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The Development of the Propensity Rule in Federal Criminal Causes 1840-1975

Thomas J Reed

THE DEVELOPMENT OF THE PROPENSITY RULE IN FEDERAL CRIMINAL CAUSES 1840-1975

*Thomas J. Reed**

I. INTRODUCTION

The first part of this series described the historical development in England and the United States of the rule excluding evidence of other crimes.[1] The rule had its roots in the Treason Act of 1695 which provided that an overt act not stated in the indictment could not be proven at trial.[2] The essence of the Treason Act of 1695 eventually became the standard for basic fairness in ordinary criminal trials in both England and the United States. By 1900 American state courts had formulated a general exclusionary rule modified by specific exceptions founded on the necessity of the case.[3] Prior criminal acts of the accused could be admitted to prove: motive; intent; guilty knowledge; continuing design, plan or criminal activities; identity; and interwoven crimes.[4] These exceptions were defined by the landmark American case of *People v. Molineux*[5] and given intellectual weight by the writings of Dean John Henry Wigmore shortly after the turn of the century.[6] This second essay in the three-part discussion of evidence of other crimes analyzes the admissibility in federal criminal decisions of such evidence during the years between *Molineux* and the effective date of the Federal Rules of Evidence.

II. THE FEDERAL COMMON LAW OF EVIDENCE

Federal courts historically have had the flexibility to develop a body of evidence law applicable in criminal trials free of the constraints of state statutory or decisional law. In 1851, the United States Supreme Court in *United States v. Reid* held that section 34 of the Judiciary Act of 1789, declaring that the laws of the several states shall be regarded as rules of decisions in trial at common law in federal courts, did not apply to criminal cases.[7] Declining to apply a contemporary Virginia

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1. Reed, *Trial By Propensity: Admission of Other Criminal Act Evidence in Criminal Trials*, 50 U. CIN. L. REV. 713 (1982).

2. 7 Will. III, ch. 3 (1695). *See* Reed, *supra* note 1, at 716-18.

3. Reed, *supra* note 1, at 728-35.

4. *Id.*

5. 168 N.Y. 264, 61 N.E. 286 (1901). *See* Reed, *supra* note 1, at 730-35.

6. J. WIGMORE, PRINCIPLES OF JUDICIAL PROOF (1913); J. WIGMORE, EVIDENCE (1904). *See* Reed, *supra* note 1, at 735-39.

7. 53 U.S. (12 How.) 361, 363 (1851).

statute regulating the competency of witnesses in criminal trials, the *Reid* Court stated that the rules of evidence in criminal cases are the rules which were enforced in the respective states when Congress passed the first Judiciary Act.[8] According to the Court, no state law enacted since 1789 could affect the rules of evidence in federal criminal trials.[9] Although such static conformity could have prevented the development of a distinct body of federal evidence law, the dearth of state reports delineating the law of evidence in 1789 produced a void that the federal courts were free to fill.[10] In *Funk v. United States*, decided in 1933, the Court held that the wife of a criminal defendant was competent to testify in federal court despite a common law prohibition of such testimony in effect in 1789.[11] The Court asserted that in the absence of a federal statute governing the subject the common law determines the competency of a witness in a federal criminal trial.[12] The Court stated, however, that "the common law is not immutable but flexible, and by its own principles adopts itself to varying conditions," and concluded that federal courts are obligated to determine evidence questions in accordance with present day standards of wisdom and justice.[13] The following year, the Court in *Wolfe v. United States* held that the rules of evidence in federal criminal cases are governed by common law principles, as interpreted and applied in the light of reason and experience.[14] The Federal Rules of Criminal Procedure codified the *Funk* and *Wolfe* decisions. Thus, the federal courts were free to develop their own rules regarding the admissibility of evidence of other crimes until the adoption of the Federal Rules of Evidence.[15]

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8. *Id.*

9. *Id.* at 366.

10. C. WRIGHT & K. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5003 (1977). Wright and Graham provide a concise review of the applicability of federal evidence law in federal criminal trials. *Id.*

11. 290 U.S. 371 (1933).

12. *Id.* at 382.

13. *Id.* at 383.

14. 291 U.S. 7, 12 (1933).

15. Rule 26 of the FED. R. CRIM. P. provides: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." The advisory committee note to the rule states:

> 1. This rule contemplates the development of a uniform body of rules of evidence to be applicable in trial of criminal cases in the Federal courts. It is based on Funk v. United States, 290 U.S. 371, 54 S. Ct. 212, 78 L. Ed. 369, 93 A.L.R. 1136, and Wolfe v. United States, 291 U.S. 7, 54 S. Ct. 279, 78 L. Ed. 617, which indicated that in the absence of statute the Federal courts in criminal cases are not bound by the State law of evidence, but are guided by common law principles as interpreted by the Federal courts

III. The Early Federal Cases

United States v. Mitchell, decided in 1795, is the earliest federal decision discussing the admissibility of evidence of other crimes.[16] In *Mitchell* the defendant was accused of treason and the prosecution sought to establish that in the course of the alleged insurrection the accused participated in the robbery of the United States mail. After noting that the mail was not robbed with traitorous intention and that the defendant had been separately indicted for participating in the robbery, the court excluded the evidence.[17]

Prior to *Molineux*, the Supreme Court decided only a handful of cases addressing the admissibility of evidence of other crimes in a federal criminal prosecution. In *Wood v. United States* the Court held that prior fraudulent acts of a kind similar to that alleged in the indictment could be admitted to establish the accused's intent or motive.[18] The Court asserted that in no other manner would it be practical to establish intent or motive, "for the single act taken by itself may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."[19] The Court further noted that if the evidence was pertinent and competent, the admission of it could not be error.[20] Thus, according to the Court, the relevance of the evidence determines its admissibility.

Near the end of the nineteenth century the Court decided two homicide cases in which the prosecution offered evidence of crimes not stated in the indictment. In the first case, *Boyd v. United States*, the evidence suggested that the homicide followed an attempted robbery.[21] At trial, the prosecution offered evidence indicating that the defendants had committed four armed robberies during the month prior to the homicide to establish that the accused had committed the homicide during the commission of a felony. Although the jury found the defendants guilty of murder, the Supreme Court, per Justice John Harlan, reversed the convictions on the ground that the accuseds' other criminal activities were both irrelevant and unduly prejudi-

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"in the light of reason and experience." The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions.

Fed. R. Crim. P. 26 advisory committee note.

16. 26 F. Cas. 1282 (C.C.D. Pa. 1795) (No. 15,789).
17. *Id.*
18. 41 U.S. (16 Pet.) 342 (1842).
19. *Id.* at 360.
20. *Id.* at 361.
21. 142 U.S. 450 (1892).

cial.[22] Justice Harlan stated that the accuseds' commission of other crimes was a matter wholly apart from the inquiry into the murder for which they were indicted. They were collateral to the issue to be tried. The Court then noted:

> No notice was given by the indictment of the purpose of the government to introduce proof of them. . . . Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. . . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.[23]

Next term, the Court in *Moore v. United States* showed a greater willingness to admit evidence of other crimes.[24] In *Moore* the accused was indicted for the murder of one Palmer. The prosecution offered evidence suggesting that the accused had earlier killed a third party named Camp and murdered Palmer because Palmer was investigating Camp's death. The accused was convicted, and the Supreme Court affirmed the conviction.[25] The Court held that the evidence of the earlier murder of Camp was admissible to establish the accused's motive for the murder of Palmer.[26] The Court never referred to *Boyd* and merely noted that the trial court was not required to exclude the evidence revealing the accused's commission of an earlier murder, "if it were otherwise competent."[27] Thus, the *Wood, Boyd* and *Moore* decisions all turned on the Court's perception of the relevancy of the evidence.

The handfull of inferior federal court decisions prior to *Molineux* generally resembled the early state court decisions.[28] Most courts were reluctant to formulate either a general rule of exclusion or one of conditional relevance and focused on the narrow issue before the court.[29] A few courts suggested that evidence of other crimes was

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22. *Id.* at 458.
23. *Id.*
24. 150 U.S. 57 (1893).
25. *Id.* at 62.
26. *Id.* at 61.
27. *Id.*
28. For a discussion of the early state court decisions, see Reed, *supra* note 1, at 721-23.
29. *See, e.g.*, Bacon v. United States, 97 F. 135 (8th Cir. 1899); United States v. Russell, 19 F. 591 (D.C.W.D. Tex. 1884); United States v. Snyder, 14 F. 554 (C.C.D. Minn. 1882); United States v. Doebler, 25 F. Cas. 883 (C.C.E.D. Pa. 1832) (No. 14,977).

admissible if relevant to any issue before the court.[30] Others articulated a general rule of exclusion, then recognized limited exceptions.[31] Prior to *Molineux*, the federal decisions indicated that evidence of other crimes could be admitted to establish intent,[32] guilty knowledge[33] and motive.[34]

IV. The Form of the Rule

After the *Molineux* decision and prior to the adoption of the Federal Rules, most federal courts adhered to the *Molineux* formulation that evidence of other crimes generally was inadmissible. In the early twentieth century case of *Thompson v. United States*, decided in 1906, the court stated that evidence of other offenses committed by the accused is not ordinarily admissible.[35] A similar formula also was followed in numerous later cases, such as *Simpkins v. United States*, a 1935 prohibition case.[36] The *Simpkins* court formulated a general exclusionary rule:

> It is a well established rule of criminal evidence that the character of the defendant is not to be put in issue by the government unless the defendant first makes the issue on his behalf. . . . It is a fundamental rule of criminal evidence frequently applied in both state and federal courts that proof of offenses other than those charged in the indictment is generally inadmissible, even though the separate offenses may be of similar nature.[37]

The simple exclusionary rule persisted in this pristine form in most federal decisions until the adoption of the Federal Rules of Evi-

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30. Wolfson v. United States, 101 F. 430 (5th Cir. 1900). *Cf.* United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

31. United States v. Roudenbush, 27 F. Cas. 902 (C.C.E.D. Pa. 1832) (No. 16,198).

32. Wolfson v. United States, 101 F. 430 (5th Cir. 1900) (in prosecution of national bank employee for illegally abstracting money from bank, evidence of similar crime admissible to show intent to defraud); United States v. Snyder, 14 F. 554 (C.C.D. Minn. 1882) (in prosecution for making false returns to auditor of Treasury of United States, evidence of similar crimes admissible to establish intent to defraud).

33. United States v. Russell, 19 F. 591 (D.C.W.D. Tex. 1884) (in prosecution for falsification of an account, evidence of other false accounts admissible to show knowledge); United States v. Doebler, 25 F. Cas. 883 (C.C.E.D. Pa. 1832) (No. 14,977) (in prosecution for passing forged notes, bank admissible to show knowledge). *Cf.* United States v. Roudenbush, 27 F. Cas. 902 (C.C.E.D. Pa. 1832) (No. 16,198) (in prosecution for passing of counterfeit notes, evidence of passing of similar counterfeit notes admissible to show knowledge; but evidence of passing of dissimilar notes inadmissible to establish knowledge).

34. *Moore*, 150 U.S. at 61. *See supra* text accompanying notes 24-28.

35. 144 F. 14, 16 (1st Cir. 1906).

36. 78 F.2d 594 (4th Cir. 1935).

37. *Id.* at 597.

dence.[38] Only the Second and Tenth Circuits routinely rejected the *Molineux* formulation for a rule of conditional relevance.[39] Naturally, the rule regarding the admissibility of evidence of other crimes tended to develop by the expansion of the judicial definition of each exception to the rule.

V. The Objects of Proof

A. *Motive*

Motive is never an element of the charged offense, and prior to the enactment of the federal rules courts most often admitted evidence under this exception to establish identity, the requisite mental state or the corpus delicti.[40] Thus, in *Reed v. United States* the Ninth Circuit admitted other crime evidence of motive to prove the commission of the charged offense.[41] The defendants in *Reed* were accused of transporting kidnapped persons in interstate commerce. The prosecution offered evidence indicating that the defendants kidnapped the victims to facilitate the defendants' escape after their commission of armed robbery. The Ninth Circuit held that the evidence of the other crime was admissible, noting that the purpose of the evidence was to show the motive for the kidnapping.[42] The court stated that deprived of

38. *See, e.g.*, First Circuit: Green v. United States, 176 F.2d 541 (1st Cir. 1949); Third Circuit: United States v. Fawcett, 115 F.2d 764 (3d Cir. 1940); Fourth Circuit: Swann v. United States, 195 F.2d 689 (4th Cir. 1952); Lovely v. United States, 169 F.2d 386 (4th Cir. 1948); Fifth Circuit: United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974); United States v. Broadway, 477 F.2d 991 (5th Cir. 1973); Seventh Circuit: United States v. Silvers, 374 F.2d 828 (7th Cir. 1967); United States v. White, 355 F.2d 909 (7th Cir. 1966); Eighth Circuit: Kempe v. United States, 151 F.2d 680 (8th Cir. 1945); Ninth Circuit: Davis v. United States, 370 F.2d 310 (9th Cir. 1966); Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963).

The Sixth Circuit probably also adopted the *Molineux* formula for the propensity rule. *See* Grant v. United States, 255 F.2d 341, 342 (6th Cir. 1958). However, in United States v. Neal, 344 F.2d 254, 255 (6th Cir. 1965), the Sixth Circuit gave some hint of a gradual shift toward the conditional rule of relevance position taken by the Second and Tenth Circuits. The D.C. Circuit probably adopted the traditional position as well. *See* Harper v. United States, 239 F.2d 945 (D.C. Cir. 1965).

39. The Second Circuit clearly adopted a rule of conditional relevance, repudiating the *Molineux* formulation of the propensity rule. *See* United States v. Bradwell, 388 F.2d 619, 621-22 (2d Cir. 1968); United States v. Gardin, 382 F.2d 601, 603-04 (2d Cir. 1967); United States v. Deaton, 381 F.2d 114, 117-118 (2d Cir. 1967). The Tenth Circuit also adopted the inclusionary approach to admission of criminal acts of the accused not included in the indictment. *See* King v. United States, 402 F.2d 289 (10th Cir. 1968); Weeks v. United States, 313 F.2d 688 (10th Cir. 1963). Occasionally, decisions in other circuits articulated a rule of conditional relevance. *See, e.g.*, United States v. Klass, 166 F.2d 373, 377 (3d Cir. 1948). For an exhaustive review of the form of the rule in one circuit, see Comment, 48 UMKC L. Rev. 343 (1980) (both rules employed but exclusionary rule predominates).

40. *See generally* C. Wright & K. Graham, Jr., *supra* note 10, § 5240.

41. 364 F.2d 630 (9th Cir. 1966).

42. *Id.* at 633.

the evidence the jury might find it difficult to believe that defendants abducted three strangers.[43] Similarly, in *United States v. Johnson* the court permitted the prosecution to offer other crime evidence of motive to prove the identity of the guilty actors.[44] The defendant was accused of conspiracy, mail theft, and uttering and forging a United States Treasury check. The conspirators purchased narcotics with the proceeds of the forged check. The defendant had not physically participated in the theft and forgery of the checks. However, the prosecution offered evidence that the accused shared in the fruits of the crime. The Second Circuit held the evidence admissible even though it revealed the commission of a separate crime—illegal use of narcotics.[45] The court reasoned that this helped to prove that the defendants participated in the check forging conspiracy.[46]

In a few federal capital cases, the courts treated motive as a terminal point of proof, equating motive and malice aforethought. In *Suhay v. United States* the Tenth Circuit held admissible in a prosecution for the murder of an FBI agent evidence indicating that the defendant killed the agent to avoid arrest for an earlier crime.[47] After noting that other crime evidence must be relevant to an issue in the case, the Tenth Circuit held that the evidence "was material upon the question of the motive for the homicide. It tended to show that the appellant killed the decedent with deliberation, preditation, and malice aforethought."[48] The Tenth Circuit then noted with approval that the trial judge instructed the jury to consider the other crime evidence as bearing solely on the issue of motive.[49]

B. *Intent*

General intent is that state of mind which negatives accident, inadvertence or mistake. By comparison, specific intent is the mental element over and above any intention to engage in the forbidden conduct.[50] Federal courts have employed a variety of theories to justify the admission of other crime evidence to prove intent. For

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43. *Id.*
44. 254 F.2d 175 (2d Cir. 1958).
45. *Id.* at 176.
46. *Id.*
47. 95 F.2d 895 (10th Cir. 1938).
48. *Id.*
49. *Id.*
50. For a discussion of the many meanings associated with the terms general intent and specific intent, see W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972).

example, federal courts have asserted that as the instances of the same occurrence multiply, the probability of accident or mistake diminishes. In *United States v. Russell,* decided in 1884, the court stated:

> [S]uppose you lose your horse; you find it in the possession of A; he asserts he took it by mistake; but you find that about the same time he took horses belonging to several others; would not the fact that he took others' about the same time be proper evidence to be considered in determining whether the particular taking was or not by mistake? The chances of mistake decrease in proportion as the alleged mistakes increase.[51]

Moreover, some federal courts have admitted other crime evidence revealing the accused's motive, theorizing that such evidence alters the probability that the accused possessed the requisite intent.[52]

Prior to the enactment of the Federal Rules of Evidence, federal courts employed the intent exception more frequently than any other exception to the general exclusionary rule. This exception frequently was employed where the prosecution had to establish the specific intent of the accused. Courts often admitted evidence of other crimes to establish the accused's specific intent in cases alleging counterfeiting,[53] forgery,[54] possession of stolen property,[55] fraud,[56] Mann Act violations[57] and income tax evasion.[58] The specific intent branch of

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51. 19 F. 591, 592 (D.C.W.D. Tex. 1884).

52. *See infra* text accompanying notes 40-46. For the evidentiary theories employed to support the admission of other crime evidence to show the specific intent of knowledge, see *supra* text accompanying notes 87-96.

53. *See, e.g.*, United States v. Koran, 408 F.2d 1321 (5th Cir. 1969); Oddo v. United States, 396 F.2d 806 (5th Cir. 1968) (per curiam); United States v. Leitner, 312 F.2d 107 (2d Cir. 1963); United States v. Fawcett, 115 F.2d 764 (3d Cir. 1940); York v. United States, 241 F. 656 (9th Cir. 1916); Schultz v. United States, 200 F. 234 (8th Cir. 1912).

54. Green v. United States, 188 F.2d 48 (D.C. Cir.), *cert. denied*, 341 U.S. 955 (1951). *See also* Miller v. United States, 397 F.2d 272 (5th Cir. 1968); United States v. Robbins, 340 F.2d 684 (2d Cir. 1965).

55. *See, e.g.*, United States v. Bryant, 490 F.2d 1372 (5th Cir. 1974); Love v. United States, 386 F.2d 260 (8th Cir. 1967); United States v. Welborn, 322 F.2d 910 (4th Cir. 1963); Degnan v. United States, 271 F. 291 (2d Cir. 1921). *Cf.* Edward v. United States, 18 F.2d 402 (8th Cir. 1927) (in prosecution for Dyer Act violation, evidence that on another occasion the accused transported in interstate commerce similar property is admissible to establish the specific intent of knowledge only if the prosecution established that the accused knowingly transported the other property).

56. *See, e.g.*, United States v. Hoffman, 415 F.2d 14 (7th Cir. 1969) (mail fraud); United States v. Kirkpatrick, 361 F.2d 866 (6th Cir. 1966) (fraud on United States bank); United States v. Abraham, 347 F.2d 395 (7th Cir. 1965) (fraud on bankruptcy court); United States v. Eury, 268 F.2d 517 (2d Cir. 1959) (fraud on United States).

57. *See, e.g.*, United States v. Smith, 452 F.2d 110 (7th Cir. 1972); Courtney v. United States, 390 F.2d 521 (9th Cir. 1968).

58. *See, e.g.*, Hoyer v. United States, 223 F.2d 134 (8th Cir. 1955); Pappas v. United States, 216 F.2d 515 (10th Cir. 1954).

the intent exception is illustrated by the Mann Act cases of the 1940's and 1950's. During those decades, the federal law enforcement apparatus attempted to eradicate organized interstate prostitution rings. In order to prove a violation of the Mann Act, the government was required to prove the defendant knowingly and intentionally transported a woman across state lines for immoral purposes. The government argued that prior Mann Act violations evidenced the necessary knowledge and intent. *Lindsey v. United States* was a typical Mann Act decision.[59] Lindsey was indicted for transporting his wife from Ohio to Miami, Florida in February of 1954 to engage in prostitution. The government offered evidence in the form of Lindsey's own statement admitting prior transportations of his wife for prostitution in 1949 and 1951. The government also introduced Mrs. Lindsey's March, 1954 arrest for prostitution in Miami. The Fifth Circuit held all of this evidence admissible, finding it relevant to the issue of Lindsey's specific intent to transport his wife for exploitation as a prostitute.[60]

Intent is an element of almost every crime. If evidence of other crimes could be admitted in any case in which intent was an element of crime, this exception alone would have emasculated the general rule. To avoid this result, federal courts required that evidence of other crimes could be admitted to establish intent only where intent was more than a formal issue. Courts were divided, however, over when intent was more than a formal issue. Most federal courts agreed that the defendant could remove the issue of intent by stipulating that he had the required mental state.[61] Although the plea of not guilty puts in issue every element of the offense, most courts rejected the theory that such a plea sufficiently raises the issue of intent to permit prosecutorial use of evidence of other crimes.[62] When the defendant

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59. 227 F.2d 113 (5th Cir. 1955).

60. *Id.* at 116-17.

61. *See, e.g.*, United States v. Buckhanon, 505 F.2d 1079, 1083 n.1 (8th Cir. 1974) (the defendant "was willing to stipulate that if she committed the charged crime, she had the requisite criminal intent. Thus, intent was not seriously in issue.").

62. *See, e.g.*, United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974). In Thompson v. Rex, [1918] 3 A.C. 221, Lord Sumner stated:

> Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words. . . . The mere theory that a plea of not guilty places everything material in issue is not enough for this purpose.

Id. at 232. In United States v. Dizenzo, 500 F.2d 263 (4th Cir. 1974), the court began its discussion of the admissibility of other crime evidence by noting that the defendant's plea of not guilty puts in issue every element of the crime with which he was charged. Therefore, the government was obligated to establish intent. *Id.* at 265. However, the court also noted that it

raised the defense of inadvertence, mistake, accident or the absence of specific intent, federal courts permitted the prosecution to offer evidence of other crimes evidencing such intent.[63] Some federal decisions appeared to suggest that evidence of other crimes could be admitted where specific intent was an element of the charged crime.[64] However, in numerous decisions, federal courts excluded other crime evidence in specific intent crimes when the mental element could be inferred from the nature of the act.[65] In *United States v. Adderly* the Fifth Circuit commented that the distinction between specific intent and general intent is of little help in deciding when intent is really in issue.[66] The court stated:

> Whether there is a material issue as to this element of intent depends not on the statutory definition of the offense but on the circumstances of the case and the nature of the offense. A defendant who admits committing an act but relies on innocence, mistake, or lack of knowledge to exculpate him has made and issue of intent. A defendant who denies participation in an act raises no discreet issue of intent and if the act be proven the intent will usually be inferred.[67]

Prior to the enactment of the federal rules, all federal courts agreed that the prosecution could rebut the defense of entrapment with evidence of other crimes.[68] Federal cases suggested that such evidence was used not to prove the conforming conduct of the defendant, but to prove his predisposition or intent to commit the crime.[69] The Supreme Court first recognized and applied the entrapment defense in *Sorrells v. United States*.[70] In *Sorrells* a federal prohibition agent

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was required to balance the necessity and reliability of the evidence against its probative value. *Id.* at 266. Such an examination requires the court to determine whether intent was more than a formal issue.

63. *See, e.g.*, Chandler v. United States, 378 F.2d 906, 908 (9th Cir. 1967).

64. *See* United States v. Hutul, 411 F.2d 607, 625 (7th Cir. 1969); Herman v. United States, 220 F.2d 219, 225 (4th Cir. 1955).

65. United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974); United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969).

66. 529 F.2d 1178, 1180-81 (5th Cir. 1976).

67. *Id.* at 1181 (citations omitted). The Fifth Circuit noted that the language of its early decisions suggested that the statutory language setting forth the elements of the charged offense determined the admissibility of other crime evidence. The court cited Hamilton v. United States, 409 F.2d 928 (5th Cir. 1969); Baker v. United States, 277 F.2d 376 (5th Cir. 1956); McClain v. United States, 224 F.2d 522 (5th Cir. 1955).

68. *See, e.g.*, Sorrells v. United States, 287 U.S. 435 (1932) (dicta); United States v. Viviano, 437 F.2d 295 (2d Cir. 1971), *cert. denied*, 402 U.S. 983 (1971). For a fairly recent annotation regarding evidence of other offenses in rebuttal of the defense of entrapment, see Annot., 61 A.L.R.3d 293 (1975).

69. *See, e.g.*, United States v. Huff, 512 F.2d 66, 70 (5th Cir. 1975).

70. 287 U.S. 435, 443 (1932).

visited the defendant while posing as a tourist and engaged him in conversation about their common military experiences. After gaining the defendant's confidence, the agent asked to purchase some liquor, but was twice refused. After a third request, the defendant capitulated. Subsequently, the defendant was prosecuted for violation of the Volstead Act. The trial court held that as a matter of law, there was no entrapment defense.[71] The Second Circuit affirmed, but the Supreme Court reversed.[72] Speaking for the Court, Chief Justice Hughes held that as a matter of statutory construction the defense of entrapment should have been available to the defendant.[73] According to the Court, the entrapment defense prohibits law enforcement officers from instigating a criminal act by persons "otherwise innocent in order to lure them to its commission and to punish them."[74] The Court rejected the government's argument that the entrapment defense should not be recognized because it would result in the introduction of issues of a collateral nature such as the past conduct of the accused.[75] The Court stated that mere inconvenience must yield to the demands of justice.[76] The Court further noted that the defendant who seeks acquittal by reason of entrapment could not complain of an appropriate and searching inquiry into his past conduct and predisposition to commit the charged offense.[77] The Court added, "if in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."[78] Reaffirming its *Sorrells* decision, the Supreme Court in *United States v. Russell* stated that the thrust of the entrapment defense focused on the intent of the defendant to commit the crime.[79] Lower federal appellate courts held that other crime evidence could be admitted under the intent exception to rebut an entrapment defense.[80] The Second and Eighth Circuits held

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71. *Id.* at 438.
72. *Id.*
73. *Id.* at 448.
74. *Id.*
75. *Id.* at 451.
76. *Id.*
77. *Id.* The admissibility of other crime evidence to rebut an entrapment defense actually was not before the court.
78. *Id.*
79. 411 U.S. 423, 436 (1972).
80. *See, e.g., Huff*, 512 F.2d at 70. Reviewing the caselaw and literature, Wright and Graham note five alternative justifications for admission of other crime evidence in entrapment cases:

> 1. The defendant's predisposition, or lack thereof, is an element of the defense; hence, character is in issue when the defense is raised.
>
> 2. Character is being used, not to prove the conduct of the defendant, but to prove his state of mind; thus, Rule 404(b) applies.

that evidence of other crimes could be admitted even as part of the prosecution's case in chief where it appeared from the defendant's cross-examination of a prosecution witness or otherwise that the defendant would rely on the claim of entrapment.[81] Although the federal courts did not prohibit the use of evidence of other crimes to rebut an entrapment defense, they did hold evidence of other crimes inadmissible because of its hearsay nature.[82]

In a number of cases involving national security, courts loosely applied the intent exception to admit evidence of the acts committed by the defendant. In *Magon v. United States*, decided in 1919, the defendant was charged with publishing an article violative of the Espionage Act of 1918.[83] The trial court admitted evidence of material published in the defendant's newsletter prior to the passage of the Act. This matter included a letter to the editor advocating anarchism written by Emma Goldman. The defendant was convicted and the Ninth Circuit affirmed, noting that the earlier articles could be admitted to establish the accused's intent to utter sedition.[84] Similarly, in *Schoborg v. United States* the Sixth Circuit held that statements made prior to the passage of the Espionage Act were admissible to establish the accused's later intent to violate the Act.[85] In both *Magon* and *Schoborg*, the courts failed to justify their very questionable assumption that the earlier commission of a completely legal act establishes an intent to violate a future statute prohibiting such conduct.

C. *Knowledge*

Although the *Molineux* court did not address the admissibility of other crime evidence under this exception, federal courts often per-

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3. Defendant's character is being used to show the reasonableness of the conduct of the police; therefore, Rule 404 is inapplicable.

4. The issue of entrapment is a preliminary fact determination by the judge; under Rule 404(a) he is not bound by the rules of evidence.

5. The entrapment rule is a substantive rule of evidence that is not affected by the repealer clause of Rule 402.

C. WRIGHT & K. GRAHAM, JR., *supra* note 10, § 5235.

81. United States v. Cohen, 489 F.2d 945 (2d Cir. 1973); United States v. Simon, 453 F.2d 111 (8th Cir. 1971); United States v. Brown, 453 F.2d 101 (8th Cir.), *cert. denied*, 405 U.S. 978 (1971).

82. Whiting v. United States, 489 F.2d 945 (1st Cir. 1961); United States v. Johnson, 426 F.2d 112 (7th Cir. 1960).

83. 260 F. 811 (9th Cir. 1919).

84. *Id.* at 813-14.

85. 264 F. 1 (6th Cir. 1920). *See also* Boehner v. United States, 267 F. 562 (8th Cir. 1920); Hinkhouse v. United States, 266 F. 977 (9th Cir. 1920); Anderson v. United States, 264 F. 75 (8th Cir. 1920); Wimmer v. United States, 264 F. 11 (6th Cir. 1920); White v. United States, 263 F. 17 (6th Cir. 1920). *But see* Wolf v. United States, 259 F. 388 (8th Cir. 1919) (reversing on ground that admission of evidence of comments made by the defendant prior to enactment of the Espionage Act were not admissible because the comments were not criminal when made).

mitted the introduction of evidence of other crimes to establish the accused's guilty knowledge. This exception obviously overlapped with the intent exception. The prosecution could introduce evidence of prior crimes to establish the defendant's knowledge and therefore rebut the defense of inadvertence or mistake.[86] Moreover, some specific intent crimes by definition require proof of knowledge. Federal courts admitted evidence of other crimes offered to establish this element of the charged offense under both the specific intent and the knowledge exception.[87]

Federal courts admitted evidence of other crimes to establish knowledge where the commission of the other act would probably have resulted in some degree of warning or knowledge. Thus, in *United States v. McCarthy* the Second Circuit held that in a prosecution for known possession of stolen property, the government could show defendant's participation in the theft to establish the accused's guilty knowledge.[88] In many cases, federal courts admitted evidence of other crimes where there existed only an attenuated nexus between the accused's commission of another crime and his guilty knowledge. For instance, in *Wellman v. United States* the accused was charged with twenty counts of making and uttering forged bills of lading. An employee of the defendant's company had issued the forged bills and the defendant denied any knowledge of the fraud.[89] The trial court admitted evidence of other forged bills of lading not covered by the indictment. The Sixth Circuit affirmed, holding that the evidence could be offered to establish the accused's guilty knowledge.[90] The unarticulated premise underlying the court's opinion apparently is that repeated instances of conduct, even if originally innocent, will produce the requisite state of knowledge. However, the possibility that a person could be associated with a criminal act several times without becoming aware of its true nature severely limits the probative value of such evidence.[91] On occasion, federal courts held that guilty knowledge could be inferred from commission of a subsequent crime. The issue arose as early as *Sapier v. United States*, decided by the Second Circuit in 1909.[92] The defendant ran a junk shop near the Brooklyn Navy Yard. On August 3, 1908, the accused bought a stolen brass casting from a yard worker. On the following day, the accused

86. United States v. Klein, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965).
87. *Id.*
88. 472 F.2d 300 (2d Cir. 1972).
89. 129 F. 925 (6th Cir. 1924).
90. *Id.* at 930.
91. *See generally* C. WRIGHT & K. GRAHAM, JR., *supra* note 10, § 5245.
92. 174 F.2d 219 (2d Cir. 1909).

bought other stolen property from a third party. The defendant was indicted for the earlier purchase. The Second Circuit held that the prosecution could offer evidence of the subsequent transaction to establish the accused's knowledge that the property was stolen.[93] Such decisions are difficult to justify. Arguably, it is unlikely that a person would be the innocent victim of several different people selling stolen property. However, such a justification approaches the admission of evidence to establish the accused's character. The federal courts often employed this exception in cases involving possession of stolen property,[94] forgery,[95] and narcotics violations.[96]

D. *Common Plan, Design or Scheme*

Courts originally admitted evidence of other crimes under this exception to establish the nature and extent of a criminal conspiracy.[97] It also was employed to establish an individual defendant's planning, preparation or scheme to commit a crime by proof of intermediate acts, incidentally criminal in nature, that were steps in the furtherance of the criminal acts alleged in the indictment.[98] In *Molineux* the court acknowledged this exception, but noted "some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a purpose."[99]

In the first three quarters of the twentieth century, federal courts often used this exception to admit evidence of other crimes in conspiracy cases.[100] The overt acts in furtherance of a conspiratorial plan or design provided proof of the nature and extent of the criminal pact, and thus they were relevant to some issue other than the propensity of

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93. *Id.* at 221.

94. Corey v. United States, 305 F.2d 232 (9th Cir. 1962); United States v. Antrobus, 191 F.2d 969 (3d Cir.), *cert. denied*, 343 U.S. 902 (1951); United States v. Brand, 79 F.2d 605 (2d Cir. 1935).

95. United States v. Hatcher, 423 F.2d 1086 (5th Cir. 1970); Bell v. United States, 100 F.2d 474 (5th Cir. 1938).

96. Hernandez v. United States, 370 F.2d 171 (9th Cir. 1966); Klepper v. United States, 331 F.2d 694 (9th Cir. 1964); Teasley v. United States, 292 F.2d 460 (9th Cir. 1961); United States v. Prince, 264 F.2d 850 (3d Cir. 1959); United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958); Stein v. United States, 166 F.2d 851 (9th Cir. 1948).

97. *See* Reed, *supra* note 1, at 733-34.

98. *Id.*

99. 168 N.Y. 264, 305, 61 N.E. 286, 299 (1901).

100. *See, e.g.*, United States v. Stadter, 336 F.2d 326 (2d Cir. 1964) (conspiracy to distribute heroin); United States v. Rubenstein, 151 F.2d 915 (2d Cir.), *cert. denied*, 326 U.S. 766 (1945) (conspiracy to import aliens under false pretenses); Devore v. United States, 103 F.2d 584 (8th Cir.), *cert. denied*, 308 U.S. 571 (1938) (conspiracy to commit election fraud); Harvey v. United States, 23 F.2d 561 (2d Cir. 1928) (conspiracy to bribe public officials).

the accused to engage in criminal activity. *United States v. Carol* is a representative conspiracy case.[101] In *Carol* the defendants were prosecuted for conspiracy to rob a mail truck.[102] The trial court admitted evidence of prior criminal activity. This evidence included a robbery carried out to determine the participants' ability to rob the mail truck.[103] The Second Circuit affirmed, holding that the evidence was properly admitted to prove the conspiracy and the planning of the substantive offenses.[104] Most of the circuits followed a similar path toward inclusion of overt acts of conspirators not listed in the indictment. As *Carol* demonstrates, the federal courts encountered no theoretical difficulties with dissimilar criminal activities perpetrated by conspirators, so long as the government established a logical relationship between the other defendants and the conspiracy.

The federal courts did not limit this exception to conspiracy cases, admitting evidence of other crimes to establish a single defendant's or multiple defendants' plan, design or scheme. In *Leonard v. United States* the defendant obtained United States Treasury checks payable to others and persuaded a second party to forge the payees' endorsement on the back of each of the checks.[105] The defendant then convinced a third party to obtain false credentials, forge the secondary endorsee's name and cash the checks. The defendant was indicted only for the latter forgery, but the trial court admitted evidence of the earlier forgery to establish the defendant's scheme or design.[106] In cases such as *Leonard*, plan, scheme or design were not ultimate issues. Arguably, the evidence of the defendant's scheme constituted an intermediate step in a chain of inference intended to establish the accused's intent to commit the charged offense.[107] However, as *Leonard* demonstrates, federal courts often failed to note the terminal point of proof.

E. *Identity*

In *Molineux* the court recognized that in exceptional cases evidence of other crimes could be offered to establish the identity of the accused

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101. 510 F.2d 507 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976).
102. *Id.* at 509.
103. *Id.* at 507.
104. *Id.* at 509.
105. 325 F.2d 911 (9th Cir. 1963).
106. *Id.* at 913.
107. Dean McCormick asserts that evidence of plan, scheme or conspiracy is only relevant to prove the corpus delicti, identity or intent. C. MCCORMICK, EVIDENCE § 190 (1972). *Cf.* C. WRIGHT & K. GRAHAM, JR., *supra* note 10, § 5244 (with possible exceptions of prosecutions for conspiracy, plan or design not element of the offense). Arguably, in *Leonard*, intent was only a formal issue.

but warned that such evidence must be subject to the most rigid scrutiny to avoid unfair prejudice.[108] The *Molineux* court noted that evidence of other crimes could be admitted under this exception when the evidence constituted direct, as opposed to circumstantial, proof of the identity of the perpetrator of the charged offense.[109] Thus, the prosecution could show that the defendant, accused of burglary, used tools acquired during the course of a prior burglary to commit the charged offense.[110] The *Molineux* court also discussed the admissibility of other crime evidence which provided circumstantial proof of identity. The court held that evidence that the accused had committed another offense employing such an identical method as to indicate that the charged crime was the accused's handiwork could be admitted under this exception.[111] The court stated, however, that such evidence could be admitted only where it is conclusively shown that the accused committed the former crime and that no other person could have committed the charged crime.[112]

Where the identity of the accused was at issue, federal courts admitted evidence of other crimes under both branches of the identity exception. In a number of federal cases, courts admitted evidence of an object linking the accused with a prior crime and the charged crime. In *United States v. Marlow* the defendant was accused of obstruction of correspondence.[113] The prosecution alleged that the defendant had failed to return a credit card addressed to the former owner of the defendant's house. The trial court permitted testimony indicating that the accused had used the credit card to purchase gas. Although the testimony tended to prove the crime of forgery, the Fifth Circuit affirmed.[114] The court noted that the testimony related directly to the use of the credit card by the defendant and proved that he was the person responsible for the violation alleged in the indictment.[115]

Federal courts also admitted evidence of other crimes under the identity exception where eyewitnesses to several offenses identified the accused as the perpetrator of each. Where the offenses were tried separately, some federal courts held that a witness's references to particular details of the offenses not on trial could lend credence to

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108. 168 N.Y. at 313-14, 61 N.E. at 302.
109. *Id.* at 313-15, 61 N.E. at 302-03.
110. *Id.*, 61 N.E. at 302-03.
111. *Id.* at 316, 61 N.E. at 303.
112. *Id.*, 61 N.E. at 303.
113. 423 F.2d 1064 (5th Cir. 1970).
114. *Id.* at 1066.
115. *Id.* at 1067.

identification of the accused as the perpetrator of the charged offense. Thus, in *Robinson v. United States* the D.C. Circuit noted that a police officer who witnessed four sales of narcotics by the accused could refer to details surrounding each of the transactions in separate trials for each of the offenses.[116] The court stated that where the identity of the seller loomed as the burning issue, testimony identifying the accused as the person who sold the narcotics could be admitted even though the jury was informed of crimes not charged in the indictment.[117] The court stated that the reliability of an eyewitness identification is apt to increase as the opportunities for observation of the subject increase and as the reasons for close scrutiny and accurate recollection become more acute.[118]

The admission of mug shot photographs taken of the defendant constituted one of the most alarming and fascinating expansions of this branch of the identity exception. The cases involving this issue were essentially the same. The government's case for identity of the accused depended upon eyewitness identification. The eyewitness faltered either under cross-examination or under direct examination. The government then called a law enforcement officer to testify that the witness earlier had identified the defendant's picture from a display of mug shots. In such cases, the government argued that necessity of proof of identification outweighed any incidental prejudice to the defendant. In *Dirring v. United States* the First Circuit held that it was not error to admit such evidence, even though the evidence contained visible markings identifying the nature of the photographs.[119] In *United States v. Reid* the Seventh Circuit held that a government witness's allusion to a mug shot of the defendant taken in prison prior to his arrest for the charged offense vitiated his right to be presumed innocent until proven guilty and substantially destroyed his right not to take the stand in his own defense.[120] However, the court specifically reserved the question of the admissibility of such photographs or a prior extrajudicial identification through them.[121] In *United States v. Harman* the Fourth Circuit held that the introduction

116. 459 F.2d 847 (D.C. Cir. 1972). The defendant was tried for the four transactions simultaneously. On appeal, the defendant alleged that the trial court's refusal to sever the trial constituted reversible error. The D.C. Circuit held that severance was not required, noting that the evidence of the other transactions would have been admissible in separate trials. *Id.* at 854-56.

117. *Id.* at 857.

118. *Id.* at 858.

119. 328 F.2d 51 (1st Cir.), *cert denied*, 377 U.S. 1003 (1964).

120. 376 F.2d 226, 228 (7th Cir. 1967).

121. *Id.* at 229.

into evidence of a photograph for purposes of identification which on its face indicated it was a mug shot constituted reversible error.[122]

In *Barnes v. United States* the D.C. Circuit addressed the propriety of a submission to the jury of mug shots where the prison numbers on the bottom of pictures were covered with tape and the backs of the photographs were covered with paper.[123] The court held that the submission of such photographs to the jury constituted reversible error, noting that the front and profile shots revealed the nature of the photographs and thus the defendant's criminal record.[124] In *United States v. Harrington* the Second Circuit reviewed the earlier decisions and developed a three-part test for the admission of mug shots.[125] The defendant had been indicted for possession of stolen property. The government alleged that the defendant, along with two others, participated in the robbery of a bank truck. At trial the prosecution sought to have a government witness identify the defendants, but the witness was unable to do so. The government then attempted to establish this identification by having the owner duplicate in court a previous out-of-court identification he had made from mug shot photographs. The photographs were submitted to the jury. They were masked, but in a grossly incompetent fashion. Reversing, the Second Circuit established guidelines for the admission of mug shots:

> 1. The government must have a demonstrable need to introduce the photographs; and
> 2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
> 3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.[126]

Applying this three-part test, the court noted that the government had a real need to introduce the photographs.[127] Although two other witnesses had identified the defendant, the expected identification from the defendant was an integral element in the scheme of the government's proof.[128] However, the court found that the mug shots had been masked poorly and clearly disclosed their nature, leading to the inference that the defendant had a criminal past. The court

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122. 349 F.2d 316, 320 (4th Cir. 1965).
123. 365 F.2d 509 (D.C. Cir. 1966).
124. *Id.* at 510-13.
125. 490 F.2d 487 (2d Cir. 1973).
126. *Id.* at 494.
127. *Id.*
128. *Id.*

suggested that the preferable course of action when mug shots are introduced is to produce photographic duplicates which would lack any incriminating indicia.[129] Finally, the court found that the manner in which the photographs were introduced focused the jury's attention on the mug shots to such an extent that prejudice may have resulted.[130] The court noted that the whole debate over the propriety of the photographs occurred in full view of the jury. Moreover, the trial judge had found the government's attempt to alter the photographs unacceptable; and with the jury looking on, he ordered the court clerk to mask the pictures. The Second Circuit concluded that the jury's attention was riveted upon the mug shots.[131]

Where the identity of the accused was at issue, federal courts also admitted evidence of other crimes which offered circumstantial evidence that the accused committed the charged offense. The courts permitted the prosecution to prove other like crimes by the accused so nearly identical in method as to earmark the charged offense as the handiwork of the accused. Courts admitting evidence under this exception examined both the uniqueness of the modus operandi and the degree of similarity between the charged crime and uncharged offense. Although courts did not require absolute parallelism between the charged crime and the other crimes they did require that the two crimes possess a common feature of features that made it very likely that the unknown perpetrator of the charged crime and the known perpetrator of the uncharged crime were the same person. In *Drew v. United States*, the D.C. Circuit concluded that a robbery of a chain store committed by a black armed male wearing sunglasses and an attempted robbery of a store in the same chain committed by an apparently unarmed black male also wearing sunglasses were not sufficiently similar to qualify for admissibility under this exception.[132] By comparison, in *Parker v. United States* the Ninth Circuit held evidence of a crime not charged in the indictment admissible under the modus operandi exception.[133] In each of the crimes, the robber posed as a hitchhiker, kidnapped the driver who offered him a ride, forced the hostage at gunpoint to drive to and accompany him into a bank, and directed the hostage to fill a pillow case provided by the robber with money from the tellers' cages.[134]

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129. *Id.*
130. *Id.*
131. *Id.* at 495-96.
132. 331 F.2d 85 (D.C. Cir. 1964).
133. 400 F.2d 248, 252 (9th Cir. 1968).
134. *Id.* at 251-52.

United States v. Woods, decided in 1973, is one of the most famous modus operandi cases decided in the United States prior to the enactment of the Federal Rules of Evidence.[135] The defendant was indicted for the murder of her eight-month old foster child, Paul, who died of cyanosis. Paul, an otherwise normal child, suddenly developed respiratory difficulties after coming to live with the defendant. On two occasions he suffered cyanosis episodes, but was successfully revived by mouth-to-mouth resuscitation. He died after experiencing a third mysterious seizure. On all three occasions, Paul was alone with his foster mother. The government's case against the accused was entirely circumstantial. At trial, a pathologist testified that there was a 75% chance that Paul's death had resulted from smothering. The court admitted evidence that eight other children had experienced similar respiratory problems while under the defendant's care. Six of those children had died. The jury convicted the accused. She appealed, arguing that the court erred by admitting evidence that other children under her supervision had suffered similar respiratory problems.

Affirming the defendant's conviction, the Fourth Circuit noted that evidence of other crimes is not admissible to establish the bad character of the accused.[136] Reviewing the traditional exceptions to the rule excluding evidence of other crimes, the court rejected the prosecution's contention that the deaths of the seven children evidenced the accused's plan or design.[137] It stated that the seven deaths might be relevant to disprove a claim of accidental death, but noted that the accused did not raise the defense of accident.[138] The court finally determined that the "handiwork or modus operandi exception is the one which appears most applicable."[139] The defense argued that cyanosis among infants is too common to constitute an unusual and distinctive device unerringly pointing to guilt on the defendant's part. Although the Fourth Circuit acknowledged the force of the defendant's argument, it noted that "the 'commonness' of the condition is outweighed by its frequency under circumstances where only defendant could have been the precipitating factor."[140] After concluding that the evidence could be admitted under a traditional exception, the court created a new "exception" for the admission of evidence of other

135. 484 F.2d 127 (4th Cir. 1973).
136. *Id.* at 133.
137. *Id.* at 134.
138. *Id.*
139. *Id.*
140. *Id.*

crimes. Arguing that evidence of prior acts had been admitted to establish the corpus delicti of arson, the court held that the evidence could have been admitted to establish the corpus delicti of murder.[141] The Fourth Circuit's conclusion that the evidence of the other crimes was admissible under the modus operandi exception clearly appears questionable. In earlier cases, courts admitted evidence of the accused's modus operandi to establish the identity of the perpetrator of the crime. In *Woods*, however, the identity of the perpetrator was not at issue. Rather, the critical issue in the case was the existence of a corpus delicti.

F. *Inseparable Crimes*

Federal courts employed this exception in cases where an adequate description of the events surrounding the charged crime necessarily resulted in revelation of conduct constituting a separate, indictable offense. Discussing the plan or scheme exception, the *Molineux* court briefly eluded to this exception, noting that other criminal actions could be proved at trial "under circumstances which render it impossible to prove one without proving all."[142] Arguably, such evidence does not constitute evidence of another crime and therefore falls outside the scope of the rule.[143] However, most federal courts characterized such evidence as other crime evidence and referred to the admission of such evidence as an exception to the general rule.[144]

Capone v. United States is a representative case.[145] The defendant, Al Capone, was charged with concealing income and failing to file tax returns for the years 1922 through 1925. Capone claimed he had no income during those years. At trial, government witnesses testified that Capone received income from the sale of bootleg beer during those years. The Seventh Circuit affirmed Capone's conviction, holding that the government was permitted to establish Capone's source of income for the years questioned, even though it amounted to proof of numerous violations of the Volstead Act.[146]

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141. *Id.* at 135-36.

142. 168 N.Y. at 305, 61 N.E. at 299.

143. *See, e.g.*, Ignacio v. People, 413 F.2d 513 (9th Cir. 1969); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[10]; C. WRIGHT & K. GRAHAM, JR., *supra* note 10, § 5239.

144. *See, e.g.*, United States v. Miller, 508 F.2d 444 (7th Cir. 1974); Ignatio v. People, 413 F.2d 513 (9th Cir. 1969); Fairbanks v. United States, 226 F.2d 251 (D.C. Cir. 1955).

145. 51 F.2d 609 (7th Cir.), *cert. denied*, 284 U.S. 669 (1931). The inseparable crimes exception was often used in income tax cases. *See, e.g.*, Bonatar v. United States, 209 F.2d 734 (9th Cir.), *cert. denied*, 347 U.S. 974 (1954).

146. 51 F.2d at 619.

G. *Impeachment*

Before the advent of the Federal Rules of Evidence, federal courts permitted the prosecution to impeach a witness's credibility with evidence incidentally revealing the defendant's prior misconduct. There were two instances when such evidence was permissible. In the first case, the defendant testified in his own behalf and the prosecution cross-examined the defendant regarding his prior acts and conduct. In the second situation, the defendant called character witnesses, and the government was permitted to cross-examine these witnesses regarding their familiarity with the background of the defendant. Federal courts permitted the trial judge to admit such evidence, upon a cautionary instruction to the jury that such evidence could only be considered in its evaluation of the witness's credibility.[147]

The federal courts strictly forbade the use of extrinsic evidence of the defendant's prior misconduct not resulting in a conviction.[148] A minority of circuits held that the prosecution could never cross-examine a defendant about prior misconduct.[149] The majority of circuits, however, permitted the government to cross-examine the defendant on his or her prior misconduct but held that the government was bound by the defendant's answer.[150] According to Professor Wright:

> [S]upport [could] be found in federal cases for each of the following positions: a witness may be impeached by inquiry about any conviction of crime, whether felony or misdemeanor; felonies may be shown but misdemeanors may not; only crimes involving moral turpitude may be shown; any felony may be shown but misdemeanors only if they involve moral turpitude; felonies and misdemeanors amounting to *crimen falsi* or that only crimes resting on dishonest conduct may be shown.[151]

Professor Wright also notes that a federal judge could exclude prior crime evidence where the prejudicial impact of the evidence outweighed its probative value.[152] In *Luck v. United States* the D.C. Circuit noted that a trial court is not required to allow impeachment by prior conviction every time the defendant takes the stand and held

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147. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 472 (1948).

148. *E.g.*, United States v. Davenport, 449 F.2d 696, 700 (5th Cir. 1971); United States v. Sager, 49 F.2d 725, 730 (2d Cir. 1931).

149. *See, e.g.*, United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968); United States v. Provoo, 215 F.2d 531 (2d Cir. 1954).

150. *E.g.*, Simon v. United States, 123 F.2d 80 (4th Cir.), *cert. denied*, 314 U.S. 694 (1941). *See generally* C. McCORMICK, *supra* note 107, § 42; 3 J. WIGMORE, EVIDENCE § 983 (1940).

151. C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 416 (1969).

152. *Id.*

that a trial court could disallow such impeachment where its prejudicial effect outweighed its probative value.[153] The court outlined a number of factors that might be relevant, including: the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and the extent to which it is more important to the search for truth for the jury to hear the defendant's testimony than to know of a prior conviction.[154] Two years later in *Gordon v. United States* the D.C. Circuit again discussed the appropriateness of such impeachment.[155] In an opinion written by then Judge Warren Burger, the court held that a trial court addressing the admissibility of evidence of convictions offered to impeach the defendant should consider the nature of the crime, the time of conviction, the witness's subsequent history, the similarity between the past crime and the charged crime, the importance of the defendant's testimony and centrality of the credibility issue.[156] The *Luck* and *Gordon* decisions had considerable impact on the other circuits in the years preceding the adoption of the federal rules.[157]

Federal courts also permitted the prosecution to inquire into a character witness's familiarity with reports and rumors of the accused's misconduct. In most circuits, the prosecutor could pursue such an inquiry as long as he had a good faith belief that the defendant committed the misconduct.[158] In *Michelson v. United States* the United States Supreme Court approved such cross-examination, noting that the prosecution must be allowed to test the qualifications of the witness to testify concerning the community opinion: "If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation."[159] Recognizing the prejudicial effect of such cross-examination, a few federal courts restricted such questioning. In *United States v. Lewis* the court observed that "merely to ask a character witness about his knowledge of a report is to get the facts reported before the jury; once there, notwithstanding the judge's limiting instructions, they may influence

153. 348 F.2d 763 (D.C. Cir. 1965).

154. *Id.* at 769.

155. 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1829 (1968).

156. *Id.* at 940. For an excellent discussion of *Luck* and *Gordon*, see J. WEINSTEIN & M. BERGER, *supra* note 143, ¶ 609[03].

157. *See* J. WEINSTEIN & M. BERGER, *supra* note 143, ¶ 609[03].

158. *E.g.*, Zaragoza-Almeida v. United States, 427 F.2d 1148 (9th Cir. 1970). *Cf.* United States v. West, 460 F.2d 374, 376 (5th Cir. 1972) (better practice is in camera showing of prosecutor's basis). *See* C. WRIGHT & K. GRAHAM, JR., *supra* note 10, § 5268.

159. 335 U.S. 469, 483 (1948).

the jury's determination on the issue of guilt."[160] The court then stated:

> The matters the witness is to be asked about should first be established to the trial judge's satisfaction as actual events. The questions put to the witness should be carefully and narrowly framed. The questions, of course, must be restricted to events affecting the character trait or traits the accused has placed in issue; their propriety is to be determined "by comparison with the reputation asserted." The process demands close supervision; "[w]ide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." And obedient to the principle governing any use of evidence indicative of other criminality, the inquiry should be permitted only when "the probative value of the information which might be elicited outweighs the prejudice to the defendant.[161]

Nonetheless, the *Michelson* decision permitted the government to cross-examine defense character witnesses regarding specific instances of the defendant's past life, including matters that could not be used to cross-examine the defendant if the defendant testified. The *Luck* and *Gordon* decisions were normally not applied to this type of other crime evidence.

VI. Limitations on Other Crime Evidence

Early federal cases suggested that evidence of other crimes could be admitted as long as a relevant recognized exception existed.[162] In *United States v. Fawcett* the defendants were accused of selling forty counterfeit ten-dollar bills.[163] The prosecution offered evidence that the defendants sold these bills for one hundred fifty dollars. The trial court also permitted a government witness to testify that the defendants purchased merchandise from him with a counterfeit bill. Although the defendants were not indicted for this transaction, the Third Circuit upheld the admissibility of this evidence under the intent and knowledge exceptions.[164] Defense counsel argued that if the jury believed that defendants sold forty ten-dollar bills for less than two hundred dollars, it would find that the defendants had the

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160. 482 F.2d 632, 638 (D.C. Cir. 1973).

161. *Id.* at 639.

162. *See, e.g.*, Troutman v. United States, 100 F.2d 628, 633 (10th Cir. 1939). *See generally* C. McCormick, *supra* note 107, § 190 ("[m]ost of the opinions . . . proceed on the assumption that the decision turns solely upon the ascertainment and application of a rule. If the situation fits one of the classes wherein the evidence has been recognized as having independent relevance, then the evidence is received.").

163. 115 F.2d 764 (3d Cir. 1940).

164. *Id.* at 768.

required mental state. According to defense counsel, the evidence of the other crimes should not have been admitted because "there was no necessity for showing the other acts." The Third Circuit rejected these arguments, noting that merely because the prosecution offered some evidence of knowledge did not preclude it from offering other crime evidence to establish the same issue.[165] The Third Circuit neither discussed the sufficiency of the prosecution's proof that the defendants committed the other crime nor expressly balanced the probative value and prejudicial effect of the other crime evidence. In some federal cases prior to the enactment of the federal rules, courts imposed restrictions on the admissibility of other crime evidence by requiring the prosecution to establish that the defendant committed the other crime, by demanding that the evidence be relevant to a contested issue, and by expressly balancing the evidence's probative value and its prejudicial effect.[166]

In *Hurst v. United States* the Fifth Circuit in dicta suggested that other crime evidence could not be admitted to establish intent unless the defendant had been convicted of the other crime.[167] The dicta in *Hurst* had little germinal force even within the Fifth Circuit.[168] Federal courts did not require that the prosecution prove beyond a reasonable doubt that the defendant committed the other crime, demanding only clear and convincing evidence of the other crime.[169]

Federal courts also required that the other crime evidence be relevant to a contested issue.[170] Most courts agreed that the defendant could prevent the admission of the other crime evidence by stipulating to the relevant issue[171] and rejected the argument that a plea of not guilty sufficiently raises an issue to justify the other crime evi-

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165. *Id.*

166. *See, e.g.*, United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); United States v. Cummings, 507 F.2d 324 (8th Cir. 1974); United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974).

167. 337 F.2d 678 (5th Cir. 1964). In *Hurst*, the court held that the government could not introduce evidence of indictments dismissed by prosecuting authorities after defense counsel erroneously cross-examined witness regarding his knowledge of defendant's criminal record. *Id.* at 680-81.

168. *See, e.g.*, United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974).

169. *See, e.g.*, United States v. Clemmons, 503 F.2d 486 (8th Cir. 1974); United States v. Miller, 500 F.2d 751 (5th Cir. 1974). *Cf.* Manning v. Rose, 507 F.2d 889 (6th Cir. 1974) (state court's admission of evidence of other crime where prosecution did not prove that defendant committed other crime does not violate due process).

170. *See, e.g.*, United States v. Conley, 523 F.2d 650 (8th Cir. 1975); *cert. denied*, 424 U.S. 920 (1976); United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969).

171. *See, e.g.*, United States v. Buckhanon, 505 F.2d 1079, 1083 n.1 (8th Cir. 1974).

dence.[172] As noted above, federal courts, however, did not completely agree over when intent was more than a formal issue.[173]

Finally, federal courts expressly balanced the probative value and the prejudicial impact of the other crime evidence.[174] Numerous courts[175] adopted Dean McCormick's formulation of the rule:

> [T]he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.[176]

In *United States v. Goodwin* the Fifth Circuit reversed the defendant's conviction for conspiracy to import and importing marijuana.[177] The trial court had admitted evidence revealing defendant's apparent possession of marijuana nine months after his alleged commission of the charged crime. The trial court primarily had relied on the intent exception. The Fifth Circuit recognized that intent was an element of the charged offense and acknowledged the existence of an intent exception to the general exclusionary rule.[178] The court expressly declined the government's invitation to sanction the admissibility of the evidence merely because it fit one of the recognized exceptions.[179] After adopting Dean McCormick's balancing test, the court noted that the issue of intent was never seriously disputed at trial and that the only contested issue was the identity of the accused.[180] The Fifth Circuit then held that the evidence should not have been admitted because of the absence of need for the other crime evidence and the danger of prejudice to the accused.[181] A few federal courts held that evidence of other crimes should be excluded unless the

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172. *See, e.g.*, United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); United States v. Dizenzo, 500 F.2d 263 (4th Cir. 1974).

173. *See supra* text accompanying notes 49-55.

174. *See, e.g.*, United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969); United States v. Johnson, 382 F.2d 280 (2d Cir. 1967).

175. *See, e.g.*, United States v. Calvert, 523 F.2d 895 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); United States v. Park, 499 F.2d 839 (4th Cir. 1974); United States v. Brettholz, 485 F.2d 483 (2d Cir. 1973).

176. C. McCormick, *supra* note 107, § 190.

177. 492 F.2d 1141 (5th Cir. 1974).

178. *Id.* at 1149-50.

179. *Id.* at 1150.

180. *Id.* at 1150-52.

181. *Id.* at 1152.

evidence was necessary to the prosecution's case.[182] In *United States v. Bussey* the defendant was accused of the robbery of a sewing machine company and he claimed that he was at home at the time of the robbery.[183] The trial court permitted a government witness to testify that he saw the defendant rob another company shortly before the commission of the charged crime. The defendant was convicted but the D.C. Circuit reversed.[184] The court stated that the prejudice was "unnecessary" because the prosecution had a strong case without the evidence of the other crime.[185] The court further noted that the government witness's testimony could have been limited to avoid prejudice.[186] The court then suggested that the prosecutor should have requested that the trial judge rule on whether the other crime evidence was necessary despite its inflammatory content.[187] According to the court, evidence of other crimes is not necessary "when the prosecution's other evidence is overwhelming. On the other hand, the prosecution should not be allowed to introduce such evidence automatically, merely on the claim that the case is a 'close one.' "[188]

VII. Conclusion

Prior to the adoption of the federal rules, the federal courts were free to develop their own standards for the admissibility of other crime evidence. After the *Molineux* decision, most federal courts adopted the general exclusionary rule barring the admission of other crime evidence unless relevant to proof of motive; intent; guilty knowledge; design or plan; identity of the accused or inseparable crimes. The federal courts expanded the exceptions to the rule, especially the identity and inseparable crime exceptions. At the same time, the federal courts also imposed restrictions on the admissibility of other crime evidence, by requiring the prosecution to establish that the defendant committed the other crime, by demanding that the evidence be relevant to a contested issue, and by expressly balancing the evidence's probative with prejudicial impact.

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182. *E.g.*, United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974); United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974); United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965).

183. 432 F.2d 1330 (D.C. Cir. 1970).

184. *Id.* at 1336.

185. *Id.* at 1335.

186. *Id.*

187. *Id.*

188. *Id.* at 1335 n.21.