

Common Law S5, Ep. 3: Teneille Brown Episode Script

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Risa Goluboff: On today's show, bad habits: Should they or other evidence about a defendant's character be admitted in the courtroom? We'll be talking to University of Utah law professor Teneille Brown.

Teneille Brown: Judges are just always complaining that they don't know how to apply the character evidence rules, they're complicated. It leads to more acquittals than any other evidence rule. It leads to more reversals than any evidence rule.

[THEME MUSIC UP, THEN UNDER AND OUT]

Risa Goluboff: Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean.

Cathy Hwang: And I'm UVA law professor Cathy Hwang.

Risa Goluboff: We are now in our fifth season of Common Law, and Cathy is back as one of four co-hosts helping to choose and interview guests connected to their fields, ranging from law and psychology, to privacy, to her own specialty, business law. It's a second take on our last season, which was so much fun, we are doing it again.

Cathy Hwang: So I have to confess, our next guest is a little outside of the corporate law world, but I know her from my days at the University of Utah S.J. Quinney College of Law. She's brilliant, and most importantly, she was a great office neighbor.

[LAUGHING]

Cathy Hwang: Her research is interdisciplinary and includes topics at the intersection of law, genetics, neuroscience, medicine and ethics. She's also the director of Utah's Center for Law and Biomedical Sciences.

Risa Goluboff: That sounds terrific. So what are we going to be talking about with her today?

Cathy Hwang: So she has a new paper coming out soon called "Bad Habits."

Risa Goluboff: Guessing it is not about the Ed Sheeran song?

[Ed Sheeran: Wooooohooooo]

[LAUGHING]

Cathy Hwang: It would be funny if her bad habits led to late nights writing this paper. I will not be singing that lyric.

[LAUGHING]

Risa Goluboff: Nor will I!

[LAUGHING]

Cathy Hwang: Everyone is happier — yeah.

Risa Goluboff: This is why we have a podcast and not, say, a musical.

Cathy Hwang: Yeah, exactly.

[LAUGHING]

Cathy Hwang: So her paper is about how evidence rules aren't keeping up with changing ideas about mental illness and human behavior, especially evidence tied to character, which has specific rules about admissibility. Teneille uses addiction as a case study to explore how such evidence is really hard to categorize, given the rising tide of psychological, genetic and environmental explanations for the way that people behave. As a result, whether judges allow such evidence is all over the map and she has her own recommendation for how to fix that problem.

[THEME MUSIC CREEPS IN]

Risa Goluboff: I have to say, it sounds like maybe there's more than one bad habit going on here if there's so much inconsistency. We will be right back with Teneille Brown.

[THEME MUSIC UP, THEN UNDER AND OUT]

Cathy Hwang: Teneille, it's wonderful to see you again, if only online through the series of tubes known as the internet. So thank you for joining us all the way from Utah.

Teneille Brown: Lovely to see you too again, Cathy.

Cathy Hwang: What made you want to research how courts admit evidence about character?

Teneille Brown: Yeah, so it started out with a project on addiction, and I really became interested in addiction through some work I was doing on the opioid crisis, and I was also teaching Evidence. So then at the same time, I realized that these courts who were looking at admitting addiction evidence didn't really know how to treat it. And some were treating it like character and some were treating it – very few were treating it like habit evidence, but then recognizing that it's also a mental illness and that there's this whole body of, of articles and case law that say that mental illness evidence should be treated differently from character and habit. So then I realized this was a separate article I needed to work on.

Risa Goluboff: So you write about several different types of evidence: character evidence, habit, physical traits and psychological profile evidence. What ties these together?

Teneille Brown: These are all kinds of propensity evidence, which is a really technical term. That just means because you acted one way before, you're going to act that way again. And so all of these types of evidence are propensity evidence and only one type is prohibited, and that's character evidence.

Risa Goluboff: Can you explain what we mean by "character evidence"?

Teneille Brown: So character evidence is evidence of someone's trait or disposition when you use it to say that they acted in conformity with it on another occasion. So once a thief, always a thief.

Risa Goluboff: And character evidence is generally not admissible?

Teneille Brown: That's right. So there is this ban on character evidence that's hundreds of years old, and it comes from this place of expecting people to be able to change. So just because you did something bad before, it doesn't mean that you're a bad person. And what you're being charged with today is entirely different. So it's really about holding the prosecution to their burden of proof and making sure that they prove that whatever you've been accused of, that you are guilty of in this case. And that jurors and judges don't just assume because you've done this bad thing before, you must be guilty of what you've been accused of today. But the way that the rule has expanded, it's really become untethered from that original justification.

Cathy Hwang: So what's the current situation with character evidence?

Teneille Brown: So character evidence is a huge mess. Uh, I came to this topic of character evidence from some work I've done on the Utah Evidence Advisory Council, where we advise the Supreme Court on evidence rules. And judges are just always complaining that they don't know how to apply the character evidence rules, they're complicated. It leads to more acquittals than any other evidence rule. It leads to more reversals than any evidence rule. So it's a really complicated rule and teaching it is hard. Students find it very counterintuitive, and they see a lot of cases that seem to be inconsistent with one another.

Cathy Hwang: So Teneille, you gave us an example in the paper of how evidence that toes the line might be admitted in a real court. And I thought it would be helpful if we each kind of take on the role of prosecutor, defense counsel, and judge, so that listeners can get an understanding of how this might play out in real life.

Teneille Brown: That sounds fun.

Cathy Hwang: So maybe Risa, you could be the prosecutor and I'll be the defense and ...

Risa Goluboff: Sure.

Cathy Hwang: And Judge Brown, I guess you'll be the judge.

Teneille Brown: That sounds great.

[DRAMATIC MUSIC COMES IN]

Risa Goluboff: Mr. Young, were you aware that when the defendant uses meth, he gets violent and sometimes beats his wife?

Cathy Hwang: Objection, impermissible character evidence.

Risa Goluboff: Your Honor, this isn't character evidence. I only wanted to ask about how well Mr. Young knows the defendant to vouch for his character.

Teneille Brown: Okay, I will allow it. The jury is instructed only to use the answer to assess the witness's awareness of the defendant's character, not to suggest the defendant has actually done these things, or is a bad person.

[DRAMATIC MUSIC ENDS]

Risa Goluboff: Tell us what's wrong with what we just read and how that goes in court.

Teneille Brown: Right, as you can probably catch from hearing this testimony, it's a very fine distinction between hearing that someone is aware of someone maybe doing this in order to be a good character witness, to be able to vouch for their character, and then the distinction of them having done it or not. Because if I'm a good character witness, you're insinuating that I should know about something someone has done, which assumes they did it, and the jury is not going to be able to make this distinction between knowledge that you just are supposed to know to assess someone's character, versus the fact that the underlying things that you know about actually occurred. And that's the kind of instruction that judges often give jurors and expect them to follow. But because we automatically draw these character inferences and we're so quick to do so, it's really, I think, kind of magical thinking to think that jurors can follow that instruction.

Cathy Hwang: Just saying for myself, I would have trouble making that distinction, especially in a high-pressure situation where you're serving as a juror and so much is going on and you're trying to pay attention.

Teneille Brown: Right, and there's tons of social psych data to support this, that if you hear that someone hit another car on the way home and they were speeding, and you try to assess what their blame and legal responsibility is, if you hear that they were speeding because they were

rushing home to give an anniversary present to their parents, people think that they are less guilty of the car accident and the reckless driving, than if you hear that they were speeding because they needed to go meet someone to get drugs. And those should be irrelevant to the car crash and the blame associated for the car crash. But it's because we automatically draw these character inferences and we're very quick to assume that people's actions speak to their character.

Risa Goluboff: Just to be clear, character evidence is not admissible, but character witnesses are admissible?

Teneille Brown: That's right, and here's the problem, because there's this different proof burden that's required. So if, if you are someone who actually beats his wife and they are being accused of that, then obviously that needs to be proved beyond a reasonable doubt. But for these character witnesses, there the burden of proof is much lower; it's just preponderance. So you could say something that they've never been charged with, something that they've never been convicted of and say, "Have you heard that Cathy steals from the grocery?"

Cathy Hwang: Slander!

Risa Goluboff: Never!

Cathy Hwang: Your honor. That's hearsay.

Teneille Brown: Never would happen, but that seed is still planted in the jury's head and they still get to hear, "Oh, Cathy steals from the grocery store." And they're definitely going to then interpret everything in the future that Cathy says through that lens of someone who steals.

Risa Goluboff: Got it.

Cathy Hwang: Hmmmm.

Risa Goluboff: In your paper, you describe this broad historical arc over hundreds of years, right? Hundreds of years ago, testimony about character wasn't permitted. And then what was admissible really changed over time as inferences about character became less tied to behavior. And then, in 1975, of course, the Federal Rules of Evidence started explicitly banning the admission of signs of character as

evidence. So, that's the really skinny version. Can you fill that in and tell us more about why and how that changed over this long period of time?

Teneille Brown: Yeah, sure. So I, I think it is important to understand the history here.

Risa Goluboff: I love hearing that, as a historian.

Teneille Brown: Oh, I think it's super important. Yeah, and fascinating and I really could have spent another paper just on that. What you see from the history is that the common law judges from the 1700s and the 1800s, they really understood something about folk psychology, which is that jurors are really quick to draw character inferences. And so that initial ban on character evidence, they got correct; that people do immediately infer that someone has a negative character trait when they hear that they've done something bad in the past. So that's why we banned character evidence. But then fast-forward to 1975 when the Federal Rules were adopted, and that connection between immoral traits and character traits was severed. And for reasons that are not very well developed either in the record and the debate around the Federal Rules or in the advisory committee notes, they decided to not tether character to morality. So it's no longer the case that the past thing that you did had to be a bad thing or that it had to be a good thing. It could be a totally neutral thing. And so that really expands the reach of the rule. And there are tons and tons of things that are character that should not be admitted, but that are admitted because they just fly under the radar and that nobody recognizes that this implicates character. And then on appeal, the judge realizes – the appellate judge – “Oh right, this is character evidence.” And then sometimes it's harmless, so no problem. But if it gets at something that is moral, it often can lead to reversal.

Cathy Hwang: You also write that around the same time that the Federal Rules on character evidence were being adopted, the way we think about behavior was also changing.

Teneille Brown: That's right. The common law judges thought of behavior in very clear, black-and-white ways. It was either voluntary or it wasn't. This was either something that was habit or it wasn't. This was either character or it wasn't. And things like addiction really complicate those classifications and distinctions because we see that mental illness and a lot of things – a lot of behaviors that flow from mental illness – are not neatly put into those buckets of character, habit, physical trait.

Cathy Hwang: You focus on addiction as the case study for your paper, so the categories of how addiction can be sorted – is it impermissible character evidence? Is it permissible habit evidence? Or is it psychological profile evidence? They kind of result in different consequences. So can you talk a little bit more about that?

Teneille Brown: The starting place is that when juries hear about a witness or a defendant having an addiction, they're very quick to then infer that this is a bad person who likely intended bad things and is not credible. So it's a really stigmatizing piece of evidence, which is why I used it as a case study. Uh, but it could be admitted as habit evidence, and it has been admitted as habit evidence. In fact, it's kind of the classic habit when most of us think of drug addiction, it is the most quintessential habitual behavior. It's compulsive. If you get to the point of truly having a substance use disorder, it's often not voluntary. The compelled behavior is incredibly automatic and reflexive. It's very hard to interrupt that drive, the seeking of drugs. So it could be habit evidence, and judges are starting to introduce it as habit evidence, which means it gets in super easily, and then the jury is left to infer all of those negative things, right?

Cathy Hwang: So unlike character, evidence, habit evidence is permissible.

Teneille Brown: That's right.

Risa Goluboff: And what about psychological profile evidence? That's another category that you write about.

Teneille Brown: Psychological profile evidence is a huge mess because courts just treat it – they don't know how to treat it. Some say it's character evidence, some say it's not.

Risa Goluboff: And what's in that category of psychological profile evidence?

Teneille Brown: So what's in that category? Things like battered women's syndrome, uh, whether or not someone might have pedophilia or be a sexually violent predator. It also could include things like specific psychiatric disorders, psychopathy — whether someone acts in a way that is consistent with psychopathy. And it's not thought by a lot of people to implicate character because it's about things you take off the

shelf and diagnoses you take off the shelf and you just say, this person is acting in a way that's reasonable given what we know about people who have been battered, that this is reasonable behavior for someone who's been battered. So some people think that doesn't implicate character, but of course it does, because if that individual hadn't been battered, then it wouldn't be relevant evidence, right? Why are you telling us about battered women's syndrome unless this particular individual had been battered? So psychological profile evidence is usually not treated as character evidence, but some courts do find that it violates the character evidence principles, but all of these categories that overlap, in my paper, I argue that the reason they overlap and cause all this confusion is because the rules have stopped focusing on morality and what morality does to sort evidence into prejudicial or not.

Cathy Hwang: It's interesting, you seem to be studying these sort of gray spaces where different areas of the law collide and you're trying to make sense of that.

Teneille Brown: I like to take these things that exist on a spectrum. In fact, a lot of the research that I do has to do with taking biological or kind of behavioral constructs that exist on a spectrum, and then where the law has to kind of put these things into discrete buckets and call it. And it's, it's often hard to map that biology onto legal categories. Like for example, I mean even something like, um, are you dead or are you alive? Like in biology, that is actually something that exists on a continuum and it's not black and white, but the law needs to know are you dead or are you alive? So they have to call it. The same with voluntary action. This is something that exists on a continuum, but the law has to say it was either voluntary or it wasn't. We don't get into the kind of discussion in the gray area about that spectrum. So I picked these different kinds of evidence that really exist on a spectrum with physical trait evidence being the kind of least controversial. This is stuff like your weight, your height, your strength. That's not even treated as propensity evidence, but it is because you're saying, because you are strong, you are able to do this thing before that required strength, and therefore on another occasion you could have also done that thing that required strength. But that's super easily admitted. There are even no special evidence rules for it. And then habit evidence, which is the reflexive involuntary kind of stuff that also easily gets in.

Cathy Hwang: It's actually interesting as well, because I think our understanding of addiction's also evolving and it doesn't really fit into buckets that neatly anymore, right? So as recently as a few decades

ago, people thought with addiction, right, you should just stop — stop drinking, stop doing meth, just stop.

Teneille Brown: Totally. And some people still think that, right? It's a disease of the will that this is something that is morally blameworthy because you could choose to not use drugs. And then a lot of the neuroscience and psychology of addiction have shown that that's — and actually the opioid crisis itself has shown — that anyone can become addicted. It's not about socioeconomic class, it's not about education, it's not about intelligence. So yeah, definitely the way we think about addiction has changed and it's evolved from being something that we blame people for purely, to recognizing that, you know, 10% of people can become addicted regardless of who they are, just based on their previous trauma and their genes and it has very little to do with moral failing.

Risa Goluboff: You mentioned before what goes on in the trial differs a lot from what happens on appeal, right?

Teneille Brown: Right.

Risa Goluboff: Trials are fast-moving. There are a lot of people, there's stuff being introduced. There are, you know, objections being adjudicated on the fly and then this leads to all kinds of problems on appeal. So can you talk a little bit more about what that looks like?

Teneille Brown: Yeah. So what happens in trial is, I mean, you have to in the moment, recognize that something is character evidence. And because historically this was always bad character, if something is kind of neutral or maybe even positive, the attorneys, even the opposing counsel may not recognize that this is character. So it gets in and the jury may make the inference that maybe even the attorney who let that slip wanted them to make. And so then what often happens on appeal is they try to figure out whether it made a difference. So was it a harmless error or not? And if it was something that implicates the morality, especially of a criminal defendant, it's much more likely to not be found to be harmless. So that's why it leads to so many reversals.

Risa Goluboff: I feel like there's often a kind of whiggish teleological story about our criminal law that it gets better over time. And that part of what makes it get better is our increased understanding of causation, our increased understanding of human psychology, of human

physiology, and that we've decriminalized a lot of behaviors, that in the past would've been seen as morally blameworthy that we think of as, you know, victimless crimes or, think about marijuana use, you could think about prostitution. Not that we've decriminalized these things entirely, but there's a whole category of criminal laws that have been reconfigured in lots of ways. And there's an irony – I don't know if that's the right word – to what you're showing that our greater understanding of the psychology and the physiology has in fact led to increasingly allowing information to come in. Whereas if it were just plain old character evidence in the past, it would've been out, and yet somehow it's been reconfigured as a result of our greater understanding to let it come in in ways that may be counterproductive.

Teneille Brown: What it demonstrates is that judges don't like the character evidence ban. There's still a sense that character evidence is incredibly probative and incredibly helpful and can make the difference in a lot of cases between guilt or innocence in ways that we think are fair. So for example, you know, the Bill Cosby case, there were 40-plus women who had accused him of grooming them, sexually assaulting them, drugging them, and yet no one wanted to come forward. And when the first person comes forward, it's a "he said, she said, Bill Cosby says she's lying." She can't bring in all of those previous accusations and stories under the character evidence ban. We understand that it's very probative to go to her credibility that she's not lying. It's not, "he said, she said," it's "he said, 40 she saids," and so there's a recognition that this character evidence is very probative in a lot of cases and is really helpful and might be fair. But the rule doesn't allow for that kind of balancing. It's just, if it's character evidence, it doesn't get in unless it's introduced by the defendant or in a self-defense case.

Cathy Hwang: And yet you say judges often end up allowing character evidence in, how is that?

Teneille Brown: It's really honored in the breach. And so a lot of judges try to find these ways to get it in, and they're not being honest about actually applying the rule correctly. There is a way to solve this, which is just to say, judges, you need to be more strict in your application of the character evidence rule. But lots of judges will acknowledge that if it's – especially in a sexual assault case – the character evidence is going to get in somehow and they're going to get it in by massaging it in some way. They recognize that it probably is character evidence, but they'll just say, "Well, we're using it for this other purpose like motive or lack of accident," which probably still requires a character inference and still is

propensity reasoning. Um, what's happening on the back end is judges are trying to find these ways to admit the character evidence by calling it habit or by calling it psychological profile evidence, or just not calling it anything and just saying, "We don't think it's character."

Risa Goluboff: So you described how this causes actually a lot of havoc on appeal, and a lot of reversals on appeal. So I'm wondering: why isn't there a feedback loop back to the trial court judges, if they keep getting reversed to say, "Oh, maybe I should be more careful."

Teneille Brown: It's very useful information. It's how we tell stories. We tell stories, we often lead with character information about the actors because that's what they know people want to hear. That's what we want to hear. So it comes out very quickly and in the moment they just don't recognize it as character. I think that's a huge part of it.

Cathy Hwang: That's really interesting. So one of the things that you talk about kind of trying to solve these issues is re-tethering the moral blame component to whether evidence is admitted. So when evidence could leave a negative inference in a juror's mind about someone's character, that should not be admitted.

Teneille Brown: Yeah, so in a previous paper I wrote about how we automatically make these character inferences and we do it within a hundred milliseconds of meeting someone. And so what we need to do is instead of having these weird categories that judges have a hard time applying, we need to just say the rule focuses on behavior that is immoral, because that's really getting at the concerns we have with this kind of evidence, which is that jurors are going to find this evidence really sticky and they're going to then use it to infer all kinds of other traits and mental states. All the social psych evidence, and there's lots of it, suggests that that kind of attribution error only happens when the thing that we're talking about is something that is bad or immoral. And so we need to recognize that the common law judges got it right, that jurors do this. They think once a thief, always a thief, but they don't think once a person who wears slip-on shoes always a person who wears slip-on shoes, right? And if they do, they don't use that to say that that person is a bad person and therefore likely intended to do some kind of harm. And so that moral distinction that humans care about the courts should care about too. And that needs to be reintroduced into the character evidence rules. Because otherwise it's not about prejudice anymore. It's just these arcane, technical rules that are really hard to follow.

Risa Goluboff: How contested do you think the category or the distinction of moral or immoral is? You know, when we were talking about addiction and you say, "It's a disease" – I think it's a disease too ...

Teneille Brown: Right.

Risa Goluboff: Ah, but then you say there are people who don't think it's a disease, and people are still attaching moral blame worthiness. So how big a spectrum is there really on what would be considered morally blameworthy character evidence?

Teneille Brown: So Risa, you hit on the weakest part of my last paper and this one, which is that: People don't agree necessarily on what is immoral and what is moral. There's some consensus on some things, like murder is immoral. But on some of these things I'm talking about, these mental health behaviors, we're kind of in a period where we're in flux, where some people think that depression and bipolar disorder and narcissism and psychopathy and addiction have moral undertones and other people don't. And so the test that I would suggest is something kind of like what judges have to do with defamation or with battery, where they have to say, "Is this offensive?" But I think you're going to have courts disagree about what that means.

Risa Goluboff: Yeah.

Teneille Brown: In the UK and in Australia where they no longer ban character evidence, they still tie it to morality. So in the UK it's "reprehensible conduct," I think is the phrase that they use. And there have definitely been cases where that issue is litigated is, is this behavior reprehensible or not? So I anticipate there would still be cases around is this character trait immoral or not? But I think it's more intuitive than the technical rules that we have now and will be easier to apply in most cases than this weird, does this require a propensity inference or not, uh, which is often just a gossamer-thin distinction.

Cathy Hwang: If you had to craft the rule, would you rather it be over-inclusive or under-inclusive? By which I mean is it better for judges to say, you know, anything that could potentially have a moral valence, right, like tattoos or you know, things that many people are like whatever, tattoos, multiple piercings, long hair, short hair, that kind of thing.

Teneille Brown: Right.

Cathy Hwang: A lot of makeup, that kind of stuff. Would you rather have all of that excluded, even if it might be useful, or would you rather have the rule crafted the other way?

Teneille Brown: Yeah, it's a great question. I'd probably be in favor of an over-inclusive definition of immorality. And then once they've classified it as immoral, say, okay, is it substantially more probative than prejudicial? So in the case of like the Larry Nassers or the Bill Cosbys, where we have pretty good evidence that it occurred, that's another piece that I put in my proposed rule is that we need to have something more than preponderance that the thing that we're using here as past acts actually happened. So maybe like clear and convincing evidence that it happened. And then the judge can decide, in this case, does justice require it? Is it more probative such that it should come in even though it implicates an immoral act.

Cathy Hwang: So Teneille, you write about a bunch of different fascinating things. Is this a line of research you're going to continue?

Teneille Brown: I'm definitely exploring lots more around character evidence. I just completed some empirical studies with Jackie Chen, who's a social psychologist, and we were presenting mock jurors with images of defendants and then asking them questions about whether they thought this person was guilty of a crime that was ambiguous. The crime we use had to do with going through target with, with a cart with a big expensive TV on the bottom of the cart. And did the person intend to shoplift or did they just forget to scan the TV? So ambiguous mental state information and everything hinged on the mental state. And then we provided them with character information that was either positive or negative. And then just the face of the criminal defendant. And we did find that when they heard positive information about the criminal defendant, they were much less likely to find them guilty and they were much more likely to infer that they didn't have the negative intent, suggesting that criminal defendants might need to include some of this positive character evidence information.

Cathy Hwang: That's incredibly interesting.

Teneille Brown: We used faces of Black women because all of this research that's been done has been done in white men, target faces.

There's actually tons of research that shows this is an incredibly robust finding that within a hundred milliseconds we draw inferences about whether someone's trustworthy or not. And it has to do with things like how far apart their eyes are or how doughy their cheeks are, how angled their jaw is. And if their eyes are close together, we find them less trustworthy. And if they have black skin, they're automatically assumed to be less trustworthy – unless they have a baby face. And a baby face on black skin is considered more trustworthy.

Cathy Hwang: That's wild. Yeah.

Teneille Brown: They're really robust findings in social science, because this is a population that is obviously much more disadvantaged by these automatic inferences. But it's really hard to capture that online in a mock jury survey because once we showed the criminal defendants Black faces, the mock jurors said, “Oh, we know what you're getting at. You're getting at race. We're not racist.” And they made those kind of comments. So it's, it's hard to study.

[THEME MUSIC CREEPS IN]

Cathy Hwang: That sounds really interesting and important. I can't wait to see what you do with that.

Teneille Brown: Thank you so much!

Risa Goluboff: Well, this has been really fascinating, Teneille. Thank you so much for being with us.

Teneille Brown: Thank you for inviting me.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

Risa Goluboff: Well, that was a really fascinating conversation, Cathy. Thank you for bringing Teneille to Common Law.

Cathy Hwang: Teneille was my next-door office neighbor and we had conversations about her work all the time because it was always so interesting and relevant, and my work is about corporations.

Risa Goluboff: Oh, so interesting and relevant. I hope it went both ways.

[LAUGHING]

Risa Goluboff: But this was clearly interesting and relevant.

Cathy Hwang: It's so hard to imagine an average juror, even, you know, you or I with our legal training, understanding exactly how those nuances play out.

Risa Goluboff: It's very complicated, you know, the idea that this thing used to be admitted, then it was banned and then even though it was banned, people are trying to find out ways that they can get it in. And then the oddity that psychological evidence or evidence of addiction is easier to get in as habit than it is to get in, you know, really, moral blameworthiness evidence that seems to be maybe more relevant in certain ways. So it feels a little bit like an upside down world. Whatever intuitions we have, they don't quite map on to what the rules are.

Cathy Hwang: I think that's right. And I think the other thing that we didn't get a chance to talk about was just, even as the rules change and as our understanding of things like addiction change, I don't really know how quickly judges can react and how reasonable it is for us to expect them to react to all those different nuances because ultimately they're making snap judgments. They're getting slow feedback about whether you know their judgments are correct or not. So I don't know how reasonable it to expect judges to be able to make changes quickly.

Risa Goluboff: Talking with her, I was thinking about both how many different kinds of interactions there are between both science and social science and the law. And, you know, what do we expect of judges? What do we expect of the law, the ways in which, as Teneille said, there are, you know, disciplinary mismatches between scientific or social scientific understandings and the way the law needs to categorize various activities or various concepts into binaries that aren't necessarily binaries in the world.

Cathy Hwang: Exactly. So she uses the dead or alive. I almost said dead or undead, but it's not really, you know, humans and zombies.

[LAUGHING]

Risa Goluboff: That takes us into a whole other realm.

Cathy Hwang: That's a different podcast.

Risa Goluboff: Exactly.

Cathy Hwang: Listen for our special Halloween episode.

[THEME MUSIC CREEPS IN]

Risa Goluboff: Well, Cathy thank you so much for joining me again as co-host on this season of Common Law. It is such a pleasure to tag team these interviews with you.

Cathy Hwang: Thank you so much for having me. It's such a pleasure to be here. I love reading this work and getting to chat with people and with you.

[THEME MUSIC UP FULL, THEN UNDER AND OUT]

Cathy Hwang: That's it for this episode of Common Law. If you want to find out more about the work of Teneille Brown, visit our website, CommonLawpodcast.com. You'll also find all our previous episodes, links to our Twitter feed and more.

Risa Goluboff: We hope you'll join us next time and throughout the season with our Co-Counsel hosts for more explorations of how law shapes our lives. I'm Risa Goluboff.

Cathy Hwang: And I'm Cathy Hwang. Thanks for listening.

[THEME MUSIC UP FULL, THEN UNDER]

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[THEME MUSIC UP FULL, THEN OUT]