

REPUTATION EVIDENCE IN THE AGE OF INSTAGRAM

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ABSTRACT

This Essay explores the reliability of reputation evidence. Specifically, the Essay examines the historical characterization of reputation evidence as reliable based on the construct of an in-person community where individuals can interact in a manner that allows the community to casually observe an individual over an extended period of time. As contemporary notions of community have moved away from the in-person construct, courts must be ready to evaluate an individual's reputation in their social media communities.

Arguably, social media communities allow individuals to share curated versions of themselves, which can undermine the reliability of reputation evidence. However, in-person communities are subject to the same reliability challenges because individuals are able to construct their public image for a given social or professional setting. Courts should either allow for the admission of reputation evidence from a social media community or reconsider admitting reputation evidence as reliable evidence when the individual's reputation flows from an in-person community.

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INTRODUCTION

This Essay questions the Federal Rules of Evidence's rationale that reputation evidence is relevant and reliable evidence of the character of a witness. Perhaps now, more than at any other time in modern history, reputation seems to be inherently unreliable as modern interactions between people operate regularly in the online, remote, and social media context.¹ By way of example, consider the role of the social media site Instagram.² Instagram allows users to interact through the posting of photo and video content with users "following" other users, adding comments to posts, and "liking" posts.³ Instagram also permits users to access various filters to alter the posted images, including filters that create false backgrounds or altered physical images.⁴

Through remote interaction, users on Instagram develop social relationships, even romantic relationships, with other users based on the content posted on the site—this occurs despite the known use of various image-altering filters.⁵ To the extent Instagram users form a community through posted materials, "likes," and comments, the members of the community engage in social interaction using a curated, self-created version of themselves.⁶ Thus, the user is known only by managed content and not through casual, regular interaction in an established community over a meaningful period of time.⁷

Under the common law of evidence, reputation evidence is more relevant and reliable than evidence of specific instances of conduct because reputation evidence is

1. See Hanh Nguyen, *From "Love Is Blind" to "The Circle," the New Breed of Reality TV Reformulates How We Connect*, SALON (Feb. 27, 2020, 10:00 PM), <http://www.salon.com/2020/02/27/love-is-blind-the-circle-love-island-reality-tv-shows-algorithm/> [https://perma.cc/9BND-HRDT] ("Love is Blind" . . . is based on the premise that you can build an 'intense, emotional connection' with someone solely by having conversations with them . . . 'The Circle' is . . . about building popularity through social media prowess. Eight strangers are housed in separate apartments and can only interact through their voice-activated screen on a platform known as The Circle. There, they create profiles, text each other, and play games. But they don't meet face[—]to[—]face . . .").

2. See William Antonelli, *A Beginner's Guide to Instagram, the Wildly Popular Photo-Sharing App with Over a Billion Users*, BUS. INSIDER (Dec. 14, 2020, 12:14 PM), <http://www.businessinsider.com/what-is-instagram-how-to-use-guide> [https://perma.cc/647L-P5HJ]. Instagram is a photo- and video-sharing social networking service owned by Facebook, Inc. *Id.* Instagram allows users to upload photos and videos to the service, which can be edited with various filters and organized with tags and location information. *Id.* An account's posts can be shared publicly or with pre-approved followers. *Id.* Users can browse other users' content by tags and locations and can view trending content. *Id.* Users can also "like" photos and "follow" other users to add their content to a feed. *Id.*

3. See Valeriya Safronova, *Instagram Is Now a Dating Platform, Too. Here's How It Works.*, N.Y. TIMES (Dec. 21, 2017), <http://www.nytimes.com/2017/12/21/style/instagram-thirst-traps-dating-breakups.html> [https://perma.cc/N8X3-B976] ("Paying a compliment on Instagram is as simple as liking a few photos.").

4. Tim Walker, *How To Use Filters To Improve Your Instagram Photos*, VERGE (Feb. 26, 2020, 4:15 PM), <http://www.theverge.com/2020/2/26/21154769/instagram-photo-filters-editing-camera-how-to> [https://perma.cc/E52T-3WTK].

5. See Safronova, *supra* note 3.

6. Whenever possible, the author has used the third person form of pronouns in this Essay to avoid assigning gender when gender is otherwise irrelevant to the discussion.

7. *Cf.* *Michelson v. United States*, 335 U.S. 469, 477 (1948) ("The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as 'the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect.'" (quoting *Badger v. Badger*, 88 N.Y. 546, 552 (1882))).

based on first-hand observations over time, occurring in a small, close-knit community of individuals.⁸ However, this reliability construct for reputation evidence is based on outdated notions of communities and social interaction.

This Essay explores the question of whether reputation evidence can continue to function as reliable evidence in the current social context or whether reliance on reputation evidence serves as another relic where cultural change has outpaced law.⁹ Section I reviews the portions of the relevance rules that allow character or character trait evidence to be admitted through testimony regarding a person's reputation, focusing with greater depth on Federal Rule of Evidence 405.¹⁰ Section II examines the historical basis of the use of reputation as a proxy for character evidence, then discusses the current social context for reputation in remote and online communities. Section III argues that because drastic changes in social engagement have altered the construct of community that underlies reputation evidence, reputation evidence should either no longer serve as a proxy for character when character evidence is admissible under the Federal Rules or social media communities should be understood to meet the foundational requirements of the Federal Rules.¹¹

I. REPUTATION EVIDENCE UNDER THE FEDERAL RULES OF EVIDENCE

The focus of this Essay is reputation evidence as addressed in Federal Rules of Evidence 404(a)(2), 405, and 608.¹² These Rules allow for certain character evidence of parties and victims through opinion and reputation evidence.¹³ Part I.A addresses the general rules regarding reputation evidence under the Federal Rules. Part I.B discusses reputation evidence in greater detail in the context of Rule 405(a).

A. Overview of the Federal Rules Addressing Reputation Evidence

Rule 404 contains the general prohibition against using evidence of a person's character or character trait "to prove that on a particular occasion the person acted in

8. *Id.*; see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 22B FEDERAL PRACTICE & PROCEDURE § 5264 (2d ed. 2020) ("Reputation is simply a cumulation of ordinary perception-testimonies, heard . . . [,] gathered, and reduced to a single implied assertion, which assertion is now reported to the tribunal by the witness who perceived the cumulative assertions." (quoting HENRY JOHN WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 431 (3d ed. 1937))).

9. See Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race To Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH & POL'Y 239, 247 ("[L]awyers and legal scholars frequently comment on the law's inability to keep up with technological change."). See generally Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171 (1993) (discussing the intersection of law and social change).

10. FED. R. EVID. 405.

11. The author drafted this Essay in the early months of 2020, completing the drafting weeks before the onset of the novel coronavirus and the comprehensive switch to online interaction. Since March 2020, people have been drawn even further online into both personal and professional interactions, creating opportunities for interaction that were underutilized or disfavored when compared to in-person interaction in the days prior. See Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), <http://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html> [<https://perma.cc/29MP-ZAZV>]. The arguments made in this Essay regarding reputation in the context of social media communities are amplified in the context of remote interaction.

12. FED. R. EVID. 404(a)(2), 405, 608.

13. See *id.*

accordance with the character or trait.”¹⁴ Rule 404(a)(2) provides an exception to this general prohibition in criminal cases for evidence of a defendant’s or a victim’s pertinent trait.¹⁵ A simple illustration of the general operation of this exception involves a criminal defendant charged with a violent crime (i.e., aggravated assault) who defends her case with allegations that her victim was actually the aggressor in the conflict, and thus she was acting in her own defense. Rule 404(a)(2)(B) allows the defendant in this hypothetical to offer evidence of the victim’s alleged pertinent trait—a trait for violence—to support her defense.¹⁶ Rule 404(a)(2)(A) also allows the defendant to offer evidence of her pertinent trait—a trait for peacefulness—to further her defense.¹⁷ However, Rule 404 does not prescribe the form of this evidence.¹⁸

Rule 405 provides that “[w]hen evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion.”¹⁹ However, inquiry into relevant specific instances of a person’s conduct is only allowed on cross examination; thus, the defendant in the aggravated assault case can only introduce pertinent trait evidence about herself or her alleged victim through reputation or opinion evidence and not through witness testimony about her own or the victim’s specific conduct.²⁰

Rule 608(a) provides parallel content, stating 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, or by testimony in the form of an opinion about that character.”²¹ The Advisory Committee Notes following Rule 608 make it clear that the use of opinion and reputation evidence as a means of proving the character of witnesses under Rule 608 is consistent with Rule 405(a).²² Rule 608 further bars the admission of testimony regarding specific instances of the testifying witness’s conduct unless the testimony is offered on cross examination and is probative of the testifying witness’s character for truthfulness or untruthfulness.²³ Like Rule 405, Rule 608 limits relevant

14. FED. R. EVID. 404(a)(1).

15. FED. R. EVID. 404(a)(2)(A)–(B).

16. *See* FED. R. EVID. 404(a)(2)(B). This example assumes that character traits for violence or peacefulness are pertinent in a criminal case involving allegations of violent assault.

17. *See* FED. R. EVID. 404(a)(2)(A).

18. *See* FED. R. EVID. 404(a) advisory committee’s note to 1972 proposed rules (“This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof.”).

19. FED. R. EVID. 405; *see also* WRIGHT & MILLER, *supra* note 8, § 5262 (“In Federal Rule of Evidence 405, the Advisory Committee departed from the pattern of the Model Code and the Uniform Rules to follow the Proposed Missouri Code. The Missouri drafters separated questions of admissibility from procedural questions such as the manner of proof; the Model Code and the Uniform Rules did not. So under the federal rules, Federal Rule of Evidence 404 controls admissibility and Rule 405 governs procedural questions.”).

20. FED. R. EVID. 405 advisory committee’s note to 1972 proposed rules (“The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character.”).

21. FED. R. EVID. 608(a).

22. FED. R. EVID. 608 advisory committee’s note to 1972 proposed rules.

23. FED. R. EVID. 608(b).

character evidence to evidence in the form of reputation or opinion. Rule 405 controls the type of reputation evidence admissible under Rules 404(a)(2) and 608.

B. Reputation Evidence Under Federal Rule 405

Rule 405, titled “Methods of Proving Character,” flows from contemporary common law determinations that reputation and opinion testimony are suitable methods to explore character when character evidence is circumstantial and, thus, of lesser importance in the case.²⁴ Witness testimony regarding specific instances of conduct may be more convincing evidence of a given person’s character or character trait; however, evidence of specific instances of conduct is more likely to confuse, waste time, or arouse prejudice because evidence of one act demands stricter proof and more factual specificity.²⁵ In fact, allowing evidence of specific instances of conduct directly threatens Rule 404’s general prohibition of using character evidence to show propensity.²⁶ Evidence of a specific instance of conduct illustrates only a person’s conduct on one day, during one event, thereby risking the unfair prejudice from a jury’s conclusion that this one action indicates how that person will act at all other times.²⁷

The Rules allowing character evidence have disfavored specific act evidence in favor of reputation and opinion evidence, although the former is in some ways more probative than the latter.²⁸ The traditional common law approach favored reputation and opinion evidence, with Wigmore²⁹ describing reputation evidence as “the secondhand, irresponsible product of multiplied guesses and gossip which we term ‘reputation.’”³⁰ Opinion evidence was traditionally deemed superior, as it was most likely drawn from personal knowledge and informed belief.³¹ Scholars have suggested that reputation evidence, the lesser sibling of opinion evidence, was allowed because it is, in effect, opinion evidence in disguise.³² Both reputation and opinion evidence are deemed to flow from personal knowledge based on observations and interactions with the relevant actor.³³

24. See FED. R. EVID. 405; see also WRIGHT & MILLER, *supra* note 8, § 5262 (“The third traditional method of proving a person’s character is circumstantial—inferences about a person’s character that the jurors might draw from specific instances of his conduct that evince some character trait.”).

25. FED. R. EVID. 405 advisory committee’s note to 1972 proposed rules.

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

27. See FED. R. EVID. 405 advisory committee’s note to 1972 proposed rules.

28. See *id.*; see also FED. R. EVID. 404, 608.

29. John Henry Wigmore was a twentieth-century evidence scholar who authored the leading treatise on evidence in 1904–1905. The treatise has been updated periodically by other scholars with its most current iteration, the fourth edition, published posthumously and titled “Evidence in Trials at Common Law.” See WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW (Arthur Best ed., 4th ed. Supp. 2021) [hereinafter WIGMORE ON EVIDENCE]; see also THE NEW WIGMORE: A TREATISE ON EVIDENCE (David P. Leonard et al., eds., 3d ed. Supp. 2020).

30. FED. R. EVID. 405 advisory committee’s note to 1972 proposed rules (quoting WIGMORE ON EVIDENCE, *supra* note 29, § 1986).

31. See *id.*

32. *Id.*; see also Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 203–07 (2017) (discussing the admissibility of reputation and opinion evidence).

33. See WRIGHT & MILLER, *supra* note 8, §§ 5264–65.

In order for reputation or opinion evidence to be admissible, the testifying witness must testify to the context for observing and interacting with the person whose character is at issue.³⁴ Evidence of character is usually limited to testimony by a member of the community in which the person lives, works, or spends a substantial portion of her time.³⁵ In determining whether the testifying witness can testify about reputation or opinion, the court considers not only the geographical community but also the “relationships with others which arise where a [person] works, worships, shops, relaxes, and lives.”³⁶ Courts have stressed that continuous personal observation is indispensable as foundation for reputation evidence.³⁷ Although courts have not asserted definitive parameters for a witness’s observation of another person, limited opportunities for observation due to short time frames or intermittent interactions have disqualified witnesses from offering reputation testimony.³⁸ In fact, some courts have rejected reputation testimony by persons who were deemed merely “social friends” of the defendant because those persons could not offer sufficient foundation as to the defendant’s reputation in the community.³⁹

Under Rule 405, courts have relied heavily on in-person interaction and observation in establishing the proper foundation for reputation testimony.⁴⁰ However, this emphasis on in-person communities does not effectively translate in a world of social media-based online communities.⁴¹

II. REPUTATION AS A PROXY FOR CHARACTER

Reputation has traditionally been viewed as something socially constructed, outside of one’s own actions, by persons with whom one regularly interacts.⁴² It has been said that “[c]haracter is what a person really is; reputation is what he seems to be.”⁴³ Part

34. *Id.* (“Before the trial judge can allow a reputation witness to testify, the proponent must show that the witness has personal knowledge of the reputation to which she will testify. The witness must heard [sic] the person’s character discussed. But these discussions need not be with all or even a majority of the folks in the relevant community.”).

35. *E.g.*, *United States v. Augello*, 452 F.2d 1135, 1139 (2d Cir. 1971).

36. *United States v. White*, 225 F. Supp. 514, 522 (D.D.C. 1963).

37. *See, e.g.*, *United States v. Straughan*, 453 F.2d 422, 426 n.2 (8th Cir. 1972).

38. *See, e.g.*, *United States v. Trollinger*, 415 F.2d 527, 529 (5th Cir. 1969) (holding that the district court neither abused its discretion nor erred in refusing to admit the testimony of a character witness who had not known the defendant for longer than one month and who did not live in either of the cities in which defendant had “recently resided”). *But see* *United States v. Gloria*, 494 F.2d 477, 482 (5th Cir. 1974) (holding testimony admissible when the testifying character witness had spent nine months out of a two-year span living in another community, away from the defendant).

39. *See, e.g.*, *United States v. Pincourt*, 159 F.2d 917, 920 (3d Cir. 1947).

40. *See* FED. R. EVID. 405 advisory committee’s note to 1972 proposed rules (“The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting.”); *see also* WRIGHT & MILLER, *supra* note 8, § 5264 (describing definitions of reputation that have been deemed appropriate under Rule 405).

41. *See* David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 271–72 (2010).

42. *Id.* at 267.

43. *Id.* at 268 (quoting Von Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 33 (1904)).

II.A discusses the origins of reputation as a legal construct. Part II.B explores the relationship between reputation evidence and social media.

A. *The Roots of Reputation Evidence*

In the context of defamation law, the relevant injury is an injury to reputation specifically, not to character.⁴⁴ Thus, the external, social nature of reputation is particularly important in assessing the nature and amount of the harm.⁴⁵ Character, by contrast, is deemed to capture the actual nature of a person rather than just what an individual presents to the community.⁴⁶ If reputation is externally constructed and character is based on one's internal development, why does evidence law use reputation evidence to establish relevant character traits?

In discussing reputation historically, media law scholar David Ardia wrote:

Throughout most of human history, reputational information was created through direct observation and communicated with word of mouth. Face-to-face sharing of “gossip” was the primary means of transmitting this information signal. . . . For example, early American communities relied on town criers, individuals who traveled—mostly on foot—from town to town carrying news and gossip. In those days, information traveled only as fast as existing transportation systems allowed. Communities were relatively small and insular; most people knew each other and information was filtered through personal interactions.

While nineteenth-century America could be described as networked in the sense that there were roads and courier systems that connected villages and cities, society did not begin to transcend physical space until the widespread use of railroads and telegraphs. These tools offered efficient transportation and “revolutioniz[ed] the way humans communicated, leading to what one historian has termed the ‘Victorian Internet.’” With the telegraph came “national” newspapers that could print and distribute news from all over the country. Radio further connected communities, and broadcast television ushered in the age of mass media. People and information thus became increasingly mobile.⁴⁷

In the emerging context of community, judges debated the role of reputation in impeachment inquiries at trials governed by the common law rules of evidence.⁴⁸ The early common law rules of evidence acknowledged that a testifying “witness could be impeached with evidence of . . . her reputation for morality or for truth and veracity,” which “formalized the functional overlap between reputation and credibility.”⁴⁹ This relationship moved the credibility inquiry further away from an inquiry into a person's actual character, deferring instead to reputation which is, at best, a “stand-in” for character.⁵⁰ Reputation could be “wholly disconnected from the actual character of the

44. *See id.* at 262.

45. *See id.*

46. *Id.* at 268.

47. *Id.* at 270–71 (alteration in original) (footnotes omitted).

48. *See* WRIGHT & MILLER, *supra* note 8, §§ 5261, 5264; *see also* FED. R. EVID. 405, 608.

49. Simon-Kerr, *supra* note 32, at 177.

50. *Id.* at 178.

witness” because reputation relies not on actual behavior but rather on whether a person is perceived to comply with the relevant community’s social norms.⁵¹

The early years of the twentieth century entailed a revived evidence debate regarding reputation evidence, which pit scholars who advocated that reputation evidence was merely a replay of the disfavored practice of allowing a witness to testify to her personal knowledge of a person’s character against those who argued inquiries into specific instances of conduct would be confusing and time wasting.⁵² The argument against using reputation evidence to demonstrate character focused on the unreliability of reputation.⁵³ At its essence, a person’s reputation is a collection of impressions about the person, formed by both in-person observation and by statements made and repeated by others.⁵⁴ The concept of reputation as a relevant indicator of character derives from a provincial attitude that people know each other through ongoing casual interactions in close communities.⁵⁵

In the early twentieth century, living and working communities were geographically isolated.⁵⁶ Most people interacted with neighbors, professionals, and friends within their own community, and the parameters of community were defined by boundaries set by geography, religion, or culture.⁵⁷ In a small American town, one could rely on a person’s reputation for truthfulness because that person had interacted directly with personal, social, and commercial entities in the community. This concept of community reputation remained relevant after the adoption of the Federal Rules, although it somewhat expanded to include reputations based on business or other nonsocial communities.⁵⁸ Under the Federal Rules, a witness testifying to reputation must first offer sufficient foundation information on the nature of the community, and the testifying witness and the subject of the reputation evidence must operate within that community and interact with each other.⁵⁹ Until the advent of remote communication

51. *Id.*

52. *See id.* at 178–79 (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1982 (1st ed. 1904)).

53. *See id.* at 180 (“In moments of candor, some judges acknowledged that the focus on reputation simply obscured the real source of a witness’s opinion.”); *see also id.* at 204 (“Not surprisingly, recent critiques of impeaching with opinion and reputation testimony argue, among other things, that it provides a direct way to import social hierarchy, or status, into the courtroom. It offers a ‘measure of one’s standing in a community or group.’” (footnotes omitted) (quoting Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 403 (2010))).

54. *See* WRIGHT & MILLER, *supra* note 8, §§ 5264–65.

55. *See* Ardia, *supra* note 41, at 270–71.

56. *See id.* at 271.

57. *See id.* at 270–72 (explaining how the concept of community expanded geographically through the development of technology such as railroads and telegraphs); *see also* Simon-Kerr, *supra* note 32, at 174–77 (discussing the influence of protecting a woman’s chastity as an influencing force in the evolution of impeachment evidence).

58. *See* WRIGHT & MILLER, *supra* note 8, § 5264.

59. *See* United States v. Kahan, 479 F.2d 290, 293 (2d Cir. 1973) (“Prior to introducing character testimony defendant must establish the witness’ acquaintance with defendant, the community and his circle of acquaintances.”), *rev’d on other grounds*, 415 U.S. 239 (1974). As an example, consider testimony regarding a real estate broker’s reputation for truthfulness within the New York City commercial real estate industry. Despite the size of New York City, the commercial real estate community involves a finite set of actors who interact

and virtual communities, the idea of in-person interaction within a given community formed the basis for character assessment.⁶⁰

When evaluating the strengths and weaknesses of reputation evidence as a proxy for character, the preference for reputation evidence makes sense if the interactions are in person. The Federal Rules limit the admissibility of evidence of specific instances of conduct to cross examination because this evidence is deemed, among other things, prejudicial.⁶¹ The argument is that seeing a person act one way, for a moment, in an isolated scenario, is not as reliable as reputation evidence based on a broad collection of observations and experiences.⁶²

For example, consider a person in a neighborhood who has been a peaceful, respectful neighbor for over ten years, never demonstrating any tendency towards violence. One day, however, that neighbor aggresses towards a driver who is speeding through the neighborhood streets despite noticing that children are playing. If another longtime neighbor observes this interaction, the behavior may seem adverse to the first neighbor's character, but the behavior does not necessarily undermine the neighbor's overall good reputation in the neighborhood. However, an outsider observing this behavior, having no prior knowledge of the neighbor, may determine the neighbor has an aggressive, perhaps even violent, character.

Further assume that other people living in the neighborhood know the neighbor has a child who was once hit by a speeding car and was seriously injured. Given these facts, the neighbor's behavior reconciles with the neighbor's reputation. Whereas, the one-time observer, the neighborhood outsider, lacks that information and thereby lacks context for the neighbor's actions. This gap in information is the source of potential prejudice in allowing evidence of specific instances of conduct as character evidence.⁶³

The Federal Rules favor the collection of genuine in-person interactions that amount to reputation over the observation of a single event.⁶⁴ In the context of traditional communities, like the aforementioned neighborhood, the Rule's rationale supports the reliability of the evidence—steady interaction over years is a more reliable indicator of character than a given event on a given day. This deference, however, makes little sense when the community does not allow for genuine in-person interaction.

B. Reputation and Social Media

The construct of the in-person community, a residential neighborhood or a business community of peers and colleagues, still exists as the mainstay of personal interaction in

through deals and professional organizations. This interaction creates a foundation for reputation assessment as brokers interact regularly and discuss their deals.

60. See, e.g., *United States v. Pincourt*, 159 F.2d 917, 920 (3d Cir. 1947). One example of how remote interaction has changed communities is remote work, with teams in industries such as banking and tech working on projects from diverse geographic locations without ever meeting in person and, in some cases, without ever talking directly by phone. Despite this distance-team approach, persons in the industry form opinions about coworkers and individuals develop reputations among peers and subordinates. Remote interaction during COVID-19 has further expanded the creation of online communities.

61. See FED. R. EVID. 404(a)(2), 405(a), 608(b).

62. See FED. R. EVID. 405 advisory committee's note to 1972 proposed rules.

63. See *id.*

64. See *id.*

society. For the most part, individuals form relationships through common interests connected to family, work, and personal behavior.⁶⁵ However, as people expand their use of social media, they limit the amount of observable in-person interaction and the amount of information that is shared through face-to-face interaction with others.⁶⁶ The expansion of available channels for human interaction not only diminishes the role of in-person interaction but also promotes the creation of online communities, particularly through social media.

Social media interaction has progressed far beyond the incarnation of Facebook, which was conceived as a social connection site for students at Harvard University.⁶⁷ Early social media, such as the first generations of Facebook and MySpace, were created to allow for interaction without in-person meetings.⁶⁸ The original version of Facebook, “TheFacebook,”⁶⁹ allowed students to create and access each other’s profiles, thereby facilitating connections without waiting for an in-person meeting at a party, class, or event and without the entry-level social interaction of meeting, talking, and asking for contact information or another meeting.⁷⁰ This new form of social interaction allowed for more expeditious and selective community building—Harvard students could create social groups based on what was posted on TheFacebook without any initial in-person

65. Cf. *Michelson v. United States*, 335 U.S. 469, 477 (1948) (“The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as ‘the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect.’” (quoting *Badger v. Badger*, 88 N.Y. 546, 552 (1882))).

66. See Ardia, *supra* note 41, at 271–72 (“[C]ommunities, and the individuals that comprise them, are no longer constrained by physical and social space. Virtual communities have sprung up, social networks have bloomed, and individuals are rushing onto the Internet to engage, argue, and disparage each other. Indeed, it is now possible for someone to have formed an opinion about me on the other side of the world without ever meeting me.”).

67. Alexis C. Madrigal, *Before It Conquered the World, Facebook Conquered Harvard*, ATLANTIC (Feb. 4, 2019), <http://theatlantic.com/technology/archive/2019/02/and-then-there-was-thefacebookcom/582004/> [https://perma.cc/WU68-G2ZE].

68. See *id.*; see also Pete Cashmore, *MySpace, America’s Number One*, MASHABLE (July 11, 2006), <http://mashable.com/2006/07/11/myspace-americas-number-one/> [https://perma.cc/LY4K-83RN]. In the early 2000s, several social interaction sites such as Facebook, MySpace, and Friendster were vying for user popularity. Although MySpace still exists, Facebook emerged as the dominant platform for social media interaction. See H. Tankovska, *Global Social Networks Ranked by Number of Users 2020*, STATISTA (Feb. 9, 2021), <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [https://perma.cc/2PM3-KRCL].

69. Mark Zuckerberg’s online directory was originally called “TheFacebook” before being rebranded to simply “Facebook” in September 2005. See Anne Sraders, *History of Facebook: Facts and What’s Happening*, STREET, <http://www.thestreet.com/technology/history-of-facebook-14740346> [https://perma.cc/X4Q6-8UKT] (last updated Feb. 18, 2020).

70. See Madrigal, *supra* note 67 (“Fifteen years later, Harvard students and faculty still remember those early months watching the new network generate a new kind of reality, one where your online activity became permanently entangled with your offline self, where a relationship wasn’t real unless it was posted to Facebook, where everyone was assumed to have an online presence.”).

vetting.⁷¹ The design allowed for ease of interaction, candor in information sharing, and an overall screening of people and groups.⁷²

TheFacebook was born in Mark Zuckerberg's dorm room in February 2004, seventeen short years ago.⁷³ In the time since its inception, people have become savvy users of Facebook and many other social media platforms that allow users to connect and create relationships. Internet user growth reached 3.969 billion in 2019.⁷⁴ Social media growth has followed suit. According to the data analytics platform Statista, Facebook reported 2.740 billion users as of January 2021.⁷⁵ Other community-focused social media sites have also grown and user-generated content sites, such as YouTube, Instagram, Pinterest, and Snapchat, reported record growth in 2019.⁷⁶ Approximately 3.6 billion people are using social media networks, and the number of social media users is expected to grow as mobile social media access increases.⁷⁷

As a result of growth in social media access and use, communities are no longer constrained by physical boundaries.⁷⁸ People can form opinions about others in an online community without ever meeting face-to-face, speaking on the phone, or even speaking the same language.⁷⁹ When a user creates a social media profile, other users who merely read the posted written material (perhaps with the aid of a translation program) and view the posted images develop opinions about the profile making user. The user's reputation in the online community can and will be formed by the profile information which, in most cases, is carefully selected and presented by the user.

Even in its earliest days, user profiles on Facebook were "a carefully constructed artifice, a kind of pixelated Platonic ideal of our messy, all-too organic real-life selves who don't have perfect hair and don't spend their weekends snuggling up with the latest

71. *Id.* (explaining that Harvard students accessed TheFacebook to see other students in their classes, to create links in a profile to an interest, to like a favorite band, and to link from one profile to the profiles of others who share the same interest).

72. *See id.* ("[A] relationship [wasn't] official until [it was] Facebook official.").

73. *Id.*

74. Joseph Johnson, *Global Number of Internet Users 2005-2019*, STATISTA (Jan. 27, 2021), <http://www.statista.com/statistics/273018/number-of-internet-users-worldwide/> [<https://perma.cc/RS8H-TQ4W>]. The United Nations estimated the world population to be 7.7 billion in 2019. Dep't of Econ. & Soc. Affairs, Population Div., *World Population Prospects 2019: Highlights*, at 5, U.N. Doc. ST/ESA/SER.A/423 (2019).

75. Tankovska, *supra* note 68.

76. *See id.* As of January 2021, YouTube had 2.291 billion users, Instagram had 1.221 billion users, Pinterest had 422 million users, and Snapchat had 498 million users. *Id.*

77. *Id.*

78. Ardia, *supra* note 41, at 271–72 ("Indeed, it is now possible for someone to have formed an opinion about me on the other side of the world without ever meeting me. In fact, that person may not even speak the same language or have anything in common with me, but if she has access to the Internet, she can read my writings or engage in a conversation with others about me.").

79. *Id.*; *see also* Barry Wellman, Janet Salaff, Dimitrina Dimitrova, Laura Garton, Milena Gulia & Caroline Haythornthwaite, *Computer Networks as Social Networks: Collaborative Work, Telework, and Virtual Community*, 22 ANN. REV. SOC. 213, 231 (1996) ("On-line relationships are based more on shared interests and less on shared social characteristics. Although many relationships function off-line as well as on-line, CSSNs [(Computer Supported Social Networks)] are developing norms and structures of their own. The [sic] are not just pale imitations of 'real life.'").

Garcia Marquez.”⁸⁰ Users on Instagram and other user-generated content sites post photos and videos to indicate who they are and what they are doing at a given time. Posted pictures of a user with a celebrity, out for the night, or on an exotic vacation are not posted as real-time pictorial diaries of daily life. Rather, those images are most often curated and selected to show the user’s exciting and dynamic lifestyle.⁸¹ Other users make assumptions about the user’s personal and professional life based on these incidental posts, rather than actual observation of the user in those settings or in other less dynamic settings.⁸² Moreover, users tend to believe what they see on another user’s page or profile, even when the images posted on social media do not appear to match the user’s real-life appearance.⁸³

Users develop opinions about other users even on sites like Instagram and Snapchat, where individuals commonly employ the use of image filters. Filters can be applied to photos to make drastic changes to physical appearance or to alter the backgrounds of photos.⁸⁴ An Instagram user may have used filters and other editing tools to shape the body and face, to enhance eye, skin, and hair color, or to alter their appearance as to age.⁸⁵ Some Instagram influencers have been revealed as using filters and photoshop techniques to enhance travel photos, including using the same cloud background in photos that were purported to be from different geographical locations or using an outdated photo of the New York City skyline in photoshopped posts.⁸⁶

80. Madrigal, *supra* note 67 (quoting Amelia E. Lester, *Show Your Best Face*, HARV. CRIMSON (Feb. 17, 2004), <http://www.thecrimson.com/article/2004/2/17/show-your-best-face-lets-talk/> [https://perma.cc/S7Z7-7HHP]).

81. See Alex Hern, *Instagram Is Supposed To Be Friendly. So Why Is It Making People So Miserable?*, GUARDIAN (Sept. 17, 2018, 5:30 AM), <http://www.theguardian.com/technology/2018/sep/17/instagram-is-supposed-to-be-friendly-so-why-is-it-making-people-so-miserable> [https://perma.cc/J956-D4M2].

82. See Ardia, *supra* note 41, at 276 (“[I]n face-to-face encounters much information about the self is communicated—often involuntarily—in ways incidental to the main purpose of the interaction. This depth and richness is lacking in most online encounters” (footnotes omitted) (citing ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 208 (1959))).

83. See *id.* at 312 (“Fascinating work is, however, being done by psychologists and formation theorists who are examining how information is assimilated and beliefs are formed. What this work has revealed is that belief information is a complicated process and that even when the facts themselves are not disputed, interpretations of them can vary.” (footnotes omitted)).

84. See, e.g., Lydia Hawken, *INSTA-SHAM: These Ridiculous Instagram Photos Prove Just How Fake Social Media Really Is*, U.S. SUN (Nov. 28, 2019, 7:04 AM), <http://www.the-sun.com/lifestyle/101822/these-ridiculous-instagram-photos-prove-just-how-fake-social-media-really-is/> [https://perma.cc/RV34-AJKG]; Walker, *supra* note 4.

85. See Jia Tolentino, *The Age of Instagram Face*, NEW YORKER (Dec. 12, 2019), <http://www.newyorker.com/culture/decade-in-review/the-age-of-instagram-face> [https://perma.cc/8P9T-HMZ9].

86. See Rebecca Husselbee, *Instasham: Instagram Influencer’s Fake Travel Pics Revealed When Followers Notice the Exact Same Cloud Pattern in All of Her Snaps*, SUN (Aug. 30, 2019, 12:39 AM), <http://www.thesun.co.uk/news/9825798/instagram-influencers-fake-travel-pics-revealed-exact-same-cloud-pattern-snaps/> [https://perma.cc/2RPZ-BGZC]; Sloane Hunter, *Instagram Influencer Accused of Lying to Her Followers with Fake Travel Images*, 2OCEANSVIBE NEWS (July 25, 2017), <http://www.2oceansvibe.com/2017/07/25/instagram-influencer-accused-of-lying-to-her-followers-with-fake-travel-images/> [https://perma.cc/6DSP-MK5D].

In an era with approximately 3.6 billion social media users,⁸⁷ the question is whether reliable reputation evidence can be created when the primary interaction between individuals is online, through a social media site. Reputation, as we have understood it for centuries, is an inherently social construct.⁸⁸ A person's reputation does not exist in a vacuum—it is created through relationships with others.⁸⁹ Although individuals can influence reputation through their own actions, reputation itself is formed through social interactions that lead others to assess individuals by means outside of their control.⁹⁰ The social construct of reputation has principally relied on the context of in-person observation and interaction, which limits an individual's ability to influence the opinions of others.⁹¹ This limited influence increased the reliability of reputation evidence thus making reputation a suitable proxy for character. However, when individuals interact remotely—for example, through social media platforms that allow image manipulation—they wield great influence over how they are perceived in a given community of users.⁹² Users' ability to influence their image as observed by the social media community undermines the overall reliability of reputation evidence gleaned from social media interaction.⁹³

III. REEVALUATING THE ROLE OF REPUTATION AS A PROXY FOR CHARACTER

Individuals have always presented different versions of themselves in different settings.⁹⁴ They may behave in one way in a conservative work setting and another way when with family and friends on a weekend night.⁹⁵ In online communities, a person may

87. Tankovsha, *supra* note 68.

88. See *supra* Section II for a discussion of the historical development of the concept of reputation. See also Ardia, *supra* note 41, at 267–68.

89. See *Michelson v. United States*, 335 U.S. 469, 477 (1948) (“The evidence which the law permits is not as to the personality of [the] defendant but only as to the shadow his daily life has cast in his neighborhood.”); see also Ardia, *supra* note 41, at 267–68.

90. See David Paul Horowitz, *ALL in the Family*, N.Y. ST. B. ASS'N J., Oct. 2011, at 18, 18 (quoting *People v. Bouton*, 50 N.Y.2d 130, 138–39 (N.Y. 1980)). See generally Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996) (explaining that even false information about a person can be damaging to their reputation).

91. Ardia, *supra* note 41, at 270–71.

92. See, e.g., Hawken, *supra* note 84; see also Walker, *supra* note 4.

93. See, e.g., Ian Bogost, *These Are the People in Your Neighborhood*, ATLANTIC, July/Aug. 2018, at 20, 20–21. Consider a site like Nextdoor that allows posting of user-generated content and commentary, much like Instagram, between neighbors who live in the same geographical area. See *id.* Neighbors who can and do interact in-person also engage through social media and one form of interaction informs the other. *Id.* If asked to testify about a neighbor's reputation in the community, users of Nextdoor who read the neighbor's posts as well as engage with the neighbor in person may not be able to offer a reliable foundation for reputation evidence as the foundation for the relevant community is unclear.

94. See Ardia, *supra* note 41, at 306–08 (“As a consequence, our reputational spheres are expanding coincident with the reductions in privacy we are experiencing in the online and offline worlds.”).

95. *Id.* at 307–08 (“Identity, therefore, is better understood as a continuum. On one end is true anonymity, in which no personally identifying characteristics are disclosed. At the other end is fully disclosed personal identification. In the middle of this identity continuum is pseudonymity, an especially common form of identity on the Internet. The Internet lends itself to pseudonymous identity because users can generally determine for themselves how much identifying information they disclose when they access services on the Internet. It is also

put forth one version of themselves on Facebook, another on Instagram, and a completely different version on a professional social media site like LinkedIn.⁹⁶ An individual with multiple online identities may have even greater influence on their reputation as one can limit the version of themselves that a given community observes.⁹⁷ For example, an individual may appear as a caring neighbor on Nextdoor, a social media site for neighbors, while engaging in racially offensive speech in a private Facebook group. In the in-person context, “the fewer people who know us, or the less they know about us, the smaller our reputational spheres will be.”⁹⁸ However, if a person can control the reach of their identity within a given online community, they can develop a broad reputational sphere based on a small amount of curated information, a strategy less available through in-person interactions.⁹⁹

Social media interaction also allows one individual to belong to various and diverse communities, even those with conflicting values and competing interests. Historically, a community was defined by a set of shared social norms with members of the community bound together by action within those norms.¹⁰⁰ Those who do not share the community’s social norms are viewed as “marginal or deviant and, therefore, as unworthy of inclusion within the community.”¹⁰¹ Thus, inclusion in the community indicates behavior within the social norms and therefore forms implicit approval of the good character of persons possessing a positive reputation in the community.

The utilization of reputation as evidence of character relied on the type of homogeneous communities that existed before online communities and social media became a ubiquitous part of social interaction.¹⁰² Most of the world’s population now live in a fully networked society including multiple communities and subcommunities, “many of which are ‘diffuse, sparsely knit, with vague, overlapping, social and spatial boundaries.’”¹⁰³ Reputation evidence requires foundation, which demonstrates the testifying witness has personal knowledge of a person’s reputation in the relevant community. The next two Parts deconstruct the foundation requirement for in-person

relatively easy and costless to maintain multiple pseudonymous identities on the Internet and change them at will . . .”).

96. See *id.* at 308 (“Individuals typically have more than one online identity, each with a distinct reputation. These identities may be associated with different merchants, online forums, social networking sites, and virtual worlds.”).

97. *Id.* (“In online communities that permit pseudonymity, individuals may be required to identify themselves to the system administrator, but to others within the community they merely expose a pseudonym identifier to which the site will associate a set of attributes or credentials. As a result, a single individual will likely have multiple reputations to go along with their multiple identities. While someone may have good reasons for needing multiple pseudonyms, this can create problems with authentication and reliance in the context of reputation.”).

98. *Id.*

99. See *id.* at 276.

100. See Lidsky, *supra* note 90, at 38–39.

101. *Id.* at 39.

102. See Ardia, *supra* note 41, at 270–72.

103. *Id.* at 302 (quoting Barry Wellman, Anabel Quan-Haase, Jeffrey Boase, Wenhong Chen, Keith Hampton, Isabel Isla de Díaz & Kakuko Miyata, *The Social Affordances of the Internet for Networked Individualism*, 8 J. COMP. MEDIATED COMM’N, Apr. 1, 2003, at 3).

reputation evidence¹⁰⁴ and demonstrate the inherent unreliability of reputation evidence based on either an in-person and online community.¹⁰⁵

A. Deconstructing the Evidentiary Foundations for Reputation Evidence

Rule 405 allows a judge to admit testimony about a person's reputation.¹⁰⁶ The Rule itself restricts the actual form of the reputation evidence to "testimony" rather than documentary or other circumstantial evidence.¹⁰⁷ Thus, when reputation evidence is admitted, it is in the form of a witness testifying to a person's reputation in the relevant community.¹⁰⁸ The testifying witness must demonstrate they have personal knowledge of the person's reputation.¹⁰⁹ This witness demonstrates the requisite personal knowledge by showing that they share the same community with the person and have had a relationship with the person and community for such a length of time as to speak with authority regarding the person's reputation in that community.¹¹⁰ Personal knowledge of a person's reputation cannot be "based on personal observations of character" or "on rumors about specific instances of conduct."¹¹¹ Rather, the testifying witness must have actually heard the person's reputation discussed.¹¹² The fact finder determines whether the preliminary facts regarding a witness's personal knowledge are sufficient for the witness to testify as to reputation.¹¹³ The presiding judge can only exclude a witness testifying to reputation if the foundation is insufficient as a matter of law.¹¹⁴

Generally speaking, the proper foundation for reputation evidence requires evidence of a shared community, such that the reputation knowledge is based on community perceptions, and evidence of both duration and recency with regard to the testifying witness's association with the person and their community.¹¹⁵ Courts require that both the community and temporal requirements be met in laying the requisite foundation.¹¹⁶

Under the common law, judges originally restricted reputation evidence to a person's reputation in the community in which they lived.¹¹⁷ As society advanced and people were able to form residential and professional communities, the courts allowed reputation evidence regarding a person's reputation in the community in which they

104. See *infra* Part III.A.

105. See *infra* Part III.B.

106. FED. R. EVID. 405; see also WRIGHT & MILLER, *supra* note 8, § 5264.

107. See FED. R. EVID. 405(a).

108. See *id.*

109. WRIGHT & MILLER, *supra* note 8, § 5264.

110. See *id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See *id.*; see also *United States v. Augello*, 452 F.2d 1135, 1139–40 (2d Cir. 1971) (discussing the common law standards under which reputation evidence may be admitted).

116. See WRIGHT & MILLER, *supra* note 8, § 5264; see also *supra* note 38 and accompanying text.

117. See, e.g., *United States v. White*, 225 F. Supp. 514, 521–22 (D.D.C. 1963) (holding that a community includes any relations that arise where a person "works, worships, shops, relaxes, and lives"), *vacated*, 349 F.2d 965 (1965).

worked.¹¹⁸ The Federal Rules allow hearsay statements to be admitted as part of reputation evidence when the statements demonstrate “reputation among a person’s associates or in the community concerning the person’s character.”¹¹⁹ The Rule identifies the proper focus of foundation as the person’s “associates or in the community,” thus allowing foundation to be established through association in nonresidential communities.¹²⁰

The expansion of community from the common law to the Federal Rules was practical as people’s interactions encompassed broader geographical areas.¹²¹ Also, the relevant inquiry in a lawsuit could be more heavily focused on a person’s professional reputation rather than their personal reputation.¹²² The expansion, however, has not included a move toward remote communities or online interaction.

The foundation requirement that the testifying witness have personal knowledge of the person’s reputation in the community has relied on interactions through an in-person community because the reputation is based on observable behavior.¹²³ In order to allow a social media community to serve as the foundation for reputation testimony, courts must not only apply the basic rules of relevance but they must also determine that the testifying witness can acquire reliable evidence of reputation through a remote construct such as social media.¹²⁴ The reliability questions raise two subordinate issues: (1) what is a social media community, and (2) is there any way to determine the reliability of reputation evidence in an online environment that allows for image and content alteration.

To argue that a person’s social media community is all of Facebook is the same as arguing that reputation evidence can be based on a person’s reputation as a citizen of the world, country, state, or even city. The community is too broadly defined. However, within those geographical units, people subdivide and create smaller communities through neighborhoods, work environments, and groups of shared interests. Relevant reputation evidence flows from a person’s reputation in that smaller, defined community, which allows for the requisite personal knowledge.

On a social media site, a similar subdivision can occur when users create smaller communities within the site by using privacy settings and other technological tools to effectively “gate” the social media community.¹²⁵ A community of breeders of a rare breed of dog may create a private community that allows users to share relevant

118. *See id.*

119. FED. R. EVID. 803(21); *see also* WRIGHT & MILLER, *supra* note 8, § 5264.

120. FED. R. EVID. 803(21).

121. *See* Ardia, *supra* note 41, at 261–63.

122. *See* WRIGHT & MILLER, *supra* note 8, § 5264. Judges must rely on the general principles of relevance to determine whether reputation in a given community is relevant to the case at issue. For example, a person’s reputation as nonviolent in her professional community of tax attorneys may not be relevant in a criminal case where she was accused of assaulting a partner.

123. *See id.*

124. *See id.* For example, a person’s reputation in a Facebook group for Australian shepherd dog breeders must be relevant to underlying facts of the lawsuit.

125. *See* Jennifer Saranow, *Some Social-Media Sites Are Gated Online Communities*, WALL STREET J. (Mar. 24, 2008, 3:27 PM), <http://www.wsj.com/articles/SB120636382602459179> [<https://perma.cc/95M2-QSZ3>].

information. This construct flows from commonality through a shared interest, which is at the core of most communities.¹²⁶ Likewise, geographically adjacent neighbors can create an online community that mirrors their geographical community, in effect creating the social media equivalent of the community requirement at common law.¹²⁷ To the extent the community formed—whether through social media or in a physical space—is cohesive enough to allow a person’s associates to observe behavior and discuss those observations, the community conforms with the generally accepted foundation requirements for reputation evidence.

The more perplexing question regarding community is whether a person is able to develop a reliable reputation in a social media community. If we assume that a person can create a reputation in a social media community, can we likewise assume the reputation is reliable when the basis for the person’s reputation does not allow for any in-person observation? As previously discussed, the common law basis for allowing reputation to serve as a proxy for character is the idea that collective observations and interactions, and a community’s discussion of those behaviors, is inherently more reliable evidence than evidence of a person’s conduct on a given day and time.¹²⁸ The community structure allows for a collective consciousness as to a person’s character.¹²⁹

When applying these precepts to reputation in a social media community, it can be argued that a person’s online image is crafted, as is a person’s communication in the community, eliminating the inherent reliability that flows from the observation of behavior by multiple community members over time. However, the same can be argued about any community. Individuals select their clothing, cars, and other accoutrements of style and life to demonstrate a desired version of themselves. A person may be considered organized and collected at work, always presenting as a “put together” person. Yet, those who know them from the neighborhood may experience the person as someone who cannot keep their home and yard clean and uncluttered. The question of relevant and reliable reputation evidence would have to flow from the relevant community, making evidence of the person’s reputation in another community irrelevant. However, if only evidence of the person’s reputation at work is admissible, that reputation evidence is incomplete and therefore unreliable.

Despite these challenges to reliability, the common law and the Federal Rules allow for reputation evidence from in-person communities.¹³⁰ Because the proponent of reputation evidence can lay the proper foundation for reputation based on an in-person community, despite a person’s ability to craft an image in person, the foundation requirements should also be met when a person develops a reputation in an online community, albeit influenced by filters and other devices that alter images and identities.

The Federal Rules do not offer any specific guidance on the relevant time frame for assessing a person’s reputation.¹³¹ However, courts have rejected certain reputation

126. See Ardia, *supra* note 41, at 302–03.

127. See Bogost, *supra* note 93 (discussing the neighborhood social media app Nextdoor).

128. See *Michelson v. United States*, 335 U.S. 469, 477 (1948).

129. See, e.g., Ardia, *supra* note 41, at 300–02 (analyzing the concept of shared community perspective and the impact of the internet on its role in defamation cases).

130. See FED. R. EVID. 405 advisory committee’s note to 1972 proposed rules; see also *Michelson*, 335 U.S. at 477.

131. See FED. R. EVID. 405; see also WRIGHT & MILLER, *supra* note 8, § 5264.

evidence when the testifying witness is incorporating statements about the charged offense into the assessment of reputation.¹³² For example, under Rule 404(a)(2)(A), the prosecution can rebut reputation evidence regarding a pertinent trait of the defendant after the defendant has offered evidence regarding the same pertinent trait.¹³³ If the defendant has offered evidence that they have a reputation for peacefulness in the relevant community, the prosecution may rebut this evidence with, among other things, evidence that the defendant in fact has a reputation for violence.¹³⁴

However, the prosecution's witness cannot testify to the defendant's reputation at a time after being charged with the current crime of violence.¹³⁵ The court would most likely deem the post-charge reputation evidence as neither relevant nor reliable.¹³⁶ In this regard, the time frame wherein the testifying witness has gained knowledge of a person's reputation must also be relevant to the facts at issue in the case, thereby imposing a temporal requirement to the evidentiary foundation for reputation evidence.

The social media context creates challenges for assessing the relevant time frame for reputation evidence. Online social interaction tends to be more fluid than in-person interaction because social media engagement does not require an in-person meeting. Individuals can be engaged in a social media community all day and all night, sharing volumes of communication and information with some or all members of the community. It can be difficult to determine what events may influence a person's reputation in a social media community at any given time, especially when knowledge of actual events—for example, allegations of a violent crime—may be unknown to the social media community because the crime charged happened in “real life,” outside of the social media community's purview, or because the person uses an alias or screen name while engaging with the social media community.¹³⁷ As such, it could be difficult to determine whether evidence of reputation overlaps with events that may interfere with the evidence's reliability.

However, the same challenges are present when assessing the foundation relevant to establishing reputation evidence from an in-person community. One may know a person at work who has a reputation for being peaceful and kind but who has been charged with assaulting their partner at home. Some people in the work community may know about the domestic abuse charges and others may not. Some may not connect news reports regarding the domestic assault to the work colleague because the formal name in the charge differs from the nickname the person uses at work. Knowledge of the domestic abuse charges may filter into the work community over time, leading to conversation and rumors about the person's character. If a work colleague were asked to testify about the person's reputation as a peaceful person in their professional community, it would be difficult to pinpoint whether the person's reputation was informed by the domestic abuse

132. See, e.g., *United States v. Lewis*, 482 F.2d 632, 641 (D.C. Cir. 1973) (“[S]ince the community's view of the accused's character could well be affected by the gossip which frequently follows on the heels of a criminal charge, his reputation in the community after the charge became publicized might not be a trustworthy index to his actual character.”); see also *WRIGHT & MILLER*, *supra* note 8, § 5264.

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

134. See *id.*

135. See *Lewis*, 482 F.2d at 641; see also *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981).

136. *Curtis*, 644 F.2d at 268–69.

137. See *Ardia*, *supra* note 41, at 307–08.

charge. However, the court-imposed temporal requirement in laying a proper foundation for reputation evidence can be met when the witness testifies that her assessment of the coworker's reputation was not impacted by the domestic abuse charge because the charge was not common knowledge in the work community. Whereas in a social media community, one can pinpoint the moment negative information became available to the community with some accuracy.

B. Reputation Evidence Is Not Reliable Evidence

As the idea of reputation evidence developed over the years, an individual's reputation was defined by those in their same geographical setting, expanded by available communication such as telephone, newspapers, or other modes of information dissemination that seem quaint in the twenty-first century.¹³⁸ To know what a person looked like, one had to see the individual in person or see a print photo of that person. Now, with the internet and its multiple avenues of social interaction, reputation has been disassociated with geography and, to some extent, with communication.¹³⁹ As the historical foundation for reputation evidence has been stripped away by cultural and technological change, the reliability of reputation evidence is similarly dismantled.

Individuals are skeptical, perhaps appropriately so, of a person's online persona. It is difficult to feel secure in one's understanding of another person's character when they have never met that person. Skepticism is enhanced when people also lack in-person knowledge of others in the same community. When individuals interact with each other through social media communities such as Facebook or Instagram, they yield the historical preference for in-person interaction to the advantages of broader, more accessible networks. But that shift in balance should not undermine the ability to assess community reputation.

Reputation evidence itself, without reference to social media communities, is the subject of skepticism and raises issues of reliability and prejudice.¹⁴⁰ Despite its failures, courts and the Federal Rules allow relevant reputation evidence, if properly submitted, because it often serves as the only evidence available to support a given argument.¹⁴¹ Character evidence, whether in the form of pertinent trait evidence under Rule 404(a)(2)(a) or otherwise, is at times critical evidence the defendant can use to raise reasonable doubt.¹⁴² In close cases, where the actual evidence can support a conviction for a violent crime, the defendant's evidence that they have a reputation for peacefulness in the community may be the best evidence to nudge the jury to acquittal. Similarly, when a testifying witness offers eyewitness testimony inculcating the defendant, evidence that the witness has a community reputation as untruthful can offer the jury a basis to question what would otherwise be uncontroverted evidence. Reputation evidence is a nudge at best, but that nudge bears particular importance in close cases and in cases where one side lacks access to proof.

138. Ardia, *supra* note 41, at 270–71.

139. *See id.* at 271–72.

140. *See* FED. R. EVID. 405 advisory committee's note to 1972 proposed rules.

141. *See* United States v. Logan, 717 F.2d 84, 87–89 (3d Cir. 1983).

142. *See id.*

The policies behind reputation evidence support its inclusion in the Federal Rules, even though the evidence itself lacks reliability.¹⁴³ As such, a strict construction of what is required to lay a proper foundation for reputation evidence accomplishes little. In fact, courts have not been strict with the evidentiary foundations for reputation evidence. The Rule drafters have neglected to offer detailed Advisory Committee Notes for Rule 405, arguably signaling that courts are competent to assess foundation without clear guidance from the Federal Rules.¹⁴⁴ As a result, reputation evidence has been largely left to the fact finder to assess and weigh.¹⁴⁵

Although the idea of social media communities and online reputations may seem like a worrisome, inherently unreliable modern construct, the requirements for evidentiary foundation for a social media-based reputation should not be any more stringent than the traditional foundation required for reputation evidence. Many of the criticisms of social media communities have parallels in in-person communities, but judges allow reputation evidence from in-person communities. For example, similar to social media communities, a person can have multiple reputations in multiple in-person communities.¹⁴⁶ Judges also allow reputation evidence from in-person communities despite the fact that a person can craft their identity to appear differently at work than in their residential neighborhood.¹⁴⁷ Arguably, changed appearances through photo filters and other devices used on social media do not lessen the reliability of reputation evidence.

Reputation evidence is unreliable, but it is useful in certain cases. To impose stricter evidentiary foundations on reputation evidence gleaned in full or in part from a social media community would be to overlook the role of reputation evidence in the overall evidentiary scheme. The fear of what is different should not prevent a litigant from utilizing their best avenues of proof.

CONCLUSION

Federal Rule of Evidence 405 allows testimony about a person's community reputation when evidence of a person's character or character trait is otherwise admissible. However, the Rules allowing evidence of a person's reputation in a given community are predicated on the idea that individuals operate principally within in-person communities that allow them to observe each other directly. As such, evidence of reputation develops through unscripted actions that indicate genuine character.

Modern communities, however, have expanded beyond in-person communities, including remote, online, and virtual communities in which persons can alter and craft their identities, their physical images, and their overall personas. Courts may be concerned that interaction through social media communities subverts the nature of

143. See WRIGHT & MILLER, *supra* note 8, § 5262.

144. See *id.*; see also FED. R. EVID. 405 advisory committee's note to 1972 proposed rules.

145. See WRIGHT & MILLER, *supra* note 8, § 5264 ("[I]t appears to us that the trial judge could exclude a reputation witness only if her personal knowledge did not suffice as a matter of law.").

146. See *United States v. Whitmore*, 359 F.3d 609, 613–18 (D.C. Cir. 2004) (providing an example of a defendant who offered evidence of a testifying officer's poor reputation for truthfulness in multiple communities, although the reputation testimony was ultimately not admitted).

147. See, e.g., Ardia, *supra* note 41, at 302–03. But see *Whitmore*, 359 F.3d at 613–18.

reputation evidence because social media communities offer an unreliable basis for personal knowledge of community reputation. However, social media communities raise the same reliability issues present in all reputation evidence. Is the community relevant to the factual inquiry? Does the person engage authentically within the relevant community? Can a witness gain personal knowledge of the person's reputation in the community?

Courts have always questioned the relevance and reliability of reputation evidence but have moderated those concerns due to the greater value of reputation evidence in situations where it is allowed by the Federal Rules and most needed by the litigants. This understanding of the value of in-person reputational evidence should be extended to reputation evidence that flows from the modern construct of community—social media. Otherwise, reputation evidence as a proxy for character should go the way of the dodo,¹⁴⁸ being outpaced by modern life.

148. *Dodo*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/dodo> [<https://perma.cc/84XZ-F9QU>] (last visited Apr. 1, 2021) (defining “dodo” as “an extinct flightless bird” or “one hopelessly behind the times”). The dodo, a flightless bird, went extinct in the early part of the eighteenth century and was the first documented example of human-driven extinction, thus making the dodo an iconic example of extinction in scientific discourse first, then in colloquial discourse. See Samuel T. Turvey & Anthony S. Cheke, *Dead as a Dodo: The Fortuitous Rise to Fame of an Extinction Icon*, 20 HIST. BIOLOGY 149, 149 (2008).