Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases

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In Reading Gaol by Reading Town
There is a pit of shame,
And in it lies a wretched man
Eaten by teeth of flame.

Oscar Wilde, The Ballad of Reading Gaol

I. Introduction

In 1894, Oscar Wilde commenced a criminal libel prosecution against the Marquis of Queensberry. The Marquis's son, Alfred Douglas, was sexually involved with Wilde. The Marquis threatened to make a public scandal of his son's affair, unless he broke off with Wilde. When Alfred refused to give up Wilde, the Marquis left a post card in the Albermarle Club addressed to “Oscar Wilde posing as a sodomite [sic].” Wilde's criminal
prosecution blew up in his face when Sir Edward Carson, Queensberry’s defense counsel, cross-examined Wilde on his prior deviant sexual activities with young, handsome men such as Alfred Douglas. Wilde’s counsel withdrew the case during Carson’s opening statement for the defense, knowing that Carson would put Wilde’s former lovers on the stand.

Queensberry turned the case over to the public prosecutor, who indicted Wilde for sodomy. Wilde was convicted and sentenced to two years at hard labor in Reading Gaol, leading Wilde to produce The Ballad of Reading Gaol, a thinly-disguised autobiographical poem, which may have been his masterpiece.

Oscar Wilde was tripped up by an exception to the character evidence rule that permitted proof of Wilde’s prior sexual misconduct to prove his predisposition to engage in sodomy. The character evidence rule forbids the prosecution from proving a criminal defendant’s bad moral character. However, exceptions to the rule exist. One of those exceptions allows the prosecution to prove an accused sex offender’s propensity for committing uncharged sexual misconduct. When the state prosecutes someone for a sex offense, the specter of the defendant’s uncharged sexual misconduct haunts

2. Id. at 70-73. Alfred Douglas had received a letter from Wilde which fell into the hands of blackmailers who extorted money from Wilde. The letter read as follows:

My own boy,

Your sonnet is quite lovely, and it is a marvel that those red rose leaf lips of yours should have been made no less for music or song than for madness of kisses. Your slim gilt soul walks between passion and poetry. I know Hyacinthus, whom Appollo loved so madly, was you in Greek days. Why are you alone in London, and when do you go to Salisbury? Do go there to cool your hands in the gray twilight of Gothic things, and come here whenever you like. It is a lovely place and only lacks you; but go to Salisbury first.

Always with undying love,

Yours

Oscar

Id. at 69-70.

Here is an example of Sir Edward Carson’s cross-examination technique. Carson eventually got around to Wilde’s letter to Douglas.

Q. Have you ever loved a young man madly?
A. No, not madly. I prefer love that is a higher form.
Q. Let us keep down to the level we are at now.
A. I have never adored anybody except myself.

* * * *

Q. I suggest there is nothing very wonderful in this “red rose leaf lips” of yours?
A. A great deal depends on the way it is read. You read it [the letter] very badly.
Q. Your “slim gilt soul walks between passion and poetry.” So that is a beautiful phrase?
A. Not as you read it, Mr. Carson.
Q. I don’t profess to be an artist. And when I hear you give evidence, I am glad I am not.

* * * *

Q. Did you ever kiss him [an alleged lover]?
A. Oh, no. He was a peculiarly ugly boy.

Id. at 73.

3. Id. at 74.

the trial process, as it did the Oscar Wilde trial. The person accused of a sex offense must expect that any deviant sexual history will be put into evidence by proof of similar uncharged sexual misconduct. The jury will convict the defendant on the basis of predisposition to commit sex crimes.

The American form of criminal prosecution is accusatorial, not inquisitorial.\(^5\) Since the defendant is presumed innocent, the defendant will be tried for committing a specific act, not for the defendant’s general predisposition to do wrong.\(^6\) The courts, in fact, have fashioned the character evidence rule in order to bar the prosecution from proving the defendant’s predisposition to do wrong.\(^7\) The courts recognize that the trier of fact can reason from proof that the defendant committed one or more similar acts to a conclusion that the defendant is predisposed to commit those same acts.\(^8\) The trier of fact can then deduce from the defendant’s proven

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5. LaFave and Israel give eight basic goals of the American criminal justice process: (1) establishing an adversary system of adjudication; (2) establishing an accusatorial system; (3) minimizing erroneous convictions; (4) minimizing the burdens of accusation and litigation; (5) providing lay participation; (6) respecting the dignity of the individual; (7) maintaining the appearance of fairness; and (8) achieving equality in the application of the process. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6 (2d ed. 1992).

According to LaFave and Israel, the accusatorial nature of the Anglo-American criminal justice process is found in the allocation to the state of the burdens of proof and of going forward, and in the adoption of the presumption of innocence and the privilege against self-incrimination as limitations on evidence. Id. § 1.6, at 42-44. Their position is supported by heavy precedent. See, e.g., Murphy v. Waterfront Comm’n, 378 U.S. 52 (1964).

6. See, e.g., the remarks of Senator Verplanck, quoted in People v. White, 24 Wend. 561 (N.Y. 1840): The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike “for the evil and the good, the just and the unjust.” Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, profession, [sic] manners, upon the minds of honest and well-intentioned jurors. Id. at 574. See also People v. Shea, 41 N.E. 505, 511 (N.Y. 1895) (explaining that evidence of past crimes is inadmissible); LAFAVE & ISRAEL, supra note 5, § 1.6, at 44 (observing that when the jury is informed of the presumption of innocence, it is told to judge the accused’s guilt or innocence solely on evidence adduced at trial and not on the basis of suspicious derived from arrest, indictment, and custody).

7. See, e.g., Michelson v. United States, 335 U.S. 469, 476 (1948). Professor John H. Wigmore restates the rule and the underlying rationale for the general exclusion of evidence of the defendant’s bad moral character in a criminal prosecution: “The rule, then, firmly and universally established in policy and tradition is that the prosecution may not initially attack the defendant’s character.” 1 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 57, at 1185 (Tillers rev. 1983). Wigmore explains the rationale of the rule: This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normanism—the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial law to much less advantage. But as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency that cannot fail to operate with any jury in or out of court.

Id.

8. Rule 404(a) of the Federal and Uniform Rules of Evidence states that evidence of an actor’s character
The general predisposition to commit a certain kind of criminal act that the defendant committed the act charged in the indictment. The courts assert that even if the defendant's commission of similar acts is relevant to the issue of whether the defendant committed the act charged in the indictment, the probative value of such evidence is substantially outweighed by prejudice to the accused. The courts are apparently committed to the accusatorial system of criminal justice because they perceive that it is in accord with the collective moral fabric of the United States. No other type of criminal prosecution is acceptable as a model of a fair trial.

Perhaps the courts are not as committed to the accusatorial system of criminal justice as they think. In fact, the courts may be permitting inquisitorial prosecutions while they speak the rhetoric of the accusatorial system. It may be more important to examine what the courts do with uncharged misconduct evidence than to examine the verbal formulae the

is inadmissible to prove that he acted in conformity therewith, subject to given exceptions. FED. R. EVID. 404(a); UNIF. R. EVID. 404(a). Therefore, character evidence in criminal prosecutions is legally irrelevant to prove the defendant acted in conformity therewith, unless, as indicated by Rule 404(a)(1), the defendant chooses to prove that the defendant is a person of good character. However, Professor Wigmore correctly believed that character evidence was logically relevant to proof of guilt:

A defendant's character, then, as indicating the probability of his doing or not doing the act charged, is essentially relevant. In point of human nature in daily experience, this is not to be doubted. The character or disposition—i.e., fixed trait or sum of traits—of the person we deal with is in daily life always more or less considered by us in estimating the probability of their future conduct.

1 WIGMORE, supra note 7, § 55, at 1157-59.

9. The typical judicial attitude to character evidence can be gleaned from Regina v. Rowton, 167 Eng. Rep. 1497 (Cr. Cas. Res. 1865). Willes, J., delivered an opinion that summarized the view about deducting specific behavior from general character traits:

[Character evidence] is not admissible upon the part of the prosecution, because . . . if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by shewing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine.

Id. at 1506. This position may not represent the current English position typified by Director of Public Prosecutions v. Boardman, 1975 App. Cas. 421 (appeal taken from Norwich). It has been challenged by commentators as well, who support admission of the defendant's similar criminal misconduct in the prosecution's case in chief based on logical relevance and judicious weighing of probative value against prejudice. See, e.g., T. R. S. Allan, Similar Fact Evidence and Disposition: Law, Discretion and Admissibility, 48 MOD. L. REV. 253 (1985) [hereinafter Similar Fact Evidence]; T. R. S. Allan, Admissibility of Evidence of Disposition Against the Defendant, 99 LAW Q. REV. 349 (1983) [hereinafter Admissibility of Evidence].

10. Typically, the courts believe that an accused who must defend against uncharged misconduct is at a significant procedural disadvantage, being unable to prepare adequately to deal with collateral issues raised by accusations made about prior acts not described in the indictment. The courts also believe that juries, in particular, will be over-persuaded by tales told of one or more similar acts of misconduct, and will disregard other evidence that may exonerate the defendant. 1 WIGMORE, supra note 7, § 57, at 1180-81.


12. Id. at 486.
courts employ to describe what they do. This Article analyzes only one type of criminal prosecution: sex offender cases. The courts are willing to allow the prosecution to prove the defendant’s predisposition to commit sex crimes by proof of specific acts of uncharged sexual misconduct. The trier of fact is free to conclude from proof of one or more similar acts committed by the defendant that the defendant is predisposed to commit sex crimes. Then, the defendant may be found guilty, based in part upon prior uncharged sexual misconduct. Although this system is not unique to sex crime prosecutions, all the issues surrounding admission of uncharged misconduct in criminal prosecutions are most sharply raised in sex offender cases.

Since 1988, the moral issues raised by proof of uncharged sexual misconduct in sex offender cases have been openly discussed by the Supreme Courts of Delaware, Indiana, and Rhode Island. In each state, a sex offender was convicted in part on evidence of uncharged sexual misconduct that proved the offender’s propensity to commit such misconduct. These defendants were in the same situation as Oscar Wilde was in 1894. Delaware and Indiana chose to reject a specific exception that admitted uncharged sexual misconduct in sex offender cases to prove the defendant’s lustful disposition, or predisposition to commit sex crimes. Rhode Island chose to keep that exception. In each case, however, the court chose to set down guidelines for admission of uncharged sexual misconduct in sex offender cases. There is little practical difference in the outcome in each of the three decisions. Uncharged sexual misconduct will be admitted in sex offender cases, given the right conditions, when the facts presented can be deemed relevant and of probative value.

II. Profiles of Three Sex Offender Cases

A. Delaware

Charles R. Getz was arrested for allegedly raping his eleven-year-old daughter. He was tried in Superior Court, Kent County, Delaware. Delaware had adopted the 1974 edition of the Uniform Rules of Evidence in 1980. The State offered two uncharged sexual misconduct incidents between Getz and his daughter to prove Getz’s motive, intent, and plan, and to show “proof of sexual interest in his daughter” under Rule 404(b)


13. This same point has been suggested by other authors. For example, Peter Tillers asserts that the character evidence rule is often eviscerated in practice by the principle of multiple admissibility which permits prohibited character evidence to be admitted under one of the many exceptions to the ban against character evidence. 1 WIGMORE, supra note 7, § 54.1, at 1151-52 (quoting Tillers).
15. Id.
17. Getz, 538 A.2d at 729 (quoting the State’s allegation). See also the Record Vol. A at 15-21 for Deputy Attorney General Ferris Wharton’s representations to the court.
Delaware Rules of Evidence. Pre-1980 Delaware case law contained no reported opinions supporting admission of similar sexual misconduct to show the defendant's predisposition to commit sex crimes.

The State called Dr. Walter Kuhn, a physician who had examined Getz's daughter about ten days after the incident for which Getz stood trial. Kuhn's medical history notes included the child's story of the two similar episodes of sexual activity with her father. The physician was allowed to put the medical history record into evidence. Next, Getz's daughter, the victim, took the stand and testified to three different episodes of incest with or child molestation by her father. Getz claimed he had been "set up" by his ex-wife so she could obtain a divorce from him on misconduct grounds to protect her right to remain in the United States. The jury did not believe Getz and found him guilty. He drew a mandatory life sentence for first-degree rape. Getz appealed his conviction on the ground that the admission of uncharged sexual misconduct under Rule 404(b) was improper.

The Delaware Supreme Court wrestled with Getz's case. Getz was not charged with a crime requiring proof of specific intent. Mens rea was established by the facts of partial intercourse. Getz raised no defense based on lack of intent, such as insanity. If Getz had a plan to molest his daughter, it was irrelevant because any criminal plan to seduce his daughter proved no more than mens rea, which was already established by the fact of the assault. The State did not have to prove Getz's guilty knowledge, and Getz did not claim he touched his daughter accidentally or by mistake. If mens rea was not at issue, Getz's motive for engaging in sexual conduct with his daughter was also irrelevant. Getz's identity as the perpetrator of whatever happened was not an issue. The two earlier child molestation incidents were too remote to be part of the same criminal act which led to his arrest. The only logical purpose for proving these two uncharged instances of misconduct was to show the jury that Getz habitually satisfied his sexual desires by molesting his daughter.

The court disposed of the State's unsupported claim that it could offer

18. Getz, 538 A.2d at 729. See also the Record Vol. B at 57-58 for the testimony of Dr. Kuhn admitting State's Exhibit 8, the one-page office visit record. The visitation record contained the following statement:

Mother states child sexually abused by father on multiple occasions [sic]. Child, herself,
states that there have been multiple episodes where father has molested her over last 1 year.
Says about 3 weeks ago father penetrated her vagina causing great pain.—Denies any incident
in last 3 weeks—Child protection already notified.

Office Visit Record of Dr. Walter Kuhn (copy on file with author).

19. Record Vol. B at 19-24. Unfortunately, the daughter's testimony on direct examination was unclear. She experienced a great deal of difficulty in getting out the facts of the last episode. On cross-examination, she stated that her father had had sexual relations with her several times. Id.

20. Getz, 538 A.2d at 728.

21. Id. at 729.

22. Id. at 733.
this evidence as anticipatory impeachment. After examining the commentators' views on Rule 404(b) of the Uniform Rules of Evidence, the court determined that a majority of jurisdictions considered Rule 404(b) an inclusionary rule admitting specific instances of uncharged misconduct to prove any relevant issue other than the accused's bad character. Although the court held that Rule 404(b) was not to be used as a laundry list of exceptions to the character evidence rule, the balance of its opinion examined the State's evidence of uncharged misconduct on its "fit" with the laundry list, and found it deficient.

The court found that other states admitted uncharged sexual misconduct in sex offender cases in two ways: by matching the offer of proof to the examples listed in Rule 404(b), or by using a special exception known as the "lustful disposition or sexual propensity exception." However, the court incorrectly equated the "lustful disposition" exception with the "motive" example listed in Rule 404(b), although Getz's habitual sexual misconduct with his daughter was circumstantial proof of his predisposition to commit the crime charged in the indictment.

The court correctly held that Getz's motive was irrelevant to the charge at hand. Readers were assured that Delaware did not recognize a "lustful disposition" exception to the character evidence rule. The court also held that the two prior episodes of fondling and incest were irrelevant to prove a plan or design to commit sexual misconduct, because the uncharged misconduct would only prove Getz's plan to satisfy his sexual desire by using his daughter, which would only establish his intent, and intent was not an issue. The Delaware Supreme Court reversed Charles Getz's conviction.

The court then set forth six specific standards to be followed by trial judges in evaluating uncharged misconduct evidence, including a limiting instruction which the trial court would be required to use in future cases.

23. Id. at 731-32.
24. Id. Justice Walsh, speaking for a unanimous court, noted that the State could not use the evidence in its case in chief solely to impeach a witness who had not testified. The court also noted in dicta that the use of these uncharged acts of misconduct for impeachment of Getz would extend no further than cross-examination of defense character witnesses on their basis for opinion or reputation evidence. Id. at 732.
25. Id. at 732-34.
26. Deputy Attorney General Wharton did not cite Director of Public Prosecutions v. Boardman, 1975 App. Cas. 421 (appeal taken from Norwich), or other English cases or commentators that favor a liberalized use of "similar acts" evidence in criminal prosecutions to discount any claim that the victim made a false accusation. See, e.g., Allan, Admissibility of Evidence, supra note 9, at 349-50 (discussing Regina v. Lewis, [1982] 76 Crim. App. 33). In Lewis, the defendant was accused of assaulting 10-year-old twin girls, the daughters of his live-in girlfriend. Id. at 349. Lewis claimed that his touching actions were innocent. The trial court admitted evidence that he had subscribed to pedophilic magazines, and that Lewis had admitted to the police that he was a pedophile. Id. The Court of Appeals affirmed his conviction on the strength of Boardman. Id. at 350.
28. Id. at 732.
29. Id. at 733-34.
30. Id. at 734-35. Justice Walsh's highly articulate opinion set out the following specific guidelines for
Getz's habitual criminal sexual behavior was the real issue. If a person who has engaged in sexual misconduct in the past is more likely, given the same circumstances, to commit the same kind of prohibited act than someone who has never done so, then proof of similar sexual misconduct tends to corroborate the victim's version of the crime charged in the indictment because it shows habitual criminal behavior or recidivism. Proof of recidivism is circumstantial proof of guilt. However, the Delaware Supreme Court did not recognize this relationship, which would have been the "corroboration" version of the lustful disposition rule that it rejected.

B. Indiana

Until the fall of 1992, Indiana permitted proof that the defendant had committed similar sexual misconduct to show that the defendant had a "depraved sexual instinct" that predisposed the defendant to commit the crime charged. Indiana admitted similar sexual misconduct evidence that occurred before and after the crime charged, but only for one of the limited purposes enumerated in Rule 404(b). The court did not mandate that the prosecution provide prior written notice to the defendant of intent to use uncharged misconduct evidence because Getz did not raise any issue about notice.

31. See, e.g., Director of Public Prosecutions v. Boardman, 1975 App. Cas. 421 (appeal taken from Norwich). In Boardman, a headmaster was indicted for one count of attempted buggery and two counts of incitement to buggery occurring at different times with different young men, aged 16 to 18, who were pupils at his school. In two instances, the defendant incited the younger male to take the lead and be the aggressor. The trial court allowed the Crown to join all three counts and introduce the victims' stories of the first and second offenses to "corroborate" each other's accounts. The third count described sexual activity that was characteristically different from those in Counts I and II. Although the reasoning of the Lords is somewhat complex, the best interpretation of Boardman is that the case authorized admission of similar sexual misconduct to prove that the allegations laid against the headmaster by one pupil were not a matter of coincidence or fabrication, when the headmaster claimed that two of the victims made false allegations against him in order to get even for his refusal to grant them special favors. For interpretations of Boardman, see Allan, Similar Fact Evidence, supra note 9, and Rupert Cross, Fourth Time Lucky—Similar Fact Evidence in the House of Lords, 1975 CRIM. L. REV. 62.

32. See, e.g., Baxter v. State, 522 N.E.2d 362, 370 (Ind. 1988) (holding evidence of uncharged sex crimes admissible in prosecution for child molestation and incest to show depraved sexual instinct); Grey v. State, 404 N.E.2d 1348, 1352-53 (Ind. 1980) (holding prior child molestation incident with other children admissible to show deprived sexual instinct in prosecution for rape of eight-year-old); Miller v. State, 268 N.E.2d 299, 301 (Ind. 1971) (holding other oral sodomy on same victim admissible to show deprived sexual instinct).

33. Grey, 404 N.E.2d at 1352-53; Miller, 268 N.E.2d at 301.

34. See, e.g., State v. Robbins, 46 N.E.2d 691, 695-96 (Ind. 1943) (holding subsequent similar acts on other children admissible, if not too remote, to show "indecent familiarity" between defendant and girls and boys).
depraved sexual instinct in attempted rape, sodomy, incest and child molestation prosecutions. The type of sexual misconduct did not have to match the incident in the indictment. For example, in Grey v. State, the defendant gave a statement to the police confessing to a rape, a child molestation incident with a small child, and an indecent exposure incident occurring several years before the date on which the defendant was arrested for rape. The court approved of admission of the child molestation and indecent exposure incidents in the defendant’s rape trial to prove his lustful disposition.

Lapse of time between incidents of sexual misconduct did not preclude the introduction of evidence of stale sexual misconduct. In Harp v. State, the court allowed the state to prove the defendant molested three other children ten to twenty years before trial, because the court believed the prior incidents showed the defendant’s depraved sexual instinct at the time of the commission of the incident alleged in the indictment. These situations show that sexual misconduct evidence admitted under the Indiana depraved sexual instinct exception to the character evidence rule was seldom restrained by analysis of the probative value of the uncharged sexual misconduct weighed against prejudice to the defendant.

In two 1987 rape cases, however, the Indiana Supreme Court overturned convictions because the trial court erroneously admitted evidence of other rapes. In Lehiy v. State and in Reichard v. State, it was held that the State could not prove the defendant’s depraved sexual instinct with other rapes, because the rape of an adult woman could not be categorized as depraved sexual conduct. Admission of uncharged sexual misconduct in such rape cases was held limited to similar sexual activity proving plan, design,

39. 404 N.E.2d 1348 (Ind. 1980). The defendant was charged with raping his eight-year-old daughter. Id.
40. Id. at 1352.
42. Id. at 500.
43. See, e.g., Kerlin v. State, 265 N.E.2d 22, 25 (Ind. 1970) (DeBruler, J., dissenting). Justice DeBruler severely criticized the admission of two prior seven- and eight-year-old instances of homosexual sodomy allegedly committed by the defendant with adult males in a sodomy prosecution for commission of a similar act with a fifteen-year-old boy. Id. at 25-27. He argued that the earlier sodomies were admitted simply to show that the defendant had a predisposition to commit sodomy. Id. at 26. He noted that the earlier sodomies lacked any probative value with respect to the defendant’s propensity to commit sodomy with a child. Id.
45. 510 N.E.2d 163, 165 (Ind. 1987).
modus operandi, and the like. 46

In 1992, Indiana abolished the depraved sexual instinct exception to the character evidence rule. 47 Donald Lannan of South Bend was indicted for molesting his fourteen-year-old female cousin, V.E. 48 On the night of June 17, 1989, V.E. stayed at her grandmother's house. She shared a room with her female cousin, T.W. According to V.E., Lannan came into the bedroom shared by the two females and asked T.W. "to mess around with him." When T.W. refused, Lannan then removed V.E.'s pants and had conventional intercourse with her. 49

V.E. testified to three additional incidents of sexual intercourse with Lannan after June 17. 50 V.E. also related that in the summer of 1988, she and T.W. had been riding with Lannan in his truck when Lannan stopped the truck and began fondling both of them. 51 T.W. also testified against Lannan. After reciting the events of June 17, 1989, describing how Lannan had fondled her and tried to inveigle her into having sexual intercourse with him before attacking V.E., T.W. also described the fondling incident in the summer of 1988. 52 All four incidents of earlier and later misconduct with V.E. or T.W. were admitted to show Lannan's depraved sexual instinct. He was convicted, and appealed on the ground that evidence of other child molestation incidents should have been excluded. The Indiana Court of Appeals affirmed 53 and the Indiana Supreme Court granted his petition for transfer. 54

The defendant asked the Indiana Supreme Court to do away with the depraved sexual instinct exception and to adopt either Uniform or Federal Rule of Evidence 404(b) as the sole standard for admission of uncharged sexual misconduct evidence in criminal prosecutions. 55

The Indiana Supreme Court stated that the depraved sexual instinct rule was based on two principles: the alleged higher recidivism rate of sex offenders, and the need to bolster or corroborate the testimony of the complaining witness by showing other instances of similar conduct by the defendant. 56 The court noted that implicit in the recidivism exception is an
assumption that sex offenders repeat their crimes more often than other criminals. The court also noted, however, that the exclusionary rule renders inadmissible character evidence offered solely to show the accused’s propensity to commit the crime for which he is being charged, the rationale being that the prejudicial effect of such evidence outweighs any probative value. The court reasoned that since the high rate of recidivism among those who violate the drug laws did not allow the state to introduce previous drug convictions in its case in chief in a prosecution for selling illegal drugs, “logic dictates [recidivism] does not provide justification for departure [from the exclusionary rule] in sex offense cases.”

Turning to the bolstering rationale, the Indiana Supreme Court noted that the rationale originated in an era “less jaded than today,” when it was felt that evidence of depraved sexual instinct was necessary to lend credence to a victim’s testimony describing acts which would “otherwise seem improbable standing alone.” The court noted, however, “we live in a world where accusations of child molest [sic] no longer appear improbable as a rule.” The court reasoned that although the emotional appeal of the bolstering argument was powerful, especially in cases involving child victims of sexual abuse, it did not support the continued application of an exception which allowed the prosecution to accomplish what the general propensity rule was intended to prevent.

The Indiana Supreme Court noted that more than twenty states had exceptions to the rules of evidence in cases where children were victims of sexual abuse. Some states explicitly recognized a depraved sexual instinct exception or allowed evidence of prior bad acts to prove the defendant’s “lustful disposition or nature.” Other states stretched the common scheme or plan exception to the character evidence rule in sex offender cases in order to admit uncharged sexual misconduct. The court also acknowledged that the rationale for allowing greater latitude in sex offender cases was in part based on the court’s concern for the victim, not the accused, and represented

that sex criminals commit hundreds of similar uncharged sexual misconduct incidents. Id. at 1337 n.6 (citing Anne H. Rosenfeld, Discovering and Dealing with Deviant Sex, PSYCHOLOGY TODAY, April 1985, at 8, 10). The court disbelieved the Indiana Trial Lawyers sociological data that showed a low recidivism rate among sex offenders, defined as rearrest and conviction for a sex crime. Id. at 1337 n.6. Apparently, neither the State, the defendant nor the amici brought Director of Public Prosecutions v. Boardman, 1975 App. Cas. 421 (appeal taken from Norwich), or any commentary on Boardman to the court’s attention. Specifically, V.E.’s recitation of the earlier fondling episode corroborated her later story that Lannan forced her to have sexual relations with him.

57. Id. at 1336.
58. Id. at 1337.
59. Id.
60. Id.
61. Id.
62. Id. at 1338.
63. Id. at 1335.
64. Id. at 1335-36.
65. Id. at 1336.
an attempt to "level the playing field" in sex crime prosecutions to protect the victim and to ensure more convictions. However, the court said these concerns were insufficient to justify the depraved sexual instinct exception to the character evidence rule.

The court asserted that studies of sex offender recidivism rates contradicted each other, yet it admitted that sex offenders might have a much higher recidivism rate than other offenders. It agreed that juries might not believe child molestation victims' accusations against the defendant because the charges were incredible, but stated that these policy reasons were insufficient to support a specific exception for uncharged misconduct evidence in sex crimes. The court criticized the depraved sexual instinct rule because it allowed the prosecution to introduce uncharged misconduct evidence without notice to the defendant, even when the uncharged miscon-
duct occurred many years before the crime charged in the indictment. The court then held that it would adopt Rule 404(b) of the Federal Rules of Evidence as the standard for admitting uncharged misconduct evidence in Indiana.\textsuperscript{71}

Turning to Rule 404(b), the court insisted that uncharged sexual misconduct evidence was admissible under Rule 404(b) when it tended to prove a common scheme or plan to commit sex crimes,\textsuperscript{72} when it was part of the res gestae, such as the attempt to assault T.W.,\textsuperscript{73} or when it was offered to prove identity of the accused or absence of mistake or surprise.\textsuperscript{74}

The court then held that application of the new rule to Lannan’s case would have resulted in admission of T.W.’s testimony about Lannan’s improper advances on June 17, 1989, but would have excluded evidence of the 1988 incident. However, the case against Lannan was one of overwhelming guilt, and the admission of the 1988 episode was harmless error. The court affirmed Lannan’s conviction.\textsuperscript{75} The court apparently wanted to reassure the public that uncharged sexual misconduct would still be available to the prosecution when the prosecutor could concoct a theory of relevance that did not involve depraved sexual instinct.

\textbf{C. Rhode Island}

Rhode Island also had a history of admitting uncharged sexual misconduct under a “lustful disposition” exception to the character evidence rule.\textsuperscript{76} In 1992, Rhode Island dealt with a challenge to its lustful disposition rule very similar to that raised in Getz and Lannan. James M. Tobin, Jr., of Providence was charged with second degree sexual assault allegedly committed against his niece, “Jill.”\textsuperscript{77} In May 1984, when “Jill” was

\begin{thebibliography}{99}
\item 71. \textit{Lannan}, 600 N.E.2d at 1338-39.
\item 72. \textit{Id.} at 1339.
\item 73. \textit{Id.} at 1340-41. The court referred to admission of other similar, uncharged misconduct committed in the course of committing the crime charged as the “res gestae” exception to the character evidence rule. \textit{Id.} at 1341. Imwinkelried refers to this rule, which permits admission of evidence showing the defendant committed an uncharged crime simultaneously with the crime charged in the indictment, as the “res gestae” doctrine. \textit{Edward J. Imwinkelried, Uncharged Misconduct Evidence §§ 6:21-6:23 (1984).} He also applies the same doctrine to criminal activity committed as part of the preparation for, or escape from, the crime charged in the indictment. \textit{Id.} at §§ 6.22-6.23. Some modern commentators prefer to call this the “interwoven crime” theory of admissibility, and do not consider it an exception to the general exclusionary rule. \textit{See Thomas J. Reed, Admission of Other Criminal Acts Evidence After Adoption of the Federal Rules of Evidence, 53 U. CIN. L. REV. 113, 146 (1984).}
\item 74. \textit{Lannan}, 600 N.E.2d at 1340.
\item 75. \textit{Id.} at 1340-41. The court agreed that admission of the 1988 fondling episode in an ordinary case might have had a major impact on the jury, but the court noted that another witness had testified that Lannan told the witness in May 1990 that Lannan was going to V.E.’s house to “f* * * them again,” meaning V.E. and T.W. \textit{Id.} at 1341.
\end{thebibliography}
thirteen years old, she spent a night in the defendant's home while her parents were moving into a new house. The defendant cornered "Jill" in the kitchen and placed his hand on her vagina and put her hand on his penis. "Jill" did not inform her parents nor did she notify any authorities about this incident.

At trial, "Jill" testified to three earlier incidents and one later incident of uncharged sexual misconduct with the defendant. In 1976, when "Jill" was only six years old, Tobin and his son allegedly stripped her, and Tobin forced his son to have conventional intercourse with her. On Christmas Eve 1981, the Tobin family was gathered at "Jill's" grandmother's house in Johnston. Early that day, Tobin fondled "Jill" while she sat on his knee. Tobin later cornered "Jill" on the staircase, put his hand down her pants, placed his hand on her vagina, and inserted his index finger into her. "Jill" did not inform her parents nor did she notify any authorities about any of these incidents when they occurred.

The later incident occurred on Christmas Day 1985. When Tobin and his son were visiting "Jill's" family, they untied "Jill's" dress and pinched her buttocks several times in the presence of other family members, who considered the actions "horseplay." All of these uncharged incidents were offered to prove defendant's lewd disposition towards "Jill" and were objected to at trial.

Tobin was convicted on one count of sexual assault, and he appealed. His counsel argued that Rhode Island should follow Delaware's example, and reject the lustful disposition rule, because Rhode Island Rule of Evidence 404(b) makes no reference to any lustful disposition exception to the character evidence rule. The Rhode Island Supreme Court found, however, that there was much support for a specific exception for evidence of lustful disposition in sex offender cases in those states that had adopted the Uniform Rules. The lustful disposition exception existed outside the structure of Rule 404.

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78. *id.* at 529.
79. *id.*
80. *id.*
81. *id.* at 530.
82. *id.*
83. *id.*
84. *id.*
85. *id.*
86. *id.*
87. *id.* at 529-30. One of the incidents, the Christmas 1985 "horseplay," resulted in a "no true bill" finding by the indicting grand jury. *id.* at 528. The trial judge did not tell the jury that the grand jury had failed to indict on this act. *id.* at 531. The Rhode Island Supreme Court held that the trial judge withheld relevant information, and reversed Tobin's conviction for nondisclosure. *id.* at 533.
88. *id.* at 528-29.
89. *id.* at 531-32.
90. *id.* at 531.
91. *id.* The court cited Imwinkelried in support of this view. *id.* at 531 (citing IMWINKELRIED, supra
Although the Rhode Island Supreme Court referred to Justice Walsh’s well-crafted Getz opinion, it refused to follow Delaware’s lead. Carefully setting out the procedural safeguards that it had applied in an earlier decision, the court declined to rule that the lustful disposition rule had been abolished by adoption of Rule 404.\textsuperscript{92} Persons charged with sex offenses in Rhode island would have to expect that similar, deviant sexual misconduct would be openly admitted to show the defendant’s lustful disposition, or propensity, to commit sex offenses of that kind.

\textbf{D. Analysis}

None of the three decisions discussed above faced up to the moral and social implications of similar uncharged sexual misconduct evidence in sex offender cases. A structural analysis of the character evidence rule and its policy objectives does not begin to meet the real issues raised by similar misconduct evidence.

For example, the three decisions assumed that prior criminal history was relevant to proof of a particular criminal act charged in the indictment, but did not articulate a reason why relevant evidence leading to conviction ought to be suppressed in sex offense prosecutions. The three defendants may have been habitual sex offenders. For example, the fact that Getz tried twice to rape or molest his daughter before the offense with which he was charged tends to suggest that he was a pedophile.\textsuperscript{93} Lannan’s prior attempts to molest V. E. and T. W. before they reached puberty also tends to establish that

\begin{footnotes}
\footnotetext{92}{Tobin, 602 A.2d at 532. In \textit{State v. Jalette}, the court had discussed the danger that indiscriminate use of uncharged sexual misconduct evidence in sex offender cases might be a substantial risk to a constitutionally fair trial. 382 A.2d 526, 533 (1978). In \textit{Tobin}, it reiterated its view that uncharged misconduct evidence should be used sparingly—when reasonably necessary, never when the evidence is purely cumulative—and accompanied by a proper cautionary instruction to the jury describing how the jury should take the evidence. \textit{Tobin}, 620 A.2d at 532.}

\footnotetext{93}{Pedophilia is described in \textit{AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL 279} (3rd ed. rev. 1992) [hereinafter DSM IIIIR] under “paraphilia.” Paraphilia is a sexual disorder characterized by sexual arousal in the sufferer involving (1) non-human objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons. Pedophilia (sexual arousal by children) is a paraphilic disorder. The essential feature of the disorder is recurrent, frequent, intense sexual urges and sexually arousing fantasies of at least six months’ duration involving sexual activity with a prepubescent child. \textit{Id}. at 284. The American Psychiatric Association sets a diagnostic limitation on pedophilia requiring that the victim be 13 or younger, and the sufferer at least 16, and at least five years older than the victim. \textit{Id}. at 285.}
\end{footnotes}
Lannan was a pedophile. Tobin's sexual activities with "Jill" over a seven-year period from ages six to thirteen indicates that Tobin had the same mental disorder.

Pedophilia is no excuse for criminal behavior connected with the objects of the mental disorder. However, the diagnostic criteria for the disorder suggest that there is a medical and psychological basis for inferring that a person who has a history of repeated uncharged sexual misconduct with children will commit the act again. Assuming that the prosecution can prove that the defendant charged with a sex offense involving children is a pedophile, it is rational to infer that the defendant committed the act charged in the indictment. It is also highly likely that a child's accusations that an adult committed pedophilic acts on the child are not made up. Proof of pedophilia thus corroborates the accusations.

It is difficult to describe and analyze the tortuous history of the law of uncharged sexual misconduct evidence. Before the widespread adoption of the Uniform Rules of Evidence, the courts were unable to provide a convincing reason either to admit or to exclude evidence of similar uncharged misconduct in sex offender cases. Since the advent of the Uniform Rules of Evidence, the courts have had no better rationale. Uniform Rule 404(a) was drafted to exclude proof of the defendant's character for the purpose of showing that the defendant acted in accordance with that character. Rule 404(a) provides for three specific exceptions to the general rule. Rule 404(b), which is a stand-alone rule, authorizes admission of uncharged misconduct to prove any issue other than the defendant's character. Rule 406, which authorizes proof of habit or routine practice, does not define habit, nor does it detail the conditions for admission of habitual behavior evidence.

Recidivism, or habitual criminal conduct, is the primary reason why similar uncharged misconduct evidence is relevant in sex offender prosecutions. The sex offender's propensity to commit similar sex crimes has been amply demonstrated by social science.

Proposed new Federal Rules of Evidence 413 through 415 are legislatively inspired attempts to deal with the specific problem of similar uncharged misconduct evidence in sex offender cases. These proposed rules are designed to establish a federal exception to the character evidence rule for similar uncharged misconduct in sex offender cases. These legislative

94. Unif. R. Evid. 404(a) (1986).
95. Id. The three exceptions are: (1) evidence of a pertinent trait of the accused's character offered by the accused, or by the prosecution to rebut the same; (2) pertinent traits of the victim offered by the accused, or by the prosecution to rebut the same, or evidence of the peacefulness of the victim offered by the prosecution to rebut a claim that the victim was the first aggressor in a homicide; and (3) evidence of the character of a witness. Id.
96. Unif. R. Evid. 404(b) (1986).
98. There are five bills pending before the U.S. Congress that call for amendment of the Federal Rules
of Evidence to include specific provisions for admitting prior uncharged sexual misconduct in sex offender cases, which read as follows:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.
(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule.
(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
   (1) any conduct proscribed by chapter 109A of title 18, United States Code;
   (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
   (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
   (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
   (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.
(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule.
(d) For purposes of this Rule and Rule 415, "child" means a person below the age of 14, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
   (1) any conduct proscribed by chapter 109A of title 18, United States Code that was committed in relation to a child;
   (2) any conduct proscribed by chapter 110 of title 18, United States Code;
   (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
   (4) contact between the genitals or anus of the defendant and any part of the body of a child;
   (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
   (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation.
(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.
initiatives respond to public pressure to level the playing field for the victims of sex offenses, to increase the conviction rate for sex offenders, and to increase the honesty with which uncharged misconduct evidence is admitted in such prosecutions. At the same time, these proposed amendments to the Federal Rules of Evidence will have a far-reaching impact on state courts and on the nature of the criminal trial process in sex offense prosecutions.

This Article advocates admission of specific instances of similar criminal sexual misconduct to establish that the defendant is an habitual sex offender and guilty of the crime charged in the indictment. After a review of pertinent social scientific literature which supports the logical relevance of such evidence, and a history of the common-law roots of the character evidence and lustful disposition rules, this Article will discuss the current rationales for admitting uncharged sexual misconduct. Since the current rationales fail to explain why courts allow such evidence or exclude uncharged sexual misconduct, this Article proposes admissions guidelines for proof of habitual criminal sexual activity. Although sex offender cases are the focus of this Article, an amendment to the Uniform and Federal Rules of Evidence that would permit uncharged sexual misconduct evidence would affect the handling of uncharged misconduct evidence in other forms of criminal prosecution now ostensibly covered by Rule 404, because habitual criminal misconduct is not confined to sex offenders.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule.


99. These policy considerations have been laid out in Report of the Attorney General on the Admission of Criminal Histories at Trial, 22 MICH. J. L. REFORM 707, 723-27 (1989).

100. The panelists at the Evidence Section of the 1993 Association of American Law Schools [AALS] meeting did not acknowledge this in their prepared remarks. Edward J. Imwinkelried, Some Comments About Mr. David Karp's Remarks on Propensity Evidence (Jan. 9, 1993) (unpublished manuscript on file with author); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases (Jan. 9, 1993) (unpublished manuscript on file with author).
III. The Logical Relevance of Uncharged Misconduct Evidence in Sex Offender Cases

A. Recidivism

If a person's past criminal behavior is a strong predictor of future, similar criminal behavior, as some evidence commentators have conceded, then an accused's criminal history would be logically relevant to proof of guilt. If an empirical relationship between prior and present criminal misconduct can be established, then the criminal history of a sex offender, limited to uncharged sexual misconduct evidence, will be relevant in sex offender prosecutions.

101. Professor Wigmore recognized this connection at the turn of the century. See John H. Wigmore, The Principles of Judicial Proof 178-83 (1913). Modern commentators have tended to treat the admission of uncharged misconduct evidence as a formalistic problem of discovering the right verbal formula which must be uttered to gain admission of the uncharged misconduct. Wigmore, however, was concerned with the substantive question of the relevance of recidivism to conviction. In his estimation—drawn before sophisticated statistical studies of recidivism were available—prior criminal behavior was a strong predictor of future or consequential criminal behavior, and thus evidence of prior behavior should be made available to the trier of fact. See id. at 188-89 (citing H.L. Adam, The Story of Crime 222 (19_ _ [sic ] ).

This point was also made recently by the person responsible for drafting proposed Federal Rules of Evidence 413 to 415. David Karp stated at the 1993 AALS Evidence Section meeting:

When I make my own assessment of evidentiary rules, I start by asking myself what information a reasonable person would want to have in deciding an important matter. If I conclude that a reasonable person would want to have information that is excluded by existing evidentiary rules, I then ask whether there is a sufficient basis for denying juries evidence that one would reasonably desire to make an informed decision.

Karp, supra note 100, at 11. Mr. Karp also observed:

Ordinary people do not commit outrages against others because they have relatively little inclination to do so, and because any inclination in that direction is suppressed by moral inhibitions and fear of the practical risks associated with the commission of crimes. A person with a history of rape or child molestation stands on a different footing. His past conduct provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him. A charge of rape or child molestation has greater plausibility against a person with such a background.

Id. at 5.

102. The principle is a simple statistical statement, pursued in civil litigation in such cases as Halloran v. Virginia Chemicals, 361 N.E.2d 991 (N.Y. 1977), and in criminal cases exemplified by United States v. Woods, 484 F.2d 127 (4th Cir.), cert. denied, 415 U.S. 979 (1973). The fact to be proved is the commission of an act on the date in question in the complaint or indictment. The perpetrator has done the same or a similar act before. The more times the perpetrator repeats that act, the more likely it is that he repeated it on the date in question, if the conditions for its perpetration are much the same as before. The logical relevance of prior uncharged misconduct is based on this insight. The more frequently a person has committed the same act, the more likely it is that under the same conditions, he or she will repeat that act. The legal question is just how many prior or subsequent similar incidents are enough to prove the fact of commission in the case at bar. This principle of recidivism lies behind most criminal investigation techniques. See Steven M. Cox & John E. Wade, The Criminal Justice Network 231 (2d ed. 1989) (citing Daniel Glaser's recidivism study, which indicated a general 35% recidivism rate for convicted felons); Daniel Glaser, The Effectiveness of a Prison and Parole System (1969). Glaser's results are contradicted by common police perceptions of a 50 to 60% general recidivism rate among known offenders.
However, not all sex offenders have the same criminal histories. There is a difference between the typical criminal histories for rapists and those of pedophiles, hebephiles, and exhibitionists. This difference is important in making inferences from prior criminal histories in sex offender cases.

1. Rapists.

Rape is a violent crime. In some American subcultures, violence is a socially approved way of getting what one wants, including control over other persons. One way men can control women is to force them to submit to degrading activities, including sexual intimacy against their will. This is the most plausible sociological explanation for a person's motivation to rape. It is drawn from the sex offender studies that include detailed self-reported circumstances of each crime committed by the offender. Other explanations for male rape have been discredited. Criminal sexual psychopaths probably do not exist. Rapists are not usually seriously mentally

and by several studies. See, e.g., STUART J. MILLER ET. AL., CAREERS OF THE VIOLENT (1982) (predicting recidivism based on rearrest rates rather than on conviction). There is a relatively high correlation between prior conviction for a crime and later rearrest for the same type of crime. The 1,591 FBI rap sheets examined by Miller, et. al., for Columbus, Ohio, violent criminals showed a 95% second arrest rate for violent criminals. Id. at 216. According to these authors, 64.5% of all violent criminals are rearrested from two to five times for various crimes after their first conviction. Id. at 216. The recidivism rate for purely violent crimes is considerably less than for all crimes. The authors found a 47% rearrest rate for a second violent crime among those convicted of violent crime. Id. at 216. Thus, the chances are one in two that a violent criminal will be rearrested for a second violent crime. If similar recidivism rates are characteristic of the various types of sex offenders, then the fact of prior conviction or a well-established prior offense not resulting in arrest or conviction tends to prove that the perpetrator has repeated the criminal act.

The literature and case law on sex offenders are hard to evaluate because the terms used to describe sex offenses by the courts and by commentators do not make logically watertight compartments. For purposes of this Article, a "rapist" is anyone who engages in sexual intercourse with anyone else against the other person's will. This category obviously includes some cases of incest committed in violent fashion without the victim's consent. Involuntary sexual intercourse is not limited to male-female genital intercourse, but includes involuntary anal and oral intercourse and all forms of involuntary homosexual intercourse. A "pedophile" (child molester) is anyone who engages in sexual activity, short of intercourse, with any person under sixteen (those who by law cannot consent). This activity covers such events as fondling, masturbating, exposure, and digital penetration. The category includes both homosexual and heterosexual activities short of intercourse. The fact that the victim voluntarily took part in the activity is irrelevant. "Incestuous persons" are those who engage in voluntary sexual intercourse with someone within the prohibited degree of consanguinity. Thus, parents who fondle their children are pedophiles, and parents who have sexual intercourse with their children are incestuous persons, not sodomists. Parents who have involuntary intercourse with their children are rapists. Hebephiles or "statutory rapists" are those who engage in voluntary sexual intercourse with unrelated persons of the opposite sex who cannot legally consent to such activity. A man who has sexual relations with his 15-year-old female first cousin is a statutory rapist in those states where persons who are so related may marry, and an incestuous person everywhere else. A "sodomist" is any person who engages in voluntary anal or oral intercourse with a person who is of the same sex. Thus, voluntary oral or anal sexual activity with a person of the opposite sex is not included in this category, although the act could be statutory rape or incest under the right conditions.

103. See infra text accompanying notes 104-154.


105. E.g., Groth & Burgess, supra note 104.

106. Stanton Wheeler, Sex Offenses: a Sociological Critique, in CRIME IN AMERICA: PERSPECTIVES
Rape is not usually precipitated by the victim. Rape is a species of assault and battery directed at humiliating and degrading victims. A generation or two ago, some writers tried to explain rape as the act of a "sex maniac" who was motivated by unnatural sex drives—i.e., his overcharged libido—to seek out women and force sexual contact with them. This was an oversimplified, incorrect application of Freud's doctrine of the libido, but it influenced judicial thinking in relatively modern times on the admission of uncharged sexual misconduct. Careful analysis of the criminal histories of rapists in recent years shows that rapists tend to commit non-sexual violent offenses almost as frequently as rapes.

107. Id. at 340 ("[A]ggressive [sex] offenders are more likely to be judged normal by psychiatric diagnosis."); Leonard A. Bard et. al., A Descriptive Study of Rapists and Child Molesters: Developmental, Clinical, and Criminal Characteristics, 5 BEHAVIORAL SCIENCE & THE LAW 203, 217-18 (1982) (finding that child molesters had greater frequency than rapists of bizarre behavior and psychoses). But see Groth & Burgess, supra note 104, at 235-36 (noting that 66% of rape offenders in the study showed at least some clinical evidence of psychosis).

108. Menachem Amir, Forcible Rape, FED. PROBATION, March 1967, at 51, 57. "Victim-precipitated rape" refers to cases in which the victims actually—or so it was interpreted by the offender—agreed to sexual relations before the actual act or did not resist strongly enough when the suggestion was made by the offenders. The term applies also to cases in which the victim enters vulnerable situations charged with sexuality, especially when she uses what could be interpreted as indecent language and gestures or makes what could be taken as an invitation to sexual relations. Id. Only 19% of the rapes in Amir's study could be described as "victim-precipitated." Id.

109. See, e.g., FRANK S. CAPRIO & DONALD R. BRENNER, SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS 194-95 (1961) (restating the old sexual psychopath theory). This view of rape motivation surfaced in such decisions as State v. McDaniel, 298 P.2d 798 (Ariz. 1956). The defendant was accused of homosexual pedophilia and sodomy with a 14-year-old boy. Other high school boys were allowed to testify that the defendant had fondled them and had inveigled them to commit fellatio on him. The court approved admission of these other tales to show McDaniel's plan or scheme of sexual satisfaction. 298 P.2d at 801-02. The court then embarked on a side tour into social science:

There is still another relevancy in the evidence herein adduced. Certain crimes today are recognized as stemming from a specific emotional propensity for sexual aberration. The fact that in the near past one has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality.

Id. at 802.

110. See generally McCAGHY, supra note 104, at 124 (finding traditional emphasis on sexual component of rape misplaced); Bard et. al., supra note 107, at 217-18. The Bard study consisted of in-depth interviews of sex offenders in a Massachusetts sex offender rehabilitation program and a control group of sex offenders held in the Walpole State Prison. Rapists in this study had a higher incidence of violent behavioral problems, were less likely to be socially withdrawn, and had fewer medical complaints than pedophiles in the study population. Id. at 205-06, 217. While the rapists scored higher on measures of aggressiveness and narcissism, child molesters were significantly more likely to show psychotic symptoms and passive sexuality. Id. at 217.

112. See Joseph J. Romero & Linda M. Williams, Recidivism Among Convicted Sex Offenders: A 10-Year Follow Up Study, FED. PROBATION, March 1985, at 58, 62-64. Romero and Williams conclude that,
In the 1950s the recidivism rate for rapists was thought to be fairly low, based on a New Jersey report that defined recidivism as conviction of the same type of crime. This over-simplified definition of recidivism ignored two forms of recidivism peculiar to sex offenders: (1) arrests for the same type of criminal activity that did not lead to a conviction and (2) prohibited conduct that was never reported to the police. It also ignored the relationship between rape, assault and battery, mayhem, robbery, and murder. More recent long-term studies of convicted sex offenders have demonstrated that rapists are as likely to be rearrested for other violent crimes as for another rape. Rapists have a 50% recidivism rate for all types of violent crimes, which is about the standard rate for violent criminals as a whole. Their recidivism rate for sexual offenses is also much closer to the average serious crime recidivism rate than was once supposed.

"[the] public's conception of the sexual assaulter as a man continually driven to aberrant sexual behavior is not supported by the current research." Id. at 62. The sexual assaulters in their research sample "were found to commit almost as many nonsexual violent offenses as sexual offenses." Id. at 63.

114. Id. at 23-24. Tappan reported extremely low recidivism rates for rapists and child molesters in New York. He cited figures showing that only 7% of convicted sex offenders were rearrested for a sex offense within 12 years of first detention. Id. at 23. In 1958, Frisbie reported similar low recidivism rates for sex offenders in California. See Louise V. Frisbie, The Treated Sex Offender, FED. PROBATION, March 1958, at 18, 20-21. Until recently, both studies were considered authoritative, and the commentators considered rape, sodomy, incest, and child molestation to be low recidivism crimes.

115. TAPPAN, supra note 113, at 23-24. Tappan cites comment by the Mayor's Committee for the Study of Sex Offenses in New York City that where recidivism was "persistent at all" it was "criminal, not sexual," without perceiving a connection between violent crime and rape. Id. at 24.

116. Romero & Williams, supra note 112, at 62. This study found that the "vast majority" of a sexual assaulter's arrests are not sex-related. Only 23% of the offenses in the arrest record of sexual assaulters in this study were sex-related. 19.4% were crimes of violence against the person (homicides, aggravated and simple assault, robbery, and weapons offenses). 57% of rapists had at least one arrest "for a nonsexual violent assault against another person or a weapons offense." Id.

117. A. Nicholas Groth et. al., Undetected Recidivism among Rapists and Child Molesters, 28 CRIME & DELINQUENCY 450, 453, 456-58 (1982). These researchers interviewed convicted rapists and child molesters in the North Florida Evaluation and Treatment Center (Gainesville, Florida) and the Connecticut Correctional Institution (Somers, Connecticut). The Florida sample consisted of 90 offenders, 49 of whom had committed some form of sexual assault on an adult, and 41 of whom had assaulted a child. The Connecticut sample of 47 was composed of 34 rapists and 13 child molesters. Each subject was asked the following five questions:

(1) How old were you at the time of your first sexual assault or attempted assault, regardless if you were caught for this or not? (2) How many sexual assaults have you been convicted of, to date? (Include attempted sexual assaults, homicide, etc.) (3) How many sexual assaults have you attempted or committed for which you were never apprehended or caught? (4) How many sexual offenses (assaults or attempted assaults) have you been acquitted for, which, in fact, you did do? (5) How many offenses (assaults or attempted assaults) have you been found guilty of, which, in fact, you did not do?

Id. at 452.

Self-reported recidivism was checked against actual FBI records for each subject. The reported FBI recidivism rate for the 83 rapists amounted to 54 of 83 (65%). Id. at 452. The reported recidivism rate for child molesters was 20 of 54 (37%). Id. Fifty-one of 76 (67.1%) rapists reported one or more unreported incidents of recidivism. Id. at 454. Twenty-six of 52 (50%) child molesters reported one or more unreported acts of child molestation. Id. The rapists and child molesters in this study admitted to an average of five similar sexual assaults for which they were not apprehended. Id. at 456. If this study represents typical
rapist with at least one prior rape conviction is much more likely to be a recidivist than a first time offender.\textsuperscript{118} Rapists confined to penitentiaries and sex offender treatment centers who participated in self-reported recidivism studies reported almost twice as many uncharged, unreported cases of rape or attempted rape than their official arrest records confirmed.\textsuperscript{119} This fact suggests that the low visibility of sex offenders in general and rapists in particular obscures a high recidivism rate for rapists.\textsuperscript{120}

The profile data on rapists and the self-reported data from sex offenders does not prove that rapists are compulsively driven to rape to satisfy their lust. It is not an indication of deep-seated psychological pathology. That data shows the typical rapist to be a vicious man who uses women in a horrible exaggeration of the stereotype of the tough male, to prove his physical prowess and control over others. An offender's criminal history of similar sexual assaults or dissimilar violent offenses may be circumstantial proof of guilt in a rape prosecution, but that criminal history is not automatically admissible because it is circumstantially relevant.\textsuperscript{121}

The defendants in \textit{Getz}, \textit{Lannan}, and \textit{Tobin} did not have a rapist's profile. Getz had no prior convictions for violent crime, although he did have a history of violent behavior toward his wives.\textsuperscript{122} Lannan also had no history of violent behavior with his two pre-teen cousins. Tobin's nine year pursuit of "Jill" was often disguised as "horseplay" and accepted as a form of teasing by "Jill's" relatives.

2. \textit{Pedophiles and Incestuous Persons}.—

\textit{a. Pedophiles}.—Pedophiles come in two types: heterosexual and homosexual.\textsuperscript{123} Heterosexual pedophilia is much more common than homosexual pedophilia.\textsuperscript{124} While pedophiles are generally speaking more

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behavior patterns for sex offenders, then sex offenders have a recidivism rate comparable to non-sexual crime rates. \textit{Id.}

\textsuperscript{118} Romero \& Williams, \textit{supra} note 112, at 62-63.

\textsuperscript{119} Groth et al., \textit{supra} note 117, at 456.

\textsuperscript{120} \textit{Id.} at 457.

\textsuperscript{121} There are some authorities who consider that logical relevance alone is sufficient to warrant admission of prior criminal histories. \textit{See, e.g., Office of Legal Policy, U.S. Dept of Justice, Report to the Attorney General on the Admission of Criminal Histories at Trial, 22 MICH. J. LAW REFORM 707, 725 (1989)}.

\textsuperscript{122} Record Vol. B at 129-32. Getz admitted on cross-examination that he had struck his second wife during an altercation, which led to the State Police being called to the Getz residence to break up the affray. Getz's character witnesses were cross-examined by the prosecution on whether or not they were aware that Getz had been arrested in 1979 for an alleged assault on his first wife, Cathy, and again in 1985 for an assault on his second wife, Audie. Record Vol. C at 70-71. However, Getz had never been charged with any other violent crime, and had no criminal convictions. Telephone interview with Ferris W. Wharton, Deputy Attorney General for the State of Delaware (August 4, 1989).

\textsuperscript{123} \textit{See} A. Nicholas Groth \& Thomas S. Gary, \textit{Heterosexuality, Homosexuality, and Pedophilia: Sexual Offenses Against Children and Adult Sexual Orientation, in Male Rape: A Casebook of Sexual Aggressions, supra note 104, at 143.}

\textsuperscript{124} \textit{See} ALAN P. BELL \& MARTIN S. WEINBERG, \textit{Homosexualities: A Study of Diversity Among Men and Women 230 (1978) ("[T]he seduction of 'innocents' far more likely involves an older male, often
likely to be seriously mentally ill than rapists, few pedophiles are anything other than mildly disturbed men. Pedophiles have about as high a rearrest rate as exhibitionists, thus close to the national average for all criminal recidivism. Child molesters come in two distinct types: "bad boys" and "dirty old men." The "bad boy" is an adolescent or a man in his early twenties who is unable to handle his own sexual changes and finds sexual gratification in fondling little girls. The "dirty old man" is likely to be between thirty and forty years of age. He has a bad marriage and generally has a hard time relating to women above the age of puberty. Consequently, he forms attachments to small children and fondles their genitals or breasts. This type of pedophilia is often associated with game-playing strategies in which the attacker's regression to preadolescent behavior is marked.

The pedophiles who participated in the inmate population studies of recidivism reported many more pedophilic acts than their arrest and conviction records showed. The recidivism rate for these individuals may be quite high, and is certainly much higher than was originally thought. Pedophiles with prior child molestation convictions are more likely to repeat the act than a first-time offender. Turning to the defendants in our trilogy, all three men had a prior history of pedophilia. Getz's background—if the two prior instances of pedophilia were to be believed—indicated that he may have been a heterosexual pedophile. Lannan, according to V.E.'s and T.W.'s testimony, had attempted to fondle or to have sexual intercourse with both young females repeatedly in 1988 and 1989. Tobin committed at least five separate
pedophilic acts on "Jill" from 1976 until Christmas 1985. If these three men were habitual heterosexual pedophiles, then the probability of their commission of future pedophilic acts on prepubescent children was about fifty percent.

b. Incestuous Men.—An adult male who satisfies his sexual urges with females who have passed puberty and not yet reached the age of consent may be a hebrephile (lover of teenagers). Hebrephiles may look to family members for satisfaction, or to other young women. All forms of hebrephilic sexual activity were once considered statutory rape, but one of the results of the sexual revolution of the 1960s was the gradual disappearance of statutory rape from the list of sex offenses. New comprehensive sexual assault statutes adopted in many jurisdictions over the past twenty years use a classification scheme for prohibited sexual conduct between adults and adolescents, usually some form of sexual assault in a lesser degree than rape. The number of prosecutions of teenage boys for voluntary sexual activity with teenage girls under 16 years old is negligible. Consequently, older recidivism studies on statutory rapists cannot be followed in modern literature. The pioneer New Jersey study done in the 1950s reported figures that indicated only a thirty-four percent recidivism rate for statutory rapists.

In recent years, however, incest and child sexual abuse have been given widespread media attention. Although incest could theoretically occur between two adults, the type of incest that the courts see now is hebrephilic incest. The victim is usually a teenage daughter or stepdaughter of the attacker. "Child sexual abuse" includes pedophilia, forcible rape of children of both sexes, and hebrephilia. The new comprehensive child sexual abuse statutes are modeled on the guidelines issued by the American Bar Association’s Resource Center for Child Advocacy and Protection. These statutes prescribe a detailed, structured series of prohibited acts and corresponding punishments for sexual intercourse between persons eighteen years old or over and adolescents under sixteen years old, as well as punishment for sexual activity with anyone who is related within the prohibited degree of consanguinity.

Child sexual abuse and incest have been featured in made-for-television

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137. See infra statutes in note 322.
138. See TAPPAN, supra note 113, at 23.
139. See Lynne Kocen & Josephine Bulkley, Analysis of Criminal Child Sex Offense Statutes, in CHILD SEXUAL ABUSE AND THE LAW: A REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION 1 (Josephine Bulkley ed., 1983) (explicitly suggesting that New Jersey’s child sexual abuse statute serve as a model for other jurisdictions, after an exhaustive review of sexual misconduct statutes in all fifty states). The writers favored special protection from older sex offenders for teenagers, a tiered series of ages for sexual contact and intercourse up to 18, and a reasonable penalty structure. Id. at 12.
140. Id. at 12.
motion pictures and in Sunday-supplement literature since the early 1980s. These accounts describe male sexual intercourse with children, stepchildren, sisters, nieces, or cousins, as well as fondling and touching incidents characteristic of pedophilia. Clinical reports on child sexual abuse show that offenders who sexually abused teenagers had a large number of similar incidents that went unreported and unpunished, suggesting that such offenders have a true recidivism rate above fifty percent, similar to the recidivism rate for violent offenders.

Men who have voluntary sexual relationships with adolescents generally choose their children, stepchildren, younger siblings, or girlfriends’ children as victims. The psychological data on these individuals is similar to that of pedophiles. They never grew up. The incestuous hebrephilic male is a man in mid-life who has a poor sexual relationship with his adult sexual partner. He may be a blood relative of the victim, a stepparent, or a live-in boyfriend. The abuser who makes use of his position as a clergyman, camp counselor, or schoolteacher to obtain access to adolescents is a statistical rarity, although such cases receive much publicity.

Getz, Lannan, and Tobin committed pedophilic acts against family members within the second degree of consanguinity. Two of them committed or attempted to commit sexual intercourse with a close relative. Getz’s daughter fit the description of the average incest victim. Getz allegedly committed a single act of hebrephilic incest. He was charged with first-degree rape, which forbade consensual sexual activity with any minor. The record does not show that Getz’s daughter resisted or refused her father’s advances. V.E. related three instances of consensual sexual intercourse with her cousin, including one incident occurring in V.E.’s grandmother’s house when Lannan and his wife were living there. Although Tobin was “Jill’s” uncle, he never attempted to have sexual intercourse with “Jill.” His

141. The literature on child sexual abuse and incest is massive. For a representative example, see Mona Simpson, Incest—Society’s Last and Strongest Sexual Taboo, MAGAZINE OF THE SAN FRANCISCO EXAMINER, Oct. 4, 1981, at 7.

142. See Groth et al., supra note 117, at 456; MILLER ET. AL., supra note 102, at 216.

143. See id. at 452, 454 (discussing assaultive offenders). The class of offenders discussed in the text has been christened “hebrephiles” (lovers of teenagers). See D. J. Baxter et al., Deviant Sexual Behavior—Differentiating Sex Offenders by Criminal and Personal History, Psychometric Measures and Sexual Response, 11 CRIMINAL JUSTICE & BEHAVIOR 477, 478 (1984).

144. Groth et al., supra note 117, at 455.


146. Since Getz’s indictment, Delaware law has been changed to limit mandatory life sentences to consensual intercourse with a minor under 16 who was not the defendant’s social companion. Former 11 Del. Code § 764 (1979) was superseded by current 11 Del. Code § 775 (1987) (unlawful sexual intercourse in the first degree). DEL. CODE ANN. tit. 11, § 775 (1987). Both statutes defined any voluntary sexual intercourse with a victim under 16 who had not previously consented to intercourse as a class A felony.

147. Record Vol. B at 19.

sexual misconduct was limited to frotteurism and voyeurism.

3. Exhibitionists.—

According to the record, none of the three defendants in this trilogy had a history of exhibitionism. Exhibitionists have a higher recidivism rate for sex-related offenses than any other sexual offenders. Exhibitionists tend to be white males who have had considerable trouble in establishing conventional sexual relationships with women. Exhibitionist behavior appears either at mid-puberty or in the early twenties. The first period corresponds to the identity crisis period in male development; the second to the time of conventional courtship and marriage. Exhibitionists are socially insecure. They have a low tolerance for frustrating events. Minor frustrations often trigger their deviant sexual behavior. Exhibitionists tend to be rearrested for exhibitionism if they have ever been arrested in the past.

B. Similar Sexual Misconduct is Relevant to Proof of a Sex Offender’s Guilt

Summarizing the preceding discussion, recent empirical evidence on sex offenders’ recidivism rates that includes estimation of undetected recidivism shows that exhibitionists, pedophiles, and adolescent child abusers may have a fifty-percent recidivism rate for sex offenses, which is much higher than earlier studies indicated. A sex offender’s probability of future criminal
sexual conduct can be predicted from known prior criminal sexual conduct. Therefore, the trier of fact can draw a logical inference that the defendant is a habitual sex offender if the defendant has previously committed a sufficient number of similar acts of sexual misconduct. Furthermore, a sex offender's similar sexual misconduct before or after the incident alleged in the indictment is circumstantial proof of the charged misconduct.

However, a rapist's probability of committing future rape is less than fifty percent, but at or near fifty percent for committing all violent crimes, making a rapist's criminal history the basis for predicting future violent conduct not necessarily confined to sex offenses. The number of past violent criminal acts committed by a defendant in a rape case is relevant to proof of guilt because it proves habitual use of violence. Although a rapist has about a one in four chance of rearrest for rape, he has a one in two chance of rearrest for violent crimes in general. Since prior rapes or attempted rapes would prove the rapist's predisposition to violent conduct to get his way, then proof of a history of violent criminal activity would be circumstantially relevant to proof of guilt in a particular case.

The national recidivism rate for rearrest within three years for all types of serious crimes hovers around sixty-five percent. Recidivism rates for violent criminals are around fifty percent. Rapists have a twenty-five percent reported recidivism rate for repeated sexual offenses. The reported recidivism rates for exhibitionists, pedophiles, and adolescent child abusers is about thirty percent, but the literature suggests that these kinds of criminal activity are not very likely to be reported and result in an arrest. It is highly likely that the recidivism rate for exhibitionists, pedophiles, and adolescent child abusers, defined in terms of commission of similar misconduct within five years of an arrest for a sexual offense, is at or above the national average for all violent criminals.

Turning to our three bellwether cases, the Getz court had these questions in mind when it dealt with Getz's contention that he was unfairly convicted on the basis of uncharged criminal misconduct. The Lannan court conceded the logical relevance of adverse character evidence on the issue of guilt or innocence. The Lannan court was less interested in the undue prejudice aroused by admission of similar sexual misbehavior than it was in

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155. See, e.g., Inter Alia: Rearrest Rate of State Prisoners 62.5 Percent, Corrections Compendium, March 1989, at 9 (citing a Bureau of Justice Statistics study that found 62.5% of former state inmates rearrested for a felony or serious misdemeanor within 3 years of discharge from prison in 1983).
156. See id. The Bureau of Justice Statistics report collected data from California, Florida, Illinois, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, and Texas. Id.
157. Miller et al., supra note 102, at 216.
158. Romero & Williams, supra note 112, at 62 (Table 5).
159. Groth et. al., supra note 117.
160. Id.
restructuring the rules guiding admission of character evidence to conform to Rule 404(b).\textsuperscript{163} The \textit{Tobin} court, on the other hand, wanted to continue a specific, categorical exception to the character evidence rule for similar criminal misconduct in sex offender prosecutions. It was interested in harmonizing a pre-rules line of authority with the structural limitations of Rule 404(b)\textsuperscript{164}

If prior criminal history is relevant to proof of habitual sexual misconduct, then the trier of fact should be able to deduce from proof of habitual behavior that the defendant behaved in accordance with his habits in the case at bar. This judgment would be derived from a probabilistic chain of logic, which would go to proof of guilt from all the evidence beyond a reasonable doubt. If this hypothesis is correct, then why do the courts erect such formidable barriers to the admission of criminal character evidence as part of the state’s case in chief? If admission of criminal character evidence is so poisonous that it cannot be used to establish a prima facie case of guilt, then why do the courts let down the bar in many specific instances, admitting incidents of uncharged sexual misconduct in sex offender cases on the flimsiest pretexts?

This inquiry must shift from social science and extended case analysis to a review of the origin and development of the rules surrounding admission of uncharged sexual misconduct in sex offender cases.

IV. The Development of the Use of Uncharged Sexual Misconduct Evidence in Sex Offender Cases

A. The Character Evidence Rule and Inquisitorial Justice

Since the days of the Glorious Revolution of 1688, English and American courts have refused to permit the prosecution to offer evidence of the defendant’s bad moral character to prove the defendant committed the crime charged in the indictment.\textsuperscript{165} If the defendant makes an issue of his

\textsuperscript{163} Id. at 1338-39. The court conceded that the recidivism and corroboration arguments in support of a specific exception to the character evidence rule had some merit. \textit{Id.} at 1338. It was more concerned with the supposed mischief that a special exception in sex offender cases would cause to the structure of character evidence law in Indiana. The court feared defendants would not be notified of intent to use uncharged misconduct and worried about the extreme laxity with which Indiana’s courts had applied the probative value versus prejudice balancing test, admitting sexual misconduct that was extremely remote in time from the events at issue in the trial. \textit{Id.} It should be noted that the similar episodes of sexual misconduct in Lannan’s case history were not remote—the first being only a year before the offense charged in the indictment—and the defendant did not argue the constitutional point that the State’s failure to notify him of its intent to use uncharged misconduct evidence violated his Sixth and Fourteenth Amendment right to notice of the charges laid against him.

\textsuperscript{164} State v. Tobin, 602 A.2d 528, 531 (R.I. 1992). The portion of the opinion devoted to uncharged sexual misconduct evidence was intended to guide the trial justice when Tobin was retried for the alleged sexual assault. \textit{Id.} at 535. The court reversed the trial court because the jury was not told that one of the incidents of uncharged misconduct resulted in a “no true bill” finding by the indicting grand jury. \textit{Id.} at 533.

\textsuperscript{165} See, e.g., \textit{Imwinkelried, supra} note 73, § 1:01; \textit{David W. Louisell & Christopher B.}
or her good moral character, the prosecution may then rebut the defendant’s evidence of good moral character with evidence of the defendant’s bad moral character.\textsuperscript{166} The defendant may not prove his or her good character by proving specific good acts. The defendant may, however, prove good moral character by the defendant’s own opinion testimony, or by calling reputation character witnesses. These witnesses are limited to testifying that they are familiar with the defendant’s reputation in the community in which the defendant resides, and that the defendant’s reputation for moral character is good.\textsuperscript{167} The prosecution is then allowed to cross-examine the defense character witness about the basis for that testimony. The prosecution may ask the character witness if the witness ever heard of any uncharged misconduct of the defendant, since it is relevant to the basis of the character witness’s opinion.\textsuperscript{168} The prosecution is also free to call its own reputation character witnesses who will testify that the defendant’s reputation for moral character is bad.\textsuperscript{169}

If the defendant chooses to testify, the defendant puts his or her credibility at issue. The prosecution then may cross-examine the defendant about prior convictions for major felonies and crimes of deception,\textsuperscript{170} or about prior bad acts which did not result in conviction, if the prior bad acts reflect adversely on the defendant’s credibility.\textsuperscript{171}

Ordinarily, the prosecution cannot prove the defendant’s prior similar

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\textsuperscript{166} See, e.g., LOUISELL & MUELLER, supra note 165, \S 138; MCMILLICK, supra note 165, \S\S 186, 187, 190; 2 WEINSTEIN & BERGER, supra note 165, \S 404[01]; 22 WRIGHT & GRAHAM, supra note 165, \S\S 5236, 5239.

\textsuperscript{167} See, e.g., IMWINKELREID, supra note 73, \S 1:09; LOUISELL & MUELLER, supra note 165, \S 138; MCMILLICK, supra note 165, \S\S 186, 187, 190; 2 WEINSTEIN & BERGER, supra note 165, \S 404[01]; 22 WRIGHT & GRAHAM, supra note 165, \S\S 5236, 5239.

\textsuperscript{168} See, e.g., LOUISELL & MUELLER, supra note 165, \S 138; MCMILLICK, supra note 165, \S\S 186, 187, 190; 2 WEINSTEIN & BERGER, supra note 165, \S 404[01]; 22 WRIGHT & GRAHAM, supra note 165, \S\S 5236, 5239.

\textsuperscript{169} See, e.g., LOUISELL & MUELLER, supra note 165, \S 138; MCMILLICK, supra note 165, \S\S 43, 187, 190; 3 WEINSTEIN & BERGER, supra note 165, \S\S 609[01]-[11]; 3A WIGMORE, supra note 7, \S\S 980, 980A, 985-988; 22 WRIGHT & GRAHAM, supra note 165, \S\S 5236, 5239.

\textsuperscript{170} See, e.g., LOUISELL & MUELLER, supra note 165, \S 138; MCMILLICK, supra note 165, \S\S 42, 194; 3 WEINSTEIN & BERGER, supra note 165, \S\S 608[01]-[08]; 3A WIGMORE, supra note 7, \S\S 980, 980A, 985-988; 22 WRIGHT & GRAHAM, supra note 165, \S\S 5236, 5239.

\textsuperscript{171} See, e.g., LOUISELL & MUELLER, supra note 165, \S 138; MCMILLICK, supra note 165, \S\S 43, 191; 2 WEINSTEIN & BERGER, supra note 165, \S\S 404[01]-[11]; 1A WIGMORE, supra note 7, \S\S 55-60; 3A WIGMORE, supra note 7, \S 925; 22 WRIGHT & GRAHAM, supra note 165, \S\S 5236, 5239.
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uncharged misconduct in its case in chief or in rebuttal. To do so would violate the rule against proof of the defendant's bad moral character. When the defendant makes an issue of his or her moral character, the prosecution may prove his or her bad moral character only through reputation witnesses. 172

There are, however, exceptions to the bar against specific similar acts evidence. If the defendant testifies in his or her own behalf, the prosecution may cross-examine the defendant on relevant specific instances of uncharged misconduct showing the defendant's lack of truthfulness. 173 The defendant may be cross-examined about prior criminal convictions, or independent proof of the defendant's criminal convictions may be submitted by the prosecution to show lack of truthfulness. 174 If the prosecution must prove some intermediate issue such as motive, intent, knowledge, plan or design, the identity of the accused, or other related sub-issues, the courts allow the prosecution to use specific instances of the defendant's uncharged misconduct to do so, if the probative value of these instances of uncharged misconduct is not substantially outweighed by the inevitable prejudice to the defendant that arises from presentation of the defendant's bad moral character to the jury. 175 The prosecution may also prove the defendant's habitual criminal activity by submitting proof of sufficiently similar instances of misconduct to establish a criminal habit. 176 The ritual for admission of uncharged criminal misconduct set out above has been codified by Rules 404, 405, 406, 608, and 609 of the 1974 edition of the Uniform Rules of Evidence.

The courts of the thirty-seven jurisdictions that have adopted the Uniform Rules of Evidence 177 liberally interpret Uniform Rules 404 and

172. McCORMICK, supra note 165, § 42.

173. Id. § 44.

174. See, e.g., McCORMICK, supra note 165, §§ 186, 190; 2 WEINSTEIN & BERGER, supra note 165, ¶¶ 404(01)-11; 3A WIGMORE, supra note 7, §§ 980-980(a), 985-987.

175. McCORMICK, supra note 165, § 190. Federal Rule of Evidence 404(a) states that character evidence is generally inadmissible to prove that a person acted in conformity with his or her character on a particular occasion. The rule recognizes three exceptions to the general bar to character evidence: (1) the defendant in a criminal prosecution may offer evidence of his or her good character, which the prosecution may rebut with bad character evidence; (2) the defendant in a criminal prosecution may offer evidence of a pertinent character trait of the victim of a crime, to show the victim's predisposition to be the first aggressor in the case of violent crimes or homicides, which the prosecution may rebut with evidence of peacefulness; and (3) evidence of a witness's character for truth and veracity. Federal Rule of Evidence 405 requires that character evidence, when offered, be tendered in the form of reputation or opinion evidence, unless the character trait which is to be proved is essential to a charge, claim, or defense. In the latter case, specific instances of the person's conduct in conformity with the character trait may be admitted. Compare Federal Rule of Evidence 406, which allows proof of habit or routine practice without mandating a particular kind of proof.


177. The following jurisdictions had adopted the Uniform Rules of Evidence as of April 1, 1993: ALASKA R. EVID. 101 to 1101; ARIZ. R. EVID. 101 to 1103; ARK. R. EVID. 101 to 1102; COLO. REV. STAT. ANN. 13-33-101 to -1103 (West 1984); DEL. R. EVID. 101 to 1103; FLA. STAT. ANN. §§ 90.101 to .958 (West 1979); GUAM CIV. CODE §§ 101 to 1102 (1988); HAW. R. EVID. 100 to 1102; IDAHO R. EVID. 101 to 1103; IOWA R. EVID. 101 to 1103; KY. R. EVID. 101 to 1104; LA. CODE EVID. ANN. arts. 101 to 1102
405 to permit admission of prior and later uncharged sexual misconduct with the same victim or other victims against an alleged sex offender. California and New Jersey, which follow similar evidence codes adopted before the 1974 edition of the Uniform Rules of Evidence, also permit admission of uncharged sexual misconduct.\textsuperscript{178} The remaining fifteen states that follow a common-law version of the rules expounded in Rules 404 and 405 are likewise willing to permit the prosecution to prove uncharged sexual misconduct of a sex offender.\textsuperscript{179} Twenty-nine states and the District of Columbia also use a special exception to the character evidence rule just for sex offenders called the "lustful disposition" rule.\textsuperscript{180} The courts treat a sex offender's propensity to commit sex crimes as a significant issue in a sex crime case.

There are buried constitutional problems caused by the use of unannounced evidence of similar sexual misconduct. The major commentators calmly accept the use of uncharged sex offenses against persons charged with rape, statutory rape, carnal knowledge, sodomy, and indecent liberties as appropriate.\textsuperscript{181} Although the notice clause of the Sixth Amendment and the

\textsuperscript{178} CAL. EVID. CODE § 1101 (West 1988); N.J. R. EVID. 55.

\textsuperscript{179} All states have either the common-law or codified version of the Molineux rule. All states allow the prosecution to prove uncharged sexual misconduct.

\textsuperscript{180} See infra note 340.

\textsuperscript{181} For an example of this uncritical acceptance of uncharged sexual misconduct evidence, see LOUISELL & MUELLER, \textit{ supra} note 165, § 140; MCCORMICK, \textit{ supra} note 165, § 190; 1 FRANCIS WHARTON, WHARTON'S CRIMINAL EVIDENCE § 188 (Torcia rev. 1985). The authors of Wigmore's treatise remain committed to the use of uncharged sexual misconduct evidence in sex offender cases, because they believe that the predisposition of sex offenders to repeat their actions is greater than those of other types of deviant criminals. 2 WIGMORE, \textit{ supra} note 7, §§ 358, 398-402. Wright and Graham mention the use of uncharged sexual misconduct to prove predisposition to commit sex crimes. 22 WRIGHT & GRAHAM, \textit{ supra} note 165, §§ 5236, 5239. The authors criticize the creation of a special exception to the character evidence rule for sex crimes alone. \textit{Id.} § 5239. But see IMWINKELRIED, \textit{ supra} note 73, at §§ 3:08, 4:11-4:18, 6:02, 6:05. In sections 6:02 and 6:05, Imwinkelried mentions the use of uncharged sexual misconduct evidence to counter a defense based on consent, or to corroborate the victim's testimony. In section 3:08 he notes that the courts have been more willing with sex offenses than other crimes to permit the use of uncharged misconduct to prove identity. Finally, in sections 4:11-4:18, he presents the lustful disposition exception to the character evidence rule and describes its gradual demise, citing most of the critical commentary that had appeared in legal periodicals up to 1983. For the author's contrary view that the lustful disposition exception is alive and well, see \textit{ supra} note 73. Weinstein and Berger note that there are relatively few federal prosecutions for sex crimes, but that the states liberally allow evidence of other uncharged sexual misconduct in sex offender cases. 2 WEINSTEIN & BERGER, \textit{ supra} note 165, ¶ 404[11]. The authors state that "[t]his liberality arises from a general (and somewhat spurious) notion that the mere fact of commission of a similar offense has
Due Process Clause of the Fourteenth Amendment may be violated every time the prosecution raises an unannounced case of uncharged misconduct, there are no shock waves of protest by constitutional scholars. 182

A new kind of criminal trial process is evolving through manipulation of the principles of evidence. The traditional model for Anglo-American criminal trials was accusatorial. The prosecution was obliged to prove a specific charge under the accusatorial model, and the judge and jury were equally obliged to acquit the defendant if the prosecution failed to prove the defendant committed a forbidden act on the day charged in the indictment. If the prosecution proved the defendant committed a similar act on another day, the defendant was acquitted because of a fatal variance between

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more probative value in proving the commission of the offense charged in cases involving sexual crimes than it does in cases involving other crimes.” Id. See also GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.15, at 166-67 (2d ed. 1987) (presenting a thoughtful analysis of the notion described by Weinstein and Berger).

Law review commentators are divided. A few uncritically accept and favor admission of uncharged sexual misconduct evidence in sex offender cases. E.g., Max D. Melville, Evidence as to Similar Offenses or Transactions in Criminal Cases, DICTA, July 1952, at 247, 248; Ralph C. Thomas, Looking Logically at Evidence of Other Crimes in Oklahoma, 15 OKLA. L. REV. 431, 446 (1962). Other commentators are highly critical of the use of such evidence. E.g., James M. H. Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 ARIZ. L. REV. 212 (1965); James W. Payne, Jr., The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases, 3 U. RICH. L. REV. 62, 67-70 (1968); M. C. Slough & J. William Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325, 335-36 (1956). Earlier, Julius Stone had suggested that the traditional formula for the rule excluding uncharged misconduct unless relevant to motive, intent, knowledge, plan or design, or identity of the accused was "spurious" and should be disregarded in favor of a general rule admitting uncharged misconduct whenever the uncharged misconduct was relevant to some issue besides the defendant’s propensity to commit crimes. Julius Stone, The Rule of Exclusion of Similar Fact Evidence: America, supra note 165, at 1011-12. Stone used a sex offense case as an example favoring his inclusive formulation of the rule, which he called the “original rule.” Id. Recently, Stone’s original inclusive admission theory has been carried one step further by H. Richard Uvillier, who favors an inclusive rule admitting evidence of an actor’s predisposition to act in habitual or characteristic ways. H. Richard Uvillier, Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom, 130 U. PA. L. REV. 845, 889-90 (1982). Uvillier’s formula would ensure admission of specific instances of similar uncharged misconduct to prove a defendant’s predisposition to commit sex offenses.


182. It should be noted that the proposed new Federal Rules of Evidence 413 and 414, supra note 98, call for advance notice of intent to use uncharged misconduct in sex offender cases. The government must inform the defendant of its intent, and supply witnesses’ statements or summaries not later than fifteen days before the first scheduled trial date. This proposed rule supplements Federal Rule of Criminal Procedure 16, which provides for discovery and inspection of inculpatory and exculpatory matter. Current Federal Rule of Evidence 404(b) also requires advance notice of intent to use specific instances of misconduct if the defendant makes some type of request before trial to receive disclosure of such matter.
indictment and proof. Under the new dispensation, the prosecution is still required to indict the defendant and elect a day and time for commission of the prohibited act, but the prosecution may prove that the defendant is predisposed to commit that type of crime by proving the defendant committed a similar bad act on another occasion. Providing the demands of the Bill of Rights for due notice of pending charges and a fair trial can be satisfied, the new dispensation in criminal justice may be accommodated by the Constitution. In the future, criminal defense counsel will have to come to court prepared to defend their client against accusations of similar, uncharged criminal activity, as well as the charges stated in the indictment.

The authors of the Constitution and the Bill of Rights feared royal tyranny more than internal criminal aggression. The memories of royal abuse of judicial process through the Court of Star Chamber and the Courts of Vice Admiralty caused them to limit the growth of inquisitorial criminal justice with a constitutional straight jacket. These courts, which followed continental models of criminal justice administration, were very effective in sending criminals to the gibbet.

In the late eighteenth century, the thirteen original colonies did not have serious problems with criminal aggression. The colonists were troubled by royal tyranny, enforced by royal judges who held deep-seated class and religious prejudices against the majority of the colonists. Two hundred years later, the United States has the highest violent crime rate of any western democracy.\(^{183}\) Criminal aggression against innocent victims is one of the top ten social problems which agitate the public.\(^{184}\) One in four American family units were crime victims during 1981.\(^{185}\) Half of all Americans are afraid to walk alone at night in their neighborhood.\(^{186}\) Americans are more likely to be victims of crime than to be injured in an auto accident.\(^{187}\) Criminal aggression control absorbs a disproportionate amount of governmental time and money. The state is unable to protect citizens from criminal

\(^{183}\) GEORGE F. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE (1989). Cole notes that the American homicide rate is ten times that of Japan, Austria, West Germany, or Sweden. Id. at 10. The New York City robbery rate is five times that of London, and one hundred twenty-five times that of Tokyo. Id.

\(^{184}\) George Gallup, Unemployment, Foreign Policy Are Americans' Top Concerns: Most Important Problem, THE GALLUP REPORT, Sept. 1986, at 27, 28. As of 1986 crime ranked eighth among major concerns. Id. If "drug abuse," a separate category under Gallup's poll, was included with "crime," then "crime" would rank fourth overall.

\(^{185}\) George Gallup, One Household In Four Victim Of Crime: Gallup Crime Audit, THE GALLUP REPORT, May 1982, at 17.

\(^{186}\) George Gallup, One Household In Four Victim Of Crime: Fear in Neighborhood, THE GALLUP REPORT, May 1982, at 21. The percentage of those afraid to walk alone at night within a mile of their residence has gone up from 34% in 1965 to 48% in 1982. Id.

\(^{187}\) COLE, supra note 183, at 23 (Table 1.3). The personal theft rate is 82 per 1,000; the violent victimization rate, 33 per 1,000; and the simple and aggravated assault rate 25 per 1,000. The motor vehicle accident injury rate is 23 per 1,000. Women are about as likely to be raped as they are to die from cancer. People are more likely to be crime victims than to be divorced. Id.
aggression. Uncontrollable criminal aggression is a formidable threat to the constitutional liberties of all U.S. citizens. The Bill of Rights was designed to restrain executive and judicial tyranny. It made no provision to restrain criminal tyranny. The U.S. Constitution relies on the states to exercise their inherent authority to provide for the health, welfare, and safety of their citizens through criminal law and procedure, vigorous police work, and efficient courts. The states, however, cannot provide effective police protection for their citizens. Consequently, as the Indiana Supreme Court pointed out in Lannan, there is a universal desire to give the victim of criminal violence a greater opportunity to win in court. This desire is sustained by the need to provide freedom from criminal aggression as a condition of a stable social order. Without this freedom, the liberties set forth in the Bill of Rights are so much paper.

At the same time, the courts have to be exceptionally careful not to turn the desire to even the odds between victim and defendant into a crusade against social deviants. Americans have a tendency to launch crusades against undesirable social activity. The outcry against sex offenders from television and newspaper commentators during the past decade has the elements of a crusade against rapists and child molesters. The opening salvo of an American crusade is usually widespread publicity pointing out the impending end of the world if a particular vice is not immediately eradicated. The next round consists of legislation making that kind of activity criminal. The third round consists of aggressive prosecution of offenders before tribunals which alter or suspend basic constitutional guaranties of due process in order to increase the number of convictions. Ultimately, the public tires of the crusade and goes on to a new diversion, leaving the precedential ghost of the crusade behind in “exceptions” to the rules of evidence.

During a crusade, the historical accusatorial process of proof in criminal cases is unconsciously suspended so that inquisitorial methods of proof can be used. Usually, the first rule of evidence to be suspended is the limit on proof of the defendant’s bad moral character. Consequently, the courts

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189. For example, from the 1930s until the 1950s there was a sequence involved in the enactment of “sexual psychopath” laws that went as follows: (a) arousal in a community of a state of fear as a result of a few serious sex crimes; (b) agitated community activity in response to the fear; (c) appointment of a committee that conducted a superficial investigation, upon which it based a report to the legislature; (d) passage by the legislature of a law, based upon an uncritical acceptance of the committee’s findings. See Edwin H. Sutherland, The Diffusion of Sexual Psychopath Laws, 56 AM. J. SOCIOLOGY 142 (1950). Similar crusades were mounted against alcohol abuse by the Women’s Christian Temperance Union and the General Conference of the Methodist Church leading to local-option laws at the turn of the century and the Volstead Act of 1919, which implemented the Eighteenth Amendment.
190. This phenomenon was first noted in the prosecution of Americans for pro-German utterances during World War I. Reed, supra note 165, at 733. As the public outcry for sedition convictions increased, federal prosecutors were under great pressure to bring home convictions. The sedition cases saw an increased use of prior pro-German and anti-draft remarks introduced as evidence against the accused, including such remarks made before passage of the 1917 Sedition Act. Id.
have a duty to protect the liberty interests enumerated in the Bill of Rights against encroachment or destruction brought on by a commendable effort to stamp out a social abuse.

This double effect raises a serious question. If inquisitorial justice can be deemed expedient during a crusade against crime, why is it not justified at all times? The Bill of Rights does not legislate an accusatorial system of criminal justice. If one component of inquisitorial justice is proof of the defendant’s habitual criminal activity, then the trier of fact should receive evidence of the defendant’s similar habitual criminal conduct, which is circumstantial proof of the crime charged in the indictment. In the context of inquisitorial justice, if the trier of fact does not evaluate the defendant’s criminal habit, it may acquit the defendant unjustly, and turn a habitual offender loose to prey on the public. This result would impair each citizen’s right to be free from criminal aggression.

During the past decade, a public outcry against rape and child molestation has produced new legislation against sex offenders and aggressive prosecution of rapists and child molesters.191 The judicial treatment of evidence brought up in sex crime prosecutions shows a consistent pattern. The defendant’s motions in limine to exclude evidence of prior criminal convictions and to permit the defendant to testify without cross-examination on prior similar convictions are denied. The court relaxes the bar to proof of the defendant’s bad moral character by specific bad acts to permit the prosecution to bring up the defendant’s similar uncharged acts of misconduct in its case in chief. Few convictions are overturned on appeal because the court allowed the prosecution too much leeway in proving the defendant’s uncharged misconduct.192 The recent inquisitorial movement is by no means historically unique. Over the years, sex offenders have been the objects of numerous crusades of this type.

B. The Common Law

The common law defined rape,193 bigamy,194 and sodomy195 as

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191. See supra note 98.
192. Arizona, California, and Indiana cases show this progression. For Arizona’s struggle with the crusade against sex crimes, see infra notes 364-380 and accompanying text. California’s plight may be found infra at notes 447-494, and accompanying text. Both states have struggled to meet shifts in public opinion over the past two decades regarding prosecutable sexual misconduct. The appellate decisions of the 1970s reflect a response to public opinion which increasingly looked upon voluntary extramarital sexual activity as “all right.” The decisions of the late 1970s and 1980s reflect the shift in opinion against certain kinds of sexual activities; e.g., rape, child molestation, and homosexual activities. In the 1970s, admission of uncharged sexual misconduct evidence was restricted. In the 1980s, it was encouraged in child molesting and rape cases. During the entire two decade period that Arizona and California struggled with the lustful disposition rule, Indiana continued to use it to convict sex criminals in a traditional, punitive way until it abolished the rule in Lannan. See supra text accompanying notes 32-75.
194. 1 HAWKINS, supra note 193, at *110.
felonies without benefit of clergy. Adultery, fornication, incest, and other sexual misconduct were matters of confession and subject to the ecclesiastical courts, not the secular courts.\footnote{196} The secular courts also had jurisdiction to try cases of abduction of an heiress\footnote{197} and, after 1574, of carnal knowledge of a female under the age of ten.\footnote{198}

The English were skeptical about accusations of rape or carnal knowledge, preferring to protect the defendant from an unjust conviction for a crime which merited the death penalty, and to push some or all of the blame for the assault off on the victim.\footnote{199} The common law required that a rape victim prove she yielded to her attacker under force, either through proof of actual violence worked upon her, or through proof of duress.\footnote{200} English law allowed the defendant to prove the victim's consent to sexual intercourse as a complete defense to the crime.\footnote{201} Sir Matthew Hale described rape as an “accusation easily made, hard to prove and difficult to defend.”\footnote{202} The victim's failure to make an immediate outcry and search for her attacker weighed against her and in favor of acquittal.\footnote{203}

The Continental view, however, was much different. The Roman law forbade ravishment of any woman of any age.\footnote{204} A male involved in sexual activity with a female was presumed guilty of ravishment, and punished accordingly, unless he cleared himself. The female's consent was immaterial. Thus, ravishment was a status offense on the Continent. Men were simply not allowed to have sexual relations with women outside of marriage, unless the women were concubines or prostitutes.\footnote{205}

The English courts, on the other hand, placed great emphasis on corroboration. Corroboration could be had by proof of an immediate hue and
cry after the sex offender, and by testimony of women who had examined the victim, but not by proof of other sexual assaults pressed by the defendant on the victim.

In sodomy prosecutions, the English abhorrence of buggery led to guarded discussions of the elements of proof of sodomy. Sir William Blackstone, following Sir Matthew Hale, warned the reader against accepting uncorroborated accusations of sodomy.

The English prosecuted very few men for rape, carnal knowledge, or sodomy. Few of these men were convicted, and even fewer still were put to death for their sexual crimes. Even though convicted rapists and sodomites were not allowed benefit of clergy, the King pardoned a great number of offenders or commuted their sentences to transportation. The English attitude toward rape, carnal knowledge, and sodomy simply reflected the prejudices of a male-dominated society based on class structure. Eighteenth century English literature scoffed at the criminality attached to all three crimes. Author Henry Fielding presented a favorable portrait of a lusty gentleman who forced himself upon women, particularly of a lower social class. Daniel Defoe and Tobias Smollett portrayed women who were involved in sexual affairs with men as provocative instigators who invited men to engage in aggressive sexual romps with them.

English laws and English attitudes toward male sex offenders crossed the Atlantic and became part of American colonial law. The colonies dutifully outlawed rape, carnal knowledge, and sodomy. In addition, because the

206. 3 CHITTY, supra note 198, at *812-13.
207. 4 BLACKSTONE, supra note 193, at *215.
208. LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 149-59 (1948). In 1810, for example, 24 prisoners were committed for trial for rape, at that time a capital crime. Sixteen were not indicted by the grand jury. Six were indicted, tried, and acquitted. Two were convicted, resulting in a single execution. Id. at 155. Although such detailed statistics are unavailable for earlier years, between 1761 and 1765 the royal justices recommended death sentences in two rape cases commuted to transportation. Id. at 113. In the same four-year period, four pardon warrants or commutation warrants were issued to convicted rapists. Id. at 119. Radzinowicz considers the eighteenth century to have been a much more lenient period for executions than the preceding two centuries. Id. at 140-42. Modern criminal statistics begin in 1810. Available Home Office figures for the period from 1810 forward indicate that the total number of prisoners committed for trial for rape represented only a tiny fraction of all capital offenders. In 1817, for example, 47 prisoners were committed for rape and 42 for assault with intent to rape, out of a total of 13,932 prisoners charged with capital crimes. Id. at 144. This represents only 0.6% of all capital cases.
209. Id. at 113, 119.
210. HENRY FIELDING, THE HISTORY OF TOM JONES A FOUNDLING (Random House 1964) (1745);
211. DANIEL DEFOE, MOLL FLANDERS (Oxford University Press 1971) (1722).
212. 1 TOBIAS G. SMOLLETT, THE ADVENTURES OF PEREGRINE PICKLE chs. 52-55 (Hutchinson & Co. 1904) (1751).
213. See, e.g., the accounts of Tom Jones's adventures with Molly, the serving girl, or the details of Moll Flanders's various affairs.
214. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 68-75 (2d ed. 1985). Considerable original work on colonial criminal law has been done in the past decade. Some of that research deals with
English ecclesiastical courts had no jurisdiction in the colonies, some of the colonies passed statutes making crimes of incest, fornication, or adultery. The courts of oyer and terminer and general gaol delivery had jurisdiction over all these sex offenses in some of the colonies. When weighty matters of criminal law and procedure came before these courts, the judges broke out their Blackstone's Commentaries for advice.

The combination of ecclesiastical and common law in the colonies imported an element of criminal procedure and evidence into colonial criminal law not present in the mother country. Under ecclesiastical law, adultery was a status offense which could consist of either an isolated coupling or a continuous liaison, i.e., living in a state of adultery. When the ecclesiastical courts punished men and women for adultery, it was relevant to prove that they had lived together for some time, and specific instances of sexual activity between the couple were admissible to show the continuing relationship. The same dual status applied to incest. As a result, when the American courts began to punish people for criminal adultery they looked back to ecclesiastical precedent and allowed proof of uncharged sexual activity between the parties to show their lustful disposition toward one another, and thus to prove their sexual misconduct.

Early American incest prosecutions permitted proof of sexual misconduct between the parties to prove an ongoing relationship between them. By

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215. The Massachusetts Body of Liberties of 1641 listed twelve capital offenses, including bestiality, sodomy, adultery, and rape. Preyer, supra note 214, at 333-34. Between 1630 and 1692, the county courts of Essex, Suffolk and Plymouth executed four people for rape, and two each for bestiality and adultery. Id. Massachusetts removed adultery from the list of capital crimes in 1692. Id. at 342. Pennsylvania's Code of 1682 (Penn's Code) punished rape and sodomy with whipping for a first offense and life imprisonment for a second offense. Adulterers were to be whipped and made to wear the letter "A" on their garments. Id. at 336-37. Virginia Colony enacted statutes against fornication, adultery, and rape, which it sporadically enforced. Id. at 340-41. Virginia followed English tradition by allowing benefit of clergy in felony cases, extending the provisions of this rule to include rape cases. Id.

216. Friedman, supra note 214, at 56.

217. Friedman, supra note 214, at 112.

218. 4 Blackstone, supra note 193, at *64-65.


220. 3 Wharton, supra note 219, at § 2096 (erroneously characterized as a "common law" crime). The same comment may be made with respect to fornication, also a crime unknown to the English common law.


222. See, e.g., People v. Patterson, 36 P. 436, 437 (Cal. 1894); Taylor v. State, 35 S.E. 161, 163 (Ga.
the mid-nineteenth century, the rules of evidence about proof of incest were so well-settled that a Michigan court could hardly believe that a defendant in an incest case would appeal his conviction based on the admission of several acts of incest between him and his victim which were not charged in the indictment.223

By the mid-nineteenth century, societal attitudes toward women and their sexual role had moved a light-year from those of the eighteenth century. Women had been placed upon a literary pedestal, where they would remain until the twentieth century. Instead of dwelling on the literary picture of women as seducers and pleasure-givers, the nineteenth century attitudes wallowed in romanticism, which alternatively depicted women as weak and spineless victims of men and as creatures of unapproachable virtue, refinement, and sensitivity.224 Sir Matthew Hale’s admonition on rape225 was lost in the popular wave of literary depictions of Victorian women ravished by villains who deserved the worst sort of punishment. Scientific criminology was also discovered during the mid-nineteenth century, generating theories about criminal character and criminal disposition which marvelously suited prosecutors in bringing sex offenders to the bar of justice.226

1900); State v. Markins, 95 Ind. 464, 468 (1884); State v. Hurd, 70 N.W. 613, 616 (Iowa 1897); Mathis v. Commonwealth, 13 S.W. 360, 360 (Ky. 1890); People v. Jenness, 5 Mich. 305, 320 (1858); Commonwealth v. Bell, 31 A. 123, 124 (Pa. 1895); Burnett v. State, 22 S.W. 47, 48 (Tex. Crim. App. 1893), overruled by Clifton v. State, 79 S.W. 824, 826 (Tex. Crim. App. 1904); State v. Wood, 74 P. 380, 381 (Wash. 1903); Porath v. State, 63 N.W. 1061, 1065 (Wis. 1895).

223. Jenness, 5 Mich. at 320. The court in Jenness formulated what became the American approach to uncharged sexual misconduct:

The general rule in criminal cases is well settled, that the commission of other, though similar offenses by the defendant, can not be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense. But the courts in several of the States have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes; and it is principally to the American cases that we are to look for the authorities upon this subject, as such intercourse is not generally rendered criminal in England, or prosecuted by indictment; being only of ecclesiastical cognizance.

Id. at 319-20.


225. See supra text accompanying note 202.

226. John H. Wigmore’s evidentiary writings, particularly The Principles of Judicial Proof (1913), are infected with a heavy dose of German criminology. At the turn of the century, German theoreticians such as Hans Gross placed great reliance upon the prediction of criminal behavior from information about recidivists. Wigmore tried to rationalize the contradiction between traditional Anglo-American abhorrence of trial by propensity and the new methods of continental criminology which pointed toward accurate prediction of future criminal behavior from prior criminal behavior. Wigmore’s “spurious” propensity rule was one of the unsatisfactory outcomes of this attempted fusion. See Stone, The Rule of Exclusion of Similar Fact Evidence: America, supra note 165, at 1001-04.
C. The Lustful Disposition Rule

During the same time that romanticism changed the literary and popular view of women, women were trying to change their legal and social status. The mid-nineteenth century feminist movement initiated widespread legislative changes in women's legal status. The feminists made allies of temperance societies in a joint demand for legislation protecting young girls from male sexual advances that they were powerless to resist. In so doing, they reflected the cultural view of women as virtuous maidens to be protected from the grasping hands of sex fiends. Common-law carnal knowledge was replaced by the new status offense of statutory rape, which was defined as engaging in sexual intercourse with any female aged sixteen or under, without regard to consent.227

Statutory rapists were aggressively prosecuted. The courts began to expand admission of other sexual misconduct in sex offender prosecutions from the old ecclesiastical offenses of adultery and incest to statutory rape228 and carnal knowledge.229 The courts also created a special exception to the character evidence rule just for sex offenders called the "lustful disposition rule."230

According to the lustful disposition rule, the prosecution in its case in chief could prove the defendant's lustful disposition to commit sex crimes by proof of prior or later instances of sexual misconduct with the same victim or a different victim.231 The prosecution could do so, whether or not the

227. The movement to change existing carnal knowledge statutes and to raise the age of consent to 18 for female victims of a sexual liaison started after the Civil War. Frances E. Willard, the president of the Women’s Christian Temperance Union, among other Victorian reformers, actively pushed for and achieved new legislative measures strengthening the criminal sanctions for voluntary sexual relations with minor female children. Willard advocated raising the age of consent to 21. See Lillian Harman’s reply to Willard’s proposal to raise the age of consent to 18, originally published in Liberty, February 9, 1895, reprinted in FREEDOM, FEMINISM, AND THE STATE 87-100 (Wendy McElroy ed., 1982).

228. See, e.g., People v. Fultz, 41 P. 1040, 1041 (Cal. 1895); State v. Lancaster, 78 P. 1081, 1083 (Idaho 1904); State v. Gaston, 65 N.W. 415, 416 (Iowa 1895); People v. Abbott, 56 N.W. 862, 863 (Mich. 1893); People v. Grauer, 42 N.Y.S. 721, 726 (App. Div. 1896); State v. Parrish, 10 S.E. 457, 461-62 (N.C. 1889); State v. Robinson, 48 P. 357, 359 (Or. 1897). The English cases of Reg. v. Chambers, 3 Cox Cr. Cas. 92 (Nor. Cir. 1848), and Reg. v. Reardon, 176 Eng. Rep. 473 (Kent Summer Assizes 1864), are likely sources for the spread of admission of other sexual misconduct between the parties to prove a sex offense with a consenting female under the age of legal consent. Chambers countenanced the admission of prior sexual activity between the defendant and the victim. Reardon allowed admission of subsequent sexual misconduct between the defendant and the victim.

229. See, e.g., State v. Cannon, 60 A. 177 (N.J. 1905); State v. Ritchey, 70 S.E. 729, 730 (S.C. 1911).


231. WIGMORE, supra note 7, §§ 398-402. Wigmore believed that proof of the defendant’s sexual
defendant made an issue of his or her good moral character. The jury was free to draw an inference from proof of the defendant's other sexual misconduct that the defendant committed the act of sexual misconduct stated in the indictment.\textsuperscript{232} The court's own notion of relevance and fair play was the only outside limitation on the use of uncharged sexual misconduct. These specific instances of sexual misconduct did not have to be included in the indictment, and the defendant was entitled to no advance warning that he would be prosecuted by innuendo based on them.\textsuperscript{233} The lustful disposition exception to the character evidence rule grew up alongside the uncharged misconduct exception to the character evidence rule. At times, the courts used both rationales to admit or to exclude uncharged sexual misconduct evidence. Therefore, the confusion which led the \textit{Getz} court to equate "lustful disposition" with "motive" is understandable. In order to untangle the knots, the use of uncharged sexual misconduct evidence in statutory rape, rape, incest, adultery, and sodomy cases must be separately studied and analyzed.

\textbf{D. Uncharged Sexual Misconduct Evidence from the Standpoint of Particular Sex Offenses}

\textit{1. Statutory Rape.}\textemdash

Statutory rape prosecutions in the last half of the nineteenth century resulted in two lines of cases. The first line favored strict compliance with the character evidence rule.\textsuperscript{234} Unless the defendant denied committing the criminal sexual act and offered good moral character evidence, the prosecution could not show that the defendant had sexual relations with the victim at other times. These cases held that an accused is not to be tried on any offense other than the one stated in the indictment. Proof of other criminal sexual activity with the victim would violate that rule, and was therefore inadmissible.\textsuperscript{235} Consequently, the prosecution could not use uncharged


\textsuperscript{233} The issue of a federal constitutional requirement of notice to the accused was raised many years ago and quickly rejected by reviewing courts. \textit{See}, e.g., \textit{State v. Macetas}, 224 N.W.2d 248, 249-50 (Iowa 1974) (rejecting defendant's claim to violation of 14th Amendment on ground of lack of notice, due to defendant's failure to challenge the indictment prior to trial). In Louisiana and Minnesota, however, leading decisions require written notice to the defendant of prosecutorial intent to use uncharged misconduct evidence. These decisions were reached on evidentiary grounds or on state constitutional grounds, and not on the Notice Clause of the Sixth Amendment. \textit{State v. Prieur}, 277 So. 2d 126, 129-30 (La. 1973); \textit{State v. Spriegl}, 139 N.W.2d 167, 170-71 (Minn. 1965). \textit{See} \textit{LA. CODE CRIM. PROC. ANN.} art. 720 (West 1981).


\textsuperscript{235} \textit{Garney}, 265 P. at 670. The court said:

\textit{The general rule is that when a man is put upon trial for one offense, he is to be convicted, if}
sexual misconduct evidence against the defendant. Alabama, Idaho, Illinois, and Ohio adopted this view before World War I. 236 California, District of Columbia, and New Jersey courts issued conflicting decisions that in part restricted and in part favored the use of uncharged misconduct evidence in statutory rape cases.237

The majority of jurisdictions, however, followed ecclesiastical precedent and admitted other sexual activity between the victim and the defendant in statutory rape cases to prove the defendant's guilt by showing his predisposition to commit sex offenses.238 The courts accomplished this result in several ways. A number of courts used the "lustful disposition" exception to the character evidence rule. These courts held that sex offenders were more likely than other criminals to repeat their sex crimes, because of their peculiar criminal personality.239 They considered a criminal history of deviant sexual activities to be a much stronger predictor of criminal behavior of the same type than criminal histories might be in other kinds of crimes.240 Therefore, the courts held that the prosecution could offer evidence of prior sexual misconduct between the defendant and the victim in its case in chief, because it was highly relevant to proof of later misconduct at the time of the offense charged in the indictment.241 The courts said that at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime, wholly unconnected with that for which he is put upon trial, must be excluded.

Id.

236. Thompson, 166 So. at 440; Garney, 265 P. at 686; Parkinson, 25 N.E. at 764; Snurr, 4 Ohio C.C. at 393.


238. State v. Haston, 166 P.2d 141, 143 (Ariz. 1946); Williams v. State, 146 S.W. 471, 474 (Ark. 1912); Eby v. People, 165 P. 765, 766 (Colo. 1917); Wright v. State, 190 S.E. 663, 668 (Ga. 1937); Barker v. State, 120 N.E. 593, 595 (Ind. 1918); State v. Gaston, 65 N.W. 415, 416 (Iowa 1895); State v. Borchert, 74 P. 1108 (Kan. 1904); McCreary v. Commonwealth, 165 S.W. 981, 982 (Ky. Ct. App. 1914); State v. Wichers, 89 So. 883, 884 (La. 1921); Commonwealth v. Piccerillo, 152 N.E. 746, 747 (Mass. 1926); People v. Abbott, 56 N.W. 862, 863 (Mich. 1893); State v. Schueller, 138 N.W. 937, 938 (Minn. 1912); State v. Scott, 72 S.W. 897, 899 (Mo. 1903); State v. Peres, 71 P. 162, 163 (Mont. 1903); Leedom v. State, 116 N.W. 496, 498 (Neb. 1908); State v. Braley, 126 A. 12, 13 (N.H. 1924); State v. Whitener, 175 P. 870, 871 (N.M. 1918); People v. Thompson, 106 N.E. 78, 78-79 (N.Y. 1914); State v. Parrish, 10 S.E. 457, 461 (N.C. 1889); State v. Rice, 168 N.W. 369, 372 (N.D. 1918); Boyd v. State, 90 N.E. 355, 355-56 (Ohio 1909); Myers v. State, 119 P. 136, 139 (Okla. Crim. App. 1911); State v. Robinson, 48 P. 357, 359 (Okla. 1897); State v. Richey, 70 S.E. 729, 730 (S.C. 1911); Commonwealth v. Senak, 9 Luzerne L. Rep. 558, 559 (S.C. 1900); State v. Sysinger, 125 N.W. 879, 880 (S.D. 1910); Sykes v. State, 82 S.W. 185 (Tenn. 1904); State v. Hilberg, 61 P. 215, 216 (Utah 1900); State v. Willett, 62 A. 48, 49 (Vt. 1905); State v. Fetterly, 74 P. 810, 811 (Wash. 1903); State v. Beacraft, 30 S.E.2d 541, 545 (W. Va. 1944), overruled by State v. Dolin, 347 S.E.2d 208, 216 (W. Va. 1986); Strand v. State, 252 P. 1030, 1032 (Wyo. 1927).


240. See, e.g., Schueller, 138 N.W. at 938.

241. See, for example, the truncated statement of the propensity rule in State v. Marty, 203 N.W. 679, 683 (N.D. 1925). The North Dakota Supreme Court concluded that the state was forbidden from convicting
prior sexual activity between the defendant and the victim was relevant to show a “lustful disposition” to commit sex crimes and therefore admissible.\textsuperscript{242}

There were variations on this theme. One jurisdiction, fearing the consequences of such a blatant acknowledgment of trial by propensity, allowed the prosecution to introduce uncharged sexual misconduct to prove “a purpose to commit the offense charged.”\textsuperscript{243} Several jurisdictions decided that uncharged sexual misconduct could be admitted to “corroborate” the victim’s story.\textsuperscript{244} To corroborate an event is to confirm the event. The defendant’s uncharged sexual misconduct confirmed the defendant’s guilt precisely because it proved the defendant’s predisposition to satisfy his sexual desires with the victim. The courts that accepted corroboration as sufficient reason for admitting uncharged sexual misconduct evidently viewed the victim’s complaint of another sexual encounter with the defendant as corroboration through proof of the defendant’s lust for the victim.\textsuperscript{245}

By the “roaring 20s,” twenty-three American jurisdictions admitted evidence of prior sexual misconduct between defendant and victim in statutory rape cases to prove the defendant’s lustful disposition.\textsuperscript{246} Some

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\textsuperscript{242} See, e.g., People v. Martinez, 210 P. 61, 62 (Cal. Ct. App. 1922); State v. Henderson, 114 P. 30, 31 (Idaho 1911); State v. Stitz, 206 P. 910, 911 (Kan. 1922), overruled by State v. Taylor, 424 P.2d 612, 615 (Kan. 1967); State v. Driver, 107 S.E. 189, 197 (W. Va. 1921), overruled by State v. Dolin, 347 S.E.2d 208, 216 (W. Va. 1986). \textit{Stitz} is one of the better examples of this type of judicial rationale. The trial court admitted prior and subsequent sexual misconduct between the victim and the defendant for the purpose of showing the defendant’s “lustful disposition, the existence and continuance of the illicit relation, as these tend to explain the act charged and corroborate other testimony of the prosecution.” \textit{Stitz}, 206 P. at 911.

\textsuperscript{243} State v. Braley, 126 A. 12, 13 (N.H. 1924).

\textsuperscript{244} See, e.g., Gilbert v. Commonwealth, 264 S.W. 1095, 1096 (Ky. Ct. App. 1924); State v. Lancaster, 78 P. 1081, 1083 (Idaho 1904); State v. Roby, 150 N.W. 793, 794 (Minn. 1915); State v. Henderson, 147 S.W. 480, 482 (Mo. 1912); Kotouc v. State, 178 N.W. 174, 175 (Neb. 1920); State v. Whitener, 175 P. 870, 871 (N.M. 1918); People v. Todoro, 100 N.Y.S. 352, 352 (App. Div. 1916); State v. Parrish, 10 S.E. 457, 462 (N.C. 1889); Penn v. State, 164 P. 992, 994 (Okla. Crim. App. 1917); State v. Conlin, 88 P. 932, 932 (Wash. 1907); Proper v. State, 55 N.W. 1035, 1039 (Wis. 1893).

\textsuperscript{245} See, e.g., Lancaster, 78 P. at 1082-83. Modern English case law recognizes “corroboration” by proof of “strikingly similar acts” as a non-character reason for offering uncharged misconduct evidence in criminal prosecutions. See Director of Public Prosecutions v. Boardman, 1975 App. Cas. 421, 427 (appeal taken from Norwich).

\textsuperscript{246} Levy v. Territory, 115 P. 415, 416 (Ariz. 1911); Williams v. State, 146 S.W. 471, 474 (Ark. 1912); People v. Soto, 105 P. 420, 423 (Cal. Dist. Ct. App. 1909); Mitchell v. People, 52 P. 671, 672 (Colo. 1899); State v. Sebastian, 69 A. 1054, 1055 (Conn. 1908); State v. Henderson, 114 P. 30, 31 (Idaho 1911); Barker v. State, 120 N.E. 593, 595 (Ind. 1917); State v. Borchert, 74 P. 1018, 1108 (Kan. 1904); State v. De Hart, 33 So. 605, 608 (La. 1902); Commonwealth v. Bemis, 136 N.E. 597, 598 (Mass. 1922); People v. Coston, 153 N.W. 831, 833 (Mich. 1915); State v. Friend, 186 N.W. 241, 242 (Minn. 1922); State v. Vinn, 144 P. 773, 776 (Mont. 1914); Reinoehl v. State, 87 N.W. 355, 357 (Neb. 1901); State v. Knapp, 45 N.H. 148, 156 (1863); State v. Cannon, 60 A. 177, 177 (N.J. 1905); State v. Whitener, 175 P. 870, 871 (N.M. 1918); People v. Thompson, 106 N.E. 78 (N.Y. 1914); Commonwealth v. Bell, 31 A. 123, 124 (Pa. 1899); State v. Ritshey, 70 S.E. 729, 730 (S.C. 1911); State v. Neel, 65 P. 494, 495 (Utah 1908);
states, such as Texas, were unable to make up their minds whether to adopt a lustful disposition exception to the character evidence rule. In Battles v. State, the Texas Court of Criminal Appeals ratified proof of uncharged sexual misconduct between defendant and victim to show the defendant's lustful disposition, overruling a dozen earlier cases which excluded such evidence. Fourteen years later, the same court excluded evidence of prior sexual misconduct between the victim and the defendant, without reference to Battles, on the ground that such evidence merely went to prove the defendant's propensity to satisfy his sexual urge with the victim, an impermissible ground for admission of such evidence. Idaho and New Jersey also had decisions going both ways on admission of uncharged sexual misconduct to prove the defendant's lustful disposition.

New York's early struggle with the lustful disposition rule reflects the general development of this exception to the character evidence rule. Until the end of the nineteenth century, admission of prior sexual misconduct between victim and defendant in second degree rape (statutory rape) cases was not raised on appeal. In 1887, the Court of Appeals determined that evidence of a prior attempted sexual assault upon the victim by the defendant

State v. Driver, 107 S.E. 189, 197 (W. Va. 1921); Lamphere v. State, 89 N.W. 128, 130 (Wis. 1902).

247. 140 S.W. 783 (Tex. Crim. App. 1911). Battles had been tried and had appealed his conviction before, which resulted in a reversal. The 43-year-old defendant, a married man, lived near Waxahachie, Texas, as did his girlfriend, 15-year-old, Ida Dutton. Battles took Dutton on trips to Dallas and bought her clothing and presents. One evening in November 1905, Battles and Dutton had sexual intercourse in Battles's buggy. This was the specific offense charged in the indictment. The prosecution introduced evidence showing that Battles and Dutton had taken overnight trips together before and after the November 1905 incident. The State showed that the two spent the night together at a Mr. Lane's house after Dutton's family had moved to Midlothian, Texas, in 1906. The fact the couple spent the night alone was circumstantial proof of a second subsequent incident of sexual misconduct between the two. Battles objected to introduction of this evidence on a number of grounds, but primarily on the basis that the evidence of the couple's trips together inflamed the jury's passions and was irrelevant to prove the sexual coupling in November 1905. Id. at 785. The prosecution's offer of proof stated that the evidence of the couple's activities together tended to prove "the motive and purpose of appellant and such seductive arts and purposes as to make and render the prosecutrix an easy, if not willing, subject of his lust." Id. The Court of Criminal Appeals reviewed practically every American statutory rape, carnal knowledge, incest, and adultery case decided up to 1911 in which a court passed on the admissibility of prior sexual misconduct between the parties. It decided the weight of authority authorized admission of prior sexual misconduct evidence and overruled a dozen contrary Texas decisions. Id. at 790-97.

248. Id.

249. Rosamond v. State, 249 S.W. 468 (Tex. Crim. App. 1923). Rosamond was followed in Folsom v. State, 281 S.W. 1069 (Tex. Crim. App. 1926). Both cases held that prior sexual misconduct between the victim and the defendant was inadmissible to prove statutory rape on a later occasion, without expressly overruling Battles.

250. State v. Henderson, 114 P. 30, 31 (Idaho 1911), and State v. Lancaster, 78 P. 1081, 1082-83 (Idaho 1904), held that prior and subsequent sexual misconduct between the victim and the defendant were admissible to prove statutory rape. But State v. Garney, 265 P. 668, 670 (Idaho 1928), expressly held that such evidence was inadmissible, without citing or overruling Henderson or Lancaster.

New Jersey admitted prior sexual misconduct evidence to corroborate a later statutory rape in State v. Cannon, 60 A. 177 (N.J. 1905). However, in State v. Pitman, 119 A. 438, 439 (N.J. 1922), the New Jersey Supreme Court found evidence of prior and subsequent uncharged statutory rapes by the defendant on the victim inadmissible, without citing Cannon.

251. No case earlier than People v. O'Sullivan, 10 N.E. 880 (N.Y. 1887), has been located.
was admissible to prove the defendant had the guilty intent to commit rape upon the victim at a later date. In 1892, the Appellate Division, First Department, affirmed the conviction of a stepfather who had ravished his fifteen-year-old epileptic stepdaughter for two years. The court held that second-degree rape involved the adulterous disposition of both parties, making their disposition to have sexual relations material to proof of the defendant's guilt. The court found that the two-year pattern of sexual relations between the defendant and his stepdaughter corroborated her story about the offense for which the defendant was convicted.

From 1890 to 1914, however, the courts rejected proof of later sexual relations between victim and defendant in second-degree rape cases. The Court of Appeals overruled these cases in People v. Thompson. Although the court had held later sexual relations inadmissible in People v. Flaherty, it dismissed Flaherty as a case of failure to elect the proper charge among several possible incidents. The Court of Appeals squarely held that both prior and subsequent sexual acts between the parties in both first and second degree rape were admissible in the trial of a single instance of rape to corroborate the victim's testimony and to show the defendant's lewd disposition.

In 1926, an Asian named Hop Sing was charged with second-degree rape of a thirteen-year-old girl. The thirteen-year-old went to Hop Sing's laundry with a twelve-year-old girlfriend. Hop Sing also had sexual intercourse with the other child that day. At trial, evidence of both sexual encounters was admitted. The jury returned a conviction and Hop Sing appealed, claiming that any sexual activity with another female was irrelevant to the crime charged. The Appellate Division disagreed and affirmed on the ground that the second sexual encounter was so interwoven with the first offense for which he stood trial that the two stories could not be told separately.

252. O'Sullivan, 10 N.E. at 880-81 (holding admissible failed “attempt to ravish” complainant four days prior to charged rape).
254. Id. at 726.
255. Id. at 724-26.
257. 106 N.E. 78, 79 (N.Y. 1914).
258. 57 N.E. 73, 77 (N.Y. 1900).
259. Thompson, 106 N.E. at 79.
260. Id. The Court of Appeals apparently considered corroboration and lustful disposition to be two ways of stating the same exception to the character evidence rule. The court refers to the same acts as offered as “corroborative” and “indicating a continuity of the “lascivious disposition.” Id.
262. Id. at 301.
263. Id. at 302. The court found that “[w]hile the act of intercourse with the younger girl was undoubtedly proof of another crime of rape, it was elicited as part of the narrative involving the crime of which the defendant was indicted and convicted.” Id.
By the 1930s, New York allowed proof of prior and subsequent sexual activities between the defendant and the victim, or between the defendant and another victim, closely related in time to the time of the offense charged. At the same time, New York was developing the general theory of the uncharged misconduct exception to the character evidence rule. In *People v. Molineux*, the Court of Appeals laid out the generally accepted structure for allowing the prosecution to prove specific instances of uncharged misconduct in its case in chief, despite the character evidence rule. If there was a substantial issue in the case regarding the defendant’s criminal intent, guilty knowledge, motive, criminal plan or design, or identity of the perpetrator, or if the defendant’s criminal activity charged in the indictment was so bound up with uncharged criminal misconduct occurring at the same time as to be inseparable from it, the prosecution could offer evidence of specific instances of uncharged criminal misconduct, unless the probative value of that evidence was counterbalanced by excessive prejudice to the defendant. This rule later became the core of Rule 55 of the 1953 edition and Rule 404 of the 1974 edition of the Uniform Rules of Evidence. The courts employed the *Molineux* rule to admit sexual misconduct evidence at the same time that they used the lustful disposition rule for

264. 61 N.E. 286 (N.Y. 1901). Molineux was charged with murdering Katherine J. Adams. Mrs. Adams let rooms in her home to Harry Cornish, the manager of the Knickerbocker Athletic Club. *Id.* at 287. Molineux had belonged to the Athletic Club and had tried to get Cornish fired because Cornish had insulted him and interfered with a club show. *Id.* at 288. Mrs. Adams died after being poisoned by cyanide of mercury which she ingested from a bottle of Bromo Seltzer originally sent to Cornish in the mail on Christmas Eve 1898. *Id.* at 287. Cornish had given the Bromo Seltzer to Mrs. Adams when she complained of a headache on December 27. Molineux, a chemist, was alleged to have mailed the poisoned patent medicine sample to Cornish. *Id.* at 289. Identification of the sender was based on expert opinion regarding the handwriting of the address on the package, which Cornish had saved. *Id.* at 293.

A similar box of patent medicine laced with cyanide of mercury had been sent to Henry Barnett, a Knickerbocker Club member in October 1898. *Id.* at 289. Barnett swallowed a dose of powder from the box, became violently ill, and died November 10, 1898. His remains were later exhumed after Mrs. Adams’s death, and an autopsy showed he had died from cyanide of mercury poisoning. *Id.* at 290. His patent medicine box had also been poisoned with cyanide of mercury. *Id.* Barnett had tried to lure Molineux’s girlfriend, Ms. Cheeseborough, away from him. *Id.* Both samples came from private mail drops rented and used by Molineux. The original package in which Barnett’s sample had been sent was lost, and no handwriting identification could be made linking Molineux to that sample. The prosecution was allowed to introduce the essential facts surrounding Barnett’s death to prove that Molineux perpetrated the killing of Mrs. Adams. *Id.* at 293. The New York Court of Appeals reversed Molineux’s conviction, finding that the prosecution had failed to show that the earlier poisoning episode had been perpetrated by Molineux. *Id.* at 303. In its analysis, the court formulated the modern or “spurious” propensity rule. Specific instances of misconduct are inadmissible to prove that the defendant had a predisposition to perpetrate similar types of criminal activities, thus leading to the conclusion that the defendant acted in conformity with his predisposition to commit that type of crime. *Id.* However, the prosecution may offer evidence of specific instances of the defendant’s similar criminal misconduct to prove some other issue such as intent, knowledge, motive, plan, preparation, or identity of the perpetrator. In each instance, the prosecution must establish the elements of the uncharged incident of misconduct by sufficient evidence. *Id.*

265. *Molineux* has been cited hundreds of times by courts in most U.S. jurisdictions in support of the uncharged misconduct rule. It is frequently cited by the courts today, 88 years after its rendition. The most recent case to cite *Molineux* is *People v. Carroll*, 601 N.Y.S.2d 702, 704 (App. Div. 1993).

266. UNIF. R. EVID. 55 (1953); UNIF. R. EVID. 404 (1974).
the same purpose, leading to confusion over the appropriate rationale for admitting this type of evidence.267

When a state court used the Molineux doctrine to review admission of uncharged sexual misconduct evidence, it restricted admission of other sexual offense evidence in statutory rape cases to prior instances of forbidden sexual activity between the victim and the defendant.268 Sexual misconduct with the victim committed after the act charged in the indictment was usually,269 but not always,270 excluded. The defendant's similar sexual activity with other victims was usually, but not always, excluded.271 Intent, plan or design, or identity of the accused were the Molineux categories most frequently used to justify admission of uncharged sexual misconduct.272

On the other hand, when a state court used the lustful disposition rule to review admission of uncharged sexual misconduct at trial, it tended to sustain admission of any prior273 or later274 sexual activity between victim

267. See, e.g., Arizona's plight, infra notes 364-380 and accompanying text. In State v. McFarlin, 517 P.2d 87, 90 (Ariz. 1973), the Arizona Supreme Court held that there was sufficient basis to admit lascivious acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts. However, in State v. Treadaway, 568 P.2d 1061, 1065 (Ariz. 1977) (en banc), the court limited that McFarlin exception by holding it inapplicable under the facts presented in the case before it without opinion evidence by an expert psychiatrist that the defendant's conduct was the result of the defendant's lustful disposition. The Arizona Supreme Court reaffirmed the vitality of the McFarlin doctrine in State v. Day, 715 P.2d 743, 747 (Ariz. 1986). The defendant, the "potbellied rapist," was charged with 17 counts of sexual assault, among 50 felony counts laid against him. Day argued that these counts amounted to prejudicial joinder. The Supreme Court disagreed and affirmed his conviction, stating that the defendant could suffer no prejudice if the 17 sexual assault counts were joined, because each could be evidence in any other count to prove his "emotional propensity" to commit sexual assault. 715 P.2d at 747.

The best example of current practice is State v. Smith, 753 P.2d 1174 (Ariz. Ct. App. 1988). The defendant was charged with child molestation. Nude pictures of the complainant were admitted "to show that [the defendant] was committed to a particular scheme of keeping photographs that depict[ed] the victim in various stages of undress and in various anal-genital poses, some of which also include[d] appellant's hand and fingers." Id. at 1180.


269. See, e.g., State v. Amende, 92 S.W.2d 106, 107 (Mo. 1936) (holding subsequent acts of alleged statutory rape inadmissible); State v. Yeager, 168 N.W. 749, 750 (S.D. 1918) (disallowing unsupported testimony of subsequent acts of statutory rape with same victim).

270. See, e.g., Morris v. State, 131 P.2d 731, 733 (Okla. Crim. App. 1913) (holding evidence of subsequent similar acts admissible in statutory rape cases); State v. Richey, 70 S.E. 729, 730 (S.C. 1911) (holding subsequent acts with same victim admissible where they tend to show commission of crime charged); State v. Willett, 62 A. 48, 49 (Vt. 1905) (allowing evidence of intercourse subsequent to the act charged in statutory rape case).

271. See, e.g., Brasher v. State, 30 So. 2d 31, 36-37 (Ala. 1947) (holding evidence of similar conduct with another victim inadmissible in a carnal knowledge prosecution); People v. Gibson, 99 N.E. 599, 600 (III. 1912) (holding similar act with another victim inadmissible where not proven part of the same transaction).

272. See infra text accompanying notes 383-431.
and defendant. The courts rationalized this free use of uncharged sexual misconduct as tending to shed light upon the relationship between the defendant and the complaining witness, or to corroborate the complaining witness’s testimony. Since the courts frequently used both rationales to justify decisions sustaining admission of uncharged sexual misconduct in statutory rape cases, there was no consensus on the basis for admitting or excluding uncharged sexual misconduct evidence. No one could have expected the cases to produce a consistent guideline.

The courts were also split on admission of other kinds of sexual activities between victim and defendant. A number of courts admitted any prior sexually-oriented activities between the victim and the defendant, including fondling and caressing and sodomy. A few courts admitted evidence showing the defendant aided and abetted a third party’s defiling of the same victim. On the other hand, some courts excluded dissimilar sexual contact between victim and defendant on grounds of lack of relevance.

The great division between the states had to do with admission of uncharged sexual misconduct between the defendant and other victims below the age of consent. A minority of reported decisions favored admission of any prior and later uncharged sexual misconduct with other victims, if not too remote in time, either to demonstrate the defendant’s lustful disposition or to show a criminal plan or design. In a few cases, such as People v. Hop

274. See, e.g., Garlach v. State, 229 S.W.2d 37, 39-40 (Ark. 1950); People v. Foster, 4 P.2d 173, 175 (Cal. 1931); Weaver v. People, 250 P.2d 124, 127-28 (Colo. 1952); Talley v. State, 36 So. 2d 201, 204-05 (Fla. 1948); Randolph v. State, 361 N.E.2d 900, 901-02 (Ind. 1977); State v. Whitesell, 262 So. 2d 509, 511 (La. 1972); Commonwealth v. Bemis, 136 N.E. 597, 598 (Mass. 1922); Stewart v. State, 2 So. 2d 509, 511 (Miss. 1887); State v. Jensen, 455 P.2d 631, 633-34 (Mont. 1969); Woodruff v. State, 101 N.W. 1114, 1115-16 (Neb. 1902); Stump v. Commonwealth, 119 L. 1114, 1115-16 (Va. 1923); State v. Crowder, 205 P. 850, 851 (Wash. 1922).

275. See, e.g., Commonwealth v. Bemis, 136 N.E. 597, 598 (Mass. 1922) (holding evidence of “similar crimes by the same parties” admissible to show “existence of the same passion . . . at the time in issue”).


279. See, e.g., Shively v. Commonwealth, 14 S.W.2d 205, 206 (Ky. 1923); but see State v. Shobe, 268 S.W. 81, 82 (Mo. 1924) (excluding evidence that on the same day the offense occurred defendant solicited other men to have sex with the victim).

280. See, e.g., State v. Letz, 242 S.W. 681, 683 (Mo. 1922) (holding victim’s statements to doctor about defendant’s paternity inadmissible because not part of res gestae); Birmingham v. State, 279 N.W. 15, 16 (Wis. 1938) (holding evidence of other dissimilar unspecified acts excludable).

281. Among those reported decisions that represent the minority practice—allowing proof of similar acts with other persons—most use the rationales that the offenses committed with other people corroborate the
The court thought that the tale of a second victim who engaged in forbidden sexual activities with the defendant shortly after the first victim's defilement was so interwoven with the first victim's story that one could not be related without telling the other. Some states, such as California, had cases going both ways, because the lower appellate courts could not decide on the proper way to limit admission of uncharged sexual misconduct. One might expect a state using the lustful disposition rule to be more lenient on admission of similar sexual activities with different victims, but Idaho followed the lustful disposition rule when it excluded evidence of the defendant's prior sexual activities with the victim's sister, who was below the age of consent, as "too remote." Missouri, a state which more or less adhered to the corroboration version of the lustful disposition rule and to the Molineux rule on uncharged misconduct, allowed proof of the defendant's misconduct with other victims to corroborate the victim's story, only after the defendant had testified that he did not have sexual relations with the victim.

2. **Rape.**

The courts were also busy between 1880 and 1930 fashioning a rule for admitting evidence of the defendant's uncharged sexual assaults in rape cases. The courts uniformly approved of admission of other attempted rapes or rapes of the victim perpetrated by the defendant when the defendant was

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**Victim's story, or demonstrate the defendant's lustful disposition. See, e.g., Bracey v. United States, 142 F.2d 85, 88-89 (D.C. Cir. 1944) (stating in dicta that prior acts with others could be admissible to show disposition); State v. Dowell, 276 P. 39, 41 (Idaho 1929) (holding acts with others in victim's presence admissible to characterize defendant's conduct and disposition); State v. Bisagno, 246 P. 1001, 1002 (Kan. 1926) (holding other acts of intercourse admissible to show lustful disposition); State v. King, 119 S.W.2d 277, 283 (Mo. 1938) (holding prior declarations admissible under res gestae to illustrate the character of the act). The remainder justify admission by claiming that other similar sexual misconduct with different victims shows a plan or design. In these cases, the defendant's criminal plan is not a material issue. See, e.g., Lee v. State, 18 So. 2d 706, 707 (Ala. 1944) (holding evidence of acts with other daughters admissible as to motive, intent, scienter, and identity); Taylor v. State, 97 P.2d 543, 545 (Ariz. 1940) (stating evidence of similar offenses admissible when showing accused used a system or plan); State v. Hance, 18 N.W.2d 315, 317 (Minn. 1945) (allowing admission of independent crimes which are outgrowth of a plan or system). The majority of states excluded acts with other persons as either irrelevant or too prejudicial. See, e.g., People v. Whalen, 160 P.2d 560, 562 (Cal. Dist. Ct. App. 1946); Moose v. State, 89 S.E. 335 (Ga. 1916); State v. Larsen, 246 P. 313 (Idaho 1926); State v. Huntley, 216 N.W. 67, 68 (Iowa 1927); People v. Gengels, 188 N.W. 398, 401 (Mich. 1922); State v. Tiedemann, 362 P.2d 529, 532 (Mont. 1959); State v. Williams, 103 P. 250, 252 (Utah 1909).


283. *Id.*


285. State v. Larsen, 246 P. 313, 313 (Idaho 1926) (attempted statutory rape three years previous to crime charged).

286. State v. King, 119 S.W.2d 277, 283-84 (Mo. 1938).
charged with assault with intent to rape. This represented a moderate use of the *Molineux* rule exception to the character evidence rule, since assault with attempt to rape required the prosecution to prove specific intent in its case in chief.

Forcible rape was not a status offense like statutory rape. Some courts acknowledged that a charge of rape did not permit the prosecution to prove a continuous relationship between the parties to corroborate the defendant’s lustful disposition. Prior rapes or attempted rapes perpetrated by the defendant upon the complaining witness were held irrelevant. The majority of U.S. jurisdictions, however, admitted instances of prior rape or attempted rape between the victim and the defendant. The courts often cited precedent derived from attempted rape and statutory rape cases to allow the prosecution to use prior rape evidence to show either lustful disposition or a plan or design to rape, even when the defendant raised no issue challenging mens rea. The elements of rape do not require proof of specific intent. Thus, neither the defendant’s motive nor any criminal plan or design to satisfy lust by sexual assault would have been relevant to proving guilt in such cases.

When the attacker’s identity was at issue, the courts were willing to admit evidence of prior rapes perpetrated by the defendant on the victim or other women, provided the modus operandi of the attacker was

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288. See, e.g., Powers, 164 N.W. at 859.

289. See, e.g., State v. Lebo, 98 S.W.2d 695, 698-99 (Mo. 1936).

290. Id.


292. See, e.g., People v. Cosby, 31 P.2d 218, 220 (Cal. Dist. Ct. App. 1934) (holding admissible evidence concerning common plan or design with other women); People v. Ing, 422 P.2d 590, 595 (Cal. 1967) (holding admissible to show common scheme or plan); but see State v. Riggio, 50 So. 600 (La. 1909) (holding evidence of other assaults on complaining witness inadmissible).

293. For cases supporting admission of other sexual assaults on the same victim proving motive, intent or corroboration, see, for example, State v. Gonzales, 535 P.2d 988, 990 (Kan. 1975); Commonwealth v. Ransom, 82 A.2d 547, 551 (Pa. 1951), aff'd, 85 A.2d 125, 126 (Pa. 1951).

294. See, e.g., Daniels v. State, 11 So. 2d 756, 761 (Ala. 1943), cert. denied, 319 U.S. 755 (1943); Johnson v. State, 5 So. 2d 632, 634 (Ala. 1941), cert. denied, 316 U.S. 713 (1942); State v. Martinez, 198
characterized as a "signature" sufficient to identify the attacker in the case at bar as the defendant. 295 Many of these "signature" crimes were very commonplace assaults with practically no distinctive characteristics. 296 At times, however, when the identity of the attacker was not at issue, and the defendant did not raise consent as an affirmative defense, the courts excluded evidence of prior rapes perpetrated on the victim by the defendant as irrelevant to proof of later guilt. 297

The courts also admitted later sexual assaults on the victim if the later assault was characterized as part of the "res gestae." 298 Later assaults that were deemed "too remote" were excluded. 299

A majority of courts continued to admit evidence of the defendant's other sexual assaults to show the defendant's lustful disposition to rape women. 300 These cases seemed to accept the theory that rape was committed by sexual psychopaths. 301 A few jurisdictions permitted proof

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295. See, e.g., Johnson, 5 So. 2d at 635. Cases falling under this exception are often characterized by the courts as evidence of a plan or scheme. See, e.g., Martinez, 198 P.2d at 117 (characterizing modus operandi evidence as "plan").

296. See, e.g., Martinez, 198 P.2d at 117 (allowing the testimony of women assaulted by defendant on same evening, on grounds of modus operandi or plan); Talley v. State, 36 So. 2d 201, 203-04 (Fla. 1948) (allowing the testimony of five rape victims that defendant approached them and made indecent proposals to them before forcing them to engage in sexual intercourse); Allen v. State, 40 S.E.2d 144, 146-47 (Ga. 1946) (allowing testimony of two other women who had been raped by a man using a knife, to show modus operandi).


298. See, e.g., State v. Ward, 85 S.W.2d 1, 4 (Mo. 1935) (holding second attack on victim admissible when attack occurred within short time of charged act).

299. See, e.g., State v. Stevens, 44 P. 992, 992 (Kan. 1896) (holding that rape perpetrated two years after offense in indictment is too remote); State v. Mertz, 225 P.2d 62, 62-63 (Wash. 1942) (holding that offense six months subsequent is too remote).


301. See, e.g., Melton v. State, 191 S.E. 91, 93 (Ga. 1937) (holding attempted rape on another victim
of the defendant's other sexual assaults to corroborate the victim's account of the assault.\textsuperscript{302} The theory behind this kind of corroboration is that the complaining witness could show lack of consent by proving the defendant had ravished her at other times, by multiplying her accusations. In some instances, the courts permitted proof of the defendant's assaults on other victims to corroborate the victim's story on the same rationale.\textsuperscript{303}

The courts prior to World War II could not agree on a threshold rule permitting admission of uncharged sexual misconduct. Just about every case which authorized admission of prior sexual assaults committed by the defendant could be paired with a case from another jurisdiction on like facts which excluded the same evidence.\textsuperscript{304} They had no coherent doctrine describing the foundation for admission of uncharged sexual misconduct that took into account the time interval between the crime charged in the indictment and the uncharged incident. The courts were unable to articulate the degree of similarity required between the uncharged misconduct and the facts of the case at bar, nor was there any consistency on the quantum of proof necessary to establish the facts of any uncharged sexual misconduct. Most courts failed to note the dissimilarity between the elements of rape and those of such status crimes as adultery, fornication, incest, and statutory rape. The courts frequently relied on precedent derived from status crimes such as statutory rape to admit uncharged sexual misconduct in rape cases.\textsuperscript{305}

\textsuperscript{302} See, e.g., Bigcraft v. People, 70 P. 417, 419 (Colo. 1902) (holding other sexual assaults on victim admissible to show defendant's "bent of mind"); Landon v. State, 140 P.2d 242, 244 (Okla. Crim. App. 1943) (admitting evidence of other rapes by defendant on complainant, but excluding similar rapes on other daughters). Wigmore found evidence of prior misconduct relevant to prove the disposition of a defendant to act criminally, and to prove a particular design to fulfill sexual passion in rape cases. 1 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 193, 402 (2d ed. 1923).

\textsuperscript{303} See, e.g., Adrian v. People, 770 P.2d 1243, 1247 (Colo. 1989).

\textsuperscript{304} See, e.g., Adams v. State, 318 S.W.2d 599, 601-02 (Ark. 1952) (holding it is error to permit cross-examination of defendant about other assaults on other victims); People v. Nails, 29 Cal. Rptr. 671, 672 (Cal. Ct. App. 1963) (holding inadmissible evidence of sexual conduct with other victims); State v. Sauter, 232 P.2d 731, 732 (Mont. 1951) (holding it is error to admit evidence of separate sex crime with no connection to the crime charged); State v. Davis, 122 S.E.2d 633, 636 (S.C. 1961) (holding evidence of another independent offense is not admissible where the only contested issue is consent); Thompson v. State, 327 S.W.2d 745, 748 (Tex. Crim. App. 1959) (stating that admission of evidence of another assault was alternative ground for dismissal).

\textsuperscript{305} Only Missouri paid close attention to the different elements of proof in rape cases. It refused to follow precedent admitting uncharged misconduct evidence in statutory rape, incest, and child molesting cases in rape cases. See State v. Lebo, 98 S.W.2d 695, 698-99 (Mo. 1936). Kansas, one of the examples of states with the worst confusion, freely followed statutory rape precedent in rape cases. See State v. Allen, 183 P.2d 458, 460 (Kan. 1947), overruled on other grounds by State v. Taylor, 424 P.2d 612, 615 (Kan. 1967). Allen, which is an assault with intent to rape case, cites State v. Bisagno, 246 P. 1001 (Kan. 1925) (statutory rape), and State v. Jenks, 268 P. 850 (Kan. 1928) (same) to support admission of uncharged misconduct.

Incest cases generally followed the pattern of statutory rape cases. Prior incestuous acts between victim and perpetrator were admitted to show lustful disposition of the parties. In most cases, incestuous acts between the defendant and other victims were excluded, unless the court felt that there was some incestuous design or plan at issue. The handful of adultery prosecutions used uncharged sexual misconduct evidence in the same manner as in incest cases. Prior sexual activity between the parties was admissible to show either lustful disposition or a plan or design of adultery.

Sodomy prosecutions were also treated as if sodomy was a status offense. The defendant’s other sodomies committed on the same victim were held to be evidence of a lustful disposition or a plan or design to commit sodomy, although sodomies on other victims were more often excluded on the grounds that they were either irrelevant or too prejudicial to the accused to be admissible. Identity of the accused seems not to have been an issue in older sodomy cases.


309. See, e.g., Brevardo v. State, 21 Fla. 789, 796 (1886); Base v. State, 29 S.E. 966, 967 (Ga. 1897); Cranc v. People, 48 N.E. 54, 56 (Ill. 1897) (subsequent acts); State v. Briggs, 27 N.W. 358, 361 (Iowa 1892); People v. Fowler, 62 N.W. 572, 574 (Mich. 1895).

310. See, e.g., Hettle v. State, 222 S.W. 1066, 1067 (Ark. 1920); State v. Ball, 144 P. 1012, 1013 (Kan. 1914); Stewart v. State, 2 So. 73, 74 (Miss. 1887); State v. Coffee, 75 Mo. App. 88, 91 (1898).


In State v. Robbins, 46 N.E.2d 691 (Ind. 1943), the defendant was charged with sodomy of a female.
The widespread use of uncharged misconduct evidence in sex offender cases corresponded to deep-seated public attitudes about sexual behavior. The courts followed the prevailing consensus about the woman’s role in sexual relations. The ideal of feminine chastity had to be defended by effective prosecution of any man who took away a woman’s virtue. Rapists were depraved perverts. Sodomists were depraved perverts. In 1937, the Gallup Poll asked Americans whether the whipping post should be reinstated. Thirty-nine percent of those polled favored its use principally for sex offenders. 314 This poll reflected the punitive, judgmental attitude toward antisocial sexual activity held by most Americans prior to World War II.

V. The Modern Rationales for Admission of Evidence of Uncharged Sexual Misconduct

A. The Revolutions in Public Moral Opinion About Sexual Conduct

Since the end of World War II, the United States has passed through a spiritual ordeal which has altered the public attitude toward sexual activity. The great consensus about protecting women’s virtue which endured for a century or more has crumbled. Two books provide insight into the depth of this change in American law and society: *Sex and the Law* 315 and *The Closing of the American Mind.* 316

In 1951, when Judge Morris Ploscowe wrote *Sex and the Law*, most states forbade sodomy with any partner, male or female. 317 Most states had statutes making crimes out of fornication and adultery. 318 In 1951, a sixteen-year-old boy could be sentenced to a long prison term for having sexual relations with a fifteen-year-old girl. 319 Rape was a capital offense in two-thirds of the states. Ploscowe’s impassioned plea for the decriminalization of sodomy between consenting adults caused clerics to denounce his book as immoral. His recommendations that adultery and fornication be struck from the statute books were also denounced.

The court admitted evidence that defendant committed sodomy on two other girls two days after the incident charged in the indictment to prove the defendant’s lustful disposition, but excluded an instance of sodomy on a boy committed a year and a half after the offense on the grounds that it did not prove the same lustful disposition. *Id.* at 695.

317. For an extended discussion of former law on this subject see PLOSCOWE, supra note 315, at 195-215. Most American statutes regulating sexual misconduct enacted prior to 1950 indiscriminately outlawed cunnilingus, fellatio, and anal intercourse between consenting adult male and female parties, as well as similar contact between persons of the same sex.
318. PLOSCOWE, supra note 315, at 221. Prosecutions under fornication and adultery statutes were rare. *Id.* at 144.
Almost everything Judge Ploscowe suggested in 1951 is commonplace in 1992. In many states, sodomy between consenting adults is no longer a crime.\(^{320}\) Adultery and fornication have been decriminalized altogether in twenty-eight states.\(^{321}\) In twenty-two states, a sixteen-year-old boy cannot be imprisoned for sexual activity with a fifteen-year-old girl. Comprehensive sexual assault statutes have decriminalized statutory rape between partners over twelve, unless there is a three or four year age difference between the partners.\(^{322}\)

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322. The following state statutes have reclassified statutory rape into some other form of sexual misconduct: ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440 (Supp. 1992) (sexual abuse of minor); ARIZ. REV. STAT. ANN. § 13-1405 (Supp. 1992) (sexual conduct with minor); ARK. CODE ANN. §§ 5-14-104 (first-degree carnal abuse: victim under 14, offender 18), 5-14-106 (third-degree carnal abuse: victim under 16, offender 20), 5-14-107 (sexual misconduct: victim under 16) (Michie 1987); CAL. PENAL CODE § 261.5 (West 1993) (unlawful sexual intercourse with female under 18); COLO. REV. STAT. §§ 18-3-403 (second-degree sexual assault: victim under 15, four year age difference), 18-3-405 (sexual assault on
a child: victim under 15, four year age difference) (1973 & Supp. 1992); CONN. GEN. STAT. ANN. § 53a-71 (1958) (second-degree sexual assault): DEL. CODE ANN. tit. 11, §§ 773, 775(a)(4) (Supp. 1992) (unlawful sexual intercourse: victim under 16); FLA. STAT. ANN. §§ 794.041 (sexual activity with 12- to 17-year-old by, or at solicitation of, person in familial or custodial authority), 794.05 (carnal intercourse with unmarried person of chaste character under 18) (West 1991); HAW. REV. STAT. § 707-732 (Supp. 1992) (third-degree sexual assault: victim under 14); ILL. ANN. STAT. ch. 720, §§ 5/12-13 (criminal sexual assault: victim under 18 and offender a family member, or victim 13-17 and offender 17, with position of trust, authority, or supervision in relation to victim), 5/12-14 (aggravated criminal sexual assault: victim under 13, offender 17 or over), 5/12-15 (criminal sexual abuse: victim at least nine but under 17, and offender, under 17, commits act of sexual penetration or sexual conduct), 5/12-16 (aggravated criminal sexual abuse: victim at least nine but under 17, offender under 17; or victim at least 13 and less than 17, offender at least five years older; or victim at least 13 and less than 18, offender 17 or over in a position of trust) (1993); IND. CODE § 35-42-4-3 (1986) (child molestation); IOWA CODE ANN. §§ 709.3 (second-degree sexual abuse: victim under 12), 709.4 (third-degree sexual abuse: victim 12 or 13; or victim 14 or 15, and member of same household or related by blood to offender, or offender in position of authority over victim or six or more years older) (1979 & Supp. 1993); KAN. STAT. ANN. § 21-3503 (1988) (indecent liberties); KY. REV. STAT. ANN. §§ 510.040 (first-degree rape: victim under 12), 510.050 (second-degree rape: offender 18 or older and victim under 14), 510.060 (third-degree rape: victim less than 16, offender at least 21) (Michie 1990); LA. REV. STAT. ANN. §§ 14:42 (aggravated rape: victim under 12), 14:43.1 (sexual battery: victim under 15 and at least three years younger than offender) (West 1986 & Supp. 1992); ME. REV. STAT. ANN. tit. 17-A, §§ 252 (rape: victim under 14), 253 (gross sexual misconduct: victim under 14), 254 (sexual abuse of minors: offender 19, victim at least 14, but under 16, and offender at least three years older) (West 1983 & Supp. 1992); MD. ANN. CODE art. 27, §§ 463 (second-degree rape: victim under 14, offender at least four years older), 464C (fourth-degree sexual offense: victim 14 or 15, offender four or more years older) (1992); MASS. GEN. LAWS ANN. ch. 265, § 23 (rape and abuse of child under 16), ch. 272, § 4 (inducing person under 18 to have sexual intercourse) (West 1990); MICH. COMP. LAWS ANN. §§ 750.520b (first-degree criminal sexual conduct: victim under 13, victim 13 or 15 and offender member of household), 750.520c (second-degree criminal sexual conduct: victim under 13; or victim 13-15 and offender household member or related by blood or affinity to the fourth degree or in position of authority used to coerce victim), 750.520d (third-degree criminal sexual conduct: victim 13 to 15) (West 1982 & Supp. 1988); MINN. STAT. ANN. §§ 609.342 (first-degree criminal sexual conduct: victim under 13, offender more than three years older; or victim 13 to 15, offender more than four years older in position of authority; or offender has significant relationship with victim and victim under 16 at time of penetration), 609.344 (third-degree criminal sexual conduct: victim under 13 and offender no more than three years older; or victim 13 to 15 and offender more than two years older; or victim 16 or 17 and offender more than four years older in position of authority; or significant relationship existed with victim who was at least 16, but less than 18, at time of penetration) (West 1987 & Supp. 1988); MISS. CODE ANN. §§ 97-3-65 (rape: victim under 14), 97-3-67 (rape, carnal knowledge: victim 14 to 17, offender older) (Supp. 1993); MO. ANN. STAT. § 566.050 (Vernon 1979) (second-degree sexual assault: victim 16, offender 17 or older); MONT. CODE ANN. §§ 45-5-502 (sexual assault: victim under 16, offender three or more years older), 45-5-503 (sexual intercourse without consent and victim under 16, offender three or more years older) (1991); NEB. REV. STAT. § 28-319 (1989) (first-degree sexual assault: victim under 16, offender 19 or older); NEV. REV. STAT. § 200.366 (1991) (sexual assault: victim under 14); N.H. REV. STAT. ANN. §§ 632-A: 2 (aggravated felonious sexual assault: victim 13 to 15; or victim 13 to 17 and offender member of household or related by blood), 632-A: 3 (felonious sexual assault: victim 13 to 15) (1986 & Supp. 1988); N.J. STAT. ANN. § 2C: 14-2 (West 1982 & Supp. 1993) (aggravated sexual assault: victim under 13; or victim 13 to 17 and offender family member or lives in household with supervisory duty); N.M. STAT. ANN. § 30-9-11 (Michie 1978 & Supp. 1992) (criminal sexual penetration: victim under 13; or victim 13 to 17 and offender in authority; or victim 13 to 15 and offender at least 18 and at least four years older); N.Y. PENAL LAW §§ 130.30 (second-degree rape: victim under 14, offender 18 or older), 130.35 (first-degree rape: victim under 11), 130.70 (aggravated sexual abuse: victim under 11, with instrument) (McKinney 1987); N.C. GEN. STAT. §§ 14-27.2 (first-degree rape: victim under 13, offender at least 12 and at least four years older), 14-27.7 (victim under 18, offender in assumed position of parent) (1986); N.D. CENT. CODE §§ 12.1-20-03 (gross sexual imposition: victim under 15), 12.1-20-05 (corruption or solicitation of minors: victim under 18) (1985); OHIO REV. CODE ANN. §§ 2907.02 (rape: victim under 13), 2907.03 (sexual battery: offender parent or stepparent), 2907.04 (corruption of minor: victim 12 to 15 and offender 18 or older) (Baldwin 1986); OKLA. STAT. ANN. tit. 21, §§ 1111 (rape: victim under 16), 1114 (first- and second-degree rape: victim under 14 and offender over 18) (West 1983); OR. REV. STAT. §§
Judge Ploscowe was a precursor of the 1960s student rebels who demanded greater sexual freedom on campus. However, some of his thinking seems old-fashioned. His easy-going male chauvinist attitude toward rapists and child molesters does not abide well after public disclosure since the mid-1970s of the menace of male rape and child molestation. Ploscowe’s suggestion that rape victims’ stories shouldn’t be accepted at face value sounds suspiciously like Sir Matthew Hale’s famous denunciation of rape victims. Ploscowe almost ignored child molestation, as if it were not a serious, pervasive social problem.

Allan Bloom argues in _The Closing of the American Mind_ that the nation has recently passed through the revolution of sexual permissiveness into a new period of sexual puritanism that is a product of the feminist movement. The _Closing of the American Mind_ is one of the most challenging critiques of the intellectual foundations for life in the 1990s. Bloom suggests that the sexual and feminist revolutions of recent decades have sabotaged the underpinnings of family life by encouraging hedonistic devotion to self-expression at the expense of the common welfare of families. He believes that these movements were the product of a major transition in American intellectual history: the scrapping of Enlightenment rationalism and its replacement by Max Weber’s sociology and Friedrich Nietzsche’s antirational philosophy. If Bloom is correct, a new ideal based on new intellectual foundations has replaced the old ideal of female modesty and virtue that led to the admission of uncharged sexual misconduct in sex offender cases. Bloom does not describe in detail the components of the new ideal of sexuality and women. The best one can do is to sketch the portrait of women as equals in the workplace who are the rulers of their own bodies, and who are also protectors of children from the invasive sexual incursions of unreconstructed males.

163.355 (third-degree rape: victim under 16), 163.365 (second-degree rape: victim under 14), 163.375 (first-degree rape: victim under 12; or victim under 16 and is offender whole or half sibling, child, or stepchild), 163.445 (sexual misconduct: victim under 18) (1991); R.I. GEN. LAWS §§ 11-37-6 (third-degree sexual assault: victim 14 or 15); 11-37-8.1 (first-degree child molestation sexual assault: victim under 15) (1956 & Supp. 1992); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1976) (criminal sexual conduct with minors: victim under 16); S.D. CODIFIED LAWS ANN. § 22-22-1 (1987) (rape: victim under 10; or victim 10 to 16 and offender at least three years older); TEX. PENAL CODE ANN. §§ 22.011 (sexual assault: victim under 17), 22.021 (aggravated sexual assault: victim under 14) (West 1989); UTAH CODE ANN. §§ 76-5-401 (unlawful sexual intercourse: victim under 16), 76-5-402.1 (rape of a child: victim under 14) (1953); VT. STAT. ANN. tit. 13, §§ 3252, 3253 (Supp. 1988) (sexual assault: victim under 16 and entrusted to offender’s care); WASH. REV. CODE ANN. §§ 9A.44.073 (first-degree rape of child: victim under 12, offender two years older), 9A.44.076 (second-degree rape of child: victim 12 or 13, offender three years older), 9A.44.079 (third-degree rape of child: victim 14 or 15, offender four years older) (Supp. 1993); W. VA. CODE §§ 61-8B-3 (first-degree sexual assault: victim under 12, offender 14 or older), 61-8B-5 (third-degree sexual assault: victim under 16, offender 16 and older, and over four years older) (1992); WYO. STAT. §§ 6-2-303 (second-degree sexual assault: victim under 12, offender four years older), 6-2-304 (third degree sexual assault: victim under 16, offender four years older) (1977).

323. BLOOM, supra note 316, at 97-98.
324. Id. at 99-101, 141-240.
Public opinion polls confirm Bloom's portrayal of a revolution in the American view of sexuality. In 1968, sixty-eight percent of all respondents told the Gallup Poll that extramarital sex was wrong. By 1985, the number of respondents condemning extramarital sex had shrunk to thirty-nine percent. Despite a recent increase in those disapproving of premarital sex, apparently due to the AIDS scare, the majority of Americans—classified by sex, age group, race, or religious affiliation—no longer condemn fornication and adultery. Forty-four percent of all Americans favor the legalization of homosexual relations between consenting adults. Extra­marital sexual activity has become common practice among middle-class Americans. Such great changes in public opinion on sexual conduct reflect a major shift in public morality. People are free to engage in any form of voluntary sexual activity they choose, so long as everyone participating in that sexual conduct does so freely, willingly, and voluntarily. The key word in this shift is "voluntariness."

The feminist revolution can be verified from similar public opinion data. When women were polled regarding their ideal personal lifestyle in 1986, fifty-eight percent indicated that it included a full-time job. Forty-three percent responded that they wished to be married, have children, and keep a full-time job. Only thirty percent preferred marriage and children without outside work, a significant decline since 1975. In 1975, fifty percent of all respondents wanted to be married and not to hold a full-time job. The Gallup Polls also indicated a heightened awareness of child abuse in the 1980s. Fifteen percent of adult Americans reported in 1982 that they knew of at least one serious episode of child abuse occurring in their neighborhood or among friends. It is difficult to summarize the public opinion poll results on feminist issues, because the polls have not asked all the right questions. The key to understanding these results seems to be that women want to be independent, and to be able to make voluntary choices with respect to career, marriage, family, and other activities. The public approves of such freedom of choice. The Gallup polls have not asked about women's attitudes toward sexual activity, and there are no available poll results on the issues of sexism and sexual harassment in the workplace.

The three decisions that form the core of this Article represent three

326. Id. See also George Gallup, Catholics Call For Greater Flexibility In Church's Stance On Sexual Morality, THE GALLUP REPORT, Apr. 1987, at 33 (showing that a majority of U.S. Catholics favor changes in the church's sexual morality with regard to its teachings on extramarital sex).
different social policy approaches to the sexual revolutions. The *Getz* court, in an exceptionally well-crafted opinion, took a conservative course. It confined admission of uncharged sexual misconduct to a limited number of situations matching the examples listed in Rule 404(b). The *Getz* court did not accept the principle of inquisitorial proof in sex offender cases. At the same time, the court’s holding would allow Delaware prosecutors to introduce uncharged misconduct evidence that could be taken by the jury as proof of predisposition to commit criminal activity, although the evidence ostensibly would be offered under express limitations confining the jury’s use of uncharged misconduct evidence to the traditional *Molineux* list of exceptions.\(^{330}\) The *Getz* court achieved a temporary truce between inquisitorial proof and traditional Anglo-Saxon accusatorial proof.

The *Lannan* court was much less sure of itself. The court wanted to integrate its long-standing depraved sexual instinct exception to the common-law character evidence rule in sex offender cases with its own case law following the *Molineux* rule. It chose to do this by abolishing the depraved sexual instinct exception through adoption of Rule 404(b) of the Federal Rules of Evidence as the only guideline for admitting uncharged misconduct evidence. At the same time the court embraced Rule 404(b), it treated the rule as an enumeration of exceptions to the character evidence rule, as if it were the common-law *Molineux* rule.\(^{331}\) The court added to the enumerated “exceptions” a “res gestae” exception that does not appear in the text of Rule 404(b). Federal Rule 404(b), however, was expressly designed to do away with a list of specific exceptions to the general character evidence rule, by allowing any relevant non-character reason for admitting uncharged misconduct evidence.\(^{332}\)

Finally, the *Tobin* court wanted to continue its long-standing common-law treatment of character evidence, even though it had adopted the Uniform Rules of Evidence and had imported wholesale the inclusionary view of Rule 404(b) favored by the majority of courts.\(^{333}\) It wanted to use Rule 404(b) as an exhaustive list of exceptions to a general exclusionary character evidence rule, and to provide for a further special exception for uncharged

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\(^{331}\) See IMWINKELRIED, supra note 68, § 2:28. Imwinkelried notes that the common-law perception that *Molineux* endorsed a general exclusionary rule with a seemingly exhaustive list of “exceptions” to the rule was so strong that, after Uniform Rule of Evidence 55 was drafted with explicitly inclusionary language, the majority of commentators interpreted it also as an exclusionary rule. *Id.*

\(^{332}\) *Id.* at § 2:30. The majority of courts examining Federal Rule 404(b) treat it as an inclusionary rule for specific instances of conduct proving intermediate issues, and treat the list of possible intermediate issues in Rule 404(b) as examples, and not as an exhaustive enumeration of exceptions. *Id.* The evidentiary principle involved in the inclusionary view is that “there is one purpose for which prior crime evidence may not be used—that is, for the purpose of showing that the defendant is an evil or vicious man, as a basis for the further inference that he is therefore guilty of the present charge.” *Id.* (quoting AMSTERDAM ET. AL., TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 368 (3d ed. 1974)).

\(^{333}\) See *id.* at § 2:29. Imwinkelreid notes that since *Molineux* commentators also have been “highly critical of the exclusionary approach.” *Id.*
misconduct evidence in sex offender cases. The Tobin court did not perceive the potential contradictory results that could be generated by application of the exclusionary and inclusionary versions of the character evidence rule to uncharged misconduct evidence.

It is time to review the current state of the law of uncharged misconduct evidence as applied to sex offender cases. The United States and thirty-seven other jurisdictions have adopted the 1974 edition of the Uniform Rules of Evidence. Uniform Rules 404, 405, 406, 608, and 609 have supplanted the common-law basis for admission of other sexual misconduct evidence in sex offender cases. Two states follow their own codified rules of evidence which differ somewhat from the Uniform Rules, but contain provisions essentially similar to Uniform Rule 404. The remainder have adopted the Molineux rule as a matter of case law. Twenty-nine jurisdictions admit uncharged sexual misconduct evidence under either the lustful disposition exception to the character evidence rule or under the Molineux rule, without distinguishing the basis for choice of one rule over another. A few states confine admission of uncharged sexual misconduct to the Molineux rule list of exceptions to the character evidence rule. Four states have repudiated the lustful disposition rule by decision.

B. Modern Lustful Disposition Rule Jurisdictions: Georgia, Arkansas, Arizona

Georgia, Arkansas, Arizona, and twenty-six other states admit sexual misconduct evidence via the common-law lustful disposition rule, although they also employ the Molineux rule for the same purpose. Some of the cases listed are from states that also utilize the lustful disposition exception.

334. See supra note 177.
335. See supra note 178.
336. See supra text accompanying note 179.
337. See infra note 340.
338. See infra note 382, for cases that admit uncharged sexual misconduct under the Molineux rule.


practice is representative of those states that still recognize the lustful disposition exception to the character evidence rule. Georgia admits evidence of an offender’s other sexual misconduct to show the offender’s lustful disposition in statutory rape,341 sodomy,342 indecent liberties,343 incest,344 and child molestation345 cases. The Georgia courts admit evidence of other similar sexual misconduct either to show the defendant’s “bent of mind” or “lustful disposition.”346 Georgia also follows the common-law


Although Maine follows the orthodox version of Rule 404(b) in admitting uncharged misconduct, dicta in State v. DeLong, 505 A.2d 803, 805 (Me. 1986), speaks about admission of other incestuous acts between father and daughter as proof of the defendant’s attraction towards the victim, which sounds very much like the “lustful disposition” rule.

346. Georgia has two different lines of development. One line springs from Dorsey v. State, 49 S.E.2d 886 (Ga. 1948). In Dorsey, the African-American defendant was charged with sexually assaulting Bertie Mae Kelly, an African-American woman, on January 25, 1947. Id. at 888. The method used was commonplace, a mugging attack from behind. The victim was forcibly dragged behind a house and the perpetrator forced
Molineux rule, and occasionally admits evidence of the defendant's other sexual misconduct to show motive, intent, plan, or design.\textsuperscript{347} Applying the Molineux rule, Georgia courts admit evidence of uncharged sexual misconduct that occurred before\textsuperscript{348} and after\textsuperscript{349} the incident charged in the indictment.

A few cases help explain how the lustful disposition rule works in

conventional sexual intercourse on the victim without further physical battery. \textit{Id.} at 889. The victim identified the defendant at a line-up of African-American males. \textit{Id.} at 889. The State offered evidence of a later similar sexual assault of Sara Crumley, another African-American victim, on September 8, 1947. Crumley also identified the defendant as her attacker. \textit{Id.} The Georgia Supreme Court affirmed Dorsey's conviction, holding that the admission of the second, later sexual assault was relevant to prove the "bent of mind" of the defendant in the earlier January incident. \textit{Id.} at 890. The crime did not require proof of specific intent. The introduction of the later assault may answer the question of why the defendant did it, but it does so by saying that he did it to gratify his abnormal sexual passions by rape. \textit{Dorsey} has been followed in recent years by the Georgia Supreme Court on the basis that evidence of other uncharged sexual misconduct should be liberally admissible. See, e.g., Rodgers v. State, 401 S.E.2d 735, 736 (Ga. 1991) (child molestation and sodomy); Johnson v. State, 250 S.E.2d 395, 398 (Ga. 1978) (kidnapping and rape). In 1987, a Georgia appellate court went so far as to admit evidence of rapes that had occurred 12 years prior to the charged rape. Wimberly v. State, 348 S.E.2d 692 (Ga. Ct. App. 1986).


\textsuperscript{347} Cf. Bacon v. State, 71 S.E.2d 615 (Ga. 1952), a burglary case which announced a general rule permitting introduction of similar misconduct to prove motive, intent, plan, or design. \textit{Bacon} is often cited in the sexual misconduct cases for the proposition that if a logical connection between two separate offenses exists, evidence may be admissible. Rape cases utilize the \textit{Bacon} doctrine as justification for admitting prior rapes of the same or other victims by the defendant. E.g., Tiller v. State, 230 S.E.2d 874, 875 (Ga. 1976) (allowing admission of acts involving other victims); Houston v. State, 370 S.E.2d 178, 180 (Ga. Ct. App. 1988) (holding as admissible the evidence of two prior charges against the defendant for the rape and burglary of women in a manner similar to the current charge).


\textsuperscript{349} See, e.g., Rodgers v. State, 401 S.E.2d 735 (Ga. 1991). The defendant was charged with molesting a 12-year-old boy. \textit{Id.} at 735. While incarcerated awaiting trial, Rodgers allegedly made homosexual overtures to two fellow prisoners. These later homosexual encounters with adults were held sufficiently like the acts involved in the child molestation and sodomy charges to be admitted as similar transactions. \textit{Id.} at 736-73. \textit{See also} Chambley v. State, 340 S.E.2d 635, 637 (Ga. Ct. App. 1986) (allowing admission of rape of another woman that occurred one week after rape charged in indictment).
practice in Georgia. In *Hall v. State*, the court followed the “bent of mind” version of the lustful disposition rule. The defendant was charged with child molestation, attempted rape, and battery committed on his twelve-year-old daughter. At trial, the defendant’s younger sister testified over objection that the defendant had had sexual relations with her at age twelve or thirteen, some sixteen years before the trial, and fifteen years before the charged molestation by the defendant of his daughter. The trial judge held a hearing on the admissibility of testimony from the defendant’s sister out of the presence of the jury and held the former misconduct admissible to prove the defendant’s lustful disposition, although the current indictment did not allege penetration, and the sixteen-year-old offense involved a single act of conventional intercourse between the defendant and his younger sister. The Court of Appeals affirmed Hall’s conviction. Relying on precedent, it found the sixteen-year-old act of incest on the defendant’s sister probative of the defendant’s predisposition to commit crimes of that sort on his own daughter.

*Burris v. State* represents a further extension of the lustful disposition doctrine. The defendant was accused of child molestation. The State produced Cindy Sexton, who testified that the defendant’s sister-in-law told her that the defendant and his wife had intercourse while the victim was in their bed. Sexton testified to the presence of pornographic literature in the Burris household. She also testified that she was in the Burris’s home when unnamed sexual devices were delivered by UPS. The defendant argued that possession of pornography and of sexual devices was not criminal and was dissimilar to the acts for which he was charged. The court held, however, that proof that the defendant possessed pornographic literature and special devices designed for sexual stimulation tended to show the defendant’s unnatural “bent of mind,” which was relevant to the charge.

Most lustful disposition jurisdictions admit uncharged sexual misconduct evidence on much the same basis as Georgia does. The courts allow uncharged similar sexual misconduct evidence to be used by the trier of fact in determining the defendant’s lustful disposition by circumstantial proof of a general character trait, followed by an inference from that inductively proved general character trait that the defendant committed the crime charged in the indictment.

351. *Id.* at 504.
352. *Id.* at 505.
353. *Id.*
355. *Id.* at 583. *Burris* is strikingly similar to Regina v. Lewis, [1982] 76 Crim. App. 33. The Court of Appeals also admitted evidence showing the accused had collected pedophilic pornographic materials in his residence. 420 S.E.2d at 584-85. It is not clear whether the defendant in *Burris* simply denied the allegations, or claimed an innocent reason for touching the children.
356. 420 S.E.2d at 584.
Some jurisdictions also follow the lustful disposition rule even though they have adopted the Uniform Rules of Evidence. Arkansas and Arizona are examples of two different approaches to amalgamation of the lustful disposition rule with Rule 404(b). Both jurisdictions have done a better job than Indiana has done.

Arkansas limits the use of its lustful disposition exception to incest and child abuse cases.\(^\text{358}\) Arkansas, unlike Georgia, has adopted the Uniform Rules of Evidence. The Arkansas Supreme Court’s leading decision on admission of similar instances of uncharged misconduct, \textit{Price v. State},\(^\text{359}\) held that uncharged misconduct could be admitted under Rule 404(b) if the prosecution established some independent grounds of relevance other than proof of the defendant’s bad character, provided that the probative value of the uncharged misconduct outweighed any prejudice to the defendant.\(^\text{360}\) It construed the limitations in Rule 404(b) on admission of uncharged misconduct as a series of examples, rather than a strict laundry list of exceptions to the exclusion of character evidence.\(^\text{361}\) In incest and child abuse cases, however, the Arkansas Supreme Court has continued its earlier case law sanctioning admission of similar uncharged misconduct to prove “a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship.”\(^\text{362}\) In forcible rape cases involving family members, Arkansas has also been known to extend its rules on admission of uncharged sexual misconduct to permit introduction of child molestation incidents preceding the rape.\(^\text{363}\) Arkansas’ approach in the sexual offenses committed by defendant against his daughter admissible to establish defendant’s unnatural sexual passion), \textit{cert. denied}, 596 So. 2d 430 ( Ala. 1991); Commonwealth v. Purinton, 593 N.E.2d 1307, 1311 (Mass. App. Ct. 1992) (finding evidence of prior similar crimes against the same victim admissible to show probable existence of the same passion or emotion at the time in issue), \textit{cert. denied}, 600 N.E.2d 171 (Mass. 1992); State v. Lachterman, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991) (holding evidence of prior similar sexual offenses admissible), \textit{cert. denied}, 112 S. Ct. 1666 (1992); State v. Delgado, 815 P.2d 631, 637 (N.M. Ct. App. 1991) (holding evidence of relationship between defendant and victim admissible to show lewd and lascivious disposition of defendant toward the victim), \textit{cert. denied}, 813 P.2d 631 (N.M. 1991); State v. Tobin, 602 A.2d 528 (R.I. 1992) (holding evidence of prior similar acts admissible to show defendant’s lewd disposition or intent); Williams v. State, 490 S.W.2d 604, 605 (Tex. Crim. App. 1973) (holding evidence of prior similar acts admissible); State v. Ray, 806 P.2d 1220, 1229-30 (Wash. 1991) (holding evidence of collateral sexual misconduct admissible to show defendant’s lustful disposition toward victim); State v. Lola Mae C., 408 S.E.2d 31, 37 (W. Va. 1991) (admitting as relevant prior sexual misconduct of defendant’s husband on victim to prove aiding and abetting by defendant in charged crime). See also the analysis of the Kentucky Court of Appeals in Thacker v. Commonwealth, 816 S.W.2d 660, 662 (Ky. Ct. App. 1991), which questions whether Kentucky ever departed from the lustful disposition rule in Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky. 1985), although Pendleton ostensibly overruled earlier case law using the lustful disposition rule.


\(^{359}\) \textit{597 S.W.2d 598} (Ark. 1980).

\(^{360}\) \textit{Id.} at 599.

\(^{361}\) \textit{Id.}

\(^{362}\) \textit{White}, 717 S.W.2d at 784.

\(^{363}\) \textit{Free v. State}, 732 S.W.2d 452, 455 (Ark. 1987). \textit{Free} was charged with five counts of forcible
above kinds of cases prefigures proposed Federal Rule of Evidence 414, which would allow similar uncharged sexual misconduct evidence to be admitted for any relevant purpose, without regard to Rule 404(b).

Arizona also retains the lustful disposition rule, but applies it in an unusual manner to sex offenses. Arizona’s leading cases on uncharged sexual misconduct happen to be sex offender cases. In 1973, before the Arizona Supreme Court had adopted the Uniform Rules of Evidence, it reaffirmed its earlier case law admitting uncharged sexual misconduct evidence in sex offense prosecutions in which “there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused’s propensity to commit such perverted acts.”

Four years later, after adoption of the Uniform Rules, but prior to their effective date, the Arizona Supreme Court took up uncharged sexual misconduct again in State v. Treadaway. The defendant was charged with the sodomy and murder of a six-year-old boy. The assailant had crept into the boy’s bedroom through a window and had raped and murdered him. Treadaway was arrested on fingerprint evidence. At trial, a three-year-old incident in which Treadaway sodomized a thirteen-year-old boy was admitted to show his emotional propensity for sexual satisfaction with young boys. The Arizona Supreme Court reversed his conviction, holding that the prior sodomy was too remote in time and too dissimilar to be relevant without a foundation from an expert medical witness that would show that sodomy of a boy three years earlier demonstrated an emotional propensity to commit such crimes.

The Arizona Supreme Court has a passion for reviewing social science literature to support its decisions in sex offender cases. In State v. McDaniel, decided in 1956, the Arizona Supreme Court relied on the obsolete criminal sexual psychopath theory to explain why it admitted uncharged misconduct evidence against the defendant, who was charged with committing oral sexual acts with a fourteen-year-old boy. The court found that the defendant’s having “given way to unnatural proclivities” within a short time of the offense in the case at bar demonstrated a “specific emotional propensity for sexual aberration.” Twenty-one years later, the court reviewed Tappan’s 1950 New Jersey work in Treadaway to show that

Homosexual rape upon a nine-year-old nephew. Id. at 453. The boy was allowed to testify to prior incidents of oral and anal sex with defendant. Id. at 455. See also Sullivan v. State, 711 S.W.2d 469 (Ark. 1986). Sullivan was charged with forcibly raping his 13-year-old stepdaughter in the bathroom of their house when several other family members were at home. Id. at 470. The girl testified to other acts of fondling and sexual intercourse with defendant starting a year before the rape. Id.

366. Id. at 1063.
367. Id. at 1065.
368. 298 P.2d 798 (Ariz. 1956).
369. Id. at 802-03.
370. Id.
it had developed doubts about the recidivism of sex offenders and about the relevance and materiality of prior similar uncharged sexual misconduct evidence.\textsuperscript{371} Since \textit{Treadaway}, the Arizona courts have waffled on the basis for admitting uncharged sexual misconduct.

In \textit{State v. Day},\textsuperscript{372} decided in 1986, the Arizona Supreme Court approved joinder of seventeen separate and distinct counts of first-degree sexual assault on the ground that evidence of each assault was relevant to establish the defendant’s "emotional propensity" to engage in rape.\textsuperscript{373} The opinion is devoid of any reference to the proper psychiatric foundation for such evidence required by \textit{Treadaway}.\textsuperscript{374} In \textit{State v. Cousin},\textsuperscript{375} a child molestation case, the Court of Appeals approved of admitting prior episodes of child molestation involving the defendant’s eighteen-year-old daughter which occurred four to seven years before the acts charged in the indictment. The state called a psychiatrist who testified that the earlier acts demonstrated the defendant’s emotional propensity for child molestation.\textsuperscript{376} In two recent child molestation cases, \textit{State v. Lindsey}\textsuperscript{377} and \textit{State v. Smith},\textsuperscript{378} the prosecution offered photographs of the defendant’s victims engaged in different forms of perverse sexual activity with the defendant to show a common plan or scheme, without reference to the fact that the photos also proved the defendant’s emotional propensity to commit depraved sexual acts on children. Apparently no psychiatric foundation evidence was presented to prove that the photographs demonstrated emotional propensity.

The practical criterion for choosing between the lustful disposition rule and the \textit{Molineux} rule in Arizona is the availability of a psychiatrist who can lay the foundation required for proof of emotional propensity. When the State cannot find such a witness, it chooses a \textit{Molineux} exception. In either case, the State usually succeeds in putting in evidence that shows the defendant’s predisposition to commit sex offenses.\textsuperscript{379} The Arizona

\textsuperscript{371} State v. Treadaway, 568 P.2d 1061, 1065 (Ariz. 1977). The court reviewed a smattering of recidivism studies dating from the 1950s to support its doubt as to the validity of recidivism as a predictor of future sexual misbehavior. Besides Tappan’s New Jersey report, \textit{supra} note 113, the court reviewed the Mayor’s Special Committee Report for the Study of Sex Offenses produced for Mayor La Guardia of New York City in 1941, and a 1950 study of 102 sex offenders at Sing Sing. None of these studies hold water today.

\textsuperscript{372} 715 P.2d 743 (Ariz. 1986).
\textsuperscript{373} \textit{Id.} at 747.
\textsuperscript{374} \textit{Treadaway}, 568 P.2d at 1065.
\textsuperscript{376} \textit{Id.} at 235.
\textsuperscript{379} The Arizona Court of Appeals was faced with a double-barrelled challenge to admission of uncharged sexual misconduct in \textit{State v. Lopez}, 822 P.2d 465 (Ariz. Ct. App. 1991). Lopez was charged with six counts of homosexual conduct with a boy under age fifteen. The State introduced evidence that Lopez had had three other relatively similar encounters with young boys, the first in 1977. \textit{Id.} at 467. In one case the defendant lured a teenage boy into his house with the promise of a lawncare job. The boy was given alcohol and marijuana in return for oral and anal sex with Lopez. In every case boys were promised
approach does require the court to make an assessment of the probative value of uncharged misconduct incidents and to review the potential for unfair prejudice against the defendant that can arise in the process of over-generalization from a few instances of similar sexual misconduct to an improper guilty verdict. However, Arizona has departed from accusatorial criminal justice. The defendant's whole sex life is on trial during the State's case in chief, provided that an expert witness has examined the defendant and reviewed the defendant's sexual case history. This expert will help the jury interpret specific instances of sexual misconduct and apply those incidents to the general verdict of guilt or innocence. The jury, being thus advised, will reach a verdict on the basis of the general predisposition of the defendant to commit crimes of that ilk.

C. Molineux Rule States

All U.S. jurisdictions admit uncharged sexual misconduct evidence under one or more of the traditional exceptions to the character evidence rule formulated in *Molineux*. Most of the states that have adopted the *Molineux* rule by case law, statute, or rule view it as a specialized rule of relevance allowing admission of the defendant's specific acts of uncharged misconduct when relevant to some intermediate issue such as motive, intent, knowledge, opportunity, plan or design, identity, or the like. Uniform

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conventional sex with a woman in return for sexual activity with Lopez. The State had a psychiatrist to supply the expert testimony, mandated by *Treadaway*, showing the defendant had an unnatural propensity for such types of sexual encounters. *Id.* at 470-71. The defendant objected on two grounds: (1) the earlier sexual conduct was too dissimilar to prove a propensity for that type of activity, and (2) even if it did, the Fourteenth Amendment precluded use of such evidence. The defendant claimed that inclusion of similar sexual misconduct only in sexual prosecutions was an underinclusive and overinclusive rule. *Id.* at 471. The Court of Appeals affirmed Lopez's conviction. It held that the "emotional propensity" exception, although not cataloged under Ariz. R. Evid. 404(b), was nonetheless similar to those listed in the rule. *Id.* at 470. The court rejected Lopez's constitutional challenge, finding that sex crimes were of such special character—often committed in secret and without other corroboration—that the Arizona Supreme Court had a rational basis for relaxing the bar to uncharged misconduct evidence in sex offender cases. *Id.* at 471.

380. In *Lopez*, the court held that an expert witness may testify about the general characteristics and behavior of sex offenders and victims, provided that the information is not within the realm of everyday knowledge. The expert cannot give an opinion on the ultimate issue of guilt by expressing an opinion that the behavior of the defendant, evidenced by prior uncharged sexual misconduct, is consistent with the crime charged in the indictment. 822 P.2d at 471. These limits were originally set up in State v. Lindsey, 720 P.2d 73, 76 (Ariz. 1986).

381. See supra note 264.

382. Modern case law permits admission of uncharged sexual misconduct under the *Molineux* rule in the following situations:

(a) In rape cases, prior uncharged sexual misconduct between the defendant and victim may be offered to prove the accused's intent through course of conduct, to show accused had a plan or design, or to prove identity of the accused through modus operandi. Martin v. State, 504 So. 2d 335, 338 (Ala. Crim. App. 1986) (allowing evidence of prior offenses to show intent in first-degree rape cases); Sullivan v. State, 711 S.W.2d 469, 472 (Ark. 1986) (holding evidence of prior sexual contact between victim and defendant admissible to prove rape actually occurred); State v. Howard, 447 A.2d 1167, 1170 (Conn. 1986) (allowing evidence of prior sexual misconduct when similar to current charge of first-degree sexual assault and when

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probativeness of defendant’s identity); State v. Spaulding, 313 N.W.2d 878, 880 (Iowa 1981) (concluding previous sexual acts with victim and victim’s sister were admissible to show defendant’s propensity for sexual assault of victim); People v. Wright, 411 N.W.2d 826, 828 (Mich. Ct. App. 1982) (holding evidence of prior sexual acts with victim admissible in rape case when probative value outweighed possible prejudice); State v. Schultz, 362 S.E.2d 853, 857 (N.C. Ct. App. 1987) (holding evidence of prior physical assault of victim by defendant was admissible to show identity).

(b) In rape cases, subsequent sexual misconduct between the defendant and victim may be offered to prove identity, motive, intent, or opportunity. See, e.g., People v. Ford, 184 P.2d 524, 526 (Cal. Dist. Ct. App. 1947) (holding evidence of other acts admissible to establish identity by modus operandi, or to rebut defendant’s claim of consent). But see Davenport v. State, 426 So. 2d 464, 469 (Ala. Crim. App. 1981) (holding subsequent rape 40 minutes after the incident charged in indictment inadmissible as part of res gestae), rev’d, 426 So. 2d 472, 473 (Ala. 1982).

(d) In rape cases, subsequent similar uncharged sexual misconduct between defendant and other victims may be offered as a part of the res gestae, or to prove intent through plan or design, or identity through modus operandi. Shelby v. State, 340 So. 2d 847, 848 (Ala. Crim. App. 1976) (holding rape of second victim sandwiched between two rapes of victim admissible as res gestae), cert. denied, 340 So. 2d 849 (Ala. 1976); People v. Jamieson, 198 Cal. Rptr. 407, 410 (Cal. Ct. App. 1984) (holding evidence admissible to establish common method, plan, or scheme, as shown by 11 points of similarity between prior and charged rapes); People v. Crocker, 183 N.E.2d 161, 162 (Ill. 1962) (holding second rape immediately following the first admissible as part of res gestae); Randolph v. State, 361 N.E.2d 900, 901 (Ind. 1977) (holding rape seven months later admissible to prove identity); State v. James, 535 P.2d 991, 993 (Kan. 1975) (holding two subsequent rapes, 2 and 5 months after incident in indictment, admissible to prove identity); State v. Vince, 305 So. 2d 916, 922 (La. 1974) (holding rape of two teenage girls within month of offense admissible to prove modus operandi); People v. Kelly, 192 N.W.2d 494, 497 (Mich. 1971) (holding testimony of victim of similar rape admissible to show scheme, plan, or system); Nester v. State, 334 P.2d 524, 532 (Nev. 1959) (holding similar actions by each assailant in similar situations admissible to show identity); State v. Sterling, 516 P.2d 87, 88-89 (Or. Ct. App. 1973) (holding similar rape of two teenage girls admissible to show identity); Carroll v. State, 370 S.W.2d 523, 529 (Tenn. 1963) (holding attempted rape after break-in within a few minutes of first rape admissible as res gestae); DeVonish v. State, 500 S.W.2d 800, 801 (Tex. Crim. App. 1973) (holding identity could be established through evidence of similar extraneous assaults based on time of day, race of victim, and location of assault); Williams v. State, 500 S.W.2d 163, 165 (Tex. Crim. App. 1973) (holding assault of victim's daughter admissible as one continuous transaction); State v. Goebel, 240 P.2d 251, 254 (Wash. 1952) (holding prior rapes admissible to prove identity and opportunity). But see Commonwealth v. Patterson, 399 A.2d 123, 127 (Pa. 1979) (finding rape five days later too dissimilar, even though same time of night and same two-block area).

(Tex. Crim. App. 1988) (holding evidence admissible in child molestation case in which defendant claimed touching was accidental); State v. Catsam, 534 A.2d 184, 194 (Vt. 1987) (holding prior molestation admissible to show common plan).

(f) In incest and child molestation cases, prior similar uncharged sexual misconduct between the defendant and other victims may be offered to prove intent through course of conduct, to show the defendant had a plan or design to commit the charged sex crime, or to prove identity through modus operandi. McFaddin v. State, 717 S.W.2d 812, 814 (Ark. 1986) (holding evidence of prior incest admissible when used to refute evidence of good character); Beasley v. State, 518 So. 2d 917, 918 (Fla. Dist. Ct. App. 1988) (holding evidence of prior incest admissible for corroboration); State v. Maylett, 701 P.2d 291, 293 (Idaho Ct. App. 1985) (holding alleged attacks on other victims admissible to show a common plan if within one year of charged offense); People v. Garland, 393 N.W.2d 896, 898 (Mich. Ct. App. 1986) (admitting evidence to show prior scheme); State v. Holden, 414 N.W.2d 516, 520 (Minn. Ct. App. 1987) (allowing evidence of acts committed outside statute of limitation to show prior intent); State v. Long, 726 P.2d 1364, 1367 (Mont. 1986) (holding different but sufficiently similar evidence admissible as proof of a prior scheme); State v. Tecca, 714 P.2d 136, 139 (Mont. 1986) (holding evidence of sexual acts with young girls over nine year period admissible to show common scheme); State v. Boyd, 364 S.E.2d 118, 119 (N.C. 1988) (finding prior sex acts relevant in incest case); Salzer v. State, 755 P.2d 97, 101 (Okla. Crim. App. 1988) (holding separate acts of abuse are properly admitted to show evidence of common scheme or plan in incest case); State v. Champagne, 422 N.W.2d 840, 843 (S.D. 1988) (holding evidence of similar acts admissible to negate defense of complete denial); State v. Means, 363 N.W.2d 565, 569 (S.D. 1985) (holding prior molestation admissible to show specific intent); Rodda v. State, 745 S.W.2d 415, 419 (Tex. Crim. App. 1988) (holding evidence of prior exposure admissible to show intent); State v. Friederich, 398 N.W.2d 763, 772 (Wis. 1987) (holding other acts admissible when probative of elements of crime). But see Bolden v. State, 720 P.2d 957, 960 (Alaska Ct. App. 1986) (holding that evidence of prior uncharged incidents should be excluded if identity not at issue and there is no claim of accident or mistake); Elmore v. State, 510 So. 2d 127, 131 (Miss. 1987) (holding prior incest with persons other than victim too remote); State v. Rogers, 362 S.E.2d 7, 8 (S.C. 1987) (holding child molestation incident ten years prior to incident in indictment too remote to show a common scheme); State v. Ramirez, 730 P.2d 98, 101 (Wash. Ct. App. 1986) (holding that proof of touching genitals of victim satisfies proof of intent and that other incidents of child molestation with other victims are not relevant to prove intent).

(g) In sodomy cases, prior similar uncharged sexual misconduct between the defendant and victim may be offered to prove intent through course of conduct, to show the defendant had a plan or design, or to prove identity through modus operandi. State v. Sandlin, 703 S.W.2d 48, 49 (Mo. Ct. App. 1985) (holding acts committed the day before the charged crime admissible to corroboration charged crime); Woods v. State, 238 P.2d 367, 370 (Okla. Crim. App. 1951) (holding past acts admissible to show the true relation of the parties to each other).

(h) In sodomy cases, prior similar uncharged sexual misconduct between the defendant and different victims may be offered to prove intent through course of conduct, to show the defendant had a plan or design, or to prove identity through modus operandi. Coaler v. State, 358 S.E.2d 894, 896 (Ga. Ct. App. 1987) (holding evidence admissible to prove modus operandi); State v. Vincen, 734 S.W.2d 837, 845 (Mo. Ct. App. 1987) (holding that evidence of other crimes is admissible to establish motive, intent, absence of malice, absence of mistake or accident, a common scheme or plan, or identity); State v. Muthofer, 731 S.W.2d 504, 508 (Mo. Ct. App. 1987) (holding evidence admissible to establish motive, intent, absence of accident or mistake, common plan or scheme, or identity); State v. Mayfield, 733 P.2d 438, 443 (Ok. 1987) (holding evidence relevant to explain why victim told mother about the crime). But see Potts v. State, 500 So. 2d 1318, 1322 (Ala. Crim. App. 1986) (holding 20-year-old sodomy charge too old to be proof of plan or design); State v. Clemens, 734 P.2d 1096, 1104 (Kan. 1987) (holding earlier court-martial conviction for sodomy inadmissible as a plan or design to sodomize if only evidence is that prior and present charged offenses violate the same or similar statutes).

(i) Lastly, courts have faced one or two cases in which the alleged perpetrator committed multiple acts of rape or sodomy on more than one victim at the same time. Using the interwoven crime exception to the character evidence rule, the prosecution has been allowed to prove all of the acts committed by the defendant. See, e.g., Gross v. Groer, 773 F.2d 116, 118-19 (7th Cir. 1985) (permitting evidence of other crime when both victims were attacked during one episode of breaking and entering); Ex parte Alabama (In re Davenport v. State), 426 So. 2d 472, 473 (Ala. 1982) (admitting evidence of incident that occurred 40 minutes later as res gestae); Shelby v. State, 340 So. 2d 845, 846 (Ala. Crim. App. 1976) (allowing evidence of prior rape of victim's 11-year-old companion); People v. Lilly, 291 N.E.2d 207, 210 (Ill. App. Ct. 1972) (allowing
Rule 404 and its common-law predecessors do not list "lustful disposition" or "corroboration of the victim's testimony" as examples of relevant purposes for which uncharged sexual misconduct would be admissible in sex offenses. States that follow a judge-made version of Rule 404 adhere to much the same line of reasoning as jurisdictions following the Uniform Rules. A surprising number of these jurisdictions, however, retain one version or another of the lustful disposition rule alongside the more modern character evidence rules.

Uncharged sexual misconduct is admitted under the Molineux rule to show the accused's motive, to show the accused had a plan or design to commit the sex crime charged, to prove identity of the accused through modus operandi evidence, and to rebut a claim of accidental touching. Intent is not an issue in sex offenses unless the accused is charged with sexual assault against a non-consenting adult, and raises the defense that the victim consented to the defendant's sexual conduct, when consent would decriminalize the act. The courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct when the intermediate issue, enumerated under Rule 404(b) or its common-law predecessor, is not truly an issue in the case.

1. Proof of Motive When Motive is a Non-Issue.—

Proof of motive is proof of intent. Sex crimes are not crimes of specific intent. Mens rea is established by consciously committing the forbidden act against the victim. Two recent cases will illustrate the appropriate and inappropriate admission of uncharged sexual misconduct in order to prove motive under the Molineux rule.

In State v. Yager, the defendant was indicted on a single count of sexual assault of a male child, committed around Thanksgiving 1988. The thirty-one-year-old defendant was accused of touching the penis of C.M., an eight-year-old child whom he was babysitting. The defendant first admitted touching the victim, claiming that his hand accidentally slipped while massaging the child's stomach to cure his stomachache. At trial, the defendant changed his story and denied touching the boy. The prosecution produced two young men, A.L. and A.G., who testified to long-term sexual relationships with Yager, beginning with fondling episodes when they were children. Yager objected to A.L.'s and A.G.'s testimony on the ground that the testimony was improper character evidence. The court permitted the men to testify in order to show the defendant's motive for touching C.M.

In short, Yager claimed an "innocent reason" for touching C.M., and

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Evidence of defendant's admission to complainant of prior rapes, rev'd on other grounds, 309 N.E.2d 1 (Ill. 1972).

384. Id. at 743.
385. Id. at 743-44.
386. Id. at 744.
the State sought to rebut that evidence by showing that Yager had had long-term sexual relations with two other boys starting ten to fifteen years before the date of the offense charged in the indictment. Yager was convicted and he appealed. The court found that Yager's original story put his intent at issue, because he first claimed to have touched C.M. innocently. Consequently, the court ruled that the State was properly permitted to prove Yager's motive for the touching by showing his prior sexual misconduct with other young boys.

This case follows earlier decisions allowing proof of similar sexual misconduct to rebut the defendant's claim of lack of mens rea due to accidental touching or touching for an innocent purpose. Once the defendant makes an issue out of mens rea, the prosecution is free to rebut a claim of lack of mens rea by proof of similar misconduct, which eliminates any claim of accident or innocent purpose by the rule of probabilities. Of course, the jury will also learn that the defendant has a criminal history involving sex offenses.

In contrast to cases that allow admission of uncharged misconduct in response to the defendant's claim of lack of mens rea, State v. Plymesser represents misuse of the motive category in sex offender cases. The defendant was charged with a single count of second-degree sexual assault of a child. The defendant was alleged to have placed his hand over the vagina of Kelly D., a thirteen-year-old daughter of the defendant's friends. The defendant had Kelly in his car and was driving her to his house to decorate a Christmas tree. He stopped the car, began french-kissing the child, and touched her breasts and vagina with his hand. He then got out of the car, urinated, reentered the car, and forced Kelly to touch his penis.

The state filed a motion in limine to permit it to introduce evidence of prior sexual misconduct. After much wrangling occurred over the admissibility of two prior 1969 and 1977 convictions for child molestation, psychiatric testimony surrounding each of the prior offenses, and the arresting officer's testimony relating the defendant's confession in 1976 to the incident underlying the 1977 conviction, the trial judge permitted proof of the 1977 conviction for sexual assault of a child and the officer's version of the defendant's 1976 confession that he put his mouth on the child's vaginal area.

387. Id.
388. Id. at 746.
389. English law has long recognized this reason for admitting uncharged sexual misconduct. See, e.g., Rex v. Ball, 1911 App. Cas. 47, 52-53 (holding evidence of prior sexual activity between couple admissible to rebut claim of innocent association of brother and sister in same bed). Regina v. Lewis, [1983] 76 Crim. App. 33, although much detested by the commentators, restates this same principle by admitting evidence of the defendant's possession of pedophiliac literature to rebut his claim of innocent touching. Id. at 37.
390. 493 N.W.2d 367 (Wis. 1992).
391. Id. at 369.
392. Id. at 370.
393. Id. at 369.
while intoxicated. The defendant objected on the ground that admission violated the character evidence rule. The defendant was convicted and his conviction was affirmed by the Wisconsin Supreme Court. According to the court, the trial judge properly admitted the 1977 sexual assault conviction and the accompanying confession under Wisconsin’s relaxed version of Rule 404(b), which permits proof of uncharged sexual misconduct to show the defendant’s motive to commit the crime.

The defendant never claimed, however, an accidental or innocent purpose for his actions. He denied touching the victim as described in the indictment. Intent was not an issue, and the defendant’s motive for his actions was not an issue. The court, in fact, was admitting proof of the defendant’s prior misconduct to show his lustful disposition towards the thirteen-year-old victim. The juries in Yager and Plymesser considered the defendant’s criminal sexual misconduct in precisely the same way: in each case a limiting instruction was given, allegedly confining the jury to consider criminal history as it related to motive, but the jury had the defendant’s criminal sexual misconduct history and could do what it pleased with that history.

2. A Plan or Design Which Proves Defendant’s Disposition to Commit Sex Offenses.—

The Molineux rule contemplates use of uncharged sexual misconduct to demonstrate a continuing criminal activity, such as a conspiracy, or to demonstrate intent by showing the defendant’s criminal plan or design. While a continuing criminal activity such as running an illegal still or a house of ill repute can be substantiated by proving more than one overt

394. Id.
395. Id. at 372.
396. Id. at 374.
397. Id. See State v. Friederich, 386 N.W.2d 763 (Wis. 1987), in which the Wisconsin Supreme Court held that evidence of prior sexual misconduct was relevant to prove motive “because the purpose of the sexual contact [was] an element of the crime.” The statute described sexual assault as touching “for the purpose of sexually degrading[] or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant.” 386 N.W.2d at 772 n.11. The court argued in Friederich that the state was obliged to prove a crime of specific intent in its case in chief, making intent an issue in the case. Id. at 772-73. The Wisconsin statute is a garden-variety sexual assault statute that does not require proof of specific intent, because the act itself proves mens rea, which is the gravamen of the words quoted from the statute.
398. Id. at 772.
399. See IMWINKELRIED, supra note 73, §§ 5:15 (membership in conspiracy), 5:33 (plan).
400. See, e.g., Webb v. State, 97 So. 246, 247 (Ala. Ct. App. 1923) (holding defendant’s presence at illegal still two weeks before offense admissible to show continuing enterprise); Casteel v. State, 235 S.W. 386, 388 (Ark. 1921) (holding subsequent sale of illegal liquor admissible to prove illegal still operation).
401. See, e.g., State v. Gaetano, 114 A. 82, 86 (Conn. 1921) (holding evidence that other visitors to premises knocked on wrong door asking for prostitutes was admissible to show continuing enterprise); People v. Levin, 11 N.E.2d 224, 227 (Ill. App. Ct. 1937) (finding evidence of officer’s actions with other women in whorehouse admissible to show character of the house); Adams v. Commonwealth, 231 S.W.2d 55, 58 (Ky. 1950) (holding reputation of premises as whorehouse admissible); State v. Rogers, 177 N.W. 358, 359 (Minn. 1920) (holding witness testimony concerning character of house admissible).
instance of resort to such a place, sex offenders rarely show any concerted plan or design to engage in sex offenses. If the courts, following the Molineux rule, limited admission of uncharged sexual misconduct to those instances in which the defendant had a criminal plan or design—such as the case of the physician who drugged his female patients to commit sexual assaults upon them—no abuse would occur. However, the courts have shown great willingness to admit prior and later instances of sexual assaults by rape defendants to show a design or plan to commit rape, which simply proves that the defendant had a propensity to commit rape.\(^{402}\)

*People v. Ing\(^{403}\)* illustrates appropriate use of the plan or design exception to admit uncharged sexual misconduct. Dr. Ing, an obstetrician, was accused of committing a sexual assault on a patient during a pelvic examination. Ing simply denied any offensive touching. The State was allowed to prove that Dr. Ing had assaulted other patients as many as eighteen years prior to the date of the crime charged in the indictment, to show that Ing had a long-standing criminal plan or design to take advantage of anesthetized patients.\(^{404}\) The jury was permitted to consider Dr. Ing's criminal history in reaching a verdict.

*State v. Hampton\(^{405}\)* illustrates the misuse of the plan or design exception. The victim and the defendant worked at the same place of business. The victim testified that the defendant approached her while she was at work, threw her down on the floor, strangled her, pressed a sharp instrument to her throat, and raped her.\(^{406}\) After copulation, the defendant allegedly offered the victim money if she would have sex with him again.\(^{407}\) Two other women, who were not fellow employees and were not attacked at the same location, testified that the defendant had approached them, thrown them down, and attempted to strangle them while he tried to have sexual intercourse with them.\(^{408}\) A fourth woman testified that the defendant had strangled her, thrown her to the floor, and raped her, and that he had offered her money for further sexual relations.\(^{409}\) The Kansas Supreme Court sustained Hampton's conviction on the ground that the three other victims' stories proved a plan or design of rape on Hampton's part. This evidence merely showed that Hampton committed several sexual assaults in a similar manner. The offer of money might have made the three assaults similar enough to be modus operandi evidence if the identity of the accused had been.

\(^{402}\) See cases cited supra note 382.

\(^{403}\) 422 P.2d 590 (Cal. 1967).

\(^{404}\) Id. at 595.


\(^{406}\) 529 P.2d at 129.

\(^{407}\) Id.

\(^{408}\) Id.

\(^{409}\) Id.
an issue in the case.\textsuperscript{410} However, neither specific intent nor identity of the accused was an issue, and the location of the assault and the relationship the defendant had with the other victims were not identical to those connected with the victim in the case tried.\textsuperscript{411} The evidence of other attacks amounted to proof of the defendant’s predisposition to commit sexual assault.\textsuperscript{412} However, the jury had Hampton’s criminal history to consider in reaching its verdict. Although \textit{Ing} presented a better rationale for allowing the jury to consider the defendant’s criminal history, the jury was allowed to consider the defendant’s criminal history in reaching a verdict in both cases.

3. \textit{Proof of Identity of the Sex Offender When Identity is not a Bona Fide Issue}.—

The \textit{Molineux} rule was formulated in a case in which the identity of the accused was the only issue. The courts have admitted uncharged sexual misconduct evidence to prove the identity of the accused. \textit{King v. State}\textsuperscript{413} represents an orthodox use of the identity exception. The victim was stopped by a man while she was driving home. He told her that her taillights were out. After he engaged the victim in conversation, he pulled out a pistol, forced the victim into his car, and drove her to a secluded place where he raped her.\textsuperscript{414} Two weeks later, she was stopped again by a man in a similar light-colored station wagon who forced her at gunpoint into his car and drove her to a secluded place where she was raped again. She identified the defendant as the perpetrator of the first assault, but was unsure of her second attacker’s identity.\textsuperscript{415} The Arkansas Supreme Court sustained King’s conviction, holding that the prosecution was properly permitted to show that the defendant committed the first sexual assault in order to prove the identity of the perpetrator in the second case.\textsuperscript{416} This particular rapist had an unusual modus operandi which warranted the inference that the same person perpetrated both rapes. Therefore, the jury could consider the defendant’s criminal history with respect to the victim in reaching a verdict.

\textit{People v. Oliphant}\textsuperscript{417} represents an abuse of the identity exception to the character evidence rule. A Michigan State University coed was raped by a black man after a social encounter. The victim met the defendant while window-shopping and agreed to go with him to a nearby bar to talk. After they left that bar and found another bar closed, the defendant drove the victim around to several other places, in spite of her requests to return to her

\textsuperscript{410} \textit{id.} at 130.
\textsuperscript{411} \textit{id.}
\textsuperscript{412} \textit{id.}
\textsuperscript{413} 487 S.W.2d 596 (Ark. 1972).
\textsuperscript{414} \textit{id.} at 597.
\textsuperscript{415} \textit{id.} at 598.
\textsuperscript{416} \textit{id.} at 599.
\textsuperscript{417} 250 N.W.2d 443 (Mich. 1976).
campus dormitory. Then the defendant drove her to a secluded place where he forced her to engage in several sexual acts, including intercourse.\textsuperscript{418} Identity was not an issue. Oliphant claimed the victim consented to sexual intercourse with him.\textsuperscript{419} The prosecution was allowed to present the testimonies of three other white, college-age women who identified Oliphant as the young black man who had offered them rides, talked to them about interracial dating and marijuana, driven them to an unfamiliar place, and forced them to engage in sex.\textsuperscript{420} Two of the three women had made criminal complaints against Oliphant which had resulted in Oliphant’s acquittal before other juries.\textsuperscript{421}

Oliphant was convicted. The Michigan Supreme Court affirmed his conviction, finding that the three other acts of sexual misconduct were properly admitted to prove Oliphant’s identity as the rapist, to corroborate the victim’s story, and to disprove any consent to his amorous advances.\textsuperscript{422} There are several problems with this analysis. First, Oliphant had admitted to having sexual intercourse with the victim, eliminating identity of the accused as an element in the case. Second, the victim’s story could not be corroborated by testimony from other victims that they had been raped by the defendant at other times. Third, the State could not prove that Oliphant had sexual intercourse with the victim against her will by proving that at other times Oliphant had sexual intercourse with other women against their wills. In reality, the court employed the identity exception to allow proof of the defendant’s propensity to commit sexual assaults on white women. This is precisely the same result reached by the House of Lords in \textit{Director of Public Prosecutions v. Boardman}.\textsuperscript{423} The effect upon the jury is the same, whatever rationale the courts use to explain away admission of uncharged sexual misconduct. The jury will have the relevant portion of the defendant’s criminal history before it and may consider that history in reaching a verdict.

4. Admission of Uncharged Sexual Misconduct and Offenses Against Children.—

Prior to World War II, statutory rape prosecutions produced most of the law that dealt with uncharged sexual misconduct, but statutory rape has been reclassified by many jurisdictions as sexual assault on a person under sixteen years old.\textsuperscript{424} In the infrequent modern prosecutions for sexual assault on a non-relative under sixteen, prior and subsequent sexual activity with the same person under sixteen is generally admitted to show plan, design,
motive, intent, or identity.\textsuperscript{425} Child molestation and incest decisions have

\begin{quote}
425. The conversion of statutory rape into various forms of sexual assault makes it difficult to compare results under former statutes outlawing statutory rape with modern case law. In general, modern case law can be organized under the following headings:

(a) Cases that admit prior similar sexual activities with the same non-incestuous minor partner to prove intent, plan or design, or identity through modus operandi. Hammes v. State, 417 So. 2d 594, 597 (Ala. Ct. App. 1982) (holding testimony concerning defendant's seven-year history of sexual misconduct admissible to show modus operandi), \textit{recognized as overruled on the issue by} \\

(b) Cases that admit subsequent similar sexual activities with the same non-incestuous minor partner to prove intent, plan or design, or identity through modus operandi. Hammes v. State, 417 So. 2d 594, 597 (Ala. Crim. App. 1982) (holding testimony concerning defendant's seven-year history of sexual misconduct admissible to show modus operandi); McMichael v. State, 577 P.2d 398, 402 (Nev. 1978) (holding admissible evidence of "similar offenses which are near in time to the principal offense and . . . [apply] to specific sexual proclivities"), \textit{overruled on other grounds by} Meador v. State, 711 P.2d 852, 856 (Nev. 1985); Johnson v. State, 709 S.W.2d 345, 347 (Tex. Ct. App. 1986) (holding admissible other acts of intercourse prior or subsequent to the date charged), \textit{cert. denied,} 498 U.S. 826 (1990); Moore v. Commonwealth, 278 S.E.2d 822, 825 (Va. 1978) (allowing evidence of subsequent touching of another victim's private parts with victim assisting, because victim was a "direct target of defendant's homosexual advances").


(d) Cases that admit subsequent similar sexual activities with a different non-incestuous minor partner (1) to prove intent, plan or design, or identity through modus operandi, or (2) as an interwoven crime. People v. Fuller, 454 N.E.2d 334, 341-42 (Ill. App. Ct. 1983) (allowing evidence of a separate offense to
made more law since the 1960s than criminal sexual assault cases involving non-relatives. The same sexual assault statutes which forbid genital contact with a person under sixteen generally also forbid fondling, touching the genitals, oral sexual activity, or anal sexual activity with a person under sixteen. Most of the recent prosecutions under the sexual assault statutes have involved child molesters. The defendant's other similar sexual acts with the same victim are admitted to show the defendant's plan or design.\footnote{426} Dissimilar acts with the same victim are also routinely admitted.\footnote{427} Additionally, the defendant's sexual misconduct with the victim's brothers, sisters, cousins, or friends is admitted to prove a guilty plan or design, or motive.\footnote{428} The courts disregard the passage of time between child

show motive, intent, identity, absence of mistake, or modus operandi); State v. Thomas, 381 N.W.2d 232, 237 (S.D. 1986) (allowing evidence of separate acts to show plan or design). But see State v. Ibrahim, 446 A.2d 382, 388 (Conn. 1982) (holding evidence of subsequent assault on 16-year-old inadmissible when identity not established by signature).


molestation incidents for the most part, admitting former sexual misconduct with the victim’s relatives or friends that occurred as long as twenty years before the assault on the victim. In short, accused child molesters must expect the state to prove other similar child molestation incidents at trial, just as Delaware did in \textit{Getz}. Proof of uncharged sexual misconduct between defendant and victim to corroborate the victim’s story or to demonstrate the attacker’s lustful disposition is still allowed in those states adhering to the lustful disposition rule. Whatever rationale the court may invoke to permit proof of the defendant’s criminal history, the result is essentially the same. The jury will receive the defendant’s history of criminal sexual misconduct and convict the defendant, in part, on propensity to commit that type of crime.

5. Conclusion.—

The point of the preceding analysis of the operation of the \textit{Molineux} rule is to demonstrate that following the \textit{Molineux} rule and Rule 404(b) does not stop the state from introducing the criminal history of a sex offender. The state is merely required to give some plausible intermediate issue—such as motive, intent, plan, design, or identity—that the defendant’s criminal history might also prove. If the State can prove the defendant’s relevant criminal history by a preponderance of the evidence, following the standard of proof established by \textit{Huddleston v. United States}, the jury will receive that history. Although the \textit{Molineux} rule requires a limiting instruction that informs the jury that it can apply that criminal history only to an appropriate

\footnotesize{another child inadmissible to show intent of sexual gratification).}


\footnotesize{431. 485 U.S. 681 (1988). \textit{Huddleston} holds that the trial court may admit “similar acts” evidence if there is sufficient evidence to support a finding by the jury that the defendant committed the similar acts. \textit{Id.} at 690.}
intermediate issue, the legal cure provided by the limiting instruction does not serve as a psychological or practical remedy for the harm done. No one can guarantee that the jury will not use the defendant’s criminal history to reach a general verdict of guilty based on predisposition. Since the *Molineux* rule fails to explain judicial behavior on admission of uncharged sexual misconduct, it is a dishonest rule to use in sex offenses. It may be a dishonest rule in other criminal prosecutions as well, when the defendant’s propensity to commit similar criminal misconduct is submitted to the jury to be used to determine the defendant’s guilt.

D. New York and California

New York and California jurisprudence on uncharged sexual misconduct is intriguing and a perfect example of the confusion that the *Molineux* rule causes when the courts try to admit uncharged sexual misconduct. New York and California each claim to follow the *Molineux* rule with respect to uncharged misconduct. However, New York retains a vestigial version of the lustful disposition rule for incest cases. California’s jurisprudence on uncharged misconduct evidence has been shattered by bewildering appellate decisions and Proposition 8, which restrains appellate review of evidence in criminal prosecutions. Since neither state neatly fits into the general mold of *Molineux* rule states, their version of the law on uncharged sexual misconduct must be treated separately.

1. New York: A State in Which a Vestigial Lustful Disposition Rule Coexists with the Molineux Rule.—

New York happens to be one of the twenty-nine jurisdictions that recognize the *Molineux* rule for uncharged misconduct and also recognize some version of the lustful disposition rule. In recent years, New York has gradually abandoned its lustful disposition exception to the character evidence rule in sex offender cases. In 1968, the Court of Appeals ruled in *People v. Johnson* that the defendant’s prior uncharged sexual assaults were irrelevant and inadmissible to prove any issue, because the defendant was charged with both forcible and statutory rape, and he had made no issue of the victim’s consent. In 1987, the Court of Appeals expressly limited in *People v. Lewis* the “amorous design” exception it had articulated in 1914 in *People v. Thompson*. Lewis was charged with committing incest with his fourteen-year-old illegitimate daughter, Ceceil. She testified to at least ten different sexual encounters with the defendant over a period of

433. Id. at 644.
435. 106 N.E. 78 (N.Y. 1914).
several months in addition to the incestuous act charged in the indictment.436 The Court of Appeals held that none of the traditional *Molineux* rule exceptions applied to Ceceil’s testimony about the ten other acts of sexual intercourse with her father.437 The court disposed of the “amorous design” exception derived from *Thompson* by stating that the “amorous design” rule was *dicta* and unsupported by the English and American cases cited in support of the rule.438 It limited the *Thompson* decision to condoning proof of other uncharged sexual misconduct in those kinds of sexual misconduct cases in which a mutual decision to engage in sexual activity is relevant.439 The court also held that a complaining witness cannot corroborate her report of one offense by making further uncorroborated charges against the accused.440

Later New York cases followed *Lewis* in excluding evidence of uncharged sexual misconduct offered merely to demonstrate the defendant’s “amorous design.”441 However, New York courts found other ways to approve admission of uncharged sexual misconduct evidence after *Lewis*. In *People v. DeLeon*,442 for example, the Appellate Division held that the defendant’s statement to the victim that “he had just recently . . . raped a girl” made during the course of a sexual assault on the victim was admissible to rebut any suggestion of consent in a case of overwhelming guilt.443 *Lewis* would not affect New York’s practice of admitting other similar sexual misconduct to prove intent in child abuse cases, when the defendant claims an innocent purpose in touching the victim’s genitals.444

New York’s experience with the *Molineux* rule in sex offender cases has been paralleled in Illinois,445 where vestiges of the lustful disposition rule

436. *Id.* at 916.
437. *Id.* at 918.
438. *Id.* at 917-18.
439. *Id.* at 918.
440. *Id.* at 918-19.
442. 521 N.Y.S.2d 777 (N.Y. App. Div. 1987), *appeal denied*, 527 N.Y.S.2d 1004 (N.Y. 1988). In New York, when the defendant has raised the defense of consent, the prosecution has been allowed to prove that the defendant engaged in other sexual assaults against other victims. *People v. Tas*, 415 N.E.2d 967, 968 (N.Y. 1980).
443. 521 N.Y.S.2d at 779.
may coexist with the *Molineux* rule in sex offender cases. Kentucky’s lower appellate courts continue to apply the lustful disposition rule, questioning the real intent of the Kentucky Supreme Court in *Pendleton v. Commonwealth*. New York’s vestigial amorous design exception to the character evidence rule would still apply in incest and bigamy prosecutions. New York has rejected corroboration as a reason for admitting the defendant’s sexual misconduct history with the victim, but its jurisprudence has the plan or design rationale at hand to permit proof of the same misconduct to demonstrate a plan or design.

Despite an attempt to reform its law on character evidence and a further attempt to limit uncharged sexual misconduct evidence, New York has really made no improvement in its law on uncharged sexual misconduct, although the courts may feel better because their approach to admission of uncharged sexual misconduct has some plausible theoretical consistency.

2. **California: Failure to Harmonize the Molineux Rule or to Develop Any Consistent Policy Towards Uncharged Sexual Misconduct Evidence.**—

California has an almost unintelligible position on admission of uncharged sexual misconduct in sex offender cases. Because it is so baffling, it is worthwhile to review the twists and turns of California’s case law, statutes, and constitutional initiatives to see how the common-law approach to character evidence can fail to achieve any clarity or consistency in practice.

California’s case law on proof of other sexual misconduct in sex offender cases has always been confusing. A number of pre-Evidence Code intermediate appellate court decisions seemed to have adopted the lustful disposition rule. However, a significant number of pre-1967 cases followed the *Molineux* rule, admitting uncharged sexual misconduct only

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when relevant to prove intent, motive, design or plan, or identity of the accused. Section 1101 of the California Evidence Code, which restated the common-law bar against admitting character evidence, did very little to ease the confusion. Section 1101(b) set out the common-law exceptions to the character evidence rule for uncharged misconduct in much the same way as the Uniform Rules did. The lustful disposition rule was not clearly repealed by the Evidence Code.

Since 1967, the California courts have struggled with the application of section 1101(b) of the Evidence Code to sex offender cases. At times, the courts have tended to use section 1101(b) as a list of magic words that sanctifies admission of the defendant's criminal history when uttered by the State in its offer of proof. At other times, the courts have prescribed limitations and controls on use of the defendant's criminal history, derived from the Evidence Code and from California's common-law tradition.

The history of the development of admission of uncharged sexual misconduct evidence under section 1101(b) of the Evidence Code really began in 1967 with People v. Covert. The defendant was charged with committing incest and lewd and lascivious acts with his sixteen-year-old daughter. The defendant's nineteen-year-old daughter testified to earlier, similar incest committed on her by the defendant. The Court of Appeals approved the admission of these stories to show the defendant's criminal plan or design and also to corroborate the story of the sixteen-year-old victim. In the same year, in People v. Paxton, a rape and robbery case, the state called a second victim to testify to an earlier rape committed on her by the defendant in what the court thought was a strikingly similar manner. This second uncharged incident was admitted to prove identity, although identity was not a real issue in the case. In People v. Gray, which was decided in 1968, the year after the Evidence Code became effective, the defendant claimed the victim consented to his advances. The defendant also proved that he had voluntary sexual relations with the victim before the alleged assault. In response, the prosecution put on three rebuttal witnesses who stated that they had been casual acquaintances of the defendant and were forcibly raped and beaten by the defendant when they did not

449. Original California Evidence Code 1101(b) stated, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts. CAL. R. EVID. 1101(b) (1966).
451. 57 Cal. Rptr. 222.
453. Id. at 777.
455. Id. at 656.
consent to his advances.\textsuperscript{456} So far, the California courts were using section 1101(b) as a vehicle to funnel uncharged sexual misconduct evidence into the prosecution’s case in chief with minimal restraints.

The courts did not care much about how far in the past the proffered incidents of prior sexual misconduct occurred. In \textit{People v. Ing},\textsuperscript{457} the California Supreme Court admitted similar episodes of uncharged sexual assaults perpetrated by an obstetrician on patients as many as eighteen years before trial to show modus operandi and plan or design, on the theory that Dr. Ing had a single conception or plot for ravishing his patients.\textsuperscript{458}

Although the court’s rationale was classic \textit{Molineux} rule theory, it did not explain why the eighteen-year-old episodes of similar misconduct were still probative.

California courts used the modus operandi rationale to admit prior sexual misconduct under section 1101(b) in \textit{People v. Whittington}.	extsuperscript{459} The First District Court of Appeals held that a rape committed almost three years before the date of the crime charged was relevant to prove the identity of the perpetrator because the modi operandi in both instances were similar.\textsuperscript{460} On each occasion the victim was accosted while emptying garbage outside her apartment. The perpetrator threatened to rob the victim, and then informed her that he was free of venereal disease and had not had any sexual relations for a long time. The sexual assault followed.\textsuperscript{461} It may have been the defendant’s express warranty of freedom from venereal disease that the court found to be a “signature” of the accused.

In \textit{People v. Cramer},\textsuperscript{462} the defendant was charged with sexual assault on a thirteen-year-old boy. Intent and identity of the accused were not in issue. Nonetheless, the California Supreme Court approved admission of similar homosexual acts committed by defendant on another boy to show “common design or modus operandi.”\textsuperscript{463}

So far, this section has reviewed cases that treat section 1101(b) as “magic words.” \textit{People v. Stanley}\textsuperscript{464} represents the other side of the coin. The defendant was charged with sexual assault of a boy. Prior similar assaults by the defendant on the same victim were admitted at trial, but admission was disapproved by the California Supreme Court on the ground that the prior uncharged sexual misconduct evidence was inadmissible when the only issue was the veracity of the victim at trial.\textsuperscript{465} \textit{Stanley} was

\textsuperscript{456} Id.
\textsuperscript{457} 422 P.2d 590 (Cal. 1967) (en banc).
\textsuperscript{458} Id. at 592.
\textsuperscript{459} 429 P.2d 582 (Cal. 1967) (en banc).
\textsuperscript{460} Id. at 586.
\textsuperscript{461} Id.
\textsuperscript{462} 433 P.2d 913 (Cal. 1967).
\textsuperscript{463} Id. at 916.
complicated by the fact that the victim may have been an accomplice under California law. At any rate, the California Supreme Court tried to limit admission of uncharged sexual misconduct evidence to cases in which there was a real issue raised under section 1101(b) that required a weighing of probative value against prejudice to the defendant.

During the mid-1970s, the California Supreme Court continued to ease the limits on the use of uncharged sexual misconduct. *People v. Thornton*, 466 involved the identity of the perpetrator of robbery, kidnap, sodomy, and rape against two different victims, Ottilia J. and Eileen S. The defendant gave alibi evidence at trial. 467 The prosecution retaliated by producing Marcia B., Edith B., and Suzanne P., who had identified the defendant as the man who robbed and sexually assaulted them. 468 The five separate instances of sexual assault had a large number of distinctive elements in common: (1) the attacker used a ruse to gain entry to the victim’s car, (2) the victim was transported to a place remote from the point of contact, (3) the victim was totally disrobed, (4) the victim’s purse was ransacked before sexual assault was perpetrated, (5) the victim was threatened with death if she talked, (6) the attacker smelled of gasoline, (7) the victim was kicked and struck with a closed fist, (8) the attacker expressed a desire to cause pain to the victim, and (9) the attacker stuffed foreign matter into the victim’s vagina. 469 The trial court admitted the other victims’ stories. The California Supreme Court, on mandatory review of a death penalty, set aside the penalty phase of the trial, but affirmed Thornton’s guilt on the ground that the five similar sexual assaults amounted to signature crimes rebutting his alibi. 470

*People v. Pendleton* 471 involved prosecutorial use of two prior instances of rape against the defendant in a rape trial. In each case, the victim had been attacked early in the morning by an intruder who entered the victim’s locked residence and threatened the victim with harm and robbery. 472 The attacker then started discussing his family and friends and the victim’s friends while holding the victim. 473 The victim was then struck and sexually assaulted. 474 Identity of the accused was not an issue during Pendleton’s trial on a third sexual assault charge. The victims of the two prior assaults testified, giving their stories to prove the defendant’s intent. 475 The California Supreme Court affirmed Pendleton’s conviction on

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467. 523 P.2d at 275-76.
468. *Id.* at 273-75.
469. *Id.* at 279-81.
470. *Id.* at 288.
471. 599 P.2d 649 (Cal. 1979) (en banc).
472. *Id.* at 651-52.
473. *Id.* at 652.
474. *Id.*
475. *Id.*
the theory that the stories of the other two victims proved criminal intent, although rape was not a crime of specific intent. The court also found that the two prior sexual assaults proved the defendant's plan or design, but it is difficult to see what kind of plan was carried out by these separate attacks. The court seemed to be returning to the lustful disposition rule without explicitly reaffirming its existence. The Pendleton decision was not classic Molineux rule theory, because the intermediate issues for which the prior assaults were held admissible were not actually litigated at trial. The court slipped back into the "magic words" approach.

By the mid-1980s California's lower appellate courts responded to the Pendleton opinion by generously allowing use of uncharged misconduct evidence in sex offender cases. In 1984, however, the California Supreme Court pulled in the reins in People v. Tassel. Tassel was charged with sexually assaulting Anne B., a waitress. He allegedly forced her to submit to oral copulation and conventional intercourse with him in her camper van. Tassell testified in his own behalf, claiming that Anne B. willingly consented to his sexual advances. The prosecution then produced Mrs. G. and Cherie B. Mrs. G., a waitress in a bar, testified that Tassell had picked her up after work and forced her to engage in sexual intercourse. Cherie B., a hitchhiker, told a similar story. She claimed Tassell had picked her up and forced her to engage in sexual relations with...
him. The prosecution offered these two tales to prove that Tassell had a
design or plan to pick up women and assault them.\(^{483}\) The California
Supreme Court affirmed Tassell’s conviction, but held that the two rebuttal
witnesses’ stories were irrelevant to any issue which could be proved under
section 1101(b).\(^{484}\) The court found that the only issue to which these two
stories related was the defendant’s evil propensity to commit sexual crimes.
The court reasoned that the two other victims’ stories were harmless error in
an overwhelming case of guilt.\(^{485}\)

Shortly after the Tassell decision was announced, the California
Legislature amended section 1101(b) of the Evidence Code to “clarify” the
decision by providing that uncharged similar misconduct evidence was
admissible in sexual assault cases whenever the defendant raised the issue of
consent.\(^{486}\)

In 1985, the California Supreme Court put further limitations on the use
of uncharged sexual misconduct evidence in People v. Ogunmola.\(^{487}\) The
defendant, a gynecologist, was charged with sexual assault on a patient
during a pelvic examination.\(^{488}\) The defendant claimed that the step at the
end of the examining table made it impossible for the examining physician
to perform sexual acts on a patient during a pelvic exam.\(^{489}\) To rebut this
contention in advance of defense evidence, the prosecution called two other
victims who testified that Dr. Ogunmola had sexually assaulted them during
their pelvic exams.\(^{490}\) The trial court allowed the other victims’ testimony
to prove Ogunmola’s plan or design,\(^{491}\) although neither identity of the
accused nor criminal intent was at issue in the case. The Supreme Court
reversed an Appeals Court affirmation of conviction, finding that the
admission of the two other victims’ stories was error, since neither identity
nor intent was at issue.\(^{492}\) This decision is very difficult to accept. The

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483. Id.
484. Id. at 7-8.
485. Id. at 8.
486. CAL. EVID. CODE § 1101(b) (West 1993). In order to “clarify People v. Tassell,” the amendment
to the Evidence Code made a special exception for rebuttal of claims of consent in sexual assault cases which
reads as follows:
   (b) Nothing in this section prohibits the admission of evidence that a person committed a
   crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity,
   intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a
   defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not
   reasonably and in good faith believe that the victim consented) other than his or her disposition
to commit such an act.

Id. The legislature’s clarification appears to authorize admission of similar uncharged sexual conduct in sex
offender cases when the defendant claims the victim consented, in order to rebut the claim of consent by
showing prior violent forcible sexual activity with the same victim or other victims.
487. 701 P.2d 1173 (Cal. 1985) (en banc).
488. Id. at 1174.
489. Id. at 1175.
490. Id.
491. Id.
492. Id. at 1176.
defendant claimed that it was physically impossible to commit rape upon his patients during a pelvic examination. The testimony of the other victims squarely rebutted that claim. Although section 1101(b) does not contain an enumerated exception authorizing admission of uncharged misconduct to rebut a claim of physical impossibility, the other misconduct evidence was certainly relevant under any view of the uncharged misconduct rule.

California law on uncharged sexual misconduct is too confused to generalize. California may still recognize a "lustful intent" exception to the character evidence rule in criminal sexual assault cases. On the other hand, it may limit evidence of uncharged sexual misconduct to those few cases where identity of the accused or intent are real issues. In 1982, the voters passed Proposition 8, an initiative that abolished nearly all limitations on evidence in criminal prosecutions. Section 28(d) of Article I of Proposition 8 was an attempt to deprive the appellate courts of supervision over admission or exclusion of evidence in criminal prosecutions. 493 It is extremely difficult to assess the impact of Proposition 8 on admission of uncharged sexual misconduct. If Proposition 8 were rigorously applied to the character evidence rule, the character evidence rule embodied in section 1101 of the Evidence Code would no longer apply to any criminal prosecution. So far, the California courts have not followed Proposition 8's literal command to permit proof of the defendant's predisposition to commit evil. 494

VI. Conclusion

Juries in courts across the country usually get to review the criminal history of sex offenders, despite the character evidence rule that bans convicting any defendant on the basis of his or her predisposition to commit


Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding. . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103.

Id. at 1008 (quoting CAL. CONST. art. I, § 28(d)). Imwinkelried and Mendez argue that after ten years' time the degree of appellate supervision over criminal evidence issues is yet to be worked out. The authors note that the California appellate courts do not always use a plain meaning approach to Proposition 8 issues, but try to carry out what the court perceives as the legislative intent behind the initiative. Id. at 1012-13.

494. Imwinkelried & Mendez, supra note 493, at 1012. The authors reviewed People v. Castro, 696 P.2d 111 (Cal. 1985), and People v. Harris, 767 P.2d 619 (Cal. 1989). Id. at 1017-19, 1020-22. They found that the California Supreme Court used section 352 of the Evidence Code as a rationale for bypassing the blanket restriction on review of evidence in criminal prosecutions. Id. at 1018, 1021-22. Castro involved Proposition 8's blanket permission to impeach a criminal defendant on any prior criminal conviction without regard to probative value. The court construed that part of Proposition 8 as an authorization for limited exclusion of prior criminal convictions to impeach, using section 352 as a touchstone for such limitation. 626 P.2d at 117. The court refused to apply Proposition 8 literally. In Harris, the California Supreme Court refused to invalidate its Frye rule with respect to admission of polygraph evidence against the accused under a similar creative construction of section 352. 767 P.2d at 650 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).
crimes. There are two popular rationales that permit the courts to ignore the character evidence rule: the lustful disposition rule and the *Molineux* rule.

The *Molineux* rule, codified by Uniform Rule 404(b), permits introduction of criminal history when some straw man issue can be interposed to make criminal history evidence relevant to something other than character or predisposition to do evil. All U.S. jurisdictions recognize one version or another of this rule.495 The *Molineux* rule permits the jury to consider uncharged sexual misconduct when it proves both the defendant's bad moral character and some other issue, such as criminal intent, plan, or identity of the accused. The palliative offered is a limiting instruction telling the jury not to consider the defendant’s criminal history on the issue of guilt or innocence, but only to prove the intermediate issue.

Twenty-nine states follow some version of the lustful disposition rule.496 Four states have done away with their version of the lustful disposition rule in the past eight years.497 West Virginia dumped its lustful disposition rule in 1987, but returned to it in 1990.498 Rhode Island considered rejecting the lustful disposition rule, but decided not to do so.499 The lustful disposition rule permits proof of a sex offender's criminal history to show his or her predisposition to commit sex crimes. No intermediate issue must be at stake when prior sexual misconduct is offered under the lustful disposition rule. The rule simply permits proof of bad character in sex crimes.

The character evidence rule was made by judges to explain why the defendant's criminal history could not be used to prove the defendant's guilt. The *Molineux* and lustful disposition exceptions to the rule permit proof of character or predisposition to act in predictable ways to prove the defendant's guilt in sex cases. The exceptions have swallowed the exclusionary rule. In truth, character evidence is inadmissible in sex crime prosecutions only when the court finds that such evidence is unreliable.

Unreliability means that the court finds that the probative value of the uncharged misconduct evidence is exceeded by prejudice to the defendant, confusion of the issues, or waste of time in collateral matters. When uncharged sexual misconduct is dissimilar to the crime charged in the indictment, or committed at a time judged to be too remote to show the defendant's propensity to commit sex crimes, or the quantum of proof of uncharged misconduct fails to meet the threshold level set by the court, it is

495. IMWINKELRIED, supra note 73, §§ 2:24-2:29.
496. See supra note 340.
excluded.

The same analysis will hold true if applied to other criminal prosecutions in which uncharged misconduct evidence is frequently offered and admitted, such as drug or conspiracy cases. There is nothing particularly unique about sex offenses that requires a special rule just for sex crime prosecutions which admits uncharged criminal conduct more leniently than in drug sales or possession of stolen property prosecutions. Prior uncharged misconduct evidence, based on recidivism, is relevant in those prosecutions as well.

What makes sex crimes unique is the public reaction to them. The public is morally outraged by sex offenses, particularly those that involve small children or others unable to protect themselves from harm. If Oscar Wilde had been accused of writing rubber checks, there would have been no criminal libel prosecution and Wilde would not have been cross-examined about his prior criminal behavior.

In short, the courts bow to public pressure to convict sex offenders and try to make it easier for the victim of a sex crime to secure retribution than the victim of a crime against property. This is done by relaxing the evidentiary safeguards that were supposed to protect U.S. citizens from Star Chamber justice.

The Sixth and Fourteenth Amendments do not require accusatorial criminal justice. The Sixth Amendment mandates the defendant's rights to receive due notice of the charges made against him, to legal counsel, to confrontation of the accuser, and to compulsory process. The Fourteenth Amendment incorporates these specific rights, and also guarantees the defendant a fundamentally fair trial that requires the state to prove guilt beyond a reasonable doubt. Indiana gave up the lustful disposition rule because it did not provide for due notice to be given to the defendant. It could have kept the rule by ordering the prosecution to provide notice of intent to use uncharged misconduct evidence. The United States and a few states, including Minnesota, have faced the notice issue by requiring notice of intent to use specific instances of uncharged misconduct.

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501. The following states have adopted a court rule mandating that the prosecution give the defendant written notice of intent to use uncharged misconduct evidence before trial commences: Louisiana: LA. CODE CRIM. PROC. ANN. art. 720 (West 1981) (following the decision in State v. Prieur, 277 So. 2d 1261 (La. 1973), which mandated pretrial notice of intent to use uncharged misconduct); Minnesota: MINN. STAT. ANN. § 609.347(4) (West 1987) (following the decision in State v. Spriegl, 139 N.W.2d 167, 173 (Minn. 1965), which mandated pretrial notice of intent to use uncharged misconduct evidence in all criminal prosecutions); Montana: MONT. R. EVID. 404(b) (1988) (codifying Just v. State, 602 P.2d 957, 963 (Mont. 1979)).

FED. R. EVID. 404(b) has also been amended to require notice to the defendant of the government's intent to use uncharged misconduct evidence, provided that the defendant first makes demand for notice upon the government before trial. This change was brought about by the trenchant criticism of Rule 404(b) furnished by Professor Paul Rothstein. Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299, 323-25 (1987) (American Bar Ass'n Crim. Justice Section Comm. on Rules of Crim. Pro. & Evid., Aug. 1987). See also proposed new rule 405(a). Id. at 330-32.
satisfies the notice clause of the Sixth Amendment by putting the defendant on guard that uncharged misconduct will come up, and allows the defendant to prepare a rebuttal case.

More than forty years ago, Justice Jackson portrayed the character evidence rule as absurd in *Michelson v. United States*.

The foregoing analysis shows that the rule is still absurd, especially as it operates in sex crime prosecutions. The lustful disposition rule, which acknowledges the probative value of criminal history, and would admit such history in sex crime prosecutions, is more rational than the *Molineux* rule. Nothing but inertia and fear of inquisitorial proof stand in the way of abandonment of the character evidence rule in criminal prosecutions. Since the courts generally permit admission of uncharged misconduct, particularly in high profile prosecutions such as sex offender cases, the rule should be that the defendant’s propensity to commit crimes of the type charged in the indictment may be proved by specific instances of uncharged misconduct or opinion evidence showing the defendant’s propensity to commit crimes of that type. Propensity evidence would be excluded if the proof submitted is more prejudicial to the defendant than probative on the issue of predisposition.

If the courts cannot bring themselves to reverse the character evidence rule entirely, then they can do so in sex offender cases by adopting a modified lustful disposition rule. The courts can permit admission of uncharged misconduct evidence to prove habitual criminal sexual activity. Arizona has taken this course. The *Treadaway* rule that permits proof of uncharged sexual misconduct to serve as a basis for expert opinion on the defendant’s habitual sexual behavior patterns is an honest rule of law fashioned for sex crime prosecutions. It does change the dynamics of the criminal prosecution. The defendant’s sexual behavior in general is on trial. The jury, aided by an expert, will use evidence of the defendant’s sexual behavior in general to convict or acquit the defendant. Arizona has given the victims of sex crimes an equal opportunity to obtain redress for the wrong done to them. It has recognized the need of victims for justice as well as the need for effective punishment for sexual offenders.

A second approach would be to adopt court rules similar to proposed Rules 413 through 415 that establish a specialized character evidence rule for sex crime prosecutions without the requirement that uncharged sexual misconduct evidence be the basis for an expert opinion.

Conservative courts, however, would be extremely uncomfortable with either of these solutions because they turn a sex crime prosecution into an inquisition. Like the Delaware Supreme Court, conservative courts will reject open acceptance of inquisitorial justice in sex offender cases. They will continue to try to limit admissibility of similar uncharged sexual misconduct to one or more of the intermediate objects of proof noted in *Molineux*.

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In *Getz*, the Delaware Supreme Court tried to restrict such evidence to the minimum absolutely necessary to support a criminal prosecution. The issue of habitual criminal conduct evidence offered under Rule 406 was neither briefed nor argued and was not raised at trial. However, the *Getz* decision continues to permit proof of uncharged sexual misconduct. Delaware’s courts can be comforted by the formalistic instruction that tells the jury not to consider uncharged misconduct evidence on the issue of guilt or innocence. Perhaps the jury will understand the instruction and follow it, and apply the uncharged misconduct only to the allowable intermediate issue. Perhaps the jury will get the instruction wrong and convict the defendant based on predisposition, but the jury cannot be impeached for such misconduct.