# OTHER ACTS OF SEXUAL MISBEHAVIOR AND PERVERSION AS EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES

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The rule of evidence in criminal cases which excludes admission of other crimes when the sole purpose of such evidence is to prove that the defendant is disposed to criminal behavior is one of impressive pedigree. When invoking the rule, courts often speak of its ancient origin and note that the protection it accords is an important example of the solicitude for criminal defendants characteristic of Anglo-American jurisprudence. Despite certain inroads on the rule and the fact that in practice it is often neglected or evaded by other rules,[1] it nevertheless remains a forceful concept in our law of evidence. In many cases it is a crucial protection to those accused of crime. Wigmore, in respect to the rule, says that "for nearly three centuries, ever since the liberal reaction which began with the Restoration of the Stuarts, this policy of exclusion, in one or another of its reasonings, has received judicial sanction, more emphatic with time and experience. It represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of Evidence."[2] An early and colorful application of the rule by Holt, L. C. J. is found in *Harrison's Trial* in 1692.[3] The defendant was on trial for murder. A witness was offered to testify that the defendant had committed another criminal act three years prior to the trial. Holt rejected this offer saying, "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

Although the rule is ancient, renowned and easily stated, its application has been uncertain and difficult. Where the relevancy or probative value of the offered evidence is great and the prejudice to the defendant which would result if the evidence were received is

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[1] *E.g.*, where the defendant has raised the issue of his character, and for the purposes of attacking the credibility of the defendant.

[2] 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940) [hereinafter cited as WIGMORE].

[3] 12 How. St. Tr. 833, 874, cited in I WIGMORE § 194.

considerable, adequate results require rigorous analysis. The first task for a court is to determine whether the evidence proffered has *any* relevancy. If it can conclude that it does not, then the evidence can simply be rejected on that ground. But, if the court concludes that the evidence is relevant, it must then determine whether it is so only because it tends to prove that the defendant has a disposition or propensity for criminal acts or whether it has some alternative relevance. The approach which allows all relevant evidence except that which tends to show the criminal disposition of the defendant might be denominated the "positive" expression of the rule of exclusion. The "negative" expression of the rule is that no evidence of other criminal acts may be admitted unless such acts form an element of the crime charged or are relevant to show the (1) intent, (2) motive, (3) knowledge, (4) plan or scheme, or (5) identity of the defendant. Stone, in a frequently cited law review article, called this latter expression the "spurious" rule and said:

> By its form of rule and exceptions the spurious rule immediately multiplied the questions on which in any particular case opinions might diverge. But further, it also necessarily led in appropriate cases to different results from those which the original rule would have yielded. First, the range of admissibility under it was narrower in respect of relevancies outside the categorized exceptions. Second, a few courts so perverted even the spurious rule that in its perverted form it admitted more than the original rule.[4]

The perversions to which Stone refers have been principally in the application of the negatively stated or "spurious" rule in trials for sexual crimes. The development of a special exception to the rule for this type of crime, the felt needs that account in part for its acceptance in a number of jurisdictions, and the legal and psychological justifications which have been advanced for the exception are the subjects of this paper. It was Stone's fear that the negative expression of the rule and the mechanical use of the enumerated exceptions by the courts would make them forget that the exceptions are essentially only indicators of relevancy and cannot alone solve difficult problems of relevancy. The cases and judicial opinions used in this paper should demonstrate that Stone's fears were well grounded. The courts in dealing with the problem in the context of sexual crimes have often used the enumerated exceptions as magic shibboleths. These have proved inadequate substitutes for the difficult balancing of relevancy and prejudice necessary for the wise application of the rule of exclusion.

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[4] Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1034 (1938).

The Model Code of Evidence uses the "positive" expression of the rule of exclusion.[5] The rule is also expressed in this form in England and several states have adopted the same approach.[6] However, the negatively stated or "spurious" rule might be called the "American" rule, for it is so stated in most of the jurisdictions of this country. The leading case is *People v. Molineux.*[7]

The statement that a number of courts have made a special exception to the rule where the prosecution is for a sexual offense must be examined. The implication is that these states allow evidence of other criminal offenses to be used even if it is relevant only to show the disposition of the defendant to do the act charged. The great majority of courts in this country have accepted such a proposition only to a limited extent, holding that where a defendant is charged with a sexual offense and the prosecutrix offers evidence that the defendant either prior or subsequent to the offense charged engaged in similar acts *with her,* this may be admitted to show the defendant's disposition or inclination to do the act charged. The court in a leading Tennessee case permitted an instruction which allowed the jury to consider evidence of other acts of intercourse with prosecutrix in order "to shed light upon the inquiry as to whether intercourse was had upon the occasion in controversy."[8] While there is some variation among the states as to admissibility of other acts alleged to have been done subsequently to the act charged and as to different types of offenses, the editors of American Law Reports conclude that "the majority rule is that in a prosecution for a sexual offense evidence is admissible which tends to show prior offenses of the same kind committed by the defendant with, or upon, the prosecuting witness."[9] In these cases the courts have frequently used language to the effect that other offenses can be used to show the disposition, inclinations, or propensities of the defendant. But most courts have been scrupulously careful to

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[5] MODEL CODE OF EVIDENCE rule 311 (1942).

[6] Williams v. State, 110 So. 2d 654 (Fla. 1959), *cert. denied,* 361 U.S. 847 (1959); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955).

[7] 168 N.Y. 264, 61 N.E. 286 (1901). In this dramatic murder case, the prosecution attempted to link the defendant with a prior murder. The trial court allowed this but was reversed. On review, the New York Court of Appeals stated the rule and enumerated the exceptions. The Court of Appeals demonstrated with great care why the evidence of the prior alleged murder could not be considered an exception to the rule and how the use of the evidence was prejudicial to the defendant. The case is extraordinarily well reasoned and it would seem that with such guidance a significant number of courts would not have so badly misapplied the rule and standard exceptions in developing the special exception for sexual crimes.

[8] Sykes v. State, 112 Tenn. 572, 82 S.W. 185 (1904).

[9] Annot., 167 A.L.R. 565, 569 (1947). For a great variety of pertinent cases, generally involving offenses such as statutory rape, fornication, adultery, and incest, see Annots., 167 A.L.R. 565 (1947); 77 A.L.R.2d 841 (1961).

restrict the application of this exception to cases in which similar offenses involved only the defendant and the prosecuting witness.

It has only been fairly recently that it has occurred to some courts that such an exception could be applied generally to sexual crimes and that other offenses alleged to have been committed against persons other than prosecutrix could be admitted. Also, some of these courts have expanded the exception even further by admitting offenses which are not similar to that of which the defendant is accused. The states in which these developments have taken place are still a small minority. Nevertheless, the idea seems to be spreading rather rapidly. There are few decisions in which courts adopting this exception have attempted any reasoned justification. Often the courts seem to slip into it almost unconsciously by thoughtlessly applying the exception designed for similar offenses with the prosecutrix. Other courts seem to have achieved the same result by forcing other sexual offenses into one of the enumerated exceptions in cases in which such exceptions were clearly inapplicable.[10] But regardless of the road taken, a serious erosion of the rule of exclusion as applied in trials for sexual crimes is occurring. In order to adequately appraise this development, it will be necessary to: (1) discuss the attitude and policies underlying the rule of exclusion; (2) consider the justifications for an exception to the rule in sexual cases for similar acts with the prosecutrix; (3) examine the cases in which this exception has been extended to admission of alleged offenses against persons other than the prosecutrix; (4) test the psychological assumptions on which these decisions are based.

## I.

Suppose a coin is flipped randomly twenty-five times and each time the result is a "tails." If the flipping process gives truly random results, such a sequence of "tails" is highly improbable. A series of twenty-six "tails" is even more improbable and the common sense gambler might be tempted to bet heavily that the twenty-sixth flip would be a "heads." It requires going a little beyond intuition or common sense to realize that the twenty-sixth flip is an event isolated from the previous twenty-five flips, and that the probability of a "heads" on the twenty-sixth flip is only fifty-fifty. The incorrect intuitive assumption is probably partly explained by our general lack of experience with randomness. Our cognitive development might be described

[10] See Note, 40 MINN. L. REV. 694 (1956). After listing a number of cases representing such distortions, the note writer concludes that "rationalizing the admission of independent transactions under standard or other exceptions may merely be a more subtle method of controverting the rule." *Id.* at 698.

in terms of learning to observe and identify consistencies in the external world. The emphasis is usually on becoming aware of the lawful repetition of relationships in our environment and attempting to mask out the random or the unrelated. This is true of behavior and we are not generally satisfied to regard a bit of behavior as random, but rather we prefer to construct concepts such as personality which permit us to relate these bits of behavior and see some consistencies or lawfulness in them. Thus in any individual, while there is a great variety of behavior and continual change in behavior, the concept of personality is considered relatively constant and not prone to substantial change. We have adopted such a concept because we have found that it frequently increases our predictive power. Experience has shown that unlike the flip of the coin, human behavior is not random. When a man commits a crime, for example, we feel that this gives us some information about his personality or predisposition. Since it is assumed that this personality or predisposition tends to be constant, we consider ourselves in a better position to predict his future behavior. We consider knowledge of the crime to be relevant to determine the likelihood of similar conduct in the future. In this respect it may be said that if a defendant is charged with a crime, it may be relevant that he has committed other crimes. It is not directly relevant but depends on the intermediate proposition that one who has committed other crimes is more likely to have committed the act of which he is accused than if he had committed no other offenses. Assuming this is true (and proving it true would be difficult because the trial and conviction rates of first offenders cannot be fairly compared with those of defendants with records since the existence of the record is likely to have an important effect on the verdict), the other crimes might be admitted to allow the trier of fact to consider this higher probability along with other circumstantial evidence. Of course, even under this analysis there would be cases in which the other offenses would contribute so little to increasing the probability of guilt that it would not be considered relevant. Thus, where the offenses are quite dissimilar, or are generally thought not to represent similar personality characteristics, or are separated by a considerable span of time, a court might decide that the greater probability is illusory or so doubtful that the other offenses should not be allowed.[11] On the other hand, there are cases in which such evidence, which has relevancy only in that it shows criminal personality or disposition of the defendant, appeals strongly to the court because of its compelling probative value. The rule of exclusion has been erected to check the impulse to admit such evidence

[11] See People v. Formato, 286 App. Div. 357, 143 N.Y.S.2d 205 (1956).

where its admission would be seriously prejudicial to the defendant.

What are the justifications for excluding such valuable evidence? Wigmore says of such evidence that "it is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."[12] The rule is essentially a reflection of concern for fairness to the defendant. If the defendant were not seriously prejudiced by admission of other offenses, there would be no justification for a flat rejection of evidence with probative value. In a criminal prosecution the advantage of having relevant information available to the trier of fact is obvious. But the ways in which the admission of such evidence may unduly prejudice the defendant requires some elaboration. In virtually the only case in the reports which attempts a reasoned analysis of the special exception for sexual crimes, the court enumerates the ways in which a defendant may be prejudiced by the admission of prior offenses: "(1) Cause the defendant to meet a charge of which he had no notice and make it impossible for him to refute fabricated charges; (2) Raise collateral issues and direct the attention of the jury from the crime being charged; (3) Result in the proof of the prior offenses being taken by the jury as justifying a condemnation of the defendant irrespective of his guilt of the offenses charged."[13] Taking these difficulties in the same order as the court, the first poses greater problems where the prior alleged offense was not reduced to a conviction. If there had been a prior conviction, the defendant might still maintain his innocence, but ordinarily he should not be surprised when the prosecutor attempts to get it into the evidence. Even where there was a prior trial but no conviction, the defendant is likely to be aware of the possibility of the issue being raised. However, where the other offenses are alleged for the first time, the danger of unfair surprise is considerable. If the defendant chooses not to meet these charges, the impression on the trier of fact may be that he is unable to do so. If he tries to meet them, then the problem of collateral issues is raised. In making a full defense to the other offenses, it may appear to the jury that the defendant is on trial for a number of crimes, and despite instruction by the judge, an indication of guilt on one of

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[12] 1 WIGMORE § 194, at p. 646.

[13] Commonwealth v. Boulden, 179 Pa. Super. 328, 116 A.2d 867 (1955).

the other offenses might generalize in the minds of the jurors to the offense charged. But the third point made by the *Boulden* court indicates the most serious way in which the defendant is disadvantaged. If the other offense had been reduced to a conviction or if the trier of fact is otherwise convinced that the defendant did commit the other offense, there may be a strong tendency for a juror to regard this as conclusive of guilt of the crime charged rather than only "some evidence" of guilt. The defendant is likely to become guilty by association with the other offenses. Exactly how jurors think and what weight they give particular evidence is a matter of conjecture. However, the fact that lawyers often shape their entire trial strategy to avoid admission of these other offenses is indicative that experience has shown the grave danger to the defendant of such evidence. With these considerations in mind, it is worthwhile to examine briefly the development of the exception made in prosecutions for sexual crimes for other offenses committed with the prosecutrix.

## II.

In crimes such as incest, statutory rape, fornication, etc., courts in this country have long recognized that a sexual relationship between the defendant and prosecutrix exclusive of the particular sexual act for which defendant is accused is relevant in proving that the defendant committed the act.[14] The high degree of relevancy, less prejudice to the defendant, and the general difficulty of proving such crimes are factors which have contributed to the development of this narrow exception. While not all states have adopted even this limited exception, the majority have. Some of these have extended it to include subsequent as well as prior relations, other offenses sexual in nature but not exactly similar to the crime charged, and offenses that are of a non-consensual nature.[15] The most frequent argument made by the courts for the exception is that it properly permits corroboration of a prosecutrix's testimony and that a defendant's lustful disposition toward prosecutrix is probative. Typical reasoning is found in a Louisiana case where the defendant was charged with aggravated rape and the prosecutrix was allowed to testify that defendant had also raped her on another occasion. The majority said, "under the exception evidence of previous acts or attempted acts of intercourse by the accused with the prosecutrix, at a time not too far remote, is relevant and admissible for corroborative purposes and to show a lustful disposition . . . ."[16]

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[14] See, *e.g.*, Williams v. State, 27 Tenn. (2 Humph.) 585 (1848).

[15] See Annots., *supra* note 9. These collections cite and describe a large number of cases for both the majority and minority view.

[16] State v. Ferrand, 210 La. 394, 27 So. 2d 174, 176 (1946). See generally Annot., 167 A.L.R. 559 (1947).

Although it is with just such ease and absence of analysis that a majority of courts have adopted the narrow exception, the wisdom of the development has not gone completely unchallenged. Noting the adoption of the narrow exception in Minnesota, one commentator has said:

> The court's liberality in admitting evidence in this type of crime is somewhat illogical. Since natural prejudice against the sex offender is so great, it would seem that he should be offorded [*sic*] more, rather than less, protection. The reason for this liberal admissibility is not clear, but appears to rest on a belief that other acts with the prosecutrix show lust of the defendant for this particular girl rather than mere disposition to commit this type of crime. . . . Such reasoning appears to be little more than rationalization to explain a complete departure from the exclusion rule which will not fit this situation.[17]

It is possible that the majority of courts have adopted an exception that makes sense but which has not been adequately explained or analyzed. The narrow exception grew up in the context of prosecutions for sexual crimes that were consensual. A successful conviction often depended primarily on whether a jury believed the story that the prosecutrix told. Ordinarily consensual sexual affairs are kept as secret as possible. Even so, each such incident (if it has in fact occurred) tends to give rise to certain circumstances that witnesses will note or that the prosecutrix may remember. The evidence that remains from any one particular incident (other than the words of prosecutrix) may be quite sketchy and not very convincing. But evidence of all the incidents taken together may provide a pattern that tends to make the alleged incident appear much more plausible and probable. That the prosecutrix is the object of all the offenses is the factor that unifies the various offenses and gives them a strong relevance to the offense charged. It may be that this is the idea that courts have shorthanded by use of the phrase "admissible to show a lustful disposition for the prosecutrix." This often without any elaboration is made even more general when courts (as they frequently do) drop the last words "for the prosecutrix." As will be seen, such careless use of language is partly responsible for the development of the broad exception for sexual crimes.

The second point courts have emphasized in adopting the narrow exception is that such evidence is needed for purposes of corroboration. That corroboration is so often mentioned is again explained by the inception of the rule in the context of consensual sexual crimes. In proof of some of these crimes in some jurisdictions, corroborating

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[17] Note, 37 MINN. L. REV. 608, 614 (1953).

evidence is not only admissible but necessary for a conviction. This is a rule to protect defendants from convictions on the basis of the bare testimony of the prosecutrix. It is interesting that in the cases applying the narrow exception the need for corroboration has become a stick with which to beat the defendant by introducing other similar offenses. The courts seldom attempt to explain why corroboration of the prosecutrix's testimony should be allowed to subvert defendant's valuable right to the protection of the rule of exclusion. It is also interesting that in many of the cases this "corroboration" amounts to no more than the recounting of other offenses by the prosecutrix. The need for corroboration when that means only multiplication of allegations by the same prosecuting witness seems a tenuous justification for the narrow exception in sexual cases.

Perhaps sounder justification for the narrow exception would be more frequently advanced if courts would revert to the notion of balancing relevancy and prejudice which underlies the rule of exclusion. In these cases involving similar offenses with the prosecuting witness, the courts have responded to the strong relevancy of the other offenses. This is quite proper if the relevancy outweighs the prejudicial effect on the defendant. The argument can be made that in this type of case the prejudicial effect of other offenses is less than usual. The prosecutrix and her relations with the defendant will be the central issue of the trial. If other similar offenses are offered in evidence there may still be the disadvantage of surprise for the defendant, especially if the evidence is fabricated. Nevertheless, the surprise problem should be somewhat mitigated since the defendant knows that any other offense introduced in evidence will have to involve both himself and prosecutrix, and he can at least be prepared to meet evidence which attempts to connect him with her. Similarly, since any other offense offered to be proven would involve the same two parties, confusion of the issues for the jury should not be as great as in a case where the defendant's connection with other women also comes into issue. Finally, where the evidence of other offenses is only the testimony of the prosecutrix that other offenses occurred (and this is frequently the case), we have only the charge of several offenses by one person. If a jury does not believe the prosecutrix in respect to the crime charged, it may not be greatly swayed by her further testimony of other offenses. This is in great contrast to the case in which other witnesses testify to other offenses by the defendant. Where there are several independent witnesses testifying to other offenses, there will be a much greater impact on the jury and a much stronger tendency to believe that the defendant committed the act charged.

The narrow exception for sexual offenses has gained wide acceptance. That it has done so is probably a result of judicial feeling that

other offenses with a prosecuting witness have a high degree of relevancy; that because of difficulties of proof in such cases it is necessary to allow greater leeway to the prosecution; and that generally the prejudicial effect on defendants is somewhat less than in other types of criminal action. Certainly these feelings have not been well articulated in many jurisdictions. If earlier courts had provided a more adequate analytical underpinning to the narrow exception for sexual offenses, it would have helped later courts in understanding the exception's limited application. However, inadequacy in this respect, together with the broad language in which the narrow exception is often expressed, has led inevitably to its blind application to situations for which it was never intended. The result is that a small but significant number of states have now developed a broad exception for those accused of sexual crimes. The exception practically vitiates the rule of exclusion for this class of defendants.

## III.

Kansas is an interesting state to consider first in a discussion of the cases. One of the earliest examples of a court adopting the special exception for sexual offenses is found there in 1926. *State v. Bisagno*[18] was an appeal from a conviction for statutory rape. The trial court had admitted evidence of another witness that the defendant, on a separate occasion, had had intercourse with an underage girl other than the prosecutrix. The court upheld the conviction in an opinion which covers little more than a page in the reports. In respect to the admission of evidence of the other alleged offense the court said, "in offenses of this class, proof of other acts of intercourse may be received to show the lustful disposition of the defendant."[19] Kansas, at the time of this decision, had adopted the narrow exception in respect to other offenses with the prosecutrix. In support of the quoted principle, the court cited cases involving the narrow exception without attempting to make any distinctions. There is no analysis whatsoever. The court simply borrows the broad language which permitted a showing of "lustful disposition of defendant" from prior cases and applied it to the facts of the case before it. In Kansas the special exception for sexual cases is an obvious lineal descendant of the narrow exception. Also *Bisagno* is no maverick lost and forgotten in the reports. That it is a much cited and applied case in Kansas will be seen shortly.

In order to develop a method of analysis with which to test the cases that will be included in this section, it might be useful to consider the *Bisagno* facts in light of the general principles underlying the rule

[18] 121 Kan. 186, 246 Pac. 1001 (1926).

[19] *Id.*, 246 Pac. at 1002.

of exclusion. There is no direct relevance in this case of the other offense alleged to the offense charged. It was not a concurrent offense which might be considered a part of the crime alleged. It does not fit any of the special exceptions of intent, knowledge, scheme, etc. If it has relevance to the crime charged, it is the statistical kind relating to disposition that the rule of exclusion is designed to keep out. It is true that the other offense is similar to the one charged and this usually tends to increase relevancy. Whether one who commits statutory rape is likely to commit it on other occasions is also a question that bears on relevancy and might properly be considered. Nearness or remoteness in time of the other offense to the crime charged should also be taken into account. In *Bisagno* the degree of relevancy of the other alleged offense is not more impressive than in many cases in which courts, including those in Kansas, have applied the rule of exclusion. The crime charged is of a class difficult to prove. It is non-violent and like other consensual sexual crimes, it is usually committed in a clandestine manner. But difficulty of proof alone has never been held to justify tipping the scales in favor of admission of other offenses. The prejudicial effect on the defendant must be considered. In this case the factors which create prejudice all seem to be present. There is no notice to the defendant of the allegations which he must meet. His surprise is greater by virtue of the evidence coming from other than the prosecutrix. Confusion of issues is just as likely here as in the trial of most other crimes. Certainly the impact on the jury of an independent accuser will be considerable in a prosecution for a sexual crime. Unless the Kansas court was ready to generally abandon the rule of exclusion, there seems little justification for the *Bisagno* decision. But the Kansas courts have accepted *Bisagno* without a general abandonment of the rule. Two recent Kansas cases,[20] discussion of which follows, have demonstrated that the exception is as strong and as unreasoned as ever.

In *State v. Whiting*, the first of these cases, the defendant was charged with and convicted of lascivious behavior with a seven year old girl. Two other girls, eight and six years old respectively, were allowed to testify that the defendant committed similar acts against them some months before. The court in upholding the trial judge said, "one of these exceptions is that when a defendant is on trial for a sexual offense similar offenses may be introduced for the purpose of showing the lustful disposition or nature of the defendant."[21] Three young girls testified against the defendant. It might be mentioned at this point

[20] State v. Fletcher, 174 Kan. 530, 256 P.2d 847 (1953); State v. Whiting, 173 Kan. 711, 252 P.2d 884 (1953).

[21] State v. Whiting, *supra* note 20, 252 P.2d at 886.

that there is considerable and frightening evidence that sexual crimes are often imagined (particularly by young girls) and charges pressed on the basis of fantasies rather than reality.[22] It might be argued that this fact supports admission of other testimony for purpose of corroboration. This might be true in some cases, but is hardly an impressive argument where the corroborating witness is another girl or woman whose background and personality characteristics are quite similar to those of prosecutrix and presents a similar danger of false witnessing. Often children are allowed to testify without any kind of medical or psychological examination in sexual cases. An examination by the judge in his chambers to determine general competency of such witnesses may not be sufficient.

In *State v. Fletcher*, the other Kansas case, decided in 1953, defendant was accused of sodomy. The court upheld the admission of evidence showing that soon after the alleged offense the defendant was found in possession of pictures showing unnatural sexual intercourse and lewd conduct. The court said that the evidence was properly admitted to show the character, habits, motives, disposition, and practices of the defendant. In *People v. Herman*,[23] a California court allowed it to be shown that the defendant had taken pictures of his daughter having intercourse with another man. The crime charged was incest. The evidence was allowed to show defendant's disposition to commit incest. In both of these cases the prejudicial effect of the admission of the evidence was considerable. As to relevancy, the other offenses in both cases were not similar to the crime charged except that all contained a sexual element. The relevancy seems greater in the California case since at least the object of both offenses was in a sense the defendant's daughter, even though technically the taking of the picture was not an offense against her. Therefore, an argument might be made that the evidence shows a passionate relationship between father and daughter somewhat analogous to that between defendant and prosecutrix in the narrow exception cases. But not even that much may be said for *State v. Fletcher*. In respect to sexual crimes, Kansas appears to permit evidence of other sexual or sexually related offenses (not unreasonably remote from each other in time) to show defendant's disposition to commit the crime charged.

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[22] See PLOSCOWE & MORRIS, SEX AND THE LAW 175-78 (1962); Williams, *Corroboration — Sexual Cases*, 1962 CRIM. L. REV. 662. See also 3 WIGMORE § 924(a), where it is stated that *"no judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."*

[23] 97 Cal. App. 2d 272, 217 P.2d 440 (1950).

Another case decided about the same time as *Bisagno* was *Abbott v. State*.[24] A physician was charged with sodomy per os against a four year old child. The trial court allowed a young man to testify that as a boy several years earlier, he had submitted to pederasty with defendant. A young girl, other than the prosecuting witness, was permitted to testify that defendant made "indecent inquiries" of her while she was riding with the defendant. In upholding the trial judge on both admissions, the court said:

> The felony charged is one of peculiar and shocking enormity, the victim a female child of tender years. The criminal impulse which makes such an act possible is unnatural and unusual. The felony itself suggests a carnal pervert. Under exceptional circumstances former instances tending to show that accused had indulged sexual depravity essential to an act like that charged may, in the discretion of the trial court, be admitted in evidence in connection with direct proof of his guilt.[25]

It would be difficult to imagine a case in which the prejudicial effect of evidence of other offenses would be greater than here. With the young girls, there was the danger of false witnessing on the basis of imagination or fantasy. The dangers of lack of notice and surprise were present. The probable impact on the jury is obvious. As to relevancy, the alleged "indecent inquiries" if relevant at all could only be so for the purpose of showing defendant's disposition for indecent behavior with children. The same is true of the alleged act with the boy and the relevancy of that even in respect to disposition is weakened by the span of time (over ten years) between it and the crime alleged. The court did not attempt to discuss the similarity of the offenses charged, the repetitive nature of the type of offense alleged, or the difficulties of proof involved. It simply asserted that the crime was a sexual one of "peculiar and shocking enormity," and the defendants accused of such crimes were deprived of the benefit of the rule of exclusion. Nebraska's flirtation with such an egregious exception was brief (six months). The original opinion was by a unanimous court. The reversal on rehearing was also unanimous. In the intervening six months, the composition of the court had changed considerably. Since the second *Abbott* case, Nebraska has remained among the majority of states which have shown no tendency to develop a special exception for sexual cases.

The District of Columbia is similar to Kansas in that it seems to have slipped easily and thoughtlessly into the special exception for

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[24] 113 Neb. 517, 204 N.W. 74 (1925), *rev'd on rehearing*, 113 Neb. 524, 206 N.W. 153 (1925).

[25] *Id.* 113 Neb. at 521, 204 N.W. at 75.

sexual crimes from the narrow exception for similar offenses with the prosecutrix. In applying the special exception, the District of Columbia courts cite *Hodge v. United States*,[26] a case involving prosecution for incest in which testimony of other acts with the prosecutrix was permitted. *Hodge* was relied upon in *Dyson v. United States*.[27] If the standard exception to show "intent" were as broad as suggested by the *Dyson* court, there would be no rule of exclusion.[28]

The standard exceptions of "motive" and "intent" to the American or negatively stated rule of exclusion have been distorted by a number of other courts in order to allow evidence of other offenses to be admitted in sexual prosecutions. Though the courts may speak of showing motive or intent, the effect of the decisions is to permit evidence which is relevant only to show the defendant's general disposition to commit sexual crimes. The evidence is admitted even though it is not necessary for the state to prove any special state of mind to establish the crime. Prior offenses are admitted even though they cannot establish any motive or intent to do the specific act charged.

Four cases decided in the 1940's make it apparent that toward the end of that decade a special exception for sexual offenses had evolved.[29] But until *Commonwealth v. Kline*[30] was decided in Pennsylvania in 1949, the courts that had adopted the exception seemed to do so almost unconsciously by extending the narrow exception for similar offenses with the prosecuting witness, or else by blithely forcing such offenses into one of the standard exceptions. In *Commonwealth v. Kline*, a court was finally willing (though using the language of "design or plan") to attempt some justification for such an exception. The effort is not particularly impressive but at least the case provides

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[26] 126 F.2d 849 (D.C. Cir. 1942).

[27] 97 A.2d 135 (Mun. Ct. App., D.C. 1953). In Dyson, the defendant was indicted for assault and battery. A police officer assigned to the morals division testified that the defendant had placed his hands on his private parts and squeezed them. The police officer also testified that on being questioned, the defendant admitted prior acts of sodomy. The defendant denied both the act and the admission and objected to the reception of the latter in evidence. The court, citing Hodge v. United States, *supra* note 26, held that while the charge with assault, it was an assault of a sexual nature, and hence the general rule of exclusion did not apply. The court said the admission was proper to show intent and lustful disposition of the defendant, thus making a special exception for a sexual assault. The prior acts of sodomy cannot be considered to show "intent" in the sense that the word is used when denoting one of the standard exceptions to the rule of exclusion. No specific intent was required to be shown, it being found inherent in the act charged and denied by the defendant.

[28] See People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).

[29] Hummel v. State, 210 Ark. 471, 196 S.W.2d 594 (1946); State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943); State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948); State v. Jackson, 82 Ohio App. 318, 81 N.E.2d 546 (1948).

[30] 361 Pa. 434, 65 A.2d 348 (1949).

some reasoning that can be explored and criticized.[31] The defendant, Kline, was charged with the statutory rape of his daughter at their home. At the trial, a neighbor of Kline's was allowed to testify that on a previous occasion, probably a few days before or after the alleged intercourse, Kline had indecently exposed himself to her by appearing nude at his back door each time she walked onto her back porch. The evidence was admitted on the ground that it could be received to affect the defendant's credibility. However, the Supreme Court of Pennsylvania ruled that the evidence should have been admitted on the ground that it was within an exception to the rule of exclusion. The court argued that this alleged offense, like most sexual offenses, was one manifestation of a general scheme, plan or design to commit sexual acts. But the court could not solve its problem simply by invoking the scheme or design exception. That exception has clearly always meant more than a mere similarity between the offense charged and the offense sought to be entered into evidence. Here even the similarity was lacking[32] except to the extent that both of the alleged offenses had sexual elements.[33] The court implies that sexual crimes may be brought within the scheme or design exception because a sexual offense is part of a compulsive drive within a sexual criminal. In a sense the sexual criminal or at least the sexual pervert has an internalized plan or inherent character defect which makes it highly likely that he will repeat his offenses. It is unfortunate that the court felt required to try to force the facts in this case into the design or scheme exception. As will be seen, there are cases where an argument can be made for the use of that exception in sexual cases, but the *Kline* facts do not fit it at all. Essentially the court is arguing that in a prosecution for statutory rape the factor of repetition of the perversion which the defendant suffers so increases the probative value of such other offenses that they should be allowed in evidence despite the countervailing considerations of prejudice. The general proposition that sexual criminals are more likely than other classes of criminals to be recidivists will be given extensive consideration in the concluding section of this paper. In respect to the *Kline* facts, one may concede that the particular perversion of exhibitionism tends to be a repetitive one, yet still face several difficulties in explaining the result of the case.

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[31] See Comment, 23 TEMP. L.Q. 133 (1949); Note, 3 VAND. L. REV. 779, 787-88 (1950).

[32] See Note, *supra* note 10, at 699; but see State v. Bradford, 362 Mo. 226, 240 S.W.2d 930 (1951).

[33] The court makes a feeble attempt to show similarity by noting that "both [acts are] in the nature of an indecent assault." Commonwealth v. Kline, 361 Pa. 434, 65 A.2d 348, 352 (1949).

Assuming that Kline exhibited himself to his neighbor and would exhibit himself to others in the future, what relevance did this have to a charge for statutory rape? There are authorities who believe that the exhibitionist is *less* likely than most to engage in ordinary sexual relations.[34] Yet the evidence was held admissible on a theory that assumed the perversion was a symptom of a character defect highly likely to manifest itself in other sexual patterns including statutory rape. Also the court leaves unanswered the question of whether there should be a special exception for all cases involving habitual criminals. Of course, the court is only deciding the case before it, but there is the implication that the court considers sexual perversions a *sui generis* category for the reason that perversions, unlike other offenses, are characteristically repetitive. Leaving aside the problem of deciding what sort of behavior patterns may be considered "perversions" and the varying characteristics of particular perversions, it is clear that other types of criminal behavior may also be strongly repetitive. Arsonists, kleptomaniacs, and drug addicts are three groups whose behavior may be compulsive and a number of other types of crimes have much higher rates of recidivism than sex offenses generally.[35] There is little justification for special treatment of sex offenses on this ground.

The suggestion in *Commonwealth v. Kline* of bringing sexual offenses within the standard design or scheme exception has been taken by several courts. The standard exception for scheme or design allows to be shown other offenses which are integral elements of a scheme or plan ultimately directed toward an end that is the same as the one toward which the offense charged is directed. For example, if X has a scheme to get Mrs. Y's property, he may burglarize her home for the purpose of altering her will in his favor, and having accomplished that, later murder her. In a trial of X for her murder, evidence of the burglary could be admitted to show a scheme or plan to acquire Mrs. Y's property. X's prior offense was not a discrete, independent crime with the burglary an end in itself. It was part of a whole pattern of behavior directed to the acquisition of a particular victim's property. While it is true that the defendant is on trial for murder and not for improperly acquiring property, it is the particular property of Mrs. Y that relates to the offense and makes the latter more probable in

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[34] See PLOSCOWE & MORRIS, *op. cit. supra* note 22, at 153, where the authors state that "fortunately the exhibitionist is not generally a dangerous individual. His sexual behavior will not go beyond exposure." See also EAST, SOCIETY AND THE CRIMINAL 112 (1949), where the author states in respect to exhibitionism, that it is "often an indication of less rather than greater lust. Fear of ordinary sexual relations or of venereal disease or an inability to obtain normal heterosexual relations may be precipitating factors."

[35] See BEST, CRIME AND THE CRIMINAL LAW IN THE UNITED STATES 283-88 (1930).

light of the former. The two alleged offenses are connected by a common objective. That courts have sometimes used the design or scheme exception to explain the narrow exception for offenses with the prosecutrix probably is a result of the feeling that in such cases the prosecutrix is the objective toward which the other offenses were directed. The example of the will alteration and murder is one in which the common objective is attained by logical steps. However, in the case of similar offenses with prosecutrix, each act with her is an end in itself even though the defendant may have some vague notion of continuing the affair or of repeating his acts. The prior offenses really do not help explain the one charged except to show defendant's disposition to do such acts with the prosecutrix. But in applying the "design and plan" exception to sexual acts other than those with the prosecutrix, some courts have indicated that if it is necessary to show some common purpose or objective, the satisfaction of a lustful disposition is such a purpose. This approach in application may simply mean that a special exception for sexual cases has been created.

Perhaps the most interesting, recently decided case applying this type of analysis is *State v. Finley*.[36] This case involved a prosecution for rape. The prosecutrix testified that while driving home, defendant and another man followed her in an automobile, and that when she arrived at her house they forced her into their car. She alleged that the other man was dropped off at a tavern and that the defendant then drove her out to the desert and raped her in his car. At the trial, a seventeen year old girl was allowed to testify that five days prior to the alleged rape, defendant raped her in a parked car at the end of a lot behind her parent's home in California. She testified that defendant lured her to the back of the lot on the pretext of showing her his new car. The court held that the second girl's testimony was admissible as tending to show a system or plan embracing two or more crimes so related to each other that the proof of one tended to establish the other. The court upheld a charge to the jury in which the trial judge said, "[this evidence] is admissible for the sole purpose of showing a system, a plan, a scheme of the defendant and to prove his lustful and lascivious disposition and as having a tendency to render it more probable that acts and attempted acts of sexual intercourse charged in the information were committed on or about the date alleged . . . ."[37] The Supreme Court of Arizona emphasized the similarity between the alleged rapes as justifying application of scheme or design. It

[36] 85 Ariz. 327, 338 P.2d 790 (1959). See Comment, 13 VAND. L. REV. 394, 397 (1959); Note, 17 WASH. & LEE L. REV. 83 (1960).

[37] State v. Finley, *supra* note 36, at 335, 338 P.2d at 796.

argued that both rapes showed the same "bent of mind"; that both were committed late at night in parked cars; that in both the defendant announced his intention to have sexual relations, ripped off undergarments and slapped the victims. The dissenting judges argued that these items were hardly sufficient to show a plan, scheme or *modus operandi* since they are so commonly found in rape cases. The majority evidently recognized this weakness and in justification for its position said, "the courts appear to be more liberal in admitting, as proof of his guilt, evidence of similar sex offenses than when one is charged with non-sex offenses."[38] This case can only be understood as a special exception for sexual crimes. General similarity between two alleged offenses has never been understood as showing the design or plan required for the standard exception. In discussing plan or design, Wigmore writes, "but where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than mere similarity."[39] In terms of the analysis suggested by this paper, there is little to be said in justification of *State v. Finley*. All possible dangers of prejudice to the defendant were present in substantial degree. In this violent rape of the prosecutrix there were no greater problems of proof than are involved in many other crimes. As to relevancy, about the only thing favorable to the opinion is that the alleged offense was similar to the one charged and fairly close in time if not in space. But there was certainly no *modus operandi*; there was only one other offense charged; the type of crime was one that is relatively unlikely to be recidivistic.[40] Other courts on facts quite similar to *State v. Finley* have strongly rejected the notion that such other offenses can be fitted into one of the standard exceptions to the rule of exclusion.[41]

There is a class of cases involving sexual offenses that presents a more difficult problem of analysis than *State v. Finley*. These cases are typically prosecutions for perversions, but may also involve rape. The other offenses offered in evidence tend to establish a very distinctive *modus operandi*, and there are often a number of different witnesses who can testify to similar offenses against themselves. A typical case is *State v. McDaniel*.[42] In this case, prior acts of fellatio alleged to have been committed within a month of the offense for which defendant was standing trial were admitted into evidence.

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[38] *Id.* at 334, 338 P.2d at 795.

[39] 2 WIGMORE § 304. See also 1 WHARTON, CRIMINAL EVIDENCE § 240 (12th ed. 1955).

[40] See Best, *op. cit. supra* note 35.

[41] See, *e.g.*, Lovely v. United States, 169 F.2d 386 (4th Cir. 1948).

[42] 80 Ariz. 381, 298 P.2d 798 (1956).

There were three other witnesses. Each told of experiences, which if believed, indicated a very distinctive pattern of luring boys and inducing them to cooperate in performing the acts. The court upheld admission of this evidence on the ground that it tended to show a scheme or plan.[43] The court said,

> In the instant case the testimony of these three other boys —as to the manner of meeting defendant, the inducements offered and the temptations flaunted before them, the insidious *modus operandi* on the part of defendant of an unnatural and lascivious nature—all tends to suggest a scheme of seduction in many respects identical with that practiced in the instance for which defendant is here tried. . . . [M] any courts recognize a limited exception in the area of sex crimes to prove the nature of the accused's specific emotional propensity. . . . Of course, this exception would be subject to the limitation of relevant nearness in time, and would not apply to mere criminal tendencies in general as distinguished from specific sexual inclinations.[44]

A similar type of case involving rape is *Rhine v. State*.[45] A doctor was accused of rendering a female patient defenseless (though not unconscious) with a shot of nembutal and then having sexual intercourse with her. As in *State v. McDaniel* there were three other witnesses who testified that the defendant had sexually abused them while they were defenseless under the influence of nembutal. Each witness had her individual story to tell. If believed, these stories together tended to show a consistent pattern used by the defendant in ravishing his female patients. In upholding the admission of the testimony of the three other witnesses the court remarked, "each of the separate acts . . . bear [*sic*] marked similarity one to the other as to clearly define a particular course of action, custom, design, scheme and plan, each combined with the same unlawful intent or motive tending to connect the defendant with the crime of the rape of Mrs. Moore."[46]

As in *State v. Finley*, the dangers of prejudice to the defendant in these cases are unmitigated. However, such cases seem considerably stronger than *State v. Finley* in other respects. Proof of such crimes is difficult since there is often no evidence of a crime other than the word of the victim (but in violent rape cases there often can be no

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[43] *Cf.*, People v. Cosby, 137 Cal. App. 332, 331 P.2d 218 (1934).

[44] State v. McDaniel, 80 Ariz. 381, 387-88, 298 P.2d 798, 802-3 (1956).

[45] 336 P.2d 913 (Okla. Crim. 1959). See also Thomas, *Looking Logically at Evidence of Other Crimes in Oklahoma*, 15 OKLA. L. REV. 431, 447 (1962), where it is stated that "it seems highly likely that the court created a new rule applicable to sex crimes in Oklahoma, and that this new rule allows evidence of similar occurrences which partake of such a peculiar nature that a plan is clearly discernible."

[46] *Id.* 336 P.2d at 922.

question that a crime has been committed). There may be a greater justification for allowing the evidence if there are a large number of such witnesses. Of course while the greater number of witnesses indicates less probability of all accusing on the basis of fantasy or vindictiveness, there should nevertheless be safeguards to insure the psychological competency of such prosecuting witnesses. It is difficult to know just what weight should be given to the establishment of a *modus operandi.* At least it can be said that if the prosecuting witnesses did not know each other prior to trial; if their stories were recorded prior to communication between them; if they were subjected to thorough cross-examination and their stories stood up; then such evidence would be quite relevant and its relevancy would tend to increase with the number of witnesses who could testify to the *modus operandi.* Finally, if the type of exception suggested in these two cases is recognized, it should be because a careful balancing of relevancy and prejudice indicates that the scale should tip toward admitting the evidence and not because the offenses involved were sexual.

## IV.

In a 1952 article, it is noted that, "because of the increasing belief that sexual psychopaths have a disposition to repeat their acts of aggression, the probative value of evidence of other such offenses is considered to be so high that some courts are beginning to question even the narrow rule of absolute exclusion."[47] Another commentator has cited as a justification for departure from the rule of exclusion, "the very probable existence of a psychological predisposition on the part of sex offenders to repeat their crimes."[48] The same idea appears to be the basis of the *Commonwealth v. Kline* rationale.[49] The first point to be made is that from a psychological point of view, there is nothing to be gained from a classification of criminals as "sex offenders," "sex criminals," or "sexual psychopaths." The only common characteristic of the members of such classes is that they have violated sex laws. Psychologically the members of such classes exhibit as wide a range of personality types and personality defects as exists in society at large. A 1941 article considers sexual crimes committed by morons, degenerate drunkards, the psychosexually-infantile, psychotics, senile men, neurotics and libertines, and points out that among these types there is a wide variation as to tendency to repeat;[50] that among repeaters there are varia-

[47] Trautman, *Logical or Legal Relevancy, A Conflict in Theory,* 5 VAND. L. REV. 385, 406 (1952).

[48] Note, 39 CALIF. L. REV. 584 (1951).

[49] Commonwealth v. Kline, 361 Pa. 434, 65 A.2d 348 (1949).

[50] Leppman, *Essential Differences Between Sex Offenders,* 32 J. CRIM. L., C. & P.S. 366, 374 (1941).

tions as to the kinds of crimes repeated with some repeating only a particular sexual act, others a variety of sexual acts, and still others repeating criminals acts both sexual and non-sexual.[51] The author concludes that *"the 'sexual offender' as a common type does not exist."*[52] Other commentators have pointed out the inadequacy of the concept of "sexual psychopath" both as a medical term[53] and as applied in "sexual psychopath" laws.[54] Also it should be noted that the etiology of sex crimes may be quite involved and difficult to understand, and that the eventual criminal act which has a sexual basis may or may not be expressed in what we normally think of as sexual behavior. What may appear to be the trial of a burglar, arsonist, or murderer may actually be the trial of a fetish thief, a sexual pyromaniac, or a sadist, respectively.[55] The great variety among "sexual criminals" in terms of repetition, etiology, symptoms (including nature of acts, type of victim or accomplice, and propensity to violence) may best be appreciated by case studies of a variety of such criminals.[56] On the basis of depth studies it is difficult to make generalizations about repetition of offenses among individuals who have never been apprehended and convicted or those who have had an encounter with the law and have learned to be highly discreet or evasive ever after. In such cases we have only the word of the individual involved on which to form a judgment. At least it may be said on the basis of such studies as those of De River, Leppman and Karpman[57] that certain perversions (*e.g.* homosexuality, exhibitionism) may be highly repetitive; others may contain a majority of individuals who are not repeaters with a minority who are (*e.g.* child molesters);[58] while others tend to be isolated events or may be the only sexual offense in a series of other non-sexual ones.

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[51] *Id.* at 375-80.

[52] *Id.* at 380.

[53] Slovenco & Phillips, *Psychosexuality and the Criminal*, 15 VAND. L. REV. 797, 823 (1962).

[54] See Comment, 96 U. PA. L. REV. 872 (1948). See also Hacker & Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955); Slovenco & Phillips, *supra* note 53, at 823: "With the possible exception of California, sexual psychopath legislation has proven ineffective and unworkable." Objections, other than classification of offenders, have been leveled at the sexual psychopath laws, such as (1) lack of procedural safeguards, (2) lack of treatment facilities, (3) inadequate knowledge of treatments for sexual offenders. Compare Tappan, *Some Myths About the Sex Offender*, 19 FED. PROB. 7, 10-12 (1955) with Frisbie, *The Treated Sex Offender*, 22 FED. PROB. 18 (1958).

[55] See DERIVER, THE SEXUAL CRIMINAL, A PSYCHOANALYTICAL STUDY 274, 277 (1956).

[56] *Id.* generally. See KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES (1956).

[57] *Op. cit. supra* notes 55, 56. *Supra* note 50.

[58] *Supra* note 50.

On the other hand, in respect to rates of recidivism, abundant evidence is available. The great weight of statistical evidence shows that, relative to other classes of criminal offenses, sexual offenses as a group have a low rate of recidivism.[59] After analyzing data from the Census Bureau on prisoners, Best concludes that, "with males, the proportion of repeaters is greatest in the case of burglary, violation of drug laws, robbery, possession of stolen goods, larceny and forgery. There are relatively few repeaters as to embezzlement, general sex offenses, homicide, rape, fraud, violation of liquor laws and assault."[60] The New York City Mayor's Committee for the Study of Sex Offenses reveals a significantly lower rate of recidivism for sex criminals than for other types of criminals lumped together, although it has been pointed out by Ploscowe that certain sexual offenses have considerably higher rates of recidivism than the average rate for sexual offenses generally.[61] Nevertheless the New York City study shows "that of 555 convicted sex offenders in 1930, for example, only 31 or slightly more than 5% were convicted again of sex crimes within the next dozen years. Of this small percentage who were reconvicted, only 6 of the 31 were convicted more than once, chiefly for indecent exposure."[62] P. W. Tappan, former Federal Parole Board chairman and a member of a New Jersey commission which studied sex offenders, is the author of an article which discusses eleven myths about sexual offenders.[63] Myth number three is that sex offenders are usually recidivists. Tappan writes:

> Sex offenders have one of the lowest rates as 'repeaters' of all types of crime. Among serious crimes homicide alone has a lower rate of recidivism. Careful studies of large samples of sex criminals show that most of them get in trouble only once. Of those who do repeat, a majority commit some crime other than sex. Only 7 percent of those convicted of serious sex crimes are arrested again for a sex crime. Those who recidivate

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[59] See Best, *op. cit. supra* note 35, at 283-88; REPORT OF MAYOR'S SPECIAL COMMITTEE FOR THE STUDY OF SEX OFFENSES 91-92 (New York City 1941); STATE DEPARTMENT OF MENTAL HYGIENE, REPORT OF STUDY OF 102 SEX OFFENDERS AT SING SING PRISON 62-95 (New York State 1950); Ludwig, *Control of the Sex Criminal*, 25 ST. JOHN'S L. REV. 203, 212 (1951); Tappan, *supra* note 54.

[60] BEST, *op. cit. supra* note 35, at 283.

[61] PLOSCOWE & MORRIS, *op. cit. supra* note 22, at 203-4, where it is stated, "but 46% of those charged with carnal abuse, 34% of those charged with sodomy, and 24% of those charged with incest had prior records of sex offenses."

[62] REPORT OF MAYOR'S SPECIAL COMMITTEE, *op. cit. supra* note 59, at 92-95.

[63] Tappan, *supra* note 54.

> are characteristically minor offenders — such as peepers, exhibitionists, homosexuals — rather than criminals of serious menace.[64]

It must be remembered that this data on recidivism involved individuals who were indicted and convicted. The cases which have been discussed in this paper have involved prior offenses that had not necessarily been proven or punished. Therefore, the conclusions that can be drawn from the data on recidivism must be qualified at least to the extent that it is possible that criminals who are convicted of sexual crimes may respond better than other criminals to punishment or may be more careful than other criminals to conceal their activities in the future. Nevertheless, the evidence on the recidivism is impressive and at least one court has recognized its significance. Interestingly enough this was a Superior Court in Pennsylvania writing six years after *Commonwealth v. Kline.* In *Commonwealth v. Boulden,*[65] the defendant was accused of corrupting the morals of two seven year old girls in the wheel alignment pit of his auto garage. A twelve year old girl was permitted to testify that about a year prior to the alleged offense the defendant had tried to get her to sit on his lap in the pit. She had refused and left the garage. Although the court reversed on the basis of the remoteness of the prior act, it used the case as an occasion for questioning the assumptions underlying the *Kline* decision. The court asked itself two rhetorical questions: "In actuality, is one with a record of indecent exposure more likely to commit rape than one with a record of assault and battery so that evidence of previous convictions of the sex offenses should be admitted and evidence of the non-sex offense rejected? Are there more recidivists among sex offenders than among thieves or other offenders?"[66] In respect to the latter question the court cites data to show that the answer is clearly "no."

It is difficult to understand the evolution of a special exception to the rule of exclusion for sexual crimes if one thinks only in terms of precedent, logic, and rational balancing of relevancy against prejudicial effect on defendants. To some extent the exception must be the result of an emotional response of courts to crimes involving sex. However one may judge the exception, the courts cannot be criticized for being shocked and appalled at some of the grotesque and horrifying deeds in which sexual elements are clearly involved. Such cases may be infrequent but they are memorable. The fear that the frequency of such acts is increasing or that the prevalence of such acts is great is

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[64] *Id.* at 8.

[65] 179 Pa. Super. 328, 116 A.2d 867 (1955).

[66] *Id.* 116 A.2d at 873.

probably unjustified.[67] However, such fears are widely experienced and are probably shared to some extent by judges as well as jurors. Another unhappy feature of some sexual offenses is that characteristically children are the victims. Although there has been little investigation to determine what real effects such experiences have on children, the general feeling that they cause serious harm, or even the possibility that such harm may result, raises the consternation and hostility of the community. Where such emotions are aroused an object on which they may be vented is required. Where fears of the crime charged are extremely pronounced and in part quite irrational, there is much greater danger that the defendant will be this object and will be assumed guilty rather than innocent. An exception to the rule of exclusion which involves serious additional dangers of creating assumptions of guilt in the minds of jurors should not be accepted without the most careful deliberation.

## Conclusion

The most unrealistic assumption of the courts which have adopted a special exception to the rule of exclusion for sexual crimes is that "sex crimes" are a group of offenses with enough common characteristics to make them an appropriate subject for such an exception. The facts are at variance with the assumption. Some sex crimes are habitual or highly repetitive; some are not. Some are violent and revolting; others are only mild nuisances. Some are very difficult to prove; others present no more difficulty in that respect than many other types of crime. Sex crimes are not committed by any identifiable "sex criminal" type but by a great variety of individuals including feeble minded, neurotics, psychotics, perverts, and a certain number of normal people who have simply made a mistake. To complicate the matter, crimes which are apparently non-sexual may be based on a sexual conflict or sexually based, emotional disturbances in the individual. Conversely, certain insecurities and tensions that are basically non-sexual may result in sexual symptoms that are also sexual crimes.

The courts should press no further for a special exception for sexual crimes as such. If what is sought is an exception to the rule which would permit evidence of other offenses where the crime charged is (a) one typically committed by habitual offenders, (b) difficult to prove, or (c) highly revolting or feared, then the exception should be

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[67] See Barnes & Teeters, New Horizons in Criminology 102-7 (1951): "Despite the great amount of publicity given to the subject of sex offenses, those committing such acts constitute a relatively small percentage of criminals. Few are found in prison populations. . . . But regardless of their number, they do not represent a serious menace to society as one would gather from the public outcry against them, generated by sensational newspaper and magazine articles."

framed in just such specific terms. Any development of a special exception to the rule of exclusion should not be advanced without full awareness of the risks to defendants. If such an exception is recognized, there should be the usual requirement of similarity of offenses (and as our psychological knowledge advances this might mean a functional rather than a surface similarity), and nearness in time. The dangers of false witnessing should always be recognized and special safeguards provided in situations in which such problems are known to exist. Exceptions so designed might apply to both sexual and non-sexual crimes. Clearly they would not apply across the board to all sexual offenses.

The general refusal of the courts to admit evidence of other offenses or crimes which tend only to show defendant's criminal disposition has been one distinguishing feature of the Anglo-American law of evidence. Courts have adopted and adhered to the rule because of strongly felt and expressed concern for the individual and the protection of his liberty and dignity. The adoption in many jurisdictions of a rigorous rule of exclusion is perhaps an indication of a willingness to take the risk that a larger number of the guilty go free than to risk the conviction of a greater number of the innocent. Possibly there is the belief that there is a greater social cost in condemning the innocent than in allowing more of the guilty to escape punishment. This point is moot. Nevertheless, the rule of evidence excluding other acts showing only the disposition of the defendant for crime has existed and evolved for three hundred years. It seems clear that a serious erosion of the rule in respect to sexual crimes is occurring in several jurisdictions. It is desirable that this development be given serious consideration. Courts which meet this problem should make an effort to rationalize their decisions if they decide to follow the line that sexual offenses constitute a category of crimes to some degree excluded from the rule. Although a number of courts have adopted this position, either expressly or by artificially forcing such offenses into one of the standard exceptions to the rule, few indeed have attempted any analysis of such an exception or provided a convincing justification for it. In crimes in which the prejudices against defendants are likely to be greatest and the danger of false witnessing considerable, an exception is being applied that leaves the accused extremely limited protection against admission of prior or subsequent offenses. Apparently, this has often been done on the simple intuition of courts that sex offenders are more likely than other criminals to be habitual or compulsive offenders. Such an assumption has little scientific support and has resulted in a rule of evidence that discriminates unfairly against this class of defendants.