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Books as Weapons: Reading Materials and Unfairly Prejudicial Character Evidence

Paul Varnado*

INTRODUCTION

Individuals from diverse cultural and socioeconomic backgrounds seem to share a desire to keep private the details of their personal thoughts and the most intimate aspects of their self-identities. But general claims of a right to privacy often fail to gain traction in our legal system, largely because “privacy” is so difficult to define.¹ Courts are particularly unresponsive to privacy concerns about the sanctity of a criminal defendant’s reading history, including web browsing and other cognitive endeavors, and broadly admit evidence of these mental processes. When reading histories will likely offend jurors’ moral sensibilities, they become effective but often unfairly prejudicial prosecutorial weapons to be pointed at defendants.

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1. As the concept of privacy has evolved in American law:

[C]ommentators and scholars of the twentieth century have invoked a barrage of philosophy, sociology, theology and anthropology to devise definitions which are endlessly varied, creative and elaborate. . . .

. . . With the zeal of astronomers seeking to name a previously evasive star in the constellation, legal theoreticians walking in the footsteps of Warren and Brandeis have searched mightily for a single definition, a satisfying string of words, to pin down privacy on the revolving map of jurisprudence, in order to give it certainty of location and a degree of predictability.

Ken Gromley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1336–37 (1992) (footnotes omitted). See also DANIEL J. SOLOVE, *THE MEANINGS OF PRIVACY* (2007); DECKLE MCLEAN, *PRIVACY AND ITS INVASION* 3–6 (1995).

The admission of such private cognitive evidence in criminal trials goes largely unnoticed by legal scholars because appellate courts bestow almost unbridled discretion on trial judges to interpret the evidentiary rules of relevance and prejudice. However, one recent case brings the problem to light. The United States Court of Appeals for the Ninth Circuit recently set a troubling precedent in *Curtin v. United States*² by allowing evidence that the defendant possessed incestuous and pedophilic pornographic reading material to be admitted in an unrelated criminal prosecution for traveling across state lines with intent to engage in a sexual act with a minor.³ The unpleasant fact pattern in *Curtin* is indicative of a recurring discrepancy: reading history almost always is used against defendants charged with stigmatized crimes to bias fact-finders by shocking

2. 489 F.3d 935 (9th Cir. 2007)

3. *See id.* at 937. The 42 year-old Curtin allegedly had engaged in Internet conversations in 2004 with a Las Vegas Metropolitan Police Department Detective posing as a 14 year-old girl. *Id.* After chatting for several hours, Curtin arranged to meet the fictitious minor at a Las Vegas bowling alley and detailed explicitly his plans to engage in various sexual activities with her in his hotel room that same evening. *Id.* at 937–38. At the same bowling alley several days later, Curtin approached an undercover female police officer dressed as the fictitious minor. When confronted by other officers, Curtin surrendered his personal digital assistant (“PDA”), which later was discovered to contain the text of more than 140 pornographic stories of incest, mostly involving fictitious minors. Curtin was charged with one count of traveling with the intent to engage in a sexual act with a juvenile, in violation of 18 U.S.C. § 2423(b), and one count of coercion and enticement, in violation of 18 U.S.C. § 2422(b). *Id.* Evidence of the stories was admitted at trial and used against Curtin, where the only disputed issue was his subjective intent to engage in sexual acts with a minor. *Id.* at 939.

In his defense, Curtin admitted to the instant message conversations and to traveling to the designated Las Vegas meeting point, but asserted that he never intended to engage in a sexual act with a minor. *Id.* at 938. Rather, he insisted that he assumed that the conversations had been with a consenting adult female who was masquerading as a teenaged female. *Id.* The jury rejected Curtin’s role-playing defense and convicted him. *Id.* at 937. On appeal, the Ninth Circuit held:

The district court did not abuse its discretion in concluding that the stories in Curtin’s PDA in his possession at the time of his arrest contained relevant evidence pursuant to Rule 404(b) insofar as they related to sexual acts between adults and minors. This evidence in this case had probative value with respect to the intent element of the specific intent crime for which he was prosecuted.

Curtin, 489 F.3d at 959. The Ninth Circuit further held that “[t]he nature of the defense heightened the probative value of the stories because they not only tended to prove Curtin’s intent, but to demonstrate also that his aggressive defense was not credible. Thus, the evidence was probative both of Curtin’s intent and the credibility of his innocence defense.” *Id.* at 950.

them with perversity or obscenity in ways that mainstream reading material never would be construed.⁴

The interests at stake in protecting reading history from scrutiny are vitally important, and protecting them would achieve much more than simply ensuring that the goals of the Federal Rules of Evidence are implemented consistently. Shielding reading histories also would uphold the constitutional rights to freedom of speech, freedom of thought, and freedom from overbroad government searches into one's private affairs. Further, shielding reading histories would ensure that the criminal justice system facilitates accurate jury decision-making processes. An examination of the limits and scope of individualized cognitive evidence is particularly timely given the emerging techniques by which state and private entities obtain records of intellectual activity.

This Note argues that reading histories should be barred as a matter of law from the criminal trial context because admission of such evidence unfairly prejudices⁵ a defendant in the eyes of a rational fact-finder. Part I of this Note surveys the Federal Rules of Evidence and historical federal and state judicial precedents related to the admissibility of evidence of criminal defendants' reading material, as well as modern trends of increasing surveillance of intellectual activity. Part I also examines the constitutional implications of using such evidence against defendants in the context of intellectual freedom implied by the First Amendment and the right to privacy bestowed by the Fourth Amendment. Part II examines scholarly material on how fact-finders, particularly juries, interpret character evidence and how judges' limiting instructions are counter-productive.

Parts III and IV of this Note analyze the harms of the current trend and propose an explicit amendment or comment to the rules prohibiting admission of reading history evidence. Given the threat to fair administration of justice posed by judges' allowance of unfairly

4. The California Court of Appeals warned against prejudicial use of reading-history evidence by making a shrewd comparison: "We start down a wavering path when we begin to judge people's actions by the content of the literature they keep about them. Had Shakespeare been charged with regicide, we doubt Macbeth would be admissible evidence." *People v. Scott*, No. A088396, 2001 WL 1663224, at *10 (Cal. Ct. App. 2001).

5. See *infra* note 11 and accompanying text.

prejudicial evidence regarding reading history, viewing history, and other cognitive evidence, the Advisory Committee on the Federal Rules of Evidence should explicitly bar such evidence from admission in criminal trials.

I. LEGAL FRAMEWORK AND HISTORY

A. Federal Rules of Evidence

The Supreme Court promulgated the Federal Rules of Evidence to establish broad principles⁶ applicable to trials in federal courts.⁷ The Federal Rules favor admissibility, giving finders of fact wide latitude to determine which factors are to be considered and how much weight to assign to each fact or theory. Rule 401 defines ‘relevant evidence’ broadly.⁸ Rule 402 provides a baseline: relevant evidence is generally, but not always, admissible, whereas irrelevant evidence never is admissible.⁹ Rule 403 serves as a safety valve for the breadth conferred by Rule 401, excluding otherwise relevant evidence where its admission could taint the outcome of the trial. Where the probative value of the evidence would be outweighed by the danger of bias because of “unfair prejudice”,¹⁰ Rule 403 serves as a check on the

6. The Federal Rules of Evidence were promulgated for the purpose of “secur[ing] fairness in administration . . . of the law of evidence to the end that the truth may be ascertained and proceeding justly determined.” FED. R. EVID. 102.

7. State high courts largely have adopted language from the Federal Rules of Evidence as the governing principles for trials in their tribunals. *See* GREGORY P. JOSEPH ET AL., EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 13.2 (1994). For example, most states have adopted a rule of evidence that is nearly identical to Federal Rule 403. *Id.*

8. FED. R. EVID. 401. Rule 401 makes relevant “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. The Supreme Court recently took note of the Rule’s breadth, noting that “[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008).

9. FED. R. EVID. 402. Rule 402 reads: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” *Id.* The Note accompanying Rule 402 explains that evidence is excluded from trial despite its relevancy in many contexts in response to the demands of public policy. FED. R. EVID. 402 advisory committee’s note.

10. FED. R. EVID. 403. Rule 403 reads: “Although relevant, evidence may be excluded if

ever-present threat that rational decision-making will fall victim to the passions and sympathies of the decision-maker.¹¹ Legal commentators conceived of “unfair prejudice” under Rule 403 as “inferential error”¹² that is “excludable when it is admitted or communicated through the use of psychological tactics that cause the jury to incorrectly ascribe value or ascribe more or less value to that evidence.”¹³

Admissibility and court treatment of evidence of a defendant’s prior non-criminal acts, including reading history, largely turns on Rule 404.¹⁴ The rule bars evidence of other crimes or acts when they are offered simply to establish or imply the character of the defendant as circumstantial proof of the defendant’s conduct in the present case.¹⁵ The advisory comment accompanying Rule 404 notes

its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.*

11. “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” FED. R. EVID. 403 advisory committee’s note.

12. See Victor Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 506 (1983) (“Inferential error occurs when the jury incorrectly decides that evidence is probative of an alleged fact or event.”).

13. Michelle Pan, *Strategy or Strategem: The Use of Improper Psychological Tactics by Trial Attorneys to Persuade Jurors*, 74 U. CIN. L. REV. 259, 275 (2005).

14. Rule 404(b) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

15. Rule 404(b) is particularly difficult for courts to apply because it governs admissibility when a given piece of evidence is both legitimate and illegitimate, or tends to prove an element of the crime, where such element is evidence of character. “No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under 403.” FED. R. EVID. 404 advisory committee’s note.

explicitly that character evidence tends to distract from probatively valuable evidence.¹⁶

Appellate courts have applied the Federal Rules of Evidence using ad hoc balancing tests¹⁷ given the facts of each case. The courts fail, however, to engage in broader analysis, which has led to an incoherent definition of unfair prejudice.¹⁸ Appellate courts consistently have affirmed convictions despite prejudicial or irrelevant¹⁹ evidence, deeming the admissions “harmless errors.”²⁰

The prosecutorial power resulting from the ad hoc system of screening defendants’ reading and viewing history evidence for unfair prejudice was bolstered by the Supreme Court’s decision in

16. The Advisory Committee warned:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

FED. R. EVID. 404 advisory committee’s note (citation omitted).

17. Application of the balancing test depends largely on the circumstances of the particular trial, including views of the judge in assessing probative value and prejudicial effect, as well as the amount of other evidence proffered. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 403.02[2][a] (Joseph M. McLaughlin ed., 2d ed. 2000).

18. *See* Gold, *supra* note 12, at 498.

19. *See* Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 540–42 (2004). Professor Nicolas notes that de novo review of a relevancy determination is appropriate where the dispute involves the materiality prong of relevance, but that a more deferential review of the probative worth prong makes sense, especially when a balancing of prejudice under Rule 403 also is involved. *Id.*

20. *See* United States v. Holt, 170 F.3d 698, 702 (7th Cir. 1999) (affirming a conviction despite finding error in trial court’s allowance of the government’s repeated references to the Anarchist’s Cookbook, which described how to make explosives, entirely unrelated to the main issue regarding guns). The government argued that sale of the book in Defendant’s store reflected his lack of “law abidingness.” *Id.* at 701. The Supreme Court of New Mexico affirmed a first-degree murder conviction where the state told the jury in its opening statement that “evidence would show that Defendant liked the film, Natural Born Killers, had seen it numerous times, and had announced his desire to ‘pull a fatality.’” *State v. Begay*, 964 P.2d 102, 106 (N.M. 1998). The court held that “a cautionary instruction given to the jury effectively eliminated any possible prejudice that might have resulted from the prosecutor’s and judge’s remarks.” *Id.* at 107. The Supreme Court of Oregon upheld the admission of “death metal” musical evidence to show motive—such music purportedly showed that the crimes were “more than simply a robbery gone awry.” *State v. Hayward*, 963 P.2d 667, 674–75 (Or. 1998).

Old Chief v. United States.²¹ The Court in *Old Chief* advanced the proposition that trial judges have complete discretion regarding the admission of evidence sought to be excluded under rule 403.²² Absent an explicit directive from the Federal Rules of Evidence, habit character evidence about reading materials will continue to influence fact-finders to the detriment of defendants.

B. Fourth Amendment

Under the Fourth Amendment,²³ reading-material evidence often runs afoul of the Constitution before an arrest is ever made. Law enforcement personnel regularly search for and seize this kind of evidence despite the explicit requirement that a search or seizure be narrowly limited in scope before it begins.²⁴ One reason for such a seizure is that during the execution of a sufficiently particular and legally obtained warrant, an officer may seize anything suspicious in “plain view” even if that evidence is not described in the warrant.²⁵

21. 519 U.S. 172 (1997).

22. The Court in *Old Chief* stated that the standard of review applicable to evidentiary rulings of district courts is “abuse of discretion.” *Id.* at 174 n.1 (citing *United States v. Abel*, 469 U.S. 45, 54–55 (1984)). This is “a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.” *Id.* at 183 n.7. *See also* *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1144–45 (explaining that wide appellate discretion afforded to evidentiary rulings, particularly with respect to Rule 403, is in deference to district courts’ familiarity with factual details of cases).

23. U.S. CONST. amend. IV. The Fourth Amendment requires that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. (emphasis added).

24. *See id.* The Supreme Court has a long tradition of strictly interpreting the particularity requirement, allowing for no discretion on the part of the officer executing the warrant as to what may be taken. *See Marron v. United States*, 275 U.S. 192, 196 (1927). The scope of the search must be “strictly tied to and justified by” the circumstances which rendered its initiation permissible. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

25. *See Coolidge v. New Hampshire*, 403 U.S. 443, 464–71 (1971). However, it is important to note that “a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.” *Terry v. Ohio*, 392 U.S. 1, 18 (1968) (citations omitted). *See also Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356–58 (1931) (enjoining the district court from using business papers as criminal evidence where officers’ warrant did not mention the company). The Fourth Amendment “prevents the issue of

Where a search implicates possible First Amendment concerns, the Supreme Court has strengthened Fourth Amendment protections by requiring warrants to meet the high standard of “most scrupulous exactitude.”²⁶ To this end, the Court has expressed concern over the possible exclusion of lawful communication from the marketplace of ideas²⁷ if sweeping searches are allowed.²⁸

C. First Amendment

Courts and legal scholars long have recognized that the First Amendment restricts the admissibility of evidence related to a criminal defendant’s core political speech or association.²⁹ However,

warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty.” *Id.* at 357.

26. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). *See also* *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1970); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1061 (Colo. 2002) (restraining law enforcement officers from executing warrant for suspect’s bookstore records where the need for evidence was not compelling enough to outweigh chilling effect on free speech). The same heightened standard applies, beyond warrant execution, to judicial evaluation of the legality of a search where expressive material is involved. *See, e.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 501–03 (1973); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211–12 (1964).

27. The metaphor of a “marketplace of ideas” often is attributed to Justice Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919). Though he never used the phrase as such, Justice Holmes stated that “the ultimate good desired is better reached by free trade in ideas.” *Id.*

28. *Marcus v. Search Warrants*, 367 U.S. 717 (1961). Appellants were distributors of magazines, newspapers, and books. *Id.* at 722. A warrant was issued authorizing officers to search appellants’ premises and seize all “obscene” material. *Id.* After hasty examination, officers seized all copies of all publications that, in their judgment, were obscene. *Id.* at 722–23. Writing for the majority, Justice Brennan explained:

In consequence there were suppressed and withheld from the market for over two months 180 publications not found obscene. The fact that only one-third of the publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.

Id. at 732–33 (footnotes omitted). The Court invalidated the search under the scrupulous exactitude standard because police “were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of [illegality of the material].” *Id.* at 732.

29. It is questionable whether the traditional balancing test for admissibility of potentially

the corresponding First Amendment right to receive information often is overlooked, despite support for it in Supreme Court precedent.³⁰

Admission of reading-history evidence threatens to chill others from later receiving protected communication by making private thoughts and beliefs public.³¹ Such erosion of our “robust culture of expression”³² substantially threatens defendants’ First Amendment rights.³³ Publication of books or electronic stories should not be viewed as a one-way endeavor, because the freedom to publish books or stories necessarily works in symbiosis with the freedom to read them. When readers are exposed to new information or ideas, they can become more dynamic barterers in the marketplace of ideas.³⁴ While the pornographic reading material in *Curtin* was deplorable by contemporary societal standards, the stories themselves presumptively were protected by the First Amendment.³⁵ They likely

unfairly prejudicial evidence, given minimal appellate review, satisfies the imperatives of the First Amendment. See Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622, 1641 (1977) (arguing courts must take “prophylactic” measures with the special strictness normally afforded to procedural guarantees when First Amendment rights are at stake).

30. *Lamont v. Postmaster General*, 381 U.S. 301 (1964) (holding mail addressee’s First Amendment rights were infringed by opt-in requirement for Communist literature); *Martin v. Struthers*, 319 U.S. 141 (1943) (holding pedestrians have right to receive spoken information from Jehovah’s Witness); *Thomas v. Collins*, 323 U.S. 516 (1945) (holding protestors have right to receive spoken information from labor organizer).

31. The Supreme Court has recognized that a critical part of protecting First Amendment rights is protecting the right to individual anonymity during the exchange of ideas. Justice Stevens provided a strong metaphor: “Anonymity is a shield from the tyranny of the majority. It . . . exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

32. Neil M. Richards, *Intellectual Privacy*, 87 Texas L. Rev. 387, 407 (2008).

33. The principal theories of the First Amendment—the search for truth and self-governance rationales—both have their roots in freedom of thought. *Id.* at 396–98. Formulating future speech or writing requires “the ability . . . to develop ideas and beliefs away from the unwanted gaze or interference of others.” *Id.* at 389.

34. The right to receive information is a well-established corollary of free speech under the First Amendment. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act unacceptably burdens citizens’ constitutional right to receive speech and to address one another); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (explaining that the First Amendment right to receive ideas “follows ineluctably from the sender’s . . . right to send them” and is “a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”).

35. Depictions of sexual contact with children, such as the text in *Curtin*’s PDA, or

were non-obscene³⁶ and exempt from prior government restraint or seizure.³⁷

D. Appellate Court Precedent

In most criminal trial contexts,³⁸ the circuit courts of appeals are split on the standards for admitting character evidence. Before *Curtin v. United States*,³⁹ the Ninth Circuit uniformly excluded otherwise legal reading material from evidence at criminal trials where such evidence was introduced merely to show intent.⁴⁰

“virtual” synthesized child pornography, are protected by the First Amendment as long as they do not meet the legal test for obscenity. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

36. The prosecutors in *Curtin* did not argue that the text files legally were obscene. In *United States v. Miller*, 413 U.S. 15 (1973), the Court enumerated a three factor test for obscenity. Reviewing courts are to inquire whether:

[T]he average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citing *Roth v. United States*, 354 U.S. 476, 489 (1957)).

37. Even possession of obscene speech receives significant protection against government suppression and seizure. *See Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that a statute making mere private possession of obscene material a crime, on the grounds that it may lead to antisocial conduct, is repugnant to the First Amendment); *cf. New York v. Ferber*, 458 U.S. 747 (1982) (images of child sexual abuse are unprotected by the First Amendment).

38. The Federal Rules of Evidence make an explicit exception to the ban on character evidence to allow such evidence in crimes of sexual assault: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” FED. R. EVID. 413(a). *See also* FED. R. EVID. 414(a) (same for offense of child molestation); FED. R. EVID. 415 (same for civil actions for sexual assault of child molestation).

39. *See supra* note 2 and accompanying text.

40. “While certain types of conduct generally condemned by society may constitute bad acts, possession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b).” *Guam v. Shymanovitz*, 157 F.3d 1154, 1159 (9th Cir. 1998) (citing *United States v. Brooke*, 4 F.3d 1480, 1484–85 (9th Cir. 1993)). The Ninth Circuit held that a district court improperly allowed a prosecutor to admit homosexual pornography as evidence that a defendant was aroused by alleged criminal contact with minor males. “Whether Shymanovitz’s actual purpose in touching the alleged victims was sexual arousal or gratification, however, or whether he was actually aroused or gratified by the touching is immaterial to the offenses, including the charges based on improper sexual contact.” *Id.* at 1158.

In *United States v. Brand*,⁴¹ the Second Circuit took a similar position to the *Curtin* court and affirmed the admission of evidence that the defendant possessed child pornography to show an alleged predisposition to commit child molestation.⁴²

The Seventh Circuit allowed similar evidence where the state affirmatively advanced a claim that the past acts directly relate to an element of the crime at issue.⁴³ The Supreme Court, in *Huddleston v. United States*,⁴⁴ gave limited recognition to the notion that past-act evidence has probative value on *mens rea*, allowing it only when more direct evidence is lacking or otherwise unavailable.⁴⁵

State and federal courts generally recognize that evidence of homosexual orientation is highly prejudicial and has no probative value for proving either action⁴⁶ or intent⁴⁷ crimes. This is quite inconsistent with the outcome in obscenity cases like *Curtin*, where courts all too often are more than willing to admit evidence that is similarly repugnant to societal norms and values.⁴⁸

41. 467 F.3d 179 (2d Cir. 2006).

42. Child pornography images were admitted against the objections of a defendant charged with traveling in interstate commerce and enticing a minor to engage in illicit sexual conduct. *Id.* at 206–07. The court reasoned that the images showed the defendant’s intent to entice an undercover agent posing as a 13 year-old girl in an Internet chat room to meet him. *Id.* at 197. The court’s reasoning depended on the inference that the images demonstrated the defendant’s sexual interest in children, and that the defendant’s purposes in traveling therefore included sexual activity with children. *Id.* at 199–201.

43. “The fact that [the defendant] maintained a collection of videos and pictures depicting intentional violence is probative of the State’s claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs are relevant.” *Dressler v. McCaughtry*, 238 F.3d 908, 914 (7th Cir. 2001) (citation omitted).

44. 485 U.S. 681 (1988).

45. “Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.” *Id.* at 685.

46. *See State v. Lee*, 525 N.W.2d 179, 183 (Neb. 1994) (evidence of defendant’s possession of homosexual pornography is irrelevant to charge of child rape); *State v. Tizard*, 897 S.W.2d 732, 744 (Tenn. Crim. App. 1994) (evidence of defendant’s possession of homosexual pornography is irrelevant to charges of sexual battery).

47. *See United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988) (“Evidence of homosexuality is extremely prejudicial” to jury determination of intent to import a minor alien for immoral purposes.).

48. For example, a Ninth Circuit decision concluded that the introduction of evidence of homosexuality creates a “clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals” *Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. 1981).

E. Availability of Reading History Data

Trial judges' willingness to admit unfairly prejudicial evidence of a defendant's reading or viewing history is particularly pertinent given several recent, disturbing trends. Vast quantities of personal consumption records are available for purchase by criminal prosecutors and other government officials due to the development of sophisticated private databases.⁴⁹ In *United States v. Miller*⁵⁰ the Supreme Court held that there is no reasonable expectation of privacy in most transactional records maintained by third parties.⁵¹ Though *Miller* was decided thirty-two years ago, only within the past decade have criminal investigators begun to use purchase histories as evidence of reading habits.⁵² Though in 2007 retail giant Amazon.com successfully challenged an exceptionally broad subpoena,⁵³ reading transactions still are accessible freely whenever

49. Several large commercial brokers collect data on a variety of transactions that Americans conduct. Some brokers, including ChoicePoint, Inc., actually tailor data compilation for purchase by law enforcement agencies. Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595, 596 (2004). For further discussion of data flow from the private sector to government investigators, see Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1095-1101 (2002).

50. *United States v. Miller*, 425 U.S. 435, 442 (1976).

51. *Id.*

52. The first well-known attempt to use a book purchase as criminal evidence came during the Monica Lewinsky scandal, when the special prosecutor, Kenneth Starr, subpoenaed the records of a Washington bookstore to determine if Ms. Lewinsky had bought a novel about phone sex. Felicity Barringer, *Ideas and Trends: Using Books as Evidence Against Their Readers*, N.Y. TIMES, Apr. 8, 2001, at wk3. Christopher Finan, president of the American Booksellers Foundation for Free Expression, theorized that, beginning early in this decade, police increasingly were shortcutting the investigative process by snooping into a suspect's bookstore records due to the publicity of this technique in the wake of the Lewinsky scandal. *Id.* This trend has arisen despite the United States District Court for the District of Columbia's ruling that "the bookstores and Ms. Lewinsky had persuasively alleged a chilling effect on their First Amendment rights." *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Media L. Rep. (BNA) 1599, 1600 (D.D.C. 1998).

53. Federal prosecutors sought 24,000 customers' book purchase records as part of an investigation of fraudulent bookselling by a Madison, Wisconsin, city official. John Diedrich, *Online Book Records Kept Private: U.S. Attorney Sought Amazon.com Buyer List in Fraud Case*, MILWAUKEE JOURNAL SENTINEL, Dec. 3, 2007, at B. The magistrate noted that while the Supreme Court has "never directly imposed a higher standard for reviewing grand jury subpoenas that implicate First Amendment concerns, the Court has implied that lower courts should be mindful of any non-speculative First Amendment concerns." *In Re Grand Jury*

booksellers, large and small, are intimidated by police or simply opt to help catch a criminal.

The congressional reaction to the attacks of September 11, 2001, further eroded privacy rights to intellectual transactional data. Under the USA PATRIOT Act, government officials gained unprecedented power to obtain materials protected by the First Amendment,⁵⁴ explicitly including reading histories among the sources for which the FBI may secure an order of production.⁵⁵

II. FACT-FINDERS AND THE PSYCHOLOGY OF PREJUDICE

The United States Constitution⁵⁶ expressly preserves the fundamental right of a criminal defendant to a trial by jury, and the Supreme Court has clarified the scope of the Constitution's procedural protections.⁵⁷ Reading-history evidence uniquely influences decision-making in this particular context, and courts long have recognized the need to shield juries from inflammatory and over-prejudicial evidence.⁵⁸ Since jurors lack training in legal

Subpoena to Amazon.com Dated August 7, 2006, 246 F.R.D. 570, 572 (W.D. Wis. 2007), available at http://www.wiwd.uscourts.gov/begi-bin/opinions/district_opinions/GJ/07/07-GJ-04-11-23-07.pdf (citing, *inter alia*, *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

54. Section 215 of the Patriot Act confers power far beyond the government's carefully constrained search warrant and subpoena powers, providing that officials can obtain materials whenever the government states—without a showing of relevance or necessity—that the materials are sought “to protect against international terrorism.” 50 U.S.C. § 1861(a)(1) (Supp. III 2003). Section 215 provides no means of challenging an order once issued and imposes an automatic gag order on the recipient of a request, barring the recipient from telling anyone, including the subject of the inquiry, about the request. *See* 50 U.S.C. § 1861.

55. Section 215 provides for production of “library circulation records, library patron lists, book sales records, book customer lists.” 50 U.S.C. § 1861(a)(1).

56. The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law” U.S. CONST. amend. VI.

57. The Supreme Court held that the right to jury trial in criminal cases is “fundamental to the American system of justice” and that the right therefore is applicable to the states by the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

58. Justice Cardozo, then Chief Judge of the New York Court of Appeals, noted:

With only the rough and ready tests supplied by their experience of life, the jurors were to look into the workings of another's mind, and discover its capacities and disabilities, its urges and inhibitions, in moments of intense excitement. Delicate enough and subtle is the inquiry, even in the most favorable conditions, with every warping influence excluded. There must be no blurring of the issues by evidence

reasoning, they are more likely than judges to reach conclusions based on emotional inferences, rather than provable facts.⁵⁹ The introduction of character evidence⁶⁰ is particularly troubling. The general prohibition of character trait evidence—intended to prove guilt by showing a defendant’s propensity to commit a crime⁶¹—is most eroded in criminal cases where the alleged conduct involves activity that goes against societal norms.⁶²

The use of character evidence to induce moral judgment by jurors has several compelling consequences. First, allowing character evidence can make the jury unduly punitive toward habitual criminals and more likely to convict on weaker evidence.⁶³ Second, evidence of past behavior is not a sufficiently accurate predictor of future dangerous or criminal conduct. Psychologists studying the variability of behavior across situations have raised doubts as to whether a stable personality exists that could allow for lay judgments of criminal guilt.⁶⁴

illegally admitted and carrying with it in its admission an appeal to prejudice and passion.

People v. Zackowitz, 172 N.E. 466, 467 (N.Y. 1930).

59. The modern view is that prejudice is particularly problematic when juries are fact-finders. *See, e.g.*, Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981) (Rule 403 exclusion of unfairly prejudicial evidence does not apply in a bench trial).

60. Professor McCormick defines “character” as “a generalized description of one’s disposition, or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.” CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 340 (5th ed. 1959) (quoted in FED. R. EVID. 406 advisory committee’s note).

61. *See supra* notes 14–17 and accompanying text.

62. Commentators long have recognized that context matters. For example, Judge Weinstein and Professor Berger note that “[i]n the trial of narcotics offenses, some courts display a particularly wide latitude in admitting evidence of other acts.” JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 404.22[2] (Joseph M. McLaughlin ed., 2d ed. 2000). Also, the Federal Rules of Evidence make an explicit exception to allow character evidence in sex crime cases. *See* FED. R. EVID. 413–15.

63. One economic model evaluating juror incentives for leniency concluded that habitual criminals are more likely than first-time offenders to be convicted by a jury—even where the jury believes the defendant probably is not guilty of the crime at hand—to compensate for perceived unpunished past transgressions. *See* Joel Schrag & Suzanne Scotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J.L. ECON. & ORG. 319, 323 (1994). The authors conclude that juries typically will “support[] the prevailing public sentiment on crime, which holds that the criminal justice system should be more punitive toward habitual criminals.” *Id.* at 340.

64. *See* Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221 (1996). Mendez argues that, at present, the weight of psychological theory

Furthermore, jurors are likely to interpret evidence using a simplistic “story model” to process information and determine guilt.⁶⁵ As cable news and other media exploit the sensational narrative of violent crime, it becomes increasingly plausible that the legal system will respond in turn, eroding or even eliminating altogether the character evidence prohibition. Amendments to the Federal Rules of Evidence allowing character evidence in sexual misconduct or child molestation cases show that the trend is toward more liberal admission requirements.⁶⁶

Trials are only partially about making factual determinations of past occurrences. Trials also are an important part of the state’s regulation of behavior in society—a forum for making and enforcing value judgments that are rooted not only in objective fairness but also in morality and traditional conformity. This is particularly true of trials by jury.⁶⁷ Understanding trials in this broader context reveals a clearer, more robust rationale for limits on admissibility of personal evidence. If potential lawbreakers were rational, they would weigh the disincentives of criminal penalties for their actions. While most are unfamiliar with the Federal Rules of Evidence, prospective

supports the proposition that the basic personality structure is stable, with stable patterns of variability. However, jurors are not equipped to make predictions about guilt, which “would have to be supplied by a qualified expert who has administered appropriate personality tests to the defendant.” *Id.* at 236. Given the infeasibility of requiring such personality tests, psychologists’ belief in a stable personality system does not justify repealing the ban on character evidence.

65. Jurors tend to create a narrative summary of the events under dispute, interpreting evidence and deciding how to vote by choosing the best-fitting verdict category for a resolution. Reid Hastie, *Emotions in Jurors’ Decisions*, 66 BROOK. L. REV. 991, 995 (2001). Some scholars have advocated the incorporation of rules to ameliorate the potential accuracy-reducing effects of the story model. See Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 572–73 (1991).

66. FED. R. EVID. 413–15. See *supra* notes 38 and 62; see also David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998). “There is no question that it is the beginning of an experiment . . . to see whether, as a general proposition, we should just abolish the bar altogether.” *Id.* at 1163 n.9 (citing Richard C. Reuben, *Some Judges Oppose Evidence Amendment*, 81 A.B.A. J. 20, 20 (1995) (omission in original)).

67. The trial by jury system implements on behavior outside of the courtroom what Professor Sanchirico calls “primary incentives.” Sanchirico notes that “character evidence . . . is one area in which the truth seeking approach and the primary incentives approach to trial point in very different directions.” Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1231–32 (2001).

defendants still tend to understand (at least indirectly) that, should they be arrested, the trial system is designed to find provable facts. The trial system is not likely seen as one that makes sweeping determinations of morality by looking to past actions or personal beliefs.⁶⁸

Given the underlying social dynamics of a jury trial, judges use limiting instructions to temper fact-finders' broad discretion to weigh evidence that borders on being unfairly prejudicial.⁶⁹ The Supreme Court has recognized both that limiting instructions can save otherwise inadmissible evidence,⁷⁰ and that it is a "naïve assumption that prejudicial effects can be overcome by instructions to the jury."⁷¹ Empirical studies confirm that jurors largely are unable to use evidence for limited purposes "because it is all but impossible for

68. Sanchirico reinforces this seemingly tenuous relationship between knowledge of criminal law and knowledge of courts' rules of evidence:

Admitting character evidence for conduct—while it might increase the accuracy of trials—attenuates the connection between actions and consequences. The population may not understand how the connection between actions and consequences is maintained in the current system, nor the particular role played by prohibiting evidence of character. Yet it is easy to imagine that were character evidence freely admitted, the resulting disjunction between actions and assigned penalties would eventually become apparent.

Id. at 1263. Sanchirico concludes that the law "allows character evidence for the secondary purpose of impeaching the witness who purports to offer trace evidence of primary conduct. . . . But, for the most part, it insulates the determination of primary conduct itself from the inference, reasonable as it may be, that individuals often act in conformity with identifiable propensities." *Id.* at 1306.

69. For example, the Federal Rules of Evidence maintain that a proper instruction limiting the use of prior convictions is sufficient to ensure the fairness of the trial process. *See* FED. R. EVID. 105.

70. *Parker v. Randolph*, 442 U.S. 62, 74–75 (1979) ("The possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions."). *But cf.* *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."):

71. *Krulewicz v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("[A]ll practicing lawyers know [this assumption] to be unmitigated fiction.") (citation omitted). Judge Learned Hand characterized the task allocated to jurors concerning prior convictions as "a mental gymnastic which is beyond, not only their power, but anybody's else [*sic*]." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932). These criticisms continue to pervade modern legal commentary. *See* MCCORMICK, *supra* note 60, at 91 & n.12.

jurors to forget evidence for one purpose while remembering it for another.”⁷² In fact, research suggests that a judge’s insistent tone in his admonishment to disregard tends to provoke a hostile reaction, causing jurors to rely on the admonished evidence.⁷³

Reading histories seem particularly susceptible to the flaws of limiting instructions, because they often are used to show deviance from societal norms regarding morality and decency, as exemplified by *Curtin*. Character evidence that shocks or offends jurors’ sensibilities, as reading or viewing histories offered into evidence often do, are likely to influence heavily jurors’ subconscious conclusions about overall social attractiveness.⁷⁴ The ad hoc exclusionary system for reading history evidence exacerbates the flaws inherent in juror fact-finding.

72. Lisa Eichhorn, Note, *Social Science Findings and the Jury’s Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 345 (1989).

In fact, when objections are launched to exclude unfairly prejudicial evidence, the objections themselves draw disproportionate juror attention to the very evidence that jurors are told to disregard. Eichhorn, *supra*, at 344. For example, the “fuss” made over ruling on the admissibility of evidence of a defendant’s insurance coverage in a tort case made mock jurors in one study infer that the evidence had particular importance, and therefore resulted in higher average damage awards for the plaintiff, despite silence on the topic during deliberation. *Id.* (citing Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959)).

73. See Joel D. Lieberman & Janie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677 (2000). For a general discussion of reactance theory, see JACK W. BREHM & SHARON S. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 35–36 (1981). The theory suggests that, because individuals resist any attempt they perceive as limiting their freedom of choice, a forbidden option becomes more attractive than it originally had appeared. *Id.* at 96–97. Under the current evidentiary rules, in the rare case in which a trial judge decides to exclude evidence of past legal acts offered by a prosecutor to show some moral flaw or character defect on the part of the defendant, jurors likely will be unable or unwilling to comply with limiting instructions.

74. A variety of studies have shown that mock jurors combine the variables of occupation, marital status, criminal history, appearance, and personality into a social attractiveness value judgment, which can influence outcomes heavily. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1274–78 (1997). Shocking indicators of a non-traditional lifestyle, particularly in the context of sexual attractions, are likely to negate any chance that the average juror will feel sympathy for a criminal defendant.

III. THE NEED FOR A CONSISTENT EXCLUSION RULE

The Federal Rules of Evidence demonstrate a clear intent on the part of Congress, the Supreme Court, and the attorneys and legal scholars who helped draft them, to exclude unfairly prejudicial evidence. Yet prosecutors consistently slip reading histories into evidence to the detriment of often socially marginalized defendants. They do so despite the heightened protection that the Bill of Rights gives to communicative and cognitive freedom, and in so doing exploit jurors' tendencies to make extraneous value judgments about a defendant when their senses of morality are offended.

The clear standard set by Rule 404(b), and explained in the comments thereto, illustrates that character evidence is particularly dangerous because it distracts attention from probatively valuable evidence.⁷⁵ While Rule 403 already draws a bright line by calling for evidence to be excluded where its unfairly prejudicial effect likely will outweigh its probative value,⁷⁶ trial judges have grown accustomed to having their evidentiary discretion go unquestioned during appellate review.⁷⁷

The Fourth Amendment protects against broad or unwarranted government intrusions into a suspect's private thoughts and activities. But a disconnect currently exists between this right to privacy and the ability of prosecutors to exploit the departure from societal norms of defendants' beliefs by embarrassing or vilifying them. The willingness of trial judges to admit otherwise lawful reading materials encourages police to "gather dirt" on a suspect using the plain-view exception to the requirement that warranted searches of written material be limited with scrupulous exactitude⁷⁸—a requirement designed to keep lawful material within the vitally important marketplace of ideas.

The First Amendment's guarantee of free speech implies a concomitant freedom to anonymously select, access, and read protected speech of one's choosing,⁷⁹ no matter the medium or the

75. *See supra* note 16 and accompanying text.

76. *See supra* notes 10–11 and accompanying text.

77. *See supra* notes 19–20 and accompanying text.

78. *See supra* note 24.

79. *See supra* note 30 and accompanying text.

apparent value of the speech to outside evaluators. Erosion of anonymity deters citizens from engaging in lawful communication⁸⁰ out of fear of the embarrassment that surveillance could bring. This fear is increasingly plausible given the emerging availability of privately aggregated consumer databases for government agencies' perusal⁸¹ and the lack of oversight under the USA PATRIOT Act as to how and when that data is acquired and used.⁸²

Evidence of a proclivity for generalized obscenity, like the incestuous stories in *Curtin*, poses the same danger of defendant stereotyping as does evidence of sexual orientation—jurors may draw character inferences from both of these traits. Courts are more willing to allow vilification of individuals viewed as deviant, but who do not fall into a more socially accepted or legally protected class like sexual orientation. Whether consciously or not, jurors may be more comfortable imputing their morality⁸³ to punish a pedophilic, role-playing, pornography consumer than to a homosexual, even though they may bring biases against both into the jury room.⁸⁴

All fact-finders are prone to actively or subconsciously integrate individual or community conceptions of morality, decency, or tradition with the evidence they receive both from prosecution and defense. Juries, who often make factual determinations in American criminal trials, tend to tackle the often-overwhelming task of processing evidence by developing their own narratives to explain or judge the thoughts and activities they attribute to a defendant.⁸⁵ It is essential for the Federal Rules of Evidence to divorce such stereotyping narratives from decisions about criminal guilt. When

80. See *supra* note 31 and accompanying text.

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

82. See *supra* note 54 and accompanying text.

83. Guilty verdicts theoretically are value judgments against one defendant that provide disincentives for similar individuals outside the courtroom. See Sanchirico, *supra* note 67 and accompanying text.

84. Fundamentally, the use of material protected by the First Amendment as negative character evidence is troubling beyond just the practical effects of inconsistent and inaccurate administration of justice. It incorrectly implies that the trial court has the province to use the force of criminal penalties to deem certain instances of protected speech to be of lesser value than others based on content alone. For a discussion of the inaccuracy of character traits and past acts as bases for judgments about criminal guilt, see *supra* notes 64–65 and accompanying text.

85. See *supra* note 65.

juries are told that a defendant habitually read or viewed violent or pornographic materials, it becomes easy for jurors to infer guilt that they may not infer normally from a defendant's engagement with mainstream books or movies.

Jurors may respond to their outrage or shock by punishing defendants for violations of societal norms, regardless of whether the elements of the charged crime or crimes were proved. Understandably, both limiting instructions and relevance objection arguments encourage jurors to consider problematic character evidence by drawing special attention to the evidence at issue.⁸⁶

The broad deference that decisions like *Curtin* grant to trial courts reflects a misguided faith in limiting instructions and relevance rulings to protect defendants. Yet the Ninth Circuit in *Curtin* completely neglected to instruct trial judges on how to mitigate the risks of admitting provocative reading-history evidence, or to provide guidelines for exclusionary rulings where such sensitive or embarrassing personal evidence is at issue.⁸⁷

A bright line rule is necessary to avoid the problem of exposing jurors to such evidence in the first place and to eliminate the incentives that prosecutors currently have to find prejudicial evidence on defendants' habits. Such a rule would make the administration of justice more efficient and accurate.

86. See *supra* notes 71–73 and accompanying text.

87. The court in *Curtin* merely warned that “[t]he use of lawful reading material to prove intent is a dangerous business, and any district court that considers admitting such evidence should carefully weigh both its relevance and the concerns embodied in Rule 403.” *United States v. Curtin*, 489 F.3d 935, 966 (9th Cir. 2007). One commentator has suggested that other circuits have better protected against unfair prejudice by guiding both district courts exercising discretion over these issues and prosecutors faced with role-playing defenses like *Curtin*'s. Recent Case, *Evidence—Relevance and Prejudice—Ninth Circuit Removes Bar on Admission of a Defendant's Reading Material to Show Intent to Solicit a Minor*, 121 HARV. L. REV. 652, 659 nn.58–59 (2007) (citing *United States v. Jernigan*, 341 F.3d 1273, 1284–85 (11th Cir. 2003) (warning judges of the danger of prejudicial antipathy in a jury upon hearing evidence of gang membership); *United States v. Crow*, 164 F.3d 229, 237 (5th Cir. 1999) (finding unpersuasive a role-playing defense to charges of sexual exploitation of a minor, based on factual analysis)).

IV. PROPOSAL

An amendment to the Federal Rules of Evidence or the accompanying comments would provide a remedy to the troubling inconsistency resulting from trial court discretion to admit prejudicial reading-history evidence. Because Congress has recognized the importance of having dynamic standards, rather than static and inflexible mandates, govern federal courts, the Judicial Conference of the United States⁸⁸ already is required by statute to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.”⁸⁹

As a first step, a member of the Judicial Conference’s Advisory Committee on the Federal Rules of Evidence⁹⁰ should review the aforementioned case law and scholarly literature, as well as other empirical research and position papers on the dangers of the current inconsistency, and then should draft a proposed amendment to Rule 404(b).⁹¹

In the last decade, the Advisory Committee has rejected suggestions to shift toward ad hoc balancing of the probative value of hearsay evidence, opting to maintain the general exclusion.⁹² Against this backdrop, the proposed amendment likely will be deemed meritorious and consistent with the letter and spirit of the Rules of Evidence, thus bolstering the Advisory Committee’s other endeavors to prevent unfair prejudice against criminal defendants and to limit the role of fact-finders to making probative determinations.

88. The Judicial Conference is headed by the Chief Justice of the United States and consists of the Chief Justice, the chief judge of each circuit court of appeals, a district judge from each regional circuit, and the Chief Judge of the Court of International Trade. 28 U.S.C. § 2073 (2000). The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071–77.

89. 28 U.S.C. § 331. The Committee is to recommend amendments and additions to rules based on the following criteria: promoting simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.

90. The Advisory Committee is composed of judges, representatives from the United States Department of Justice, law professors, and practicing attorneys.

91. Most of the debate over admission of reading-history evidence at trials arises in the context of balancing the factors in Rule 404(b). *See supra* notes 14–17 and accompanying text.

92. Recent Case, *supra* note 87, at 658 n.54 (citing *Tome v. United States*, 513 U.S. 150, 164 (1995)).

However, there is an argument that excluding reading-material evidence is a frivolous use of the Committee's time, and the significant step of amending the federal rules is unnecessary when individual judges already can and should exclude all unfairly prejudicial evidence under Rules 403 and 404(b). Moreover, the statutorily prescribed process for amending a Rule of Evidence is quite protracted and requires cooperation by state bar associations and legal scholars, as well as approval by both the Supreme Court and Congress.⁹³

However, the Advisory Committee should recognize that the status quo tacitly encourages jurors to convict seemingly immoral, dangerous, or unpopular defendants despite prosecutors' failure to prove the elements of the crime at issue beyond a reasonable doubt. If legislative reform proves infeasible, appellate courts must convey clear warnings⁹⁴ to district courts exercising discretion on reading-history evidence to consider the constitutional paradigms of assuring that all lawful ideas, even those repugnant to many societal norms, can be freely espoused.

93. After drafting the suggested amendment to exclude evidence of reading habits, the Advisory Committee must submit the rule for distribution to state bar associations, hold one or more public hearings, and provide a six month opportunity for members of the public to comment. Paul R. Rice, *Federal Rules Decisions: A Short History of Too Little Consequence*, 191 F.R.D. 678, 680-82 (2000).

Next, the Advisory Committee must submit the proposed amendment, along with a summary of any comments received, to the Standing Committee on Rules of Practice and Procedure. *Id.* If the Standing Committee approves a proposed rule change, it will transmit the change to the Judicial Conference with a recommendation for approval, accompanied by the Advisory Committee's reports and the Standing Committee's own report explaining any modifications it made. *Id.* If the Standing Committee makes a modification that constitutes a substantial change from the recommendation of the Advisory Committee, the proposal normally will be returned to the Advisory Committee with appropriate instructions. *Id.*

The Judicial Conference, after approving amendments during its September session, recommends changes to the Supreme Court for approval. The Supreme Court must transmit proposed amendments to Congress by May 1 of the year in which the amendment is to take effect. 28 U.S.C. § 2074. Finally, Congress has a statutory period of at least seven months to review any rules and enact legislation to reject, modify, or defer the rules. Rice, *supra*, at 682.

94. Decisions like *Curtin* move in the wrong direction by expanding unbridled discretion. Luckily, some district court judges will continue to exercise discretion wisely by strictly scrutinizing prosecutors' efforts to exploit defendants' First Amendment freedoms to access information.

CONCLUSION

An explicit prohibition in the Federal Rules of Evidence against the admission of character evidence based on reading history would serve several practical functions. It would facilitate more accurate determinations of criminal guilt by juries who tend unknowingly to disregard limiting instructions and let nonconformity with social norms influence determinations of guilt. It would safeguard constitutional rights to privacy and free thought against increasing government and private surveillance of cognitive activity. Finally, it would replace the inconsistency of the current discretionary, ad hoc balancing test for admissibility with a test that promotes consistency among federal courts and similarly would compel state courts to amend their rules.

By failing to safeguard the private act of consuming constitutionally protected information, courts have permitted jurors to consider reading history that shocks and offends sensibilities. But to do so diverts jurors' focus from the elements of the crime charged. Undoubtedly, defendants have paid a heavy price where perverse reading habits were unfairly determinative of serious criminal convictions.

It may be easier for a prosecutor to portray a defendant as repulsive, but, given our commitment to universal civil liberties, we should exclude reading-history evidence and thereby require the government to respect defendants' cognitive rights. Prosecutors undoubtedly can rely on the multitude of other weapons in their arsenals to prove each case objectively, no matter how arduous.