

PROPENSITY EVIDENCE IN CONTINENTAL LEGAL SYSTEMS

MIRJAN R. DAMAŠKA*

INTRODUCTION

Anyone expecting to find elaborate doctrines in continental European evidence law regarding information about a person's character, predilections, or incidents from past life, is bound to be disappointed. Most problems that engage common law lawyers in connection with the employment of this information—subsumed in what follows under the general label of “propensity evidence”—seem to have received only scant attention by continental courts and commentators. Statutory provisions on the subject are few and far between.

Two reasons for this state of affairs are worth mentioning at the outset. The first is the pervasive continental distaste for rules that call for an advance assessment of the probative effect of evidence. The probative effect is thought to depend so much on the concrete circumstances of individual cases that it cannot satisfactorily be expressed in terms of categorical norms.¹ On this ground alone evidentiary rules that reject information about a person's character, or past life seem problematic: whether this information is without probative value, receives more weight than it deserves, or has some other deleterious effect on fact-finding accuracy, appears to be a matter too unruly to obey the lawgiver's rein and too contextual to be captured in the web of legal norms. Even well conceived rules could become Procrustean in application.²

* Ford Foundation Professor of Law, Yale University.

1. Despite this antipathy to relevancy rules, it does not require much familiarity with continental court practice to note that a limited number of standards exist regarding the problem of insufficiently probative evidence. French judges, for example, are empowered to refuse to hear evidence for lack of “conclusive character” (*défaut de caractère concluant*). For a succinct description of the French free-proof system (*liberté de la preuve*), see M-L. Rassat, *Forensic Expertise and the Law of Evidence in France*, in *FORENSIC EXPERTISE AND THE LAW OF EVIDENCE* 53, 53-57 (J. F. Nijboer et al. eds., 1991). For a discussion of German evidentiary threshold requirements, quite unexacting in comparison to those of the common law, see MAX ALSBERG ET AL., *DER BEWEISANTRAG IM STRAFPROZESS* [Offer of Proof in Criminal Procedure] 588 (5th ed. 1983).

2. This negative attitude toward the regulation of the probative worth of evidence is of relatively recent origin. It appeared as a reaction against the much berated law of proof that prevailed throughout the Continent prior to the French Revolution. This law, replete with de-

The second reason for the current state of affairs is related to the special features of the continental procedural environment. Initially, consider the "unitary" character of the continental trial courts. Even where they have both a lay and a professional component, very little internal division of labor occurs between amateur and professional adjudicators: they sit together and jointly decide all issues.³ The resulting institutional unity of the trial court makes the administration of exclusionary rules awkward whenever they require rejection of information that is of some probative value. Nowhere is this better illustrated than in the example of evidence of uncharged misconduct with predictive value for future criminal involvement. Think of a person on trial for rape who has a long history of violent sexual encounters for which he is not presently charged. In trying to apply the rule excluding information about these encounters as propensity evidence, the judges of a unitary court, having carefully weighed probative value against unfair prejudice, would have to say to themselves: "We ought to neglect what we have just learned about the defendant's past. Unless we do so, we might give too much weight to it, or become hostile toward the accused." But can they eliminate forbidden information from their minds?⁴

The difficulty of disregarding actually probative material is especially poignant in continental trials where factfinders are constantly exposed to information about the accused's character and past life. The principal reason for this difficulty in criminal trials is the absence of the division into separate guilt-determining and sentencing proceedings. Before the court retires to deliberate and decide a case, all evidence relevant for sentencing purposes must be presented; this includes, of course, data about the character, propensities and prior conduct of the accused.⁵

tailed rules on the probative effect of evidence, included a body of "presumptions" to be drawn from a person's proclivities and past life. See, e.g., IACOBUS MENOCHIVS, DE PRAESUMPTIONIBUS, CONIECTURIS, SIGNS ET INDICIIS, [On Presumptions, Conjectures, Signs and Circumstantial Evidence] Liber 5, Praesumptio 32, 705-09 (Geneva, De Tournes 1670) (discussing presumptions from prior instances of negligence, perjury, forgery, adultery and the like).

3. This is currently the prevailing mode of lay participation on the Continent. Following the French Revolution, several continental European countries adopted a variant of the bifurcated jury court, but only for the adjudication of serious criminal cases. The experiments with independent juries did not last very long, however. Country after country instituted reforms requiring the jury to deliberate with a panel of professional judges, transforming the jury into the lay component of a unitary "mixed" tribunal. The genuine lay jury can now be found only in some Swiss cantons and in Belgium. Russia is presently trying to revive the true jury system that was established in the nineteenth century but abolished after the communist takeover.

4. See *infra* note 27.

5. The gathering of this type of information usually begins in the course of preliminary investigations. In France, for example, it is the standing practice of the investigating judge, who

But even if issues of guilt and sentence were separately decided on the Continent, the traditional method of generating evidence would continue to inject more propensity information into proceedings than would occur in common law trials. This is because the judicially-controlled mode of interrogation accords witnesses considerable freedom to relate what they know, and the free flow of their narratives—their testimonial *legato*—almost invariably includes at least passing remarks on the accused's character traits or prior conduct. By contrast, where evidence is adduced in the common law's *staccato* fashion, namely by questions of partisan counsel, the content of witness' testimony can be more closely monitored and forbidden information more easily prevented from reaching the triers of fact.

The scarcity of prophylactic continental law on propensity evidence can thus be explained by an attachment to "free proof" and by a peculiar procedural ecology. This is not to suggest that continental courts remain insensitive to the risks that accompany the reliance on information about a person's character or collateral misconduct; rather, their concerns are almost exclusively focused on the probative value of this genre of information. If this type of information exists, data from the accused's life history can and should be used in adjudication. Absent from continental evidentiary thought, then, at least from its surface, is only the concern that this data could be over-valued by the court or could unfairly predispose the factfinders toward a particular outcome.⁶ It is also true that the range of issues over which problems of propensity inference are identified is narrower than in Anglo-American law. The lense of continental analysis is brought to bear almost exclusively on the use of prior convictions for guilt-adjudication, while misconduct which has not resulted in a criminal conviction

plays picador to trial judges, to extensively question the defendant about the course of his life. The results of this *interrogatoire de curriculum vitae* become part of the dossier which is then transmitted to the trial court. See 2 JEAN PRADEL, *DROIT PÉNAL* [Criminal Law] 303 (4th ed. 1984).

6. If this concern surfaces now and then, it is usually provoked by familiarity with Anglo-American literature on the topic. A good example is the description of the pitfalls of propensity inference by a classic of French evidentiary literature, a description that clearly takes its cue from Wigmore. See FRANÇOIS GORPHE, *L'APPRÉCIATION DES PREUVES EN JUSTICE* [Evaluation of Evidence in Court] 316-23 (1947). The same is true of general reflections on abuse and overvaluation of evidence (*sopravalutazione*) by an Italian scholar with a remarkable range of comparative vision. See MICHELE TARUFFO, *LA PROVA DEI FATTI GIURIDICI* [The Proof of Adjudicative Facts] 387 (1992).

A particular concern, however, is indigenous to the continental institutional environment. It is the concern that the routine reference to prior convictions at public trials could damage the accused's standing in the community—even if the trial results in an acquittal. For an early voice expressing this particular concern, see 2 HANS GROSS, *GESAMMELTE KRIMINALISTISCHE AUFSATZE* [Collected Articles on Police Science], 257, 259-60 (1908).

tion seldom receives any separate scrutiny. The continental law on joinder and severance of cases seems completely untouched by concerns underlying the common law propensity theory.⁷ And if one happens upon a sporadic rule requiring the rejection of evidence of character, or of past misconduct, the rule is inspired by values independent from the desire to assure accurate outcomes.

I. COLLATERAL CONVICTIONS

It is generally acknowledged on the Continent to be improper to assume that just because a person has a criminal record that person is more likely to have committed the crime. In the legal folklore of continental countries, one even comes across sweeping proclamations that prior convictions have no bearing whatsoever on the finding of criminal liability.⁸ But it would be a mistake to read these statements as expressing anything more than an admonition against reliance on prior convictions as such, that is, without a prior finding that they are valuable as circumstantial evidence of guilt in the specific context of the case. As in common law systems, prior convictions can be used to establish an element of a crime, such as intent, or a particular *modus operandi*.⁹ In addition, albeit in contrast to the common law, a criminal record can also be relied upon to establish a particular inclination of the accused—provided, of course, that the inclination can reasonably be inferred from the conduct that was the object of a prior conviction. The more the inclination appears unusual, the more the

7. If a continental defendant is charged with several independent crimes, and no common scheme is alleged, the simultaneous trial on all of these charges is not only possible but often mandated. In common law jurisdictions, on the other hand, the risks associated with propensity inferences can lead to severance, or are at least noted as a problem in permitting joinder of criminal cases. See, e.g., ADRIAN ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 337-39 (1989). The concern is that adjudicators, unsure whether the defendant has committed one of the crimes charged, might nevertheless convict because of their familiarity with the evidence of other offenses, or, that they might resort to propensity inferences which would be impermissible if the crimes were tried separately.

8. For the German version of such proclamations, see, e.g., THEODOR KLEINKNECHT & KARLHEINZ MEYER, *STRAFFPROZESSORDNUNG* [Code of Criminal Procedure] 820 (38th ed. 1987) (commentary to paragraph 243 (IV) of the Code of Criminal Procedure). These proclamations are also commonly encountered in Italy. I owe this information to Michele Taruffo. Letter from Michele Taruffo to Mirjan R. Damaška, Ford Foundation Professor of Law, Yale University (Feb. 7, 1994) (on file with author).

9. See, e.g., KLEINKNECHT & MEYER, *supra* note 8. An example of the use of prior convictions to show *modus operandi* has been vividly described by an English observer of European trials. An accused's long record of thefts, all of them impulsive actions prompted by sudden temptation, was relied upon by a German judge to support a larceny conviction. See SYBILLE BEDFORD, *THE FACES OF JUSTICE: A TRAVELLER'S REPORT* 145 (1961). But the circumstances of these prior thefts were not so unusual or so distinctive as to rise to the level of a "signature" or a "hallmark" that is normally required by Anglo-American judges to show identity.

inference of propensity is thought to be appropriate.¹⁰ The only convictions which cannot be used for propensity inferences, no matter what their probative potential, are those that were “expunged” through clemency, or some equivalent procedure.¹¹ But this specific ban on the use of prior convictions should not be mistaken for a rule of “auxiliary probative policy,” that is, a rule designed to further the accuracy of factfinding.¹² The ban is inspired instead by the desire to promote the rehabilitation of criminals and imposes side-constraints on the pursuit of the truth.

While prior convictions are thus relied upon with relative freedom in deciding on the merits, their use to discredit an accused’s testimony is generally prohibited. This result is in stark contrast to common law jurisdictions, of course, where prior convictions are routinely used to impeach the accused who decides to testify in his own defense. The commission of any felony is thought to indicate a “general readiness,” or proclivity, to break the law, and appears relevant in assessing the probability that the accused is committing perjury on the stand. To understand the contrasting continental attitude, one should remember that criminal defendants are not treated as ordinary witnesses in continental criminal procedure. Although they are regularly subject to interrogation at the outset of the trial, they are not permitted to testify under oath, and are under no legal obligation to tell the truth.¹³ Because their credibility is thus automatically discounted, so

10. See ERICH DÖHRING, DIE ERFORSCHUNG DES SACHVERHALTS IM PROZESS [Factual Inquiry in Legal Proceeding], 401 (1964). While male homosexuality was criminalized in Germany, trial courts had been known to use prior convictions of this offense as circumstantial evidence of guilt in subsequent prosecutions. See *id.* at 399. Many common law courts are also receptive to propensity evidence of sex crimes, provided that they appear impelled by uncommon drives. Thus, for example, the ban on propensity inference breaks down in regard to sexual molestation of minors. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 166-67 (2d ed. 1987).

11. This is an old idea in continental law that can be traced back to early Roman-canon authorities. See MENOCHUS, *supra* note 2, Liber 5, Praesumptio 32, num. 33-36 (citing to Bartolus and Baldus). On this particular point there are even statutory provisions, quite rare in matters dealing with propensity evidence on the Continent. For an example, see the German Federal Statute on the Criminal Register (*Bundeszentralregistergesetz*) § 51.

12. The term “auxiliary probative policy” is from JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1171, at 395 (1972), revised by JOHN H. CHADBOURN.

13. For a discussion of the procedure in France, see PRADEL, *supra* note 5, at 293. The prevailing view is that interrogation of an accused under oath exposes guilty defendants to the cruel dilemma (*tortura spiritualis*) of deciding whether to tell the truth (thereby convicting themselves out of their own mouth), or falsely testifying (thereby committing another crime). See Helen Silving, *The Oath* (pts. 1 & 2), 68 YALE L.J. 1329, 1527 (1959). It is sometimes said that the continental criminal defendant has “the right to lie,” but the premise of this view is not beyond criticism. See Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 528 n.44 (1973).

to speak, any additional attack on their veracity smacks of inappropriate double counting.¹⁴

When thinking about the implications of the case where an accused's criminal record is known to the adjudicators before they decide the issue of criminal liability, bear in mind that the probative worth of prior convictions is arguably somewhat higher in continental than in common law trials. In common law jurisdictions, where only disputed cases come to trial, it should be expected that guilty repeat offenders less frequently contest charges than (guilty) first offenders: by refusing promises of leniency and by insisting on standing trial, the former face the risk that their criminal record will become known to the decision maker. If this self-selective process actually takes place, then the association between prior conviction and present guilt, for those defendants who insist on their right to trial, is much weaker than might appear on first inspection. In such cases the real danger becomes that the criminal record might indeed be attributed more weight than it deserves.¹⁵ Continental trials, however, are not limited to contested cases: trials are required for all serious crimes, irrespective of whether the defendants fully confess. As a result, the association between prior conviction and present guilt is bound to be stronger, and the inferences from prior convictions to present guilt can be drawn—*ceteris paribus*—with somewhat greater confidence. All in all, then, the greater use of the criminal record on the Continent can be explained not only by the two factors outlined at the beginning of this Paper, but also by the reduced danger of over-valuation which this use implies.

II. NONCONVICTION MISCONDUCT

Observed from the common law's vantage point, continental law is strangely silent on evidence of collateral misconduct that does not contravene the criminal law and on evidence of collateral crime that has not resulted in a conviction. One thus vainly scans the continental legal landscape in search of a maxim warning the factfinder against

14. Since the accused is not obligated to tell the truth, continental courts would refuse to hear witnesses called to the stand for the specific purpose of testifying about the defendant's bad reputation for truthfulness. But if a witness, called to testify on another matter, volunteers a remark on the accused's mendacity, that witness will seldom be interrupted by the presiding judge. All of this is not to suggest that a prior record—with which judges are always familiar—never influences the court's judgments of credibility: where the conduct underlying the prior conviction is strongly indicative of mendacity, this influence is quite easy to imagine.

15. On this possibility, see RICHARD O. LEMPERS & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 217-18 (2d ed. 1982).

hasty propensity inferences from bad acts, a maxim that would be analogous to the one encountered on the subject of prior convictions. The main reason for this asymmetry is that, while prior convictions are always known to the adjudicators, information about nonconviction misconduct of the accused only occasionally comes to their attention.¹⁶ An identical approach to propensity evidence in both contexts can nevertheless be discerned from the sporadic references to collateral bad acts contained in the trial judges' opinions.¹⁷ Courts seem to be preoccupied, once again, solely with the probative value of information from the defendant's past. Provided that this information has a bearing on the case at hand, the information is readily invoked to support the finding of guilt—although the reasoning from prior misconduct to present crime sometimes involves unmistakable propensity inferences. Instances of prior sexual misconduct are thus used to support convictions of sex crimes, and early training in pickpocketing is used for larceny convictions. Even the fact that the accused socializes with known criminals can apparently be treated as an indication of present guilt.¹⁸ It seems safe to assume, of course, that such propen-

16. Explicit references by continental lawyers to collateral misconduct are mostly the result of their interaction with lawyers raised in the common law tradition. An example is the evidence rules for the recently constituted War Crimes Tribunal for Ex-Yugoslavia. Basically continental in orientation, these rules show in several places that their drafters were reacting to concerns that characterize common law thinking. One such place is the provision that allows evidence of a "consistent pattern of conduct" to be introduced at trial whenever its introduction is mandated by "the interest of justice." See *Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia*, Rule 93, U.N. Doc. IT/32 (1994).

17. The idea that trial judges should write such opinions is now an *idée reçue* of continental jurisprudence. See *infra* note 29 and accompanying text.

18. See, e.g., DOHRING, *supra* note 10, at 396. Generally speaking, "circumstances of one's life" can be used to support a finding of guilt, provided they are of value as circumstantial evidence. CLAUS ROXIN, STRAFVERFAHRENSRECHT [Law of Criminal Procedure] 103 (9th ed. 1969).

The author of this article has sent a brief description of a hypothetical murder case involving damaging collateral information to several evidence scholars in Europe. The hypothetical was based on an old Kansas case in which a farmer was suspected of having murdered a farm hand, and the search of his land led to the discovery of two additional bodies. *State v. King*, 206 P. 883 (Kan. 1922). Would the use of this "collateral" information appear problematic to continental judges? All experts agreed that since minimal probative value could scarcely be denied to the discovery of bodies buried on the accused's land, judges would feel justified—if not required—to use this information in deciding the issue of guilt. I am indebted to several individuals for this information. Letter from Professor Joachim Herrmann to Mirjan R. Damaška (Sept. 9, 1993) (on file with author); Letter from Professor Thomas Weigend to Mirjan R. Damaška (May 15, 1990) (information on Germany) (on file with author); Letter from Professor Michele-Laure Rassat to Mirjan R. Damaška (March 3, 1994) (information on France) (on file with author); Letter from Professor Hans Nijboer to Mirjan R. Damaška (Jan. 13, 1994) (information on Holland and Belgium) (on file with author); Letter from Professor Davor Krapac to Mirjan R. Damaška (May 21, 1990) (information on former Yugoslavia) (on file with author).

sity evidence is actually used by trial courts to reach their decisions more often than it is invoked by them to support their factual findings.

It is worth emphasizing, however, that such inferences from collateral misconduct to present liability are accorded little weight—at least if statements of appellate courts on this subject are taken at face value. According to these courts, collateral misconduct can only serve to corroborate evidence linking an individual directly to the crime charged. Consider the example of a German burglary case. Stolen goods were discovered in the apartment of the accused's friend, who had a convincing alibi and could in no way be implicated in the crime. Although other evidence linking the accused to the burglary was also weak and circumstantial, the trial court nevertheless convicted, stating, *inter alia*, that the accused consorted with thieves and bragged to a witness about his disregard of law and order. The Supreme Court reversed. It conceded that information about the accused's unsavory past was of some probative value in suggesting an inclination to break the law, but only insofar as it served to corroborate incriminating inferences from the location of stolen goods. This inference was insufficient, however, to compensate for the tenuous proof linking the defendant directly to the burglary charged.¹⁹

Evidence that the accused has committed a collateral crime which was prosecuted but did not result in a conviction deserves a special word of mention. Continental courts are quick to acknowledge that prior criminal proceedings do not *per se* provide legitimate support for a finding of present guilt. But background information regarding circumstances of prior crime can be employed in a subsequent prosecution, provided that it reinforces evidence of the crime presently on trial. Another German case offers an illustration of this point. The accused was tried for arson of his mill. Two suspicious fires had previously occurred on the same site, which triggered criminal proceedings against the accused. The prosecutions, however, were discontinued in both cases before they reached the trial stage. In the instant case, the trial judge invoked the aborted prosecutions to support a conviction: it seemed unlikely to him that an innocent person would be so often implicated in suspicious fires. The appellate court found this reasoning erroneous and reversed. Its inspection of documents from prior prosecutions revealed that they were both based on unsubstantiated local rumours. Had the specific grounds for these rumours been known, the appellate court opined, and had they been of probative

19. Judgment of Oct. 26, 1954, as reported in 26 *Juristische Rundschau* 468.

value in the present case, they could have properly reinforced evidence in the present case. In the absence of this background information, however, the prior prosecutions generated a "mere suspicion" incapable of providing adequate support for a judgment of conviction.²⁰

Complications can arise in some continental countries with the employment of information about a crime that was never subject to criminal prosecution. In order to understand these complications—unknown to common law—it should be realized that continental public prosecutors are sometimes required to prosecute serious felonies if sufficient evidence exists to support the charge.²¹ Suppose now that in a jurisdiction that embraces this regime, the public prosecutor prefers—in support of a propensity inference—some evidence that the accused has committed a collateral felony for which he was never prosecuted. Suppose also that the prosecutor could have previously brought charges for this independent offense. In this situation, at least some continental courts are prepared to refuse to admit the evidence tendered.²² Their message to the prosecutor is as follows: "If you have credible evidence of this independent crime, go ahead and press charges. If proceedings can be returned to the preliminary stage for additional investigations, you can expand their scope to cover the crime in question. And when the matter comes back before us, we might even allow this additional crime to be tried jointly with offenses covered by your original charging papers. But we shall not let you prove incidentally the commission of a crime you were bound—but failed—to prosecute and prove directly."

Another special situation still deserves attention. Some continental authorities maintain that a crime for which the accused was finally acquitted cannot be used as a basis for a propensity inference. The view holds true no matter how compelling the newly available evidence of this crime might be. Reasons urged for this position are associated with values underlying the *res judicata* doctrine: findings of

20. See DÖHRING, *supra* note 10, at 399-400. Döhring also refers to a case in which a defendant's conviction for a sex crime was reversed on the ground that the trial court automatically relied on the fact that he was previously prosecuted for the same type of offense. The court below, the appellate judges declared, should have examined the background information regarding the offense involved in prior proceedings. *Id.*

21. For details on this system of mandatory prosecution, see Mirjan R. Damaška, *The Reality of Prosecutorial Discretion*, 29 AM. J. COMP. L. 119, 119-22 (1981).

22. If reference to such a collateral crime, however, occurs in a passing remark by a witness called for another matter, few judges would interrupt the witness' narrative. I credit this information to Professor Davor Krapac. Letter from Professor Davor Krapac to Mirjan R. Damaška (May 21, 1990) (on file with author).

fact contained in the ordering part of the judgment—be it a conviction or an acquittal—should be taken for the truth.²³ In this special case, then, at least some continental courts refuse to rely on evidence that would be admissible in many Anglo-American jurisdictions.²⁴ As in the case of “expunged” convictions, however, this refusal is not an unexpected accolade by continental courts of relevancy-based exclusionary rules: instead of promoting accurate factfinding, the rejection of evidence is meant to place constraints on the pursuit of the truth. This is not, however, the generally accepted view on the continent. Many jurisdictions permit aspects of a criminal event to be proven, although the accused was acquitted of charges resulting from this event. It is argued in support of this position that incriminating facts can be fully established despite the final acquittal. Acts of sexual molestation can be fully ascertained, for example, albeit the perpetrator cannot be convicted for lack of the requisite mental element.²⁵

III. CONCLUDING REMARKS

The most important conclusion to flow from this bird's-eye survey is that continental judges are exposed to propensity evidence much more so than common law jurors. This conclusion holds true even when due allowance is made for the fact that the latter also frequently come into contact with material that lends itself to propensity inference. Not only does the common law ban on the use of this material for substantive purposes have notoriously flexible boundaries, but propensity evidence is readily introduced at trial whenever the accused chooses to take the stand.²⁶ It might be thought that the exposure of continental triers of fact to propensity material equals that of common law judges in bench trials because the latter are inevitably exposed to this kind of information as they rule on its admissibility. But the “contamination” of continental judges is still much more ex-

23. *Res judicata pro veritate habetur*. For a classical statement, see EUGENIO FLORIAN, *DELLE PROVE PENALI* [Criminal Evidence] 90 (3d ed. 1961).

24. For American federal courts, see *Dowling v. United States*, 493 U.S. 342 (1990).

25. See DOHRING, *supra* note 10, at 397-98. Remember that the details of the courts' findings can be readily established in continental systems because trial judges are required to file opinions that explain what was found and why.

26. To be sure, jurors are admonished to use propensity inferences solely in regard to the testifying defendant's credibility, but instructions of this genre are notoriously ineffective in preventing jurors from drawing conclusions on the merits of the case as well. They find it difficult and counter-intuitive to confine evidence to a surgically limited goal. For empirical research on this subject, see Roselle L. Wissler & Michael I. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Convictions Evidence to Decide on Guilt*, 9 *LAW & HUM. BEHAV.* 37 (1985).

tensive: remember that they gather material relevant for sentencing purposes before deciding the issue of guilt, and this material is, of course, replete with information about the accused's character, proclivities and behaviour.

Since continental courts are thus constantly immersed in data about an accused's past, it is easy to understand their peculiar approach to character and collateral misconduct evidence, an approach that is characterized by a narrow focus on probative worth alone. For if the law adopted the view that judges must also consider the side-effects of this evidence, rejecting it whenever prejudice outweighed probative value, it would be very difficult to effectively apply the resulting evidentiary regime. Returning to the question asked at the outset, can prejudicial effects, once implanted in their mind, be bleached out by legal fiat?²⁷ The demand that probative information be disregarded could easily become an invitation to hypocrisy: factfinders might be tempted to falsely claim, or deceive themselves into thinking that they neglected information which actually influenced their thinking. In short, a ban on propensity evidence, no matter how desirable in theory, could easily become a weak normative eddy standing in the way of the factfinders' natural flow of reasoning.

It will be said in opposition that this is an unduly pessimistic view of the matter. Are common law judges not regarded as capable in bench trials of sorting out the prejudicial effects of inadmissible evidence, neutralizing them when necessary in their calculus of decision? If continental professional judges are equally capable of sorting through prejudicial evidence, then their dominant role in the administration of justice provides an antidote to the risks which common law systems associate with the exposure of *lay* factfinders to probative but prejudicial propensity evidence. Unfortunately, there is no solid ground in psychology for the belief that only novice factfinders succumb to the temptation of drawing negative conclusions from a person's unsavory life history, while professional adjudicators are immune, even in close cases, to the syren's call of these inferences. Unconvincing even in common law jurisdictions, the claim of such im-

27. The answer depends, of course, on the actual psychological mechanisms that are responsible for a decision on the facts. Compelling but forbidden information could be effectively eliminated from decisionmaking if factfinders attached probative value to discrete bits of evidence, aggregating and disaggregating them in the formation of their beliefs like pebbles in composing a mosaic. Although the precise character of psychological responses to evidence remains controversial, it seems unlikely that factfinders are capable of such "atomistic" compartmentalization in processing information. For recent research on this subject, see Ronald J. Allen, *The Nature of Juridical Proof*, 13 *CARDOZO L. REV.* 373, 383-96 (1991).

munity is particularly suspect in continental procedure, where all cases come to trial and judicial intuitions about guilt and innocence are shaped by contacts with a pool of defendants, where the guilty greatly outnumber the innocent.²⁸ It seems realistic in this situation to conclude that damaging information from an accused's past can induce even career judges in close cases to lean toward the hypothesis of guilt, becoming more sensitized to incriminating than exculpating material. The only safeguard provided by the continental professional milieu against the uncritical acceptance of propensity evidence is the previously mentioned obligation of trial judges to write a reasoned opinion demonstrating that their factual findings have a firm basis in evidence and a solid support in rational inference.²⁹ This safeguard is absent, of course, from typical common law trials in which factual findings are made by the jury: occasional lay judges, innocent of applicable rationalizing conventions, cannot be expected to successfully justify their findings.³⁰

All things considered, then, it seems that the easy access of continental adjudicators to information from an accused's personal history could tip the scales of justice against the accused in at least some close cases in which common law juries might be prone to acquit. A good illustration is the recent rape trial of William Kennedy Smith. In this *cause célèbre*, the prosecution urged admission into evidence the testimony of three young women who claimed they were sexually assaulted by the accused in circumstances quite similar to the incident subject to trial.³¹ The Florida judge rejected this motion, however, apparently on the ground that the testimony offered by the prosecution was more prejudicial than probative. The jury returned a verdict of "not guilty." Had the three uncharged incidents become known to the jurors—as they certainly would to the continental trial court—it is quite likely that this knowledge would have affected the outcome of the trial.

28. For an indication that American professional judges attach considerable importance to an accused's criminal record, see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 121-33 (1966).

29. While the importance of this obligation can easily be overstated, the requirement of reasons and the appellate review thereof should not be dismissed as a mere formality. The trial court must decide in a way that can be properly justified. Nonetheless, there are limits on what even the most resourceful professional judge can explain. The prospect of hierarchical supervision is thus not without instrumental value.

30. For an argument linking the giving of reasons with the idea of legitimate exercise of power in the Western tradition, see Carl J. Friedrich, *Authority, Reason and Discretion, in AUTHORITY* 28 (Carl J. Friedrich, American Society of Political and Legal Philosophy, ed., 1958).

31. See Memorandum of Law in Support of Similar Fact Evidence, *State v. Smith*, No. 91-5482 CF-A-02 (Fla. Cir. Ct. 1990).

How the discrepant availability of propensity evidence in continental and common law procedure affects the accuracy of trial outcomes is another question, of course—a question that is difficult to answer with any degree of confidence.³² Anyone willing to speculate on the matter should consider the crucial role played by pretrial proceedings in the administration of justice. All trials depend, for the precision of their factual determinations, on the quality of previously assembled information; to a significant degree, these factual determinations are everywhere a ceremonial ratification of prior factfinding efforts. But this truism holds much more for the continental than for the Anglo-American mode of adjudication. It is not without reason that continental trials strike many common law observers as no more than a review of the results of official investigations, the results as enshrined in the proverbial dossier. But how these results compare in terms of their accuracy to the findings of more partisan pretrial proceedings in common law countries remains an open question.³³ What can confidently be said in the end is only that the common law ban on propensity evidence gives the defendant, whether guilty or innocent, a somewhat better chance to escape conviction than does the continental criminal justice system. As in so many other aspects of the legal system, then, the use of propensity evidence in the common law's contested trial comes closer than its continental analogue to the image of justice as a fair game in which both sides must be given a chance to win.

32. Research conducted in Germany has traced some erroneous convictions to the uncritical use of prior convictions. See 2 KARL PETERS, *FEHLERQUELLEN IM STRAFPROZESS* [Sources of Error in Criminal Proceedings] 79 (1972). The results of this research remain controversial, however. See, e.g., 1 ROLF BENDER & ARMIN NACK, *TATSAHENFESTSTELLUNG VOR GERICHT* [Fact Determination in Court] 65-66 (1981).

33. Another factor to consider when thinking about the comparative accuracy of outcomes is the discrepant probative force of prior convictions in the two trial contexts.

**SYMPOSIUM ON
LAW REVIEW EDITING:
THE STRUGGLE BETWEEN
AUTHOR AND EDITOR
OVER CONTROL OF THE TEXT**

**James Lindgren
Symposium Editor**

