Should the Tail Wag the Dog: The Potential Effects of Recidivism Data on Character Evidence Rules

Charles H. Rose III

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SHOULD THE TAIL WAG THE DOG?: THE POTENTIAL EFFECTS OF RECIDIVISM DATA ON CHARACTER EVIDENCE RULES
CHARLES H. ROSE III*

I. INTRODUCTION

At once, when a man raises his eyes from the common law system of evidence, and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here, a great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. [W]e alone have generated and evolved this large, elaborate, and difficult doctrine.¹

The words of Professor James Bradley Thayer, a master of the law of evidence,² still ring out across the years. From 1898 until the present day, these words have captured the essence of evidentiary law and its common law heritage. In Thayer’s day, the evidence rules represented a precedent-setting application of common sense to legal issues. They balanced the needs of the state to determine the truth of an occurrence, with a commitment by the state to ensure that individual rights are protected.³ As a result, present evidentiary law has been forged in the crucible of common sense and vast experience.⁴ At its best, it balances competing values with great dexterity, while at its worst, it leaves us scratching our heads and wondering why we cannot fashion a more rational and cogent way to deal with the very human dynamics of the law.

Humanity’s presence in the courtroom continually pushes evidentiary law in different directions. Character evidence is one spot where the rules ebb and flow with societal concerns and an always developing understanding of what it means to be human. It is an area within the Federal Rules of Evidence where common sense, social science, and public policy go hand in hand.⁵ The boundaries of admissible

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¹ See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 1–2 (1898).
² See 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE, at xiv (2d ed. 1923) (1904) (identifying Professor Thayer as a dominant scholar in evidence) [hereinafter WIGMORE, EVIDENCE].
³ See THAYER, supra note 1, at 3–4.
⁴ According to Thayer, the law of evidence is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and sound practical understanding; and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that inquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, and not even heard by the jury. Id. at 4.
⁵ See THAYER, supra note 1, at 3–4.
⁶ 1A JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 54.1, at 1152 (Peter Tillers rev. ed. 1983) [hereinafter WIGMORE REVISED].
The issue then becomes what sort of balance should be used to weigh the legitimate probative importance of the evidence against the danger of its improper use by the jury and how effectively trial judges use their authority to exclude for undue prejudice to regulate the danger of prejudice when persistent advocates do their utmost to find a legitimate basis for the admission of evidence reflecting badly on character and to persuade the court that the dangers of prejudice are outweighed by the legitimate benefits of the evidence.

Id. (explaining how character evidence is, or is not, admitted at trial).

6. See 1 WIGMORE, EVIDENCE, supra note 2, § 56, at 269–70. Wigmore laid out the historical development of cases where the character of the accused became admissible when it had not previously been so. Examples included capital indictments, the relationship between charged perjury and being a man of property, and peaceful disposition. Id.

7. 1A WIGMORE REVISED, supra note 5, § 54.1, at 1156 n.2. However, we see no good reason to shy away from what we see to be true merely because the implications of the truth are far-reaching and do to a degree undermine the significance of our own enterprise, viz., that of assessing and describing the usual legal treatment of various types of evidence and of explaining the reasons for that treatment.

Id. at 1159 n.2.

8. MICHAEL D. MALTZ, RECIDIVISM 1 (1984). Maltz defines recidivism as “reversion of an individual to criminal behavior after he or she has been convicted of a prior offense, sentenced, and (presumably) corrected.” Id.


10. At a minimum, further research is necessary before crafting or modifying evidentiary rules dealing with the admissibility of prior sexual misconduct. The recidivism data available in the studies relied upon in this Article deal with offenses from several different states. Each state treats character evidence of prior sexual misconduct in a different manner. Where appropriate, this Article will identify the current law concerning prior sexual misconduct.
identifies specific factors explaining the statistical relationships between property crimes, drug crimes, and prior offenses. The analysis also identifies gaps in our knowledge of the correlation between prior and future sexual misconduct that warrant further study. Finally, the analysis supports drafting new propensity character evidence rules where our knowledge of the relationship between character traits as they relate to specific types of offenses has sufficiently matured.

Recidivism data analysis impacts our current views on the proper use of propensity evidence. This data supports modifying the character evidence rules by applying the behavioral sciences properly while grounding the changes in the historical underpinnings of evidentiary law. Developments in the behavior science field of personality explain and verify the connection between character traits and actions in specific situations. These new theories, interactionism and latent-state-trait theory, challenge the current legal reasoning behind the propensity character rules of evidence. Interactionism and latent-state-trait theory place into context the historical underpinnings of the character evidence rule and show how it relates to the common law.

It is time to fashion clear, cogent rules of character evidence that accurately reflect human nature, the social sciences, and the historical underpinnings of the common law. The statistical data gathered by the federal government provide that opportunity. Two separate government agencies have produced recidivism statistics. This Article will review each of the studies and then suggest which, if any, will assist in drafting new evidentiary rules. The applicable studies are the fifteen-year U.S. Sentencing Commission report released in May of 2004,11 which served as a “‘performance review’ of criminal history’s predictive ability,”12 and the three Bureau of Justice Statistics reports on recidivism, titled Recidivism of Prisoners Released in 1983 (1989),13 Recidivism of Prisoners Released in 1994 (2002),14 and Recidivism of Sex Offenders Released from Prison in 1994 (2003).15

While not designed or intended to address the use of character evidence at trial, these studies serve as an excellent window through which to view the validity of past criminal behavior for its predictive ability; they assist in establishing the veracity and degree of logical relevancy between past conduct of a specific nature and future similar conduct. This Article will examine possible changes to the propensity character rules of evidence for criminal trials based upon this empirical information. This Article focuses on the use of propensity character evidence in criminal trials in three different situations dealing with commonly charged offenses of criminal misconduct routinely handled by our trial courts: property crimes, drug offenses, and sexual assaults.

and the law that existed when these prisoners were initially convicted. The Federal Rules of Evidence changed their treatment of character evidence dealing with sexual misconduct in the mid-1990s. For an in-depth analysis of that change, see generally Robert F. Thompson III, Character Evidence and Sex Crimes in the Federal Courts: Recent Developments, 21 U. ARK. LITTLE ROCK L. REV. 241 (1999).
11. See MEASURING RECIDIVISM, supra note 9.
12. Id. at 2.
15. See LANGAN, SCHMITT & DUROSE, supra note 9.
Part II of this Article correlates the existing studies and compares their recidivism data in light of specific offenses. Part III identifies and analyzes the relationship between psychology, character, and evidence law by focusing on current and previous theories of personality and their impact on the development of character evidence. Part IV illustrates the development of the historical and societal underpinnings of character evidence through the lens of practical application. Part V combines the issues developed earlier and posits that through a combination of history, psychology, and statistics we can do a better job of crafting character evidence rules.

II. AN ANALYSIS OF CURRENT RECIDIVISM DATA

Recidivism data must address and compare categories of prior criminal activity in light of specifically identified recidivating misconduct if it is to serve as a useful tool in developing more accurate propensity character evidence rules. The recidivism data compiled and discussed in this Article are summarized in the following table.¹⁶

<table>
<thead>
<tr>
<th>Table 1. Relationships Between Recidivating Prisoners and Their Recidivating Offense by Either Category of Offense or Specific Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PRIOR CONVICTED OFFENSES BY CATEGORY</strong></td>
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<tr>
<td>SEX CRIMES</td>
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<td>DRUG CRIMES</td>
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<td>PROPERTY CRIMES</td>
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<td><strong>PRIOR SPECIFIC CONVICTED OFFENSES</strong></td>
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<td>HOMICIDE</td>
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<td>OTHER SEXUAL ASSAULTS</td>
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<td>MOTOR VEHICLE THEFT</td>
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<td>ROBBERY</td>
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<tr>
<td>BURGLARY</td>
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<tr>
<td>LARCENY/THEFT</td>
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<tr>
<td>DRUG OFFENSES</td>
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Table One establishes that the highest logical correlation between previous crimes and commission of the same crime in the future exists for property crimes and drug crimes. The current Federal Rules of Evidence do not admit propensity

¹⁶ This table is a summation of excerpts of recidivism data from the U.S. Sentencing Commission and Department of Justice Reports. See supra note 9.
One of the lowest statistical correlations exists between prior sexual crimes and future sexual misconduct. Despite this fact, the Federal Rules of Evidence routinely allow for the admissibility of propensity evidence regarding prior sexual misconduct—even when such misconduct did not result in a conviction. The recidivism data for sexual offenses is currently incomplete. The evidentiary rules addressing propensity evidence for sexual misconduct were improperly drafted based upon assumptions that are not empirically supported by the information currently available.

Once the correlation between prior misconduct and current misconduct is understood through recidivism data, the next step is to identify factors present in character-based conduct that form the basis for creating valid admissibility tests allowing for a greater use of propensity evidence when appropriate. Judges and finders of fact would use those factors when determining whether to admit propensity evidence and what weight propensity evidence should be given. At a minimum, the percentages expressed above support an inquiry into whether the propensity character rules of evidence should be modified to reflect the predictive ability of prior misconduct. This would allow for empirical data to guide character evidence rules in a way not previously contemplated. Before taking that step, a review of the recidivism studies is in order.

In November 1984, Congress adopted the U.S. Sentencing Guidelines, making them mandatory for all federal courts. The imposition of mandatory sentencing guidelines by Congress and later by state legislatures created a great deal of

17. FED. R. EVID. 404 (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes). Rule 404 provides:
   Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
   (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
   (2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
   (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.


19. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter SRA]. The SRA mandated the formation of the U.S. Sentencing Commission as an independent agency in the judicial branch. The SRA required that the commission be composed of seven voting members. The President of the United States was given the power to appoint the members of the commission with the advice and consent of the Senate. The SRA also required that at least three members of the commission be federal judges. A maximum of four members could be from one political party. Each member of the commission was to serve on a staggered six-year term. Congress tasked this commission with creating a mandatory set of sentencing guidelines to be used in federal courts. Three years after creation of the commission, Congress was able to adopt, with an effective date of November 1987, the U.S. Sentencing Guidelines. Those guidelines established mandatory minimums for sentencing and created a structured process to arrive at a range of possible sentences for the trial judge. The mandatory nature of those guidelines has been a source of contention and much litigation since their inception. In fact, the Supreme Court recently held that the guidelines are merely advisory. See United States v. Booker, 543 U.S. 220, 222 (2005) (finding that, if mandatory, the guidelines are unconstitutional but that district courts are required to take them into account but are not bound by them).
controversy, criticism, and discussion within the legal community. Regardless of the ultimate impact of those criticisms,20 the mandate of the U.S. Sentencing Commission has focused the penal community on the effects of incarceration, to include the recidivistic tendencies of released inmates.21 This scrutiny created a marked increase in data collection. One positive effect of this data-oriented approach to recidivism is a commitment on the part of the Department of Justice Bureau of Justice Statistics22 to separately and systematically examine the crimes for which an individual was convicted, his actions upon release from confinement, and his potential for committing additional crimes upon release from prison.23 Government agencies conducted this research into recidivism to determine the efficacy of sentencing as it applied to rehabilitation and the commission of future offenses.24 An interesting by-product of this research has been the ability to statistically calculate the probability that individuals who commit certain crimes will commit those same crimes, similar crimes, or dissimilar crimes within a specified period of time after release from prison. This statistical probability, when properly applied in light of current theories of personality, could revolutionize the manner in which we handle character evidence during a trial.25

In the 1980s, Congress turned its focus to the construction of sentencing guidelines for the federal courts.26 As part of that “war on crime,” Congress was trying to pinpoint the connection between conviction for criminal activity, incarceration, release from incarceration, and re-offending. Criminologists27 and

penologists continually research these issues to discover possible causal connections between previous criminal activity and subsequent criminal misconduct. The goal is to develop methods of investigation and treatment to reduce subsequent criminal conduct and rehabilitate inmates. One product of this focus on recidivism has been the creation of data connecting previous crimes to subsequent charged misconduct. The research identifies this data as "recidivism rates." A comparison of recidivism rates identifies which members of the prison population are most at risk to commit additional misconduct and what types of misconduct they are most likely to engage in when they do recidivate. Recidivism data is not the only data available on this issue, but it is controlled, cross-situational, and taken from a representative sample of the nation.

Discussions about recidivism rates begin with a careful identification of how recidivism data are identified and acquired. When dealing with this issue, the parameters of the data source are important. Data sources in recidivism research identify what types of activities will be considered recidivating acts. The way researchers categorize conduct in light of this recidivism standard is crucial from a statistical standpoint. The research results will not be reliable if the data source does not accurately reflect the general population and a defined control standard. Statisticians working in the field of recidivism studies have considered and used three primary methodologies for determining recidivism rates. They compare the rates between prior convictions and re-arrest, re-conviction, and re-incarceration. Each of these methodologies is valid in application, but some have more value for the purpose of considering character and recidivism. The methodology chosen will have an impact on the percentage of recidivism presented by the research. That impact is observable and predictable, supporting the validity of the different research paradigms and the data sets.

Practical considerations drive the choices of how recidivistic behavior has been identified and collected in the United States. Criminals do not volunteer information about ongoing illicit activities and it is not currently possible to identify

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28. See id. at 1170 (defining penology as "[t]he study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals").

29. See Federal Bureau of Prisons, http://www.bop.gov/about/index.jsp (last visited May 15, 2006). The Bureau protects public safety by ensuring that Federal offenders serve their sentences of imprisonment in facilities that are safe, humane, cost-efficient, and appropriately secure. The Bureau helps reduce the potential for future criminal activity by encouraging inmates to participate in a range of programs that have been proven to reduce recidivism. The Bureau's approximately 35,000 employees ensure the security of Federal prisons, provide inmates with needed programs and services, and model mainstream values.

30. See BECK & SHIPLEY, supra note 9, at 2; LANGAN & LEVIN, supra note 9, at 2–3; MEASURING RECIDIVISM, supra note 9, at 5.

31. See supra note 30.

32. BECK & SHIPLEY, supra note 9, at 2. For a discussion of problems with other measures of recidivism, see generally MALTZ, supra note 8.

33. See BECK & SHIPLEY, supra note 9, at 2 (discussing the difference between re-arrest and re-conviction as a recidivism rate identifier); LANGAN & LEVIN, supra note 9, at 2, 4 (establishing why re-arrest is the best category for representational recidivism rates).

34. See MEASURING RECIDIVISM, supra note 9, at 4–5 (discussing how difficulties in law enforcement reporting techniques and human error generally ensure that the reported incidents of recidivating offenses are less than the actual number).
crimes committed by released inmates that have not been reported and investigated by the criminal justice system. Once a crime has been reported and investigated and an arrest made, procedures within state and federal governments allow statisticians to access data reflecting the interactions between released felons and the criminal justice system. The data available to statisticians from these sources is usually sorted into three categories or data sets: re-arrest, re-conviction, and re-incarceration.

Re-arrest occurs when a previously convicted felon is released from prison and later re-arrested for a felony offense or a serious misdemeanor. Criminal histories maintained by state bureaus of investigation and the Federal Bureau of Investigation contain data indicating whether the arrested individual was previously convicted, the crime for which he or she was previously convicted, and the crime for which the individual has been re-arrested. The continued interest in recidivism research and the corresponding development of better methods of data collection, retention, and recovery, show a strong commitment to increasing the reliability of this data set.

This is the first point where verifiable and reliable information identifies and quantifies the substantive contact between convicted criminals and new misconduct that potentially resembles the misconduct that formed the basis for previous conviction(s). Researchers also collect additional data from various state and federal agencies concerning the location and activities of released inmates, but that data is not offense-specific. A percentage of those re-arrested will actually be re-convicted of a new charge, but statisticians know that a subset of this group is not properly identified and recorded.

Convictions are classified as a re-conviction when at least one new charge results in a conviction at a new trial. Statisticians get this information from

35. See id.
36. BECK & SHIPLEY, supra note 9, at 2. “In previous studies of recidivism, criminologists have concluded that in the aggregate rearrest is the most reliably reported measure of recidivism.” Id.
37. Id.
38. See infra note 41. This claim of increasing reliability is based upon the commitment by the Department of Justice to conduct recidivism research and the fact that they have conducted not one, but three substantive reviews of recidivism data as of May 2006. The clear interest in recidivism data and the quality of the Bureau of Justice Statistics reports support a belief in the increased reliability of re-arrest as a viable data set.
39. BECK & SHIPLEY, supra note 9, at 1.
40. Examples of other data collection might include the location of sexual offenders and predators, parole board records, parole officer reports, work release programs, and other agency activities designed to assist felons in reentering society successfully while also monitoring their progress and activity as they do so.
41. Id. at 2 (noting that “[d]ata on convictions and other dispositions were not reported for approximately 32% of all arrests in the criminal-history files”); see also LANGAN & LEVIN, supra note 9, at 2 (“For these reasons, studies such as this one that rely on these repositories for complete criminal history information will underestimate recidivism rates.”).

The use of two different recidivism definitions addresses the state of post-release criminal behavior records. The recidivism literature recognizes that the FBI offender “RAP” sheets are the most accurate and readily available data source for repeat criminal behavior. However, “RAP” sheets can contain errors or partial information. For example, “RAP” sheets only contain information on offenses for which offender fingerprints were obtained. Additionally, depending on the reporting policies and practices of local jurisdictions, arrest dispositions may not always be transferred to the FBI for inclusion on “RAP” sheets. “RAP” sheets will under report actual criminal behavior, and will under report convictions resulting from arrests.

MEASURING RECIDIVISM, supra note 9, at 4–5.
42. BECK & SHIPLEY, supra note 9, at 2.
prosecutors, courts, and correctional agencies. The data set for this group is always going to be smaller than the re-arrest data set because not all re-arrested criminals are re-convicted. Some are found innocent, some have the charges dropped, some return to jail for parole violations, and others are not properly reported. Other factors affecting the re-conviction rate include plea bargains, lack of evidence, police misconduct, and the running of the statute of limitations. These latter factors focus on process instead of conduct, but the interactions between the subsequent misconduct and the constitutional and procedural protections built into the criminal justice system impact the re-conviction data set. As such, while the recidivism rates from data sets taken from re-convictions are comparable to recidivism rates based upon re-arrest data sets, the re-arrest data sets are more illustrative when addressing character and conduct. Re-arrest gives us the best understanding of the relationship between previous criminal convictions and current criminal activity. By choosing re-arrest data sets we do not lose those re-arrested who subsequently fall out before conviction because of plea bargains and parole revocations. Thus, the connection between character and misconduct is more reliably represented by the re-arrest data set than by the re-conviction data set.

Re-incarceration occurs whenever a convicted felon is returned to prison or admitted to a local jail for a new offense. It can be the result of a variety of factors, including parole violations, misdemeanors, and supervisory revocations. Data sets based upon re-incarceration are typically developed from reports submitted by state or federal prisons and local jails. Given that an unknown number of convicted felons are not re-incarcerated based upon misconduct causally related to their previous offenses, this data set is not illustrative of the relationship between character and conduct from an evidentiary perspective. In order for such information to have value for evidentiary rule purposes, we must establish a logical and legal relevance between the recidivating offense and the prior offense. We cannot do that with the re-incarceration data set.

In previous studies about recidivism, statisticians determined that the re-arrest data set is the most reliable reported measure of recidivism. Logically, this conclusion makes sense. Assuming police officers are not infallible, they will fail to catch some criminals who commit additional offenses. If that is true, then the number of individuals who actually reoffend is higher than the number of individuals subsequently re-arrested. The success of police investigations in the United States increases the reliability of the re-arrest data set, especially in light of the resources employed by society in managing the data set of prior convicted felons. Prisoners are managed by the system after leaving incarceration and that
management is by and large successful. Recent statistical reductions in the overall crime rates support an assumption that the law enforcement community is relatively successful in protecting the populace; police departments and their chiefs would not long remain employed if they were unsuccessful. While a better measurement would include undiscovered misconduct, a means to reliably determine that percentage is not currently available. Negative information cannot be tracked, and the lack of statistical information about offenses of which the state is not aware is a fact of recidivism studies that must be accepted and accounted for. Choosing the re-arrest data set minimizes this concern but does not erase it.

Re-arrest provides the best statistical snapshot of recidivism and works well for analysis of the relationship between previous crimes and the nature of subsequent misconduct. Before re-arrest, a law enforcement official must have probable cause to believe that an offense has been committed and that the person being arrested committed the offense in question. Criminal procedure rules also require that an independent magistrate approve arrest warrants, and the investigative process must discover corroborating evidence that law enforcement and prosecutors require before making an arrest. These factors support the use of the re-arrest data set. The relationship between prior misconduct resulting in a conviction and subsequent conduct after release from prison shown in recidivism rates reflects a causal relationship between character and conduct that is sufficiently illustrative to contribute to the discussion about how to best draft character rules of evidence.

A. Studies Completed

This Article relies upon the recidivism studies of two federal agencies: The U.S. Sentencing Commission and the Department of Justice Bureau of Justice Statistics. The U.S. Sentencing Commission encapsulated its findings in two reports: Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines and Recidivism and the First Offender. The Department of Justice Bureau of Justice Statistics produced three separate reports titled,
Recidivism of Prisoners Released in 1983,\(^5\) Recidivism of Prisoners Released in 1994,\(^5\)\(^8\) and Recidivism of Sex Offenders Released from Prison in 1994.\(^5\)\(^9\) These studies overcome the most vexing issue in recidivism research—accurate and reliable data collection.\(^6\) Their methodologies are reliable and their samples sufficiently representative to allow for adequate analysis.\(^6\) A comparison of recidivism rates from these studies identifies which members of the prison population are most at risk to commit additional misconduct and what types of misconduct they are most likely to engage in when they do recidivate.

1. U.S. Sentencing Commission Reports

The U.S. Sentencing Commission released *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*\(^6\)\(^2\) in May of 2004. The Commission was concerned with the effectiveness of the Criminal History Category (CHC) guidelines.\(^6\) Those guidelines were designed "to quantify the extent and recency of an offender's past criminal behavior."\(^6\)\(^4\) The Commission was concerned with whether the CHC did an adequate job of predicting limited rehabilitation potential.\(^6\)\(^5\) The statutory reason for the criminal history measure is to quantify culpability, to deter criminal conduct, and to protect the public from

57. BECK & SHIPLEY, supra note 9. This report begins to identify specific offenses and recidivating offenses with some specificity but ultimately falls short of the necessary details required to promulgate evidentiary rules.

58. LANGAN & LEVIN, supra note 9. This report, and the follow up study dealing specifically with sexual offenders, is the best single source currently available for use in addressing potential evidentiary rule changes regarding propensity evidence.

59. LANGAN, SCHMITT & DUROSE, supra note 9, at 3–11. This study begins to address the statistical anomalies concerning our own sense of how sexual offenders act as compared to the statistical data. It does not go far enough to allow us to answer the questions raised by the initial lack of a relationship between prior sexual misconduct and subsequent recidivating offenses but it begins to address those issues.

60. For an in-depth explanation of how these studies validate their results, see BECK & SHIPLEY supra note 9, at 12–13; LANGAN & LEVIN, supra note 9, at 11–15 (providing an excellent explanation of how such studies, and this particular study, organize and process data to ensure reliability and viability); MEASURING RECIDIVISM, supra note 9, at 3 n.9.

61. See supra note 60.

62. MEASURING RECIDIVISM, supra note 9.

63. Id. at 1.

Along the horizontal axis lie six "criminal history categories" (CHCs) designed to quantify the extent and recency of an offender's past criminal behavior. The table cell in which the offense level and the criminal history level intersect displays the minimum and maximum number of months for an offender's recommended sentence.

Inherent in using the horizontal axis of the sentencing table is the notion that prior criminal behavior warrants incremental punishments: the more extensive an offender's criminal history, the harsher the sentence should be. This notion is formally justified in terms of culpability (just punishment), deterrence, incapacitation, and limited rehabilitation potential. The Commission recognizes the importance of measuring accurately such prior criminal behavior and future recidivism risk, thus improving the goals of crime control.

In developing the guidelines' Chapter Four criminal history component, the first U.S. Sentencing Commissioners evaluated several preexisting prediction tools. Due to pressing congressional deadlines, the guidelines' criminal history measure did not emanate from its own direct empirical evidence. Instead, the chosen criminal history instrument combined elements from the already validated U.S. Parole Commission's "Salient Factor Score" and the "Proposed Inslaw Scale."

64. Id.

65. Id.
additional crimes committed by the accused.\textsuperscript{66} While the Commission historically has been required to include recidivism data based upon the most recent and acceptable recidivism research,\textsuperscript{67} this report captured the first actual completion of that mandate. As such, it is nascent and not as fully developed as the information found in the Department of Justice Bureau of Justice Statistics studies that will be discussed later.\textsuperscript{68} The report contains some useful data sets, but the results from those data sets are oriented to resolve the issue of adequate functioning by the CHCs.

The data set used for this report came from federal prisoners sentenced in 1992.\textsuperscript{69} It was controlled to ensure that the individuals within the group met the requirements of the study for previous offense, previous conviction, release from confinement, and subsequent re-incarceration.\textsuperscript{70} While the study was not designed to identify offense-specific recidivism tendencies, it does provide useful information about the percentage of recidivating offenses for general categories of conduct including violent crimes, property crimes, and drug offenses.\textsuperscript{71} It also identifies factors used by the U.S. Sentencing Commission when determining criminal history guidelines.\textsuperscript{72} The relationship between those factors and subsequent recidivist activity assists evidence scholars in identifying fact-specific issues that increase the predictive ability of past misconduct. Some of the factors identified in the criminal history categories that are of interest include gender,\textsuperscript{73} age at sentence,\textsuperscript{74} employment status,\textsuperscript{75} educational attainment,\textsuperscript{76} marital status,\textsuperscript{77} illicit drug use,\textsuperscript{78} and the sentencing guidelines applied by the court when sentencing the defendant.\textsuperscript{79}

The CHC guidelines provide data that show which offenders are most likely to recidivate based upon their classification by the federal sentencing guidelines when

\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} See infra Parts II.A.2-4.
\textsuperscript{69} MEASURING RECIDIVISM, supra note 9, at 3; see also RECIDIVISM AND THE FIRST OFFENDER, supra note 55.
\textsuperscript{70} Id. at 4-5.
\textsuperscript{71} Id. at 6-8.
\textsuperscript{72} Id. at 11 (establishing that men recidivate at a higher rate than women across all criminal history computation guidelines); see also LANGAN & LEVIN, supra note 9, at 7 tbl.8.
\textsuperscript{73} Id. at 9, 12 (indicating that recidivism rates decline relatively consistently as age increases). Contra, LANGAN, SCHMITT & DUROSE, supra note 9, at 1 (positing that, in some situations for sex offenses, age is not a determining factor).
\textsuperscript{74} MEASURING RECIDIVISM, supra note 9, at 12 (indicating that employment reduces recidivism rates but that reduction is less noted when an individual is a career criminal and falls into a higher CHC).
\textsuperscript{75} Id. Educational attainment has an impact on potential recidivation. Id. Based on my own analysis, I believe that this factor is not as relevant as criminal history and specificity of offense from a character evidence standpoint.
\textsuperscript{76} Id. (stating that marital status decreases recidivism rates in comparison to both divorced and never-married prisoners).
\textsuperscript{77} Id. at 13 (finding that illicit drug use results in a higher recidivism rate but that rate is not tied within the study to a specific category of criminal activity).
\textsuperscript{78} Id. at 14-15. This factor is interesting because it reflects the overall position of this report: the greater the degree of previous criminal activity, the higher the likelihood that the released felon will recidivate. This is a statistical verification of what our common sense has shown and scholars have commented on dating back to Wigmore and Thayer.
initially sentenced. Table 2,80 an edited exhibit from the study, illustrates this point:

Table 2. Recidivism Rates and CHCs

<table>
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<tr>
<th>Offense Characteristics*</th>
<th>Total</th>
<th>Category I %</th>
<th>Category II %</th>
<th>Category III %</th>
<th>Category IV %</th>
<th>Category V %</th>
<th>Category VI %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instant Offense Level</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>01-08</td>
<td>22.5</td>
<td>15.1</td>
<td>29.8</td>
<td>37.6</td>
<td>44.1</td>
<td>54.6</td>
<td>62.4</td>
</tr>
<tr>
<td>09-10</td>
<td>22.5</td>
<td>9.6</td>
<td>18.3</td>
<td>45.4</td>
<td>51.0</td>
<td>54.4</td>
<td>60.6</td>
</tr>
<tr>
<td>11-12</td>
<td>21.7</td>
<td>8.7</td>
<td>38.0</td>
<td>39.1</td>
<td>50.8</td>
<td>52.2</td>
<td>52.0</td>
</tr>
<tr>
<td>13-16</td>
<td>22.2</td>
<td>14.8</td>
<td>23.5</td>
<td>37.4</td>
<td>39.5</td>
<td>50.8</td>
<td>58.1</td>
</tr>
<tr>
<td>17-21</td>
<td>27.3</td>
<td>17.5</td>
<td>25.7</td>
<td>37.5</td>
<td>44.1</td>
<td>59.6</td>
<td>59.6</td>
</tr>
<tr>
<td>22-25</td>
<td>22.8</td>
<td>13.3</td>
<td>22.5</td>
<td>33.3</td>
<td>40.3</td>
<td>34.9</td>
<td>61.6</td>
</tr>
<tr>
<td>26-30</td>
<td>20.7</td>
<td>18.9</td>
<td>19.7</td>
<td>19.2</td>
<td>39.5</td>
<td>43.8</td>
<td>41.4</td>
</tr>
<tr>
<td>31-43</td>
<td>17.5</td>
<td>11.1</td>
<td>12.2</td>
<td>22.4</td>
<td>30.6</td>
<td>46.2</td>
<td>39.9</td>
</tr>
</tbody>
</table>

Primary Sentencing Guidelines

- Drugs (Trfc): 21.2% Category I, 16.7% Category II, 19.8% Category III, 26.1% Category IV, 37.7% Category V, 48.1% Category VI
- Fraud: 16.9% Category I, 9.3% Category II, 26.3% Category III, 33.8% Category IV, 42.3% Category V, 51.2% Category VI
- Larceny: 19.1% Category I, 11.6% Category II, 37.9% Category III, 56.6% Category IV, 43.0% Category V, 57.4% Category VI
- Firearms: 42.3% Category I, 23.7% Category II, 26.8% Category III, 44.1% Category IV, 53.0% Category V, 54.2% Category VI
- Robbery: 41.2% Category I, 33.7% Category II, 31.4% Category III, 38.8% Category IV, 57.1% Category V, 45.2% Category VI
- All other guidelines: 20.5% Category I, 12.6% Category II, 23.6% Category III, 34.0% Category IV, 44.3% Category V, 53.7% Category VI

* "Instant offense" refers to the recidivating offense committed by the criminal that served as the genus for the subsequent incarceration. For a discussion of the CHC categories, see supra note 64 and accompanying text.

This table shows only the instant (original) offense that resulted in a conviction, not the recidivating offense. Although it identifies the percentage of felons convicted for a particular offense that recidivated, it does not identify the specific recidivating offense or its relationship with the prior conviction. The first column does show that total recidivism rates are 41.2 percent among offenders previously sentenced for robbery, 42.3 percent among offenders who violated a firearms statute, 19.1 percent among offenders convicted of larceny, and 21.2 percent among offenders previously sentenced for drug trafficking.81 The study noted that the recidivism rates for larceny and drug trafficking rose to match those of robbery and firearms violations when the recidivating individual came from CHC V or CHC VI.82 This rise in recidivism rates is independently verified in the Bureau of Justice Statistics reports concerning larceny.83 Unfortunately, it is not possible to match specific recidivating offenses with prior misconduct using this report.

80. Id. at 30 exh. 11. The data in this chart are for offenders originally sentenced in fiscal year 1992. See infra note 88 and accompanying text.
81. Id.
82. Id. at 13.
83. LANGAN & LEVIN, supra note 9, at 10.
The Recidivism Project used a stratified random sample of 6,062 citizens sentenced under the Federal Sentencing Guidelines in fiscal year 1992. The sample represented the total 28,519 prisoners sentenced for offenses in the federal system that year. The data set included re-convictions for a new offense, re-arrests with no conviction disposition information available, and supervision revocations. When addressing character and conduct, the relationship between certain convicted offenses and the likelihood of additional misconduct serves as a starting point for additional discussions, but more defined categories are needed to extrapolate a relationship between character and conduct that is relevant and reliable. The limitations of the Commission’s report are not surprising given the statistical breakdown of the federal prison population and the difficulties experienced by the Commission in developing and implementing a recidivism study.

The Commission identified steps that should be taken to increase the predictive ability of the criminal history categories. Despite the problems with this nascent attempt by the U.S. Federal Sentencing Commission, the methodology employed and the results reported reinforce the conclusions of the Bureau of Justice Statistics studies. Table 3, the second edited exhibit from the report, provides recidivism data correlating the recidivating offense with criminal history categories.

84. MEASURING RECIDIVISM, supra note 9, at 3.
85. Id.
86. Id.
88. MEASURING RECIDIVISM, supra note 9, at 2.
89. Id. at 15–16. These steps included adding additional factors that should be considered for the purpose of sentencing such as offender age, reduction in drug use, completion of high school diplomas, level of education, and completion of rehabilitation programs.
90. See infra Parts II.A.2–4.
91. MEASURING RECIDIVISM, supra note 9, at 32 exh. 13.
Table 3: Recidivism Rates by Primary Definitions for CHCs

Excerpts from Exhibit 13—Measuring Recidivism
Offenders' Recidivating Offense Under the Primary Recidivism Definitions of Re-arrest, Supervised Release/Probation Violations, or Conviction, by Criminal History Category

<table>
<thead>
<tr>
<th>Recidivating Offense Type</th>
<th>Total Category I %</th>
<th>Category II %</th>
<th>Category III %</th>
<th>Category IV %</th>
<th>Category V %</th>
<th>Category VI %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probation Rev.</td>
<td>20.8</td>
<td>24.1</td>
<td>21.8</td>
<td>20.8</td>
<td>17.8</td>
<td>14.7</td>
</tr>
<tr>
<td>Supervision Rev.</td>
<td>18.6</td>
<td>14.0</td>
<td>17.4</td>
<td>19.6</td>
<td>25.1</td>
<td>26.7</td>
</tr>
<tr>
<td>Fraud</td>
<td>4.8</td>
<td>5.9</td>
<td>5.1</td>
<td>5.1</td>
<td>2.5*</td>
<td>2.1*</td>
</tr>
<tr>
<td>Drug Possession</td>
<td>5.6</td>
<td>5.2*</td>
<td>2.6*</td>
<td>8.8</td>
<td>4.5</td>
<td>6.4</td>
</tr>
<tr>
<td>Drug Trafficking</td>
<td>8.8</td>
<td>11.1</td>
<td>9.3</td>
<td>7.4</td>
<td>7.6</td>
<td>6.7</td>
</tr>
<tr>
<td>Larceny</td>
<td>7.7</td>
<td>6.9</td>
<td>8.0</td>
<td>5.6</td>
<td>5.7</td>
<td>9.5</td>
</tr>
<tr>
<td>DUI</td>
<td>4.9</td>
<td>6.1</td>
<td>6.0</td>
<td>5.0</td>
<td>2.3</td>
<td>2.8*</td>
</tr>
<tr>
<td>Serious Violent Offense</td>
<td>11.7</td>
<td>9.6</td>
<td>13.5</td>
<td>12.2</td>
<td>16.3</td>
<td>10.8</td>
</tr>
<tr>
<td>Other</td>
<td>17.1</td>
<td>17.1</td>
<td>16.3</td>
<td>15.5</td>
<td>18.2</td>
<td>20.3</td>
</tr>
</tbody>
</table>

*The sample sizes for these data were too small to be statistically significant.

This table defines the relationship between specific recidivating offenses and specific criminal history categories and explains them. It establishes the connection between specific types of recidivating offenses and the criminal history categories relied upon by the U.S. Sentencing Commission. Unfortunately, the Commission does not use prior offenses in this table. For example, while the report posits that one in every ten recidivating offenses constituted a serious violent offense, it does not statistically subdivide that category further or correlate it to previous convictions. It shows an increase of larceny as a recidivating offense when the CHC category changes (from a low rate of 6.9 percent to a high of 14.9 percent). While this report connects recidivating offenses to the CHCs, it does not connect the CHCs to prior offenses committed by the defendant. As such, the report does not provide sufficient specificity to support modification of the character rules of evidence but points it in that direction by showing that connections between recidivating offenses and other categories do exist. The report does serve as an adequate controlled check on the Bureau of Justice Statistics reports but does not quantify the relationship between character and subsequent misconduct with sufficient specificity to serve as the basis for proposed modification to the character rules of evidence. Such a connection is necessary in order to meet the logical and legal relevance standards that are required for the admissibility of character evidence.


The first report released by the Bureau of Justice Statistics encompassing a comprehensive look at recidivism in the United States was titled *Recidivism of*
Prisoners Released in 1983. Published in 1989, the report tracked prisoners during the first three years after they were released from confinement. The sample consisted of more than 16,000 released prisoners representing all prisoners released from eleven different states in 1983. The members of this data set “had been arrested and charged with an average of more than 12 offenses each; nearly two-thirds had been arrested at least once in the past for a violent offense; and two-thirds had previously been in jail or prison.” At the time of its release, the 1983 Beck and Shipley Study conducted by the Bureau of Justice Statistics “provided the most precise estimates of recidivism available among prisoners of all types of postrelease supervision.”

The Beck and Shipley study used three different methodologies to create recidivism rates: re-arrest, re-conviction, and re-incarceration. The study also identified a list of factors that increased the likelihood of recidivism. These factors included time span between release and recidivating offense, the age of the prisoner at time of release, the extensive nature of the prisoner’s prior arrest record, and the type of crime for which the prisoner was originally incarcerated. These factors compare favorably with those identified in the later U.S. Sentencing Commission Recidivism Project and may potentially serve as a way to identify clearly defined specific situations and relevant character traits for categories of misconduct. After identifying the factors increasing the likelihood of recidivism, the study next addressed the impact that the original incarcerating offense had on the chances of a particular prisoner recidivating. The study concluded that certain categories of criminal activity establish a definite predictive relationship between the prior criminal activity and the commission of some type of qualifying recidivating offense. Prisoners released for property crimes were more likely to recidivate than other prisoners (at a rate of approximately 68.1 percent). Prisoners released for violent offenses recidivated at a rate of 59.6 percent, while prisoners released for drug offenses recidivated at a rate of 50.4 percent. The study went on to identify the rate of recidivism for a variety of individual offenses for which the prisoner had

94. BECK & SHIPLEY, supra note 9.
95. Id.
96. Id. at 1. “The 11 States in the sample included California, Florida, Illinois, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, and Texas. These States accounted for more than 57% of all State prisoners released in the Nation during the year.” Id.
97. Id. This information most closely corresponds to the CHC V and CHC VI categories addressed in the U.S. Sentencing Commission’s Recidivism Project. See MEASURING RECIDIVISM, supra note 9.
99. BECK & SHIPLEY, supra note 9, at 2.
100. Id. “Released prisoners were often re-arrested for the same type of crime for which they had served time in prison. Within 3 years, 31.9% of released burglars were re-arrested for burglary; 24.8% of drug offenders were re-arrested for a drug offense; and 19.6% of robbers were re-arrested for robbery.” Id.
101. See supra notes 72–79.
102. BECK & SHIPLEY, supra note 9, at 5–6.
103. Id. at 6.
104. Id. at 5 tbl.8. Recidivism is measured by re-arrest rate. Re-conviction and re-incarceration rates are lower. Id.
105. Id.
originally been incarcerated. The following table from the study identifies these offenses and their recidivism rate.

<table>
<thead>
<tr>
<th>Table 4. 1983 Recidivism Rates by Released Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excerpts from Table 8 – The Beck and Shipley Study</td>
</tr>
<tr>
<td>Recidivism Rates of State Prisoners Released in 1983 by Most Serious Offense for Which Released</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Offense</th>
<th>Released %</th>
<th>Re-arrested %</th>
<th>Re-convicted %</th>
<th>Re-incarcerated %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent Offenses</td>
<td>34.6</td>
<td>59.6</td>
<td>41.9</td>
<td>36.5</td>
</tr>
<tr>
<td>Murder</td>
<td>3.1</td>
<td>42.1</td>
<td>25.2</td>
<td>20.8</td>
</tr>
<tr>
<td>Rape</td>
<td>1.4</td>
<td>42.5</td>
<td>27.9</td>
<td>21.8</td>
</tr>
<tr>
<td>Other Sexual Assault</td>
<td>.6</td>
<td>54.5</td>
<td>35.7</td>
<td>31.3</td>
</tr>
<tr>
<td>Robbery</td>
<td>2.1</td>
<td>51.5</td>
<td>36.4</td>
<td>32.3</td>
</tr>
<tr>
<td>Property Offenses</td>
<td>48.3</td>
<td>68.1</td>
<td>53.0</td>
<td>47.7</td>
</tr>
<tr>
<td>Burglary</td>
<td>25.8</td>
<td>69.6</td>
<td>54.6</td>
<td>49.4</td>
</tr>
<tr>
<td>Larceny/theft</td>
<td>11.2</td>
<td>67.3</td>
<td>52.2</td>
<td>46.3</td>
</tr>
<tr>
<td>Motor Vehicle Theft</td>
<td>2.6</td>
<td>78.4</td>
<td>59.1</td>
<td>51.8</td>
</tr>
<tr>
<td>Drug Offenses</td>
<td>9.5</td>
<td>50.4</td>
<td>35.3</td>
<td>30.3</td>
</tr>
</tbody>
</table>

This data is still not sufficient to make a character evidence connection between prior offenses and recidivism data. While the specific offense resulting in incarceration is identified, the recidivating offense is not. The Beck and Shipley study addressed this issue as well by also comparing specific prior convictions to the current recidivating offense. The data answering those questions established a logical correspondence between the incarcerated offense and the recidivating offense. The percentages do not necessarily match recent media coverage of sexual offenders or our own perceptions of how frequently sexual offenders commit additional sexual offenses, but they are nonetheless reliable from a statistical perspective.

The study shows the percentage of offenders who were re-arrested for the same crime as their original offense. The percentage of such re-arrests was much lower...
for rapists than for any other type of offense except for homicide.\textsuperscript{111} Property crimes showed the highest recidivism rate for the same type of offense.\textsuperscript{112} For property crimes and drug crimes, the re-arrest rates for the same type of offense are higher than anticipated by the current Federal Rules of Evidence, while the rates for sexual offenses are much lower than anticipated by the Federal Rules of Evidence. The following table excerpted from Table 9 of the Beck and Shipley Study shows this trend:\textsuperscript{113}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
\textbf{Re-arrest Charge} & \textbf{Murder} & \textbf{Rape} & \textbf{Robbery} & \textbf{Burglary} & \textbf{Larceny/Theft} & \textbf{Motor Vehicle Theft} \\
\hline
\textbf{All Charges} & 42.1 & 51.5 & 66.0 & 69.5 & 67.3 & 78.4 & 50.4 \\
\hline
\textbf{Violent Offenses} & 21.6 & 27.5 & 33.3 & 20.9 & 19.5 & 23.0 & 12.2 \\
Homicide & 6.6 & 2.8 & 2.9 & 1.1 & 0.8 & 1.4 & 0.3 \\
Rape & 0.8 & 7.7 & 1.4 & 0.7 & 0.4 & 0.1 & 0.4 \\
Robbery & 7.0 & 8.5 & 19.6 & 9.1 & 8.7 & 12.8 & 4.2 \\
\hline
\textbf{Property Offenses} & 16.8 & 25.0 & 38.9 & 50.4 & 50.3 & 54.7 & 22.9 \\
Burglary & 6.4 & 12.7 & 15.4 & 31.9 & 17.5 & 23.7 & 8.2 \\
Larceny/Theft & 7.4 & 7.4 & 21.0 & 25.3 & 33.5 & 26.3 & 12.2 \\
Motor Vehicle Theft & 2.5 & 0.7 & 5.0 & 6.0 & 8.2 & \textbf{18.6} & 2.3 \\
\hline
\textbf{Drug Offenses} & 9.1 & 11.3 & 18.0 & 17.7 & 15.1 & 17.1 & 24.8 \\
\hline
\end{tabular}
\caption{1983 Recidivism Rates by Most Serious Offense and Re-arrest Offense}

*The rates for prisoners who were re-arrested for the same offense as their original offense are shown in bold.

Unlike Tables \textsuperscript{2} and \textsuperscript{3} from the U.S. Sentencing Commission Recidivism Project or Table 4\textsuperscript{4} from the Beck and Shipley Study, the data set from the Department of Justice Bureau of Justice Statistics in Table 5 allows for a direct comparison between prior offenses and recidivating offenses. The data shows us that 51.5 percent of rapists committed a recidivating offense\textsuperscript{117} and 27.5 percent of rapists committing a recidivating offense committed a violent crime.\textsuperscript{118} Only 7.7

\begin{itemize}
\item \textsuperscript{111} BECK & SHIPLEY, supra note 9, at 5 tbl.8.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. The rates for prisoners who were re-arrested for the same offense as their original offense are shown in bold.
\item \textsuperscript{114} See supra note 82 and accompanying text.
\item \textsuperscript{115} See supra note 94 and accompanying text.
\item \textsuperscript{116} See supra note 110 and accompanying text.
\item \textsuperscript{117} See supra note 110 and accompanying text.
\item \textsuperscript{118} See supra Table 5.
\end{itemize}
percent committed another rape as their recidivating offense. That is a number of low significance for character evidence purposes because it does not sufficiently tie prior misconduct to current misconduct from a logical and legal relevance standpoint. This information would not be sufficient to support the admissibility of the evidence at trial.

On the other hand, 50.4 percent of those prisoners released for burglary recidivated by committing a property offense and 31.9 percent of those same prisoners committed another burglary. This has a corresponding character evidence value from a logical relevance perspective. Logical relevance refers to whether or not the existence of this fact would make another fact more likely. Under that standard, this type of evidence shows a sufficient connection between prior acts and subsequent acts. When comparing the recidivism data in light of the way character evidence rules handle propensity evidence for these offenses, it is striking that the information that is most probative from a logical propensity perspective is excluded, while the evidence that has the least logical relevance from a propensity perspective is admitted for precisely that purpose.

Although the statistical data supporting the use of propensity evidence applies to property and drug offenses, Congress passed the Federal Rules of Evidence allowing for the admissibility of sexual misconduct propensity evidence, with little regard for the statistical relationship between prior sexual offenses and recidivating offenses. The current recidivism data clearly establishes that the logical correlation between sexual offenses and recidivism is lower than almost all other categories of misconduct, when compared to the relationship between each prior offense by categories and the frequency of a specific type of recidivating offense for those categories. This relationship, when compared between prior offenses, shows that the logical relevance connection between prior sex offenses and recidivating offenses is low in comparison to drug or property offenses.

The findings in the Beck and Shipley study represent an estimated 108,580 prisoners released from the eleven states and who were alive in 1987. The 62.5 percent recidivism rate established by the data set used had a margin of error of plus or minus one percentage point. The validity of this first major recidivism study, when combined with the specific factors that improve the ability to predict the probability of recidivism, establishes a baseline set of conditions that are relevant when drafting new character evidence rules dealing with propensity.

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119. See supra Table 5.
120. See supra Table 5.
121. See supra Table 5.
122. FED. R. EVID. 402.
124. The Bureau of Justice Statistics has struggled with this common sense anomaly and its initial efforts have attempted to explain how the statistics are not properly representative of the correlation between repeat offenders and prior sexual misconduct. See LANGAN, SCHMITT & DUROSE, supra note 9, at 3-11. The validity of the Bureau's position is beyond the realm of this Article but is fruitful ground for analysis and comment in the future.
125. Baker, supra note 123, at 578-79; see also Imwinkelreid, Comments, supra note 25.
126. BECK & SHIPLEY, supra note 9, at 12.
127. Id. This margin of error expanded slightly when looking at specific re-arrest data but never rose above two to three and one half percent. Id. at 12-13.

The 1994 Bureau of Justice Statistics Report conducted by Langan and Levin tracked the re-arrest, re-conviction, and re-incarceration of 272,111 former inmates after their release from prison in 1994. This number represented two-thirds of all prisoners released in the United States that year. It constitutes the single largest data set for recidivism studies used by the Department of Justice Bureau of Justice Statistics. The prisoners forming the data set for this study were released from prisons in fifteen different states. In order to ensure the ability to cross-reference this study with the earlier Beck and Shipley Study, the Department of Justice Bureau of Justice Statistics ensured that all eleven states from the Beck and Shipley Study were included in this fifteen state sample. The study established that within three years of release 67.5 percent of released prisoners were re-arrested for a new offense. Of that 67.5 percent, the highest re-arrest rates were for robbers (70.2 percent), burglars (74.0 percent), larcenists (74.6 percent), motor vehicle thieves (78.8 percent), those imprisoned for possessing or selling stolen property (77.4 percent), and those imprisoned for possessing, using, or selling illegal weapons (70.2 percent). The lowest re-arrest rates were for homicide (40.7 percent), rape (46.0 percent), other sexual assault (41.4 percent), and driving under the influence (51.5 percent).

The study used four measures of recidivism: re-arrest, re-conviction, re-sentence to prison, and return to prison with or without a new offense. As discussed previously, the re-arrest statistics are the most relevant for correlating character and conduct. The Langan and Levin study verified that certain factors influence the ability to accurately predict the commission of recidivating offenses. These include the length of time between release and re-arrest, whether or not the prisoner was a “specialist,” and the number of times the prisoner has previously

128. LANGAN & LEVIN, supra note 9.
129. Id. at 1.
130. Id.
131. The fifteen states were Arizona, Maryland, North Carolina, California, Michigan, Ohio, Delaware, Minnesota, Oregon, Florida, New Jersey, Texas, Illinois, New York, and Virginia. Id.
132. Id. at 11.
133. Id.
134. Id.
135. Id.
136. Id.
137. See supra note 36 and accompanying text.
138. See generally LANGAN & LEVIN, supra note 9.
139. Id. at 3. This corresponds to the position taken by Beck and Shipley and by the U.S. Sentencing Commission’s Recidivism Project. See supra note 9.
140. Specialists are those felons that develop a particular modus operandi for their crime of choice. These prisoners have a higher percentage chance of committing a recidivating offense that is remarkably similar to the earlier offense for which they were incarcerated. The study supports the notion that individuals who commit crimes of property tend to specialize, as evidenced by the high re-arrest rate among property offenders for new property offenses. While the study claims that the data suggest a degree of specialization among rapists, that degree of specialization, based upon percentage of sexual offenders who commit a sexual offense as their recidivating offense, is less than that for other non-sexual offenders. Conversely, the majority of rapists who recidivate do not commit rape or some other form of sexual assault as their recidivating offense. See LANGAN & LEVIN, supra note 9, at 9-10.
been arrested. The study noted that prisoners previously convicted for money-related crimes have a higher recidivism rate than prisoners previously convicted for crimes that were not motivated by a desire for monetary gain.

The Department of Justice Bureau of Justice Statistics took steps to ensure that this second recidivism study incorporated the lessons learned from its 1983 effort. Those steps included using all eleven states that formed the first study and obtaining criminal records from both state agencies and the FBI. The results for incarcerated offenses and recidivating offenses were as follows:

<table>
<thead>
<tr>
<th>Re-arrest Charge</th>
<th>Murder</th>
<th>Rape</th>
<th>Robbery</th>
<th>Burglary</th>
<th>Larceny/Theft</th>
<th>Motor Vehicle Theft</th>
<th>Drug Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Charges</td>
<td>40.7</td>
<td>46.0</td>
<td>70.2</td>
<td>74.0</td>
<td>74.6</td>
<td>78.8</td>
<td>66.7</td>
</tr>
<tr>
<td>Violent Offenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homicide</td>
<td>1.2</td>
<td>0.7</td>
<td>1.1</td>
<td>0.7</td>
<td>0.6</td>
<td>2.4</td>
<td>0.7</td>
</tr>
<tr>
<td>Rape</td>
<td>0</td>
<td>2.5</td>
<td>1.2</td>
<td>0.8</td>
<td>0.5</td>
<td>1.6</td>
<td>0.3</td>
</tr>
<tr>
<td>Robbery</td>
<td>3.4</td>
<td>3.9</td>
<td>13.4</td>
<td>5.9</td>
<td>7.3</td>
<td>8.4</td>
<td>4.9</td>
</tr>
<tr>
<td>Property Offenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burglary</td>
<td>10.8</td>
<td>14.8</td>
<td>32.9</td>
<td>45.4</td>
<td>47.8</td>
<td>45.7</td>
<td>24.0</td>
</tr>
<tr>
<td>Larceny/Theft</td>
<td>2.0</td>
<td>4.4</td>
<td>8.7</td>
<td>23.4</td>
<td>13.9</td>
<td>11.1</td>
<td>5.5</td>
</tr>
<tr>
<td>Motor Vehicle Theft</td>
<td>4.1</td>
<td>6.2</td>
<td>16.5</td>
<td>23.0</td>
<td>33.9</td>
<td>18.9</td>
<td>11.5</td>
</tr>
<tr>
<td>Drug Offenses</td>
<td>13.0</td>
<td>11.2</td>
<td>29.4</td>
<td>27.6</td>
<td>27.1</td>
<td>33.9</td>
<td>41.2</td>
</tr>
</tbody>
</table>

*The rates for prisoners who were re-arrested for the same offense as their original offense are shown in bold.

141. Id. at 10.
142. Id. at 8.
143. Id. at 11–12.
144. Id. at 9 tbl.10.
The results in Table 6 support the relationships identified in the Beck and Shipley Study, with an even greater recidivism rate attached to property crimes. The differences between this study and the Beck and Shipley study fall within a range that can be explained as a possible statistical anomaly. The minor differences between the two studies are not important for purposes of an evidentiary analysis because both studies do connect prior misconduct to future misconduct with an ability to predict the probability of that relationship based upon the recidivism data contained within them. They are sufficiently definitive to support making logical and legal relevance arguments based upon the information contained within both reports, but the greater degree of specificity in the second report, particularly as it relates to prior offenses and the recidivating offense, is helpful when considering the admissibility of propensity evidence. For example, in the Langan and Levin study, 74 percent of burglars recidivated, with 45.4 percent of them committing a property offense for their recidivating offense. Almost 23.4 percent were re-arrested for committing exactly the same type of offense—burglary. On the other hand, 46 percent of the rapists released were re-arrested, but only 18.6 percent of them committed a violent crime as their recidivating offense.

This is a low statistical correlation from an evidentiary analysis perspective. A careful study of Table 6 above and Table 7 in the following text indicates that, while a small percentage of rapists recidivated by committing an additional rape, the chances of a recidivating offense of rape being committed by a felon who had not previously raped was less than for rapists. Rapists are more likely to commit a rape than other released inmates, but the chance of a rapist committing a rape as the recidivating offense is only 2.5 percent.


The 1994 Bureau of Justice Statistics Report written by Langan, Schmitt, and Durose tracked the re-arrest, re-conviction, and re-incarceration of the 9,691 male sex offenders released from prison as part of the 272,111 former inmates from fifteen states that formed the Langan and Levin Study. These 9,691 prisoners represented two-thirds of all United States sex offenders released that year. This study focused on the nature of sexual misconduct for the small percentage of the

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145. See supra notes 115–126 and accompanying text.
146. See supra Table 6.
147. See supra Table 6.
148. See supra Table 6.
149. See supra Table 6.
150. See supra Table 6.
151. See supra Table 6.
152. LANGAN, SCHMITT & DUROSE, supra note 9.
153. Id.
154. See id. at 1.
155. Id.
recidivating sexual offenders whose recidivating offense was a sex crime.\textsuperscript{156} The study defined the term sex crime as a crime of sexual assault where violence is a factor.\textsuperscript{157} While the study established that the small percentage of sexual offenders who recidivate with another sex crime is proportionally higher than that of other convicted felons,\textsuperscript{158} it did not establish a high percentage correlation between previous conviction and subsequent recidivating offense of the same nature. Below are the statistics for the percentages of those who recidivated without regard to the recidivating offense:\textsuperscript{159}

<table>
<thead>
<tr>
<th>Table 7. 1994 Recidivism Rates for Sexual Offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Excerpts from Table 9—Langan, Schmitt and Durose Study</td>
</tr>
<tr>
<td>Recidivism Rate of Sex Offenders Released from Prison in 1994 by Type of Recidivism Measure, Type of Sex Offender and Time after Release</td>
</tr>
<tr>
<td>Cumulative percent of sex offenders released from prison in 1994:</td>
</tr>
<tr>
<td>Time After 1994 release</td>
</tr>
<tr>
<td>--------------------------</td>
</tr>
<tr>
<td>Re-arrested for any type of crime within</td>
</tr>
<tr>
<td>6 months</td>
</tr>
<tr>
<td>1 year</td>
</tr>
<tr>
<td>2 years</td>
</tr>
<tr>
<td>3 years</td>
</tr>
<tr>
<td>Re-conviction for any type of crime within</td>
</tr>
<tr>
<td>6 months</td>
</tr>
<tr>
<td>1 year</td>
</tr>
<tr>
<td>2 years</td>
</tr>
<tr>
<td>3 years</td>
</tr>
<tr>
<td>Returned to prison with a new sentence for any type of crime within:</td>
</tr>
<tr>
<td>6 months</td>
</tr>
<tr>
<td>1 year</td>
</tr>
<tr>
<td>2 years</td>
</tr>
<tr>
<td>3 years</td>
</tr>
</tbody>
</table>

The lack of statistical significance is substantial in considering the relationship between the crime resulting in imprisonment and the recidivating crime. That percentage relationship is illustrated in the following table taken from the Langan, Schmitt, and Durose Study:\textsuperscript{160}

\textsuperscript{156} See id. at 1–2.  
\textsuperscript{157} Id. at 3.  
\textsuperscript{158} Id. at 1 ("Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime.").  
\textsuperscript{159} Id. at 16 tbl.9.  
\textsuperscript{160} Id. at 24 tbl.21.
Table 8. Percentage of Sexual Offenders Re-arrested and Re-convicted

Excerpts from Table 21—Langan, Schmitt & Durose Study
Of Sex Offenders Released from Prison in 1994, the Percent Rearrested and the Percent Reconvicted
for Any New Sex Crime by Type of Sex Offender

| Percent rearrested for any new sex crime within three years | 5.0-5.5 |
| Percent reconvicted for any new sex crime within three years* | 3.2-3.7 |
| Total released | 9,691 |

Note: The 9,691 sex offenders were released in 15 States.
* Because of missing data, prisoners released in Ohio were excluded from the calculation of percent reconvicted. Due to data quality concerns, calculation of percent reconvicted excluded Texas prisoners classified as "other type of release."

The courts have recognized this low statistical correlation and have implemented cautionary or limiting instructions as to how propensity evidence admitted under Federal Rule of Evidence 413 should be used by the jury.161 Five percent of the


Form Instruction 5-27 Similar Acts of Sexual Abuse

There has been evidence received during the trial that defendant engaged in other conduct which was similar in nature to the acts charged in the indictment. In a criminal case in which the defendant is accused of [specify nature of crime involving sexual abuse], evidence of the defendant's commission of another offense or offenses of [sexual abuse] is admissible and may be considered for its bearing on whether the defendant committed the offense for which he is charged in this indictment. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the indictment. As you consider this evidence, bear in mind at all times that the government has the burden of proving that the defendant committed each of the elements of the offense in the indictment as I have explained them to you. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the indictment.

Id.
The discussion regarding Form Instruction 5-27 further states:

There are several prerequisites for admission of evidence under the Rules. First, the government is required to provide notice 15 days before trial of its intention to introduce evidence under either of the Rules. Second, the defendant must be accused of a sexual offense as defined by the Rules. Third, the trial court must make a determination that the evidence is of defendant's commission of another similar offense.

Next, the trial court must make a determination that the evidence is relevant. As a general rule, such evidence is relevant because a propensity to commit sex offenses makes it more likely than not that defendant committed the offense. The courts have indicated that the time period for which such evidence remains relevant is very broad, although not unlimited. Indeed, the sponsors of the legislation specifically indicated congressional intent that "substantial lapses in time are permitted."

Finally, the trial court must conduct the balancing required by Rule 403(b) of the relevance of the evidence against the risk of prejudice from its admission. Although the Rules are not clear on this point, the sponsors indicated that this was their intention. The courts have made clear that such balancing is constitutionally required, as the failure to perform it would deprive the defendant of due process. However, the trial court should be careful not to exclude evidence merely because it tends to prove a propensity to commit sexual offenses. As the Eighth Circuit has explained, Congress enacted the new Rules to create an exception to the rule that propensity evidence is not permitted; to use Rule 403(b) to avoid that result would run contrary to the clear legislative intent.

Id. (footnotes omitted).
rapists released from this data set were re-arrested for another sex crime within three years of their release from prison.162 Five and one half percent of all other sexual assaulters committed a sex crime as their recidivating offense within the same three year period.163 Overall, 94.7 percent of the convicted sex offenders did not commit a recidivating sex offense within this time period.164 These results validate the percentage connections of both the Beck and Shipley Study165 and the Langan and Levin Study166 regarding qualifying recidivating offenses for previously convicted sexual offenders. A comparison of these results calls into question the validity of the assumptions behind Federal Rule of Evidence 413 concerning the probative value and relevance of character evidence.167 Either these assumptions were incorrect, or we have not yet sufficiently identified a means to capture the behavior that supports these assumptions. It may very well be that both of these have occurred. Either of these scenarios supports a strong argument for greater specificity and control over the sexual propensity evidence rules that currently exist. It also supports the need for new propensity rules that look at crimes across the spectrum of criminal categories now available through these recidivism studies.

B. Issues Raised by These Studies

When taken together, these recidivism studies establish a clear relationship between prior offenses and current misconduct only if sufficient additional factors are available. The prior offense is not the only factor, but these studies clearly identify its importance.168 In deciding the weight that should be given to the existence of a prior offense, other definable characteristics have emerged. These include the age of the prisoner, the number of prior offenses, and the specialized nature of the prior offense.169 The number of prior offenses appears to be the single greatest factor in determining the predictability of future misconduct, closely followed by the degree of specialization.170 Propensity evidence rules that incorporate these factors would enhance our proper use of this evidence while at the same time preventing its overvaluation by the jury. Before determining how recidivism data should impact the character evidence propensity rules, it is first necessary to understand the potential relationships that may exist between character traits, subsequent predicted conduct, and evidence law.

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162. LANGAN, SCHMITT & DUROSE, supra note 9, at 24, 26 tbl.27.
163. Id. at 24 tbl.21.
164. See id.
165. See BECK & SHIPLEY, supra note 9.
166. See LANGAN & LEVIN, supra note 9.
167. See supra note 10; infra notes 238, 292, 316.
168. See generally BECK & SHIPLEY, supra note 9; LANGAN & LEVIN, supra note 9; LANGAN, SCHMITT & DUROSE, supra note 9.
169. See generally BECK & SHIPLEY, supra note 9; LANGAN & LEVIN, supra note 9; LANGAN, SCHMITT & DUROSE, supra note 9.
170. Measuring Recidivism, the Beck and Shipley Study, and the Langan and Levin Study all identify the number of prior offenses as a very determinative factor. See BECK & SHIPLEY, supra note 9, at 2; LANGAN & LEVIN, supra note 9, at 10; MEASURING RECIDIVISM, supra note 9, at 13–14.
III. PSYCHOLOGY, CHARACTER AND EVIDENCE LAW

Personality theory has been one of the most dynamic areas of psychology research over the last thirty years. It is one area where the current state of generally accessible knowledge has not always been accurately reflected in the available resources and undergraduate courses taught. Professor Lawrence A. Pervin noted this deficiency in his 1996 treatise, *The Science of Personality.* He explained it as follows:

To my knowledge, personality is the only area in psychology in which the leading texts do not present the field as it currently exists....I believe that it is time for the teaching of the field to reflect current research more accurately....[A] paper given by Gerald Mendelsohn of the University of California (Berkeley)...indicated that the typical, time-honored approach to teaching personality to undergraduates—namely a Theories of Personality course—is misleading and uninformative. The material presented in such a course is outdated and of limited scientific relevance and has little to do with research actually done by personality psychologists....

More recently, an article by Mark Leary of Wake Forest University...noted that the current classic theories course does not adequately reflect contemporary personality psychology. In addition, he indicated that many of the theories covered in such a course are unsubstantiated.

Professor Pervin's words in 1996 were a gentle admonition to his colleagues that they should do better. He then outlined the current state of personality theory as it existed and posited areas of profitable inquiry where a "new schema offers a better foundation on which to assemble the mushrooming data in this field." This text spearheaded a continuing development in personality theory where the basic concepts of trait theory, situationism, interactionism, and latent-state-trait theory and their correlations to each other were properly analyzed and organized. Evidence scholars have written many excellent articles about character evidence based upon texts in the personality field that unfortunately do not now accurately reflect the current research and developing understanding of the relationship between character and conduct. While their analyses have been cogent and well

171. For an in-depth analysis of the competing theories of trait, situationism, and interactionism as they have applied to the work of evidentiary scholars, see Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 728–38 (1998). While this Article agrees with Professor Park's excellent rendition of how personality research and the law have developed to date, it does not share his concerns about the dangers of using propensity evidence based upon the limitations he identified. For a discussion of Professor Park's concerns, see id. at 738. As discussed within this Article, recent recidivism data with defining factors, when taken in conjunction with further developments of latent-state-trait theory, establish sufficient correlations to support propensity use. *See supra* notes 9, 26 and accompanying text; *infra* notes 194, 225 and accompanying text. The question now is how much and in what form.


173. Id.

174. Id.

175. Id. at vi (quoting an anonymous reviewer of a draft of the textbook).

176. For a discussion of trait theory, situationism, and interactionism, see *supra* notes 171–172 and accompanying text and *infra* notes 183–184, 189, 211, 215, 224 and accompanying text.

reasoned, an incomplete understanding of how psychologists currently view personality theory resulted in analyses that in some cases were somewhat flawed. Correct knowledge of the relationships between character and conduct is a fundamental prerequisite to accurately analyze whether current propensity rules of evidence properly reflect their interaction. If they do not, they should be modified if sufficiently reliable correlations exist. Personality theory, as currently constructed, establishes those reliable correlations. A review of the development of personality theory as it relates to evidentiary rules is in order based upon this increased understanding of how character and conduct interact.

A. Trait Theory

Some scholars have theorized that the trait approach to psychology can be traced back to the beginnings of Western thought. Professor John Wigmore explained the relationship between character trait and behavior as follows: "A defendant's character...as indicating the probability of his doing or not doing the act charged, is essentially relevant." This explanation of the relevancy of character traits was a reflection of common sense nurtured by several centuries of legal experience. Trait theory reiterated through the social sciences what had already been determined through experience and common sense—inquiring into a person's character is relevant when weighing his or her actions through the presentation of character traits at trial. Relevancy based upon either common sense or the social sciences in and of itself does not necessarily equate to admissibility, but it is an initial hurdle that evidence must clear. It also neatly fit with the then relatively new concept of trait theory espoused by one of its early pioneers, Gordon Allport.

Professor Allport believed that human behavior is governed by personality traits. These traits are the basic structural elements of personality and create a predisposition to respond to situations in a certain way. Because those traits are stable, they produce generally predictable behavior across a wide range of situations. Under this theory, each person has ingrained character traits that allow


178. See infra notes 224-225, 227, 229 and accompanying text.
180. IA WIGMORE REVISED, supra note 5, § 55.
181. Cf. GORDON W. ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION (1937) (discussing the psychology of personality and the role of character traits).
182. See FED. R. EVID. 403.
184. ALLPORT, supra note 181, at 286. Allport considered traits as "a generalized and focalized neuropsychic system (peculiar to the individual), with the capacity to render many stimuli functionally equivalent, and to initiate and guide consistent (equivalent) forms of adaptive and expressive behavior." ld. at 295 (emphasis omitted).
185. PERVIN, supra note 172, at 33.
186. See id. at 33-38; see also HANS J. EYSENCK, CRIME AND PERSONALITY 9 (1964); WALTER MISCHEL, PERSONALITY AND ASSESSMENT 6 (1968).
for the general prediction of certain behaviors, if, as this theory presupposes, people act in accordance with particular character traits when confronted with situations where those character traits are relevant. If correct, observable behaviors should be predictable. Initial attempts to empirically reproduce research results in accordance with this theory were relatively unsuccessful, and that lack of success had a palpably negative impact on the development of character evidence rules.

From an evidentiary perspective, the application of trait theory should predict the likely actions of an individual. This could be applied retrospectively to assist finders of fact in determining who did what. If the relevant character trait is known and the situation where it will be applied can be identified, one should be able to establish, at a minimum, the relevancy of that character trait to the issue before the court. By the same token, if a correlation does not exist, character is not relevant and should not be admissible. This struggle between when character is both relevant and admissible is one of the great issues that has permeated the common law development of evidentiary rules and the subsequent federal and state rules of evidence. Professor Wigmore's work on propensity character evidence reflected this understanding of the relationship between character and behavior. Trait theory supported the historical development of the character evidence rule, seemed a practical example of social sciences supporting the common sense experience derived from generations of practicing attorneys and sitting judges, and argued for the admission of character evidence when properly limited as to its purpose. The inquiry centered on the purpose of admitting the character evidence and the limitations placed upon the jury when considering such evidence.

Psychologists espousing trait theory initially failed to reproduce their predicted results in the laboratory. This led to an erroneous hypothesis that perhaps people do not have definable character traits but instead merely react to situations in no predictable fashion based on environmental factors that are difficult to identify or quantify. If this were true, admitting character evidence at trial would prevent the
court from arriving at a decision based upon relevant evidence. This position continues to be reflected in the literature on evidence and within the Federal Rules of Evidence\textsuperscript{195}—even though it has subsequently been discounted by later developments in the personality theory field.\textsuperscript{196} If it is believed that people do not have predictable character traits, then character evidence is not relevant at trial and simply wastes the time of the finder of fact and confuses the issue. The difficulties in clearly defining specific traits of character that would predict future conduct\textsuperscript{197} led to a concerted attack upon the trait theory by psychologists and its subsequent replacement for a time by situationism as the dominant theory of personality.\textsuperscript{198}

B. Situationism

Situationism posited that people react to situations as they occur because character traits are not immutable and do not forecast subsequent behavior.\textsuperscript{199} What began as an attempt to empirically validate the trait theory through laboratory studies became its main competition.\textsuperscript{200} The results of the research appeared to show that decisions are made based on the situation and not the character of an individual for a specific trait.\textsuperscript{201} Situationists hypothesized from this that there is not a relevant relationship between character traits and the decision-making process of

\begin{itemize}
  \item \textsuperscript{195} The Federal Rules of Evidence provide that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403 (emphasis added).
  \item \textsuperscript{196} See infra note 204 and accompanying text.
  \item \textsuperscript{197} Mischel stated that "[t]he initial assumptions of the trait-state theory were logical, inherently plausible, and also consistent with common sense and intuitive impressions about personality. Their real limitation turned out to be empirical—they simply have not been supported adequately." Mischel, supra note 186, at 147. This is no longer the case according to more current research. See infra notes 224–225.
  \item \textsuperscript{198} Méndez, Stable Personality, supra note 177, at 228 n.22 ("Mischel’s findings and those of other researchers have been interpreted as evidence against the utility of the personality construct.") (internal quotation marks omitted).
  \item \textsuperscript{199} Hugh Hartshorne & Mark A. May, Studies in the Nature of Character: Studies in Deceit 411 (1930) ("[T]hese studies show that neither deceit, nor its opposite, 'honesty,' are unified character traits, but rather specific functions of life situations. Most children will deceive in certain situations and not in others. Lying, cheating, and stealing as measured by the test situations...are only very loosely related."). This work is a study dealing with children where they were placed in various situations to test their honesty. See id. It serves now primarily as an example of a respected but dated work in the field of psychology that formed the empirical basis for subsequent legal scholarship about the exclusion of character evidence. See Méndez, California's New Law, supra note 183, at 1051–52; Méndez, Stable Personality, supra note 177, at 227–29.
  \item \textsuperscript{200} See Méndez, Stable Personality, supra note 177, at 228 ("Mischel...became a leading exponent of the new theory of specificity....").
  \item \textsuperscript{201} See Mischel, supra note 186. Mischel stated: First, behavior depends on stimulus situations and is specific to the situation: response patterns even in highly similar situations often fail to be strongly related. Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories. The more dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the same individual. Even seemingly trivial situational differences may reduce correlations to zero....There are, of course, many correlations among an individual's behaviors even in response to diverse situations. Individual differences occur on almost all measures of behavior; extensive networks of correlations can be, and have been, found for response patterns on a multitude of tests. These vast networks of test-test correlations are, however, of limited utility, mainly because of the situational specificity of behavior and the consequently low magnitude of the associations. Id. at 177–78 (emphasis added).
\end{itemize}
individuals, but rather, the specificity of situations is the determinative factor.\textsuperscript{202} It appears that this view of the relationship between character and conduct profoundly impacted the developing federal evidentiary rules. A legal system relying on the validity of character traits would have had a difficult time answering challenges to admissibility when the possibility of confusion, waste of time, and lack of relevance were almost guaranteed in light of situationism. If character traits cannot predict future behavior then they should not be admitted at trial. The situationism position that character traits were not related to subsequent conduct did not ring true to the proponents of trait theory.\textsuperscript{203}

The time in which trait theory fell out of favor coincided with the development of the Federal Rules of Evidence and justifications for excluding character evidence based on its lack of probative value.\textsuperscript{204} If character worked as situationists believed, the predictive ability of character for legal purposes would be nil. If character traits do not result in predictable behavior, then admitting evidence of character would create a high probability of confusing the jury and misrepresenting evidence. The combination of these two factors supported the continued exclusion of character evidence at trial, even though the fundamental reasoning behind why character evidence should be excluded was radically different from the "too probative" argument that developed in the common law.\textsuperscript{205} Earlier legal scholars used the work of Hugh Hartshorne and Mark A. May\textsuperscript{206} to support the idea that character evidence should be excluded because it does not have a predictive correlation to conduct.\textsuperscript{207}

Situationism developed in response to the social science community's inability to support trait theory by connecting supposed immutable character traits to a predictive standard.\textsuperscript{208} The inability to create a testing environment that produced empirical evidence supporting a correlation did not necessarily mean that such a relationship did not exist. Theorists eventually demonstrated that relationship correctly.\textsuperscript{209} Seemingly unique acts in each situation were reflective of certain defined character traits and what was missing from the earlier work was a

\textsuperscript{202} Méndez, Stable Personality, supra note 177, at 229 n.24. Méndez explained:

Despite the empirical findings by Mischel and others, the concept of personality invariance has retained adherents. Mischel and Shoda readily acknowledge that a current trend continues to equate behavioral dispositions with the basic invariances of personality, with the personality construct, and indeed with the field of personality itself. Even the strongest advocates of the new theory of situational specificity have declined to jettison trait theory completely. Over 10 years ago, Mischel himself doubted that the situation—whatever it is—accounts for everything....Mischel and Shoda have come to share the belief that at least some aspects of the personality are relatively invariant.

\textsuperscript{203} Id. (citations and internal quotation marks omitted).

Mischel has continued to publish in the field, eventually developing his correlations between character traits and situations to more fairly be said to encompass some form of interactionism theory.

\textsuperscript{204} See id.

\textsuperscript{205} Inwinkelreid, Comments, supra note 25, at 44.


\textsuperscript{207} See Hartshorne & May, supra note 199. The problem with relying on the work of Hartshorne and May is that it focuses on non-criminal conduct. The researchers observed the truthfulness of kindergarten students—a far cry from adult criminal activity.

\textsuperscript{208} See supra note 171, at 728 n.28.

\textsuperscript{209} See supra text accompanying notes 188–189.

\textsuperscript{209} Davies, supra note 193, at 516 n.71; see also Park, supra note 171, at 733–35 n.57.
sufficiently broad inquiry to establish those traits and their relationship to specific situations. That inquiry, when it later occurred, established a correlation between character traits and subsequent conduct that also considered specific situations.

The proponents of trait theory had not remained quiescent. As they began to look at the scholarly work surrounding situationism, an interesting thought occurred: what if instead of the either/or proposition regarding trait theory and situationism, the relationship between those two theories was instead two different sides of the same coin? Subsequent research established a relationship between specific character traits and defined situations that allowed for predictive behavior. This thought process led to the currently accepted doctrine of interactionism.

C. Interactionism

Psychologists observed the conflict between trait theory and situationism and then looked at the possibility that, if you have enough information about specific character traits and their interactions with defined situations, you can predict behavior. This allowed for a statistical approach to questions concerning the predictive ability of character traits. The resulting work validated the earlier suppositions concerning the ability of specific character traits to predict behavior in defined situations. Interactionism requires a complex statistical model, a sufficient definition as to the character trait in question, and a clearly defined situation with a broad sample of data. With these, it becomes possible to make connections between character and predictive behavior. Some evidence scholars have begun to consider the impact of interactionism theory and what it may mean for character evidence rules.

As researchers continued to develop statistical models to identify the predictive nature of character traits in defined situations, they discovered the reason that the original trait theorists had so much difficulty in empirically capturing results of research that supported their theory. One of the specific traits relevant to looking at character is whether a person makes decisions based on principles that reflect

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210. Park, supra note 171, at 732–33 n.55.
211. Pervin, supra note 172, at 79 ("What is suggested by this research is that each of us has a characteristic style of behaving similarly within certain groups of situations and differently in other groups or situations.").
212. Davies, supra note 193, at 518–19.
214. Id.
215. David M. Buss et al., Tactics of Manipulation, 52 J. PERSONALITY & SOC. PSYCHOL. 1219–29 (1985). These researchers established a link between a person's personality traits and their behavior. Id. at 1220. They did not find that the subjects' personality traits were a complete predictor but they did demonstrate some strong links. Id. at 1228–29. This particular study dealt with the observation of college student dating styles and applicable personality traits for interpersonal relationships. Id. at 1219–20. At a minimum, this type of research establishes a relevancy link between character traits and predicted behavior in accordance with those traits. Id.
216. Imwinkelreid, Comments, supra note 25, at 47. ("[J]ust as the proposed rules sweep beyond the reforms effected in other common-law jurisdictions, the rules exceed interactionist theory; interactionists demand a substantial sample of behavior before inferring a character trait, and the proposed rules would allow a prosecutor to invite that inference based even on a single, isolated act.").
their character or whether they make decisions to fit specific situations.\textsuperscript{218} Significant portions of the population are situation-driven decision makers.\textsuperscript{219} For these individuals, decision making is primarily based on the situation that they confront.\textsuperscript{220} This is a character trait.\textsuperscript{221} Once researchers identified the dichotomy between individuals who are driven primarily by dispositional factors such as character traits and individuals who were driven by situations, the problems with earlier attempts to empirically support trait theory were clear. The determination that cross-situational consistency is, in fact, a personality trait or characteristic allowed for modifications to statistical models that significantly increased the ability to connect personality traits with predicted behavior.\textsuperscript{222}

The conflict between trait theory and situation theory in personality theories research ultimately improved the current understanding of how personality and character interrelate. There is now widespread agreement within the field of psychology that behavior is a combination of specific character traits and clearly defined situations.\textsuperscript{223} The most recent research is now looking at establishing an additional connection between character traits and predictable behavior using latent-state-trait theory. Researchers have looked at the cross-consistency issues between character, behavior, and situations, and have applied structural equations, positing that:

\begin{quote}
[L]atent state-trait theory (LST theory)…is another reaction to the consistency controversy. Just like modern interactionism, it aims at taking into account the fact that not only persons but also situations and the interaction between persons and situations are important sources of variance in psychological measurement. However, in contrast to [modern interactionism]..., LST theory strives to consider these sources of variances also in observational (nonexperimental) research and to represent traits and situation and/or interaction effects in structural equation models.\textsuperscript{224}
\end{quote}

The issues in predicting behavior based upon traits are complex and require a large sample of information in order to assure accuracy,\textsuperscript{225} but the connections clearly exist. The logical connections between specific individualized traits and subsequent behavior form the basis for interactionism and LST theory. This is the most recent theory of personality subjected to statistical analysis with predictive

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\item \textsuperscript{218} David Funder & C. Randall Colvin, Explorations in Behavioral Consistency: Properties of Person's, Situations, and Behaviors, 60 J. PERSONALITY & SOC. PSYCHOL. 773, 773–76 (1991).
\item \textsuperscript{219} See id.
\item \textsuperscript{220} See id.; Kennon M. Sheldon et al., Trait Self and True Self: Cross-Role Variation in the Big-Five Personality Traits and Its Relations with Psychological Authenticity and Subjective Well-Being, 73 J. PERSONALITY & SOC. PSYCHOL. 1380, 1381 (1997).
\item \textsuperscript{221} See id. at 1381.
\item \textsuperscript{222} For an excellent discussion of the comeback of trait theory and its melding with situationism into interactionism, see William B. Swann Jr. & Conor Seyle, Personality Psychology's Comeback and Its Emerging Symbiosis with Social Psychology, 31 PERSONALITY & SOC. PSYCHOL. BULL. 155, 162 (2005).
\item \textsuperscript{223} Davies, supra note 193, at 518 n.84.
\item \textsuperscript{224} Rolf Steyer et al., Latent State-Trait Theory and Research in Personality and Individual Differences, 13 EUR. J. PERSONALITY 389, 391 (1999) (providing an excellent introduction to the current state of LST theory as well as fundamental examples of the grounding principles of LST theory).
\item \textsuperscript{225} See id. at 392–93.
\end{itemize}
results. Attorneys and evidence scholars should consider these recent developments in personality theory as a call to critically review the character rules of evidence and promulgate new rules of evidence that are based on an accurate understanding of the predictive power of character.

The conclusions gleaned from the analysis of interactionism theory suggest that it is time to rethink how we define relevancy and character evidence. There is a clear connection between character traits and the situations where they apply. This indicates a potential predictive ability using character if sufficient knowledge as to the connections between the behaviors to be predicted, the character trait, and the actions of the individual in the past are available. This theory of personality is an exciting development. It combines the common sense approach to the development of evidentiary law offered by Wigmore and Thayer with an understanding of human nature based on the behavioral sciences.

The research is finally maturing to the point that the results can be useful when drafting fair, equitable, and understandable character rules of evidence. At a minimum, one must concede that there is a relationship of statistical significance between clearly defined specific traits of character and conduct. This relationship meets the evidentiary standards of legal and logical relevance. The remaining question is whether one can identify traits of character in a legal context and then use their predictive ability to assist finders of fact while protecting the rights of the accused. This should be possible if sufficient evidence exists to support defined character traits and their predictive ability in specified situations. A review of the basic tenets of character evidence is required before discussing how such modifications might best be accomplished.

IV. CHARACTER EVIDENCE: HOW DOES IT WORK?

Scholars have expended a tremendous amount of effort to assist members of the legal profession in understanding and applying the character rules of evidence. That scholarship has criticized the current rules, outlined their historical foundations, and argued for change based on a greater current understanding of

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226. See id. at 403–04.
227. See Davies, supra note 193, at 514; Méndez, Stable Personality, supra note 177, at 226.
228. See supra notes 217, 219, 221, 223, 225 and accompanying text.
229. See generally WIGMORE, EVIDENCE, supra note 2; WIGMORE REVISED, supra note 5.
230. See generally THAYER, supra note 1.
231. See FED. R. EVID. 401, 402, 403.
233. See, e.g., Méndez, Character Evidence Reconsidered, supra note 177; Orenstein, supra note 177; Tillers, supra note 177; Sanchiro, supra note 177.
234. See, e.g., Leonard, supra note 232; Melilli, supra note 232.
the human psyche. This Article synthesizes these competing views in light of current empirical recidivism data. This synergistic analysis provides a way of looking at character evidence that is not limited by antiquated theories of the human psyche while still managing to give due deference to our personal, legal, and national sense of what is right and fair in the context of a search for truth—to the extent that it can ever be found.

The law struggles with character evidence because its relevancy is often grounded in its potential for an unfairly prejudicial result. The fear of such a result grows out of concerns about a jury’s potential overvaluation of evidence, its perceived inability to properly weigh evidence, and the possibility of obscuring the fundamental issues at trial by admitting character evidence for consideration by the finder of fact. In order for evidentiary rules to strike a balance between what should be admitted or excluded, these concerns must be weighed against the natural human desire to know the whole story and the need for jurors to feel that they are valid participants in the process. Common sense tends to indicate that knowing an individual’s character is helpful when trying to determine, after the fact, what may or may not have happened in a particular situation. This tension between the normal desire to know all of the details and the fear that too many character details will either waste time, confuse issues, or result in unfair decisions has shaped the development of the use of character evidence ever since the first time a parent cross-examined two children about who ate the cookie. By looking at the common law development of the jury system and the use of character at trial, the philosophical underpinnings of the sometimes contrary nature of character evidence in the United States can be better understood. Once that level of understanding is achieved, intelligent modification will become possible.

A. A Historical Perspective

A hallmark of the common law system of justice is a marked predilection for excluding relevant evidence that other systems of justice would clearly admit and consider. One example of that exclusionary preference is the rule prohibiting propensity character evidence. The prohibition against the use of character

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235. See, e.g., Leonard, supra note 232; Melilli, supra note 232.
236. See 1 WIGMORE, supra note 2, § 8a, at 120 (“We may assume it understood that the solid function of the law of Evidence is to assist the discovery of truth in trials, while safeguarding the jury from false estimates of evidence, by means of rules of exclusion based on long experience in jury trials.”).
237. THAYER, supra note 1, at 525; 1A WIGMORE REVISED, supra note 5, § 54.1, at 1150-51.
238. Richard D. Friedman described this concern as follows:
   Here is the over-valuations concern: Although a given piece of evidence has probative value, enough to warrant admission if there were an ideal fact-finder, the jury is likely to give the evidence too much weight, and the excess weight means that the truth-determination process is better off if the evidence is excluded than if it is admitted. Several points about this concern warrant emphasis and counsel against it causing the exclusion of evidence. Minimizing the Jury Over-Valuation Concern, 2003 MICH. ST. L. REV. 967, 969 (2003).
239. Id. at 967 (“In various contexts we are told that although an item of evidence is probative, it must be excluded because the jury will give it too much weight.”).
241. THAYER, supra note 1, at 3 n.1.
242. Id. at 2 n.1.
243. FED. R. EVID. 404(b).
evidence to prove that a person acted in a predictable manner based upon a perceived character trait extends back to the Seventeenth Century.244 Several important cases during that era developed the proposition that an individual should be judged based upon what he may or may not have done, not what he may or may not be.245 This common law position was unique and served as a signpost marking the continued separation of the secular law (common law)246 from Canon Law.247 From a western civilization perspective, common law and Canon Law had previously worked together and relied on each other. Examples are readily apparent of the importation of Canon Law standards into secular law. This relationship between common law and Canon Law developed many of the great facets of our current system, including one of the most famous: the privilege against self-incrimination.249

Canon Law was inquisitorial,250 relying upon a panel of judges to determine the outcome of controversies.251 An underlying belief of Canon Law was that the more information available to the finder of fact, the more reliable and truthful the final decision.252 This system required access to all relevant facts in order to ensure that

244. Office of Legal Policy, Dep't of Justice, Report to the Attorney General on the Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Reform 707, 716 (1989) [hereinafter Dep't of Justice] ("About the same period [the end of the seventeenth century] an equally distinctive feature, the rule against using the accused's character, became settled."); see also 1 Wigmore, Evidence, supra note 2, § 8, at 109.

245. Dep't of Justice, supra note 244, at 716.

246. See G. Robert Blakey & Brian J. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 BYU. Rev. 829, 839 n.17, 880 n.133, 902 & n.180. Secular law is used here to describe and identify the development of the King's law as opposed to God's law. The rise and fall of various kings within Great Britain often correlates with the initial splits and differences between medieval canon and secular legal systems. See id. at 1028 n.648. Secular law and the common law of the King are one and the same. See id. at 1029 & n.654.

247. As Wigmore noted:

Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words, and their documents, the whole question of admissibility arises.

One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered systemless jury trial; and it was not for another two centuries that the numerical system was finally repulsed.

1 Wigmore, Evidence, supra note 2, § 8, at 108.

248. Canon Law, in the Roman Catholic Church, is the body of law based on the legislation of the councils (both ecumenical and local) and the popes, as well as the bishops (for diocesan matters). It is the law of the church courts and is formally distinguished from other parts of ecclesiastical law, such as liturgical law. However, when liturgical law overlaps with canon law, canon law normally prevails. Canon law has had a profound influence on the law of countries where the Roman Catholic Church has been the state church. In the Middle Ages the church courts had very wide jurisdiction—for example, in England, control of the law of personal property—and because they were well regulated, they tended to attract many borderline cases that might also have been heard by the developing royal courts. The Catholic Encyclopedia (New Advent Catholic Encyclopedia CD-ROM), available at http://www.newadvent.org/cathen/09056a.htm.

249. 1 Wigmore, Evidence, supra note 2, § 8, at 109. Wigmore explained:

A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this period—the privilege against self-incrimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be the most distinctive feature of our trial system.

Id.


251. See id.

the judges could determine a truthful outcome.\textsuperscript{233} Canon Law presupposed that truth was determinable and accepted the burden that the business of settling controversies is the discovery of truth.\textsuperscript{254} Canon Law placed a particular emphasis on state of mind.\textsuperscript{255} In fact, the common law’s emphasis on state of mind in secular criminal law comes from the Canon Law.\textsuperscript{256} Canon Law generally accepted as a given that the character of the individuals involved was relevant to the issue in controversy.\textsuperscript{257} That belief ensured that inquiries into the character of the individual were not only permissible but encouraged.\textsuperscript{258} This treatment of character evidence is still followed in European civil court systems.\textsuperscript{259}

Canon Law’s approach to the use of character evidence did not cross over into common law.\textsuperscript{260} The historical roots of the current attitude towards the admissibility of character evidence serve as an excellent example of how legal doctrine developed by the common law can differ markedly from that found in Canon Law. The decision at common law to take a road “less traveled by”\textsuperscript{261} regarding character evidence was based on the importance of the jury system and competing views of how the use of character evidence would impact a fact finder’s decision making process.\textsuperscript{262} Common law viewed character evidence as being too prejudicial and feared that the jury would be unduly influenced by it. On the other hand, Canon Law posited that the more logically relevant information the finder of fact had, the closer to the truth the decision making process would come.

B. Character and the Federal Rules of Evidence

Federal Rule of Evidence 404(a)\textsuperscript{263} governs the admissibility of character evidence for the accused and the victim in a criminal case.\textsuperscript{264} The underlying

\begin{itemize}
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id.; see also Blakey & Murray, supra note 246, at 1029 n.654.
\item \textsuperscript{256} THE CATHOLIC ENCYCLOPEDIA, supra note 248. The belief that a trial should be the search for an ultimate identifiable and ascertainable truth still forms the fundamental basis for most civil law systems in Europe. Id.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id.
\item The defendant in a criminal trial is not himself subjected to examination, according to English law, unless he offers himself voluntarily to give evidence, and then he may be examined like a witness. In canon law the accused is examined. [sic] and the question arises whether he is bound to tell the truth against himself. He is bound to tell the truth if he is interrogated according to law; canon law prescribes that when there is \textit{semiplena probatio} of the crime and this is made clear to the defendant he should be interrogated.
\item \textsuperscript{260} See 1 WIGMORE, EVIDENCE, supra note 2, § 8, at 108-09.
\item \textsuperscript{261} ROBERT FROST, THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED 105 (Edward Connery Lathem ed., 1975). This poem has become a symbol of how choices at specific moments have impact for an extended period of time. This Article posits that such a choice arises when it comes to propensity character evidence. For a primer on the differences between civil and common law systems, as well a discussion of the prevalence of civil law systems vis-à-vis common law systems, see APPLE & DEYLING, supra note 259, at 1.
\item \textsuperscript{262} See Dep’t of Justice, supra note 244, at 709–10; Leonard, supra note 232, at 1170–71 & n.48.
\item \textsuperscript{263} See supra note 17.
\item \textsuperscript{264} Rule 404 does not address credibility issues for witnesses. See generally Fed. R. Evid. 404. Rules 608 and 609 apply to victims, accused, and all other witnesses that testify. See Fed. R. Evid. 608, 609. The ability
foundation of this rule is that the accused holds the key that opens the door to the character of both the victim and the accused. Subject to the exceptions outlined in Federal Rules of Evidence 404(b) and 413, the decisions made by the accused concerning whether or not to admit character evidence determine the extent to which character evidence will or will not be admitted at trial. One way to conceptualize the application of these rules is to view the use of character evidence rules by the accused as a shield. The accused can use the rules to prevent an attack upon his character as the basis for prosecution, thus protecting him from trial by character assassination by the state. However, if the accused decides, based upon his right to present a defense, that relevant issues of the accused’s character, or the victim’s character, should be placed into evidence, he loses the shielding of Federal Rule of Evidence 404(a). The rules do not allow an accused to use the rules to attack the character of the victim while also using those rules to shield him or herself. Once the door to character has been opened by the accused, it remains open, and relevant character evidence that might otherwise have been excluded can properly be admitted by the court for both parties, subject to logical and legal relevancy restrictions.

The shield analogy can be illustrative, but students of the law of evidence must understand that the shielding nature of character evidence only addresses the use of propensity evidence to prove conformity therewith. Where a non-propensity based theory of relevancy is used, character evidence that would normally be considered inadmissible suddenly becomes admissible under alternative theories under Rule 608 to use character evidence normally not admissible under Rule 404 to attack a witness’s credibility is one of the curious by-products of the character evidence propensity ban. For a discussion of the admissibility of character evidence concerning witnesses other than the accused and the victim, see Fed. R. Evid. 608, 609 advisory committee’s notes and commentary.

265. Michelson v. United States, 335 U.S. 469, 479 (1948) (“The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.”).

266. Rule 404(b) provides:

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

Fed. R. Evid. 404(b).

267. Rule 413 provides: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” Fed. R. Evid. 413(a) (Evidence of Similar Crimes in Sexual Assault Cases).


269. See id.

270. See id.

271. A non-exhaustive list of possible alternative theories for the admissibility of character evidence for a non-propensity purpose must begin with the exceptions found in 404(b). See Fed. R. Evid. 404(b). Most commentators on the rules of evidence would agree that the courts have been expansive in determining whether or not prosecutorial theories for offering such evidence are proper. See, e.g., Leonard, supra note 232, at 1212-13; Dep’t of Justice, supra note 244, at 718-19 & n.11. Prior to the passing of Rule 413, many jurisdictions got around the limitations of Rule 404 concerning the prior sexual misconduct of an accused by using the “lustful disposition” doctrine. See infra note 272.
such as the lustful disposition doctrine. 272 Another example of an alternative theory of admissibility is when the prosecutor introduces evidence of a prior burglary to prove that the accused committed the current charged burglary using the same plan or modus operandi that was present in the previous offenses. Because the evidence will be used for a non-character purpose, it is potentially admissible. 273 While practically speaking, the prosecutor is showing that the accused acted in accordance with a character trait, legally speaking, there is an alternative non-propensity theory for its admissibility and it is therefore potentially admissible. Much of the evidentiary argument that takes place in the courtroom is a dance around this rule. Each side tries to admit character evidence that might normally be considered propensity evidence under an alternative theory, hoping to garner admissibility of their proffered evidence while preventing opposing counsel from using other character evidence that only fits in the propensity niche.

At common law, the state always had the ability to admit character evidence for reasons other than showing that a person acted in conformity with a particular character trait. 274 The initial question asked is, what is the legal reason for admitting the propensity evidence? If the reason goes to a use other than propensity, such as proving motive, scheme, or knowledge of the nature of the illegal act, it is admissible for that purpose. 275 The acceptance of these alternative reasons for admitting character evidence formed the basis for the Federal Rule of Evidence 404(b) exception concerning evidence of other crimes, wrongs, and acts. 276 The key test before such evidence is admissible is an establishment of relevancy from the offering party and the weighing of the possibility of an unfair prejudicial impact in comparison to its probative value for the finder of fact. 277 The court looks to the proffered purpose for offering the character evidence and the existence of a historical exception contemplated by the proffered use of what would otherwise be propensity evidence. 278 If it fits into a non-character trait theory of relevancy, it is potentially admissible. 279

While commentators argue that the admission of propensity evidence might potentially waste time and distract jurors, 280 a more logical and attractive reading of this relationship is that the jurors would be no more distracted by the use of propensity evidence with proper limiting instructions than they currently are by the battle within the courtroom over alternative theories of admissibility. Recent high profile cases dealing with propensity evidence of sexual misconduct have shown that juries are capable of following appropriately fashioned instructions, even in the

273. See FED. R. EVID. 404(b).
274. See Dep’t of Justice, supra note 244, at 716–18.
275. Id.
276. Id. at 719–23.
277. See FED. R. EVID. 403.
278. See Dep’t of Justice, supra note 244, at 716–18.
279. Id.
280. See supra note 238–240 and accompanying text.
face of extensive publicity and public scrutiny. Allowing for the use of propensity evidence forces the jury to properly weigh the credibility of witnesses and allows them to make informed decisions about the weight that evidence is given.

The proper use of propensity evidence is based upon the idea that circumstantial proof of a particular character trait is probative when attempting to prove the guilt or innocence of an accused for a charged criminal act. The fact-finder uses a person's character to say that, on a particular occasion relating to the current charged misconduct, that individual acted in a manner that conforms to his or her character, thereby circumstantially proving guilt. This type of circumstantial proof based upon character evidence has historically been forbidden by the common law rules of character evidence. The Federal Rules of Evidence adopted that same doctrinal position when they were initially ratified and approved. The two reasons relied upon when fashioning this restriction, the evidence is either so probative that it is unfairly prejudicial or the evidence is not sufficiently relevant to assist the jury, are not logically consistent. The logical inconsistency between these theories for excluding propensity character evidence has created considerable confusion in the understanding and application of character evidence rules. At the same time, relatively recent changes to the Federal Rules of Evidence added to the complexity of propensity evidence discussions by successfully reducing the bar to admissibility of propensity evidence in instances dealing with prior sexual misconduct.

Whole sale changes to the doctrine supporting excluding propensity evidence recently occurred in Great Britain, the country where common law evidence took root and flourished. Its courts began a relaxation of the use of character evidence.


282. See, e.g., Michelson v. United States, 335 U.S. 469, 475 (1948) (discussing the common law tradition of excluding prior bad act evidence to establish guilt); Boyd v. United States, 142 U.S. 450, 458 (1892) (holding that the prosecution cannot introduce evidence of prior robberies in order to prove the identity of the suspect in a murder case, which is interesting in light of the current Rule 404(b) exception for identity).

283. See Davies, supra note 193, at 504; Imwinkelreid, Comments, supra note 25, at 38; Imwinkelreid, Small Contribution, supra note 217, at 1135; Kuhns, supra note 177, at 780–81.

284. See Imwinkelreid, Comments, supra note 25, at 38–39; Imwinkelreid, Small Contribution, supra note 217, at 1140.

285. See Kuhns, supra note 177, at 795; Méndez, Stable Personality, supra note 177, at 223–24.

286. See infra note 315 and accompanying text.

287. See Kuhns, supra note 177, at 778–80; Leonard, supra note 232; Méndez, Character Evidence Reconsidered, supra note 177, at 872–73; Tillers, supra note 177, at 785, 788.


289. See supra note 272.

290. THAYER, supra note 1, at 2–3.
in 1975. Professor Imwinkelried noted that the leading case in Great Britain admitting propensity evidence was a House of Lord's decision in *R. v. Boardman.* More recently, the British Government did away with the exclusion of uncharged misconduct with the passage of the Criminal Justice Act of 2003. One section of this act specifically allows for the use of character evidence of the accused if "it is relevant to an important matter in issue between the defendant and the prosecution." Phillip Plowden, an attorney in Great Britain, has noted that this statute represents a departure from their common law tradition. While the American propensity evidence rule seems like a massive bar to the admissibility of character evidence, reality paints a different picture. In actuality, the character evidence prohibition shield has never been anywhere near solid.

Some evidence scholars view the application of the rules in this manner as a careful balancing of competing interests: the interests of the court in justice and timeliness, the right of the accused to present a defense, and, more recently, the rights of victims to not be harassed based upon their own character traits. Others

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291. As noted by Professor Imwinkelried in a symposium on the admission of character evidence in sexual assault cases:

Adopting proposed Rules 413-15 would not only shift [the United States] to an extreme position; the proposed rules would also push us well beyond the extent to which other common-law jurisdictions have been willing to liberalize the character evidence prohibition. It is true that the current rules embody a more categorical prohibition than other jurisdictions such as England recognize. In 1975 in *R. v. Boardman,* the House of Lords rejected a rigid distinction between character and noncharacter reasoning. However, in their speeches in Boardman, the Lords made it clear that they were sanctioning character reasoning only when disposition has exceptional probative value in the case.


292. *Id.* at 40.

293. See Criminal Justice Act, 2003, c. 44, § 101 (Eng.). Section 101 governs “Defendant’s bad character” and provides:

(1) In criminal proceedings evidence of the defendant’s bad character is admissible if, but only if—

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person’s character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) 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.

294. *Id.* § 101(d).


297. The recent change to 404(a) states:

Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the
consider the character rules of evidence to be an incredible mish-mash of competing rules with no rhyme or reason. In some instances, scholars question the actual sanity of the rules as currently written. Some feminist scholars decry the inability of the character rules of evidence to accurately and adequately address the needs of victims of sexual assault, while also approaching the adoption of Federal Rule of Evidence 413 with a great degree of trepidation. Like most issues producing strident discourse, the practical truth lies somewhere in the middle.

C. Too Relevant or Not Relevant Enough?

The arguments for and against the admissibility of character evidence are premised on two specific modes of analysis. The first position posits that character evidence is so prejudicial that it will have a substantially unfair impact on the deliberative process. The second position focuses on the fact that, in some instances, character evidence is not probative because it wastes time, confuses issues, and results in decisions that are not reliable. Both of these positions have historical roots in the development of character evidence, with the latter heavily influenced by the development of situationism during the time that the Federal Rules of Evidence were drafted. Before considering changes to the propensity character evidence rules, one must consider them in light of recent recidivism studies and the historical development of the evidentiary law.

1. Character Evidence Is So Relevant That It Is Unfairly Prejudicial

One view of character evidence agrees with the earlier Canon Law supposition that character evidence is relevant to the issue at controversy. Scholars have commented on this position, providing excellent examples of how it is supported by daily human experience. When someone hires an individual to work in his or her home or place of work, he or she is concerned with the person’s character and crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

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

298. See Uviller, supra note 177, at 845–46.
301. See 1 WIGMORE, EVIDENCE, supra note 2, § 57, at 272 (“Here, however, a doctrine of Auxiliary Policy...operates to exclude what is relevant—the policy of avoiding the uncontrollable and undue prejudice, and possible unjust condemnation, which such evidence might induce.”); see also id. § 29a, at 237.
302. See Méndez, Character Evidence Reconsidered, supra note 177, at 872–73.
303. See, Imwinkelreid, Small Contribution, supra note 217, at 1148; infra note 359 and accompanying text.
304. 1A WIGMORE REVISED, supra note 5, § 55, at 1157 (“A defendant’s character, then, as indicating the probability of his doing or not doing the act charged, is essentially relevant.”)
305. 1 WIGMORE, EVIDENCE, supra note 2, § 55, at 269 (“The character or disposition—i.e., a fixed trait or the sum of traits—of the persons we deal with is in daily life always more or less considered by us in estimating the probability of future conduct. In point of legal theory and practice, the case is no different.”); Park, supra note 171, at 721 (“Common sense (that is, unsystematic inductions from everyday experience) is the principal basis both for believing character evidence to be probative, and for fearing its prejudicial effect. We all use character evidence in ordinary life.”).
the impact that character will have on any interactions with that individual. No one wants a sexual predator watching his children or known thieves cleaning her home.

While some have noted that the thought process for hiring and associating with people is qualitatively different from the thought process required when ascertaining guilt or innocence under the beyond a reasonable doubt standard, understanding how people use character in their day-to-day lives leads to the reasonable assumption that available character evidence might be so persuasive that it would have the ability to improperly overcome other evidence. The focus of this analysis hinges on the idea that character evidence is not only relevant when applied under a common sense standard—it is too relevant and often overcomes proper deliberations, causing convictions for who a person is as opposed to what a person has done. This analysis is persuasive, but it does not consider the fact that we now routinely allow highly inflammatory propensity evidence for prior sexual misconduct and allow for its proper application through the use of cautionary and limiting instructions that mitigate any potential inflammatory effects.

2. Character Evidence’s Relevancy Is Nil and It Confuses Issues

This argument takes the competing position that character evidence is of minimal value in predicting future activities by an individual, and the cost of using character evidence at trial from a practical perspective is too expensive. The combination of these two factors supports the position that such evidence should be excluded due to its minimal relevance and the fact that the act of admitting such evidence would cost the system a great deal in terms of time, confusion, and resources. This presupposes that there is no direct correlation between possible character traits and their ability to predict subsequent behavior. The lack of a logical connection, if true, would be a very strong reason to exclude character evidence under this theory. This line of reasoning was supported by psychological research initially developed to expand and increase understanding of the trait theory in the twentieth century but has recently been cast into doubt through the developing theories of interactionism and LST.

306. Park, supra note 171, at 721-22.

307. 1 WIGMORE, EVIDENCE, supra note 2, § 29 a, at 237 ("[Y]et [character evidence] may be excluded because of the undue prejudice liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation visited upon him, not for the act, but virtually for his character.").

308. This belief found its way into the case law. For an in depth analysis of the historical case law development of the character evidence ban, see Leonard, supra note 232.

309. Id.

310. Id.

311. Professor Tillers believes this to be an open question. See Tillers, supra note 177, at 791 (taking "no position on the question of whether the character evidence rule is, on the whole, a good thing or a bad thing"). But see Park, supra note 171, at 738 n.68 (citing research that supports the position that people apply too much importance to character); Uviller, supra note 177, at 851-52, 886.

312. HUGH HARTSHORNE, MARK A. MAY & FRANK K. SHUTTLEWORTH, STUDIES IN THE NATURE OF CHARACTER: STUDIES IN THE ORGANIZATION OF CHARACTER 372 (1930) ("It seems to be a fair conclusion from our data that honest and deceptive tendencies represent not general traits nor action guided by general ideals, but specific habits learned in relation to specific situations which have made the one or the other mode of response successful."); see also supra note 199.

313. See supra note 202; see also supra notes 195-196 and accompanying text.

314. See Imwinkelreid, Comments, supra note 25, at 45-46; Imwinkelreid, Small Contribution, supra note 217, at 1148-50; Park, supra note 171, at 728-29.
3. Does the Use of Propensity Evidence Guarantee Unfair Results?

When taken separately, both trait theory and situationism have some general validity. They do not, however, adequately serve as a fundamental basis for excluding propensity character evidence. Evidentiary scholars raised arguments based upon both trait theory and situationism when additional character propensity rules dealing with sexual misconduct were discussed and later implemented. They took the position that propensity evidence would violate the constitutional guarantees of a fair trial. If these concerns about the overwhelming nature of propensity evidence were valid, the courts would have subsequently overturned cases based upon this type of evidence. That did not happen. Instead, the courts fashioned a balancing test utilizing Federal Rule of Evidence 403 and applied it to Federal Rules of Evidence 413 and 414 when determining whether or not to admit evidence of prior sexual misconduct. Based upon that balancing test, the courts fashioned limiting instructions that assist the finder of fact in properly applying sexual misconduct propensity evidence while also ensuring the constitutional rights of the accused are protected.

Limiting instructions have successfully shaped the use of what is generally recognized as extremely inflammatory information dealing with evidence of prior sexual misconduct under Federal Rules of Evidence 413 and 414. The courts have adequately fashioned limiting instructions handling inflammatory propensity character information when recidivism statistics tell us that the danger of a lack of relevance is actually high. Therefore, appropriately fashioned evidentiary rules, in concert with specific procedural guidelines at trial, will allow for the fair use of propensity evidence in areas where recidivism data tell us that the statistical correlation is correspondingly much higher than that found for sexual crimes. This supports a modification of Federal Rule of Evidence 404(a) allowing for the use of propensity evidence for both property and drug crimes with limiting instructions.

316. Id. at 345.
317. Id. at 349.
318. For a fine discussion and survey of how federal courts handled the then-new rule 413, see Thompson, supra note 10.
319. Id. at 247–48.
320. Id.
321. See supra notes 280–281 and accompanying text.
322. See infra note 337.
323. See generally Orenstein, supra note 177; Tillers, supra note 177.
V. MAKING SENSE OF IT ALL—COMBINING HISTORY, PSYCHOLOGY, AND STATISTICS

It is time to adopt an alternative view of character evidence based upon a continuing maturation of our understanding of the human psyche as it relates to criminal activity. The historical underpinnings of character evidence, the discordant manner in which the current Federal Rules of Evidence address character evidence, the influence of psychological theories regarding personality theory over the development of the character rules of evidence, and the data in recent recidivism studies support this argument. Adopting this alternative view of character evidence requires taking empirical recidivism data and positing that it should impact the admissibility of propensity character evidence. The issue is how to draft new rules that allow for the use of character evidence while protecting the rights of the accused and the victim.

Discussions about new recidivism data and recent developments in personality theory and their impact on understanding and modifying the Federal Rules of Evidence must begin with an organization of the recidivism data in a fashion that highlights the importance of this evidence from a character predictive standpoint. The following two tables are a compilation of the data found in the Beck and Shipley and Langan studies. Unless specifically indicated, all percentages are based on the re-arrest criteria for defining recidivism data sets previously discussed.

<table>
<thead>
<tr>
<th>Recidivating Offense</th>
<th>BJS 1983</th>
<th>BJS 1994</th>
<th>BJS Sexual Offenses 1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burglary</td>
<td>31.9</td>
<td>23.4</td>
<td>N/R</td>
</tr>
<tr>
<td>Larceny/theft</td>
<td>33.5</td>
<td>33.9</td>
<td>N/R</td>
</tr>
<tr>
<td>Motor vehicle theft</td>
<td>18.6</td>
<td>11.5</td>
<td>N/R</td>
</tr>
<tr>
<td>Drug Offenses</td>
<td>24.8</td>
<td>41.2</td>
<td>N/R</td>
</tr>
<tr>
<td>Homicide</td>
<td>6.6</td>
<td>1.2</td>
<td>N/R</td>
</tr>
<tr>
<td>Rape</td>
<td>7.7</td>
<td>2.5</td>
<td>5.0</td>
</tr>
<tr>
<td>Other Sexual Assaults</td>
<td>N/R</td>
<td>N/R</td>
<td>5.5</td>
</tr>
</tbody>
</table>

324. See generally Davies, supra note 193.
325. See, e.g., THAYER, supra note 1; WIGMORE, EVIDENCE, supra note 2.
326. See Kuhns, supra note 177, at 802; Uviller, supra note 177, at 845–46.
327. Park, supra note 171, at 756–64. Professor Park’s article sounds a cautionary note on the possible use of recidivism data in the promulgation of character evidence rules.
328. See supra note 9 and accompanying text.
329. See supra note 9 and accompanying text.
330. See supra note 47 and accompanying text.
Table 10. Percentage of Prisoners Who Subsequently Committed the Same Category of Offense

<table>
<thead>
<tr>
<th>Category of Recidivating Offense</th>
<th>BJS Study 1983</th>
<th>BJS Study 1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent Offenses (homicide, rape, robbery, assault)</td>
<td>30.4</td>
<td>27.5</td>
</tr>
<tr>
<td>Property Offenses (burglary, larceny/theft, motor vehicle theft, fraud)</td>
<td>49.8</td>
<td>46.3</td>
</tr>
<tr>
<td>Drug Offenses</td>
<td>24.8</td>
<td>41.2</td>
</tr>
</tbody>
</table>

The Beck and Shipley study and the Langan studies establish that a convicted burglar has a high statistical probability of committing an additional property crime. Further, there is a high statistical probability that the recidivating property crime will resemble the burglar’s previous offense. If similarities between the previous offense and the recidivating offense are sufficiently connected from a logical and legal relevance perspective, the finder of fact should be allowed to consider the prior actions by the accused as circumstantial proof for the charge concerning the recidivating offense. The judge would first compare the misconduct that resulted in the earlier conviction to the current charged misconduct. If sufficient similarities exist, the court would allow the finder of fact to consider the actions resulting in that earlier conviction as circumstantial proof of the charged offense. Any concerns about the propensity evidence overwhelming the deliberative process would be addressed through the use of limiting evidentiary instructions. This would prevent wasted time searching for a non-propensity theory that the court will accept. It also injects a sense of direct purpose and transparent honesty into the trial. If the accused was not a career criminal and had character traits that could be used to rebut allegations that he committed an offense, he or she would be allowed under these new rules to admit evidence of specific acts of conduct that could circumstantially prove his or her innocence, subject to a legal or logical relevance connection mirroring the same type of analysis for admissibility of relevant prior misconduct.

Because a variety of factors are working in concert when admitting propensity evidence, a standard methodology must exist allowing the courts to rely with confidence upon the logical and legal relevance of the character propensity evidence offered. A systemic process for addressing this type of evidence is required when the court determines propensity admissibility. The factors identified in the recidivism studies provide the standard methodology for determining logical and legal relevance, and a careful redrafting of Federal Rule of Evidence 404(a) would establish a systematic process for weighing those factors. The recidivism studies establish that prisoners with certain criminal histories are much more likely

331. See supra Table 5.
332. See supra Table 5.
333. See supra notes 280–281 and accompanying text.
334. See supra note 17.
to commit a similar offense. If these character traits and factors for specific situations are identifiable, then the system can and should rely upon propensity evidence when it meets the standards outlined above. When both common sense and statistical research lead to this conclusion, these factors should form the basis of any balancing test under a legal relevancy standard prior to admitting character propensity evidence. These factors should be found even in areas of low statistical connection, particularly in crimes involving sexual misconduct. If they do not, such evidence cannot be considered legally relevant and should be excluded.

Such an approach would require the removal of Federal Rules of Evidence 413, 414, and 415 and the creation of a much more rational, cogent, and applicable standard for prior sexual misconduct under Federal Rule of Evidence 404(a) or 404(b). The low statistical correlation between prior sexual offenses and recidivating sexual offenses supports this change. Without the revision, the validity of the currently configured rules is called into question by the recidivism data. The current rules are not based upon sound statistical data and the lack of specificity within the rules concerning particular sexual offenses greatly reduces their potential validity. Utilizing the specific factors identified in the Bureau of Justice Statistics, a recent Canadian study, and research by the Center for Sex Offender Management, it will be possible to begin to create rules of evidence that address these concerns and provide for the admissibility of propensity evidence where appropriate, even when dealing with crimes that have the lowest statistical correlation between prior offense and recidivating offense.

335. See supra note 17.
336. The low statistical correlation for sexual crimes and recidivism can only be explained by considering the additional offense specific factors outlined for sexual offenders in the recidivism studies, specifically the Canadian studies relied upon by the Bureau of Justice Statistics when it addressed the counter intuitive anomaly of the statistics it created. See infra notes 340–344, 351 and accompanying text.
337. Wigmore, Thayer, and the courts of Great Britain stretching back into antiquity had it right—character matters. They intuitively understood the connection between what you are as a person, defined by your character, and what you do. The developments in personality theory support this correlation between character and conduct. See supra notes 226–229 and accompanying text. Interactionism establishes how certain character traits produce predicted behavior when the situation impacting the specific character trait is sufficiently defined. Recidivism data provide the factors that supply sufficient definitions as to when character is relevant and probative in specific situations. See generally CENTER FOR SEX OFFENDER MANAGEMENT, RECIDIVISM OF SEX OFFENDERS (2001), available at http://www.csom.org/pubs/recidsexof.html [hereinafter CSOM]; R. Karl Hanson & Monique T. Bussière, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998), available at http://home.wanadoo.nl/ipce/library_two/han/hanson_98_text.PDF; R. Karl Hanson & Kelly Morton-Bourgon, Public Safety and Emergency Preparedness Canada, Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004-02, http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/200402_e.pdf (last visited June 3, 2006). Examples include the use of a certain plan or scheme or the identification of a particular type of victim. See Hanson & Bussière, supra, at 3–4; Hanson & Morton-Bourgon, supra, at 15–16.
338. See generally supra Tables 5–9; Hanson & Bussière, supra note 337.
339. See CSOM, supra note 337. The Center for Sex Offender Management has become a premier grant-based institution focusing on the many issues surrounding sexual offenders. The CSOM points out that sex offender characteristics can be divided into historical and dynamic categories. Historic categories cannot be changed by treatment and they include such issues as age, prior offense history, and age at first sex offense arrest or conviction. Dynamic factors are potentially subject to treatment and include deviant sexual preferences, substance abuse, and a pattern of sexual arousal coupled with substance abuse. Id. at 5. The CSOM also notes that reviews of some studies have established a recidivism rate for incest offenders between four and ten percent, for rapists between seven and thirty-five percent, child molesters with female victims between ten and twenty-nine percent, and child molesters with male victims between thirteen and forty percent. Id. at 7.
The Langan, Schmitt, and Durose study by the Bureau of Justice Statistics addressed the low statistical correlations for recidivating sexual offenders, pointing to the existence of other factors within the subset of recidivating sexual offenders. The study reasoned that sex offenders are approximately four times more likely than non-sex-offenders to commit a sex crime as their recidivating offense but noted that recidivating sexual offenders do not commit the vast majority of sex crimes perpetrated each year. The Langan, Schmitt, and Durose study only covered a three-year period following the release of prisoners.

Two Canadian studies, titled *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies* and *Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004–02*, performed meta-analysis that identified specific risk factors for the increased possibility that additional sexual offenses will be committed by identified sexual offenders. The first analyzed over sixty-one different studies, some of which followed sexual offenders for more than fifteen years. It found that, over the course of a four to five year period, there is approximately a thirteen percent chance that a sexual offender will commit another sexual crime. The study noted that deviant sexual interest is a highly predictive factor with male sex offenders, citing the response to phallometric testing concerning young boys as an example. The risks of recidivism varied based upon sexual criminal history variables.

The second Canadian study supports the position that identifiable factors greatly increase the predictive ability of character traits to commit additional sex crimes based upon certain identifiable risk factors such as deviant sexual interests and antisocial orientation or lifestyle. Deviant sexual interests include sexual preoccupations, paraphilic interests, sexual interests in children, and high scores by men on the Masculinity-Femininity scale of the Minnesota Multiphasic Personality Inventory. The second Canadian study also identified additional general categories of sexual attitudes and intimacy deficits as potential predictors of sexual recidivism.

These three studies are important because they show a distinct statistical correlation between definitive factors of situation and subsequent actions in accordance with a character trait that is triggered by defined situations. This supports the idea that a legal relevance balancing test for character propensity

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340. LANGAN, SCHMITT & DUREOSE, supra note 9.
341. Id. at 1, 3–11.
342. Id. at 1.
343. Id. at 33–34.
344. Id. at 1.
345. See HANSON & MORTON-BOURGON, supra note 337.
346. Hanson & Bussière, supra note 337, at 5.
347. Id. at 8–9.
348. Id. at 3–4.
349. Id. at 9.
350. Hanson & Morton-Bourgon, supra note 337, at 1 ("There is now a general consensus that sexual recidivism is associated with at least two broad factors: a) deviant sexual interests, and b) antisocial orientation/lifestyle instability.").
351. Id. at 9.
352. See id.
evidence must consider these factors, particularly when the crime in question is sexually based. While the percentage of recidivating sex offenders who commit additional sex crimes is small, the connection between specific types of victims and additional misconduct is high.\(^{353}\) There are no studies addressing the impact of more mundane or pedestrian types of character traits that form the basis for property crimes and drug crimes, but given the clear correlation with sex crimes, the admissibility of propensity evidence under a similar standard for those offenses is reasonable.

Data from the recidivism studies indicate that character evidence relating to property crimes and drug offenses is a much better predictor of future similar misconduct than character evidence relating to sexual crimes when looked at from a broad category perspective.\(^{354}\) Some evidence scholars have noted that this type of evidence is generally somewhat prejudicial, but nonetheless relevant.\(^{355}\) Also, evidence about property theft and drug possession or distribution is much less likely than evidence of sex crimes to inflame the passions of the jury to the extent that they cannot rationally and cogently follow the instructions of the judge. If a judge can formulate instructions concerning the proper use of character evidence that are sufficiently clear to allow a jury to properly use evidence of prior sexual misconduct,\(^{356}\) it is clearly possible to produce cogent limiting instructions allowing jurors to hear logically relevant evidence concerning prior property crimes or prior drug offenses. The fact that prior misconduct captured by recidivism data is extremely relevant from a logical perspective argues for its admissibility. The successful use of limiting instructions by courts for sexual misconduct propensity evidence\(^{357}\) supports the position that we can produce a system that allows this legally and logically relevant information before the finder of fact without destroying the process. The best use of the recidivism data will allow for the admissibility of prior misconduct as to a specific crime when the relationship between the prior conviction and currently charged offense is sufficiently similar to ensure both the logical and legal relevance of the proffered propensity evidence.

A proper system designed to introduce relevant propensity evidence must address the fear of jury overvaluation before admitting propensity character evidence to show that an individual acted in accordance with a particular character trait. Some evidence scholars have discussed the impact of character evidence on the jury process previously,\(^{358}\) and specific research has been performed concerning the impact of character evidence as it relates to the sexual activities of the accused.\(^{359}\) One jury study established the visceral reaction of juries when confronted with the

\(^{353}\) See id. The sexual preoccupations factors listed in this study support the argument that a predilection for specific types and classes of victims is to be expected.

\(^{354}\) See supra Table 1.

\(^{355}\) See supra note 238 and accompanying text.

\(^{356}\) See supra notes 280–281 and accompanying text.

\(^{357}\) See supra notes 10, 244, 267 and accompanying text.


details of abnormal sexual behavior and its possibility of overcoming rational deliberations. The effect that specific limiting instructions have on jury deliberations has not yet been researched. One can extract from recent high profile cases such as the prosecution of pop star Michael Jackson that these instructions are working. Additional studies need to be done in this area to further assist us in understanding what impact these types of instructions have on the deliberative process, since our system currently relies upon those instructions to properly apply and interpret the rule of law.

The concern about jury overvaluation has been cited as a primary reason for limiting the use of character evidence. In a recent article, Professor Friedman outlined ways to minimize the jury overvaluation concern if it is presupposed that the concern is valid. Examples of the application of limiting instructions to cases involving Federal Rule of Evidence 413 support the position taken by Professor Friedman that such evidence can be admitted. The Federal Rules of Evidence favor the admissibility of evidence but the issue of overvaluation is considered to be one of the primary reasons to exclude evidence from the jury and that preference is clearly present in the 403 balancing test. We know that character evidence for certain categories of crimes and for certain specific crimes is clearly probative. The logical relevance connection between them is established. The legal relevancy concerns are addressed by applying specific identified factors that increase the likelihood of recidivism to the balancing test conducted by the court before admitting such evidence. The issue of legal relevance is one of balancing competing concerns, and those identified factors would allow the court to competently balance them. Given that the Federal Rules of Evidence are weighted in favor of admissibility, and that the ability of the trial judge to prevent the impermissible use of character evidence is well established through recent studies of lay jurors’ ability to comply with a limiting instruction confining evidence of an accused’s prior conviction to a credibility use. For the most part, the studies conclude that the jurors have great difficulty following the instruction—many jurors disregard the instruction and misuse the evidence in their reasoning on the merits of the case. Indeed, jurors interviewed as part of the University of Chicago Jury Project “almost universally used the defendant’s record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.” Id. at 295 n.94 (quoting James E. Beaver & Steven L. Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment, 58 Temp. L.Q. 585, 587, 602-06 (1985)). This sort of misuse of character propensity evidence is more likely under our current system. A proper redrafting of the rules will allow for appropriate instructions to jurors establishing when they can, and when they cannot, make this logical connection.

During the Jackson trial, evidence of prior sexual misconduct with underage males was admitted through the testimony of witnesses. The prosecution then argued in closing argument that because Mr. Jackson allegedly committed sexual misconduct with young males in the past it was more likely than not guilty of the crime for which he was then standing trial. Id. at 295 n.94 (quoting James E. Beaver & Steven L. Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment, 58 Temp. L.Q. 585, 587, 602-06 (1985)). This sort of misuse of character propensity evidence is more likely under our current system. A proper redrafting of the rules will allow for appropriate instructions to jurors establishing when they can, and when they cannot, make this logical connection.

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360. Id. at 294–95 & n.94.

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See Friedman, supra note 238.

See generally Imwinkelried, Comments, supra note 25.

See Fed. R. Evid. 402 (stating that "all relevant evidence is admissible") (emphasis added).

See Fed. R. Evid. 403.

See id.
applications of Federal Rules of Evidence 413 and 414, there is a good argument for admitting propensity evidence if the jury does not overvalue it.

VI. CONCLUSION

Our current system of evidentiary rules routinely excludes propensity evidence not relating to sexual misconduct while allowing it under different legal theories. This is a misuse of resources and an additional source of confusion for the everyday citizens who come in contact with the court system through the trial process. It forces attorneys to create alternative theories of admissibility that sometimes stretch the bounds of credibility. The list of common-law exceptions codified in Federal Rule of Evidence 404(b) provides illustrative examples of how prior attorneys convinced judges to allow propensity character evidence that was clearly probative into evidence under an admissible non-character theory of relevance. This approach creates the misconceptions discussed earlier that produce a sense among jurors that an individual more likely committed the misconduct if he committed similar acts in the past, without specific instructions on how to apply the propensity elements of the prior misconduct that the jurors' common sense tells them is relevant, if not dispositive. Up until now, the use of propensity evidence under false rubrics created situations where the tail of propensity evidence and non-propensity theories of character have been wagging the dog of evidentiary law. It is time for the rules of evidence to properly wag the tail of propensity at trial where warranted by a deeper understanding of psychology and recidivism. We should begin to draft logically consistent rules for the admissibility of character evidence to prove that a person acted in conformity therewith under Federal Rule of Evidence 404(a). History, psychology, and recent recidivism data support that action, and fairness to the victims of crime and those individuals accused by the state of criminal activity creates a moral imperative to address these issues now.

367. See supra note 266.

368. The other side of allowing propensity evidence will be the ability of an accused to offer his or her own relevant character traits through specific acts of conduct. For a discussion of how this sort of positive use of propensity evidence might occur, see Josephine Ross, "He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt, 65 U. Pitt. L. Rev. 227 (2004).