



***HOW ADDICTION EXPOSES  
THE FLAWS IN CHARACTER  
EVIDENCE***

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# Historical Concerns with Character Evidence

- Jurors would automatically infer:
  - *“Once a thief, always a thief.”*
  - *“Once a thief, you deserve to be punished now.”*
- Reflects due process: presumption of innocence and double jeopardy concerns, but allowing in character evidence found not to violate 5<sup>th</sup> or 14<sup>th</sup> Amendment (412-415)

# Current Rule in U.S. FRE 404

- “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted *in accordance* with the character or trait.”

- Character evidence has been called “*the most important evidentiary issue* in contemporary criminal practice.”
  
- Yields more published decisions than any other part of the rules of evidence (federal and state)
  
- In many jurisdictions character evidence provides **the most frequently litigated issue in criminal appeals** as well as the **most likely basis for reversal**.
  - Edward J. Imwinkelried, *Uncharged Misconduct*, CRIM. JUST. 6, 6, Summer (1986).

# Why is Teneille jittery and speaking so fast?



**Situational attributions**—  
She didn't get any sleep  
last night and drank too  
much coffee



**Dispositional attributions**— She's hyperactive and skittish;  
Fundamental Attribution error: ignore environment and situation, preferring stable explanations from traits

■ “Character is a generalized description of one’s disposition, or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.”

– -*McCormick, Evidence, § 162, at 340*





HISTORICAL  
EMPHASIS  
ON MORAL  
BLAME

# Traits That Travel Through the “Propensity Box” Are NOT Admissible

Defendant has a reputation in the community as an “addict”

CHARACTER TRAIT



DISPOSITIONAL INFERENCE

Defendant was likely using drugs when he drove into pedestrian

IMPERMISSIBLE PROPENSITY INFERENCE



# Past Acts That Travel Through the “Propensity Box” Are NOT Admissible

Eyewitness used drugs in the past

PAST ACT

Eyewitness testified that he  
saw a person who  
used drugs

DISPOSITIONAL  
INFERENCE

Eyewitness was  
using drugs when he  
saw the defendant

IMPERMISSIBLE  
PROPENSITY  
INFERENCE

# Past Acts To Infer MENTAL STATES Are Not Thought to Travel Through the Propensity Box

Defendant had **motive** to steal (to buy drugs) or knew substance was fentanyl

Defendant has sold and used heroin in the past

Defendant is the kind of person who sells and uses drugs

Defendant was likely to have sold or used heroin on another occasion

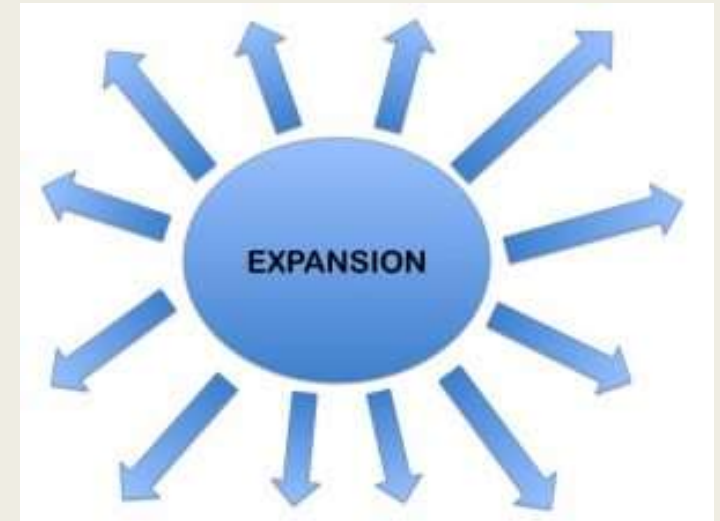


Character no longer refers to shameful, or bad character

Refers to all general traits: good, bad, morally neutral

Refers to all evidence, even evidence the defendant himself introduces

Applies in civil and criminal cases, and to all witnesses and parties



# 404(b) lets In A Lot of Prejudicial “Character” Evidence

- Doctrine of chances
- M.O. evidence
- Psychological diagnoses
- Profile/syndrome evidence
- Statistical evidence

# True Exceptions

- Current rules allow propensity reasoning, if for policy reasons we think the prejudice is ok (sexual offenses, molestation).



CLASSIFYING  
CHARACTER  
EVIDENCE IS  
HARD

# Traditionally, Character Distinguished From:

CHARACTER

PHYSICAL  
TRAITS

MENTAL  
STATES

HABIT

- Habit “is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of habitual acts may become semi-automatic.”

- *FRE 406 Advisory Committee's Note (1972) (quoting McCormick, Evidence, § 162, at 340 [now see John W. Strong, 1 McCormick on Evidence, § 195, at 584-85 (5th ed. West 1999) ]).*



# Character considered more prejudicial and less probative

**Character**

**Habit**

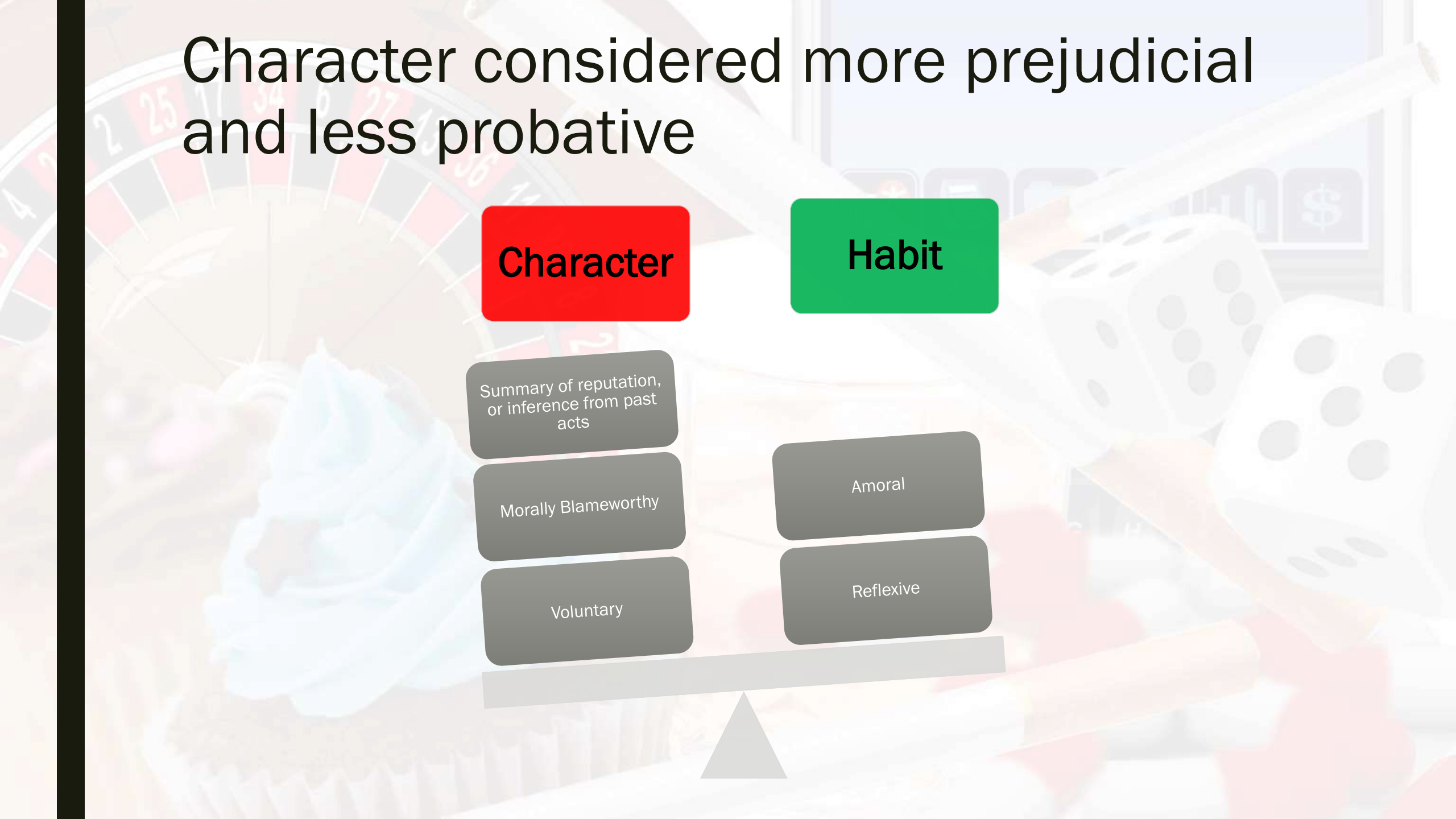
Summary of reputation,  
or inference from past  
acts

Morally Blameworthy

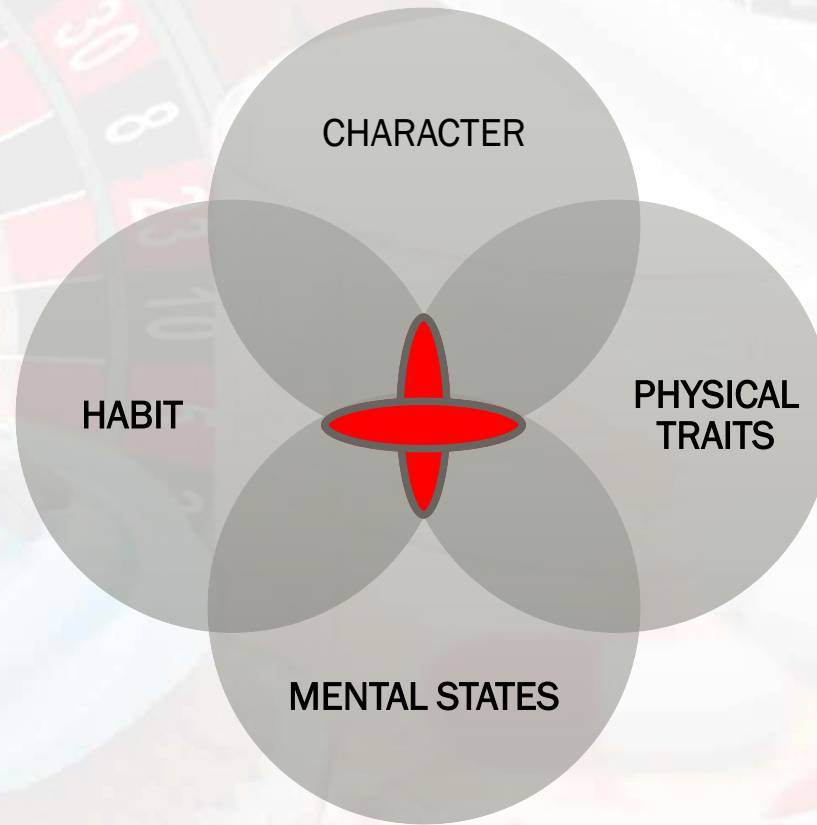
Voluntary

Amoral

Reflexive



# Evidence of addiction straddles these categories





SO HOW HAVE  
MODERN  
COURTS  
TREATED  
EVIDENCE OF  
ADDICTION?

# Addiction *is* Character Evidence

- Car accident case: “Plaintiff seeks to exclude evidence and argument indicating that Plaintiff is a ‘drug seeker,’ ‘pill popper,’ or other similar reference because of Plaintiff's alleged addiction or improper use of pain medications. Defendants state that they want to introduce evidence of Plaintiff's misuse of pain medications on the issue of Plaintiff's failure to mitigate damages under the theory that Plaintiff does not follow the orders of his treating doctors.
- The Court finds that evidence and argument regarding Plaintiff's addiction or misuse of pain medications is improper character evidence prohibited by Rule 404.”

- *Douglas v. Zachry Indus., Inc.*, 2015 WL 12838969, at \*3 (M.D. Fla. Sept. 1, 2015)

# Addiction *is* Not Habit Evidence

- In civil case, pedestrian was killed by driver while walking in the middle of the road. Defense argued decedent was comparatively more at fault because she was drunk and had a drinking problem. Plaintiff's counsel argued that this was improper; defense argued that it was "habit" evidence. Court said it was **not** habit evidence.

# Addiction often comes in as “motive”

- “Evidence of defendant's methamphetamine use on the morning of the killing and for the previous eight or so years was relevant to defendant's angry state of mind when he stabbed Nava and his motivation for the stabbing. ...A defendant's anger toward the victim can provide motive to kill...The evidence now challenged was not simply bad character evidence, and it was relevant and admissible for the purpose of explaining a source of, and the intensity of, defendant's anger.”

- *People v. Vasquez-Zapata*, WL 4257189, at \*9  
(Cal. Ct. App. Aug. 12, 2016)

# Addiction is not character evidence

- Defense counsel asked “[H]ow long has your mother been addicted to drugs?” State argued this was impermissible character evidence; defense counsel stated, “I haven't asked any questions about character. I've asked about knowledge of physical problems and whether or not she has an addiction. That's all.”
- DISSENTING JUDGE: {¶ 27} “[A]ddiction is a recognized disease... And nothing in the record indicates that Richart possessed any specialized knowledge on the subject of drug addiction. Therefore, I do not believe that Richart was competent to diagnose appellant as a drug addict. Rather, I believe that Richart could testify only that appellant displayed some of the character traits commonly associated with drug addiction; i.e., character evidence. Therefore, I believe that Richart's testimony was indeed character evidence and, as such, “triggered” Evid.R. 405(A).”
  - State v. Green, 2009-Ohio-5199, ¶ 11, 184 Ohio App. 3d 406, 411, 921 N.E.2d 276, 280

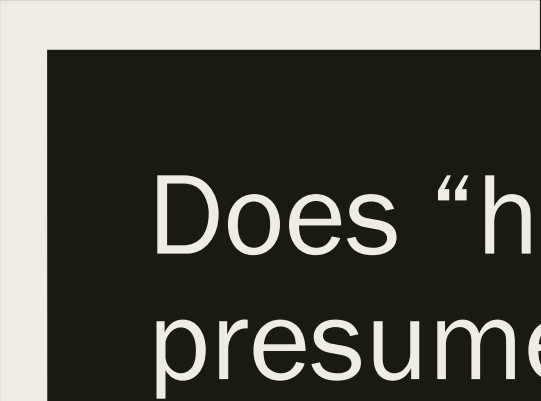
# Addiction May Be Habit

- Evidence concerning physician's use of marijuana was not admissible, in medical malpractice trial; witness could not testify as to actual firsthand knowledge of physician using marijuana during the week prior to physician's treatment of patient, witness formed a belief that physician had used marijuana around the time of patient's procedure based on her observation of his past conduct, and at the time of trial habit evidence was not admissible to prove action in conformity therewith.
  - Bloxam v. Berg, 230 S.W.3d 592 (Ky. Ct. App. 2007)



# Habitual Stoner?

- “[C]ourts have correctly been ‘reluctant to admit evidence that a person is a ‘habitual drunk’ or has a habit of reckless driving [or smoking a joint every morning] [because] such evidence may be more prejudicial than probative with respect to the issues in the case.” In this case, the prosecutor used the term in just this inflammatory manner when he declared: “You're just pretty much a one joint morning [sic] and one joint at night, that's just your habit.”
  - Burchett v. Com., 98 S.W.3d 492, 496 (Ky. 2003)



# Does “habit” presume behavior is amoral?

- “It is easy to recognize the prejudice to the defendant if the prosecutor is permitted to attach the label of ‘habit’ to his actions. *E.g.*, John Doe has the ‘habit’ of watching pornographic videos after work in front of his minor daughters. Or, John Doe has the ‘habit’ of beating his wife on the weekends. Simply characterizing the defendant's actions as a ‘habit’ attaches excessive significance in the minds of jurors...The label becomes a scarlet letter.”
  - Burchett v. Com., 98 S.W.3d 492, 496 (Ky. 2003)

# Courts are not sure how to treat modern evidence of addiction

- SUD is a reflexive / compulsive disease
- SUD is physical – genetic risks and changes visible in brain
- SUD drug-seeking behaviors are somewhat predictable
- Drug use is a specific response to a particular stimuli
- BUT addiction is still thought of as immoral; so does morality control?

# What's the bigger issue here?

- Lots of probative (relevant) evidence is being excluded when it's not that prejudicial
- Lots of prejudicial evidence is being admitted for another purpose (and the limiting instructions can't be followed)
- Judges are confused

# We must Revise Character Evidence Rule

- 404 is too broad; We are no longer preventing the particular kind of prejudice that the rule sought to avoid
- 404 is too narrow; 404(b) allows in too much prejudicial evidence that cannot be limited through instruction
- Rather than have categorical exclusion of “character evidence,” employ discretionary reverse 403, employ moral blameworthiness to return rule to its attribution error roots
- Likely to have less appeals
  - *Permissive rather than mandatory rule*
  - *Sliding scale rather than categorical*
  - *Acknowledges variance in results, but less fight over threshold definitions and more of a fight on the merits of obvious stigma to defendants and prejudice*

# RECAP

Without reference to the morality of the trait in question, the distinction between habit and character evidence falls apart.

Evidence of addiction highlights this.

Judges are ringing their hands over the definition of “character” in cases where there is not likely to be a prejudicial attribution error.

We are going to see many more errors as OUD arises in litigation of all types

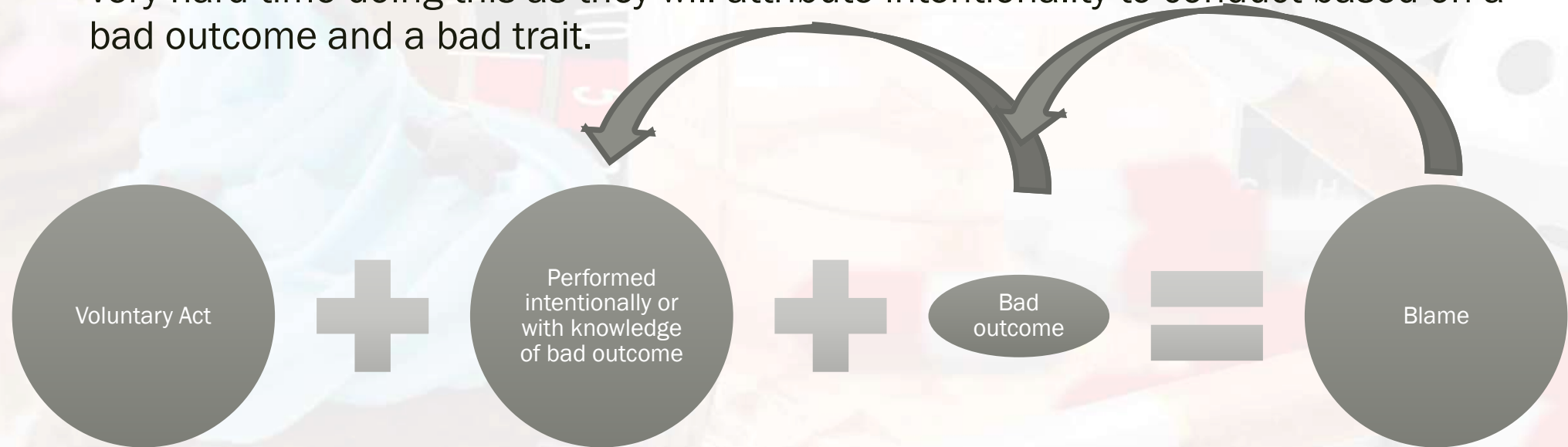
\*\*Limiting instructions will not work where trait is highly stigmatized.



THANKS!  
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# Limiting Instructions Will Not Work

- Normally jurors instructed to use evidence for its allowed, non-propensity purpose
- If trait in question is highly stigmatized and morally blameworthy, jurors will have a very hard time doing this as they will attribute intentionality to conduct based on a bad outcome and a bad trait.





# Past Acts That Travel Through the Statistical “Propensity Box” Are USUALLY NOT Admissible at Guilt Phase

Defendant previously convicted of possession of fentanyl

PAST ACT

77% of drug offenders will offend again

DISPOSITIONAL INFERENCE???

Defendant was likely to have committed this drug offense

IMPERMISSIBLE PROPENSITY INFERENCE

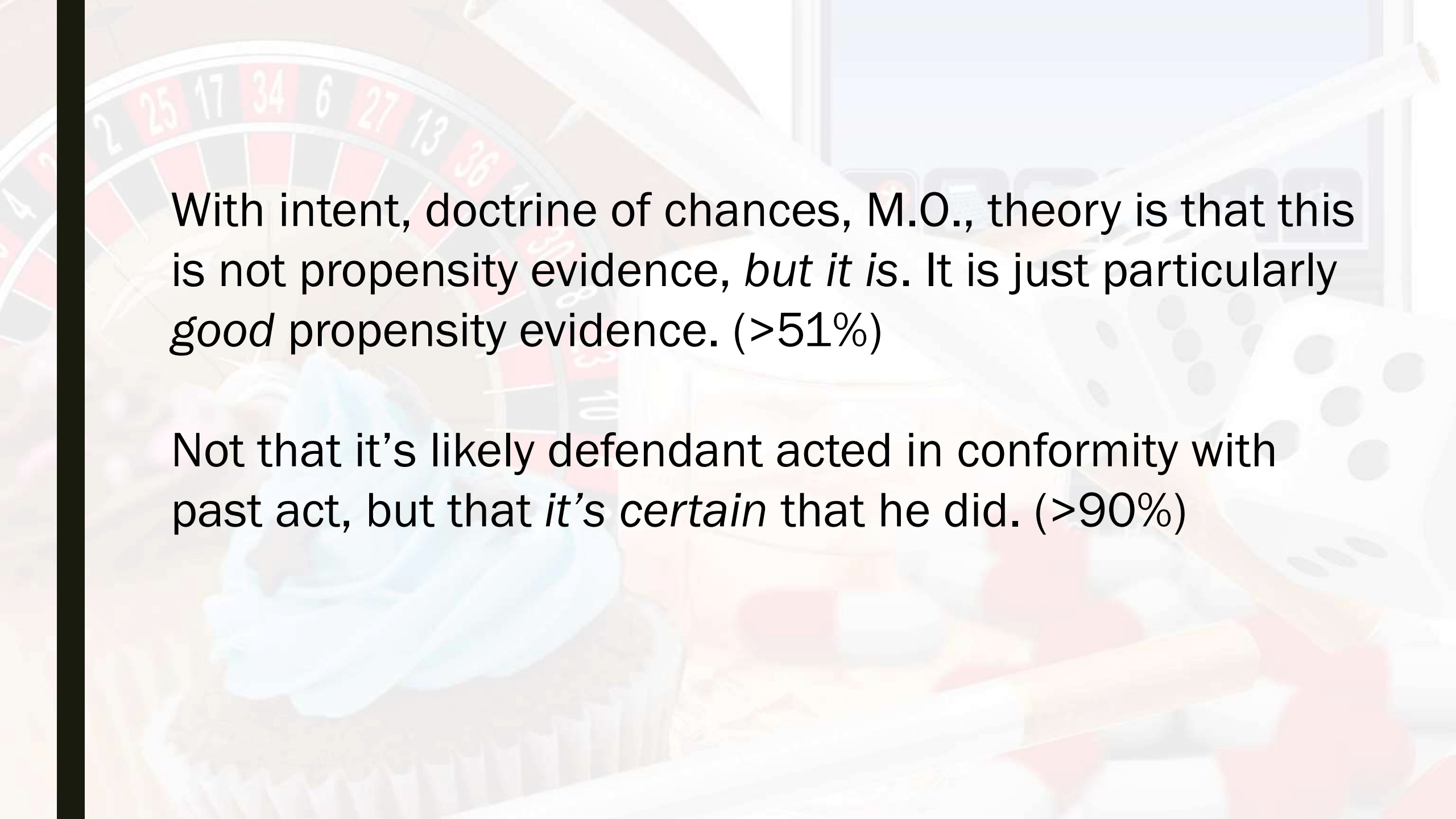
# Doctrine of Chances – relies on propensity reasoning, but allowed

- The Brides case; what are the odds that the third wife “accidentally” died in the bathtub, too? VERY low. But this is just really strong propensity evidence.
- 9 children in woman’s care died of accident → smothering
- “The doctrine of chances is “a theory of logical relevance that ‘rests on the objective improbability of the same rare misfortunate befalling one individual over and over.’”  
State v. Lopez, 2018 UT 5, ¶ 50



# Character evidence can be VERY probative

- Evidence that someone had 4 times before stolen OxyContin from his parents, to prove that on this occasion he probably stole the OxyContin
- Evidence that someone has bullied women he met online through a dating app, to prove that he did it on this occasion
- Evidence that someone had cheated on his tax returns 5 times before, to prove that he probably did it on this occasion
- Evidence that someone drugged women he invited over for career advice before, to prove that he also did it on the evening of the crime charged



With intent, doctrine of chances, M.O., theory is that this is not propensity evidence, *but it is*. It is just particularly good propensity evidence. (>51%)

Not that it's likely defendant acted in conformity with past act, but that *it's certain* that he did. (>90%)