

RESEARCH ARTICLE

‘Bad character’, tragic errors and deep ignorance

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Abstract

This paper proposes new grounds for the legal ambivalence about ‘bad character evidence’. It is suggested that errors based on such evidence are profoundly tragic in the Aristotelian sense: the defendant who previously committed crime is likely to reoffend; nevertheless, she beats the odds and refrains from further crime commission – only to then be falsely convicted based on the very odds she has almost heroically managed to beat. It is further proposed that the tragic nature of such false convictions might make them particularly unfair to the defendant. It is, however, submitted that the likelihood of errors based on such evidence is unknown and probably also unknowable. Accordingly, the maximin rule for decision in conditions of deep ignorance is applied, leading to the conclusion that exclusion is to be preferred.

Keywords: evidence law; ‘bad character’ evidence; propensity evidence; statistical evidence; tragic errors; maximin

Introduction

The character of the defendant has won considerable attention in legal literature. Its relevance and significance for decisions on preventive means, on guilt and on sentencing have been widely debated.¹ These debates have been mirrored in legal developments and reforms in all these areas.²

This paper discusses one narrow but persisting question: whether evidence of what is often called the defendant’s ‘bad character’ should be admissible for the purpose of proving the defendant’s criminal liability.³ The focus will be on evidence of the defendant’s previous misconduct, and more specifically, on evidence of previous commission of comparable crimes.⁴ Against the background of

¹For the relevance of character in the context of preventive means see for example RA Duff ‘Pre-trial detention and the presumption of innocence’ in A Ashworth et al (eds) *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) pp 127–130; DT Wasserman ‘The morality of statistical proof and the risk of mistaken liability’ (1991) 13 *Cardozo Law Review* 935. For character in the context of criminal liability see eg RA Duff ‘Choice, character, and criminal liability’ (1993) 12 *Law and Philosophy* 345; V Tadros *Criminal Responsibility* (Oxford: Oxford University Press, 2005) ch 2; MD Bayles ‘Character, purpose, and criminal responsibility’ (1982) 1 *Law and Philosophy* 5. For character in sentencing see eg AE Bottoms and R Brownsword ‘The dangerousness debate after the Floud report’ (1982) 22 *British Journal of Criminology* 229; A von Hirsch and A Ashworth *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) especially ch 4; JV Roberts and A von Hirsch (eds) *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (London: Hart Publishing, 2010).

²For the history of the use of character evidence to prove guilt and for a detailed account of the reforms in the Criminal Justice Act 2003 see M Redmayne *Character in the Criminal Trial* (2015) chs 5 and 7. The Criminal Justice Act 2003, Part 12, chapter 5 reformed the law on sentencing of ‘dangerous offenders’. For a brief history and an account of the reform see Redmayne, ch 12.

³The paper does not discuss good character evidence, but it could lead to the conclusion that there is no sufficient ground for excluding it.

⁴But see F Picinali ‘Generalisations, causal relationships and moral responsibility’ (2016) 20 *The International Journal of Evidence & Proof* 121.

indecisive literature,⁵ the paper will identify new grounds for the continuing legal ambivalence about the evidence and will propose a way forward. Paying respects to Professor Mike Redmayne, whose work has always been a compass for understanding evidence law, the paper has been written with his last book, *Character in the Criminal Trial*, vividly in mind.⁶

The paper begins with a brief account of the development of the law of ‘bad character evidence’. The transition from the common law regime of narrow categories of admissibility to the Criminal Justice Act 2003 regime of probative value is noted, and the ground is set for its examination.

The paper then proposes a new analysis of the legal ambivalence about ‘bad character evidence’. It is suggested that false convictions based on such evidence are profoundly tragic in the Aristotelian sense: the defendant had made a tragic error that put him in the claws of the gloomy recidivism statistics, but he nevertheless managed to stay away from crime against all odds – only to then be falsely convicted based on the very odds he had almost heroically beaten. It is further suggested that the common law’s categories approach may have captured this aesthetic characteristic of the evidence.

Next, the paper examines the likelihood of profoundly tragic false convictions under a rule of admission and under a rule of exclusion. It is demonstrated that juries’ interpretations of ‘bad character evidence’ or its absence may affect the likelihood of tragic false convictions. However, we are deeply ignorant about the way juries interpret the evidence or its absence. The maximin rule for decision-making in conditions of deep ignorance is then applied, leading to the conclusion that exclusion should be preferred.

Last, the conclusions suggest how this analysis could affect the interpretation of the Criminal Justice Act 2003.

1. ‘Bad character evidence’ in the common law and in the criminal Justice Act 2003

Since the early nineteenth century, the common law had been ambivalent about evidence of ‘bad character’. A rule of exclusion emerged,⁷ which was initially associated with the probative value of the evidence and then with the possibility of prejudice.⁸ Yet the common law never resorted to blanket exclusion. Rather, the rule of exclusion ‘was subject to exceptions from the moment of its birth’.⁹ At first these took the form of categories of admissibility based on the purpose for which the evidence was introduced. Relying on a list devised by Cross, Redmayne notes that ‘bad character evidence’ was admissible for the purposes of ‘rebutting a defence of accident or involuntary conduct, rebutting the accused’s plea of ignorance or mistake of fact; rebutting an innocent explanation of a particular act or of the possession of incriminating material; proving identity; and rebutting a defence of innocent association’.¹⁰

Most of the categories had something in common. Redmayne suggests that apart from proving identity, all the categories allowed admission of ‘bad character evidence’ for the purpose of rebutting ‘confession and avoidance’ defences.¹¹ In ‘confession and avoidance’ the defendant admits facts that the prosecution seeks to prove, but she argues for the existence of additional facts that preclude liability. Significantly, in such cases the defendant bluntly and transparently fails herself. The defendant: (1)

⁵Advocates of broad admissibility include Redmayne, above n 2; JR Spencer *Evidence of Bad Character* (London: Hart Publishing, 2nd edn, 2009); D Culberg ‘The accused’s bad character: theory and practice’ (2009) 84 *Notre Dame Law Review* 1343. Advocates of narrow admissibility include R Tandy ‘The admissibility of a defendant’s previous criminal record: a critical analysis of the Criminal Justice Act 2003’ (2009) 30 *Statute Law Review* 203 at 207–208; S Parsons ‘*The Criminal Justice Act 2003 – do the bad character provisions represent a move towards an authoritarian model of criminal justice?*’ in (2007) *Mountbatten Yearbook of Legal Studies* 181.

⁶Redmayne, above n 2.

⁷Redmayne, above n 2, at p 93 mentions the unreported decision in *Cole* from 1810 as the point of emergence of the rule of exclusion.

⁸Redmayne, above n 2, p 94.

⁹*Ibid.*

¹⁰Redmayne, above n 2, p 128, relying on R Cross *Evidence* (London: Butterworths, 5th edn, 1979) pp 378–393.

¹¹*Ibid.*

puts herself in a difficult position that allows the prosecution to easily connect her to the offence at issue; and (2) subsequently decides to make a partial confession, endorsing some of the circumstances of the offence and thereby completing a significant part of the task for the prosecution. Through her miscalculated moves the defendant thus puts herself on the defensive: she now needs to provide independent evidence to rebut the charges. In most of the common law categories, this transparent self-failing opened the door to the introduction of further prosecution evidence of the defendant's 'bad character'. The significance of transparent self-failing for decisions about admissibility of 'bad character evidence' will be further discussed in section 3.

Notably, such failing of oneself could also be traced in one subcategory of proof of identity, namely in *modus operandi* cases. The clearest example was *Straffen*,¹² which concerned a 'singularly bizarre crime which Straffen had himself committed twice the year before', to use John Spencer's lucid description.¹³ The defendant in this case thus devised a 'criminal fingerprint'. This is a transparent act of self-failing; it involves taking a clear risk that one would be directly connected to specific past or future offences. In the similar 'brides in the bath' case of *Smith*,¹⁴ three of the defendant's wives died of drowning in bathtubs shortly after making financial arrangements that would benefit the defendant if they died. Here, transparent self-failing consisted of one of the following: either devising a 'criminal fingerprint' or failing to correct a clear impression that such a 'fingerprint' has been devised. In these *modus operandi* cases the error is so remarkably obvious that self-failing can be identified even without partial confession.¹⁵

The only subcategory that did not require the defendant to have bluntly and transparently failed herself was proving identity in cases where a witness's testimony was available against the defendant. Here, the defendant did not self-failingly connect herself to the offence at issue; rather, the alleged connection between the defendant and the offence was mediated by an external indicator (the testimony). This subcategory can be understood as a first sign of future legal developments: it signalled that the defendant's conduct in the run up to trial is to be set aside, and instead the focus should be on probative value. Specifically, this subcategory focused on the probative value of one type of incriminating evidence that existed in addition to bare past misconduct, namely the testimony.

This shift of focus continued to unfold in *Boardman*,¹⁶ where the common law categories were replaced by a test of 'striking similarity' between past misconduct and the conduct at issue. The 'striking similarity' test focused on probative value of incriminating data that could not be introduced without revealing bare 'bad character evidence', namely data regarding a similar pattern of commission that the defendant endorsed. *Boardman* established that only where such data were highly probative could the defendant's past misconduct be revealed to the jury. Yet the decision did not complete the shift of focus to considerations of probative value by considering the independent value of bare past misconduct and by generalising to all incriminating data that might exist in addition to bare past misconduct, and it has been criticised on this ground.¹⁷

It was the Criminal Justice Act 2003 (CJA 2003) that concluded the shift of focus from the defendant's blunt and transparent self-failing to considerations of probative value. The 2003 Act defines evidence of 'bad character' in s 98 as 'evidence of, or of a disposition towards, misconduct'; and 'misconduct' is defined in s 112(1) as 'the commission of an offence or other reprehensible behaviour'.

Section 101(1) sets seven gateways for admission of 'bad character evidence'. For current purposes, the relevant gateway is gateway (d), which makes the evidence admissible if 'it is relevant to an important matter in issue between the defendant and the prosecution'. This gateway has relaxed the common law's striking similarity (or enhanced relevance) requirement, and in this way it has signified completion of the

¹²[1952] 2 QB 911.

¹³Spencer, above n 5, at para 1.72.

¹⁴*R v Smith* (1916) 11 Cr App R 229.

¹⁵This can be distinguished from having one's physical fingerprint found in the scene of crime, which is not necessarily associated with any transparently erroneous behaviour that was sure to turn the defendant into a suspect of crime.

¹⁶*DPP v Boardman* [1975] AC 421.

¹⁷Redmayne, above n 2, p 130.

transition to a strict regime of probative value. According to s 103(1)(a), matters in issue between the defendant and the prosecution include, among other things, ‘the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence’. Section 103(2) further mentions one way of proving propensity, namely by introducing evidence of previous convictions of an offence of the same description or category as the offence he is accused of. Admission is subject to s 101(3), which requires exclusion where the evidence would have an adverse effect on the fairness of the proceedings.

Other gateways allow the introduction of ‘bad character evidence’ where all parties agree to it;¹⁸ where it is the defendant who introduces it¹⁹ or who raises the issue of his character²⁰ or of another person’s ‘bad character’;²¹ where it is important explanatory evidence;²² and where it has substantial probative value for an important matter in issue between the defendant and a co-defendant.²³

These provisions changed the exclusion regime in more than one way. The definition of ‘bad character evidence’ that they adopt is exceptionally broad, at least in some respects. Significantly, Federico Picinali has noted that in addition to evidence of previous commission of comparable crimes, propensity evidence might include evidence of other indicators of propensity, such as affiliations and group memberships.²⁴ As already noted, the discussion in this paper focuses on evidence of previous commission of comparable crimes; extending the argument to other indicators of propensity, and indeed to naked statistical evidence that does not indicate propensity,²⁵ remains for future work.²⁶

As for the scope of admissibility, *Hanson*²⁷ was one of the first decisions to interpret the CJA 2003 provisions, and it remains relevant. The decision focuses on probative value. Analysing the probative value of bare evidence of past misconduct for proof of propensity, the Court of Appeal has noted the significance of the number of instances of past misconduct. Analysing the possible impact of admission on the fairness of proceedings, the court addressed mainly the probative value of other available incriminating data. Here, the court referred to the level of similarity of past commissions to the offence at issue and, more generally, to the strength of the prosecution case. The court also mentioned the importance of the respective gravity of past and present offences. Last, *Hanson* outlined a warning that the trial judge should make when admitting propensity evidence.²⁸

It is fairly consensual that by completing the shift of focus to probative value, the 2003 Act has extended the scope of admissible evidence of previous misconduct.²⁹ Yet examination of the case law that followed *Hanson* has led Redmayne to conclude that it is impossible to describe it with much precision, especially given that the Court of Appeal has granted trial judges a broad discretion in applying the law.³⁰ Redmayne notes that where probative value in the circumstances of the case is the main consideration, this is not necessarily a bad thing;³¹ after all, these circumstances change from one case to another in a way that may require particularistic judgment.

¹⁸CJA 2003, s 101(1)(a).

¹⁹CJA 2003, s 101(1)(b).

²⁰CJA 2003, s 101(1)(f).

²¹CJA 2003, s 101(1)(g).

²²CJA 2003, s 101(1)(c).

²³CJA 2003, s 101(1)(e).

²⁴Picinali, above n 4, 129.

²⁵For example, in the bus companies example which is a variation on the American case of *Smith v Rapid Transit Inc* 88 NE 2d 754 (Mass 1945). See the discussion in GL Wells ‘Naked statistical evidence of liability: is subjective probability enough?’ (1992) 62 *Journal of Personality and Social Psychology* 739; or the rodeo stadium example in LJ Cohen, *The Probable and the Provable* (Clarendon Press 1977) pp 74–75.

²⁶Notably, legal practice does not yet indicate a problem, as naked statistical evidence is hardly ever relied on to prove propensity.

²⁷*R v Hanson* [2005] EWCA Crim 824, [2005] 2 Cr App R 21.

²⁸*Ibid.*

²⁹Redmayne, above n 2, p 167; AL-T Choo *Evidence* (Oxford: Oxford University Press, 4th edn, 2015) pp 263–264.

³⁰Redmayne, above n 2, p 169.

³¹Redmayne, above n 2, pp 169–172.

2. Tragic errors

(a) 'Case-specific evidence', 'bad character evidence' and tragic errors

The law of 'bad character evidence' has thus been characterised by constant movement and unrest. I would like to suggest that the law has been traditionally ambivalent about 'bad character evidence' because of the nature of (entirely possible) errors made based on this evidence: such errors are profoundly tragic in the Aristotelian sense. This argument focuses on the nature of the error (as profoundly tragic); it does not focus on the nature of the inference from the evidence, nor does it focus on the consequences of convicting based on the evidence, such as creating inappropriate incentives or indeed causing unnecessary suffering in cases of error.³²

To unfold this argument, we can start by comparing errors based on different types of evidence. Assume first that we have 'case-specific' CCTV evidence, in which a person can be seen committing robbery, and that based on this evidence the defendant can be identified to a likelihood of 98%. The defendant is convicted, alas wrongfully – unfortunately, his conviction falls within the 2% likelihood of error. The error is of course tragic in the plain sense of the term, ie unfortunate and regrettable; but this is what it amounts to, and nothing more than this. The meaning of this error amounts only to the fact that CCTV evidence has been wrongly assumed to prove that which it did not prove. In such circumstances the error is a highly unfortunate chance event.

The same is true with respect to some statistical evidence that the legal system easily endorses, such as DNA evidence introduced for identification purposes.³³ To see this, assume again that DNA evidence is available against the defendant, and it matches a DNA sample taken from the defendant, again to a likelihood of 98%. The defendant is again convicted, alas wrongfully, as his conviction falls within the 2% of errors. Here too, the error only amounts to the unfortunate actualisation of the very low likelihood of, for example, misidentification following DNA testing or mistake in DNA testing. Here too, it is an unfortunate chance event.³⁴

Now assume that the same defendant is convicted based on evidence that he previously committed robberies; assume further, unrealistically, that the evidence creates a merely 2% probability of error.³⁵ Again, the conviction falls within that 2%, as the defendant actually did not commit this robbery. But here, the meaning of the false conviction is different and more profoundly tragic: it is a false conviction based on past misconduct whose statistical implications the defendant has, in fact, almost heroically beaten when refraining from crime. It can be suggested that this is a tragedy at a scale better left for the theatre. It is hard enough for the legal system to live with the disaster of any false conviction; living with the overwhelming tragedy of falsely convicting those who have beaten all odds, based on the very odds they have beaten, is more than the legal system might be willing to do.

(b) *The defendant's story unfolded*

To clarify this argument, let us first examine how the story unfolds for a defendant who is falsely and tragically convicted based on previous misconduct. The starting point of this story is the actor's past choice to commit some crimes. This choice puts the actor in the claws of the gloomy recidivism statistics. And the statistics are gloomy. They are gloomy not because they show that an actor who previously committed crime is almost certain to commit further such crimes (they do not show this³⁶);

³²This point is further clarified below.

³³D Enoch and T Fisher 'Sense and "sensitivity": epistemic and instrumental approaches to statistical evidence' (2015) 67 *Stanford Law Review* 557 at 587–592.

³⁴It is possible that the police held a sample of the defendant's DNA due to previous involvement in crime; in this case, the DNA evidence actually indicates previous misconduct, and despite the different inference from such evidence, the meaning of the error is similar to its meaning in cases of 'bad character evidence'. This may explain some of the controversy over DNA databases.

³⁵This unrealistic assumption helps to demonstrate that the ambivalence does not necessarily have to do with the probative value of the evidence. The more realistic scenario, in which bad character evidence is only part of the evidence that leads to false conviction, is discussed below.

³⁶See Redmayne, above n 2, pp 16–21.

the statistics are gloomy because they show that an actor who previously committed crime is much more likely to commit further such crimes than an actor who did not previously commit crime. This is not the place to analyse all existing findings,³⁷ but a few of Redmayne's conclusions can nevertheless be mentioned. Redmayne compared conviction rates among adults released from custody or commencing a court order under probation supervision over a follow-up period of one year with conviction rates in the general population over that year. When numbers of offences were measured, a previously convicted offender was 49 times more likely to be convicted of any offence than a member of the general population; an offender previously convicted of a violence offence was 98 times more likely to be convicted of a further violence offence; an offender previously convicted of burglary was 773 times more likely to be convicted of a further burglary; and an offender previously convicted of a sexual offence was 2,353 times more likely than a member of the general population to be convicted of a further sexual offence over the one year follow-up period.³⁸ These figures dropped but remained significant where a study measured the numbers of offenders who reoffend (rather than numbers of offences) over the course of two years (rather than over the course of one year).³⁹

These statistics have two meanings. First, they have a purely evidential meaning: they simply indicate that the actor is statistically more likely than a random person to have committed the crime at issue.⁴⁰ Second, the statistics have a metaphysical meaning: they indicate that the choice to refrain from crime is more challenging and difficult for this actor than for others who did not previously commit crime. Compared with others, this actor has apparently been subject to particularly strong forces that push towards further crime commission. At the very least, reality has presented these forces to the actor as traps to be avoided, and this in itself is challenging. As for the nature of these forces, it can be speculated that the actor may have developed the self-perception of a criminal, may have crossed the internal Rubicon that usually stops people from crime commission, may have befriended other criminals who encourage further crime commission, etc. The operation of such forces must be presumed if the statistics are not to be taken as mere 'spurious' generalisations.⁴¹ And while not all the forces are relevant for all actors who have previously committed crime, at least some of them are relevant for many of these actors, and at least one of them will have been relevant for our actor.⁴² This last metaphysical meaning of the statistics, and only this meaning, is morally significant: it implies that our actor faces a difficult moral challenge.

But as he is faced with this difficult moral challenge, the actor then almost heroically stands up to it. He fights the forces that push towards crime commission, whatever these may be, and wins; he beats the odds. And while many in his position manage to do the same, his achievement is still impressive (and so is that of similar others). They should all be compared with others who do not face similar challenges at all. The achievement of each and every actor who manages to evade the traps of past misconduct and thereby wins over the statistics is impressive.

Alas, against all expectations, the statistics then nevertheless chase the actor all the way to his false conviction for other crimes. Just as it seems that the actor has remarkably situated himself next to law-abiding citizens and escaped the fate of a criminal, the fate of a criminal knocks on his door. It suddenly becomes apparent that while he managed to beat the morally significant metaphysical implications of the error, its morally insignificant evidential implications cannot be evaded. The evidence

³⁷For lack of space, I do not engage here directly with all the vast criminological literature about recidivism; nor will I engage with the empirical literature on bias in section 3 of the paper. Rather, I adopt Redmayne's thorough analysis of those in n 2 above.

³⁸Redmayne, above n 2, p 24 (Table 2.7).

³⁹Redmayne, above n 2, pp 23–24.

⁴⁰For an elaborate critical discussion of the ways to analyse the probative value of evidence of previous misconduct see Redmayne, above n 2, pp 35–41.

⁴¹See Picinali, above n 4, at 122–123. For critical discussion see A Pundik 'Against racial profiling' (2017) 67 *University of Toronto Law Journal* 175 at 188–189.

⁴²What matters for the purposes of the current argument is that there are (indeed many) defendants who will have to fight these forces, and that some of them will have triumphed over them.

created by his original misconduct brings about a false conviction.⁴³ His story is, in the end, a story of an actor who finds himself unable to escape the punitive implications of the statistics he had erroneously put himself into, and whose human journey ends in a disproportionate disaster.

A couple of words of caution are due when considering this story: first, only previous convictions have been statistically connected with recidivism.⁴⁴ Thus, the broader category of previous comparable crime commission can be connected with recidivism only if it is assumed that the previous choice to commit comparable crime can help to explain high recidivism rates among those previously convicted.⁴⁵ While this assumption may seem reasonable, it is yet unproven and indeed is hard to prove. If rejected, the defendant's story as outlined above remains relevant only for those with previous convictions. Second, the available statistics about previous convictions have their own limitations. As it is hard to isolate and measure the effect of previous convictions on recidivism, other factors, such as criminal justice policies, can affect results. Redmayne's conclusions about the available statistical data thus seem valid:

... no great claims are being made about the comparative figures presented here. They give us some idea about the differences between those with previous convictions and those without, but cannot be taken as anything like exact. However, even if the figures are all reduced by a factor of ten, they still represent significant differences. If a person with previous convictions is only twice as likely to offend as someone without, that is still significant in terms of probative value.⁴⁶

Another qualifying point is that, as presented, the story of a defendant who is falsely and tragically convicted is a rare occurrence. First, in reality 'bad character evidence' can hardly bring about false convictions on its own. Given its more limited probative value, it can merely contribute to false convictions in combination with other circumstantial evidence. I will have more to say about this below,⁴⁷ but for now it is enough to note that in most cases this does not change the way in which the defendant's story unfolds.⁴⁸ As far as the narrative is concerned, the impact of this last piece of 'bad character evidence' that may well have sealed the false conviction remains significant. It still produces astonishment in the face of a disproportionate disaster. Indeed, the question what would have happened if only the defendant had refrained from committing the past crime remains as nagging as ever, if not more than ever (due to the unsettling effect of uncertainty).

Another rare aspect of the story is the defendant's presumably full reform as he refrains from crime and wins over the statistics. Reality rarely presents an actor who is fully reformed, and even more rarely does it present an actor who is fully reformed and is nevertheless falsely and tragically convicted. We can thus now observe the story of a defendant who has not gone through the unlikely process of full reform, but rather did not commit the crime on the occasion at issue for other reasons, for example because she was too tired or busy doing something else.

The story of such a defendant is not significantly different from the story of the fully reformed defendant. To see this, we should think of the probability of commission per opportunity to commit comparable crime (usually expressed in Bayesian terms⁴⁹). For a defendant who has already committed crimes, the probability of commission per opportunity to commit a comparable crime is

⁴³Where the evidence does not contribute to the false conviction, it is not clear that the false conviction is profoundly tragic. Yet it is hard – if not impossible – to identify such cases; furthermore, the fact that there are some cases in which the evidence does contribute to the false conviction is the significant one when making general admissibility decisions.

⁴⁴Thus, a clean record does not mean that one has not, or does not, commit crime. Nor does it mean that one does not face similar challenges and temptations as those who have convictions.

⁴⁵This seems to be the assumption in the CJA 2003.

⁴⁶Redmayne, above n 2, p 25.

⁴⁷Subsection (e).

⁴⁸As we shall see below, the nature of the other evidence might make a difference where it indicates that the defendant endorses some of the circumstances of the offence at issue.

⁴⁹L Levanon 'The law of police entrapment: critical evaluation and policy analysis' (2016) 27 *Criminal Law Forum* 35.

comparatively high. Whenever such an offender chooses not to take an opportunity to commit such a crime – whatever the reason for that choice may be – she beats the odds. Every such choice involves a small but nevertheless impressive victory over the statistics. Alas, as with the fully reformed defendant, the statistics still chase her all the way to her false conviction.

Arguably, there is a difficulty with the defendant who has not fully reformed, when her case is observed through the prism of probability per time unit (rather than per opportunity).⁵⁰ According to this argument, while such a defendant did not commit the crime on the relevant opportunity, she did not thereby confront and beat the high odds of crime commission over the same week or month. As the relevant time period has not been exhausted, the same odds are still there, waiting to be confronted. Thus, when probabilities are observed per time unit, this defendant has not yet beaten the odds.

This argument relies on several inaccuracies. First, such a defendant is actually expected to commit less crimes per (sufficiently long) time unit than a similar fellow defendant who has taken an early opportunity to commit crime. This indicates an initial process of distancing herself from crime, or of reform. Second, with every day that goes by without her committing crime, this defendant's likelihood of repetition drops (as recidivism rates drop with time⁵¹). For this reason, too, postponing criminal activity indicates initial reform. Accordingly, even if in the end this defendant does not reform, her story is still similar to that of the reformed defendant: she is falsely convicted for something that took place exactly in the time period when she opened the door for reform, and based on her low likelihood of reform. Last, observing probabilities per time unit only provides part of the picture, and thus we must have regard also to the abovementioned probabilities per opportunity.

The only cases where the story of a false conviction of a defendant based on bare 'bad character evidence' unfolds differently are the following: (1) where the defendant did not commit the relevant crime because she was busy committing another comparable crime; and (2) where the defendant did not commit the relevant crime but had already committed a comparable recidivist crime, say on the day before. For current purposes, it is enough to note that were it possible to identify such cases, it would be hard to say whether using evidence of previous misconduct would still cause unrest.⁵²

(c) *The Aristotelian tragedy*

Let us now examine the materials tragedies are made of, with the prospect of highlighting the strong tragic aspects of our defendant's story. Nowadays the word 'tragedy' is used loosely to refer to bad events that cause suffering and regret. Any false conviction would therefore easily qualify as a tragedy in this sense. However, the theoretical-theatrical concept, and particularly the original Greek theoretical-theatrical concept, has a narrower meaning. To comprehend this narrower meaning, we can observe Aristotle's account of tragedy in his *Poetics*.⁵³ While probably non-exhaustive,⁵⁴ this account is illuminating.

⁵⁰Ibid.

⁵¹Redmayne, above n 2, pp 26–27.

⁵²In any case, what matters for current purposes is the need to avoid rare but profoundly tragic false convictions of reformed defendants. After all, a rule of exclusion based on the nature of errors is based on the assumption that it is justified to exclude some perfectly good evidence (eg all the evidence of previous misconduct that would not end up leading to errors) in order to avoid some errors.

⁵³According to Aristotle's definition of a tragedy, it 'is an imitation of an action that is serious, complete and of a certain magnitude; ... in the form of action, not of narrative; through pity and fear effecting the proper purgation of those passions': *The Poetics of Aristotle* Part VI (3rd edn, edited with critical notes and a translation by SH Butcher, 1902).

⁵⁴The Aristotelian account has been criticised as overly narrow, in the sense that it does not even capture all types of Greek tragedies. See GR Noyes 'Aristotle and modern tragedy' (1891) 13 *Modern Language Notes* 6 at 11–12. See further P Woodruff 'Aristotle on character in tragedy, or who is Creon? What is he?' (2009) 67 *The Journal of Aesthetics and Art Criticism* 301; M Pabst Battin 'Aristotle's definition of tragedy in the poetics' (1975) 33 *The Journal of Aesthetics and Art Criticism* 293. Yet Aristotle's account was probably not meant as an exhaustive definition of a tragedy. See Noyes, *ibid.*, at 7.

In terms of content, Aristotle's account captures what we can call the profound tragedy, where a disproportionate disaster or total destruction is brought about on the hero not by some arbitrary fate but by her own misjudgement or by her human weaknesses (known as hamartia in Greek tragedy).⁵⁵ The Aristotelian tragedy is thus made of an imperfect protagonist making what initially looks like a limited error, but which ends up having extremely destructive consequences.

The structural components of the Aristotelian tragic plot are the following:⁵⁶ a sequence of events that are connected as causes and effects;⁵⁷ an element of surprise;⁵⁸ reversal of the situation/intention, where an event ends up having the opposite effect to that which was intended or expected;⁵⁹ a moment of recognition, where the protagonist comes to realise his error;⁶⁰ and a scene of suffering (or a tragic incident), where the painful impact of the disaster manifests itself.⁶¹

In terms of its effects, the tragic course of events stimulates pity and fear.⁶² Aristotle further elaborates the means by which this effect is produced, or the circumstances that in his mind strike us as most terrible or pitiful. According to Aristotle, pity and fear are stimulated when the tragedy happens between persons who are near or dear to one another;⁶³ and where the protagonist is above common level and is characterised by goodness and propriety,⁶⁴ but is nonetheless true to life and fairly consistent.⁶⁵ The tragic hero should remind us of ourselves,⁶⁶ 'a man who is not eminently good and just, yet whose misfortune is brought about not by vice or depravity, but by some error or frailty'.⁶⁷ In this way tragedies demonstrate that we are our biggest enemies; and this insight is terrible and frightening.

(d) Application of the definition of tragedy to Oedipus Rex and to the defendant's story: a comparison

We can now examine how these characteristics present themselves in Sophocles' *Oedipus Rex*, which Aristotle considered the purest example of a tragedy,⁶⁸ and, by way of comparison, how they present themselves in the story of the defendant who is falsely convicted based on previous misconduct. The examination will start with contents and then move to the structure of the plot and the means by which the tragic effect is achieved.

The content of *Oedipus Rex* is familiar enough: Oedipus has been given a prophecy according to which he will kill his father and sleep with his mother. Trying to escape this prophecy, he leaves his home in Corinth and the people he believes are his biological mother and father. Alas, his fate (or the prophecy) cannot be escaped, and Oedipus ends up discovering that after leaving his home he committed these horrors against his biological parents without realising who they were. Notably,

⁵⁵See *The Poetics of Aristotle*, above n 53, Part IX; D Frede 'Necessity, chance, and "what happens for the most part"' in A Rorty (ed) *Essays on Aristotle's Poetics* (Princeton, NJ: Princeton University Press, 1992) pp 197, 205 and 212. The extent to which hamartia involves (limited) guilt is controversial. See TCW Stinton 'Hamartia in Aristotle and Greek tragedy' (1975) 25 *The Classical Quarterly* (New Series) 221.

⁵⁶*The Poetics of Aristotle*, above n 53, Part IX ff.

⁵⁷*The Poetics of Aristotle*, above n 53, Part IX.

⁵⁸*Ibid.*

⁵⁹*The Poetics of Aristotle*, above n 53, Part XI.

⁶⁰*Ibid.*

⁶¹*The Poetics of Aristotle*, above n 53, Part XII.

⁶²*The Poetics of Aristotle*, above n 53.

⁶³*The Poetics of Aristotle*, above n 53, Part XIV.

⁶⁴*The Poetics of Aristotle*, above n 53, Part XV.

⁶⁵*Ibid.*

⁶⁶for pity is aroused by unmerited misfortune, fear by the misfortune of a man like ourselves': *The Poetics of Aristotle*, above n 53, Part XIII.

⁶⁷*The Poetics of Aristotle*, above n 53, Part XIII.

⁶⁸See M Barstow 'Oedipus Rex as the ideal tragic hero of Aristotle' (1912) 6 *The Classic Weekly* 2.

the origins of the disaster trace back to the crime of killing a stranger at a crossroads.⁶⁹ The implications of this crime seemed to have been limited, but eventually revealed themselves as disastrous (the stranger was later revealed as Oedipus' biological father).

This story bears strong similarity to the story of the defendant that has already been outlined. Like Oedipus, this defendant lives in the shadow of a prediction: the statistics predict that she will end up being destroyed by repeated convictions of further crimes. In what initially looks like a successful attempt to escape this prediction, she refrains from further crime commission. But, like Oedipus, this defendant's fate cannot be escaped, and she ends up being falsely convicted based on the statistics and thereby being destroyed. Here too, the origins of the disaster trace back to crime commission whose implications seemed to have been limited but eventually revealed themselves as disastrous.⁷⁰

The plots of both *Oedipus Rex* and the defendant's story have the abovementioned structural characteristics of the Aristotelian tragedy. As already demonstrated, in both stories the chain of events flows as a causal chain. Furthermore, in both stories the destruction of the protagonist is surprising: Oedipus seems to have evaded the prophecy when leaving Corinth for the city of Thebes, and his discovery that the prophecy has been realised is astonishing. Similarly, the defendant seems to have escaped the claws of statistics when she refrains from further crime commission, and her false conviction based on these statistics is not less astonishing. Moreover, in both cases there is the 'reversal of situation'. In *Oedipus Rex* the messenger brings information that is supposed to free Oedipus from his worries (namely that Merope was not his real mother), but this message produces the opposite effect, leading to the discovery that Jocasta is his mother. In the defendant's case, the trial is supposed to reveal the truth and free the defendant from false suspicions, but it ends up producing the opposite effect when the defendant is falsely convicted. In addition, in both stories there is a moment of recognition. Aristotle notes that '[t]he best form of recognition is coincident with a Reversal of the Situation, as in the Oedipus'.⁷¹ The same applies for the defendant, who comes to realise her disaster as the evidence is presented against her and seals her false conviction. Last, in both stories there is a scene of suffering, where the protagonist is mortified. Oedipus plunges Jocasta's pins into his eyes, and the defendant's suffering is, presumably, apparent as the court finds her guilty.

As for the tragic effect, while both stories stimulate extreme pity and fear, the means that achieve the tragic effect are admittedly more strictly Aristotelian in *Oedipus Rex* than they are in the defendant's story. Unlike in *Oedipus Rex*, the defendant's tragedy does not involve family or friends. Furthermore, unlike Oedipus, who comes from the ruling classes and who accordingly is considered above common level, the defendant is not above common level and is not necessarily characterised by goodness and propriety. But at least to the extent that this defendant is fully or partly reformed, her intentions are good and we can identify with her. Moreover, like Oedipus, the defendant is true to life and fairly consistent, and this too allows identification.

To conclude, the defendant's story has the content and structure of an Aristotelian tragedy. The absence of some characteristics that Aristotle considered as best producing the tragic effect does not necessarily prevent the development of this effect. The defendant who is falsely convicted based on his past is therefore very similar to Aristotle's tragic hero.

(e) Back to the law

We can now go back to observing the law. The analysis proposed so far can shed light on the common law exceptions to the rule of exclusion of 'bad character evidence'. It was noted in section 1 that almost all of these exceptions involved cases where the defendant failed herself one more time, above and

⁶⁹There is disagreement in the literature on the hamartia in *Oedipus Rex*, but many trace it to this killing that is later revealed as patricide, that also opens the door for him marrying his biological mother. See I Hyde 'The tragic flaw: is it a tragic error?' (1963) 58 *The Modern Language Review* 321; L Golden 'Hamartia, Atē, and Oedipus' (1978) 72 *Classical World* 3.

⁷⁰At least under the assumption that Oedipus' hamartia was indeed the ignorant killing of the person at the crossroads.

⁷¹*The Poetics of Aristotle*, above n 53, Part XI.

beyond her bare past misconduct, and this time bluntly and transparently so. But this additional moment of blunt and transparent self-failing affects our evaluation of the defendant's entire erroneous course of conduct and its outcomes in several ways.

First, it deprives the defendant's original error (the bare past misconduct) of its limited scope, turning it into one in a sequence of risky behaviours. Secondly, a subsequent false conviction based partly on the original error no longer comes as a complete surprise: the defendant who has transparently turned herself into a suspect has also openly taken all the risks associated with a criminal justice process, including that of a false conviction. That this might actually lead to her being falsely convicted is hardly astonishing. Thirdly, the theatrical disproportionality of a false conviction is no longer measured only against the single original error, but against the combination of this error with the following act of blunt self-failing. Accordingly, the disaster seems less disproportionate. Fourthly, her blunt and transparent self-failing makes the defendant significantly harder to identify with. The defendant therefore loses many of the characteristics of a tragic protagonist, and the false conviction loses many of the characteristics of a tragic outcome.

It can thus be suggested that the common law categories captured cases where the admission of 'bad character evidence' no longer had the potential to lead to profoundly tragic false convictions. Only in these cases was admission exceptionally allowed. Clearly, this is not to suggest that the common law categories exhausted the cases where admission of 'bad character evidence' would not lead to tragedies; neither is it to suggest that all the categories were accurate and fully explicable along the suggested lines. Still, the proposed analysis does demonstrate that the common law's approach may have had its grounds. In addition, this analysis can explain why the categories only partly overlap with the pool of cases in which other strong evidence is available against the defendant.⁷² Last, the analysis sheds different light on the transition completed by CJA 2003 into a regime of probative value: this transition has removed the distinction between profoundly tragic errors and other errors.

(f) A brief comment on the connection between aesthetics and ethics

Some questions nevertheless remain: can the proposed analysis offer more than aesthetic observations? Can the 2003 Act be criticised for disregarding the distinction between tragic and non-tragic errors? Why should the law care about tragedies at all? Is 'tragedy' a legally relevant category, and if so, how exactly? These questions concern the possible connection between aesthetics and ethics: whether there is such a connection at all; and if there is, whether it is such that good aesthetics accurately captures ethically relevant distinctions and categories. That positive answers are far from impossible is evident already in Kant's suggestion in his *Critique of the Power of Judgement* that taste is 'at bottom a faculty for the estimation of the sensible rendering of moral ideas'.⁷³ Still, the questions run deep and merit separate attention.⁷⁴ The following paragraphs merely propose initial routes to explore.

We can assume for now the existence of only a loose connection between aesthetics and ethics, of the type proposed in Kant's third Critique.⁷⁵ For Kant, morality is based on reason and is independent from aesthetics; still, there is an analogy between the aesthetic and the moral; this analogy is essential for an account of moral feeling; and moral feeling, in turn, makes morality possible for human beings.⁷⁶ Aesthetics are thus not a source of moral duties; however, the aesthetic symbolises the moral.

⁷²Compare with Redmayne, above n 2, pp 128–129.

⁷³I Kant *Critique of the Power of Judgment* (P Guyer (ed), translated by Paul Guyer and Eric Matthews; *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 2000)) §60.

⁷⁴For an introduction see J Levinson (ed) *Aesthetics and Ethics: Essays at the Intersection* (Cambridge: Cambridge University Press, 1998); D Glowacka and S Boos (eds) *Between Ethics and Aesthetics: Crossing the Boundaries* (Albany: State University of New York Press, 2002); S Symons (ed) *The Marriage of Aesthetics and Ethics* (Leiden: Brill, 2015). For the Kantian view see P Guyer *Kant and the Experience of Freedom: Essays on Aesthetics and Morality* (Cambridge: Cambridge University Press, 1996).

⁷⁵Kant, above n 73.

⁷⁶See Kant, above n 73. Kant's account is complex and deserves more extensive and accurate exploration than can be provided here. See P Guyer 'Feeling and freedom: Kant on aesthetics and morality' (1990) 48 *The Journal of Aesthetics and Art Criticism* 137.

Even under these relatively weak assumptions, tragedy emerges as a morally and legally relevant category: the aesthetic impact of tragedy is powerful and timeless because tragedy symbolises morally relevant categories. Tragedy produces such strong unrest because it is an aesthetic representation of moral failure. Arguably, tragedy symbolises a human failure to prevent certain misfortunes that must be prevented (as a matter of moral duty) whenever possible. Since tragedy symbolises such moral failure, it engages not only aesthetic taste but also the comparable and closely connected moral feeling (indeed, this is the source of its powerfulness).

For current purposes, the significant conclusion is that tragedy symbolises failure to fulfil duty. Exploring the independent moral derivation of this duty is a different matter that cannot be comprehensively pursued here. A couple of initial possibilities can nevertheless be briefly proposed.

Evidently enough, tragedies do not necessarily indicate a particularly high level of suffering by the defendant. The amount of suffering or loss that any event involves is contingent and depends on its particular circumstances. A tragic course of events may well involve less suffering than other extremely unfortunate courses of events. The suffering of a parent who is falsely convicted of the murder of her child is almost beyond imagination, and it is far greater than the suffering of a defendant who is falsely convicted of burglary based on previous burglaries she committed.

Yet it can be tentatively suggested that failing to prevent tragedies is unfair to the defendant:⁷⁷ it puts on her shoulders more than her fair share of arbitrariness. According to this suggestion, while arbitrariness cannot be completely avoided, human choice usually serves to minimise it and distribute it fairly.⁷⁸ But the defendant's choice does the opposite of this: it frustrates minimisation and fair distribution of arbitrariness. By depriving the defendant's subsequent good choice of any potential to shield from arbitrariness, it leaves the defendant exposed to a tremendous and indeed unfair share of arbitrariness.⁷⁹ And where individual choice proves counter-productive, justice kicks in: it requires that society bear some arbitrariness of false acquittals for the sake of preventing the defendant from carrying this excessive share of arbitrariness on her shoulders.

It can be added in a similar tentative spirit that allowing tragic courses of events to unfold might also be plainly disrespectful of defendants: if the duty of respect that the state owes to its citizens entails acknowledging their exercises of autonomy,⁸⁰ then allowing tragic false convictions is a failure to respect the defendant's impressive and almost heroic manifestation of autonomy (through change).⁸¹

If failure to prevent tragedies indeed has distinct negative value that is ethically and legally relevant, there is at least an *a priori* reason to criticise the 2003 Act for not taking account of this negative value.

(g) *Interim conclusions*

To conclude the discussion so far, the legal system's traditional reluctance to admit evidence of previous misconduct can be defended with reference to the nature of entirely possible errors based on

⁷⁷This is not to suggest that such unfairness is more or less significant than other forms of unfairness that might arise in the context of the criminal justice process, such as instances where the state is complicit in misleading the court about the available evidence.

⁷⁸It is only fair that some good choices should shield from certain arbitrary forces; it is only fair that some bad choices should expose to certain arbitrary forces; and there is nothing unfair in accepting that luck has its say, so that sometimes good choices fail to shield and bad choices do not expose to such arbitrary forces. Justice does not demand that we do anything to alter these realities. For additional suggestions about the value of choice see TM Scanlon *What We Owe to Each Other* (Harvard University Press, revised edition, 2000) pp 251–255.

⁷⁹I suggest this argument without losing sight of the fact that the ancient Greeks were interested in personality and fate rather than in the human power of choice.

⁸⁰Compare with S Darwall's account of recognition respect in 'Two kinds of respect' (1977) 88 *Ethics* 36.

⁸¹The demeaning nature of the mistake is also reflected in the particularly high impact on the defendant's self-esteem. See Redmayne's analysis of labelling, above n 2, pp 88–90.

such evidence: false convictions based on such evidence are profoundly tragic in the Aristotelian sense. Possibly, this means that they are also unfair and disrespectful of the defendant. The 2003 Act reflects a transition from a regime that takes into account this special nature of possible errors, to a regime that is concerned solely with probative value.

But this analysis only takes us so far in deciding whether to admit or exclude the evidence even in those cases where the defendant is comparable to a tragic protagonist. Examination of possible interpretations by juries of the evidence or of its absence obscures the picture. Mainly, a risk of profoundly tragic errors may arise not only where the evidence is admitted, but also where it is excluded. Thus, the possibility of profoundly tragic errors does not yet necessarily call for exclusion. The next section addresses this problem.

3. The likelihood of errors

(a) *The problem*

The decision whether to admit or exclude 'bad character evidence' can be made based on the expected negative values of errors associated with each rule: the rule that is associated with lower negative values should be preferred. For the purposes of convenience, I will refer to such negative values hereinafter as 'costs'. Estimating the cost of errors involves identifying the different costs associated with different types of errors and the likelihoods of different types of errors under the two types of rules (admission and exclusion). Likelihoods of errors, in turn, are not determined directly by the evidence or its absence, but rather by the factfinders' interpretations of the evidence or its absence. This section demonstrates that we are deeply ignorant about factfinders' interpretations of 'bad character' evidence or its absence. Derivatively, we are also deeply ignorant about the overall costs associated with a rule of admission and with a rule of exclusion. The section then uses decision theory and the maximin rule to advance the argument that considering the difference in the costs of the possible errors under a rule of admission and under a rule of exclusion, a rule of exclusion should be preferred.

It is often argued that juries overestimate the probative value of evidence of previous misconduct, or alternatively convict in order to punish for previous misconduct.⁸² One of Redmayne's significant contributions to the research of evidence of previous misconduct was his careful and thorough analysis of the existing empirical research on bias. While indecisive, the conclusions of this analysis are far from being insignificant. Redmayne concludes that we cannot know whether evidence of previous misconduct is likely to be biasing, and that there are reasons to think either way.⁸³ Furthermore, Redmayne notes that in some cases, evidence of previous misconduct might even have the unexpected outcome of reducing the likelihood of conviction.⁸⁴ This might be the case where introduction of evidence of previous misconduct seems to the jury to be unfair;⁸⁵ or, alternatively, where absent the evidence the jury would have made unfounded and more condemning speculations.⁸⁶

The picture we end up with regarding the expected outcomes of admission or exclusion thus becomes remarkably obscure: both a rule of admission and a rule of exclusion might or might not hamper juries' judgement in either of two ways (for or against the accused) and to an unknown extent.⁸⁷ Accordingly, we cannot know how many errors and of which type (profoundly tragic or

⁸²For presentation and analysis of the relevant mock jury studies and real trial studies see Redmayne, above n 2, pp 53–59.

⁸³Redmayne, above n 2, p 60.

⁸⁴Ibid, p 55, citing such findings with respect to the impact of dissimilar convictions in S Lloyd-Bostock 'The effects on juries of hearing about the defendant's previous criminal record: a simulation study' [2000] *Criminal Law Review* 734.

⁸⁵Ibid.

⁸⁶See J McEwan *The Verdict of the Court: Passing Judgement in Law and Psychology* (London: Hart Publishing, 2003) pp 169–170; Spencer, above n 5; Lord Justice Auld's position in Great Britain: Lord Chancellor's Department *A Review of the Criminal Courts in England and Wales* (2001) ch 11, paras 118–120. See also L Laudan and RJ Allen 'The devastating impact of prior crime evidence and other myths of the criminal justice process' (2013) 101 *Journal of Criminal Law and Criminology* 493, 515 and 522.

⁸⁷Redmayne's proposed solution seems to reflect the assumption that the lack of knowledge with respect to prejudicial inferences is such a non-starter, that it must be set aside. See Redmayne, above n 2, chs 2 and 12.

not) would be brought about by each of the rules. It is therefore impossible to know which rule might minimise the cost of errors.

The difficulty is a general one in the law of evidence. It occurs where there are reasons to think that the evidence is overall valuable and other reasons to think it is damaging overall, and we cannot evaluate the probability of it being valuable or damaging. The evidence (might) pull in different directions.

Indeed, this difficulty goes beyond the law of evidence; it is a difficulty long known to decision theorists and referred to as 'deep ignorance'.⁸⁸ Deep ignorance is a condition where the likelihoods of different outcomes of different courses of action are unknown and unknowable, since a sufficiently broad range of evaluations can be supported by good reasons.⁸⁹ Thus, unlike in conditions of mere uncertainty, cost-expectancies cannot be calculated, and a decision about the appropriate course of action cannot be made based on a principle of cost minimisation. As the principle of cost minimisation is inapplicable, different principles of decision are needed for conditions of deep ignorance.

(b) Decision theory: the maximin rule for decisions in conditions of deep ignorance

Decision theory proposes several decision rules for conditions of deep ignorance.⁹⁰ The two dominant rules in decision theory, and those which have already been applied convincingly in moral and political theory,⁹¹ are the maximin rule and the lexical maximin rule (leximin). The following discussion applies these rules to the problem of bias in the context of evidence of previous misconduct.

The maximin rule requires maximising the minimal level of value obtainable with each decision. Accordingly, this rule works where we can discern one potential decision whose worst outcome has more value than that of the worst outcome of other potential decisions. If this is not the case, and the minimal obtainable value is identical for all potential decisions, the lexical maximin rule comes to play: if the worst outcomes are equal, we should maximise the value of the second worst outcome; if the second worst outcomes are equal, we should maximise the value of the third worst outcome, and so on.

The following analysis examines the possible outcomes of a rule of admission and a rule of exclusion. It does so with reference to the types of possible errors under each regime, given the ways juries might interpret the evidence or its absence. Subsection (c) demonstrates that the range of possible outcomes under a rule of admission and under a rule of exclusion is, in fact, qualitatively equal: considering the possibility that juries might 'fill in the gap' where the evidence is excluded and presume propensity, profoundly tragic errors are possible not only under a rule of admission, but also under a rule of exclusion. Next, subsection (d) demonstrates that the possible outcomes of a rule of admission and of a rule of exclusion are nevertheless quantitatively different: profoundly tragic errors made under a rule of admission are more tragic than those made under a rule of exclusion. Accordingly, principles offered by decision theory lead to the conclusion that exclusion is preferable to admission.

(c) Initial application: errors and profoundly tragic errors

To apply maximin to admission of evidence of previous misconduct clearly, two unrealistic assumptions are made: first, it is assumed that evidence of the defendant's previous misconduct is the only available evidence; and secondly, it is assumed that juries' possible estimations of the likelihood of

⁸⁸R Aboodi et al 'Deontology, individualism and uncertainty: a reply to Jackson and Smith' (2008) *The Journal of Philosophy* 259, 270.

⁸⁹For a comprehensive analysis of uncertainty and theories of resolving uncertainties see VR Walker 'Theories of uncertainty: explaining the possible sources of error in inference' (2001) 22 *Cardozo Law Review* 22.

⁹⁰For a clear introduction see M Peterson *An Introduction to Decision Theory* (Cambridge: Cambridge University Press, 2009) ch 3. To go further, see eg PH Giang 'Decision making under uncertainty comprising complete ignorance and probability' (2015) 62 *International Journal of Approximate Reasoning* 27 and the references therein.

⁹¹John Rawls' difference principle is closely related to the maximin principle. See J Rawls *A Theory of Justice* (Harvard University Press, revised edn, 1999) p 132 ff.

recidivism are radical, so that overestimation means estimation of 100% likelihood and underestimation means estimation of 0% likelihood.

The two relevant acts are admission and exclusion of the evidence. The three relevant states are: (1) juries overestimate the likelihood of recidivism given the defendant's past; (2) juries estimate correctly the likelihood of recidivism given the defendant's past; and (3) juries underestimate the likelihood of recidivism given the defendant's past. Where the evidence is excluded, these three states are further differentiated: under each of them, juries might assume no past, correct past, or excessive past. The five relevant possible outcomes are the following: true acquittal, false acquittal, true conviction, false conviction, and tragic false conviction.

Tragic false conviction is a false conviction based on the defendant's previous misconduct, whether or not it involves overestimation of the likelihood of recidivism. It has been demonstrated in section 3 that such a conviction is tragic where juries estimate the likelihood of recidivism correctly. Overestimation of this likelihood by the juries does not negate the tragic nature of the conviction: it is the reliance on the defendant's poor odds, rather than the accuracy of the estimation of these poor odds, that makes the false conviction tragic.

Tragic false conviction can occur either where evidence of previous misconduct has been introduced or where it has not been introduced, but juries assume rightly or wrongly that the defendant has a past of misconduct. We have already seen why tragic errors are possible where the evidence is introduced. Where the evidence is not introduced, but juries fill the gap by rightly assuming that the defendant has a past of previous misconduct, the outcome is similar to that of admission, and there is a similar risk of tragic errors. Where the evidence is not introduced, and juries wrongly assume that the defendant has a past of misconduct, erroneous convictions would still be tragic. Unfortunate as this may be, the statistics indicate that, at the very least, defendants are indeed more likely to have previous convictions than random citizens (and to the extent that they have such previous convictions, they are more likely to have committed the offence at issue).⁹² Accordingly, the fact that a person has been accused of crime indicates that there are strong forces pushing him to commit crime; indeed the forces pushing such a person to commit crime are stronger than the forces pushing random citizens to commit crime. Given these statistical realities, where the defendant has beaten the odds by not having committed past crimes and accordingly not having such a past (and hence he is no longer more likely to have committed the offence at issue), her false conviction based on the odds that she has beaten is still profoundly tragic.

As for the costs of each outcome, it is assumed that true results have no relevant costs; that false convictions are worse or more costly than false acquittals; and that tragic false convictions are worse or more costly than other non-tragic false convictions. The first and second assumptions do not require explanation. The third assumption (that tragic false convictions are worse than other non-tragic false convictions) attributes additional costs to profound tragedy. It relies on our natural strong response to tragedies – a response that implies such additional costs. In addition, this assumption can rely on the additional unfairness, beyond that of any false conviction, that tragic false convictions involve, as well as on the disrespect towards the defendant that the legal system arguably demonstrates when it allows tragic false convictions to happen.⁹³

Now, let us observe the respective acts, states, and outcomes as summarised in Tables A–D in the Appendix below. The observation leads to the following conclusions: if juries do give some weight to evidence of previous misconduct, but where the evidence is excluded they assume that the defendant has no history of previous misconduct, then maximin would recommend excluding the evidence. The reason is that under this assumption, the worst possible outcome of exclusion is false acquittal, and this outcome is better than the worst possible outcome of admission, namely tragic false conviction.

⁹²These assumptions are not in conflict with the presumption of innocence. For a discussion see L Levanon 'Sexual history evidence in sexual assault cases: a critical reevaluation' (2012) 62 *University of Toronto Law Journal* 609.

⁹³See the discussion above.

However, assuming again that juries give some weight to the evidence, but that following exclusion juries might actually assume that the defendant does have some history of previous misconduct, maximin becomes less helpful. The reason is that under this assumption, the worst possible outcomes of exclusion and of admission are equally bad (tragic false convictions). In such circumstances, we should apply leximin and examine the second worst possible outcomes. Yet this too does not take us far, as the second worst possible outcomes of admission and of exclusion are also equal (false acquittal); and other outcomes are true outcomes and therefore good outcomes.

The same is true assuming that juries do not attribute any weight to the evidence: the worst outcomes under a rule of admission and of exclusion are equally bad (false acquittals); and other possible outcomes are true outcomes and therefore good outcomes.

Thus, under such assumptions, maximin and leximin do not take us far in deciding the question of admission.

(d) Taking the analysis forward: the role of incentives

Reconstruction of the incentive argument originally proposed by Sanchirico⁹⁴ and further developed and extended by Enoch, Spectre and Fisher⁹⁵ can get the analysis going. According to this argument, admission of evidence of previous misconduct creates a disincentive for potential defendants with a past of misconduct to refrain from the proscribed act. This argument is consequentialist and tentative in nature, but it can be integrated in a non-consequentialist argument about the duty to prevent the most tragic of errors based on maximin.

Where evidence of previous misconduct is admissible, potential defendants with a past of misconduct *know* that their past would be considered during trial; they *know* that it might be overestimated by the juries; and they *know* that they might be falsely convicted on the basis of their past. Thus, the possibility of a tragic false conviction becomes visible to them. It is this visibility that reduces potential defendants' motivation to refrain from further crime, with the implication that they are more likely to commit such crime. Arguably, this visibility does more than that: it actually increases the motivation to commit further crime; it creates a positive incentive for further crime commission. If potential defendants know that their prospects of a good life are diminished because of the possibility of tragic false convictions, they have a positive incentive to balance this out by taking what they consider as 'more' of life (for example by way of stealing property or taking criminal revenge etc) in the time that is left before the expected false conviction. Thus, the visibility of possible tragic errors puts potential defendants deeper in the claws of the recidivism statistics. But the deeper potential defendants are trapped by these claws, the more heroic is their eventual decision to refrain from further crime, and the more profoundly tragic is their eventual false conviction. If this is true, then a rule of admission involves a risk of errors whose tragic nature is particularly profound; it involves a risk of errors that are more profoundly tragic than other tragic errors. A decision to opt for a legal rule of admission, therefore, has particularly low minimal value obtainable with it.

The same does not apply to the minimal value obtainable with a decision to opt for a rule of exclusion. Where the rule is one of exclusion, the possibility of tragic false convictions is far less visible to potential defendants. Unless highly sophisticated or unusually pessimistic, they are not expected to think that juries would assume they have a past of misconduct absent evidence of such misconduct (and indeed, this is the assumption that lies in the heart of any incentive-based analysis of evidence of previous misconduct). Thus a decision to opt for a rule of exclusion does not reduce potential defendants' motivations to refrain from the proscribed act in a way similar to a decision to opt for a rule of admission. A rule of exclusion therefore does not increase the odds of commission and put potential defendants deeper in the recidivism statistics, and accordingly it does not make their

⁹⁴CW Sanchirico 'Character evidence and the object of trial' (2001) 101 Colum L Rev 1227.

⁹⁵Enoch and Fisher, above n 33, and D Enoch et al 'Statistical evidence, sensitivity, and the legal value of knowledge' (2012) 40 Philosophy and Public Affairs 197.

eventual decision to refrain from crime more heroic. Thus, a false conviction reached in an exclusion regime may well be profoundly tragic, but it is not as profoundly tragic as a false conviction reached in an admission regime. A decision to opt for a legal rule of exclusion therefore does not have particularly low minimal value obtainable with it.

If this is the case, then maximising the minimal value obtainable with the admissibility decision, as required by the maximin rule, entails opting for exclusion. The worst outcome of exclusion (profoundly tragic false conviction) is still better than the worst outcome of admission (more profoundly tragic false conviction).

Note that in this analysis contingent incentives play a role, but it is not a justifying role: the way it is applied here, maximin does not recommend exclusion based on the added value of discouraging crime (which is a contingency). Rather, the justification for exclusion is the profoundly tragic and unfair nature of possible errors.

Conclusions

This paper has argued that where the defendant does not connect herself to the offence at issue, admission of ‘bad character evidence’ can lead to the most profoundly tragic of false convictions. It has further proposed that this aesthetic characteristic of the evidence can explain the legal ambivalence about it; and that to the extent that this characteristic has moral grounds and moral bearings on the fair treatment of defendants, a rule of exclusion can be justified. Such a rule would also be justifiable, based on maximin, if juries’ possible interpretations of the evidence or its absence are taken into consideration.

CJA 2003, however, sets a regime of broad admissibility based on probative value. It can now be cautiously suggested that in such conditions, there may be a reason to use the unfairness provision in s 101(3) in order to reintroduce into the law the distinction between profoundly tragic false convictions and other false convictions. The common law categories that seem to have captured this distinction could serve as guidance. Thus, where the defendant transparently connects herself to the offence at issue in ways comparable to those covered by the common law categories, admission of ‘bad character evidence’ no longer has the potential to lead to profoundly tragic false convictions, and accordingly it can be sustained. In all other cases exclusion should be preferred.⁹⁶

Appendix: the range of possible outcomes under a rule of admission and under a rule of exclusion

Table A: possible outcomes under a rule of admission

	Juries overestimate to 100%			Juries estimate correctly			Juries underestimate to 0%	
Admission	True conviction	Tragic false conviction	True acquittal	False acquittal	True conviction	Tragic false conviction	True acquittal	False acquittal

⁹⁶The case of a defendant who committed another comparable offence beforehand is mostly theoretical, but if proved, it is possible that this too should open the door to ‘bad character evidence’.

Table B: possible outcomes under a rule of exclusion, assuming juries' overestimation

Juries overestimate to 100%						
Exclusion	Juries assume no past		Juries assume correct past		Juries assume excessive past	
		True acquittal	False acquittal	Tragic false conviction	True conviction	Tragic false conviction

Table C: possible outcomes under a rule of exclusion, assuming juries' correct estimation

Juries estimate correctly						
Exclusion	Juries assume no past		Juries assume correct past		Juries assume excessive past	
		True acquittal	False acquittal	True conviction	Tragic false conviction	True conviction

Table D: possible outcomes under a rule of exclusion, assuming juries' underestimation

Juries underestimate to 0%						
Exclusion	Juries assume no past		Juries assume correct past		Juries assume excessive past	
		True acquittal	False acquittal	True acquittal	False acquittal	True acquittal

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