Limited Admissibility and Its Limitations

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LIMITED ADMISSIBILITY AND ITS LIMITATIONS
LISA DUFRAIMONT†

I. INTRODUCTION

Among the challenges facing juries and judges in adjudicating cases is the obligation to use evidence for limited purposes. Evidence inadmissible for one purpose is frequently admissible for other purposes, a situation known as "limited admissibility." Where limited admissibility arises in jury trials, courts generally deliver limiting instructions outlining the inferences that can legitimately be drawn from the evidence and identifying prohibited lines of reasoning to be avoided. Limiting instructions represent an expedient solution to limited-admissibility problems, but they create obvious problems of their own. A thoughtful observer might suspect—as psychological studies confirm—that limiting instructions are likely to fail in their purpose of

† Faculty of Law, Queen's University. I would like to thank Don Stuart and my other Queen's Law colleagues for their incisive comments on an earlier draft of this paper presented at a faculty works-in-progress seminar.


2 See e.g. R v White, 2011 SCC 13, [2011] 1 SCR 433 [White] ("[t]he goal of ... providing a limiting instruction is ... to prevent the jury from considering the evidence ... with respect to one or more issues" at para 30).
constraining jury reasoning.\(^3\) Jurors may not understand such instructions, and even if they do understand, they may be unable or unwilling to follow them.\(^4\)

Still, questioning our legal system’s faith in limiting instructions can be tricky. Courts in both Canada and the United States frequently interpret criticisms of the assumption that juries follow instructions as attacks on the jury system itself.\(^5\) Regrettably, this line of thinking insulates from examination not only the lay jury but also the largely judge-made procedural rules that may lead juries astray. Given the importance of the jury in the common-law system, particularly in criminal cases, one can readily understand why judges avoid reasoning in ways that undermine the jury.\(^6\) But refining procedural rules to help juries understand and comply with the law should enhance and not detract from the legitimacy of the jury system. This paper aims to demonstrate how the courts’ approach to limited admissibility can be improved—both by reducing the reliance on limiting instructions and by adjusting the content of those instructions—without calling into question the institution of trial by jury.

The paper explores the concept of limited admissibility in the common law of evidence,\(^7\) with an emphasis on the approach taken by Canadian

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\(^3\) See e.g. Daniel D Blinka, “Delusion or Despair: The Concept of Limited Admissibility in the Law of Evidence” (1989) 13:2 Am J Trial Advoc 781 [Blinka, “Delusion”] (“[d]espair arises because it is widely recognized that juries cannot follow these directives” at 781). See also the discussion in Part II.B, below.

\(^4\) See e.g. Leonard, Wigmore, supra note 1, ch 1 at 23.


\(^6\) In Canada, many of the most serious criminal cases are tried by jury. Importantly, jury trial is normally compulsory in murder cases. See Criminal Code, RSC 1985, c C-46, ss 469–71. A criminal accused who faces at least five years’ imprisonment also has a constitutional right to jury trial under paragraph 11(f) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

\(^7\) Phrases like “common law of evidence” are used in this paper in reference to the system of evidentiary regulation in place in common-law countries, including its common law, statutory, and constitutional components.
The analysis begins in Part II with an overview of the role of limited admissibility in evidentiary regulation, including its relationship to our larger system of exclusionary rules, the psychological findings that cast doubt on the efficacy of limiting instructions, and the conceptual difficulties limited admissibility can create. The discussion will reveal that the law is ambivalent about limited admissibility, a doctrine that appears both indispensable and potentially ineffectual. Part III of the paper will examine in more detail Canadian courts’ approach to limited-admissibility issues, which exemplifies this ambivalence. In Part IV, the analysis turns to some proposals for rationalizing the limited-admissibility analysis. I will argue that courts addressing limited-admissibility issues should accept the legitimacy of jury fact-finding, aspire to apply rules that are realistic from a psychological point of view, and focus on the policies underlying evidentiary rules. Ultimately, I will offer two concrete suggestions. First, courts should avoid limited admissibility where possible by distinguishing between the permissible and impermissible uses of evidence only when it is necessary to do so. Second, when limiting instructions are needed, judges should consider the social-science research and aim to design instructions that will be persuasive to juries.

II. LIMITED ADMISSIBILITY IN THE LAW OF EVIDENCE

Limited admissibility refers primarily to situations where evidence in question logically grounds more than one inference related to the material issues, and is admissible to support one or more of these inferences, but also inadmissible to support one or more of them. This phenomenon has been called “purpose-oriented” limited admissibility, because the limitation applies to the inferential purposes for which the evidence can be used. This purpose-oriented form of limited admissibility will be the focus of the

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8 Such an analysis is arguably long overdue, since Canadian legal literature has thus far grappled with problems of limited admissibility almost exclusively in discrete doctrinal contexts. See e.g. the discussion of particular rules of limited admissibility in Owen M Rees, “The Jury’s Propensity for Prohibited Reasoning: Corbett Revisited” (2002) 7:1 Can Crim L Rev 333.

9 Leonard, Wigmore, supra note 1, ch 1 at 13.
analysis in this paper, but it is worth noting that limited admissibility can also arise in other situations. For example, evidence may be admissible against one party and not another party to the litigation.\(^\text{10}\) The common theme in all situations of limited admissibility is that the fact-finder is not free to consider the evidence for every material issue to which it is relevant. Rather, limited-admissibility rules seek to constrain the evaluation of evidence and block the fact-finder from engaging in impermissible reasoning.

A. A FOUNDATIONAL DOCTRINE

This section will show that limited admissibility forms a part of the basic structure of evidence law in the common-law tradition. Conceptually, the potential for limited admissibility inheres in our purpose-driven understanding of admissibility and exclusionary rules. In practice, limited-admissibility rules have become a ubiquitous form of evidentiary regulation.

1. LINK WITH EXCLUSIONARY RULES

Exclusionary rules lie at the heart of evidence law.\(^\text{11}\) Evidence can be ruled inadmissible on a variety of grounds, and the nature, scope, and wisdom of such exclusionary standards remains a central preoccupation of evidence scholars.\(^\text{12}\) In discussing exclusionary rules, one falls easily into the shorthand of describing certain “types” of evidence as admissible or inadmissible, but this shorthand can be misleading. In fact, admissibility questions must be decided in the context of particular cases because admissibility is purpose driven. No admissibility issue can be decided without determining, first, the

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\(^{10}\) See e.g. Bryant, Lederman & Fuerst, *supra* note 1 at 74; Leonard, *Wigmore, supra* note 1, ch 1 at 13, 27–28 (discussing “party-oriented” limited admissibility).

\(^{11}\) See e.g. *R v Graat, [1982] 2 SCR 819, 144 DLR (3d) 267*, Dickson J ("[w]e start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions" at 835, cited to SCR).

purpose for which the evidence is being called and, second, whether the evidence is admissible for that purpose. A prominent example of this purpose-driven analysis is the hearsay rule, which operates to exclude out-of-court statements only when they are relied on to prove the truth of their contents. In the hearsay context, as in many others, admissibility turns on the inferential use to be made of the evidence.

The purpose-driven character of the admissibility analysis constitutes a fundamental feature of our system of evidentiary regulation. It also gives rise to the doctrine of limited admissibility. The fact that exclusionary rules only prohibit the use of evidence for particular purposes makes it possible for evidence to be admissible for some purposes but inadmissible for other purposes—a situation that frequently arises in practice. Emerging as it does from the purpose-driven conception of admissibility that underlies exclusionary rules, limited admissibility represents an inherent structural feature of evidence law.

13 See Leonard, *Wigmore*, supra note 1, ch 1 at 2. See also John Henry *Wigmore*, *Evidence in Trials at Common Law*, revised ed by Peter Tillers (Boston: Little, Brown, 1983) vol 1 ("when an evidentiary fact is offered for one purpose and becomes admissible ... in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity" at 694).

14 See especially *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787 [*Khelawon*] ([the] purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises" at para 36).

15 See e.g. Richard D Friedman, "General Editor's Introduction to the Volume: Limitation on Admissibility and Rationales for Exclusion" in Leonard, *Wigmore*, supra note 1 [Friedman, "Intro"] (hearsay is an example of the proposition that "[m]ost exclusionary rules provide in effect that a given type of evidence is not admissible to prove a particular type of proposition or to operate by a particular type of reasoning" at xxxviii).

16 See *Wigmore*, supra note 13 ("the entire structure of the modern law of evidence rests on the specialized and limited use of evidence" at 695, n 1).

17 See *ibid* ("[i]n practical application this doctrine is constantly exemplified" at 694).

Moreover, because limiting instructions formally acknowledge the improper purposes for which evidence may not be used, offering such instructions reaffirms exclusionary rules. Beyond its obvious function of attempting to constrain the fact-finder's use of evidence, limited admissibility also benefits the party against whom the evidence is led in two important ways: First, when evidence is admitted for limited purposes, the parties are bound to confine their arguments to the permissible uses of the evidence. Second, just as outright exclusion of evidence can lead to the collapse of a case, limited-admissibility rules can ground judgment against a party as a matter of law (on a motion for nonsuit or directed verdict) where the impermissible use of the evidence constitutes the only proof of an essential fact. In short, the doctrine of limited admissibility both flows from and complements our system of exclusionary rules.

2. ENFORCEMENT THROUGH LIMITING INSTRUCTIONS

Given that judges must continually distinguish the permissible and impermissible uses of evidence, it seems natural that they should have devised a mechanism for admitting evidence for permissible purposes only. After all, the alternatives are unappealing: excluding the evidence altogether would mean losing its value for the proper purpose, while admitting the evidence without any limitation would prejudice the party against whom an improper inference might be drawn. Where an item of evidence grounds multiple inferences, the doctrine of limited admissibility promises to relieve judges of

19 See Friedman, "Intro", supra note 15 ("limitations on admissibility would erode if the instructions were not given" at xlii).

20 See Blinka, "Ethical Firewalls", supra note 18 at 1234; Leonard, Wigmore, supra note 1, ch 1 at 87; Blinka, "Delusion", supra note 3 (in that sense, "the doctrine of limited admissibility is as much a 'lawyer control device' as it is a jury control device" at 785).

21 See e.g. Friedman, "Intro", supra note 15 at xxxix.

22 See e.g. ibid (courts have three choices where evidence grounds proper and improper inferences, "(1) exclude the evidence altogether, (2) admit it subject to a limiting instruction, and (3) admit it without restraint" at xli).
having to make a stark choice between these unattractive alternatives. The main difficulty with limited admissibility lies not in the theory of separating the permissible and impermissible uses of evidence, but with doing so in practice—particularly in jury trials. The procedural mechanism generally employed to enforce limited admissibility is a limiting instruction to the jury.

In the United States, limiting instructions are identified as the ordinary remedy for limited-admissibility problems under Rule 105 of the Federal Rules of Evidence. US judges routinely offer limiting instructions in relation to a wide variety of evidence problems, including relevancy, hearsay, the use of a witness’s prior inconsistent statements, and the admission of otherwise inadmissible materials to explain the basis for an expert’s opinion. American law recognizes that limited-use evidence must be excluded entirely in rare circumstances where the prejudicial effect of the evidence is exceptionally high, and limiting instructions cannot control the risk of misuse. Overwhelmingly, however, American courts adopt the view

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23 See Blinka, “Ethical Firewalls”, *supra* note 18 at 1233; Richard D Friedman, “Anchors and Flotsam: Is Evidence Law ‘Adrift’?”, Book Review of *Evidence Law Adrift* by Mirjan R Damaška (1998) 107:6 Yale L J 1921 (limited admissibility springs from “unwillingness to be confined to two unpalatable choices: unduly restricting the information available to the factfinder, on the one hand, or abandoning altogether the impulse behind the exclusionary rule, on the other” at 1932).

24 See Blinka, “Ethical Firewalls”, *supra* note 18 (while admitting evidence for limited purposes “strikes one as eminently reasonable on its face, the doctrine of limited admissibility is unsettled by its procedural features” at 1233).

25 “If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly”: Fed R Evid 105. Most of the states have adopted the rule verbatim or in substance. See Leonard, *Wigmore*, *supra* note 1, ch 1 at 11.

26 The limited admissibility aspect of these evidence problems is discussed in Blinka, “Ethical Firewalls”, *supra* note 18.

27 See especially *Bruton v United States*, 391 US 123 (1968) [*Bruton*] (limiting instructions were not adequate to protect the defendant and exclusion was constitutionally required for the “powerfully incriminating extrajudicial statements of a codefendant” at 135). See also *Wigmore*, *supra* note 13 (“[w]hile trial courts may exclude evidence admissible for a limited purpose because of the danger that the jury may use the evidence for an improper purpose, many appellate courts stress . . . that [this] . . . is a drastic remedy” at 701).
implicit in the Federal Rules of Evidence that instructions represent an adequate solution for limited-admissibility problems.28

The Canadian courts have taken a similar approach, albeit in a different doctrinal setting. Canadian evidence law emerges mainly from case law and does not contain any codified general approach to limited admissibility analogous to Rule 105 of the Federal Rules of Evidence. But the Supreme Court of Canada has repeatedly held that limited-admissibility problems should normally be addressed using limiting instructions.29 Like their American counterparts, trial judges in Canada have discretion to exclude evidence when its prejudicial effect outweighs its probative value,30 and this discretion can sometimes be used to exclude altogether evidence that would otherwise be admitted for limited purposes. However, in the great majority of cases where limited admissibility arises, courts admit the evidence and trust the judge or jury to use the evidence only as permitted. Examples of this approach abound in the Canadian cases.31

The best-known limited-admissibility rule in Canadian law pertains to the use of the accused's criminal record under R v Corbett.32 Where the

28 Fed R Evid 105. See Wigmore, ibid at 697; Leonard, Wigmore, supra note 1, ch 1 at 40; Blinka, "Ethical Firewalls", supra note 18 at 1234.

29 See e.g. Corbett, supra note 5 (in the "many situations where the jury is permitted to hear and use evidence relevant to one issue, but not to another... all that is required is a clear direction to the jury indicating what is permissible use and what is not" at 694); R v Starr, (2000) SCC 40, [2000] 2 SCR 144 [Starr] ("when a piece of evidence may conceivably be put to both proper and improper uses, the trial judge in a criminal case must give the jury a limiting instruction regarding the permissible inferences that may be drawn from the evidence" at para 184).

30 See R v Seaboyer; R v Gayme, [1991] 2 SCR 577 at 611, 83 DLR (4th) 193 (judges generally have the power to exclude evidence whose prejudicial effect outweighs its probative value, but the discretion is narrower in respect of defence evidence, which may only be excluded if its prejudicial effect substantially outweighs its probative value).

31 See e.g. Donald G Casswell, "Through the Admissibility of Evidence Maze: An Attempt at a Purposive Structuring" (1991) 29:3 Alta L Rev 584 at 613–14 (Canadian evidence rules that require limiting instructions include the hearsay rule, prior-conviction evidence, prior inconsistent statements, character evidence and similar facts, and statements by co-accused).

32 Supra note 5. For a detailed discussion of Corbett, see Part III.A, below.
accused testifies, courts most often admit the record but instruct the jury to consider it only as evidence going to the accused's credibility and not as evidence of the accused's propensity to commit the offence.\textsuperscript{33} Courts also invoke limited admissibility in contexts that are more obscure. For instance, an accused person's refusal to participate in a police lineup for the purposes of identification may be admissible to explain why the police failed to hold a lineup, but remains inadmissible to prove guilt.\textsuperscript{34}

Another fruitful source of limited-admissibility issues in Canadian law is the hearsay rule, which operates to exclude only those out-of-court statements offered to prove the truth of their contents.\textsuperscript{35} The distinction between hearsay and non-hearsay purposes of evidence has generated a seemingly endless variety of limited-admissibility rules. Where a witness's testimony conflicts with his or her prior statements about events, those prior statements are usually admissible only for the limited purpose of impeaching his or her credibility and not for their truth.\textsuperscript{36} Prior statements \textit{consistent} with a witness's testimony are inadmissible to confirm the truth of the testimony, but may be admitted for other purposes: for instance, they may rebut an allegation that the witness recently fabricated the story,\textsuperscript{37} or otherwise give context for assessing the witness's credibility.\textsuperscript{38} When the defence claims that the police investigation of an offence was inadequate, the Crown may be entitled to lead evidence of what various witnesses told police during the investigation. Where admissible, such "investigative hearsay"\textsuperscript{39}

\textsuperscript{33} \textit{Corbett} does recognize the trial judge's discretion to exclude the accused witness's record in some cases. This discretion is discussed in greater detail in Part III.A, below.


\textsuperscript{35} See \textit{Khelawon, supra} note 14 at para 36.

\textsuperscript{36} See \textit{R v B (KG)}, [1993] 1 SCR 740, 19 CR (4th) 1 (recognizing exceptions to the "orthodox rule that prior inconsistent statements are admissible only to impeach the credibility of a witness, and not as evidence of the truth of their contents" at 755, cited to SCR).

\textsuperscript{37} \textit{R v Stirling}, 2008 SCC 10 at para 5, [2008] 1 SCR 272 [\textit{Stirling}].


must be accompanied by a limiting instruction explaining that the information should be considered solely to develop the narrative of the investigation and not for its truth.\textsuperscript{40}

The limited-admissibility rules catalogued above have all been approved by the Supreme Court of Canada. The list is by no means exhaustive, but it is sufficient to reveal how thoroughly the doctrine of limited admissibility permeates Canadian evidence law. Limiting instructions are offered so frequently and in connection with such a variety of evidence doctrines that one can scarcely imagine our system of evidentiary regulation without them. This proliferation of limited-admissibility rules—together with the conceptual link between limited admissibility and rules of exclusion—indicates that limited admissibility holds a foundational place in our law of evidence.

B. PSYCHOLOGICAL CRITIQUE

However indispensable limited-admissibility rules appear from a legal standpoint, they seem unworkable from a psychological perspective. The law rests on the premise that juries abide by limiting instructions and use evidence for proper purposes only. That premise is grounded, in turn, on three propositions, each of which appears open to question: First, in order to follow limiting instructions, juries must understand them. Second, juries must be motivated to try to respect the limitations imposed by the court. Third, even when juries understand and are motivated to follow limiting instructions, they must be psychologically capable of controlling the impact of the evidence on their decision-making processes. The idea that juries have the necessary comprehension, motivation, and psychological ability to abide by limiting instructions seems dubious as a matter of common sense.\textsuperscript{41} One

\textsuperscript{40} Ibid.

\textsuperscript{41} See Judith L. Ritter, "Your Lips Are Moving... But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions" (2004) 69 Mo L Rev 163 ("given the legalistic wording of most jury instructions, common sense would suggest that... lay persons would have great difficulty in understanding them" at 164); Blinka, "Delusion", supra note 3 (it is "intuitively obvious... that limiting instructions... cannot... effectively control the minds and thought processes of jurors" at 809).
suspects, for example, that lay jurors would have difficulty comprehending the legal distinctions drawn by limited-admissibility rules, such as the notoriously difficult distinction between hearsay and non-hearsay. As the discussion in this section will reveal, empirical research into jury psychology supports these common sense doubts.

Of course, limited-admissibility rules apply both in jury trials and in trials by judge alone. The present focus on jury psychology should not obscure the fact that both judges and juries probably lack the psychological ability to direct their mental processes strictly in accordance with limited-admissibility rules. One might doubt whether any decision maker could be entirely faithful to a requirement to consider evidence for some but not other relevant purposes. However, their legal training and professional role provide assurances that judges understand and try to uphold the distinctions between permissible and impermissible uses of evidence. By contrast, one might fairly question not only juries' psychological ability to follow limiting instructions but also their understanding of these instructions and their motivation to abide by them. Thus, while limited admissibility raises concerns in both bench and jury trials, the ultimate test of any limited admissibility rule is whether it will be faithfully applied by a jury.

42 See Blinka, "Ethical Firewalls", supra note 18 at 1244 (deriding the “fantastical” notion that jurors understand the difference between hearsay and non-hearsay uses of evidence on the basis of a brief instruction).

43 What little research has been done on judges suggests that they too draw impermissible inferences from evidence. One study of US judges who filled out questionnaires based on written trial summaries found that "judges do not disregard inadmissible information when making substantive decisions in either civil or criminal cases": Andrew J Wistrich, Chris Guthrie & Jeffrey J Rachlinski, "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding" (2005) 153:4 U Pa L Rev 1251 at 1323.

44 See e.g. Leonard, Wigmore, supra note 1, ch 1 (“[b]ecause judges do not shed their natural human tendencies when they ascend to the bench, there will be times when they will not be able to cast aside evidence of logical value even though it is inadmissible as a matter of legal policy" at 34); Damaška, supra note 1 at 32 (both judges and juries are susceptible to impermissible propensity reasoning on the basis of bad character evidence).

45 See Wistrich, Guthrie & Rachlinski, supra note 43 at 1256 (judges are probably more motivated than jurors to ignore inadmissible evidence because they understand and are committed to the policies behind evidentiary rules).
Moreover, enforcement problems with limited-admissibility rules are particularly acute in jury trials. In bench trials, judges "instruct themselves" on limited-admissibility rules. Where a judge fails to appreciate a distinction between permissible or impermissible uses of evidence, or where the reasons reveal that the judge used the evidence for an impermissible purpose, these errors may ground an appeal. Juries, on the other hand, do not give reasons, so their actual use of evidence cannot be reviewed. The law must depend entirely on the prophylactic effect of the judge's instructions. Gauging the effectiveness of the limiting instructions given to juries therefore takes on special urgency, and it is to this question that the analysis now turns.

1. **Empirical Doubts About Limiting Instructions**

A substantial body of psychological research sheds light on the operation of limiting instructions. These findings must be generalized with caution to the Canadian courtroom setting, since the studies are largely American and frequently employ trial simulation methods that do not closely parallel the experience of actual jurors. While generalizing American studies to other jurisdictions can be hazardous, the similarities between Canadian and American approaches to limited admissibility suggest that American studies can shed light on the Canadian legal system. And despite the differences

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46 See e.g. Dinardo, *supra* note 38.

47 See especially David DeMatteo & Natalie Anumba, "The Validity of Jury Decision-Making Research" in Joel D Lieberman & Daniel A Krauss, eds, *Jury Psychology: Social Aspects of Trial Processes; Psychology in the Courtroom, Volume 1* (Surrey, UK: Ashgate, 2009) 1 (there is a "lingering concern that research studies involving college students pretending to be jurors in a trial that consists entirely of brief written summaries do not yield information that is relevant to and predictive of the behaviour of actual jurors in an actual trial" at 12).

48 See *ibid* at 5.

49 Moreover, some of the leading studies on the effects of criminal-record evidence are actually Canadian. See AN Doob & HM Kirshenbaum, "Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused" (1973) 15 Crim LQ 88; Valerie P Hans & Anthony Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1975) 18 Crim LQ 235 at 242. These studies are often cited by American scholars as relevant to that legal system. See e.g. Joel D Lieberman & Jamie Arndt, "Understanding the Limits of Limiting Instructions: Social..."
between the courtroom and laboratory settings, currently available evidence suggests that jury simulation studies generate useful results. Moreover, confidence in the generalizability of research findings should increase as results are consistently replicated with a number of different research designs, and especially as meta-analytic studies emerge. Many of the findings bearing on limiting instructions have been confirmed in these ways. Ultimately, the psychological findings should be of interest to lawyers because they provide the best available information about the effects of evidence rules on jury decision making.

A review of the research on limiting instructions raises a problem of terminology. The phrase “limiting instructions” is sometimes used to denote instructions to consider evidence for some permissible purposes while ignoring it for other, impermissible purposes—a true situation of limited admissibility. Unfortunately, the psychological literature frequently employs the phrase more broadly to encompass any instruction that purports to restrict the fact-finder’s use of evidence, including instructions to disregard inadmissible evidence that may not be used for any purpose. In this paper, the term “limiting instructions” is used narrowly to denote instructions on the limited use of evidence. Instructions to disregard evidence are treated separately. When referring collectively to limiting instructions and instructions to disregard, this paper employs the term “admonitions.”

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DeMatteo & Anumba, supra note 47 (“[t]he safest conclusion may be that jury decision-making research is potentially of high value to the discerning consumer of research” at 15).

See e.g. ibid at 19.

For an example of this broad use of the term “limiting instructions”, see Lieberman & Arndt, supra note 49 at 686. A plurality of the Supreme Court of Canada recently defined limiting instructions in this broad sense in White, supra note 2 (“[t]he purpose of a limiting instruction is to preclude the jury from considering certain evidence, either with respect to all the live issues in a case or with respect to one or more particular live issues” at para 28).

This taxonomy is borrowed from J Alexander Tanford, “The Law and Psychology of Jury Instructions” (1990) 69 Neb L Rev 71 (“[a]dmonitions are given . . . in an effort to prevent jurors from misusing potentially prejudicial information . . . . They come in two
On the whole, the existing empirical research suggests that admonitions frequently fail to control the fact-finder’s use of evidence.54 In fact, admonitions sometimes produce a "backfire effect" whereby instructions to disregard or use evidence for limited purposes induce fact-finders to focus more attention on the evidence than they would have without the instructions.55 These overall trends in the empirical findings are disconcerting.56

Instructions to disregard inadmissible evidence have been studied extensively. This body of research has important implications for those interested in the effectiveness of limiting instructions because if jurors cannot ignore inadmissible information when they are told to do so, there is little reason to be confident in their ability to perform the more delicate mental task of considering evidence only for limited purposes. A recent meta-analysis examined 48 studies on the effects of various forms of inadmissible evidence on mock jurors.57 The meta-analysis did not distinguish between types of admonitions, so a few studies of limiting instructions were included alongside numerous studies of instructions to disregard.58 Overall, the meta-analysis showed that being exposed to

main varieties: admonitions that jurors must completely disregard information and instructions to limit their use of evidence" at 76).

54 Lieberman & Arndt, supra note 49 at 686; Joel D Lieberman, Jamie Arndt & Matthew Vess, "Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard" in Lieberman & Krauss, supra note 47, 67 at 80.

55 See e.g. Lieberman, Arndt & Vess, ibid ("judicial instructions to disregard or limit the use of inadmissible evidence are frequently unsuccessful. . . . [They] can also paradoxically focus jurors’ attention to the inadmissible information and thus amplify its impact on legal decisions" at 80); Dennis J Devine et al, "Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups" (2001) 7:3 Psychol Pub Pol'y & L 622 (admonitions “have proven to be ineffective and have even been associated with a paradoxical increase in the targeted behaviour” at 666).

56 See Lieberman, Arndt & Vess, supra note 54 at 80.


58 For example, the meta-analysis included the two Canadian studies cited at supra note 49 on the effects of instructions to limit the use of evidence of the accused’s criminal record.
inadmissible evidence affects verdicts. In particular, guilty verdicts reliably increased when mock jurors were exposed to inadmissible evidence favouring the prosecution. Furthermore, the effects of inadmissible evidence on fact-finders were not successfully corrected by judicial admonitions. In general, then, the research suggests that jurors may be unable or unwilling to disregard information they perceive as relevant to the issues before them.

The existing research on limiting instructions centres on criminal-record evidence. Studies in the United States, the United Kingdom, and Canada have examined the effects of instructions to consider an accused's criminal record only on the issue of credibility and not as evidence of propensity to commit the offence. An early Canadian study by Doob and Kirshenbaum examined mock-juror verdicts on the basis of a brief written trial summary that either included or did not include the fact that the accused had a record of five convictions for the very offence charged (breaking and entering). In that 1973 study, knowledge of the criminal record increased the likelihood that mock jurors would find the accused guilty, and limiting instructions had no effect. Another early Canadian study by Hans and Doob set out to replicate these results with deliberating mock juries. In that 1975 study, mock jurors read a short summary of a burglary trial and deliberated in groups to arrive at a verdict. The trial summary was varied so the accused

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59 Steblay et al, supra note 57 at 486.
60 Ibid (“[l]evel of guilty verdicts increases with pro-prosecution evidence . . . . The average effect is small . . . . but reliable”).
61 Ibid (“when inadmissible evidence does make a significant impression on jurors, a corrective judicial admonition does not fully eliminate the impact”).
62 See Lieberman, Arndt & Vess, supra note 54 (“[i]n general, this research indicates that jurors are often biased by such information, and that even concerted efforts to ignore it may fail, especially when the information is viewed as highly relevant” at 76); Devine, supra note 55 (“jurors are unwilling (or unable) to set aside information that appears relevant to determining what happened—regardless of what the law (and thus the judge) has to say about it” at 666).
63 Doob & Kirshenbaum, supra note 49.
64 Ibid (“[t]he judge’s instructions had no effect whatsoever on the decisions by the subjects” at 95).
65 Hans & Doob, supra note 49.
either did or did not have a conviction for burglary, and jurors either were or were not instructed to limit their use of the record to credibility and not guilt. Mock juries who knew of the accused's prior conviction viewed the evidence against the accused as stronger and were significantly more likely to convict the accused,66 regardless of any limiting instruction.67

Researchers testing the impact of limiting instructions face the challenge of assessing whether any effect of limited-use evidence on verdicts has occurred through permissible or impermissible reasoning. In the criminal-record context, for example, the mere fact that guilty verdicts increase when a criminal record is present does not indicate any impropriety in the mock jurors' reasoning. As long as jurors reason through the accused's credibility and not through propensity, the increase in guilty verdicts is consistent with the applicable limited-admissibility rule. The Doob and Kirshenbaum study described above was designed to separate the effects of reasoning through the accused's credibility from forbidden propensity reasoning: the trial summary indicated that the accused's testimony did not touch on any important issues, so the accused's credibility was not really in question. The authors concluded that the increase in guilty verdicts flowing from the criminal record could be attributed to improper propensity reasoning.68 Subsequent studies have refined methods for isolating the permissible and impermissible effects of limited-use evidence.

A 1985 American study by Wissler and Saks tested the impact of an accused's criminal record and limiting instructions on mock jurors' judgments.69 Subjects read a brief case summary before assessing both the accused's credibility and his guilt. Versions of the case varied on the issue of the accused's criminal record: either no record was mentioned, the accused had a prior conviction on the same charge, or the accused had a prior conviction on a dissimilar charge. The results indicated that mock jurors did

66 Ibid at 242, 244, 251.
67 Ibid at 252.
68 Doob & Kirshenbaum, supra note 49 at 94–95.
not abide by limiting instructions. Changing the information about the accused's criminal record had no effect on mock jurors' credibility judgments, but it did affect conviction rates. The accused was least likely to be convicted when no prior record was mentioned and most likely to be convicted when he had a prior conviction for the same charge. The authors concluded that mock jurors used the criminal record not for the permissible purpose of gauging the accused's credibility but for the impermissible purpose of assessing the accused's propensity to commit the offence. Subjects' use of the prior record defied the instructions they were given on the limited use of the evidence.

Another study on prior convictions was published in 2000 by Lloyd-Bostock. This English study used a sophisticated video trial simulation with several variations in terms of current charge and criminal record. Consistent with previous research, the mock jurors judged the accused most likely to be guilty when he had a recent conviction on a similar charge. The study also measured mock jurors' assessments of several dimensions of the accused's character and credibility, and these measures supported the

70 Ibid ("[t]he defendant's credibility is already so much lower than that of the other witnesses... that the admission of prior convictions does not reduce the credibility of the defendant further" at 43). But see Michele Cox & Sarah Tanford, "Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility" (1989) 4 Social Behaviour 31 ("[o]ur findings are discrepant from the study by Wissler and Saks... We have consistently obtained effects on credibility for limited-use evidence" at 52).

71 Wissler & Saks, supra note 69 at 43.

72 Ibid.

73 Ibid at 47.

74 Ibid ("[p]eople's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it"). See also Edith Greene & Mary Dodge, "The Influence of Prior Record Evidence on Juror Decision Making" (1995) 19:1 Law & Hum Behav 67 (mock-juror study of effects of prior convictions and acquittals in which "limiting instructions had little effect on jurors' use of this evidence" at 76).


76 Ibid at 742. To a similar effect, see the results of the LSE Jury Project, reported in AP Sealy & WR Cornish, "Juries and the Rules of Evidence" (1973) Crim L Rev 208 at 217.
conclusion that the accused's record affected subjects' decisions through forbidden propensity reasoning and not through credibility.\textsuperscript{77} Tellingly, for example, no matter what offence was charged, an accused with a prior conviction for indecent assault on a child was perceived as the least believable, the most likely to be guilty, and the most likely to lie in court.\textsuperscript{78} It appears that mock jurors made a general negative judgment about an accused with a record for this offence, suggesting that evidence of such a previous conviction can be gravely prejudicial.\textsuperscript{79} As in the studies discussed above, there was no evidence that mock jurors abided by the limiting instructions they were given on the permissible purposes of criminal-record evidence.\textsuperscript{80}

One limitation of the existing body of research on the effect of limiting instructions is that the studies all focus on evidence of an accused's criminal record. The heavy prejudice associated with such criminal-record evidence may make limiting instructions particularly difficult to follow in this context. Nevertheless, it is fair to say that the existing research casts serious doubt on the efficacy of limiting instructions.

There is also a chance that limiting instructions may backfire. The "backfire effect" of admonitions was first observed and has most often been replicated in the context of instructions to disregard evidence; often, such instructions prompt research subjects to rely more heavily on the inadmissible evidence than they would without the admonition.\textsuperscript{81}

\textsuperscript{77} Lloyd-Bostock, \textit{supra} note 75 at 748.
\textsuperscript{78} \textit{Ibid.}
\textsuperscript{79} \textit{Ibid} at 753.
\textsuperscript{80} \textit{Ibid} (jurors were instructed that the criminal-record information was "not relevant at all to the likelihood of his having committed the offence.... It is relevant only as to whether you can believe him" at 735).
\textsuperscript{81} An early demonstration of the backfire effect for disregard instructions appears in Sharon Wolf \& David A Montgomery, "Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors" (1977) 7:3 Journal of Applied Social Psychology 205 (the biasing effect of inadmissible information was eliminated when jurors were simply told it was inadmissible; however, when "the judge went on to specifically admonish the mock jurors to disregard the inadmissible testimony, the bias was not significantly reduced" at 216). See also Lieberman \& Arndt, \textit{supra} note 49 (reviewing research indicating that "admonitions to disregard evidence may not only
existing research provides some support for the notion that limiting instructions can also backfire. One mock jury study based on a video re-enactment of a civil negligence trial found that when limited-use evidence was led against the defendant, "limiting instructions actually increased liability." However, the influence of the limited-use evidence and the effect of limiting instructions depended on the type of evidence presented. Research on this question is underdeveloped, but one cannot ignore the possibility that limiting instructions might perversely increase the jury's use of forbidden reasoning.

Psychologists have posited several explanations for the backfire effect. The most obvious explanation turns on salience: the simple act of drawing attention to evidence by way of an admonition may increase the probability that jurors will be influenced by it, properly or improperly. A second explanation for the backfire effect comes from a psychological theory known as "reactance", which refers to a state of psychological arousal that occurs when people perceive a threat to their ability to act freely. Individuals experiencing reactance sometimes try to reassert their freedom by engaging in the targeted behaviour. Reactance theory can explain the backfire effect because if jurors perceive judicial admonitions as threats to their deliberative freedom, they may engage in prohibited reasoning in an attempt to assert

be ineffective in many situations but may serve to focus jurors' attention on inadmissible evidence and increase their reliance on it in their decision making" at 691).

Cox & Tanford, supra note 70 at 51.

Ibid ("[l]imiting instructions increased negative defendant impressions for other-acts evidence, and reduced them somewhat for similar-happenings evidence. . . . [Thus] a biased inference process does occur for limited-use evidence, although the extent of this bias depends on the particular trait or behavioural information that is provided").

For commentary suggesting that limiting instructions can produce backfire effects, see supra note 55.

See e.g. Lisa Eichhorn, "Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence" (1989) 52:4 Law & Contemp Probs 341 ("the 'fuss' that was made in objecting to the evidence and in ruling on its admissibility seemed to indicate to jurors that the [evidence] had a particular importance" at 344).

Lieberman & Arndt, supra note 49 at 693.

Ibid at 694.
their freedom to determine independently the import of the evidence.\textsuperscript{88} A third explanation for the backfire effect involves "ironic processes of mental control,"\textsuperscript{89} whereby efforts to ignore information make the information more cognitively accessible.\textsuperscript{90}

These three explanations are not mutually exclusive; all may play a part in accounting for occurrences of the backfire effect. Reactance theory best explains the effect in situations where jurors lack motivation to abide by admonitions, while ironic mental control theory best explains backfire effects when jurors try to follow the judge’s instructions.\textsuperscript{91} The unfortunate result is that admonitions may backfire either way.\textsuperscript{92} Taken together, the psychological literature on limiting instructions, disregard instructions, and the backfire effect casts grave doubt on the efficacy of admonitions. This psychological critique calls into question the courts' reliance on limiting instructions to enforce the doctrine of limited admissibility.

2. AREAS OF PROMISE

While the general picture appears gloomy, social scientists have identified some factors that seem to make admonitions more effective.\textsuperscript{93} To the extent that jurors fail to follow admonitions because they don’t understand them,\textsuperscript{94}

\textsuperscript{88} Ibid.
\textsuperscript{89} Ibid at 697.
\textsuperscript{90} Ibid at 698.
\textsuperscript{91} Ibid at 702–03.
\textsuperscript{92} Ibid ("juxtaposition of the two theories suggests a rather sobering view of the effectiveness of limiting instructions" at 702).
\textsuperscript{93} See Linda J Demaine, “Realizing the Potential of Instructions to Disregard” in Lynn Nadel & Walter P Sinnott-Armstrong, eds, Memory and Law (Oxford: Oxford University Press, 2012) 185 ("e]mpirical studies paint a grim picture of the effectiveness of instructions to disregard. . . . [But some] contrary findings suggest that certain characteristics in the content and delivery of instructions to disregard can render them more or less effective" at 186).
simplifying the language of instructions can enhance their effectiveness. Comprehension problems seem particularly likely to arise with limiting instructions, which explain the conceptually challenging distinctions between the permissible and impermissible uses of evidence. The available evidence suggests that comprehension can be improved to some degree by rewriting instructions according to psycho-linguistic principles. Another factor that appears to improve jurors' compliance with admonitions is group deliberation. Many of the studies that cast doubt on the efficacy of limiting instructions were conducted with individual mock jurors, and some empirical evidence has emerged that deliberation enhances the effectiveness of admonitions.

Innovations in the timing of instructions also hold some promise for improving jury compliance. For example, forewarning juries that they might be exposed to inadmissible or prejudicial information may make them better able to control their response to such information when it is presented. Finally, a number of studies have shown that jurors are more likely to abide by instructions to disregard when judges explain why the evidence should be ignored. These findings raise the intriguing possibility—to be discussed further below—that admonitions, including limiting instructions, can be

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95 *Ibid* at 600–01.

96 See e.g. *ibid* at 609, 623; Tanford, *supra* note 53 at 80–82; Laurence J Severance & Elizabeth F Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17:1 Law & Soc'y Rev 153 (mock-juror study finding that "psycholinguistic changes in pattern instructions can improve jurors' abilities to both comprehend and apply jury instructions" at 194).

97 See the mock-jury studies reported in Kamala London & Narina Nunez, "The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence" (2000) 85:6 Journal of Applied Psychology 932 ("the process of deliberation lessened the biasing impact of inadmissible evidence" at 935); Jeffrey Kerwin & David Shaffer, "Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony" (1994) 20 Personality and Social Psychology Bulletin 153 ("[m]embers of deliberating juries were... more likely than individual (nondeliberating) jurors to adhere to a judicial ruling that they disregard inadmissible information" at 159).

98 See e.g. Tanford, *supra* note 53 at 108.

99 See especially the meta-analysis of Steblay et al, *supra* note 57 at 487.

100 See Part IV.B.2.
made more effective by incorporating a persuasive rationale. Taken together, these factors offer some hope that the effectiveness of limiting instructions can be enhanced through procedural innovation.

Psychological research yields insights into legal policy in the area of limited admissibility. A substantial body of empirical work casts doubt on the ability of limiting instructions to structure fact-finders' use of evidence in the way the law intends. The same body of research points to a few procedural reforms that carry some potential to enhance the effectiveness of limiting instructions. The effects of admonitions seem likely to depend on the type of evidence and form of instruction, and future research may refine the understanding of these factors. Ultimately, though, the psychological research cannot solve the complex problem of limited admissibility. The empirical data offer some clues, but judges and legislators must go on implementing courtroom procedures in conditions of uncertainty about their practical effects.

C. CONCEPTUAL CONFUSION

Fraught with difficulty from a psychological point of view, the doctrine of limited admissibility also generates confusion at a conceptual level. The permissible and impermissible uses of evidence are frequently so closely aligned as to be difficult if not impossible to separate. When the law adopts spurious distinctions between proper and improper inferences, the issue becomes not whether juries actually understand and apply those distinctions but whether they are even capable of being understood and applied.

The conceptual confusion surrounding limited-admissibility rules can be explained in part by the incentives of the adversary system. In theory, limiting instructions aim to prevent juries from using evidence for improper purposes while permitting them to use it for proper purposes. In reality, as American scholar Daniel Blinka has pointed out, adversary lawyers may invoke limited admissibility to evade exclusionary rules. Because judges decide questions of admissibility in jury trials, juries are normally insulated

101 See Steblay et al, supra note 57 at 488; Devine, supra note 55 at 687.

102 Blinka, "Ethical Firewalls", supra note 18 at 1237.
from evidence excluded as inadmissible for all purposes. However, if an advocate finds a permissible purpose for evidence that would otherwise be inadmissible, the doctrine of limited admissibility applies, and, typically, the evidence will be admitted subject to a limiting instruction. Thus, the doctrine is vulnerable to manipulation by lawyers, who may argue that evidence should be admitted for some proper purpose while hoping that the limiting instruction will be ineffective and the jury will use the evidence for an impermissible purpose.

What is more, since identifying a permissible purpose represents a ticket to admission, adversary lawyers are motivated to find or invent such a purpose for any otherwise inadmissible evidence that advances their case. This incentive generates some untenable distinctions as lawyers work with evidentiary concepts in an attempt to differentiate each prohibited use of evidence from an ostensibly permissible purpose. Judges in their turn may be enchanted by the sophistication of these fine distinctions or simply happy to find a way to admit valuable evidence that would otherwise be subject to an exclusionary rule. Either way, judges frequently rely on feeble distinctions in applying limited-admissibility rules. In sum, according to Blinka's

103 See Damaška, supra note 1 (exclusionary rules are most effectively enforced in jury trials because the divided court protects the jury from being exposed to inadmissible information, so “inadmissible but otherwise credible evidence leaves no imprint on the fact finder's mind” at 47).

104 See Blinka, “Ethical Firewalls”, supra note 18 at 1238; Daniel D Blinka, “Ethics, Evidence, and the Modern Adversary Trial” (2006) 19:1 Geo J Legal Ethics 1 [Blinka, “Ethics”] (“[l]imited admissibility allows the proponent to offer evidence ostensibly for a restricted purpose (e.g., the declarant believed the black car ran the stop sign) yet with reasonable confidence that the trier of fact will nonetheless use the evidence as it sees fit (e.g., in fact, the black car ran the stop sign)” at 19).

105 See Blinka, “Ethics”, ibid (“trial lawyers are motivated to expose the jury to whatever information helps their case”).

106 See e.g. Bruton, supra note 27 (“the limiting instruction, although not really capable of preventing the jury from considering the prejudicial evidence, does as a matter of form provide a way around the exclusionary rules of evidence that is defensible because it ‘probably furthers, rather than impedes, the search for truth . . . .’” at 133, quoting from Nash v United States, 54 F 2d 1006 at 1007 (2d Cir 1932) [Nash]).

107 Blinka, “Ethical Firewalls”, supra note 18 at 1238, 1241.
scathing assessment, the doctrine of limited admissibility "invites abuse and sharp practice by harbouring distinctions that are often questionable and sometimes just plain meaningless." 108

D. THE LAW'S AMBIVALENCE

Judges are, of course, not unaware of the problems with limited-admissibility rules. Some of the harshest criticisms of limiting instructions have emanated from common-law judges, especially in the United States. Judge Learned Hand famously opined that limiting instructions ask the jury to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else." 109 In a similar vein, Justice Robert Jackson of the United States Supreme Court pronounced "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . [an] unmitigated fiction." 110 Canadian judges have occasionally expressed similar sentiments. 111 For instance, Justice Estey of the Supreme Court ridiculed the "offence against common sense" 112 of instructing the jury to consider a key witness's prior statements about the material events only on the issue of the witness's credibility and not as substantive evidence of what happened. 113 For generations, then, certain voices from within the judiciary have questioned the efficacy of limiting instructions.

Yet, for every judge who has criticized limiting instructions, many have accepted the premise that juries can and do follow instructions to consider

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108 Ibid at 1238.
109 Nash, supra note 106 at 1007.
111 For example, one judge harshly criticized limiting instructions in his extrajudicial writings, arguing that the law wrongly "clings to the assumption that a trier of fact can compartmentalize thinking": Brent Knazan, "Putting Evidence out of Your Mind" (1999) 42:4 Crim LQ 501 at 509.
112 McInroy and Rouse v The Queen (1978), [1979] 1 SCR 588 at 606, 89 DLR (3d) 609.
113 Ibid (such a limiting instruction "lacks the ring of reality but is transparently a rule adopted for comfort in the full awareness by the Court that regardless of the instructions to the jury, the content of the prior inconsistent statement will be weighed by the jury . . . in their findings or conclusions on the facts" at 620).
evidence only for limited purposes. In both the United States and Canada, courts operate on the basis of this premise,\textsuperscript{114} which has been variously described as a “presumption”,\textsuperscript{115} a “legal fiction”,\textsuperscript{116} “an exercise in faith”,\textsuperscript{117} and a “judicial lie”.\textsuperscript{118} Obviously, courts’ reliance on this premise stands in tension with the persistent doubts about the efficacy of limiting instructions. Some judges and commentators have acknowledged this tension, admitting that the law’s stated confidence in limiting instructions represents less a true article of faith than an imperfect but “practical accommodation” of conflicting demands.\textsuperscript{119} Other courts have taken a more defensive posture, scorning criticisms of judicial instructions as insults to the system of trial by

\begin{footnotes}
\item[114] Writing for a majority of the Supreme Court, Scalia J recognized “the almost invariable assumption of the law that jurors follow their instructions”. \textit{Richardson, Warden v Marsh}, 481 US 200 at 206 (1987) [Richardson]. See also Leonard, \textit{Wigmore, supra note 1, ch 1} (a review of the US cases reveals that “the law places significant faith in the ability and willingness of the fact finder to ignore evidence inadmissible for particular purposes” at 88-6); Tanford, \textit{supra note 53} (“since the first studies demonstrating . . . [the] ineffectiveness [of admonitions] were published in 1958, [US] appellate courts have approved their use in approximately 21,000 cases—a ninety-five percent approval rate” at 95); Casswell, \textit{supra note 31} (Canadian “judges generally . . . adhere to the traditional wisdom that the trier of fact is able to and does follow even difficult instructions on the limited use to which evidence may be put” at 612).

\item[115] On the “presumption” that juries follow judicial instructions generally, see Ritter, \textit{supra note 41}. US courts interpret this presumption sometimes as a fixed rule, and sometimes as a rebuttable presumption (\textit{ibid} at 174–77).

\item[116] Blinka, \textit{Ethical Firewalls}, \textit{supra note 18} at 1234; Blinka, \textit{Delusion}, \textit{supra note 3} at 781.

\item[117] \textit{Wigmore, supra note 13} at 696, n 1.

\item[118] \textit{Rees, supra note 8} (“[i]t is of absolutely no value to continue with the judicial lie that juries when properly instructed by the judge do not reason through propensity” at 346).

\item[119] \textit{Richardson, supra note 114}. Scalia J (“[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process” at 211). See also \textit{Wigmore, supra note 13} (the limited admissibility “doctrine, though involving certain risks, is indispensable as a practical rule” at 694); Kenneth S Broun, ed, \textit{McCormick on Evidence}, vol 1, 6th ed (St Paul, Minn: West, 2006) (“[r]ealistically, the instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best reconciliation of the competing interests” at 296).
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These conflicting responses demonstrate the law's ambivalence toward the fundamental but flawed doctrine of limited admissibility. The next part of this paper will explore how this ambivalence plays out in Canadian law.

III. LIMITED ADMISSIBILITY IN THE CANADIAN COURTS

The Supreme Court set the stage for the modern Canadian approach to limited admissibility more than twenty years ago in *R v Corbett*. In the course of an inconclusive split opinion, the battle lines were drawn between staunch defenders of limited admissibility and those with a more skeptical view. This part will review *Corbett*'s impact and the conflicting approaches to limited admissibility that continue to find expression in Canadian law.

A. THE LEGACY OF CORBETT

The common law generally prohibits the prosecution from advancing evidence of an accused's bad character—including any criminal record—to show that the accused is the type of person likely to commit the offence. However, section 12 of the *Canada Evidence Act* provides for the criminal record of any witness to be admitted to go to the witness's credibility. Before *Corbett* was decided in 1988, the courts interpreted section 12 as mandatory and routinely admitted evidence of the criminal record of any

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120 See e.g. *White*, supra note 2 (worries that a jury might draw irrational inferences from post-offence conduct despite a proper instruction undermine the system's "conviction that jurors are intelligent and reasonable fact finders" at para 56); *Ritter*, supra note 41 (frequently, US "courts subscribe to the notion that questioning the validity of this presumption poses a threat to the survival of our system of justice" at 163).

121 *Supra* note 5.

122 See especially *ibid* ("an individual is to be tried not for the kind of person he may be but for the offence he may have committed" at 725).

123 See *Canada Evidence Act*, RSC 1985, c C-5, s 12, which provides: "A witness may be questioned as to whether the witness has been convicted of any offence.... If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction."
accused person who took the stand. To guard against prejudice, judges would instruct juries to confine their use of the record to the question of credibility. The problem with this process was plain: it rested on the dubious assumption that the limiting instruction would in fact prevent juries from engaging in propensity reasoning.

The accused in Corbett was on trial for murder and he took the stand in his own defence. The jury was informed of his criminal record, which included an earlier conviction for murder. The accused was convicted and ultimately brought an appeal to the Supreme Court, claiming that section 12 violated his right to a fair trial under the Canadian Charter of Rights and Freedoms. Corbett’s appeal was unsuccessful; two separate opinions together constituting a 5:1 majority of the Court concluded that the criminal record had been properly admitted. Of greater interest to posterity, a differently constituted 4:2 majority of the Court held that section 12 should be interpreted as allowing trial judges discretion to exclude an accused witness’s criminal record where the limiting instruction would not adequately safeguard the accused’s fair trial rights. Chief Justice Dickson,

124 See Corbett, supra note 5 (under “the prevailing interpretation of s. 12 . . . , the trial judge had no discretion to exclude” at 701).

125 See ibid ("the trial judge is under a duty in cases where the accused has been cross-examined as to prior convictions to instruct the jury as to the limited permissible use it can make of such evidence" at 688–89). The trial judge in Corbett told the jury that the accused’s criminal record can only be used to assess the credibility of the Accused and for no other purpose. Because the Accused was previously convicted of murder, it must not be used by you, the Jury, as evidence to prove that the Accused person committed the murder . . . . You must not, under any circumstances, come to the conclusion that, because he has a criminal record, he would be more inclined or predisposed to commit this particular offence:

ibid at 682.

126 The accused claimed a violation of the right to a fair hearing under paragraph 11(d) of the Charter, supra note 6.

127 Writing for three members of the court, Dickson CJC concluded that the trial judge had a discretion to exclude the criminal record of an accused witness but that the trial judge nonetheless properly admitted the accused’s record in the circumstances. Justice McIntyre, with whom LeDain J concurred, reasoned that the accused’s record was properly admitted because section 12 made its admission mandatory.
with whom two judges concurred, and LaForest J in sole dissent, agreed that such discretion exists. Beyond that area of agreement, the two judges took entirely divergent approaches to this limited-admissibility problem.128

The Chief Justice repeatedly affirmed his belief in the jury’s ability to abide by limiting instructions. In the view of Dickson CJC, embracing a skeptical view of limiting instructions would mean challenging the very institution of trial by jury. He reasoned as follows:

[I]t would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. . . . Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. . . . [U]ntil the paradigm is altered by Parliament, the court should not be heard to call into question the capacity of juries to do the job assigned to them. The ramifications of any such statement could be enormous.129

Evidently alarmed at the prospect of courts overstepping their institutional bounds by questioning the basic structure of the trial system, the Chief Justice advocated confidence in juries’ abilities to follow judicial instructions.

Justice LaForest rejected the Chief Justice’s attempts to “assert away”130 the problems with section 12 by relying on general statements of faith in the jury. For LaForest J, the provision was open to abuse by prosecutors seeking to evade the character-evidence prohibition.131 As a species of bad character evidence, criminal-record information carried a heavy potential prejudice that had to be weighed against the often limited value of the information on

128 See Peter Sankoff, “Corbett Revisited: A Fairer Approach to the Admission of an Accused’s Prior Criminal Record in Cross-Examination” (2006) 51:4 Crim LQ 400 (the judgments in “tone and approach are markedly opposed” at 409).

129 Corbett, supra note 5 at 692–93 [emphasis in original].

130 Ibid at 727.

131 Ibid (“s. 12 significantly, and often invidiously, circumvents the complex of rules that precludes, in general, the introduction by the Crown of evidence of an accused’s ‘bad character’” at 725).
the issue of credibility. This strong potential prejudice was well-known, LaForest J argued, and the law should forthrightly acknowledge it:

[It is specious to say that to recognize what we know from experience to be the limitations of the human reasoning process is simultaneously to discredit the general utility of the jury as an instrument of justice. Indeed, an appreciation of human limitations can only redound to the benefit of the system as a whole by ensuring that these are accounted for and protected against. We deceive ourselves if we expect the jury to reason in ways that we, as lawyers and judges, know from experience to be often unrealistic, if not impossible.

Thus, LaForest J urged courts to recognize openly the risk that limiting instructions might fail to constrain jury reasoning.

The Chief Justice and LaForest J agreed on the factors influencing the discretion to exclude criminal-record evidence: recent convictions and those for crimes of dishonesty were more probative on the legitimate issue of credibility, while previous convictions for offences similar to the offence charged were more indicative of propensity and therefore more prejudicial. However, the two judges differed on how often the discretion to exclude should be exercised. Justice LaForest called it a “salutary discretion” and seemed to envision that criminal-record evidence would frequently be excluded because its prejudicial effect outweighed its probative value. Chief Justice Dickson, on the other hand, called on judges to use their

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132 Ibid (criminal-record evidence appears more probative of propensity than credibility “as a matter of logic and human experience” at 726).
133 Ibid (“a resoundingly uniform body of judicial and academic opinion, as well as empirical evidence . . . [supported the notion that section 12 was] capable of causing manifold prejudice to the interests of the accused (and, for that matter, of the public) in a fair trial” at 724).
134 Ibid at 727.
135 See ibid at 740–43 (LaForest J), 698 (Dickson CJC). Both judges also agreed that a defence attack on the credibility of Crown witnesses with criminal records of their own could militate in favour of admitting the accused’s criminal record, lest the jury be left with an unbalanced view of the various witnesses.
136 Ibid at 721.
137 See ibid at 745.
discretion to exclude only in "unusual circumstances." These conflicting approaches—with no majority of the court adopting any one interpretation of the discretion—have generated marked inconsistencies in the way lower courts deal with an accused witness's criminal record. Indeed, after extensively reviewing the cases applying Corbett, Peter Sankoff concluded that the discretion to exclude "operates in a highly erratic manner, virtually to the point of complete randomness."  

Corbett's legacy of confusion and ambivalence extends beyond the trial judge's discretion to exclude the criminal record of an accused witness. This ambivalence also shapes the law's approach to limited admissibility more generally. Some judges embrace the doctrine, confidently parsing the permissible and impermissible uses of evidence in the apparent expectation that fact-finders—both judges and juries—will apply those distinctions faithfully. Other judges express skepticism about limited admissibility, questioning whether those same distinctions are coherent and capable of being applied, especially in jury trials.

B. THE TENSION IN THE CURRENT LAW

Canadian law on limiting instructions thus continues to reflect the conflict that divided the Court in Corbett. Within the cases, the dominant discourse remains optimistic, but a more skeptical strain of discourse persists. This section provides some recent examples of case law exemplifying these opposing approaches. Given that limited-admissibility problems arise constantly, it would be impractical to attempt an exhaustive survey of the Canadian courts' treatment of the issue. Instead, this section considers four cases in which the Supreme Court has recently grappled with limited-admissibility problems, two of which arguably represent an optimistic approach and two of which seem to illustrate a more skeptical view.

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138 Ibid at 692.

139 Sankoff, supra note 128 at 403.
1. THE OPTIMISM OF Dinar do AND Griffin

Canadian courts tend to be sanguine about limited admissibility: convinced that the proper uses of evidence can be distinguished from improper purposes, and confident that those distinctions can be given effect in the fact-finding process. As we have seen, this confidence carries some risks. Judges may rely on limiting instructions that fail, in practice, to constrain jury reasoning. And, buoyed by the sense that whatever distinctions they draw can be put into effect, courts may maintain subtle or illusory distinctions that cannot reasonably direct the reasoning of any fact-finder, jury, or judge. Examples of this optimistic attitude and its disadvantages can be found in the cases of R v Dinardo and R v Griffin.

Dinar do concerned an allegation of sexual assault by a young woman with an intellectual disability. The complainant claimed that a taxi driver touched her breasts and vagina while she was a passenger. She spontaneously reported these events to several individuals on the day they allegedly occurred, and she testified at trial consistently with those early reports. In convicting the accused, the trial judge found that the consistency of the complainant's story provided a “form of corroboration” of her testimony. The Supreme Court allowed the accused's appeal and ordered a new trial on the basis that the trial judge used the complainant's prior consistent statements for an impermissible purpose. Writing for the Court, Charron J reasoned that the prior consistent statements were inadmissible for the purpose of confirming the complainant's testimony, and the trial judge erred in using the statements that way. However, Charron J explained that the statements were admissible for the purpose of establishing the narrative of the complainant's disclosure.

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140 Supra note 38.
142 Dinardo, supra note 38 at para 17.
143 Ibid at para 40.
144 Ibid (the statements could “be used for the limited purpose of helping the trier of fact to understand how the complainant’s story was initially disclosed” at para 37).
The Court in *Dinardo* clearly repudiated the proposition that a witness's mere repetition of a story makes the story more likely to be true. The law's longstanding rejection of that proposition underlies the general prohibition on prior consistent statements. Yet, one might question whether Charron J succeeded in drawing a workable distinction between the permissible and impermissible uses of the evidence. She explained the proper purpose for which the trial judge should have considered the prior consistent statements as follows:

> [I]n light of the evidence that the complainant had difficulty situating events in time, was easily confused, and lied on occasion, the spontaneous nature of the initial complaint and the complainant's repetition of the essential elements of the allegations provide important context for assessing her credibility.

Presumably, given the complainant's intellectual disability and her consequent challenges as a witness, the prior consistent statements offered valuable "context" for judging her credibility, because their spontaneity and consistent repetition offered some assurance that she was telling the truth. How then was the trial judge wrong to conclude that the complainant's consistency was a factor tending to suggest her story was true? At bottom, there is little difference between the permissible and impermissible uses of prior consistent statements laid out in *Dinardo*.  

*Dinardo* was not a jury case, but it is worth considering whether a jury would be capable of applying this limited-admissibility rule. Even if the distinction between considering the complainant's prior statements as confirmation of her story and using them to gauge her credibility can be sustained at a conceptual level, one might doubt whether this distinction could be explained to the jury in a comprehensible manner. Ultimately, the

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145 See e.g. *Stirling*, supra note 37 ("it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth" at para 7).

146 *Dinardo*, supra note 38 at para 39.

Supreme Court’s holding in Dinardo exemplifies what Blinka has called “limited admissibility’s flawed preoccupation with analytic precision and sophistic distinctions.”

A similarly troubled distinction underlies the discussion of limited admissibility in Griffin. In that case, a murder victim told his girlfriend that if anything should happen to him, the accused would be responsible. Shortly thereafter the victim was shot to death. By a majority, the Supreme Court held that the trial judge properly admitted the victim’s statement subject to a limiting instruction to the jury that the statement could be used as evidence of the victim’s state of mind but not of the accused’s state of mind. For the majority, Charron J observed that this instruction accurately reflected the state of mind or present intentions exception to the hearsay rule, which permits hearsay statements to be admitted only on the issue of the declarant’s own mental state. Citing Dickson CJC’s opinion in Corbett, Charron J expressed confidence in the jury’s ability to abide by the instruction.

On the surface, this limiting instruction appears relatively straightforward. The problem with the instruction is that the victim’s state of mind was immaterial except to the extent that it could ground an inference about the accused’s intentions. The fact that the victim thought the accused might harm him was only relevant because it would tend to show that the accused did, indeed, intend to harm him. But using the statement to infer the accused’s state of mind was supposed to be impermissible. In the words of the dissenting judges, who concluded that the statement should have been excluded entirely, “the victim’s state of mind is irrelevant on its own, and it is impermissible to use it to infer [the accused’s] motive.” Thus, as in

\[148\] Blinka, “Ethical Firewalls”, supra note 18 at 1247.
\[149\] Griffin, supra note 141.
\[150\] Ibid at para 71.
\[151\] Ibid at para 57, citing Starr, supra note 29 at para 172.
\[152\] Griffin, supra note 141 (“juries must be trusted to have the requisite intelligence to perform their duties in accordance with the instructions given to them by the trial judge” at para 72).
\[153\] Ibid at para 105, LeBel and Fish JJ, dissenting.
Dinardo, the distinction between the permissible and impermissible uses of evidence in Griffin seems to collapse upon examination.

Justice Charron defended the distinction in Griffin by arguing that the victim's fearful state of mind was indicative of the nature of the victim's relationship with the accused, which in turn could be evidence of the accused's motive to harm the victim. But adding a step to the Court's description of the inferential process does not change the nature of that process. Ultimately, the jury would be invited to reason from the victim's fear of the accused to the accused's malicious intent. Jurors would likely be confused by an instruction simultaneously warning them to avoid this impermissible inference and inviting them to draw it through the vague mediating concept of the parties' "relationship". Even if some arguable legitimate purpose for the evidence could be maintained, that purpose would likely have trivial practical significance for the jury in the face of the natural temptation to conclude that the victim was right when he said the accused might harm him. Griffin and Dinardo demonstrate the difficulties with judicial optimism toward limited admissibility. An excess of confidence in the doctrine can generate untenable distinctions between the permissible and impermissible uses of evidence and drive reliance on limiting instructions that appear doomed to failure.

2. THE SKEPTICISM OF HANDY AND HENRY

While optimism remains the courts' prevailing attitude, an important strain of skepticism toward limited admissibility persists in Canadian law. Some judges have questioned or discarded certain applications of the doctrine. The Supreme Court’s judgments in R v Handy and R v Henry exemplify this skeptical approach.

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154 Ibid at paras 63–64.
155 See ibid ("[i]t is difficult to justify admitting the statement for a marginally probative and tangential purpose while insisting that the jury not use it in the most obvious and prejudicial way possible" at para 108).
In *Handy*, the Court enunciated the modern Canadian law on similar-fact evidence. Traditionally at common law, evidence of the accused’s prior discreditable conduct was inadmissible for the purpose of showing the accused’s propensity to commit the offence charged. Evidence of such similar facts could be only admitted for other purposes, such as to prove the identity of the perpetrator or rebut the accused’s claim that death was accidental. This traditional “category approach” to similar facts plainly constituted a rule of limited admissibility: use of the evidence for propensity was prohibited, and admissibility depended on the proponent’s ability to identify some alternative, legitimate purpose. Over time, the Canadian courts moved away from the category approach, with the Supreme Court finally repudiating categories entirely in its unanimous judgment in *Handy*. *Handy* established that similar-fact evidence is generally inadmissible because of its highly prejudicial effect against the accused, but that a narrow exception exists making similar facts admissible where the probative value outweighs their prejudicial effect.

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158 See Ronald Joseph Delisle, Don Stuart & David M Tanovich, *Evidence: Principles and Problems*, 9th ed (Toronto: Carswell, 2010) (“[c]ourts for many years in England and Canada would only admit similar fact evidence if it was relevant to some issue other than propensity” at 244).  
159 See ibid, citing the classic statement of the traditional approach to similar-fact evidence in *Makin v Attorney-General for New South Wales*, [1894] AC 57 at 65, 58 JP 148 (PC). See also *R v B (CR)*, [1990] 1 SCR 717, [1990] 3 WWR 385 [*B (CR)* cited to SCR] (historically, situations where similar-fact evidence was admissible “were reified into a series of categories…. Similar fact evidence was admitted to show intent, a system, a plan, malice, identity, as well as to rebut the defences of accident, mistake and innocent association” at 724).  
160 *B (CR)*, ibid at 723.  
161 See especially *R v Sweitzer*, [1982] 1 SCR 949, 137 DLR (3d) 702; *B (CR)*, supra note 159, McLachlin J (“[i]t is no longer necessary to hang the evidence tendered on the peg of some issue other than disposition” at 731). But see ibid, Sopinka J, dissenting (“I am unable therefore to subscribe to the theory that in exceptional cases propensity alone can be the basis for admissibility” at 744).  
162 *Handy*, supra note 156 at paras 31–55.
Handy essentially eliminated the limited-admissibility aspect of the similar-fact evidence rule. The Court declared that similar facts could be admitted as propensity evidence where their probative value on that issue outweighed the great potential prejudice.\(^{163}\) Writing for the Court, Binnie J disclaimed the courts’ often fruitless attempts to distinguish prohibited propensity reasoning from the alternative, ostensibly legitimate purposes for similar-fact evidence.\(^{164}\) If the evidence was in fact being admitted to establish propensity, he reasoned, courts should acknowledge that use instead of obscuring it with untenable distinctions.\(^{165}\) Propensity evidence should be frankly accepted as such, Binnie J wrote, because “[b]y affording its true character, . . . the Court keeps front and centre its dangerous potential.”\(^{166}\) Thus, by excising limited-admissibility concerns from the analysis, the Court at once simplified the test for admissibility of similar-fact evidence and reaffirmed a focus on the central problem of prejudice.

Admittedly, where similar-fact evidence is admitted, Canadian law still requires juries to be instructed to avoid reasoning that the accused’s character or disposition makes him or her the sort of person likely to have committed the charged offence.\(^{167}\) This instruction seems strange since the Supreme Court has acknowledged that similar facts can now be admitted to show propensity.\(^{168}\) Arguably, the practice of instructing juries in this way should be abandoned.\(^{169}\) In any event, under current law it seems difficult to characterize this instruction as a “limiting instruction” because no categorical

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163 Ibid at paras 59–60.

164 See ibid (“Propensity Evidence by Any Other Name Is Still Propensity Evidence” at para 59).

165 See ibid (“propensity evidence . . . must be recognized for what it is” at para 61).

166 Ibid.


168 See Delisle, Stuart & Tanovich, supra note 158 at 279.

169 But see Michael Plaxton & Glen Luther, “Limiting Instructions and Similar Facts” (2009) 63 CR (6th) 12 (suggesting that courts adopt “a new instruction . . . explaining that similar fact evidence can be used to infer specific but not general propensity” at 23).
distinction remains between the permissible and impermissible uses of the evidence. Perhaps the remaining instruction may be best understood as a caution to the jury, in light of the acknowledged prejudicial potential of similar-fact evidence, to avoid general propensity reasoning “from bad personhood to guilt”.\footnote{Shearing, supra note 167 at para 57.}

The Supreme Court’s wisdom in eliminating the limited-admissibility aspect of the law on similar facts becomes apparent when one considers the situation in the United States, where prior bad acts are still generally only admitted if they fit into some non-propensity category.\footnote{Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident[.] Fed R Evid 404(b). Special rules favouring wider admission of such information govern in cases of sexual assault and child molestation (see Fed R Evid 413–15).} Prosecutors frequently abuse this rule, conjuring some colourable legitimate purpose as a way to bring the accused’s prior discreditable conduct before the jury.\footnote{As explained in Blinka, “Ethical Firewalls”, supra note 18 at 1241: In criminal cases, prosecutors frequently proffer (‘sneak’?) evidence of the defendant’s prior bad acts and criminal conduct not to prove his bad character (and hence guilt), but ostensibly to prove other propositions, such as motive, opportunity, plan, intent, and the like. Often the real difficulty is that the distinction between the permissible purpose and the forbidden character inference is strained or nonexistent.} The Canadian approach appears, by contrast, refreshingly direct. Instead of occupying themselves with frail distinctions between propensity reasoning and other uses of similar-fact evidence, Canadian courts must now decide admissibility by weighing the probative value and prejudicial effects of the evidence.

Another example of the Supreme Court’s occasional skepticism toward limited admissibility emerges from its unanimous judgment in Henry.\footnote{Supra note 157.} This case concerned the accused’s constitutional protection against self-incrimination under section 13 of the Charter, which provides as follows: “A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any
other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.”¹⁷⁴ In contrast to American law,¹⁷⁵ Canadian law does not excuse witnesses from testifying when their testimony might incriminate them.¹⁷⁶ Instead, witnesses can be made to testify, but section 13 provides use immunity for their compelled testimony. Thus, the purpose of section 13 is to prevent “individuals from being indirectly compelled to incriminate themselves.”¹⁷⁷

For many years, the section 13 jurisprudence employed the concept of limited admissibility. In R v Kuldip,¹⁷⁸ a majority of the Supreme Court interpreted use immunity under section 13 as covering only those situations where the prior testimony was used “to incriminate” the accused, as opposed to the distinct purpose of impeaching the accused’s credibility.¹⁷⁹ Therefore, prior compelled testimony could be used against the accused for the limited purpose of impeaching credibility, as long as the trial judge delivered a limiting instruction to the jury explaining that the evidence could not be used to incriminate.¹⁸⁰

¹⁷⁴ Charter, supra note 6.
¹⁷⁵ The Fifth Amendment of the US Constitution protects the accused’s privilege to refuse to testify when his or her answers would be incriminating: US Const amend V.
¹⁷⁶ See Canada Evidence Act, supra note 123, s 5(1), which provides as follows: “No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him”.
¹⁷⁷ Dubois v The Queen, [1985] 2 SCR 350 at 358, 23 DLR (4th) 503.
¹⁷⁸ [1990] 3 SCR 618, 61 CCC (3d) 385 [Kuldip cited to SCR].
¹⁷⁹ Ibid (“[u]sing a prior inconsistent statement from a former proceeding during cross-examination in order to impugn the credibility of an accused does not, in my view, incriminate that accused person” at 634).
¹⁸⁰ Writing for a majority of the Supreme Court in Kuldip, ibid at 634–35, Lamer CJC offered an infamous hypothetical example. If B testified at someone else’s trial that he (B) was in Montreal committing a bank robbery on a particular day, and if B was subsequently accused of that bank robbery and testified in his own defence that he (B) was in Ottawa on that day, section 13 would not prevent the Crown from putting the prior inconsistent statement to B in cross-examination for the purposes of impeaching his credibility. To ensure that the evidence would not be used for an improper incriminatory purpose, the Chief Justice suggested that the trial judge should offer a limiting instruction inviting the jury to use the prior inconsistent statement to assess whether the accused was lying about
As the Court began to recognize some years later, this application of the doctrine of limited admissibility raised both conceptual and practical problems. Conceptually, the distinction between incriminating and credibility impeaching uses of prior testimony was unstable because every use of evidence against an accused is, broadly speaking, incriminating. Practically, any limiting instruction based on this troubled distinction appeared likely to be ineffective, especially in light of the jury's natural inclination to be influenced by incriminating evidence. The significance of these practical and conceptual problems was heightened in the Charter context, since the accused's constitutional protection against compelled self-incrimination would rise and fall on the solidity of the distinction and the effectiveness of the limiting instruction. Consequently, in R v Noël, a majority of the Supreme Court narrowed the limited admissibility rule under section 13 by holding that an accused's prior testimony should be inadmissible even for impeachment purposes unless there existed "no realistic danger of incrimination." The full Supreme Court finally repudiated the concept of limited admissibility under section 13 in Henry. Emphasizing that the analysis should focus on the purpose of the Charter right—to protect the accused

being in Ottawa, but forbidding the jury from relying on the statement as proof that the accused was in Montreal and committed the robbery. As Binnie J observed on behalf of the Court in Henry, supra note 157 at para 32, "few triers of fact, whether judge or jurors . . . would not have found the prior admission of the accused, that on the day in question he was in Montreal robbing a bank, probative on the issue of guilt of that offence."
against indirect self-incrimination that is compelled—Binnie J held that, contrary to prior case law,\(^\text{185}\) nothing turned on the tortured distinction between impeachment and incrimination.\(^\text{186}\) Rather, section 13 should be interpreted as granting the accused immunity from having prior compelled testimony used against him or her for any purpose.\(^\text{187}\) In Henry, as in Handy, the Supreme Court repudiated an unworkable application of the doctrine of limited admissibility.

There are, of course, numerous important distinctions between Dinardo, Griffin, Henry, and Handy. These four Supreme Court cases represent areas of evidence law as diverse as hearsay, character, and self-incrimination. The forgoing comparison is not intended to mask these distinctions or even to deny that these diverse doctrinal contexts may have played a part in the way the court approached the limited-admissibility problem in each case. Rather, the purpose here is to draw out the very different ways of reasoning about limited admissibility that continue to exist in Canadian law.

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\(^\text{185}\) Henry, supra note 157 expressly overruled this part of Kuldip, supra note 178.

\(^\text{186}\) See Henry, supra note 157 ("prior compelled evidence should, under s. 13 ... , be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility" at para 50).

\(^\text{187}\) Recently in R v Nedelcu, 2012 SCC 59, 353 DLR (4th) 199 [Nedelcu], the Supreme Court reintroduced some complexity into the section 13 analysis by concluding that use immunity only covers prior compelled testimony evidence that is "incriminating" in the sense that "the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt" (ibid at para 9). As the dissenting judges pointed out, this distinction between evidence that is incriminating or non-incriminating in nature appears unstable and may lead to confusion in future cases (see ibid at paras 110-32). However, the majority specifically rejected the idea that it was resurrecting the distinction between incriminating and non-incriminating uses of the evidence. Consistent with Henry, the majority affirmed that, where it applies, section 13 precludes the Crown from using the evidence against the accused for any purpose (ibid at paras 18, 37). Consequently, however problematic the distinction introduced in Nedelcu, the Court has not gone so far as to recreate a limited-admissibility problem under section 13.
IV. RATIONALIZING LIMITED ADMISSIBILITY

As we have seen, Canadian courts have adopted various, sometimes conflicting approaches to limited admissibility in different areas of evidence law. Because limited-admissibility rules are so common, however, and because the doctrine raises similar conceptual and practical difficulties whenever it is used, a more consistent approach to limited admissibility would represent a vital advance in the law. This part aims to outline what such an approach might look like.

A. GUIDING PRINCIPLES

The courts' differing approaches to limited admissibility reflect diverse perspectives on the jury, on the role (if any) of psycho-legal research in the evolution of the law, and on the purposes of evidentiary regulation. This section briefly explores these underlying issues and suggests three guiding principles that together could form the foundation of a more coherent approach to limited admissibility in Canadian law.

1. ACCEPTING JURY LEGITIMACY

The jury represents a vital institution within the Canadian legal system. While bench trials far outnumber jury trials even in the criminal-law context, the jury trial retains great systemic importance in the criminal law because of its status as a constitutional right of the accused and because the most serious criminal cases are commonly tried by jury. It therefore seems uncontroversial that the law should reflect respect for the jury, and courts should not be heard to question the legitimacy of jury adjudication. At the same time, Courts would be wise to recognize that most if not all common-law judges hold juries in high esteem, and it is generally unhelpful

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188 See e.g. Neil Vidmar, “The Canadian Criminal Jury: Searching For a Middle Ground” (1999) 62:2 Law & Contemp Probs 141 (in Canada, “the vast bulk of criminal cases, at least ninety percent, are tried by judge alone” at 147).

189 See supra note 6 and accompanying text; Gerry Ferguson, “Community Participation in Criminal Jury Trials and Restorative Justice Programs” (2001) [unpublished, archived with author] (“of the more serious cases that do go to trial, jury trials are a common mode of trial” at 42).
to accuse other judges of undermining jury legitimacy. Regrettably, this rhetorical technique remains all too common in the Canadian cases, especially in the area of limited admissibility. Ever since Dickson CJC adopted this style of argument in Corbett, judges who question the effectiveness of judicial instructions have been regularly charged with denigrating the institution of the jury. One wonders whether the prevalence of this line of argument has had a chilling effect on legitimate debate about the doctrine of limited admissibility.

But to what extent are common-law judges bound to uphold the premise that juries follow judicial instructions? Certainly respect for the jury system entails a weak version of this premise. Our practice of explaining the law to juries would be a sham without a basic level of confidence that those explanations have real effects. Thus, jury legitimacy requires some commitment to the idea that juries normally try to follow judicial instructions and that they are generally capable of doing so. However, as we have seen, courts often adopt a strong version of this premise, defending the notion that juries unfailingly abide by whatever instructions they are given. The strong version of this premise flies in the face of the available empirical evidence on limiting instructions. Worse, it may impede the development of the law.

190 See Corbett, supra note 5. See also the discussion at III.A, above.

191 See e.g. Griffin, supra note 141 ("[t]o make too much of the risk that the jury might misuse evidence is contrary to established principles of law regarding jury trials" at para 72). See also supra note 120 and accompanying text; Lisa Dufraimont, "R v Miljevic: Reflections on Faith in the Jury" (2011) 82 CR (6th) 8.

192 In his dissenting reasons in Corbett, supra note 5 at 727, LaForest J accepted "the time-honoured and obviously practical and necessary assumption that jurors are eminently capable of following a judge's limiting instructions respecting the uses to which evidence may be put". See also Ritter, supra note 41 ("[n]ot believing that jurors do their best and are usually successful in following a court's directives could have arguably unacceptable consequences" at 204); Sankoff, supra note 128 (quite properly, "judges... intrinsically accept... that juries are capable of following instructions in the majority of cases" at 433).

193 See the discussion in Part II.B, above. See also Ritter, supra note 41 ("there is far less practical necessity to cling to a presumption that all jury instructions are understood" at 204).
When courts stubbornly adhere to the idea that juries always follow instructions (including limiting instructions), there can be no opportunity to ponder the effectiveness of any particular instruction, and no opportunity for instructions to be improved. But like any other part of the procedural law, limiting instructions should be evaluated and refined over time. To put the matter another way, courts have sometimes succumbed to the fallacy that when juries have problems complying with limiting instructions, that must mean something is wrong with the jury. They have overlooked a more plausible explanation: that something is wrong with the instructions. Arguably, then, courts addressing limited-admissibility problems should be guided by a moderate principle of respect for the jury, avoiding both extreme skepticism and blind faith. Juries would be viewed as capable of discharging their duties, but there would always be room to question and improve the procedural rules surrounding jury adjudication.¹⁹⁴

2. ASPIRING TO PSYCHOLOGICAL REALISM

A second principle that could guide courts in their approach to limited admissibility is psychological realism. Under this principle, courts would strive to apply evidence rules that are realistic from a psychological point of view. To the extent that empirical research yields insights into the operation of limited-admissibility rules, courts would consider those insights in shaping the law. Admittedly, the empirical work on jury psychology provides no easy solutions for limited-admissibility problems; the research can be difficult to interpret, is constantly developing, and does not resolve the basic question of what to do when evidence supports both legitimate and improper inferences. But these challenges do not appear to justify ignoring the lessons of psychology. Rather, the law would be best served by courts

¹⁹⁴ One prominent Canadian jurist put it this way:

The institution of trial by jury in criminal cases is not fatally flawed. True, it has its problems. But the problems do not begin and end with juror competence. Judicial adherence to rigid trial procedures and practices that ignore incontrovertible learning about juror comprehension and decision-making are at the same time a significant part of the problem and a substantial impediment to its solution.[

constantly working to improve evidentiary rules and jury-instruction practices using the best information available.

Encouragingly, existing psycho-legal research suggests that courts can make changes to enhance the effectiveness of limiting instructions. The research points to various factors—including adjustments to the language, timing, and content of instructions—that might increase jury compliance with judicial admonitions. In the parlance of experimental psychology, these factors are “system variables” because they lie within the control of the justice system. To this point, the empirical work on limiting and disregard instructions has primarily demonstrated the effects of such system variables. Consequently, judges and policymakers have reason to be confident that changes in courtroom procedures can result in real improvements to the effectiveness of limiting instructions.

3. FOCUSING ON THE UNDERLYING POLICY

The third suggested guiding principle is that courts addressing limited-admissibility issues should centre their analysis on the policies behind the rules. The distinctions between the permissible and impermissible uses of evidence can be conceptually challenging, and judges who become preoccupied with these distinctions may neglect the underlying values and interests at stake. In *Henry*, for example, Binnie J explained that the section 13 analysis went off track when the courts began to focus on the distinction between incrimination and impeachment, losing sight of the basic purpose of section 13: protection against compelled

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195 See Part II.B.3, above.

196 See Gary L. Wells, “Applied Eyewitness Testimony Research: System Variables and Estimator Variables” (1978) 36:12 Journal of Personality and Social Psychology 1546 (“system variables” are to be contrasted with “estimator variables” that are “not under the control of the criminal justice system. . . . [T]hey cannot be controlled in actual criminal cases” at 1548).

197 See Steblay et al, supra note 57 (“fortunately, the greatest variability in the current data involves system variables, suggesting room for productive intervention” at 489).
self-incrimination. While the Charter context of Henry made such a purposive interpretation all the more appropriate, focusing on the policies driving the rules seems suitable in the context of limited admissibility more generally. Such a focus accords with the Canadian courts' emphasis on principled analysis of evidence law, and it provides some assurance that courts will design and implement rules that are reasonably well-calibrated to achieve their objectives.

The task of identifying these underlying policies is complicated by the fact that, by nature, limited admissibility pursues competing policies. Limited-use evidence carries some value for its legitimate purpose, but using the evidence for its impermissible purpose can result in prejudice to the opposing party. The very reason to admit evidence for a limited purpose is to reconcile these competing demands. Thus, to grasp the policy implications of a limited-admissibility rule requires assessing both the value of the evidence in terms of the permitted inference and the nature of the potential prejudice flowing from the impermissible inference. In this context, the courts must decide whether the doctrine of limited admissibility strikes an appropriate balance.

This policy-focus principle—like the principles of jury legitimacy and psychological realism—may seem largely uncontroversial. Certainly these suggested guiding principles represent no radical departure from our traditions of evidence law. Rather, the principles are intended to serve as common ground on which a more rational approach to limited admissibility could be developed.

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198 Henry, supra note 157 (twenty years of experience “shows that taking our eye off the underlying purpose of s. 13 has given rise to a number of distinctions and sub-distinctions that in the end have proven unworkable” at para 42).


200 For example, on the “principled approach” to hearsay, see Khelawon, supra note 14.
B. A Refined Analysis of Limited Admissibility

This section presents a concrete proposal for a two-step analysis that could be applied to any limited-admissibility issue. The first step would be a necessity test: the doctrine of limited admissibility would only be employed when necessary. Second, where the necessity test is met, courts would deploy the doctrine in a way that incorporates the learning from the psychological research on jury instructions. In particular, judges would apply limited-admissibility rules with a view to persuading the jury.

1. Eliminating Unnecessary Limited Admissibility Rules

The discussion of limited admissibility in this paper has revealed that the doctrine is plagued with difficulty. The psychological literature suggests that limiting instructions are likely to be ineffective or even counterproductive, and limited admissibility generates seemingly intractable problems on a conceptual level as well. To be realistic about the doctrine, one must admit that limited admissibility never represents an ideal solution to any evidence problem. At best, the doctrine may constitute the most acceptable accommodation of competing demands. Consequently, the proposed analysis of limited admissibility begins with the question of necessity. Even where both permissible and impermissible uses of evidence can be identified, frequently the interests of justice will be best served by admitting the evidence entirely or excluding it outright. Limited-admissibility rules should only be retained where they are necessary to protect some important policy or value.

Two situations can be imagined where limited admissibility would fail this necessity test. First, as we have seen, the distinctions between the permissible and impermissible uses of evidence are often subtle or even

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201 See Part II.B.2, above, “Empirical doubts about limiting instructions”.
202 See Part II.C, above, “Conceptual confusion”.
203 See supra note 119 and accompanying text.
204 For an argument that courts should never use a limiting or disregard instruction “unless requested by an affected party who wants to incorporate it into its argument”, see Tanford, supra note 53 at 107.
illusory. No purpose is served by instructing a fact-finder to draw impossible distinctions, and limited-admissibility rules based on such distinctions should be identified and discarded.205 Even when the permissible and impermissible uses of evidence are meaningfully different, the question remains whether the policies underlying the rule warrant the application of limited admissibility. Unless the impermissible use threatens some significant interest or value, it may be better to admit the evidence without limitation. Equally, if the permissible use is tenuous or overshadowed by the prohibited inference, then exclusion might be the best result. In short, only when the permissible and impermissible uses of the evidence generate a real policy conflict should the doctrine of limited admissibility be engaged.

A few examples may demonstrate how this necessity test could work. In Griffin,206 the distinction between the permissible and impermissible use of the hearsay statement was so weak as to be of no real value. The jury was instructed that it could use the murder victim's statement that he feared the accused as evidence of the victim's state of mind only, and not as evidence of the accused's state of mind. But the victim's fear was only probative because it pointed to the accused's malice. In this circumstance, resort to the doctrine of limited admissibility was unnecessary because there was no manageable distinction to maintain. In light of the danger that the jury might be impressed by this unreliable hearsay statement, the basis of which was unknown, outright exclusion would have been the appropriate result in that case.207

Even where the distinction between the permissible and impermissible uses of evidence appears more solid, in many cases the underlying policies would not justify applying the doctrine of limited admissibility. Exclusion would seem appropriate, for example, where the proponent of the evidence advances a permissible purpose simply as a way to evade an exclusionary rule

205 See Blinka, "Delusion", supra note 3 ("modify or discard those rules which turn on distinctions that are so subtle that instructions cannot be formulated and even lawyers cannot be expected to appreciate the distinctions within the context of the trial" at 823).

206 See Griffin, supra note 141, and the discussion of that case in Part II.B.1, above.

207 This was the argument advanced by LeBel and Fish JJ. dissenting.
and bring prejudicial evidence before the jury. In other cases, the legitimate purpose may pale in comparison to an obvious, impermissible inference, in which case the risk of prejudice would be too great to rely on the doctrine of limited admissibility. For instance, various commentators have argued that an accused witness's criminal record should generally be inadmissible, not because of any theoretical weakness in the distinction between using the record for credibility and using it for propensity, but because the distinction seems totally impractical when any fact-finder would be tempted to use the record for its most obvious but forbidden purpose. Others have argued that prior-conviction evidence should be freely admitted because, in its absence, jurors are likely to surmise that the accused has a criminal record and will be left to speculate about its severity. In light of the unanswered empirical questions about jury reasoning underlying this debate and the heterogeneity of prior conviction evidence, one can hardly be confident that

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208 See Friedman, “Intro”, supra note 15 (where the permissible use is raised as a pretext by a litigant who wants to see the evidence admitted for its impermissible purpose, “simple exclusion will be the best result” at xlii).

209 In the famous case of Shepard v United States, 290 US 96 (1933), for example, the accused was charged with killing his wife. Before her death, the wife had accused the husband of poisoning her. It was suggested that the wife’s statement was admissible not to show that the husband was the murderer but to rebut the suggesting that the wife intended to commit suicide. The Supreme Court rejected this application of the doctrine of limited admissibility because the impermissible purpose was so much more prominent than the permissible one. The Court held that “[t]he reverberating clang of those accusatory words would drown all weaker sounds”: (ibid at 104).

210 Canadian commentators who have advanced this view include Rees, supra note 8 at 347–48 (prior convictions of an accused witness should generally be inadmissible, even to go to credibility, but some exceptions should be recognized, as where the accused attacks the credibility of Crown witnesses on the basis of their own criminal records); Sankoff, supra note 128. For an American commentary to the same effect, see Robert D Dodson, “What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence” (1999) 48:1 Drake L Rev 1 (“current rules allowing prior convictions to be admitted should be dropped in favour of a categorical rule barring the admission of prior convictions for impeachment” at 4).

the ends of justice will be served by always excluding or always admitting such evidence. However, at least in cases where the accused has a record of committing similar crimes, the existing empirical evidence supports the view that the prejudicial effect of admitting the criminal-record evidence will be great and will likely overwhelm its limited value on the issue of the accused's credibility as a witness.212 In such circumstances, excluding the evidence outright should be the preferred course.213

In other circumstances, the prejudice flowing from the impermissible use of evidence appears so trifling that the evidence would be best admitted without limitation. Dinardo provides an apt example:214 In this case, the complainant's prior consistent statements were inadmissible to confirm the truth of her allegations at trial, but in light of her intellectual disability the narrative of her disclosure (and the consistency of her allegations) was admissible to provide context for assessing her credibility. Even assuming that this tortured distinction could be maintained, one might question whether there was any real risk of prejudice flowing from the alleged impermissible use of the prior consistent statements. Although courts sometimes express

212 See supra notes 72 and 76 and accompanying text. Even Laudan & Allan, supra note 211, who generally doubt the prejudicial effect of admitting evidence of the accused's prior convictions, recognize the weight of the evidence from mock-juror studies of the prejudicial effect flowing from prior convictions on similar charges (at 514). But see TM Honess & GA Mathews, "Admitting Evidence of a Defendant's Previous Conviction (PCE) and Its Impact on Juror Deliberation in Relation to Both Juror-Processing Style and Juror Concerns over the Fairness of Introducing PCE" (2012) 17:2 Legal and Criminological Psychology 360, reporting a mock-juror study in which evidence of the accused's prior conviction on the same offence was not found to be associated in a simple way with confidence in the accused's guilt. The authors posited that the weaker impact of the evidence might be attributable to the richness of the trial simulation, which was more realistic that the simplified trial summaries used in other research (ibid at 377).

213 Excluding evidence of similar prior convictions is permitted and sometimes occurs under the trial judge's discretion to exclude as recognized in Corbett, supra note 5. However, as Sankoff has noted, despite empirical evidence of the prejudicial effect of similar prior convictions, in the Canadian cases "similar convictions are often admitted in circumstances where no attack was made on the character of a Crown witness, and even in instances where other convictions would have remained available to go before the trier of fact": supra note 128 at 453.

214 See Dinardo, supra note 38 and the discussion of that case in Part II.B.1, above.
concern about witnesses manufacturing evidence to support their own testimony, it seems unlikely that a jury would be greatly impressed by the mere repetition of a witness's story. The most persuasive reason to exclude prior consistent statements is that they waste the court's time. But such efficiency concerns may not be weighty enough to warrant applying the doctrine of limited admissibility. Arguably, examining the policies at stake suggests that the complainant's prior consistent statements in Dinardo should have been freely admitted.

Finally, it seems important to consider an example of a situation where the necessity test would be met and use of limiting instructions justified. In Corbett, Dickson CJC agreed with LaForest J that judges hold a discretion to exclude the criminal record of an accused who testifies, but found that such exclusion would have been inappropriate in the case at bar. Corbett's defence was largely based on attacking the credibility of the Crown witnesses on the basis of their own criminal records, and in light of this defence tactic the Chief Justice reasoned that excluding Corbett's own record would have created an unfair imbalance in favour of the accused. In such a case, a real

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215 See Bryant, Lederman & Fuerst, supra note 1 (one of the two common rationales for excluding prior consistent statements is that "no person should be allowed to create evidence for him or herself" at 395).

216 See Delisle, Stuart & Tanovich, supra note 158 (the best justification for excluding prior consistent statements relates to "superfluity and consumption of time" at 606); Bryant, Lederman & Fuerst, supra note 1 at 395 (the second common rationale for excluding prior consistent statements is that they lack value); Stirling, supra note 37 ("prior consistent statements are generally inadmissible . . . . This is because such statements are usually viewed as lacking probative value and being self-serving" at para 5).

217 See Leonard, Wigmore, supra note 1, ch 1 ("[l]imited admissibility problems certainly arise in which the relevant danger against which probative value must be weighed is undue delay, waste of time, or needless presentation of cumulative evidence . . . [and though] these dangers can be significant, they generally do not raise as severe a risk of inaccurate verdicts as are posed by the other enumerated dangers, which can, for present purposes, be grouped together under the category of unfair prejudice" at 55).

218 Supra note 5.

219 Ibid ("[h]ad Corbett's record been excluded, the jury . . . would have been left with the entirely mistaken impression that while the Crown witnesses were hardened criminals, Corbett had an unblemished record" at 698).
policy conflict arises because the grounds for excluding the evidence for its impermissible purpose (to avoid the heavy prejudice that would come with revealing the accused's prior conviction on the same charge) and the rationale for admitting it for its permissible purpose (to avoid the unfairness to the Crown that would come from concealing the criminal record of the defence's key witness while highlighting the criminal records of the Crown witnesses) both appear compelling. In these circumstances, arguably the only acceptable, albeit imperfect, solution was to admit the record together with a limiting instruction.

2. OPTIMIZING LIMITING INSTRUCTIONS

Despite its risks, the doctrine of limited admissibility sometimes offers the only workable solution to evidence problems. Where resort to the doctrine is necessary, judges should be mindful that while limiting instructions frequently fail to constrain jury reasoning, there are methods of enhancing their effectiveness at least to some degree. It behooves judges framing limiting instructions, in consultation with counsel, to draw insights from the psychological literature to make those instructions as effective as possible. Indeed, even judges presiding alone should be mindful of those insights, since the distinctions they draw might become the basis of limiting instructions in future cases. The psychological research suggests several ways to make limiting instructions more effective. For instance, innovations in language and timing of instructions carry the potential to make limiting instructions more effective, and they warrant further exploration in Canadian law.

One particularly promising innovation merits examination here. Admonitions may be more effective when they incorporate a rationale that

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220 See supra notes 96 and 98 and accompanying text.

221 For discussion of these and other jury instruction innovations and their application in Canadian law, see Marie Comiskey, "Initiating Dialogue About Jury Comprehension of Legal Concepts: Can the 'Stagnant Pool' Be Revitalized?" (2010) 35:2 Queen's LJ 625. Regarding adjustments to the language of instructions, Comiskey observed that "systematic studies are required to test the overall comprehensibility of the Canadian instructions and to determine whether modifications according to psycho-linguistic principles might improve juror understanding": (ibid at 648).
jurors find persuasive. A recent meta-analysis of studies on the effects of inadmissible evidence concluded that jurors are more likely to abide by instructions to disregard when judges explain why the evidence should be disregarded. Further, the substance of the explanation matters: instructions to disregard are generally ineffective when no explanation is offered or when the explanation turns on a perceived "technicality" like the exclusion of illegally obtained evidence. By contrast, instructions to disregard are relatively effective when jurors are told that evidence is hearsay, irrelevant, or unreliable. Thus, the empirical research suggests that jurors comply selectively with admonitions, disregarding evidence they see as lacking in value but holding on to evidence they see as valuable. Applying these findings to the limited-admissibility context, the effectiveness of limiting instructions may be enhanced when judges offer a compelling explanation of the purposes for which the evidence can and cannot be used.

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222 Steblay et al, supra note 57 at 487.
223 Ibid.
224 Ibid.
225 Two studies demonstrating this selective compliance showed that jurors were more likely to follow an instruction to disregard wiretap evidence when they were told it was unreliable than when they were told it was obtained in violation of the accused's rights. See Saul M Kassin & Samuel R Sommers, "Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations" (1997) 23:10 Personality and Social Psychology Bulletin 1046 ("jurors... exhibit selective compliance with instructions to disregard inadmissible evidence. . . . [T]hey cannot resist the temptation to use information they see as relevant—whether it satisfies the law's technical rules or not" at 1050–51); Samuel R Sommers & Saul M Kassin, "On the Many Impacts of Inadmissible Testimony: Selective Compliance, Need for Cognition, and the Overcorrection Bias" (2001) 27:10 Personality and Social Psychology Bulletin 1368. See also Steblay et al, supra note 57 ("jurors resist giving up evidence that they believe is probative" at 487).
226 See Leonard, Wigmore, supra note 1, ch 1 ("[i]f the judge's instruction includes a logical and inherently compelling explanation of the reasons why the evidence is inadmissible for a particular purpose, there is a greater chance that the jury will choose to follow the instruction" at 63); Lieberman & Arndt, supra note 49 ("[i]f mock jurors are given a logical reason for the judge's decisions that they believe is legitimate, then there is evidence that they are able to obey the admonitions" at 688).
The research findings on the effects of an explanation have not been entirely consistent. In one frequently cited study, Pickel found that an explanation did not help mock jurors disregard inadmissible information. During a simulated trial, a witness testified that the accused had earlier been convicted of perjury. The judge's instructions on this evidence varied. In some conditions the jury was simply told that the criminal record was inadmissible, and in other conditions the judge also explained that ruling. Mock jurors disregarded the evidence when the judge ruled it inadmissible without explanation, but those who also received a legal explanation did not disregard the evidence. In other words, the legal explanation backfired by inducing mock jurors to rely on the inadmissible evidence.

Superficially, Pickel's results cast doubt on the usefulness of explaining evidentiary admonitions to juries. However, the results may well flow from the type of explanation used in the mock trial. The judge's entire explanation was as follows:

According to the rules of evidence, the witness may not testify about crimes that the defendant allegedly committed because this testimony might improperly suggest to you that the defendant has a bad character and tends to behave in the same negative way in all situations.

On examination, this "explanation" fails to provide any rationale for disregarding the criminal-record evidence: it simply points to the existence of a plausible propensity inference and tells the jury to reject that inference as "improper." One can hardly be surprised that such an explanation would fail to encourage juror compliance with evidentiary rules. A more substantive explanation of the reasons to avoid propensity reasoning might have


228 Pickel also ran a second experiment in which inadmissible information was excluded as hearsay. In that experiment, explaining that the evidence was hearsay did not help the subjects ignore the evidence because they ignored it even without the explanation. See ibid ("it appears that participants already suspected that hearsay evidence should not be used and quite easily disregarded it when so instructed" at 419).

229 Ibid at 415.

230 Ibid at 412.
highlighted the reliability-related concern that bad character evidence can be overvalued and is considered an untrustworthy indicator of guilt.\footnote{See e.g. Corbett, supra note 5 (noting that even if innocent, an accused with a criminal record may face a "vicious circle"... A person is suspected and investigated because of his record and the existence of that record increases the likelihood of his conviction" at 728).} Even the non-reliability-related rationales for avoiding propensity reasoning—such as the basic unfairness of stacking the deck against an accused with a blemished past—could have been explained to the jury more persuasively.\footnote{On the various justifications for character-evidence rules, see especially David P. Leonard, "In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character" (1998) 73:4 Ind LJ 1161.}

Judges seeking to incorporate explanations into their limiting instructions will have to consider what makes an explanation persuasive to a jury.\footnote{See Demaine, supra note 93 ("It is imperative... that the explanation be convincing" at 189).} Since the existing research supports the notion that jurors are persuaded by reliability-related rationales, judges could likely increase compliance with limiting instructions by alerting the jury to any pertinent reliability concerns.\footnote{See e.g. Leonard, Wigmore, supra note 1, ch 1 (where limited-use evidence cannot be used for its truth but only for some non-hearsay purpose, the limiting instruction might "at least acquaint jurors with the dangers of hearsay, making them skeptical of the evidence and likely to discount it as proof of the matters asserted, even if they will find it difficult to ignore the evidence altogether" at 102–102-1); Blinka, "Delusion", supra note 3 ("when the distinction between the permissible and impermissible purpose arises from concerns about the trustworthiness or reliability of the evidence, the fears justifying the rule should be explained to the jury in an instruction which educates them about the dangers" at 820).} Where the permissible uses of evidence are limited for reasons unrelated to reliability, judges may simply have to explain those rules as persuasively as they can.

Some commentators have advocated a "collaborative instruction approach"\footnote{Shari Seidman Diamond & Neil Vidmar, "Jury Room Ruminations on Forbidden Topics" (2001) 87:8 Va L Rev 1857 at 1911.} whereby judges treat jurors as active co-participants in enforcing legal rules based on a shared understanding of their purposes. The policies behind the rules are clearly explained to juries in an attempt to enlist their
co-operation. There is some empirical support for this approach, even in contexts where the rationale behind the rule is unrelated to reliability. In a 1992 study by Diamond and Caspar, mock jurors watched a video simulation of an antitrust case and were charged with compensating the plaintiffs for their damages.\textsuperscript{236} Under US law, the damage award would be tripled to penalize the defendants for the antitrust violations. Mock jurors were either (1) not told about the treble damages rule, (2) told about the rule without any instruction about what to do with the information, (3) told about the rule and instructed that it should not affect their damage awards, or (4) told about the rule, instructed that it should not affect their awards, and offered an explanation of why they should not let their awards be affected. That explanation stressed that reducing awards in anticipation of trebling would undermine Congress's punitive purpose in enacting the trebling rule. In the study, the explanation of the rule had the desired effect. Jurors who knew about the treble damages rule awarded lower damages, but the judge’s explanation of the rationale behind the rule mitigated that effect, thereby increasing compliance with instructions. Such a collaborative instruction approach, which brings the policy basis of evidence rules to the fore in the judge’s instructions, seems promising as a method of enhancing the effectiveness of evidentiary admonitions.\textsuperscript{237} This collaborative approach also seems attractively consistent with respect for the jury as an institution capable of adjudicating cases according to law.

Presently in Canadian trials, judges frequently deliver limiting instructions that lay out the permissible and impermissible uses of evidence without any discussion of the rationale for those limitations.\textsuperscript{238} Both


\textsuperscript{237} See Demaine, supra note 93 (the Diamond and Casper study “suggests that a policy-based explanation for an inadmissible ruling can remove the effects of prejudicial inadmissible evidence” at 188). See also Diamond & Vidmar, supra note 235 (instructions to disregard should be offered through “a reason-based explanatory instruction” instead of a “simple admonition” at 1908).

\textsuperscript{238} For instance, the Canadian Judicial Council's pattern jury instructions suggest charging juries on the limited purpose for which they can consider the criminal record of an accused witness in the following minimalist terms: “You have heard that [the accused] has
common sense and empirical evidence suggest that jurors may not be motivated to abide by such seemingly arbitrary judicial commands regarding the analysis of evidence. If courts seek to protect some important policy by limiting the jury's reasoning from evidence, the best strategy may be to help the jury understand the importance of upholding the value or principle at stake. It is true that incorporating a rationale would make limiting instructions somewhat longer and more complex, and complexity in jury instructions can be a barrier to comprehension. However, on the whole the proposals presented in the paper would lead to simpler jury instructions, since many of the limiting instructions that are currently offered would be eliminated as unnecessary. Where a limiting instruction is necessary to resolve some real policy conflict between the permissible and impermissible uses of evidence, surely it is worth the extra time to explain to the jury the policies underlying the rule.

V. CONCLUSION

Judges must be sorely tempted to take a formalist approach to limited admissibility. As long as no one looks behind the proposition that juries follow limiting instructions, limited-admissibility rules seem unproblematic. However, courts' tendency to content themselves with "solving" limited-admissibility problems in form but not in substance has generated some undesirable results. Most obviously, courts continue to rely on limiting instructions that probably don't constrain jury reasoning in the ways the law intends. In addition, the courts' refusal to examine the doctrine of limited admissibility too closely has allowed some untenable distinctions between

previously been convicted of a criminal offence. You must not use the fact that [the accused] has committed a crime in the past as evidence that s/he committed the crime charged. You may only consider the fact, (number) and nature of that (those) conviction(s) to help you decide how much or little of [the accused]'s testimony you will believe or rely on." Canadian Judicial Council, "Mid-Trial Instructions, Part 7.5", Model Jury Instructions, online: <http://www.cjc-ccm.gc.ca>.

See Lisa Eichhorn, "Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence" (1989) 52:4 Law & Contemp Probs 341 (given "an explanation of underlying policy[,] . . . jurors would view the [admonitions] . . . as less arbitrary and more reasonable" at 353).
the permissible and impermissible uses of evidence to become established in our law of evidence.

The solution to these problems lies in a moderate kind of realism. Canadian courts should stop refusing to critically appraise their own procedures for the ostensible purpose of protecting jury legitimacy. They should at least try to respond to the devastating critiques of limited-admissibility rules by recognizing the limitations of the doctrine and attempting to frame instructions that will be as effective as possible. Ultimately, it is probably not possible to ensure that judges and juries always use evidence only for permissible purposes; the doctrine of limited admissibility will remain an uncomfortable compromise. If the courts would at least acknowledge that discomfort, they might do a better job resolving limited-admissibility problems.