argues with respect to the character evidence prohibition, evidence of a corporation's character for honesty is highly relevant.<sup>156</sup> And under the traditional "probative versus prejudicial" balancing test,<sup>157</sup> instances of nefarious corporate culture or corporate criminal acts are less prejudicial and more probative.<sup>158</sup>

The other Federal Rules' treatment of corporate activity sheds light on the drafters' beliefs about corporate character evidence. Rule 406 allows the introduction of evidence of "a person's habit or an organization's routine practice" to prove a party acted in accordance with that practice or habit.<sup>159</sup> The

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<sup>154</sup> Foerschler, *supra* note 42, at 1289.

<sup>155</sup> LEMPERT ET AL., *supra* note 46, at 416.

<sup>156</sup> Wagner, *supra* note 15, at 1322-23.

<sup>157</sup> See FED. R. EVID. 403.

<sup>158</sup> Wagner, *supra* note 15, at 1322-23.

<sup>159</sup> LEMPERT ET AL., *supra* note 46, at 379. Habit is defined as "one's regular responses to a repeated [specific] situation." *Id.* at 381.

rationale for Rule 406 is that it is more appropriate to draw inferences based on a person's habits, or a corporation's business practice, than to draw inferences based on a person's character. In fact, in the Rules' "strength-of-inference continuum," business practice is even more conducive to inference drawing than habit, and it sits at the opposite end of the spectrum from character.<sup>160</sup> This recognition of the inferential value of corporate activity weighs in favor of allowing for impeachment based on corporate character evidence. Although prior acts that speak to a corporation's untruthfulness may appear to be propensity evidence, if a corporation's routine business practice is to respond to a given stimulus in an untruthful way, there is a case to be made that strong inferences can be drawn about the truthfulness of its vicarious testimony. Moreover, opinion and reputation testimony under Rule 608(a) can offer evidence that a corporation regularly responds to certain acts in untruthful or evasive ways, and opinion and reputation testimony should thus be admitted to call into question the veracity of a corporation's testimony.

Finally, courts' application of the Rule 609 exception to corporations<sup>161</sup> weighs in favor of courts giving corporations the same treatment under Rule 608. Like Rule 608, Rule 609 focuses textually on the individual witness, to the detriment of clarity about the Rule's applicability to corporations. One commentator argued that "[b]y its plain language, Rule 609(a) applies only when the witness himself has been convicted of a crime. Since the corporate entity is a legal fiction and without corporeal existence, it cannot be a witness at trial."<sup>162</sup> Therefore, under its plain language, Rule 609(a) can never be used to impeach a corporation, "because the corporation, not the witness on the stand, will be the one with a previous conviction. Thus, the current language of 609(a) prevents the jury from learning of important evidence that would better allow it to assess the credibility of a corporate representative."<sup>163</sup> Rule 609's plain language should therefore be modified to state that the Rule can be used to impeach a corporation.

Fortunately, although the language of Rule 609 does not guide courts in how to apply the Rule to corporations, as discussed in Section III.B, courts like those in *Stone* and *Hickson* have admitted impeachment evidence under Rule 609 anyway.

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<sup>160</sup> *Id.* at 385.

<sup>161</sup> *See supra* Section III.B.

<sup>162</sup> Friedlander, *supra* note 37, at 1333.

<sup>163</sup> *Id.*

The scholarly response to this practice has been favorable. For example, one commentator wrote of *Hickson*:

This is the first time we have seen a corporation's criminal conviction offered as impeachment evidence under Rule 609(a). If a corporation can testify vicariously through its officers or employees, a logical inference, then there is no reason why a conviction would not be admissible to impeach the corporation's credibility, as placed in issue through testimony by its representatives.<sup>164</sup>

By the same token, the plain language of Rule 608 applies only to the reputation or conduct of the witness and not the corporation for which she is testifying. But according to the purpose of the rule, the reputation and conduct of the corporation should be admissible to impeach the corporation's testimony via any corporate representative. Despite the lack of textual clarity in Rule 608, courts should allow corporate impeachment under Rule 608 the same way the court allowed corporate impeachment under Rule 609 in *Hickson*.

Although courts have allowed for corporate impeachment under Rule 609,<sup>165</sup> it is uncertain whether courts will consistently do so for either of the impeachment exceptions. Unfortunately, this means that corporations currently have the ability to cover up a track record of dishonesty by vicariously testifying through a witness that cannot be impeached. Rule 608's focus on individuals rather than corporations allows a court to refuse to implement Rule 608 for corporations based on the Rule's plain language. Therefore, the rules should be amended to explicitly indicate that corporations' prior bad acts and reputation can serve as a basis for impeachment under Rule 608. Until that time, courts should apply the character evidence impeachment exceptions to corporations, because doing so is in line with the purpose of the rules—to give fact-finders pertinent information about whoever, or whatever, is testifying.

## CONCLUSION

The Federal Rules of Evidence limit the use of character evidence to specific instances, including the impeachment of a witness. The character evidence rules focus textually on individuals, and thus it is unclear whether they apply to corporations. The principal traditional rationales for the ban on

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<sup>164</sup> 17 Fed. Litigator (West) No. 12, at 312, 2002 WL 31154954.

<sup>165</sup> *Stone v. C.R. Bard, Inc.*, No. 02 CIV 3433 WHP, 2003 WL 22902564, at \*1 (S.D.N.Y. Dec. 8, 2003); *Hickson Corp. v. Norfolk S. Rwy.*, 227 F. Supp. 2d 903 (E.D. Tenn. 2002).

character evidence are concerns about inferential error prejudice and nullification prejudice, and the dangers of both types of prejudice are at least as concerning when a corporation is a party. This is because juries are more likely to find corporations guilty and thus are more likely to succumb to both types of prejudice with respect to corporations.

Similarly, the primary rationale for the impeachment exceptions to the character evidence rules—that prejudice is lower and probative value is higher when character evidence is used to impeach—is at least as applicable when a corporation is a party as when an individual is a party. This is because a corporation’s bad acts that demonstrate untruthfulness are often likely to be part of a general business practice. Corporations’ profit-driven nature, along with the systems that are regularly put in place to respond to specific stimuli, suggest that a corporation’s character for untruthfulness is probative of a corporate representative’s likelihood of testifying truthfully. Unfortunately, the Federal Rules that codify the impeachment exceptions to the character evidence ban do not make clear that a corporation’s vicarious testimony can be impeached in the same way as an individual’s.

Therefore, Rule 608 should be amended to explicitly state that corporations may be impeached regardless of the corporate representative’s character for truthfulness, as long as character evidence relating to the corporation’s character for untruthfulness can be established. In the meantime, courts should apply the impeachment exceptions to the character evidence rules to corporations, because the purpose of the rules—along with the rationales for their existence—apply with equal force to corporations.

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