

Justice in the Pursuit of Truth: A Moral Defence of the Similar Facts Rule

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Abstract The law of evidence serves an important function in ensuring the legitimacy of trial deliberation. One way of discharging this function is through ‘regulation’, effected in the form of rules forbidding reliance on particular lines of evidential reasoning. An example of such a rule is that on similar facts. The rationale for regulation will be explored by engaging in two kinds of analysis. Traditionally, an ‘external’ approach is taken. There are, so it is hoped to show, deficiencies in this approach. A different method of analysis, one conducted from an ‘internal’ perspective, will be proposed to meet these deficiencies. In many cases, values other than truth have to be pursued, not simply as subsidiary considerations, but as values which are integral to the nature and purpose of fact-finding. A party has not merely a right that the substantive law be correctly applied to objectively true findings of fact, and a right to procedure that is rationally structured to determine the truth; he has, more broadly, a right to a just verdict, where justice must be understood to incorporate an ethical evaluation of the process (of evidential reasoning) which led to the outcome (in the form of conclusions of fact). Truth and justice, so it will be argued, are not opposing considerations; rather, principles of one kind reinforce demands of the other. This article seeks to instantiate these general themes in a discussion of the similar facts rule.

I. Introduction

In his *Review of the Criminal Courts of England and Wales*, Auld LJ recommended ‘that the English law of criminal evidence should, in general, move away from technical rules of inadmissibility to trusting judicial and lay fact-finders to give relevant evidence the weight it deserves’.¹ The UK Government’s White Paper, *Justice for All*, reported a ‘growing public concern that evidence relevant to the search

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1 Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (September 2001) 547. Similar remarks have been made by the former Home Secretary, David Blunkett: see *The Times* (25 October 2004).

for truth is being wrongly excluded'.² It would seem from these remarks that the law of evidence not only complicates unnecessarily but actually works against the very enterprise of fact-finding which it is meant to serve. This complaint is not new; Bentham, for example, found the law to be 'incompetent on every occasion to the discovery of truth . . . incompetent therefore, on every occasion, to the purposes of justice'.³

There is, so it will be argued, more of value in our common law heritage of evidential rules than the critics allow. Undoubtedly, some of the rules, especially in their finer ramifications, are unjustifiable. But many of them express, at the core of their operation, principles which are integral to the morality of fact-finding. This much can be seen only from an internal perspective of the normative role evidence law plays in controlling trial deliberation. The intrinsic value of the law is overlooked by critics who approach it purely from an external angle.

These claims will be substantiated in a discussion of the similar facts rule. The aim is to illustrate the deficiencies of arguments issued from an external perspective and to explain and justify the rule on an internal interpretation of its expressive function. While the specific objective is to defend the similar facts rule, the broader aim is to offer wider insights into the analysis of evidence law generally. To lay the groundwork for the specific discussion, it is necessary to do two things: first, describe the main features of the internal and external modes of theorizing about evidence law, and, secondly, give an overview of the various ways in which trial deliberation is legally controlled.

II. Two General Approaches to Evidence Law

i. Outline of the External Approach

On the external approach, evidential rules are analysed or evaluated in terms of the consequences of their application and of their impact on the outcome of fact-finding. Arguments are made which are contingent on the validity of empirical claims about those consequences and impact. For example, one familiar form of justifying an exclusionary rule is to claim that the jury is likely to give the kind of evidence in question more weight than it deserves. Admitting the evidence will ultimately increase the likelihood of the trial producing the wrong conclusions of fact. This style of evaluation takes as its ultimate criterion the correctness of the verdict, and the soundness of the argument depends on whether it is true that the jury is cognitively incompetent as claimed.

² Cm 5563 (2002) para. 4.52.

³ J. Bentham, 'Rationale of Judicial Evidence' in J. Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 7 (William Tait: Edinburgh, 1843) 206.

The primary concern is with regulating the trial such that it will best achieve its goals. Evidential rules are conceived and evaluated as means to those ends. Chief amongst the perceived ends is discovery of the truth about the facts in dispute.⁴ How likely it is that this goal has been achieved is a matter of the verdict's reliability. A verdict is more or less reliable, depending on the reliability of the trial system which produced it. The reliability of a trial system is, conceptually, a matter of the frequency with which it produces or leads to findings that are correct—or, as Lord Devlin puts it, of the 'percentage of error'.⁵

On this approach, truth is desired, but not for its own sake; it is so that 'justice' may be done. The reference to 'justice' is, traditionally, to a particular conception of it. Behind that conception is a theory of adjudication according to which legal rules posit, or can be stated in terms of, general facts. A claim deserves to succeed under a legal rule only if its factual predicate or antecedent is established. The facts necessary to support the claim (sometimes called the 'material facts'),⁶ if disputed, must be proved. For example, if the legal rule is that the first in time prevails, the claimant, to succeed in her claim on a property, must prove that she was in possession of it before her opponent. Justice, in the sense of giving a person her due under substantive law, is contingent on the material facts obtaining: a verdict for the claimant is just only if the court has got it right in finding that the claimant had prior possession. Lord Denning said that the object of the trial judge 'above all, is to find out the truth, and to do justice according to law'.⁷ Doing justice, in this sense, is applying substantive law correctly to true findings of facts: to say with Bentham, it is achieving 'rectitude of decision'.⁸

One who claims that the trial is primarily concerned with the ascertainment of truth may yet acknowledge, if not insist, that other values—values 'external to proof'⁹—and, in a criminal case, rights of

4 Other objectives have been suggested, such as 'inspiring confidence, supporting independent social policies . . . and tranquilizing disputants': J. B. Weinstein, 'Some Difficulties in Devising Rules for Determining Truth in Judicial Trials' (1966) 66 *Columbia LR* 223 at 241.

5 'Who is at Fault When Injustice Occurs?' in Lord Devlin *et al.* (eds), *What's Wrong with the Law?* (BBC: London, 1970) 76.

6 J. L. Montrose, 'Basic Concepts of the Law of Evidence' (1954) 70 *LQR* 527 at 536–7.

7 *Jones v National Coal Board* [1957] 2 QB 55 at 63; repeated in *Harmony Shipping v Davis* [1979] 3 All ER 177 at 180–1.

8 This concept is examined by W. Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicholson: London, 1985) 88 *et seq.* On its wide acceptance as the primary objective of the trial, see W. Twining, 'The Rationalist Tradition of Evidence Scholarship' in his *Rethinking Evidence – Exploratory Essays* (Northwestern University Press: Evanston, 1994) ch. 3.

9 The distinction between values internal to proof and those external to it is made by D. J. Galligan, 'More Scepticism about Scepticism' (1988) 8 *OJLS* 249 at 255. A corresponding distinction is drawn by Wigmore between 'rules of probative policy' and 'rules of extrinsic policy': J. H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, Vol. 1, 3rd edn (Little, Brown & Co: Boston, 1940) e.g. at 296.

the accused,¹⁰ have to be respected in pursuing that end.¹¹ For example, an accused person cannot be compelled to testify even if putting him in the witness box is likely to shed light on the case. Some argue that forcing him to speak violates his privacy.¹² It is a matter of contention whether our regard for privacy should prevail over our regard for the truth. It is a matter of contention only because we are mindful that '[t]ruth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much'.¹³ Since the claim is that the pursuit of truth is the main goal, and not that it is the absolute or overriding end, it involves no contradiction to admit to the legitimacy of 'side-constraints' on that enterprise.¹⁴ Thus, Wigmore had no difficulty accommodating 'rules of extrinsic policy' within a scheme which places the ascertainment of truth at the centre of the trial agenda.¹⁵ Whether a constraint is legitimate would depend, it is often said, on the balancing of competing values.¹⁶

ii. Outline of the Internal Approach

It is important to recognize that moral principles have to be respected, not only as 'side-constraints' on the legal pursuit of truth, but as requirements internal to that pursuit. These principles, so it will be argued, lie at the foundation of many rules of evidence. To uncover those principles, an approach must be adopted that focuses on the fact-finder's responsibilities during the process of deliberation and on the rights the person standing trial has relating to the manner in which adverse findings of fact are made against her. Evidential rules must be evaluated modally, as constitutive of the process in which facts are found; the rules, in turn, obtain their significance from the purpose of that process. Fact-finding is an enquiry into the basis on which the court is asked to declare a person liable or guilty. This declaration involves holding the person responsible for certain action, for which she is often blamed or condemned. An adverse finding will

10 A. Ashworth, 'Excluding Evidence as Protecting Rights' [1977] *Crim LR* 723.

11 As these writers are careful to stress: D. J. Galligan, *Due Process and Fair Procedures—A Study of Administrative Procedures* (Clarendon: Oxford, 1996) 7, 12, 51, 79 and 81; Galligan, above n. 9 at 255; and A. I. Goldman, *Knowledge in a Social World* (OUP: Oxford, 1999) 284–5.

12 D. J. Galligan, 'The Right of Silence Reconsidered' [1988] *Current Legal Problems* 69 at 88–91.

13 *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28 (statement made in context of legal professional privilege).

14 See R. S. Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-finding—Their Justified Divergence in Some Particular Cases' (1999) 18 *Law and Philosophy* 497; and A. Ashworth, 'Concepts of Criminal Justice' (1979) *Crim LR* 412.

15 'Extrinsic policies' are 'policies which override the policy of ascertaining the truth by all available means': Wigmore, above n. 9 at 296. It should be noted that the 'internal' / 'external' distinction drawn in this article does not correspond with Wigmore's 'intrinsic' / 'extrinsic' distinction.

16 *Elkins v US* 364 US 206 at 233 (1960); Wigmore, above n. 9 at 296. On difficulties in the concept of 'balancing', see e.g. I. H. Dennis, *The Law of Evidence*, 2nd edn (Sweet & Maxwell: London, 2002) 29–30.

also affect her interests badly in terms of the adverse consequences that typically follow.

The person whose case is before the court has not merely a right that the substantive law be correctly applied to objectively true findings of fact, and a right to trial procedure that is rationally structured to determine the truth; she has, more broadly, a right to just treatment during fact-finding. Justice must be understood, not as an end-state but as ‘a way of doing things’, an activity that carries with it an ethics ‘of discourse and enquiry’.¹⁷ Justice, as so understood, imposes ethical demands on the process of trial deliberation itself: specifically, the court must not reach, and must not be seen to reach, findings of fact in a manner that shows disrespect for the person to whom those findings are adverse; nor should it do so in a manner that expresses a lack of concern for her interests.¹⁸ The court must not only pursue truth to do justice, it must also do justice in pursuing truth.

This argument rests on a theory of the trial, defended by various writers, as a process that seeks to justify an adverse decision to the person against whom it is taken.¹⁹ A court which has treated a person unjustly in making a finding against her cannot reasonably expect her to accede to the moral authority of that finding. This is a normative, and not an empirical or a psychological, claim; what matters, in the end, is not whether the person would in fact accept the finding but whether we are entitled to say that she ought to, given how it was made.

iii. Evidence Law and the Control of Trial Deliberation

The internal approach locates the significance of evidential rules within the deliberative context. Much of the law of evidence seeks to control trial deliberation, the thinking process by which the fact-finder evaluates the evidence and decides on the verdict.²⁰ This may be a surprising claim. The concentration on ‘exclusionary rules’ creates the impression that the critical point at which the law controls fact-finding is at the stage of excluding evidence, and that, once the evidence is admitted, it is and should be subjected freely to ordinary reasoning. Wigmore, for example, divided the principles of evidence, as they are applied to the trial, into two major parts. One part is ‘Admissibility,—the procedural rules devised by the law, and based on

17 E. Kamenka, ‘What is Justice?’ in E. Kamenka and A. Erh-Soon Tay (eds), *Justice* (Edward Arnold: London, 1979) 14.

18 That injustice betokens want of respect or lack of concern: J. R. Lucas, *On Justice* (OUP: Oxford, 1980) 7.

19 See e.g. T. R. S. Allan, *Constitutional Justice—A Liberal Theory of the Rule of Law* (OUP: Oxford, 2001) 77–87; R. A. Duff, *Trials and Punishment* (CUP: Cambridge, 1986) especially introduction and ch. 4.

20 But the common law is assiduous in avoiding, as a means of control, the infamous Romano-canonical method of assigning pre-determined weight to classes of evidence. On the latter, see A. Engelman, *A History of Continental Civil Procedure*, R. W. Millar (tr. and ed.) (Little, Brown and Co: Boston, 1927) 41–4.

litigious experience and tradition, to guard the tribunal . . . against erroneous persuasion';²¹ these rules are 'artificial legal rules peculiar to . . . Anglo-American jury-system'.²² Another part deals with 'Proof' and is 'concerned with the ratiocinative process of contentious persuasion'.²³ The principles of proof 'represent the natural processes of the mind in dealing with the evidential facts after they are admitted to the jury';²⁴ '[t]he evidence is in, and the question now is, What is its effect?'.²⁵

This dichotomy between the 'artificial' rules of exclusion and the 'natural process' of evidential reasoning is overdrawn.²⁶ The evaluation of evidence is free in so far as it rides on common sense—on non-expert, rational reasoning, and on common knowledge.²⁷ The fact-finder must generally act by her own lights in moving from premises to conclusions. At the basic level, the process of deliberation is simply 'too unruly to obey the lawgiver's rein, too contextual to be captured in a web of categorical legal norms'.²⁸ Nevertheless, many evidential rules serve to guide or regulate deliberation²⁹ at the 'meta-level' of evidential reasoning.³⁰ They are second-order rules,³¹ operating at the stage when the fact-finder reflects critically on the justification for the factual beliefs that she has tentatively formed.³²

21 J. H. Wigmore, *The Science of Judicial Proof—as given by Logic, Psychology, and General Experience and illustrated in Judicial Trials* (Little, Brown and Co: Boston, 1937) 3.

22 *Ibid.* at 5.

23 *Ibid.* at 3.

24 *Ibid.* at 5.

25 *Ibid.*

26 It is drawn by J. B. Thayer as well; according to him, the 'law of evidence . . . excludes matter logically probative' but it 'has no orders for the reasoning faculty': 'Law and Logic' (1900) 14 *Harv LR* 139 at 142.

27 'Common sense' can mean a 'power of the mind (common to all or most men)' or the 'body of beliefs commonly accepted as true': R. E. Beanblossom and K. Lehrer (eds), *Thomas Reid's Inquiry and Essays* (Hackett: Indianapolis, 1983) xxvi.

28 M. R. Damaška, *Evidence Law Adrift* (Yale University Press: New Haven, 1997) 20.

29 According to Damaška, above n. 28 at 8, Anglo-American law of evidence aspires to 'structure the analysis of evidence'. Cf R. D. Friedman, 'Anchors and Flotsam: Is Evidence Law "Adrift"?' (1998) 107 *Yale LJ* 1921 at 1928–34. On the diverse ways in which the law impacts on evidential reasoning see P. McNamara, 'The Canons of Evidence—Rules of Exclusion or Rules of Use?' (1986) 10 *Adelaide LR* 341; R. J. Allen, 'Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices' (1980) 94 *Harv LR* 321; S. Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 *Yale LJ* 1535.

30 They are 'reasoning about reasoning', on which see generally: M. A. Finocchiaro, 'Reasoning About Reasoning' in D. M. Gabbay and H. J. Ohlbach (eds), *Practical Reasoning* (Springer: Berlin, 1996) 167.

31 They aim 'to constrain and control, rather than to facilitate or release, lay cognitive inclinations': Damaška, above n. 28 at 28. Essentially the same view was expressed long ago by T. Starkie, *A Practical Treatise of the Law of Evidence*, 2nd edn (J. & W. T. Clarke: London, 1833) 13.

32 On the duty and voluntary nature of critical reflection, see K. Kim, 'The Deontological Conception of Epistemic Justification and Doxastic Voluntarism' (1994) 54 *Analysis* 282.

Although many lawyers favour fewer evidential rules,³³ or fewer ‘technical interferences with ordinary principles of reasoning’³⁴ as they see them, there are often powerful reasons for controlling deliberation. Far from being mere ‘technicalities’, many rules of evidence, including the similar facts rule, embody important moral principles.

There are at least three major techniques of controlling deliberation. The first is by way of an ‘advice’. For example, fact-finders may be told that they can, if they are so minded, draw an adverse inference from the silence of an accused under specified circumstances,³⁵ or to consider certain factors while weighing evidence.³⁶ ‘Advice’ is a weak form of control; it is suggestive or cautionary, not obligatory or prescriptive. The second technique is ‘exclusion’. Information may, for one reason or another, be withheld from the jury to keep them ignorant of its existence: the information is ‘perceptually excluded’. A different facet of ‘exclusion’ is ‘exclusion from deliberation’. Evidence may be disclosed to the judge (for the purpose of determining its admissibility) or to the jury (by error) who are later required to ignore it altogether. Here, the third technique, the law controls deliberation by ‘regulating’ it. The fact-finder is not merely advised to ignore the evidence, she is ordered to do so. A ‘regulation’ is obligatory or prescriptive. It may, instead of requiring the evidence to be ignored, forbid only a specific use of it: the evidence is admitted but it must, or must not, figure in deliberation by a particular line of reasoning. For example, the hearsay rule permits the fact-finder to infer from evidence of an out-of-court statement that it was made but not that it is true: it allows one line of reasoning but prohibits another. While an advice seeks to inform the evaluation of evidence, a regulation imposes a constraint or structure on evidential reasoning.

III. The Similar Facts Rule

Our general discussion will now be applied to a particular topic in the law of evidence. The prosecution may want to adduce, as part of its

33 Of them, Bentham was perhaps the most extreme: Twining (1985), above n. 8 at 66–75. Cf A. Stein who argues that ‘judicial fact-finding should be thoroughly regulated by law’: ‘The Refoundation of Evidence Law’ (1996) 9 *Canadian Journal of Law and Jurisprudence* 279 at 285; ‘Against Free Proof’ (1997) 31 *Israel LR* 573; and *Foundations of Evidence Law* (OUP: Oxford, 2005) ch. 4.

34 W. Twining, ‘Freedom of Proof and the Reform of Criminal Evidence’ (1997) 31 *Israel LR* 439 at 452.

35 See the specimen direction approved in *R v Cowan* [1996] QB 373 at 380–1 on the drawing of an adverse inference under the Criminal Justice and Public Order Act 1994, s. 35. This direction ‘allows a jury enormous latitude, subject to neither control nor review’: R. Munday, ‘Cum Tacent Clamant: Drawing Proper Inferences from a Defendant’s Failure to Testify’ [1996] *CLJ* 32 at 34.

36 E.g. the Civil Evidence Act 1995, s. 4(2), listing the factors the court may take into account when weighing hearsay evidence.

case in chief, evidence of a previous conviction of the accused or of his discreditable conduct on an occasion other than that cited in the charge for which he is being tried. Its admissibility is governed at common law by the 'similar facts rule'.³⁷ Where it is convenient, the evidence covered by this rule will be called 'evidence of previous misconduct' or 'evidence of bad character'. According to the modern test formulated by the House of Lords in *DPP v P*,³⁸ which has been followed in many Commonwealth jurisdictions,³⁹ the evidence is admissible only if 'its *probative force* in support of the allegation that an accused person committed a crime is sufficiently great to make it *just* to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime'.⁴⁰ While the focus has traditionally been on the opposing factors to be weighed, it should not be overlooked that 'justice' provides the fulcrum.

In England and Wales, the common law on similar fact evidence was abolished when the relevant provisions of the Criminal Justice Act 2003 ('CJA 2003') came into force on 15 December 2004.⁴¹ But the present discussion remains relevant. This is not only because understanding the changes effected by the statute requires knowledge of the position at common law;⁴² more importantly, it is because both the statute and the common law address the same problem, and this article is concerned with the essential nature of that problem and the normative response to it. Indeed, as we will see, the statute seems to adopt substantially the basic principles that applied at common law.

Under the CJA 2003, bad character evidence⁴³ is admissible by a number of routes. Amongst these, the 'core gateway, designed to replace the major part of . . . the similar fact rule' is s. 101(1)(d).⁴⁴ This provision allows evidence of the defendant's bad character to be admitted where 'it is *relevant* to an important matter in issue between the defendant and the prosecution'.⁴⁵ Evidence is so relevant where, *inter alia*, the question is 'whether the defendant has a propensity to

37 This article does not examine other aspects of the law on character evidence. Should it be the case that the law elsewhere compromises, or otherwise falls short, on the suggested moral principles underpinning the similar fact rule, it would neither be surprising nor undermine the thesis advanced here: few moral principles are absolute and tensions within the law are common.

38 [1991] 2 AC 447.

39 As noted by the High Court of Australia in *Pfennig v R* (1995) 182 CLR 461 at 484.

40 Above n. 38 at 460. Emphasis added.

41 CJA 2003, s. 99(1) abolishes the common law in this area. The provisions on bad character evidence were brought into force by the Criminal Justice Act 2003 (Commencement No. 6 and Transitional Provisions) Order 2004 (SI 2004 No. 3033).

42 As pointed out by P. Roberts and A. Zuckerman, *Criminal Evidence* (OUP: Oxford, 2004) 517.

43 On its meaning, see CJA 2003, ss 98, 112(1).

44 C. Tapper, 'The Criminal Justice Act 2003—(3) Evidence of Bad Character' [2004] *Crim LR* 533 at 546.

45 CJA 2003, s. 101(1)(d).

commit offences of the kind with which he is charged'.⁴⁶ Relevance, however, is not determinative of admissibility. Under s. 101(3), the evidence *must* be excluded if it appears to the court that its admission 'would have such an adverse effect on the fairness of the proceeding that the court ought not to admit it'. This provision applies only on the application by the defendant for exclusion; but as Murphy rightly suggests, 'if the circumstances were sufficiently compelling . . . the judge might properly take it upon himself to invite the defence to make the application'.⁴⁷ The word 'must' is significant as it suggests that the court has a duty,⁴⁸ and not merely a discretion,⁴⁹ to exclude where fairness so requires; in other words, s. 101(3) provides for 'a rule of inadmissibility'⁵⁰ and not merely an exclusionary discretion. This provision is supplemented by s. 103(3) which further restricts proof of previous misconduct.⁵¹ It qualifies s. 103(2)⁵² and disallows the defendant's propensity to be established by evidence of conviction of an offence of the same description or category as the one with which he is charged where it would be '*unjust*' to do so.⁵³

Hence, both at common law and under the statute, probative value is not the ultimate criterion. In both cases, evidence of previous misconduct is excluded avowedly for ethical reasons, which have to do with considerations of 'justice' or 'fairness'. An essential factor that must be taken into account in deciding on the justice or fairness of admitting evidence of bad character under the CJA 2003, as at

46 '[E]xcept where his having such propensity makes it no more likely that he is guilty of the offence': CJA 2003, s. 103(1)(a). Tapper notes that this lowers the common law probative hurdle and makes it much easier for the prosecution to adduce similar fact evidence: above n. 44 at 543, 547. Other problems with this provision are raised by R. Munday, 'Bad Character Rules and Riddles: "Explanatory Notes" and True Meaning of s.103(1) of the Criminal Justice Act 2003' [2004] *Crim LR* 533, 338–9.

47 P. Murphy, *Murphy on Evidence*, 9th edn (OUP: Oxford, 2005) 173. Cf *R v Highton* [2005] EWCA Crim 1985 at [23].

48 A number of writers take this view: e.g. Murphy, above n. 47 at 171–2. As Rose VP noted in *R v Hanson* [2005] EWCA Crim 824, 169 JP 250, at [10], the wording of s. 101(3) (in particular, the phrase 'must not admit') 'is stronger than the comparable provision in s. 78 of the Police and Criminal Evidence Act 1984' which uses the words 'may refuse to allow'.

49 However, some judges do speak of 'discretion' when referring to this provision (e.g. *R v Bovell* [2005] EWCA Crim 1091 at [31]) as have some commentators (e.g. G. Durston, 'The Impact of the Criminal Justice Act 2003 on Similar Fact Evidence' (2004) 68 *Journal of Criminal Law* 307 at 310). Cf Tapper who describes s. 101(3) as providing for 'discretionary exclusion' but immediately qualifies this in a footnote with the observation that it is 'cast in terms of a *duty* to exclude': C. Tapper, *Cross and Tapper on Evidence*, 10th edn (LexisNexis Butterworths: London, 2004) 216.

50 H. M. Malek *et al.* (eds), *Phillips on Evidence*, 16th edn (Sweet & Maxwell: London, 2005) para. 19–35.

51 In *R v Hanson*, above n. 48 at [10], Rose VP described s. 101(3) and s. 103(3) as closely related and calling for similar considerations.

52 Elaborated in the CJA 2003, s. 103(4), (5).

53 It may be considered unjust 'by reason of the length of time since the conviction or for any other reason': CJA 2003, s. 103(3).

common law, is its prejudicial effect.⁵⁴ Indeed, Mirfield, writing in *Phipson on Evidence*, describes s. 101(3) as having ‘embraced the *DPP v P* rule of exclusion’⁵⁵ and, similarly, Roberts and Zuckerman suggest that the effect of the provision ‘may well be to place *DPP v P* on a statutory footing’.⁵⁶

i. External Analysis

The ethical basis of the similar facts rule can be clarified only through internal analysis of our objections to the use of evidence of previous misconduct. There are inadequacies in the usual attempts to explain or justify its exclusion from an external perspective.

(a) Account of External Justifications

On the external approach, the key question is this: how does the rule impact on the probabilities of getting the facts right in the end? Whether a finding of fact is correct is a matter of its reliability. Empirical claims are made about the consequences of admitting evidence of previous misconduct or about how the rule affects reliability.

The effect on reliability is complicated by this perceived tension. Evidence of previous misconduct is often thought to have probative value. Depriving the fact-finder of it may lead to acquittal of the truly guilty. Most people would regard as relevant that the defendant had previously committed crimes of the same kind as that for which he now stands trial. They would think that a person with that record is more likely than someone without it to be guilty as presently charged. To accept that the evidence is relevant is to admit that it is of some use in ascertaining the facts under enquiry. If we are interested in the truth, we should admit the evidence. That, of course, is not to say that the evidence is conclusive; it is merely to say it should be taken into account in the overall assessment.

54 See *R v Benguit* [2005] EWCA Crim 1953 at [27]-[32]. In deciding whether it is fair to admit the evidence, the court ‘must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged’: s. 101(4). As Munday rightly points out, this provision ‘does not prevent the court from considering other issues’, which ‘may be just as important’, such as the prejudicial character of the previous misconduct: R. Munday, *Evidence* (OUP: Oxford, 2005) 286. Similarly, Murphy, above n. 47 at 173-4.

55 *Phipson on Evidence*, above n. 50 at para. 19-35. Mirfield, *id.*, further suggests that ‘the only really significant change made to this branch of the law of bad character is that, whereas, under the common law, the prosecution had to show that probative value exceeded prejudicial effect, under s. 101(3), the defence must show that prejudicial effect exceeds probative value’. However, s. 101(3) does not allocate the burden of proof. It only obligates the court to rule on the issue of justice when the defence makes an application for exclusion; it does not say who carries the burden of persuasion on that issue. Also, if it is right that prejudice is a normative rather than factual enquiry, it may be misplaced to talk about the burden of proof.

56 Roberts and Zuckerman, above n. 42 at 517.

But the evidence, it is also recognized, has, potentially, a ‘prejudicial effect’. By this is meant the capacity of the evidence to lead the fact-finder away from the correct factual conclusion.⁵⁷ Where the prejudicial effect of the evidence outweighs its probative force, admitting the evidence is more likely to obstruct than aid the discovery of truth. In such a case, it is justifiable to exclude the evidence for that is the course of action most conducive to the desired outcome.⁵⁸ This judgment is based on a prediction of how the fact-finder will respond mentally to the evidence. Two major factors are commonly cited for believing that admission of the evidence will probably hinder more than facilitate the pursuit of truth.⁵⁹

First, there is a danger that the fact-finder will treat the evidence of previous misconduct as more damning than it actually is.⁶⁰ Common-sense assessment of the evidence, even though made in good faith, may be off the mark. The cause is ignorance on the part of the fact-finder. Call this the *risk of cognitive error*. It is common for those urging the reality of this risk to point to studies suggesting that the lay person is prone to overestimate recidivism rates, that the perception of criminal specialization—that criminals tend to recommit the same sorts of crime—is not wholly supported by empirical data,⁶¹ that people have a tendency to draw stronger inferences from evidence of past acts than is actually warranted.⁶² In particular, they tend to put too

- 57 Thus, R. O. Lempert treats ‘prejudicial evidence’ as ‘any evidence that influences jury verdicts without relating logically to the issue of guilt or innocence’ (‘Modeling Relevance’ (1977) 75 *Michigan LR* 1021, 1036) and S. Scotchmer defines it as evidence which ‘makes the jury more willing to convict without changing the posterior probability ratio of guilt to innocence’ (‘Rules of Evidence and Statistical Reasoning in Court’ in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, Vol. 3 (Macmillan: London, 1998) 390).
- 58 G. R. Stone, ‘The Rules of Evidence and the Rules of Public Debate’ [1993] *University of Chicago Legal Forum* 127, 141–2.
- 59 The distinction that is being drawn between these two factors corresponds generally with that maintained by those who separate ‘reasoning prejudice’ from ‘moral prejudice’ (see e.g. Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, Consultation Paper No. 141 (1996) e.g. at para. 9.92; and Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Cm 5257 (2001) e.g. para. 7.23; A. Palmer, ‘The Scope of the Similar Fact Rule’ (1994) 16 *Adelaide LR* 161); ‘inferential error prejudice’ from ‘nullification prejudice’ (R. C. Park, ‘Character at the Crossroads’ (1998) 49 *Hastings LJ* 717 at 720; D. P. Leonard, ‘In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character’ (1998) 73 *Indiana LJ* 1161 at 1184); and, ‘disposition prejudice’ from ‘bad person’ prejudice (*Phipson on Evidence*, above n. 50 at paras. [19–46] and [19–47]).
- 60 *R v Boardman* [1975] AC 421 at 456; *R v Isleworth Crown Court, ex p. Marland* (1998) 162 JP 251 at 255 and 258; Roberts and Zuckerman, above n. 42 at 505–6.
- 61 E.g. J. V. Roberts and L. J. Stalans, *Public Opinion, Crime, and Criminal Justice* (Westview: Oxford, 1997) 30–2, 191–3.
- 62 D. A. Dripps, ‘Relevant but Prejudicial Exculpatory Evidence: Rationality versus Jury Trial and the Right to Put on a Defense’ (1996) 69 *S Cal LR* 1389, 1401. The tendency to overestimate the probative value of character evidence has been explained in terms of the ‘halo effect’ of the evidence, or what Méndez prefers to call the ‘devil’s horns effect’; according to this theory, people are prone to

much store on character traits and take insufficient account of situational factors.⁶³ We are told that evidence of the accused's criminal record is not as accurate as many suppose it to be, and not as telling as it appears on the face of criminal statistics.⁶⁴ The statistics can be misleading, especially to people without inside knowledge of the workings of the criminal justice system. It is said, for instance, that the likelihood of a person with a criminal past being investigated and charged does not truly reflect the objective likelihood of his guilt. This is because the police get leads from criminal files and, understandably, their investigation is usually 'biased' against persons who have had brushes with the law, especially those with records relating to the kind of offence under investigation.⁶⁵ It has also been pointed out that accused persons with criminal records have various incentives to plead guilty and that those who are not enticed by such incentives and insist on going to trial are more likely to be innocent than their criminal past might, at first blush, suggest.⁶⁶

Secondly, it is believed that evidence of the accused's bad character has the potential to sway the fact-finder unduly against him. Let this be called the *risk of emotivism*.⁶⁷ The fear is of the evidence creating in the fact-finder such antipathy towards the accused that she feels that he should be punished in any event, regardless of his guilt in respect of the crime with which he is charged.⁶⁸ In consequence, the fact-finder may convict the accused even though she does not really believe that he committed the present crime, or she may deny him the benefit of reasonable doubt to which he is entitled.⁶⁹ The latter occurs when the fact-finder allows herself to be persuaded too quickly of guilt;⁷⁰ is biased against the accused and fails to be objective and dispassionate in the evaluation of evidence;⁷¹ or does not look with

oversimplify and judge others on the basis of one outstanding good or bad quality: M. A. Méndez, 'California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies' (1984) 31 *UCLA LR* 1003 at 1047.

63 *BRS v R* (1997) 191 CLR 275 at 322.

64 J. Jackson and M. Wasik, 'Character Evidence and Criminal Procedure' in D. Hayton (ed.), *Law's Future—British Legal Development in the 21st Century* (Hart, Oxford: 2000) 352–4.

65 Law Commission Consultation Paper 141, above n. 59 at paras. 7.8 and 7.23.

66 R. O. Lempert and S. A. Saltzburg, *A Modern Approach to Evidence*, 2nd edn (West Publishing: Minnesota, 1982) 216–17.

67 See Wigmore, above n. 9 at 454–6.

68 *Thompson v R* [1918] AC 221 at 233.

69 *Noor Mohamed v R* [1949] AC 182 at 193; *Roberts and Zuckerman*, above n. 42 at 506–7.

70 'The more hateful the defendant, the more readily will judges find a causal connection between the defendant and the injury complained of': F. S. Cohen, 'Field Theory and Judicial Logic' (1950) 59 *Yale LJ* 238, 242.

71 J. Landon, 'Character Evidence: Getting to the Root of the Problem Through Comparison' (1997) 24 *Am J of Crim L* 581, 590–1.

sufficient care for facts which are consistent with the accused's innocence.⁷² According to a psychological explanation for this behaviour, knowledge of the accused's bad character tends to lower the fact-finder's anticipation of regret at wrongful conviction.⁷³

(b) Critique of External Justifications

On the external account, neither cognitive error nor emotivism is intrinsically objectionable; both are objectionable because they lead the trier of fact to the wrong verdict. The first justification (the need to guard against the risk of cognitive error) is based on empirical assertions that are themselves not free of controversy amongst social scientists and psychologists. The claim that the fact-finder is likely to overestimate the probative value of bad character evidence is contested by a number of writers.⁷⁴ Davies, for instance, has argued that '[c]urrent psychological literature strongly supports the common-sense intuition that people act predictably according to their characters'⁷⁵ and also that 'the psychological literature does not indicate that character evidence is unduly prejudicial'.⁷⁶

A view that is endorsed by many is, 'that a defendant has committed offences of a similar type before statistically and logically suggests that he is more likely than those without such a record to commit such offense again'.⁷⁷ Even so, it is critical to note that the traditional justification for exclusion under the similar facts rule is not that the evidence is irrelevant but that the fact-finder tends to give it more weight than it *actually* merits.⁷⁸ It is difficult to understand what

72 A. Bucknill, *The Nature of Evidence* (Skeffington: London, 1953) 33–4.

73 See Lempert, above n. 57 at 1034–6; Lempert and Saltzburg, above n. 66 at 162–5.

74 M. Bagaric and K. Amarasekara, 'The Prejudice Against Similar Fact Evidence' (2001) 5 *Int J of Evidence and Proof* 71 at 81: 'it seems that the dangers of a jury decision being influenced by feelings of bias or prejudice have been overstated'.

75 S. M. Davies, 'Evidence of Character to Prove Conduct: A Reassessment of Relevancy' (1991) 27 *Criminal Law Bulletin* 504 at 506.

76 *Ibid.* at 533. See also Park, above n. 59 at 730: on the issue of whether similar fact evidence ('specific-act evidence') should be admissible to prove guilt, he noted that 'the literature from social psychology and personality psychology does not point strongly to one conclusion or the other'. The Law Commission in its Consultation Paper No. 141, above n. 59 at para. 6.11, urged caution in relying on psychological studies: 'Psychologists are far from formulating a single, definitive explanation of the causes of human behaviour, or of the concept of personality, and their findings need to be treated with some care'. It noted that the various studies conducted in the United Kingdom and the United States 'do not give a uniform answer to the question whether [the disclosure of a criminal] record is prejudicial' (*ibid.* at para. 7.6). But in Cm 5257, above n. 59 at para. 6.41, the Law Commission preferred to err on the side of caution. For a recent summary of psychological research findings and competing theses in this field, see M. Redmayne, 'The Relevance of Bad Character' (2002) 61 *CLJ* 684 at 687–90.

77 Auld, above n. 1 at 566.

78 *DPP v Kilbourne* [1973] AC 729 at 757; *R v Boardman*, above n. 60 at 456; *ex p. Marland*, above n. 60 at 255. Cf suggestions that the evidence is irrelevant: *Thompson v R* [1918] AC 221 at 232; *R v Miller* [1952] 2 All ER 667 at 668; J. F. Stephen, *A General View of the Criminal Law of England* (Macmillan: London, 1863) 309–10.

is meant by the claim that the fact-finder has been *unduly* influenced, for, as Dripps notes, this claim ‘depends on a background judgment of rationality that is difficult to verify or to falsify empirically’.⁷⁹ One cannot conclude merely from data suggesting that disclosure of the accused’s criminal record increases the chances of conviction that fact-finders are inclined to *overvalue* evidence of past convictions. This allegation implies that the evidence has an objectively ‘correct’ weight. But in what sense have fact-finders given, and how are we to tell (save in extreme cases) that they have given, ‘too much’ weight to the evidence?⁸⁰ If the evidence is of a previous criminal conviction, it has been argued that a rough sense of its objective probative value may be derived from the relevant crime statistics and recidivism figures; but the interpretation and use of such data are fraught with difficulties.⁸¹ The first line of justification seems speculative, if not conceptually vague.

For sake of argument, let it be that lay people do tend to find past convictions and prior misconduct more incriminating that they actually are. The first line of justification, as mentioned, attributes the cognitive error to ignorance: the fact-finder relies, in her deliberation, on beliefs and reasoning which, unknown to her, are false or invalid. But if ignorance is the problem, and if the bad character evidence is deemed probative, and therefore acknowledged to be truth-revealing to some degree, would not the most appropriate response be to guide the fact-finder in the evaluation of it?⁸² Why does the law not treat it the same way it treats other evidence that carries the risk of cognitive error? An example is evidence of (eye-witness) identification which,

79 Above n. 62 at 1401. Some have argued that studies claiming to show that people are prone to fallacious reasoning actually show no such thing, that the researchers have misconstrued the data or made questionable assumptions in analyzing them: e.g. N. Rescher, *Rationality—A Philosophical Inquiry into the Nature and the Rationale of Reason* (Clarendon: Oxford, 1988) 194–6.

80 Referring to those who called for empirical verification, Cross rightly asked: ‘But would they have been any wiser with regard to the crucial question whether the disclosure of the record increases the risk of the conviction of an innocent man?’: R. Cross, ‘Clause 3 of the Draft Criminal Evidence Bill, Research and Codification’ [1973] *Crim LR* 400, 403.

81 See M. Redmayne, ‘The Law Commission’s Character Convictions’ (2002) 6 *Int J of Evidence and Proof* 71 and ‘The Relevance of Bad Character’ (2002) 61 *CLJ* 684. The author argued, based on a sampling of criminal and recidivism statistics, that the studies on which Cm 5257, above n. 59, relied for its claim that similar fact evidence has an unduly prejudicial effect on fact-finders, do not in fact support the claim; indeed, he suggested that the studies showed the reverse, that the subjects gave too little rather than too much weight to the evidence. (On the studies, see Sally Lloyd-Bostock, ‘The Effects on Juries of Hearing about the Defendant’s Previous Criminal Record: A Simulation Study’ [2000] *Crim LR* 734 and ‘The Effects on Magistrates of Knowing of a Defendant’s Criminal Record’, summarised in Cm 5257 at pp. 241–9.) But, as Redmayne himself acknowledged, there are many difficulties in interpreting the statistics on which he relied: ‘The Relevance of Bad Character’ (2002) 61 *CLJ* 684 at 700–13.

82 The question is raised also by A. A. S. Zuckerman, *The Principles of Criminal Evidence* (Clarendon: Oxford, 1989) 231–2, and Bagaric and Amarasekara, above n. 74 at 81–2.

as it has come to be accepted, is not as trustworthy as it is widely believed to be; nevertheless, the law admits the evidence subject to ‘advice’ on its evaluation; the fact-finder is told about the aspects in which the testimony might be unreliable and urged to be cautious in believing it.

The law controls bad character evidence by the techniques of ‘exclusion’ and ‘regulation’ instead. The evidence is excluded from deliberation altogether if it is adduced for the purpose that offends the similar facts rule. If that purpose does not offend the rule, but the evidence might nevertheless attract a line of reasoning that offends it, the evidence is admitted subject to regulation on how it cannot be used; the jury will be instructed not to rely on the so-called ‘forbidden chain of reasoning’.⁸³ ‘Advice’ is a weaker form of controlling deliberation than ‘exclusion’ or ‘regulation’. It is understandable why, in the present context, the law prefers one or the other of the last two options. To choose either is to take a categorical stance on the underlying objection. A categorical stance is the proper response because moral principles are at stake. To understand the similar facts rule, we have to explore its ethical basis. This will be done in the next section.

The second line of justification (the need to safeguard the accused against the risk of emotivism) is also inadequate. In determining the reality and degree of this risk, we have to predict how the trier of fact is likely to react to the evidence. As will be argued, this idea makes little sense of the application of the similar facts rule at a bench trial. A deeper analysis of the second line of justification is needed to uncover its normative roots. What is risky about exposing the fact-finder to bad character evidence, we are told, is that it may cause her to convict the accused without the necessary belief in his guilt on the present charge, or to cause her to settle too quickly upon that belief, for example, by being biased in the evaluation of the evidence. But what sentiments is the evidence capable of invoking in the trier of fact that could induce her to behave thus? It is, broadly speaking, the belief that a leopard never changes its spots. Our moral intuition against the prejudice contained in this belief is captured in the popular saying not to ‘give a dog a bad name and hang him’.⁸⁴ The underlying ethical concerns remain even when the trial is by judge alone. They must be carefully articulated from the internal point of view. In the final analysis, it is not psychological weaknesses, but our commitment to certain

83 *R v Boardman*, above n. 60 at 453; *BRS v R*, above n. 63 at 294–5, 302–3, 326–7, 329–30; *R v Carrington* [1990] *Crim LR* 330; cf *R v Rance* and *R v Herron* (1975) 62 Cr App R 118, 122; *R v Roy* [1992] *Crim LR* 185; P. McNamara, ‘Dissimilar Judgments on Similar Facts’ (Part I) (1984) 58 *Aust LJ* 74 at 77–8 and (Part II) (1984) 58 *Aust LJ* 143 at 154; R. Nair, ‘Weighing Similar Fact and Avoiding Prejudice’ (1996) 112 *LQR* 262; Roberts and Zuckerman, above n. 42 at 532, 534. The need for careful jury instruction is stressed in several post-CJA 2003 cases: e.g. *R v Hanson*, above n. 48 at [18]; *R v Edwards* [2005] EWCA Crim 1813 at [3].

84 *George Ballantine & Son v Dixon & Son* [1974] 1 WLR 1125 at 1132.

moral values underpinning the trial process that give meaning and importance to the similar facts rule.

ii. Internal Analysis

(a) Moral Constraints on Evidential Reasoning

The internal approach focuses on the process rather than outcome of fact-finding. It seeks justification for the rule by arguing from the moral import of finding facts establishing criminal guilt. This kind of justification relies on a priori principles and is not contingent on the validity of empirical claims. Whereas the emphasis of the external approach is on the potential that bad character evidence has in evoking certain mental responses from the fact-finder, the internal approach focuses on the normative bounds of reasoning on such evidence. The external analyst is interested primarily in how the similar facts rule contributes to the reliability of trial findings. On the other hand, to understand the moral basis, as opposed to the goal-effectiveness, of the rule, we have to take the perspective of the person, the fact-finder, on whom the rule binds; we need to examine what it means to hold the accused responsible for a crime; and, we must reflect on the fair manner in which this should be done.

It was, for a long period of time, the orthodoxy that the similar facts rule strictly prohibits the trier of fact from reasoning in a certain way towards the conclusion of guilt. (The idea that there is a strictly ‘forbidden chain of reasoning’ is no longer fashionable, but, as we will see, it is possible to interpret the idea in a manner reconcilable with the view which claims to oppose it.) It was held in *Makin v Attorney-General for New South Wales*⁸⁵ that the court may not, from the fact that ‘the accused had been guilty of criminal [or discreditable] acts other than those covered by the indictment’, infer that he ‘is a person likely from his criminal [or discreditable] conduct or character to have committed the offence for which he is being tried’.⁸⁶ To arrive at a guilty verdict by the forbidden chain of reasoning would, according to Lord Sankey in *Maxwell v DPP*, offend ‘one of the most deeply rooted and jealously guarded principles of our criminal law’.⁸⁷ The first task is to identify the principles on which the rule rests.

The rule must be examined in the context of the purpose for which facts require proof. When the prosecution seeks to prove facts at a trial, they do so for the purpose of showing that the accused is guilty on the specified charge. To find that the accused has committed the crime alleged in the charge is at once to convict him of it, to condemn and blame him, not generally for the person that he is, but specifically for the act which constitutes the crime. Given the moral import of a

⁸⁵ [1894] AC 57 at 65.

⁸⁶ Similarly, r. 404(b) of the United States’ Federal Rules of Evidence provides that ‘[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith’.

⁸⁷ [1935] AC 309 at 317.

conviction, the ascription of criminal responsibility has to be subjected to certain moral constraints. Two of them are reflected in the similar facts rule.

The first moral constraint is that the court ought not, because it is unfair, to hold a person responsible for his action if he lacks the capacity of reflective self-control—where, although he did it, he can genuinely⁸⁸ protest, ‘I could not help it’.⁸⁹ To be morally responsible for a crime, the agent must possess, at the time of its alleged commission, the normal capacity of understanding and control with respect to his action. The ‘powers of reflective self-control’ consist of two kinds of rational powers: the power to grasp and apply moral reasons, and the power to govern one’s behaviour by the light of such reasons.⁹⁰

According to Wallace, to hold a person morally responsible is to hold him to the moral obligations that we accept, and we hold him morally responsible for an action when we believe that he has, in so acting, violated those obligations. However, it is unfair to hold someone to such obligations if he is incapable of meeting our moral expectations:⁹¹ ‘it is unreasonable to demand that people do something – in a way that potentially exposes them to the harms of moral sanction – if they lack the general power to grasp and comply with the reasons that support the demand’.⁹²

The second moral constraint comes from this settled principle of criminal justice: the accused is to be tried specifically on his responsibility for the criminal act the prosecution alleges he has committed; it is not the point of the trial to judge him generally for the person that he is, on the life that he has lived. ‘[A] defendant must be tried for what he did, not for who he is.’⁹³ As Gross elaborates:⁹⁴

[C]riminal justice requires us to determine the culpability of a person’s conduct, not the culpability of a person . . . Judgments sometimes are rendered about what a person is rather than about what a person has done. At times it is a conclusion about him based on what he has done in the past. At other times it is a conclusion about him based on certain

88 Stressing the importance of establishing the truth of this protest: H. Fingarette, ‘Addiction and Criminal Responsibilities’ (1975) 84 *Yale LJ* 413 at 426–44.

89 Underlying the criminal law, according to Hart, is the ‘fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it’: H. L. A. Hart, *Punishment and Responsibility—Essays in the Philosophy of Law*, revised edn (Clarendon: London, 1970) 174; and see also at 39–40.

90 R. J. Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press: Massachusetts, 1994) 7.

91 See *ibid.* at 157 *et seq.* for an elaborated defence of this point.

92 *Ibid.* at 161.

93 *US v Meyers* 550 F 2d 1036 at 1044 (5th Cir, 1977), describing this principle as a ‘concomitant of the presumption of innocence’. The same was held to be ‘fundamental to American jurisprudence’ in *US v Foskey* 636 F 2d 517 at 523 (DC Cir, 1980).

94 H. Gross, *A Theory Of Criminal Justice* (OUP: New York, 1979) 76–7; and see also at 9.

conduct he has engaged in that is assumed to be representative of what he is disposed to do . . . When determining criminal liability, the criminal law confines its concern with culpability to specific conduct that is alleged to constitute a crime, placing these other matters entirely out of bounds.

The similar facts rule forbids reliance on reasoning in support of a conviction that violates either of the above two moral constraints. Of the two, the second stands in greater danger of violation. Suppose the court has to decide whether the accused is guilty of a particular crime. There is evidence of his previous engagements in that kind of criminal activity. One may seek to reason from his bad character along this line:

It is likely that the accused is guilty because his past shows that he is the *sort of person* likely to have committed this crime.

This general form of reasoning may rely on one of two generalizations about ‘the sort of person’ the accused is believed to be. We may think that:

P1: he is the sort of person who *cannot help doing* this kind of criminal act (under certain conditions); or that

P2: he is the sort of person who *tends to commit* this kind of criminal act (under certain conditions).

Each of these generalizations (P1 and P2) can, in turn, be based on one of two conceptions of the accused as a person. That, under certain conditions (such as the availability of relevant opportunity or presence of sufficiently strong temptation), the accused cannot help committing the kind of criminal act in question (P1) may be explained by one of two possible characterizations of his moral personality. According to the first, he lacks the power of critical moral reflection. He was in each case guided by his basic, or first-order, desire to commit that kind of act. He is incapable of making higher-order evaluations, of reflecting on the rightness or wrongness of his conduct, and consequently of wanting to change.⁹⁵ According to the second, he lacks the power of self-control. He is unable to guide his life by the light of his critical judgments. While he understands that what he has done was wrong and, at a higher level, desires not to do it again, he is incapable, in certain circumstances, of self-restraint. His actions, while intentional, were involuntary. On each occasion, he truly could not help doing it and did it against his better judgment.⁹⁶

Both conceptions of him may be objectionable on empirical or logical grounds: often, the previous incidents of similar misconduct

95 See Frankfurt’s description of someone lacking ‘second-order volitions’: H. G. Frankfurt, ‘Freedom of the Will and the Concept of a Person’ (1971) 68 *Journal of Philosophy* 5.

96 Following Gert and Duggan, he may be said to lack the ‘ability to will’ in respect of committing the crime as a kind of action: B. Gert and T. Duggan, ‘Free Will as the Ability to Will’ (1979) 13 *Noûs* 197.

are not strong enough to show that the accused lacks the capacity to act otherwise than he allegedly did. In theory, there will come a point when the number of antecedents makes either conception of him plausible. But there is another independent objection, a moral one. A finding of guilt not only asserts facts constitutive of the crime in question, it also (at least in the typical criminal case and if only implicitly) blames or condemns the accused for committing it. According to the first moral constraint, a person does not merit blame for his action when he does not have the capacity of reflective self-control. In the present version of the reasoning (P1), the accused is treated precisely as such a person; he is thought either to lack the power to grasp and apply moral reasons or to lack the capacity to control his behavior by the light of such reasons.

The concept of character employed here has no ethical connotation. It is analogous to the kind attributed to non-moral entities. To say that sugar is soluble is to say that it will dissolve ('cannot help but dissolve') under the condition of being placed in water. It is unintelligible to hold sugar 'responsible' for 'behaving' as it is disposed to do.⁹⁷ If we accept the first moral constraint on the ascription of criminal responsibility, we cannot, without a lack of integrity, rely on the 'cannot help it' argument to secure a guilty verdict: if the accused's character is truly such that he could not help committing the crime, then he is not morally accountable for it and therefore ought not to be found guilty of it. P1 breaches this constraint covertly, under the guise of evidential reasoning, where an inference is drawn towards guilt from a conception of his character that ought, in principle, to exclude him from accountability.⁹⁸

Since the first moral constraint is strong and clear, few fact-finders would consciously violate it. But there is a more problematic and worrying way in which the criminal past of the accused may be held against him, and it is on this that we will henceforth concentrate. One might be tempted to reason that he is the *sort of person* likely to have committed this crime because he is the sort of person who *tends to commit* this kind of criminal act under certain conditions (P2). Here, we do not think that he lacks the powers of reflective self-control, but we believe that his exercise of those powers is deviant or falls short of expectation. He may be a wicked man who does not think it is wrong to act in the way he did, or he may be a moral weakling. He understands that it is wrong to commit the crime but gives in too easily. His

97 Example taken from G. Ryle, *The Concept of Mind* (Hutchinson's University Library: London, 1949) 123.

98 It is not suggested that the fact-finder is never allowed to find as a fact, were it a legal issue in the case, that the accused lacks the powers of reflective self-control. What the fact-finder is not allowed to do is to infer this fact from the accused's record of criminal or discreditable conduct and use it as a basis for finding that he is guilty where his incapacity is not presented as an issue in dispute at his trial.

will or power of self-control is weak.⁹⁹ In both cases, one might reason that it is likely that he will repeat what he did where the conditions which tend to elicit that kind of behaviour are present. However, the nature and form of this reasoning need careful study.

(b) Use and Abuse of Evidence of Previous Misconduct

Plainly, it cannot be inferred solely from the fact that the accused had committed this type of crime in the past that he is likely to be guilty of the instant crime. There is much debate between those who advocate the significance of character in controlling human behaviour and those who take as determinative the situation in which the actor found himself. Doris has warned against needlessly polarizing this debate. Whether character or situation has greater influence, it can scarcely be denied that both contribute to a person's conduct.¹⁰⁰ Attribution of a disposition does not *entail* action in conformity with it.¹⁰¹ That a person has a disposition to do X does not mean that he will 'constantly, on every occasion, do things of sort X'; much will turn on 'the situation that is immediately present'.¹⁰²

There are two ways in which one may account for the role that character and situation play in influencing behaviour.¹⁰³ This translates, in the present context, into two ways of conceptualizing, and

- 99 Action performed against one's better judgment is not necessarily involuntary. We are here supposing a case where judged by 'ordinary everyday criteria', we would say that he could have avoided acting as he had done. (D. Pears, *Motivated Irrationality* (Clarendon, Oxford, 1984) 229.) As Pears points out at 232, 'capitulation to . . . mild addiction would not be a case of compulsion'. The second conception of P2 (the case of the moral weakling) is different from the second conception of P1 (the case where the actor lacks the power of self-control); in the first, the person is 'weak-willed' and in the second, 'will-less'; on the conceptual difference, see T. E. Hill Jr., 'Weakness of Will and Character' (1986) 14 *Philosophical Topics* 93.
- 100 J. M. Doris, *Lack of Character – Personality and Moral Behavior* (CUP: Cambridge, 2002) 25–6. See also J. A. Johnson, 'Persons in Situations: Distinguishing New Wine from Old Wine in New Bottles' (1999) 13 *European Journal of Personality* 443 at 444–5.
- 101 'To attribute a disposition to someone is never to preclude that he may on some occasion act, or have acted, in some way contrary to his general tendency or disposition . . . It is typical of human character . . . that it allows of lapses, and that people sometimes behave in a way which is not in accordance with their character.' S. Hampshire, 'Dispositions' (1953) 14 *Analysis* 5 at 7.
- 102 J. J. Kupperman, *Character* (OUP: Oxford, 1991) 59.
- 103 The vast body of relevant literature includes W. P. Alston, 'Traits, Consistency and Conceptual Alternatives for Personality Theory' (1975) 5 *Journal of the Theory of Social Behaviour* 17; R. B. Brandt, 'Traits of Character: A Conceptual Analysis' (1970) 7 *American Philosophical Quarterly* 23; W. Mischel and Y. Shoda, 'A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure' (1995) 102 *Psychological Review* 246; Y. Shoda and W. Mischel, 'Reconciling Contextualism with the Core Assumptions of Personality Psychology' (2000) 14 *European Journal of Personality* 407; J. C. Wakefield, 'Levels of Explanation in Personality Theory' in D. M. Buss and N. Cantor (eds), *Personality Psychology – Recent Trends and Emerging Directions* (Springer: New York, 1989), ch. 25.

reasoning from, the bad character of the accused. First, his bad character may be seen as the direct or, as Aristotle calls it, 'efficient',¹⁰⁴ cause of his behaviour. This account views people 'as objects which are passively affected by events in their environment'.¹⁰⁵ While they are treated as capable of making choices in their behaviour, their choices are thought to be dictated by their fixed psychological properties. This mechanical conception of human character, like the reasonings in P1, does not sufficiently accommodate moral agency. On this deterministic account of human behaviour, that a person behaves 'in character' (however badly) provides as little basis for condemnation as when a rattlesnake bites out of instinct.¹⁰⁶ Given the moral aspect of ascribing criminal responsibility, a motivational conception of character is needed to justify reliance on it to explain criminal conduct.

The deterministic conception of human character encourages one to apply to human conduct a mode of prediction that is based on behavioural trends. One may, for example, take the accused's previous theft conviction as evidence of a propensity to steal. Relying on crime statistics on reoffending, he is placed in the reference class of persons presumably impressed with the same disposition. On purely statistical or 'actuarial grounds',¹⁰⁷ some weight is then attributed to his previous conviction as evidence of his guilt on the present charge. On this analysis, his previous conviction alone, apart from other evidence presented in the case, has some probative value. But this assumes that he fits the statistical profile of the average member of the reference class; to put it differently, that he retains his propensity to steal and remains as liable to give in to the pull to recommit such acts as the (stereo)typical thief.¹⁰⁸

Although statistical reasoning has a place in legal fact-finding, the court should not rely upon it directly, in the manner just described. To do so is morally objectionable. Respect for the accused requires that the court must not be dismissive of his capacity to revise, or act against, his bad character. This is best interpreted as the point of the ban on the 'forbidden chain of reasoning'. It prohibits the court from drawing any probability of guilt, however slight, simply and immediately from his discreditable life history. His past, standing on its own, should not be used directly against him on the assumption of probability that he is still the evil man or the moral weakling that he

104 J. R. Averill, 'The Dis-Position of Psychological Dispositions' (1973) 6 *Journal of Experimental Research in Personality* 275 at 278–9.

105 R. Harré and P. F. Secord, *The Explanation of Social Behaviour* (Rowman and Littlefield: New Jersey, 1972) 30.

106 Example given by T. Nagel, *The View From Nowhere* (OUP: New York, 1986) 121.

107 D. M. Buss and K. H. Craik, 'The Act Frequency Approach to Personality' (1983) 90 *Psychological Review* 105 at 107.

108 On a similar point, see M. Colyvan, H. M. Regan and S. Ferson, 'Is it a Crime to Belong to a Reference Class?' (2001) 9 *Journal of Political Philosophy* 168, especially at 172.

was. This offends the second of our two moral constraints. As Cardozo CJ said:¹⁰⁹

If a . . . propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away . . . In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar.

An aspect of autonomy is the ability to engage in the rational ‘process of self-*re*-creation’;¹¹⁰ as autonomous beings, we ‘always retain the possibility of stepping back and judging where we are and where we want to be’,¹¹¹ of ‘starting life afresh’ as Cardozo CJ says. We deny this to the defendant when we stigmatize him on the basis of a previous error. We fail to respect him fully as a person when we are dismissive of the possibility of moral redemption, of him seeing the wrong in what he has done or of developing moral fortitude to resist the kind of temptation to which he has previously fallen. Reliance on evidential reasoning that expresses such disrespect is objectionable in itself, apart from whatever bad consequences to which it might lead. A court cannot claim moral authority to demand of the accused acceptance of its verdict if the verdict was reached by a reasoning that treats him unjustly, as less of an autonomous moral agent than he has a right to be presumed to be.¹¹²

There is also, arguably, an internal connection between the similar facts rule and the purpose of a criminal trial. The trial, as some have persuasively argued, resembles a process of moral criticism; it ‘seeks to persuade the person whose conduct is under scrutiny of the truth and justice of its conclusions’.¹¹³ This supposes that the person is open to persuasion. There is an element of inconsistency, perhaps even a sense of incoherence, in trying a person for a crime, seeking outwardly to elicit from him moral contrition, and, at the same time, dismissing inwardly his capacity for moral reform. In the absence of hope that the person is capable of such reform, the trial loses much of its point as a moral dialogue aimed at getting him to see the wrongness of his action.

109 *People v Zackowitz* 172 NE 466 at 468 (1930). The internal argument that the making of the forbidden assumption against the accused is intrinsically unjust to him is different from the consequentialist argument that it might discourage his rehabilitation: on the latter, see e.g. *R v Handy* (2002) 213 DLR (4th) 385 at 401.

110 J. Feinberg, ‘Autonomy’ in J. Christman (ed.), *The Inner Citadel—Essays on Individual Autonomy* (OUP: Oxford, 1989) 34.

111 G. Dworkin, ‘Autonomy and Behaviour Control’ (1976) 6 *Hastings Center Report* 23 at 25.

112 Duff, above n. 19 at 131. This internal demand of justice is distinct from such external concerns as fear of the consequential loss of public confidence in the trial system (Cm 5257, above n. 59 at para. 6.52) or of incurring the resentment of the defendant (para. 6.46).

113 Duff, above n. 19 at 116. A view that is shared by others: e.g. Allan, above n. 19 at 81 *et seq.*

There is a legitimate alternative to the objectionable way of using bad character evidence. It is the availability of this alternative that makes it possible to reconcile the traditional view that the rule imposes a strict ban on a ‘forbidden chain of reasoning’ with the current view¹¹⁴ that the reasoning is permissible if the probative force of the evidence is strong enough. In contrast to the deterministic conception of character, this alternative view adopts an internal perspective and conceptualizes character in terms of an individual’s set of relatively enduring motivational or cognitive–purposive structures (comprising of stable, but not unrevisable, higher-order desires, needs, motives, wants, aversions, beliefs and such inner states). Here, we adopt the perspective of the person whose action is under examination. ‘From the standpoint of the actor or agent who consciously controls his performance, desires, emotions or passions are not linked to behaviour like blind mechanical pushes, but are factors in determining what the agent takes himself to be doing.’¹¹⁵ A person is not merely an object that is acted upon by the forces of circumstances, to whom things only happen. On the contrary, it is precisely on account of her capacity of reflective self-control that we hold her responsible for her intentional action.¹¹⁶ The present conception of character allows for a person’s disposition to serve as the key to an interpretation of the body of evidence brought by the prosecution that explains why he committed the crime with which he is charged. The explanation is in terms of reasons, encompassing beliefs and desires, which motivated the specific action under enquiry.¹¹⁷

To the extent that it is true of an adult that his internal motivational structures, system of basic beliefs and outlook on life are relatively stable, it is rational to believe that he will be disposed to a relatively stable pattern of experiencing needs and aversions that generates reasons (good or bad) that motivate his actions.¹¹⁸ On this account, human action is voluntary, a response ‘in judgment, feeling and action . . . to one’s situation’.¹¹⁹ How a person chooses to act in the circumstances depends on the ‘set of motivations, including the person’s

114 See the suggestions made by Lord Cross in *R v Boardman*, above n. 60 at 456–7 and the clear acceptance of this view in *R v Randall* [2003] UKHL 69, [2004] 1 All ER 467, at [26]. In criminal cases, there are now explicit provisions on propensity reasoning in CJA 2003, ss. 101(1)(d) and 103(1)(a).

115 Harré and Secord, above n. 105 at 37.

116 See Nagel, above n. 106 at 120–1; M. Moody-Adams, ‘On the Old Saw That Character Is Destiny’ in O. Flanagan and A. Oksenberg Rorty (eds.), *Identity, Character, and Morality—Essays in Moral Psychology* (MIT Press: Massachusetts, 1990) ch. 5.

117 That character traits indirectly explain human agency, see Brandt, above n. 103 at 31; Wakefield, above n. 103 at 338; R. R. McCrae and P. T. Costa Jr., ‘Trait Explanations in Personality Psychology’ 9 (1995) *European Journal of Personality* 231 at 247 and 248.

118 Cf. Zuckerman, above n. 82 at 227; Kupperman, above n. 102 at 15.

119 R. Kamtekar, ‘Situationism and Virtue Ethics on the Content of Our Character’ (2004) 114 *Ethics* 458 at 477.

desires, beliefs about the world, and ultimate goals and values'.¹²⁰ This set of motivations, if sufficiently integrated and enduring, informs a person's character.

However, action is under-determined by character. There are at least three sources of uncertainties in inferring specific action from the agent's traits. First, change in character is possible, reflecting fundamental shifts in beliefs, goals, and motivational system; it is thus that a person can turn over a new leaf, come to repent of his crime, when he finally realizes the true gravity of his action. Secondly, even if there is no 'global' change of the sort just mentioned, one may, on occasions, act against character.¹²¹ Thirdly, the agent's motivational constitution will need specification if it is to have any real explanatory power.¹²² For example, the disposition to commit rape may consist of a latent higher-order desire to violate prostitutes forcibly and of the distorted belief that such people deserve to be raped. Whether a disposition is activated on a particular occasion is dependent on many other variables, including the person's other (counter) traits. In our example, the accused may be prudent in character and highly averse to getting caught. If the victim is not known to the accused to be a prostitute, or if the crime was committed with much daring, the disposition of the accused, understood as a complex of interacting internal states, loses its relevance or much of its probative force.¹²³ Hence, the probative value of the accused's disposition depends on the availability of evidence, not only of its existence and precise nature, but also of the presence of conditions in the circumstances of the case that would activate the first-order desire to act in the alleged manner.¹²⁴ The demand that this evidence must be sufficiently coherent is arguably how we should read the law's insistence that similar fact evidence must have sufficiently high probative value. As the Court of Appeal held in *R v Cowie*,¹²⁵ 'the resolution of a dispute over the admissibility

120 *Ibid.* at 460.

121 See Moody-Adams, above n. 116.

122 This point relies on the 'widely accepted' form of analysing character dispositions as subjunctive conditionals. On this view: 'To say that P is courageous means, among other things, that if P were in a situation of great danger that required action rather than inaction or passivity, P would be disposed to act'. O. Flanagan, *Varieties of Moral Personality – Ethics and Psychological Realism* (Harvard University Press: Massachusetts, 1991) 279. For theories of disposition along this line, see Ryle, above n. 97 at ch. v, and Brandt, above n. 103.

123 This was perhaps the point of the discussion on 'situation-specific propensity' in *R v Handy*, above n 109 especially at 413–5, criticized by M. Redmayne, 'Similar Facts, Familiar Obfuscation' (2002) 6 *Int J of Evidence and Proof* 243.

124 Cf *R v Handy*, above n 109 at 398; *R v Shearing* (2002) 214 DLR (4th) 215 at 232 (the Supreme Court of Canada founded the cogency of similar fact evidence on a 'double inference', first, that the accused has a situation-specific propensity to commit a particular crime in a particular way and secondly, that his character or propensity gives rise to the further inference that he proceeded in that way with the victim on the charge under consideration).

125 [2003] EWCA Crim 3522 at [26]. See also *R v Barney* [2005] EWCA Crim 1385.

of allegedly similar fact evidence can be achieved only by considering the circumstances of a particular case. It is a contextual question’.

On the forbidden mode of using the evidence, previous misconduct *of its own* affects the probability of guilt. It may do so, as mentioned earlier, in the statistical sense which relies on empirical generalizations about the class of persons to which the accused is said to belong. On the present view, similar fact evidence supports the inference of guilt only *indirectly* by offering an *explanation* for the alleged action that is grounded in *reasons* which motivated the agent. By way of illustration, consider the well-known case of *R v Ball*.¹²⁶ A pair of siblings was charged with incest, which was then recently criminalized. According to Lord Loreburn, the evidence showed that:

there was ample opportunity for this offence, and that there were circumstances which, to say the least, were very suggestive of incest. Also these two persons lived together and occupied the same bedroom and the same bed.

When the police visited the house, the sister opened the door wearing her nightdress and when they accompanied her upstairs, they met the brother coming out of the bedroom fastening up his trousers.¹²⁷ Ordinarily, if a man and a woman live together in the way the defendants did, it is reasonable to infer that they are in a sexual relation. But the stumbling block to this inference was that the two were siblings. Usually, we would dismiss out of hand the possibility that a pair of siblings would be sexually attracted to each other. But there was evidence, the admissibility of which was the issue before the court, of their history of incest. The value of this evidence was to show that the siblings—although they were siblings—were sexually drawn to each other.¹²⁸ This made sense of their situation, particularly, of their living and sleeping arrangements.¹²⁹

This interpretation of the evidence is based on our understanding of their desire for each other, and of the strength and relative durability of that desire. An explanation for their incestuous acts is offered which relies on an internal construction of ‘the kind of person’

126 [1911] AC 47. Although *Ball* is often cited in support of the contrary view, it was in fact emphasized in that case that the ban on the ‘forbidden line of reasoning’ is strict: *ibid.* at 64–5 (argument), 71 (*per* Lord Loreburn LC).

127 [1911] AC 47 at 50.

128 As Lord Loreburn said, ‘the existence of a sexual passion between them’ was an element ‘in proving that they had illicit connection in fact on or between the dates charged’: [1911] AC 47 at 71. Unless this ‘passion’ was shown, opportunity to commit the alleged misconduct would have been neither here nor there: cf *Ross v Ross* [1930] AC 1 at 21.

129 This approach is similar to that taken by historians in seeking explanation for human action: H. Burhenn, ‘Historical Evidence and the Explanation of Actions’ (1976) 10 *Southern Humanities Review* 65 at 68: ‘If the historian can show that an action was reasonable, he will ordinarily not attempt to find some other kind of explanation for the action. He will rest content to have shown that the action is not puzzling . . . [I]t is primarily in those cases where an action does not make sense that the historian will press on to find further information’.

that the defendants are believed to be; personality, in the present context, refers to ‘conceptions of disposition that involve motives, needs, beliefs and desires that energize, direct, and select behaviors as a function of the individual’s values, capacities, and situational opportunities’.¹³⁰

We do not take the siblings’ previous sexual intercourse as a factor that, *in itself*, contributes directly some weight to the finding of guilt. On the contrary, *in itself*, and without more, it must count for nothing. What it can be allowed to do is to serve as evidence of the intense sexual attraction they must have felt for each other in the past.¹³¹ The probative value of this fact turns on the belief that this kind of intense attraction is relatively durable. Statistical evidence may show the reasonableness or otherwise of this belief and the potential usefulness of statistical reasoning in this connection is freely acknowledged. But, however reasonable the belief is, we cannot in fairness to the siblings dismiss their capacity to change the way they view each other or to resist the old urges to which they had previously succumbed. For that reason, we should allow evidence of their discreditable past to be used only to support a purposive interpretation of the body of other evidence brought by the prosecution to establish their guilt. Similar fact evidence should serve only, loosely speaking, a ‘corroborative’ function.¹³²

(c) Reinterpretation of Balancing Test

If, as claimed, the similar facts rule is about dispensing justice or fairness to the accused, how should we read the test of admissibility? The common law test, as set out in *DPP v P*,¹³³ calls the probative force of the evidence to be weighed against its prejudicial effect. Traditionally, it is thought that the competing considerations spring from a common concern. Bad character evidence can potentially impede the objective ascertainment of the material facts. At the same time, it is often probative and can aid the search for truth. These considerations are focused on the same end: the right verdict. They are engaged, so to speak, in a tug of war; although they pull in opposite directions, their forces are exerted along the same (cognitive) plane. If the court predicts that, on balance, admission is more likely to benefit the

130 J. Block, ‘Critique of the Act Frequency Approach to Personality’ (1989) 56 *Journal of Personality and Social Psychology* 234 at 238.

131 Intense enough, at any rate, to have overridden whatever inhibitions they may have had about sexual intimacy on the previous occasions.

132 Cf the suggestion that has been made that the similar fact rule operates ‘as a sort of corroboration rule: it ensures that the defendant will not be convicted on the propensity inference alone, that there will always be other evidence . . . to back it up’: (M. Redmayne, ‘Drugs, Money and Relevance: R v. Yalman and R v. Guney’ (1999) 3 *Int J of Evidence and Proof* 128 at 134, discussing the requirement that evidence be relevant to a specific issue.

133 Above n. 38 at 460. The Law Commission had recommended essentially the same test, but wanted ‘structured guidelines’ on how it is to be applied: Cm 5257, above n. 59 at e.g. Part XI, especially paras. 11.42–11.45.

search for truth than to harm it, it should admit the evidence; if the balance should tip the other way, the court should exclude the evidence. Exclusion is a prudential measure, arising from distrust in the fact-finder's ability to assess the evidence 'logically', 'rationally', 'objectively'. In this respect, the trained judge is often deemed more trustworthy than the lay juror.

This traditional analysis of the balancing exercise raises many difficulties and overlooks fundamental principles that are at stake. To begin with, many commentators have pointed out that the considerations to be weighed lack a common measure, and that the court is, in effect, asked to balance incommensurable factors.¹³⁴ Also, the danger of the evidence being prejudicial, in the sense of it being overly influential, does not 'disappear' just because or whenever the evidence has high probative value. The two factors do not stand in a logical relation of correlated variation. To say that the evidence is potentially prejudicial is to acknowledge the danger of the fact-finder giving the evidence more weight than it objectively has, *however much weight we think it objectively has*.¹³⁵

Furthermore, on the psychological explanation of the rule, it is conceptually incoherent to apply the balancing test at a bench trial. First, on a literal application, the judge has to predict whether she has the psychological fortitude to stop herself from being influenced unduly by the evidence. If she answers negatively (and it must be hard to find a judge willing to admit to her own weakness), she must exclude the evidence. But, for exactly the same reason (the admitted lack of fortitude), the exclusion would, on the present account, be pointless since the judge has been exposed to the evidence. The shocking result is that, at a bench trial, the precaution can be taken only after the harm is done. Secondly, if the judge decides to exclude the evidence, she must not allow it to influence her deliberation on the verdict. We trust the judge to comply with the law and ignore the evidence completely. But should not the same faith in the judge's ability make us admit the evidence instead? As the Privy Council held in *Attorney-General of Hong Kong v Siu Yak-Shing*:¹³⁶

If the judge having ruled it inadmissible is to be trusted to put the evidence out of his mind he can surely be trusted to give it only its probative, rather than its prejudicial, weight if he rules that it is admissible.

The conventional view of the balancing exercise sets up an opposition between truth and fairness. Admission of bad character evidence is

134 E.g. A. A. S. Zuckerman, 'Similar Fact Evidence—The Unobservable Rule' [1987] 103 *LQR* 187 at 196; C. Tapper, 'Trends and Techniques in the Law of Evidence' in Peter Birks (ed.), *Criminal Justice and Human Rights* (OUP: Oxford, 1995) 29; *Pfennig v R*, above n. 39 at 528. But cf Roberts and Zuckerman, above n. 42 at 526–7.

135 Nair, above n. 83 at 263.

136 [1989] 1 *WLR* 236 at 241.

unfair to the accused to the extent that it can potentially prejudice him. However, the unfairness is excusable if there is a greater countervailing interest in getting to the truth of his guilt. This way of thinking weakens the right to a fair trial, for it suggests that it is permissible to give the accused a less than fair trial whenever there is sufficiently great interest in securing his conviction.¹³⁷

As noted earlier, it is acknowledged at common law, and under the new regime established by the CJA 2003, that the exclusion of bad character evidence is for reasons of justice or fairness. Criticisms of the balancing test can be met if it is seen, as it should be, as an operation of justice, manifesting in its application respect for the person standing trial. Contrary to the impression created by the metaphor of 'balancing', there is not an antithesis between truth and fairness; they are not on opposing sides of the scales such that every concession to one is a sacrifice of the other.

The balancing exercise is not about predicting the likely reaction of the fact-finder to the evidence. Exclusion of evidence of previous misconduct expresses in an emphatic fashion the law's particular concern about the moral legitimacy of the manner in which the state seeks to secure a person's conviction. It displays a commitment, founded on respect for his moral autonomy, not to hold his discreditable past against him unless it can lend coherence to a body of available evidence that shows his guilt in relation to the charge under trial. Similar fact evidence should only play a 'corroborative' role. It can assume that secondary role only where there is sufficiently strong evidence, not only of the alleged disposition, but also of conditions that were present in the case which would, given his disposition and related traits, tend to motivate him to commit the specified crime. How probative this body of other evidence must be to satisfy the test of admissibility is a question of degree.¹³⁸ It would be naïve to expect a formulaic solution to this (or indeed any) moral problem. But this does not diminish the point that is being made: to hold the accused's past *directly* against him, on the assumption of probability that he will repeat his error, is to insult his personal dignity. The exclusion of evidence in such a case is of significance even when the trial is by judge alone.¹³⁹ It expresses the importance attached to finding the truth in a manner that, at the same time, does justice to the accused as a person.¹⁴⁰

137 Cf *Pfennig v R*, above n. 39 at 528–9.

138 *DPP v P*, above n. 38 at 461; *R v H* [1995] 2 AC 596 at 621; *Makin v Attorney-General for New South Wales*, above n. 85 at 65.

139 The value of the rule even in a trial without a jury is acknowledged by Mr Justice Schofield, 'Should Juries Know of a Defendant's Convictions?' (1992) 142 *NLJ* 1499.

140 M. C. Slough and J. W. Knightly claim that the rule is 'born of fairness and sobriety' and 'based upon the precepts of a civilized society': 'Other Vices, Other Crimes' (1956) 41 *Iowa LR* 325 at 349 and 350.

IV. Conclusion

Discourse on the law of evidence is usually conducted from an external perspective. The arguments are cast in consequentialist form. An instrumental interpretation is taken of the role of evidential rules. Those who take this approach tend to concentrate on the logical aspect of the trial, seeing it as a system engineered to get to the truth of a factual dispute, and their recommendations on the methodology of fact-finding are informed and moved chiefly by the desire to increase the chances of a correct verdict in instant case or to maximize the ratio of correct verdicts in the long run. The external observer is chiefly interested in seeking out causal connections between the structures of fact-finding and the reliability of the outcome.

We must take an internal perspective if we are to appreciate the moral significance of the law of evidence. From this angle, the relevant issues appear in the deliberative context: given what fact-finding is about and entails, how ought the person with the responsibility of the task consider the evidence in her deliberation? Are there ethical constraints on the lines of reasoning that may be used to support a guilty verdict? Just as fact-finding is not a pure cognitive enterprise, the principles on which such questions must be answered are not wholly of a logical nature. Moral considerations are crucially and inextricably at play.

These general themes were illustrated by an examination of the similar facts rule. The rule regulates trial deliberations in two ways. First, it does not allow the court to reason that it is likely that the accused is guilty because his past shows that he is the sort of person who, in appropriate circumstances, cannot help committing the kind of crime in question. There is a lack of integrity in using this reasoning covertly to secure a guilty verdict for if it is true that the accused 'could not help doing what he did', he is not morally responsible for his action and, in general, ought not to be convicted of the crime. Most fact-finders would recognize and accept this normative objection and, for that reason, the risk of its violation is low. Secondly, and more importantly, the court must not hold the accused's discreditable past directly against him for to do so is to be dismissive of his potential for moral development. His bad history can be used against him only indirectly, as evidence of his motivational disposition, to support an explanation of his action that is suggested by other available evidence; and it can be so used only when there is sufficiently strong evidence that the circumstances of the case were such as would engage his alleged trait and generate in him reasons or desires to commit the crime in question. The similar facts rule is founded ultimately on the demand that the court do justice to the accused in the pursuit of truth.