THE DUBIETY OF SOCIAL ENGINEERING THROUGH EVIDENCE: A REPLY TO PROFESSOR SANCHIRICO'S RECENT ARTICLE ON CHARACTER EVIDENCE

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I. INTRODUCTION

The United States Supreme Court has bemoaned the fact that the character evidence doctrine is a "grotesque structure."[1] In Justice Jackson's words, the doctrine is "paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other."[2] The doctrine contains a number of troubling asymmetries.[3] For example, although litigants ordinarily may not use a person's character as circumstantial evidence of the person's conduct on the historical merits of the case,[4] the same litigants may employ a witness's character of untruthfulness as evidence that the witness lied during his or her testimony.[5] Thus, as Professor Chris Sanchirico noted in a recent article, "a witness's past perjury conviction may be introduced for the inference that she is now lying under oath, and yet may not be introduced against that same individual, as a defendant, in a subsequent perjury action based on that lie."[6] In addition, although a criminal accused has the election to place his or her character in issue on the merits, the prosecution has no such election.[7] The accused's election is especially puzzling, because the criminal trial is an adversarial proceeding in which both sides are ordinarily subject to the same restrictions.[8]

As Professor Sanchirico explains in his article, these inconsistencies are difficult to rationalize under the conventional premise that "trial is at its core a search for truth."[9] It seems impossible to justify singling out the character trait for untruthfulness and exempting that trait from the general ban on character evidence. There is no evidence that persons are more consistent with respect to that trait than with respect to other traits such as peacefulness.[10] The differential treatment of the

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1. *See* Michelson v. United States, 335 U.S. 469, 485-86 (1948) (discussing the downfalls of the law regulating character testimony). *See generally* Richard C. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123, 124 (1987).

2. Michelson v. United States, 335 U.S. at 486.

3. RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 399 (5th ed. 2002).

4. FED. R. EVID. 404-05.

5. FED. R. EVID. 608-09.

6. Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1234 (2001).

7. FED. R. EVID. 404-05.

8. *See* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1-5 (1988) (noting that all parties to a trial must submit evidence to a neutral and passive decision maker and that all are subject to the same complex set of rules).

9. Sanchirico, *supra* note 6, at 1228, 1239-59.

10. *See* Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 779-85 (1975) (footnote omitted) (one leading study of the degree of consistency between a character trait of truthfulness and conduct on specific occasions reported that "the most striking thing . . . is the amount of inconsistency exhibited"); Roderick

character trait for untruthfulness cannot be defended on the ground that that trait is more probative and a better predictor of conduct than other character traits.

Given the inability to explain these seeming inconsistencies under the conventional premise, a new theory that promised to rationalize the character evidence doctrine would understandably be attractive. In his article, Professor Sanchirico proposes an imaginative new theory that, in his view, has greater explanatory power.[11] Professor Sanchirico has dubbed his theory an "incentive setting approach."[12] He argues that the character evidence rules could be conceived as part of the state's broader project to create incentives for out-of-court conduct.[13] The law attempts to establish disincentives to discourage persons from engaging in tortious and criminal conduct.[14] Professor Sanchirico reasons that if character evidence were generally admissible against a person, its admissibility would dampen the person's disincentive;[15] the evidence could be used against the person whether or not the person engaged in the alleged misconduct.[16] Therefore, the person supposedly has nothing to lose by performing the antisocial act.[17] Professor Sanchirico also elaborates his belief that this theory has the capacity to explicate the liberal admission of character evidence on the question of a witness's credibility.[18] If this new theory possesses that explanatory power, in that respect it would certainly be superior to the conventional wisdom. After describing his theory and asserting its explanatory power, Professor Sanchirico utilizes it to critique several aspects of modern character evidence doctrine.[19] By way of example, near the end of his article, Professor Sanchirico urges the abolition of the "mercy rule," allowing an accused—but not the prosecution—to choose to use the accused's character as circumstantial proof of conduct on the merits.[20]

Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act of 1898*, 1986 CRIM. L. REV. 511, 513-14 (noting that many psychological findings do not support the law's assumption that a criminal's dishonesty in the broad sense is evidence of his dishonesty in another sense); Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 351-53 (1979) ("For example, a prior conviction for perjury will generally say nothing about the willingness of a person to lie on this occasion.").

11. Sanchirico, *supra* note 6, at 1232, 1282.
12. *Id.* at 1230.
13. *Id.* at 1230-31.
14. *See id.* at 1264 (discussing tailoring incentives with respect to the admissibility of propensity evidence).
15. *Id.* at 1237, 1264.
16. *Id.* at 1262, 1266, 1275.
17. *Id.* at 1287.
18. *Id.* at 1282-85.
19. *Id.* at 1282-1305.
20. *Id.* at 1302-05.

The thesis of this Article is that while Professor Sanchirico's theory unquestionably warrants serious empirical investigation, at this point it would be premature to rely on the theory to revise any aspect of character evidence doctrine. As Part I of this Article points out, Professor Sanchirico's theory makes several assumptions about laypersons' knowledge of evidentiary rules and the extent to which that knowledge influences their out-of-court behavior. The assumptions have a certain plausibility, but it can be a grave mistake "to confuse the plausible and the proven."[21] Parts II and III of this Article argue that there is reason to doubt the empirical validity of Professor Sanchirico's cognitive and behavioral assumptions. Finally, Part IV contends that there are countervailing considerations to weigh before implementing Professor Sanchirico's new theory.

II. A DESCRIPTION OF PROFESSOR SANCHIRICO'S NEW "PRIMARY INCENTIVES" THEORY

Although the preceding introduction presented an overview of Professor Sanchirico's theory, the theory is a sophisticated one, warranting a more extended description. This more in-depth description is a necessary prologue to the detailed critique of the theory in Parts II through IV.

As previously stated, Professor Sanchirico insists that the character evidence rules be viewed in the context of the state's central project to regulate primary behavior outside the courtroom.[22] Left to his or her own devices, an individual might fail to adequately take the interests of other citizens into account in deciding whether to engage in certain conduct.[23] In order to discourage persons from engaging in conduct that will injure the legitimate interests of third parties, the law attaches consequences or sanctions to injurious conduct.[24] In particular, the law creates disincentives to encourage persons to refrain from injurious conduct.[25]

In applying the incentive setting approach to evidence law, Professor Sanchirico relies on a distinction between trace and predictive evidence coined by Professor Uviller of the Columbia law faculty.[26] Trace evidence is the evidentiary

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21. CARLSON ET AL., *supra* note 3, at 10-13.

22. Sanchirico, *supra* note 6, at 1230.

23. *Id.* at 1231.

24. *Id.*

25. *See id.* (discussing legal sanctions and rewards as a means of deterring certain behavior); *see also* Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1649 (2001) (discussing deterrence as a means of promoting lawful conduct).

26. Sanchirico, *supra* note 6, at 1234 (relying on a distinction between trace and predictive evidence identified by H. Richard Uviller in *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 847-48 (1982)).

byproduct of an earlier act.[27] The category of trace evidence includes such items of evidence as fingerprints and eyewitness recollections.[28] In the case of trace evidence, the earlier act is the cause, and the trace evidence is the effect of the act.[29] The existence of the effect is relevant evidence that the causal act occurred.[30] In contrast, in the case of predictive evidence, "the causal relationship runs in the opposite direction."[31] Predictive evidence includes such factors as the person's character which can cause the person to later engage in the act.[32] Predictive evidence is relevant to the question of whether the act occurred, but the existence of predictive evidence does not depend on the occurrence of the event.

Armed with this distinction, Professor Sanchirico argues that the incentive setting approach explains why the courts should generally reject character evidence proffered on the historical merits.[33] To illustrate his argument, he uses the hypothetical of P and D sitting on adjacent stools at a bar.[34] After a verbal exchange, "D gets up off his stool, sets his feet, clenches his fist . . . and there we stop action: in the split second during which D decides whether to throw the punch."[35] Professor Sanchirico contends that to maximize D's incentive to refrain from throwing the punch, evidence law ought to adopt the view that the determination at the liability or guilt phase must turn solely on trace evidence.[36] Again, trace evidence is the byproduct of the act, and will come into existence only if D engages in the conduct by throwing the punch. In Professor Sanchirico's words, trace evidence is "act dependent evidence."[37] There will be no eyewitnesses to the punch if D does not throw the punch.

However, suppose that D has committed prior violent acts, evidencing a propensity for violence. If character evidence were generally admissible and D realized its general admissibility, he would be in a classic "damned if he does, damned if he doesn't" position.[38] D has nothing to lose by throwing the punch.[39]

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27. *Id.* at 1234, 1261.
28. *Id.*
29. *Id.* at 1261.
30. *Id.* at 1234.
31. *Id.* at 1261.
32. *Id.* at 1260-61.
33. *Id.* at 1259.
34. *Id.* at 1260.
35. *Id.*
36. *Id.* at 1276.
37. *Id.*
38. *Id.* at 1266.
39. *Id.* at 1287; *see also* Lempert, *supra* note 25, at 1683 (discussing how police and prosecutors use past convictions to determine the strength of a case); Joel Schrag & Suzanne Scotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J. L. ECON. &

As predictive testimony, the character evidence exists whether or not D throws the punch. Thus, the character evidence can be used against him at trial whether or not he refrains from the act.[40] Hence, D might as well throw the punch.[41] In short, rather than strengthening the disincentive for misconduct, the general admissibility of character evidence on the merits weakens or dampens the disincentive.[42]

While, in Professor Sanchirico's mind, the incentive setting approach rationalizes the inadmissibility of character evidence on the merits, it also helps explain the courts' receptivity to evidence of the character trait of untruthfulness for impeachment. He writes:

> The explanation arises from the need to verify that what is offered as trace evidence of primary conduct is in fact just that. This is a crucial requirement of incentive setting. If the actual evidentiary traces of conduct are regularly disregarded, while spurious trace evidence often produces penalty, the law cannot successfully influence primary conduct. Eyewitness testimony is a form of trace evidence. Using it as such to influence primary conduct requires making an accurate assessment of whether the witness has lied. . . . The law cares . . . about determining whether the witness has in fact lied on this particular occasion.[43]

Suppose that D refrains from throwing the punch. Professor Sanchirico declares that in that event, D will know that "the only witnesses [who] will testify otherwise are those who are willing to lie on the stand."[44] He then asserts that "[i]f character is indeed probative, then those willing to lie against him then and there are more likely to have lied elsewhere and so are more likely to be impeachable based on past dishonest conduct."[45] Professor Sanchirico concedes that on the alternative assumption that D refrains from throwing the punch, D "must [still] worry about the chance that witnesses on his side will also have a record of or reputation for untruthfulness."[46] However, those witnesses will be "selected by circumstance and coincidence—they happened to be watching" at the right time.[47] Professor Sanchirico then asserts that there is "no special reason to think that they can be

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ORG. 319, 341 (1994) (discussing how a prejudiced jury is "willing to convict a habitual criminal irrespective of the evidence linking that person to the crime").

40. Sanchirico, *supra* note 6, at 1262, 1266, 1275.
41. *Id.* at 1281.
42. *Id.* at 1237, 1264.
43. *Id.* at 1283-84.
44. *Id.* at 1284.
45. *Id.*
46. *Id.*
47. *Id.*

shown to have been dishonest in the past."[48] Consequently, he argues, they will presumably be "less likely to be impeachable by evidence of past lies."[49]

Having rationalized the simultaneous admissibility of the character evidence for impeachment and its inadmissibility on the historical merits, Professor Sanchirico advances the further contention that the incentive setting approach helps explain another apparent anomaly in character evidence doctrine, the routine acceptance of evidence of a defendant's other acts for sentencing and the determination of punitive damages.[50] Just as sentencing often follows the determination of guilt in a criminal case, in a civil action punitive damages are frequently assessed in a later phase after a determination of liability.[51] If character evidence is inadmissible at the earlier stage, how can we justify admitting it in a later phase of the very same proceeding? According to Professor Sanchirico, the incentive setting approach provides the justification.[52] As a general proposition, limiting the parties to trace evidence during the liability or guilt phase maximizes actors' disincentives to refrain from misconduct.[53] However, once it has been determined that the D is liable or guilty, the incentive approach favors providing "more severe [disincentives] for higher propensity offenders."[54] In Professor Sanchirico's judgment, "admitting other act evidence for sentencing and punitive damages . . . turns out to be a simple and almost foolproof way of providing higher powered incentives for higher propensity offenders."[55]

On the one hand, Professor Sanchirico believes that the incentive setting approach has greater explanatory power than the conventional view.[56] As we have seen, he argues that, unlike the conventional view, his approach can explain away several vexing inconsistencies in modern character evidence.[57] In particular, he contends that the incentive setting approach can rationalize the general rule excluding character evidence on the merits with both its admissibility for impeachment and its routine acceptance for sentencing and the determination of punitive damages.[58] On the other hand, Professor Sanchirico acknowledges that

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48. *Id.*
49. *Id.*
50. *Id.* at 1233.
51. Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 345 (1998) ("Many states require that punitive damages proceedings be divided into two phases, the determination of liability and the punitive damages phase—a procedure that resembles criminal sentencing.").
52. Sanchirico, *supra* note 6, at 1267.
53. *Id.*
54. *Id.*
55. *Id.* at 1237.
56. *Id.* at 1282-99.
57. *Id.*
58. *Id.* at 1285-94.

even his approach does not adequately explicate all the aspects of character evidence doctrine.[59] He concludes that if neither the conventional view nor the incentive setting approach adequately accounts for an aspect of character evidence doctrine, "change is needed."[60] He therefore criticizes several aspects of contemporary character evidence doctrine, notably the "mercy rule" allowing an accused to place his or her good character in issue and use it as circumstantial evidence that he or she did not commit the charged offense.[61] He notes that some proponents of the conventional view have virtually conceded that it does not justify the mercy rule.[62] As he points out, the Federal Rules of Evidence Advisory Committee "seems to throw its hands up: '[The mercy rule's] basis lies more in history and experience than in logic . . . .'"[63] He also faults the rule from the perspective of the incentive setting approach.[64] Under that approach, the determination of guilt should turn solely on trace evidence, but:

> The mercy rule only has bite when trace evidence taken alone would be sufficient to convict. Those for whom trace evidence leaves reasonable doubt are not much helped by the option to launch a character based defense. In the end, then, the mercy rule offers dispensation to those whom we would not have predicted would have committed this crime, but who, looking just at the trace evidence marshaled against them, appear to have done so beyond a reasonable doubt.[65]

Hence, the adoption of the incentive setting approach would not only enable the courts to better rationalize most of the key facets of modern character evidence doctrine, it would also authorize some immediate reforms such as the abolition of the mercy rule.

III. DOUBTS ABOUT THE INCENTIVE SETTING THEORY'S COGNITIVE ASSUMPTION OF KNOWLEDGE OF THE CURRENT STATE OF THE LAW

In the course of defending his theory, Professor Sanchirico takes up a number of potential objections. The very first is this: "Is it really reasonable to suppose that individuals account for, or even have knowledge of, evidentiary rules in making out-of-court decisions?"[66] As the phrasing of his question indicates, his theory posits

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59. *Id.* at 1304-05.
60. *Id.* at 1306.
61. *Id.* at 1302-05.
62. *Id.* at 1303.
63. *Id.* (quoting FED. R. EVID. 404 advisory committee's note).
64. *Id.* at 1305.
65. *Id.* at 1304.
66. *Id.* at 1263.

both a cognitive and a behavioral assumption. The cognitive assumption is that laypersons know at least the basic parameters of the modern character evidence doctrine. The further behavioral assumption is that that knowledge will influence their out-of-court conduct. In other words, they will factor that knowledge into their decision-making process and give it significant weight.

To be sure, the cognitive assumption is plausible. There is a widespread perception that contemporary society is more litigious than ever before.[67] There is not only more litigation than ever before, the litigation also receives more media attention. Headlines in the print media are devoted to actual cases such as the Arthur Andersen prosecution.[68] There are cable television channels such as *Court TV* entirely devoted to covering actual cases, while fictional legal series such as *The Practice* and *Law & Order* abound.

Professor Sanchirico points to some empirical evidence of lay knowledge of legal rules. For instance, early in his article he states that in studies on the impact of "substantive legal rules," "while fine tuning is likely ineffective, broad brush effects are well confirmed."[69] Later in the article, he argues that "[o]ne could point to . . . the pervasiveness of lineups, finger prints, and mug shots in popular culture. One might also point to the recent salience of 'three strikes and you're out' laws. If more systematic evidence is required, some recent studies show that sentencing enhancements do have real deterrent effects."[70] Lastly, as his fallback position, Professor Sanchirico adds that if the evidentiary rules were amended to freely admit character testimony, the state of the law "would eventually become apparent" to the average citizen.[71]

Even considering all the arguments advanced by Professor Sanchirico, the case has not yet been made that the typical citizen knows the general parameters of the modern character evidence doctrine. At three different levels, there are significant doubts about the cognitive assumption of knowledge.

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67. *See, e.g.*, Brad Bacon, Note, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 KAN. J.L. & PUB. POL'Y 221, 236 (1998) (referring to today's society as "ultra-litigious").

68. Kurt Eichenwald, *Prosecutors Will Introduce Past 'Bad Acts' by Andersen*, N.Y. TIMES, May 7, 2002, at C1.

69. Sanchirico, *supra* note 6, at 1263 (citing Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 422-23 (1994)).

70. *Id.* at 1276-77 (citing Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 345 (1999)).

71. *Id.* at 1263.

A. *Substantive Law Versus Evidence Law*

To begin with, even if laypersons are generally aware of the content of the substantive legal rules which regulate their behavior, they might be largely ignorant of the tenor of evidentiary doctrine. As previously stated, Professor Sanchirico cites studies indicating that in "broad brush" terms, laypersons are cognizant of "substantive legal rules" such as tort doctrines.[72] It is expectable that the average citizen would bother to gain some understanding of substantive legal rules, since those rules directly regulate his or her conduct.[73]

In contrast, evidentiary rules have only an indirect effect on the typical person's behavior.[74] Courts have implicitly recognized this distinction between the two types of rules, and have developed the due process void-for-vagueness doctrine for legislation governing citizens' behavior.[75] Under the doctrine, legislation is void if it does not give the citizen fair notice of proscribed conduct.[76] The cases applying the doctrine are legion.[77] Yet, research reveals no case in which a court has ever extended the doctrine to an evidentiary rule. The cases have limited the reach of the fair notice requirement to criminal statutes and other legislation directly regulating what Professor Sanchirico would call primary activity.[78]

Although there are evidently no studies on point of laypersons' knowledge of the character evidence rules, studies relating to lay understanding of other evidentiary rules call into question the assumption that the average citizen has even a rudimentary understanding of evidence doctrines such as the character rules. For example, there have been studies of the extent of the lay understanding of the rules

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72. *Id.*

73. *Id.*

74. *Id.*

75. Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 85-88 (1960).

76. San Filippo v. Bongiovanni, 961 F.2d 1125, 1135 (3d Cir. 1992).

77. *See, e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-95 (1982); Gooding v. Wilson, 405 U.S. 518, 527-28 (1972); Papachristou v. Jacksonville, 405 U.S. 156, 165-69 (1972); United States v. Sun, 278 F.3d 302, 308-10 (4th Cir. 2002); Forbes v. Napolitano, 236 F.3d 1009, 1011-13 (9th Cir. 2000), *amended by* 247 F.3d 903, 904 (9th Cir. 2001); United States v. Chestaro, 197 F.3d 600, 604-06 (2d Cir. 1999), *cert. denied*, 530 U.S. 1245 (2000); Thomas v. Davis, 192 F.3d 445, 455-56 (4th Cir. 1999); Karlin v. Foust, 188 F.3d 446, 457-78 (7th Cir. 1999); Chad v. City of Ft. Lauderdale, 66 F. Supp. 2d 1242, 1244-45 (N.D. Fla. 1998); Walker v. Bain, 65 F. Supp. 2d 591, 589-99 (E.D. Mich. 1999); Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 493-500 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000).

78. *See* Romualdo P. Eclavea, Annotation, *Supreme Court's Application of Vagueness Doctrine to Noncriminal Statutes or Ordinances*, 40 L. Ed. 2d 823 (1975).

governing evidentiary privileges.[79] The privilege rules are especially significant. As former Supreme Court Justice Arthur Goldberg pointed out during the Congressional deliberations over the then-proposed Federal Rules of Evidence, privileges have a relatively direct impact on out-of-court behavior.[80] During the same deliberations, Representative Elizabeth Holtzman echoed Justice Goldberg when she remarked that "unlike most evidentiary rules, privileges" affect conduct "outside of the courtroom."[81] Consequently, one would think that of all the evidentiary doctrines, the privilege rules are the ones which laypersons would have the most motivation to learn. Yet, in the studies conducted to date, laypersons have displayed vast ignorance of—and many misconceptions about—the privilege rules. For example, in the original Yale study, the answers of most lay respondents indicated that they mistakenly believed that notwithstanding a privilege, a judge could simply order an attorney to reveal privileged information.[82] Professor Zacharias reached similar findings in his research conducted in the 1980s.[83] The data prompted him to question whether even privilege rules have a substantial impact on out-of-court conduct.[84]

B. *Trace Evidence Versus Predictive Evidence*

At a second level, assuming that laypersons are motivated to learn evidentiary rules, which rules are they most likely to focus on—the rules governing predictive evidence such as character, or the rules controlling the admissibility of trace evidence? Professor Sanchirico employs that distinction in developing his primary incentive setting theory.[85] However, the same distinction is pertinent here. When he is arguing that information about evidentiary rules is "pervasive" in American society, Professor Sanchirico gives several examples.[86] The first two examples are "lineups [and] finger prints."[87] However, by Professor Sanchirico's definitions,

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79. 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 5.2.2 (Richard D. Friedman ed., 2002).

80. *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 142, 143-44 (1973) (testimony of Hon. Arthur J. Goldberg, Former Justice of the Supreme Court of the United States).

81. H.R. Rep. No. 93-650, at 28 (1973).

82. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communication Doctrine*, 71 YALE L.J. 1226, 1262 (1962).

83. *See* Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 381 (1989) (stating the study "revealed widespread misunderstanding among clients as to the nature of confidentiality and its scope").

84. *Id.*

85. Sanchirico, *supra* note 6, at 1234, 1260-62, 1276.

86. *Id.* at 1276.

87. *Id.*

those are examples of trace, not predictive, evidence.[88] As he states earlier in his article, the trace evidence category includes "evidence such as fingerprints and eyewitness recollections . . . ."[89] Those examples came readily to Professor Sanchirico's mind, just as they would to the mind of the average layperson. It is true that if a layperson became concerned whether a litigant could prove that the layperson was present at an incident, it might eventually occur to the layperson to think about a doctrine such as the character evidence rule. However, before his or her mind adverted to that topic, they would more naturally think about such questions as "Will someone be able to testify that she saw me there?" or "Could someone from a crime laboratory find my fingerprints at the scene?" Common sense suggests that the cognitive motivation to learn trace evidence rules is stronger than the motivation to learn predictive evidence rules.

C. *Predictive Evidence Offered on the Merits Versus Predictive Evidence Offered on Credibility*

At still another level, it is doubtful whether the average layperson understands the basic parameters of the character evidence rules as Professor Sanchirico describes them.[90] The differential treatment of character on the merits and for impeachment is one of the key apparent inconsistencies which Professor Sanchirico claims his theory has the power to rationalize.[91] According to Professor Sanchirico, if D knows that character evidence is inadmissible on the merits, D will have a stronger motivation to refrain from throwing the punch.[92] Moreover, if D knows that character evidence is admissible for impeachment, D will realize that he can effectively attack the credibility of anyone who furnishes false trace evidence against him.[93]

The question thus arises whether the average layperson knows and appreciates the distinction between the two uses of character evidence. Again, there are no studies on point, but there is some research which sheds light on the question by analogy. There have been studies of lay jurors' ability to comply with a limiting instruction confining evidence of an accused's prior conviction to a credibility use. For the most part, the studies conclude that the jurors have great difficulty following the instruction—many jurors disregard the instruction and misuse the evidence in

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88. *Id.* at 1234.
89. *Id.*
90. *Id.* at 1263, 1274.
91. *Id.* at 1282-86.
92. *Id.* at 1263-64.
93. *Id.* at 1284.

their reasoning on the merits of the case.[94] If the jurors experience such difficulty applying the trial instruction setting out the distinction, their difficulty is itself evidence that before trial they were unfamiliar with the distinction. If they had realized the gist of the distinction before they walked into court, they presumably would have been able to apply the instruction with greater ease. Thus, the limiting instruction studies are at odds with the assumption that the typical layperson knows even this elementary aspect of modern character doctrine.

IV. DOUBTS ABOUT THE INCENTIVE SETTING THEORY'S BEHAVIORAL ASSUMPTION UNDER THE CURRENT STATE OF THE LAW

If the only flaw in the incentive setting theory were the weakness of its cognitive assumption, the flaw could easily be remedied. The legal system could embark on an intensive campaign to publicize the most salient character rules. However, the cognitive assumption is not the only premise underlying the theory; there is a further behavioral assumption. Even if the average citizen gained a basic knowledge of the current state of the law, it would be fallacious to leap to the conclusion that that knowledge would have a material influence on the citizen's out-of-court behavior.

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94. *See, e.g.*, James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 587, 602-06 (1985) (noting that as part of the University of Chicago Jury Project, Dale Broeder "interviewed jurors after they had deliberated and rendered verdicts in criminal trials," and asserted that the "'jurors almost universally used the defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial'"); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37, 43 (1985) (concluding that evidence of prior convictions affects verdicts despite limiting instructions); Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 347-48 (stating that in "the studies of past criminal record evidence, . . . [j]urors . . . may not have understood the reasoning behind an instruction not to take the defendant's prior record as evidence of his criminal propensity. . . . This . . . may have led to the jurors' inability to follow the limiting instruction given them."); Edward E. Gainor, Note, *Character Evidence by Any Other Name . . .: A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 764, 789, 791 (1990) ("Studies and surveys support the view that a jury is likely to give substantial consideration to evidence of prior convictions in assessing the defendant's guilt, despite instructions to the contrary; . . . numerous studies . . . support . . . [the] conclusion that there is an 'overwhelming tendency for jurors . . . to misuse prior conviction evidence.'"); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961) (discussing research that indicates "jurors do not segregate evidence introduced for impeachment purposes"); David S. Prince, Note, *Enhancing Penalties by Admitting 'Bad Character' Evidence During the Guilt Phase of Criminal Trials*—State v. Bishop, 1989 UTAH L. REV. 1013, 1017-19 (summarizing the studies).

There is, of course, the question of whether, as a general proposition, evidentiary doctrines can exert considerable sway over lay conduct.[95] However, more specifically, there are several reasons to be skeptical whether knowledge of the character evidence rules would have the behavioral impact that Professor Sanchirico hypothesizes.

In order for the current state of the law to have such an impact, a set of favorable factors would have to concur: The actor would need time to consciously advert to the evidentiary rules in his or her decision-making process; the actor would have to be in a frame of mind to consider the rules; and the rules themselves would need to send a fairly clear signal, encouraging conduct in the desired direction. In the case of the character evidence rules, all three factors are in serious doubt.

A. *The Adequacy of the Time for a Rational Decision*

To begin with, although the idealized *homo rationalis* of economics[96] has the time to weigh all the relevant utilitarian considerations, legal actors sometimes do not enjoy that luxury. Consider Professor Sanchirico's own hypothetical. After an unpleasant verbal exchange with P, "D gets up off his stool, sets his feet, clenches his fist . . . and there we stop action: in the split second during which D decides whether to throw the punch."[97] Even if D is intimately familiar with the current state of the law of character evidence, does D realistically have enough time to advert to that consideration before deciding whether to throw the punch? Assuming that D is in a frame of mind to think rationally, would the character evidence rules come quickly to mind? D might have enough time to think about the substantive law implications of his contemplated conduct: "After P's insult, I'd love to nail P. But is it worth the risk of being prosecuted or sued?" If D had an additional

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95. After his review of the empirical data on attorney-client privilege rules, Professor Zacharias concluded that while the data "support[s] the notion that confidentiality rules have *some* impact . . .[,] they also cast doubt on whether the effect is as substantial as proponents of confidentiality presume." Zacharias, *supra* note 83, at 377-79 (emphasis added). In his article, Professor Sanchirico mentions the contention that rape shield laws, such as Federal Rule of Evidence 412, will encourage victims to report and prosecute sexual offenses. Sanchirico, *supra* note 6, at 1294-95. Rape shield laws have been in effect in most American jurisdictions for a substantial period of time. Yet, according to some researchers, "[s]tudies show rape-shield statutes have had little effect on reporting rates of sexual assault victims." Richard A. Wayman, Note, Lucas *Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865, 886 (1992).

96. *See* JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 51 (1996) (stating that "justice is simply rational prudence"); LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 18-23 (1949) (proposing that "[h]uman action is always rational," and is based on a "cause and effect" or "means and ends" consideration); Lempert, *supra* note 25, at 1709-10 (discussing how economists analyze the adversary system specifically by positing participants who are rational actors).

97. Sanchirico, *supra* note 6, at 1260.

moment, his mind could turn to the availability of trace evidence. He might quickly scan the bar and think, "Is anyone watching?" However, even if D is knowledgeable about character evidence, it seems fanciful to suggest that in that "split second," the predictive character evidence rules will come to mind quickly and forcefully enough to influence D's behavior.

B. *The Rationality of D's Frame of Mind*

Even if D has enough time, the next issue is whether his frame of mind will be conducive to rationally factoring the character evidence rules into his decision. If after P's insult D has already performed the acts of getting off the stool, setting his feet, and clenching his fist,[98] what is D's probable subjective state of mind? Unless D is saintly, D is likely angry. Again, will that anger realistically allow him to dispassionately weigh the effect that the character evidence rules will have on his various possible courses of action? At one point in his article, Professor Sanchirico observes that individuals sometimes "lack suitable control over their impulses."[99] That observation comes into play here. The D in Professor Sanchirico's hypothetical may have a strong impulse, animated by anger, to punch P.[100] In the hypothetical situation, any D would have to possess extraordinary self-control to force himself to pause, calm down, and engage in a thought process thorough enough to include a consideration of the character evidence rules.

Of course, these criticisms do not completely undermine the behavioral assumption underpinning the incentive setting theory. Although the criticisms are telling in Professor Sanchirico's hypothetical, one can conceive of other situations in which a D would have enough time and presence of mind to consider the predictive character rules. Suppose, for example, that rather than sitting in a bar, D is a businessperson sitting in her office. Rather than deciding whether to punch P who is sitting on the adjacent barstool, D is making a calculated decision whether to engage in a sophisticated scheme designed to defraud P. In this hypothetical, D certainly has adequate time; and if D does understand the current body of character evidence law, D might include that law as a consideration in her calculation. However, even in this hypothetical, the desired incentive setting might not occur.

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98. *Id.*
99. *Id.* at 1280.
100. *See id.* at 1260.

C. *The Difficulty of a Rational Prediction of the Subsequent Admissibility of Uncharged Misconduct Evidence in the Current State of the Law*

Why might the theory fail, even given enough time and a rational, calculating D? What would prevent D's knowledge of the current state of the character rules from setting the incentives that Professor Sanchirico targets? The rub here is that in his analysis of the current state of the "character" rules, Professor Sanchirico places undue stress on the formal character rules[101] governing the use of character as circumstantial proof of conduct. In so doing, he slights the impact of the potential introduction of D's prior misconduct on non-character theories sanctioned by Federal Rule of Evidence 404(b).[102] From D's perspective under the incentive setting theory, the critical question is this: If I refrain from the conduct, do I have a relatively firm assurance that the jury will be shielded from any evidence of my prior misdeeds? The formal character rules may indeed preclude the introduction of testimony about the earlier offenses as circumstantial proof of D's conduct, but at most, those rules are only half the story. The current state of the law includes the uncharged misconduct rules as well as the character rules. Rather than sending a clear signal that D can ensure the exclusion of evidence of prior misconduct on the historical merits, the current state of the law sends D a decidedly mixed message.

In pertinent part, Federal Rule of Evidence 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .[103]

Professor Sanchirico does acknowledge that the possibility of introducing D's uncharged misconduct on non-character theories under the second sentence of Rule 404(b) represents "something of a loophole" to the formal character strictures.[104] However, that acknowledgment is an understatement. The volume of uncharged misconduct admitted at trial on non-character theories is staggering.[105] In the mid-1980s, "[a] WESTLAW search of key numbers 369 (Other offenses as evidence of offense charged in general), 370 (Acts showing knowledge), and 371 (Acts showing

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101. FED. R. EVID. 404-05.

102. *See* FED. R. EVID. 404(b) (prohibiting evidence of prior misconduct from being used as character evidence, but allowing it to be used for other purposes such as proof of motive, opportunity, and intent).

103. *Id.*

104. Sanchirico, *supra* note 6, at 1299.

105. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:04 (rev. ed. 1999).

intent or malice or motive) revealed 11,607 state cases . . . and 1,894 federal cases."[106] Rule 404(b), governing the admission of uncharged misconduct on these theories, generates more published opinions than any other provision of the Federal Rules of Evidence.[107]

Trial judges admit uncharged misconduct in a large number of cases. To make matters worse for the incentive setting theory, for several reasons, at the time when D must decide whether to act, it can be virtually impossible for D to predict whether the evidence will later be ruled admissible. One reason is that some of the criteria for determining admissibility are vague, rendering rulings unpredictable. On its face, Rule 404(b) allows a proponent of uncharged misconduct to introduce the evidence for the purpose of showing a "plan" common to the charged and uncharged acts.[108] There has long been controversy over the foundational requirements for satisfying the common plan or scheme theory of admissibility.[109]

Another complicating factor is that evidence otherwise admissible under Rule 404(b) is subject to exclusion under Rule 403.[110] By its terms, Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[111]

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106. State v. Johns, 725 P.2d 312, 317 (Or. 1986).

107. 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08] (1996); 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239 (1978); Crane McClennen, *Admission of Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b)–It's Time to Start Following the Rules*, ARIZ. ATT'Y, June 1990, at 13 (stating "[t]he area of evidence that has generated most of the litigation in recent years is the admission of evidence of other crimes, wrongs, or acts"); Eric D. Lansverk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1214 n.6 (1986); *see also* FED. R. EVID. 404(b) advisory committee's note (discussing the 1991 amendment to the rule and stating "Rule 404(b) has emerged as one of the most cited rules in the Rules of Evidence").

108. FED. R. EVID. 404(b).

109. *See, e.g.*, David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 546-51 (1994); Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute Over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005, 1011-16 (1995); Jeannie Mayre Mar, *Washington's Expansion of the "Plan" Exception After* State v. Lough, 71 WASH. L. REV. 845, 849-50 (1996); Miguel A. Mendez & Edward J. Imwinkelried, People v. Ewoldt*: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 478-80 (1995); Kenneth G. Flickinger, Jr., Note, *Evidence—Relevance and Materiality—Similar Fact Evidence to Show Plan or Scheme*, 2 ARIZ. L. REV. 140, 141 (1960).

110. FED. R. EVID. 403.

111. *Id.*

The appellate courts have concluded that in assessing the "probative value" of uncharged misconduct, the trial judge should consider whether the prosecution has a legitimate need for the evidence in the sense that the prosecution is offering the evidence to prove a material issue in dispute at trial.[112] At the time of trial, is the accused willing to stipulate to the fact that the prosecution offers the evidence to establish a material fact,[113] or will the defense controvert that fact?[114] Any trial is likely to occur months or years after the incident. Earlier when D must decide whether to punch P, D will not be in a position to predict the linchpin factual issues in any litigation ensuing from his confrontation with P.

It will not only be virtually impossible for D to make that prediction, it will also be frightfully difficult for D to forecast how the trial judge will exercise his or her discretion under Rule 403. After the trial judge gauges the probative value of the evidence, Rule 403 empowers the judge to balance the probative value against the incidental probative dangers such as the risk that the admission of the evidence will tempt the jurors to decide the case on an improper basis, perhaps their revulsion at D's long criminal history.[115] Those competing factors defy quantification.[116] In part for that reason, the appellate courts grant the trial judge exceptionally broad discretion in striking a balance.[117] The commentary to the American Law Institute's *Model Code of Evidence* provision codifying the same doctrine states that "[t]he application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as precedent in another."[118] The Court of Appeals for the Third Circuit voiced a widespread judicial sentiment when it wrote that "[i]f judicial restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."[119] The breadth of the trial judge's discretion prevents D, in deciding whether to punch P, from confidently predicting whether his

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112. 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §§ 8:10-15 (rev. ed. 1999).

113. *Id.* § 8:11; *see also* Old Chief v. United States, 519 U.S. 172 (1997).

114. 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 8:15 (rev. ed. 1999).

115. FED. R. EVID. 403 advisory committee's note.

116. C.R. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 290, 347 (1979).

117. *See, e.g.*, Hurt v. Coyne Cylinder Co., 956 F.2d 1319, 1328 (6th Cir. 1992) (holding that it is not improper for a judge to make a subjective determination of prejudice); United States v. Nickens, 955 F.2d 112, 125 (1st Cir. 1992) (noting that several different rulings by the trial judge might be within "the ambit of reasonable debate"); United States v. Barron, 707 F.2d 125, 128 (5th Cir. 1983) (explaining that the trial court has broad discretion and will not be reversed absent a "substantial abuse" of discretion).

118. MODEL CODE OF EVIDENCE Rule 303 cmt. (1942).

119. United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978).

uncharged misconduct will be admissible against him in any subsequent litigation. Thus, the current state of the law does not establish a significant incentive to refrain from misconduct even for a D who: (1) knows the current state of the law; (2) has enough time to advert to that body of law before making his decision; and (3) is calm and deliberate enough to factor that body of law into his decision-making process. Unless we are to mislead D by telling him only part of the story—and leaving him in ignorance about the significance of Rule 404(b)—the current state of the law cannot achieve the objective of the incentive setting theory.

V. THE NORMATIVE QUESTION OF THE WISDOM OF IMMEDIATELY REVISING THE CURRENT STATE OF THE LAW OF CHARACTER EVIDENCE IN ORDER TO SET INCENTIVES FOR OUT-OF-COURT CONDUCT

Parts II and III of this Article discussed the validity of the cognitive and behavioral assumptions underpinning the incentive setting theory. Those doubts relate to essentially empirical questions. In fact, do most laypersons know the basic outlines of contemporary character evidence rules? Assuming such knowledge, would such knowledge increase the typical layperson's incentive to refrain from undesirable, out-of-court conduct? Parts II and III raised doubts about those assumptions, but, in the final analysis, subsequent empirical investigation could remove those doubts. Common sense suggests that at least some of these doubts have merit. However, experience teaches that it can be a mistake to rely on "the primitive psychology of common sense."[120] On occasion, psychological research has demonstrated that the truth is counterintuitive, running contrary to common sense notions.[121] Given the number of substantial questions about the validity of these assumptions, it might be surprising if empirical investigation validated them,

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120. HUGO MUNSTERBERG, ON THE WITNESS STAND: ESSAYS IN PSYCHOLOGY AND CRIME 9-10, 63 (1923); Hugo Munsterberg, *Nothing but the Truth*, MCCLURE'S MAG., 1907, at 532, 536.

121. David L. Abney, *Expert Testimony and Eyewitness Identification*, CASE & COMMENT, Mar./Apr. 1986, at 27 (stating that "experimental data reveal no relationship between the certainty and the accuracy of an eyewitness identification"); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243 (1980) (concluding that courts should not equate witness confidence with the accuracy of the identification); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUDIES 395, 400-01 (1987) (noting the lack of correlation between the confidence of an eyewitness and the accuracy of the eyewitness's identification); Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, *in* CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 105, 107-08 (M. Tonry & N. Morris eds., 1981) (documenting the fallibility of eyewitness memory); Elizabeth F. Loftus, *The Eyewitness on Trial*, 16 TRIAL, Oct. 1980, at 37 (discussing the questionable accuracy of eyewitness identifications); JOHN MONAHAN & ELIZABETH F. LOFTUS, *The Psychology of Law*, *in* 33 ANNUAL REVIEW OF PSYCHOLOGY 441, 450 (Mark R. Rosenzweig & Lyman W. Porter eds., 1982) ("Despite the fact that jurors give great weight to the 'confidence' of an eyewitness in assessing his or her credibility, confidence in recognition has been found unrelated to accuracy of recognition.").

but it is certainly not out of the question. Professor Sanchirico has formulated a creative, comprehensive theory that warrants serious empirical investigation.[122]

In the short-term, the question is whether we should immediately implement the incentive setting theory. In his article, Professor Sanchirico seems ambivalent about that question. At times, he appears content to initiate a debate over the soundness of the traditional "truth seeking paradigm" of the trial.[123] His stated objective is attaining a "deeper understanding" of the theories rationalizing trials and the evidentiary rules enforced at trial.[124] Other passages, though, indicate that he wants to take the next step and implement immediate change based on the supposed validity of the incentive setting theory. For example, he flatly declares that "[t]he incentives approach advocated in this Article cannot accommodate the 'mercy rule,'"[125] giving the accused the election to use his or her character as circumstantial proof of conduct on the merits. He argues that "it may well be time to put the mercy rule out of its misery."[126] More broadly, he argues that the validity of the incentive

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122. As previously stated, the agenda for future evidence reform must place a high priority on rigorous, empirical inquiry into many of the psychological assumptions inspiring evidentiary doctrines. CARLSON ET AL., *supra* note 3, at 10.

123. Sanchirico, *supra* note 6, at 1306.

124. *Id.*

125. *Id.* at 1305.

126. *Id.* Although Professor Sanchirico contends that the mercy rule cannot be rationalized under the conventional view, he overlooks one possible defense of the mercy rule:

> To make sense of the character rules, we should begin by inquiring why the law singles out the accused and allows the accused to open the issue and employ his character as circumstantial proof of conduct. One rationale for doing so is that of all the possible uses of character evidence, this use has the greatest probative worth relative to the ultimate burden of proof. Introducing evidence is not an end in itself; it is a means of meeting a burden of proof. The defendant need only raise a reasonable doubt to gain an acquittal. In surveys of trial judges in the United States, most judges roughly equated the standard of proof beyond a reasonable doubt with a probability of guilt somewhere between 80 and 90%. Subtracting those figures from a probability of 100% certainty, the defendant's objective is to raise a probability of innocence falling somewhere between 10% and 20%. It may be true . . . that character is a poor predictor of conduct. If that is so, past innocent conduct may fall short of creating a probability of innocence of the charged crime. However, the accused's evidence of law-abiding character need not create a 51% probability of innocence to satisfy the defense's objective; if the trier interprets proof beyond a reasonable doubt as necessitating a 90% guilt probability, law-abiding character raising only a 15% innocence probability may be highly probative relative to the defense's practical burden and win the accused an acquittal. At one time in the United States, it was a widespread practice for the judge to charge the jury that standing alone, good character evidence could raise a reasonable doubt mandating an acquittal. Considered in relation to the respective burdens of proof, character evidence is more useful to an accused than to the prosecution or to either civil party.

setting theory demonstrates that "despite most of what is said about the object of trial, our desire to find the truth is subordinate to our desire, in effect, to shape it through the provision of incentives."[127]

I submit that it would be premature either to immediately rely on the incentive setting theory to revise individual character evidence rules or to abandon the conventional view of the purpose of trial proceedings. As Professor Sanchirico remarks in another context, "multitasking" can be "delicate and risky."[128] That remark is insightful. In effect, he is proposing that evidentiary rules be revamped in order to "multitask." One task is the traditional function of reconstructing the past and attempting to "discover[] what really happened."[129] Professor Sanchirico argues that evidence law should assume a second task, that is, providing incentives to regulate behavior outside the courtroom.[130] As he candidly admits, "the implications for trial of primary incentive setting often do correspond to those of truth seeking. But not always."[131] There are times when tailoring the character evidence rules to enhance primary activity incentives will impair their effectiveness in helping the trier of fact to get at the truth.

Caution is in order. One of the most fundamental functions of government is to "insure domestic Tranquility."[132] In part, government does so by giving its citizens access to a public litigation system for pacific resolution of disputes. The hope is that the vast majority of citizens will resort to that system and eschew private, violent means of dispute resolution. However, the system will fail unless there is a widespread public perception that the system operates fairly, yielding accurate, just decisions.[133] To the extent that the system adopts evidentiary rules that frustrate the search for truth and the public becomes cognizant of those rules, that public perception is in peril.

Edward J. Imwinkelried, *The Admissibility of Similar Fact Evidence in Civil Cases in the United Kingdom and the United States: The Need for Rethinking on Both Sides of the Atlantic*, 9 LIVERPOOL L. REV. 137, 153-54 (1989).

127. Sanchirico, *supra* note 6, at 1232.

128. *Id.* at 1280.

129. *Id.* at 1229.

130. *Id.* at 1230-31.

131. *Id.* at 1231.

132. U.S. CONST. pmbl.

133. *See* JOHN BIESANZ & MAVIS BIESANZ, INTRODUCTION TO SOCIOLOGY 586 (1969) (stating that governmental authority must be founded on social consensus regarding fundamental values and methods to preserve them); Seymour Martin Lipset & William Schneider, *Political Sociology*, *in* SOCIOLOGY: AN INTRODUCTION 399, 406 (N. Smelser ed., 1973) (noting that when attempting "to analyze a nation's political stability . . ., knowledge of its level of legitimacy is decisive"); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (arguing that the need to promote public acceptance of verdicts can explain many evidentiary and procedural rules).

There are times when it is justifiable to frustrate the search for truth and exclude probative evidence.[134] However, as Thayer declared more than a century ago, the public stake in discovering the truth should prevail unless the advocate of the asserted countervailing interest demonstrates that the interest is both real and substantial.[135] In the instant case, although the claimed explanatory power of the incentive setting theory has a tempting allure, there are too many nagging questions about the cognitive and behavioral assumptions implicit in the theory. Those assumptions should be tested with rigor but also with an open-mindedness to the possibility that they will be validated, justifying at least a substantial modification of the trial paradigm. However, until those tests are conducted and produce solid validation, it would be irresponsible to assign trials the second task and engage in social engineering through evidence doctrine.

VI. CONCLUSION

Professor Sanchirico's theory poses a question that transcends the issue of the admissibility of character evidence. In some instances, he proposes excluding probative character evidence in order to create incentives to encourage persons to refrain from antisocial conduct.[136] Although the dominant thrust of Anglo-American evidence scholarship has been rationalist,[137] in many cases, contemporary evidence rules exclude evidence in the hope of encouraging out-of-court conduct. For instance, we bar evidence of subsequent remedial measures in the hope that landowners will be encouraged to improve the safety of their property and manufacturers will be more likely to redesign their products—free from the fear that the improvement or redesign will come back to haunt them at a subsequent trial.[138] We invoke similar reasoning to justify excluding probative evidence of compromise negotiations[139] and plea bargaining.[140] Trial court calendars are so backlogged that the public interest favors the disposition of cases short of trial: "[O]ur system of adjudication could not survive if substantially more cases went to trial than are tried currently,"[141] and the concern is that litigants would be less inclined to engage in out-of-court settlement negotiations if they knew that probative statements uttered

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134. *See, e.g.*, *infra* text accompanying notes 139-40.

135. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-66 (1898).

136. *See supra* notes 11-13 and accompanying text.

137. WILLIAM TWINING, RETHINKING EVIDENCE: EXPLANATORY ESSAYS 32-91 (1990).

138. FED. R. EVID. 407 advisory committee's note.

139. FED. R. EVID. 408 advisory committee's note.

140. FED. R. EVID. 410 advisory committee's note.

141. DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY § 3.3.3., at 307 (rev. ed. 2002).

during the negotiations could be used as evidence against them at trial.[142] Moreover, as previously stated, the traditional, Wigmorean rationale for privileges is that they are needed to encourage laypersons to consult with and divulge to confidants such as attorneys and therapists.[143]

Admittedly, in some of these settings it is more reasonable to assume that the state of the relevant evidence law will influence the actor's conduct. In the bar, it is highly unlikely that there will be an attorney at D's side to talk sense and character evidence law to D before D makes a final decision whether to punch P. In contrast, when the actor is a manufacturer contemplating the redesign of a product to improve its safety, the manufacturer's in-house counsel might bring the pertinent evidentiary rule to the attention of the decision-makers. Or, if the actor is involved in settlement negotiations or plea bargaining, the actor is either already in or on the brink of litigation; and may have retained counsel who will apprise the actor of the evidentiary rules. However, all these situations share a common denominator: In each case, the law has decided to bar relevant evidence in attempted social engineering, designed to influence out-of-court conduct.

However, the privilege studies conducted to date call into question the assumption that laypersons are acutely concerned about evidentiary rules when they make decisions about out-of-court conduct.[144] Given their professions, it is understandable that judges and attorneys constantly have litigation on their mind. However, the world may not revolve around the courtroom to the extent that the law has assumed in the past. In truth, even at this late date relatively little is known "empirically about the implications of evidence rules for behavior . . . ."[145] Abstract "analysis can only take us so far. Empirical data are needed."[146] Much of Professor Sanchirico's analysis relies on conjecture about empirical propositions. An investigation into the incentive setting theory's assumptions is desirable not only because the theory itself is significant, but also because it provides an important opportunity to study the utility of social engineering through evidence. If the investigation validates the theory, the acceptance of the theory could lead to useful reforms of character evidence doctrine. However, if the investigation undercuts the theory, there will be more reason to be dubious of evidentiary social engineering—and even more fuel for the call to relax evidentiary barriers restricting the introduction of valuable, probative evidence.

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142. *See id.* at 308-09 (citing MCCORMICK, EVIDENCE § 76, at 158 (1954)).

143. 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 3.2.1 (Richard D. Friedman ed., 2002).

144. *Id.* § 5.2.2.

145. Lempert, *supra* note 25, at 1684.

146. *Id.* at 1683, 1709.


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