Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials

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TRIAL BY PROPENSITY: ADMISSION OF OTHER CRIMINAL ACTS EVIDENCED IN FEDERAL CRIMINAL TRIALS

Thomas J. Reed*

Preface

Since the close of the eighteenth century, the propensity rule has been one of the fundamental restraints on prosecutorial proof in American criminal trials. The propensity rule excludes evidence offered to establish the accused's disposition to commit crime. The rule had its roots in the accusative, as opposed to inquisitorial, nature of the Anglo-American criminal process. Under an accusative system, the state must establish that the accused did some act forbidden by law. In contrast, an inquisitorial process assumes the accused committed the crime and imposes upon him the burden of establishing his innocence. The courts admit evidence of the accused's prior criminal activity which the accused must also overcome.

The American propensity rule has two main branches. The first prohibits reputational evidence of the accused's character and is not a primary part of this three-part essay.\(^1\) The second concerns the admissibility of evidence of other crimes not stated in the indictment or information which initiated the criminal process.\(^2\) The traditional formulation of the rule governing the admissibility of other crimes was exclusionary: it forbade introduction of evidence of other criminal activity, then listed a number of specific exceptions to the rule. These

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1. At common law evidence of reputation could be offered in criminal trials for several purposes. Courts uniformly admitted reputation evidence attacking a witness' character for veracity. After a witness' veracity had been challenged, courts also admitted reputation evidence supporting the witness' character for veracity. C. McCormick, Handbook on the Law of Evidence § 44 (2d ed. 1972); 3 J. Weinstein & M. Berger, Weinstein's Evidence §§ 608[04], 608[08] (1981); 3A J. Wigmore, Evidence §§ 922-923, 927-930 (Chadbourn rev. ed. 1970). Courts permitted the accused to introduce reputation evidence of his good moral character and allowed the prosecution to rebut such evidence with reputation evidence of the accused's bad moral character. C. McCormick, supra, § 191; 2 J. Weinstein & M. Berger, supra, ¶ 404[05]; 1 J. Wigmore, supra, §§ 52, 53, 55-58, 193. In rape and sexual assault cases, some courts admitted evidence of the victim-witness' reputation for unchastity and then permitted the prosecution to establish the victim-witness' reputation for chastity. 2 J. Weinstein & M. Berger, supra, ¶ 412[01]; 3A J. Wigmore, supra, §§ 924, 924(a). In homicide cases, courts permitted the accused to introduce evidence of the victim's reputation for violence to support his claim of self defense which the prosecution could then rebut with reputation evidence of the accused's peaceful nature. C. McCormick, supra, § 193; 2 J. Weinstein & M. Berger, supra, ¶ 404[06]; 1 J. Wigmore, supra, § 63.

2. C. McCormick, supra note 1, §§ 188, 190; 2 J. Weinstein & M. Berger, supra note 1, ¶¶ 404[02], 404[04]; 1 & 2 J. Wigmore, supra, §§ 57, 305.
exceptions, which were well known and understood by attorneys and judges in federal practice prior to adoption of the Federal Rules of Evidence, permitted the introduction of evidence of other criminal activity to establish a consequential fact other than the propensity of the accused. The federal rules have adopted a different approach, providing that evidence is admissible if relevant to any issue other than the propensity of the accused. The federal rules’ expansion of the scope of prosecutorial use of evidence of other crimes and the federal courts’ willingness to admit such evidence is subtly transforming the American criminal justice system from an accusative to an inquisitorial process.

This Article discusses the problems associated with the changing standards for admissibility in criminal trials of evidence of other criminal activity. In part I, the historical foundation for the rule is explored from early English decisions through the landmark American decision of People v. Molineux, concluding with a discussion of Wigmore’s treatment of this branch of evidence. Part II traces the development of the federal common-law rule from its inception after Molineux up to adoption of the Federal Rules of Evidence. Part III surveys the impact of the federal rules on the federal courts, establishing the courts’ willingness to admit evidence of other criminal activity and noting the slow drift toward an inquisitorial criminal trial process violative of the sixth amendment.

3. Prior to adoption of the federal rules, the prosecution in a federal criminal trial could offer evidence of other criminal conduct by the accused to establish motive, intent, guilty knowledge, the nature and extent of a continuing criminal operation, identity, interwoven crimes and a witness’ lack of veracity. See C. McCormick, supra note 1, §§ 43, 190; 2 J. Weinstein & M. Berger, supra note 1, ¶¶ 404[12], 608[06], 609[01]; 1, 2 & 3A J. Wigmore, supra note 1, §§ 215-218, 301, 306, 324, 926, 980-981.

4. Fed. R. Evid. 404 provides:

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

5. 168 N.Y. 264, 61 N.E. 286 (1901).
I. EXCLUSION OF EVIDENCE OF OTHER CRIMES

A. Origin of the English Criminal Trial Process

Prior to the fourteenth century, the usual modes of dispute resolution in England were wager of law, in which oaths were formally recited, and battle, in which the accused hired a professional champion to fight a man of arms chosen by the crown. To be sure, the Normans had introduced the inquest, a process which was regularly used by the county coroner to establish the cause of death in homicides. The inquest also was available in major criminal trials brought before the justices in Eyre. The inquest began to replace wager of law and battle as the preferred mode of dispute resolution in the years following the Black Death, and by 1350 it had become the preferred mode in two of the three divisions of the Eyre Court.

Originally, the knights of the shire, who sat as the inquest jury, were chosen because of their knowledge of the salient facts of the case. In some civil cases, however, charters, rolls and deeds were brought to the inquest by the party and submitted to the jury. In both civil and criminal inquests, attorneys for both sides commonly made lengthy recitals to the jury of the facts of the case. By Fortesque's time, witnesses informed the jury of the facts surrounding the case.

The jury trial of 1450 resembled in many respects the trial process familiar today. The court opened by selection of the jury from the knights of the shire, subject to the right of the defendant to challenge any juror for cause or otherwise. The attorneys for the crown and for

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7. The inquest was available as a mode of dispute resolution in both civil and criminal cases from early Norman days. It was rarely used outside the trial of writs of right in civil litigation until the age of Henry II. There are no precise historical landmarks for the use of the inquest in criminal trials, although criminal appeals and oyer & terminer records from the fourteenth century reflect its widespread use at that time. J. THAYER, supra, at 47-54.
8. The inquest in criminal cases evolved from the coroner's inquest which consisted of a body of from twelve to thirty-two knights of the shire called to determine the cause of death in homicides. If the inquest found that a crime had been committed, the “panel” for the eventual trial was drawn from the inquest itself. 9 SELECT CORONERS' ROLLS xxiv-xxxii (Selden Soc’y ed. 1896). The trial was conducted before royal justices who rode circuit throughout England dispensing justice at the Eyre Court. The Eyre sat in three divisions: the assizes, which handled civil matters in which the royal justices handed out fines and amercements; criminal appeals, which sat on cases heard in manorial and other inferior courts for which a writ of appeal lay; and oyer & terminer and general gaol delivery, the court of original criminal jurisdiction. The inquest was employed by all three divisions of the Eyre as a dispute resolution process, but in oyer & terminer and general gaol delivery, it became the preferred mode by 1350. See 1 J. STEPHEN, History of the Criminal Law of England 97-99 (1883); J. THAYER, supra note 6, at 90-93.
9. J. THAYER, supra note 6, at 98-104.
10. Id. at 104-08.
The English courts did permit evidence of other crimes to be admitted in certain cases. In *Rex v. Horne Tooke* it was held that any overt act which furthered the alleged conspiracy could be admitted to establish the accused’s intent.\(^{21}\) In prosecutions for counterfeiting, the courts admitted evidence indicating the accused had previously passed counterfeit money in order to prove the absence of mistake.\(^{22}\) Similarly, when prosecuting one accused of forgery, the crown’s counsel could offer evidence indicating that on prior occasions the accused had passed forged notes in order to establish the defendant’s knowledge and intent.\(^{23}\) Moreover, in libel trials excerpts from the allegedly libelous document which were not mentioned in the indictment were admitted to establish the author’s identity, even if the excerpts were independently libelous.\(^{24}\) In a prosecution for writing threatening letters to extort money, the prosecution could introduce similar letters written by the defendant to establish the author’s identity.\(^{25}\) The crown’s counsel also could offer evidence that one accused of maintaining a disorderly house had kept a similar establishment at another location in order to show the continuing nature of the criminal operation.\(^{26}\) Finally, the crown’s counsel could cross-examine the defense’s character witnesses by probing the witness’ familiarity with the defendant’s prior criminal activity.\(^{27}\) A defendant was not competent to testify at this time, and thus there existed no analogue to the modern rule regarding the admissibility of a witness-defendant’s prior crime for impeachment pur-

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4 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 205-06 (London 1721). Citing Hawkins, Chitty similarly noted:

As we have seen that the evidence is to be confined to the points in issue, it is clear that the prosecutor can adduce no proof of the defendants’ general character, unless that is the very scope of the charge against him. But where general character is put in issue, facts relating to it may be admitted. . . . But evidence to character is more frequently called on the behalf of the defendant, and, in doubtful cases, will often influence the jury to an acquittal. And even where the defendant thus opens the discussion, the prosecutor can ask no questions as to particular facts, but must confine himself simply to general reputation and character.


21. 25 St. Tr. 1, 27, 455 (1794).
27. Rex v. Davidson, 31 St. Tr. 99 (1809); Rex v. O’Connor, 27 St. Tr. 31 (1798); Rex v. Hardy, 24 St. Tr. 199 (1794); Rex v. Turner, 6 St. Tr. 565 (1664).
poses.\(^{28}\) It should be noted that the courts in these early English cases stated neither a general rule of exclusion nor a rule of conditional admissibility. Rather, the courts limited their opinions to the narrow issues before them.

C. Jeremy Bentham and Evidence of Other Crimes

Jeremy Bentham’s *A Treatise on Judicial Evidence*, which appeared in 1796, provided a theoretical foundation for the exclusion of evidence of other crimes.\(^{29}\) According to Bentham’s theory of human behavior, an individual reacts to external excitations predictably. Thus, if one understands an individual’s motives, his actions can be readily predicted.\(^{30}\) Bentham sought to harmonize his psychological insight with the English common law. According to Bentham, “when a disposition of the accused person announces a high degree of strength in the selfish or anti-social motives, it tends to raise the probability of his guilt.”\(^{31}\) Bentham recognized, however, that disposition cannot be the subject of judicial proof: “To make disposition subject of a special inquiry would be to undertake under the name and occasion of one case a different one, and perhaps a multitude.”\(^{32}\) In Bentham’s estimation, the introduction of so many collateral issues would disrupt the trial and also would interfere with the accused’s presentation of his defense.\(^{33}\) In short Bentham recognized that human motivation should not be the subject of judicial proof.

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28. See Fed. R. Evid. 608(b) which provides:

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

See generally 3 J. Weinstein & M. Berger, supra note 1, ¶ 608[05].


30. Bentham considered disposition to be “the result of motives.” *Id.* at 176. He divided motives into external and internal, defining external motives as “every material object which excited the desire.” *Id.* at 174. Consequently, if the judicial process was capable of revealing the external motives which set men to criminal activity, it would be scientifically correct to conclude that an actor, when faced with an external motive which produced a desire to act criminally, would follow through and respond accordingly. Bentham, however, considered the judicial process too crude an instrument for such work. *Id.*

31. *Id.* at 176.

32. *Id.*

33. *Id.* at 177. Bentham noted:

On what ought the accused individual to be examined? On the facts which have been specified in the written accusation and on which he alone can be prepared to defend himself; but an inquiry into his reputation would be an inquiry into his whole life, and the source of a crowd of prejudices excited by assertions, not one of which can be regularly proved.
Jeremy Bentham did not, however, establish any definitive doctrinal synthesis regarding the admissibility of evidence of other criminal acts until publication of his *Rationale of Judicial Evidence* 1827. In that longer work he considered the issue of proof of disposition in detail. Although recognizing the probability that a person acts in conformity with his character, he noted the absence of any evidentiary safeguards to test the basis for an allegedly bad reputation. Discussing the admissibility of the accused's prior antisocial behavior, he noted the danger associated with the admission of such evidence:

If a punishable or otherwise disreputable act is to be charged upon a man, on this occasion as on others, the charge ought to be made good by a satisfactory mass evidence. On this as on any other occasion, he ought to be heard in his defense, with liberty to contest the charge, and produce exculpatory evidence of all sorts, as in other cases. Under the name of giving evidence of character, what then does the operation here in question amount to? It is trying one cause to the purpose of another cause.

Bentham formulated a sharply defined version of the propensity rule:

Evidence of bad character incriminating the defendant, ought not be admitted, unless and insofar as it results in evidence admissible on other grounds; or unless the fact of the offense being cleared, the question is between two persons suspected, which of them was the author? And even in these cases (that the quantity of vexation and delay may not be altogether boundless), power should be left to the judge to limit the quantity or quality of the evidence, the number and choice of the witnesses, in declared consideration of the apprehended magnitude of these respective inconveniences.

Bentham's publications, especially his earlier and less expansive treatise, clearly had a major impact on early American cases involving introduction of prior criminal activity.

II. The American Rule Excluding Evidence of Other Crimes

A. Exclusion of Evidence of Other Criminal Activity Prior to 1850

The colonial charters of independence indicate that by the late eighteenth century, the colonists wished to abolish criminal proceedings
reminiscent of the Star Chamber and incorporate the reforms instituted by the Treason Act. Article VIII of the *Virginia Declaration of Rights* specifically required pretrial notice to the accused of the offenses for which he would be tried. Similar guarantees appeared in the fundamental charters of six other colonies. In his *Essay on the Revolutionary History of Virginia*, Edmund Randolph argued that article VIII of the *Virginia Declaration of Rights* was drafted in response to the Star Chamber procedures.

Some of the provisions of the Treason Act of 1965 thus became matters of fundamental law of the separating colonies, and eventually appeared in the Bill of Rights to the Federal Constitution.

At least one colonial court addressed the admissibility of evidence of prior criminal acts. In *Rex v. Doaks*, in a prosecution for keeping a bawdy house, the court held inadmissible evidence of the accused's earlier lascivious acts. Shortly after the close of the eighteenth century, American courts began to address more frequently the admissibility of other crimes. In *State v. Van Houten*, decided in 1810, the accused argued that in a trial for counterfeiting the court could not admit evidence that he had earlier passed counterfeit money. Rejecting the accused's argument, the New Jersey court held that the evidence could be admitted to establish the accused's knowledge, but could not be admitted as circumstantial evidence of the defendant's conduct. In 1811 Connecticut's Supreme Court reached the same conclusion in *State v. Smith*.

1. The Form of the Rule

In *Smith* and *Van Houten* the courts, following the pattern of the earlier English decisions, had declined to adopt either a general rule of exclusion or a rule of conditional admissibility. In contrast, the court in *State v. Odell*, decided in 1816, suggested that evidence was admissible

40. DEL. DECLARATION OF RIGHTS art. XIV (1776), reprinted in 1 B. SCHWARTZ, supra note 39, at 276, 278; MASS. DECLARATION OF RIGHTS art. XII (1780), reprinted in 1 B. SCHWARTZ, supra note 39, at 339, 342; N.H. BILL OF RIGHTS art. XV (1783), reprinted in 1 B. SCHWARTZ, supra note 39, at 375-77; N.Y. CONST. art. XXXIV (1777), reprinted in 1 B. Schwartz, supra note 39, at 301, 310; N.C. DECLARATION OF RIGHTS art. VII (1776), reprinted in 1 B. SCHWARTZ, supra note 39, at 286, 287; VT. DECLARATION OF RIGHTS ch. I, art. X (1783), reprinted in 1 B. SCHWARTZ, supra note 39, at 319, 323.  
42. Quincy 91 (1763).  
43. 3 N.J. (2 Penn.) 248 (1810).  
44. 5 Day 175 (Conn. 1811).
if directly relevant to any issue. The Virginia Supreme Court rejected the Odell approach in Walker v. Commonwealth. The Commonwealth had charged the defendant with stealing a watch, a gold chain and a key. At trial, the court admitted evidence that the accused had stolen a cloak from the same victim at or near the time of the theft of the other articles. Reversing the trial court, the Virginia Supreme Court held that the admission of evidence of the theft of the cloak constituted reversible error. The Court began its opinion by stating a general rule excluding evidence of other crimes:

[I]t is incumbent on the prosecution to prove the offense which is charged has been committed: he is not allowed to go into proof of the commission of any other offense than that charged, or the character of the prisoner, unless the prisoner himself opens the way for the admission of that evidence by putting his character in issue; and, even in that case, the prosecutor cannot prove particular facts, but must content himself with evidence of general character. The reasons on which these positions are founded, are sufficiently obvious. Not only must the proof correspond with the allegation, but it is an important principle, that the prisoner should not be taken by surprise. As he is charged with a particular offense, he has notice to be prepared to defend himself against that charge, and that alone: he cannot be prepared to defend himself against other charges, not exhibited against him, or to maintain the integrity of his whole life, when that is not put in issue.

The court held that evidence of crimes not listed in the indictment could be admitted in only two classes of cases: (1) where the circumstances surrounding the charged crime could not be described without revealing a crime not specified in the indictment; and (2) where the evidence of the other crimes was offered to show the accused's guilty knowledge. The court held the evidence inadmissible because it did not fall within either of the recognized exceptions to the exclusionary rule. The Walker formulation became more common during the latter half of the nineteenth century and was cited by numerous other courts in support of admission or exclusion of other criminal acts at trial.

The evolution of the rule restricting the admissibility of evidence of other crimes parallels the development of other common-law rules of evidence, such as the hearsay rule. In very early cases, the courts

45. 3 S.C.L. (1 Brev.) 552 (1816).
46. 28 Va. (1 Leigh) 574 (1829).
47. Id. at 576.
48. Id. at 576-79. See text accompanying notes 76-78 infra.
49. 28 Va. at 579-80.
50. See, e.g., People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).
formulated a general rule of exclusion, then listed necessary exceptions. Thayer noted:

What has taken place, in fact, is the shutting out by the judges of one and another thing from time to time; and so, gradually, the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules. For example, in the case of hearsay, our courts treat as the affirmative rule the one which excludes hearsay; and in a new case, unless it can be brought within an admitted exception, this is the rule which is applied. 51

Analyzing this phenomenon, Thayer stated: “[T]he main errand of the law of evidence is to determine not so much what is admissible in proof, as what is inadmissible. Assuming, in general, that what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded.” 52 The anti-Star Chamber bias of the colonists, the formal methods of pleading, proof and argument in criminal trials 53—and the reluctance of judges, trained by apprenticeship, to extend their decisions beyond the adjudicative facts of any case also promoted the formulation of the rule as an exclusionary edict, subject to one or more notable exceptions. These exceptions crystalized by 1850 into exceptions permitting the prosecution to prove motive, intent, guilty knowledge, design or plan of continuing criminal activity and interwoven criminal conduct.

2. Objects of Proof

By the middle of the nineteenth century, American courts had admitted evidence of other crimes to establish a number of issues.

a. Proof of Motive

Most of the early cases dealing with proof of motive were capital cases in which the accused was indicted for first-degree murder. In capital cases, courts permitted the prosecution to introduce evidence of other crimes to establish malice aforethought. 54 In a number of capi-

51. J. Thayer, supra note 6, at 264.
52. Id. at 268.
53. At the time the American rule regarding admissibility of evidence of other crimes was formulated, the method of pleading, proof and argument in criminal trials was especially formalistic. Failure to follow proper form was a legal justification for dismissal of the state’s case.
54. See, e.g., Austin v. State, 14 Ark. 555 (1854) (in murder trial, evidence of previous lying in wait admissible to show accused’s malice aforethought); Reese v. State, 7 Ga. 373 (1849) (in murder trial, evidence indicating accused assaulted victim’s father immediately before killing the victim admissible to show malice aforethought). Cf. Allbrict v. State, 6 Wis. 74 (1858) (in manslaughter trial, evidence of accused’s prior act of violence towards the victim inadmissible because malice aforethought is not an element of the crime).
tal cases courts also admitted evidence of other crimes to show motive. However, unlike malice aforethought, motive was not an ultimate issue in these cases; and the prosecution offered the evidence to establish either the identity of the actor or the existence of a required mental state. *State v. Brooks*, decided in 1851, involved a prosecution for homicide committed by obstructing railroad tracks. No one could place the defendant at the scene of the derailment, although circumstantial evidence showed that he might have been in the vicinity prior to the collision. The court admitted evidence that the accused had obstructed the railroad tracks on previous occasions, apparently reasoning that such evidence aided in the identification of the accused:

Whoever placed the obstruction on the track, must have entertained feelings of deep hostility to the road or the railroad company. The act could not have been dictated by ill feelings toward the deceased or toward any one in his company, for the circumstances were such that it could not have been known that he or they were at that time passing over the road. It becomes important then to inquire whether the person to whom other circumstances point entertained those feelings. That knowledge will supply the motive, an important link in a chain of circumstantial testimony. Whatever may be the diverse theories of speculative philosophy, we know that practically men do not act without a motive, and when circumstances unequivocally point to a particular person as the perpetrator of an offense, we still hesitate in believing him guilty, until we find some inducement, some motive to prompt the act.

In *People v. Pool* evidence of motive was offered to establish the accused's intent. In *Pool* the defendant was charged with the death of a deputy sheriff, and the trial court admitted evidence indicating that the defendant murdered the deceased to avoid arrest for robbery. The California Supreme Court affirmed, noting:

Whenever it is important to determine the character of the act perpetrated and to ascertain the intent of the accused, the existence of any motive likely to instigate him to the commission of the crime may be proved, and is relevant and competent for purpose of fixing or tending to fix the crime upon him.

In *Commonwealth v. Ferrigan* the Pennsylvania Supreme Court held admissible in a prosecution for murder evidence that the accused had adulterous intercourse with the decedent’s wife as recently as the day of the murder. The court stated that such evidence which established

56. Id. at 410.
57. 27 Cal. 572 (1865).
58. Id. at 576.
59. 44 Pa. St. (8 Wright) 386 (1863).
the accused's motive was properly offered to show the wilfull, deliberate, and premediated nature of the homicide. 60

b. Intent

By 1850 a number of courts held that evidence of other crimes could be admitted to prove specific intent. In Commonwealth v. Stone, decided in 1842, the defendant was accused of passing a bill of an insolvent bank with intent to defraud. 61 The Supreme Judicial Court of Massachusetts, per Chief Justice Shaw, held that the prosecution could establish the accused's intent to defraud, as well as his knowledge, by showing that he had earlier possessed and passed similar bills. 62 Recognizing that courts generally exclude evidence of prior criminal activity, the court noted that the specific intent often only could be proved by circumstantial evidence:

This is an exception to the general rule of evidence. But it must be considered that it is to prove a fact not proveable by direct evidence; that is, a guilty knowledge and purpose of mind, which can rarely be proved by admissions or declarations, and can in general be proved only by external acts and conduct. 63

Similarly, in Williams v. State, in which the defendant was accused of assault with intent to rape, the Tennessee Supreme Court held admissible evidence establishing that the defendant had made earlier sexual advances to the victim which the victim had resisted. 64 The court held that the evidence could be admitted to establish the accused's specific intent. 65 Although courts admitted evidence of prior criminal activity to establish specific intent, evidence of other crimes was not admissible to prove general intent unless the accused argued he lacked the necessary criminal intent. In Barton v. State the defendant was charged with two counts of larceny. 66 The Ohio Supreme Court excluded evidence indicating that the defendant had previously committed larceny because the accused's intent was not at issue. 67

c. Guilty Knowledge

As Stone indicates, courts that admitted proof of prior passage of counterfeit or worthless notes to prove the accused's specific intent also

60. Id. at 388.
61. 45 Mass. (4 Met.) 43 (1842).
62. Id. at 47.
63. Id.
64. 27 Tenn. (8 Hum.) 585 (1848).
65. Id. at 595.
66. 18 Ohio 221 (1849).
67. Id. at 223-24.
admitted the evidence to prove the accused's knowledge of the counterfeited nature of the notes. Shortly after mid-century, the New York Supreme Court reviewed a conviction for receipt of stolen property in People v. Rando. The trial court had held that the prosecution could offer into evidence a series of acts by the accused of like character. Affirming the conviction, the court held that such evidence was admissible to establish the accused's guilty knowledge. Similarly, in Commonwealth v. Tuckerman, decided in 1857, the Supreme Judicial Court of Massachusetts permitted the prosecution to prove other acts of embezzlement by a bank employee to establish the employee's knowledge that he was misapplying bank funds.

d. Design, Plan, or Continuing Criminal Activities

In the very early case of Gardner v. Preston the Connecticut Supreme Court of Massachusetts held that the prosecution could prove the existence and extent of a conspiracy to defraud by offering evidence of overt acts not listed in the indictment. At mid-century, the North Carolina Supreme Court held in State v. Freeman that evidence of similar arson attempts were admissible to establish a design or plan to commit arson. Commonwealth v. Eastman, decided in 1848, presents the clearest example of the introduction of similar acts to prove a design or plan of wrongdoing. In that case the prosecution charged Eastman and his partners with fraudulently misrepresenting their solvency to merchants. The Supreme Judicial Court of Massachusetts held that the prosecution could offer evidence of eight similar purchases made by the insolvent defendants in order to show a scheme or plan to defraud.

e. Interwoven Crimes

As discussed above, the Walker court stated in dicta that evidence of an accused's prior criminal conduct was admissible where the circum-
stances surrounding the charged crime could not be described without revealing another crime.\(^7^6\) The court noted:

If one or more links of that chain [of evidence] consists of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, there is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence, that they cannot be departed from with propriety; and there is no reason why the criminality of such intimate and connected circumstances, should exclude them, more than other facts apparently innocent. Thus, if a man be indicted for murder, and there be proof that the instrument of death was a pistol; proof that that instrument belonged to another man, that it was taken from his house on the night preceding the murder, that the prisoner was there on that night, and that the pistol was seen in his possession on the day of the murder, just before the fatal act committed, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction; and whether they are perfectly innocent in themselves or involve guilt, makes no difference, as to their bearing on the main question which they are adduced to prove.\(^7^7\)

The court appeared to suggest that such evidence is admissible because it does not constitute proof of other crimes but rather evidence of the circumstances surrounding the charged crime.\(^7^8\) In *Heath v. Commonwealth*, decided in 1842, the Virginia Supreme Court held admissible in a murder trial evidence that the accused had shot a third person shortly before killing the deceased.\(^7^9\) The court stated that such evidence was admissible because the murder and the shooting of the third person appeared to be connected as parts of one entire transaction.\(^8^0\) In *State v. Benjamin*, an 1851 decision, the Louisiana Supreme Court allowed proof by the prosecution in a slave stealing case that the abducted slave was found in the male defendant's quarters.\(^8^1\) The court permitted the evidence even though it proved the crime of harboring a slave.\(^8^2\)

\(^7^6\) See text accompanying notes 46-48 *supra*.

\(^7^7\) 28 Va. at 576-77.

\(^7^8\) The court stated that there is only one class of cases in which evidence of other crimes can be offered to prove the charged crime: cases in which it is necessary to prove *scienter*. Thus, the court apparently viewed the evidence of the interwoven crime as so bound up with the evidence of the charged crime as not to constitute evidence of an "other" crime. Some recent cases have adopted such an approach. See generally 22 C. Wright & K. Graham, Jr., *Federal Practice and Procedure* § 5239 (1978).

\(^7^9\) 40 Va. (1 Rob.) 735 (1842).

\(^8^0\) *Id.* at 743.

\(^8^1\) 7 La. Ann. 47 (1851).

\(^8^2\) *Id.* at 48-49.
B. The Modern Propensity Rule

In the latter half of the nineteenth century, two courts synthesized the case-by-case decisions regarding the admissibility of evidence of other crimes. One stated a general rule of exclusion modified by exceptions; the other a rule of relevance. The first, Shaffner v. Commonwealth, decided by the Pennsylvania Supreme Court in 1872, involved a first-degree murder charge. The state had indicted Emanuel Shaffner for the first-degree murder of his second wife. The death of Shaffner's second wife, for which Shaffner was indicted, occurred two years after the death of his first wife and a few months after the death of his mistress' husband. All three died after experiencing similar symptoms: cramps, vomiting, diarrhea and eventually the failure of all of their vital functions. Although the trial court excluded as too remote evidence regarding the death of his first wife, the court permitted the prosecution to introduce evidence of the death of the husband of his mistress in order to establish Shaffner's motive for murdering his second wife. Reversing the trial court, the Pennsylvania Supreme Court stated a general rule that "a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against the prisoner." The court then defined the limited exceptions to the general rule:

To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other.

Thus, the court formulated a general rule of exclusion, then recognized exceptions to the rule. Advocating careful judicial discrimination in the application of the rule, the court noted that admission of evidence of other crimes predisposes the juror to believe the accused guilty, compels the accused "to acquit himself of two offenses instead of one," and forces a court to try multiple issues that tend to confuse and mislead the jury. Applying these general principles, the court held the evidence inadmissible. The court rejected the prosecution's theory that the evidence of his mistress' husband's death could be admitted to establish Shaffner's desire to murder his second wife so that he could marry his mistress. The court found that there was no evidence indicating

83. 72 Pa. 60 (1872).
84. Id. at 65-66.
85. Id. at 65.
86. Id.
87. Id.
88. Id. at 68.
89. Id. at 67-68.
Shaffner’s intent to marry his mistress and stated that establishment of such an intention was necessary “to complete the connection, without which the death of both are not so probably connected” as to be admissible. The court thus defined the conditions of relevance which would make proof of another, similar criminal act admissible to establish a proper object of proof—the accused’s motive.

Four years later, New Hampshire’s Supreme Court in State v. Lapage also synthesized the earlier cases involving evidence of prior criminal activity. In contrast to the Shaffner court, the court in Lapage articulated a rule of relevance: relevant evidence is admissible unless offered to show the accused’s propensity. In Lapage the defendant was indicted for the murder of a woman committed in October 1875. The trial court permitted a witness for the prosecution to testify that the accused had choked and ravaged her four years earlier. Admitting the testimony over defense objections, the trial court held that such evidence showed that the accused murdered the victim during the course of committing rape. The New Hampshire Supreme Court reversed, holding that the witness’ testimony regarding the 1871 rape was inadmissible. The court began by stating four propositions regarding the admissibility of character evidence:

1. It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character.
2. It is not permitted to show the defendant’s bad character by showing particular acts.
3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.
4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstance has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions.

Reviewing many of the English and American cases previously cited in this Note, the court noted that evidence of other criminal activity had been admitted to establish intent, guilty knowledge, the absence of mistake, motive and a general plan or conspiracy. Apparently the

90. Id.
91. 57 N.H. 245 (1876).
92. Id. at 288.
93. Id. at 252.
94. Id. at 295-96.
95. Id. at 289.
96. Id. at 293-96.
court perceived these cases as illustrating the kinds of use that are not prohibited by the rule. The court concluded that courts have admitted evidence of other crimes only "on the grounds that there was some logical connection between the crime proposed to be proved other than a tendency to commit one crime as manifest by the tendency to commit the other." The court held the evidence regarding the 1871 rape inadmissible because it showed only "a tendency or disposition to commit that particular crime; but it would go no further, and in fact would amount to little more than attack upon the respondent's character."

*Shaffner* and *Lepage* were important early cases synthesizing the earlier cases and defining the purposes for which such evidence had been offered; *People v. Molineux*, the landmark American decision delineating the American rule, built upon these decisions. Roland Molineux, a chemist by profession, belonged to the elite Knickerbocker Athletic Club of New York City. He violently disliked Frank Cornish, the club's director, and attempted, without success, to have Cornish dismissed in 1896 and 1897. In 1898 Cornish received a "free sample" of bromo seltzer in the mail which he administered to his landlady, Mrs. Adams. She died within hours of taking the bromo seltzer which proved to be laced with cyanide of mercury. Henry C. Barnett—a member of the Knickerbocker Athletic Club who resided with a woman with whom the accused was in love—had died under similar circumstances in November 1898.

Striking similarities surrounded the deaths of Barnett and Mrs. Adams. Both Barnett and Cornish had been enemies of Molineux. Both were associated with the Knickerbocker Athletic Club. Third, Barnett and Mrs. Adams had died from cyanide of mercury poisoning administered through a sample of well-known patent medicine. Both Barnett and Mrs. Adams had received their samples through a mail package delivered to their intended victims at the Athletic Club. Moreover, someone had rented a "blind box" in the name of H. Cornish at a private letter service, and had solicited patent medicines to be delivered at the box. A similar box had been rented by someone in the name of "Barnett" a few months earlier.

At Molineux's trial, over continuing defense objections, the prosecution proved that handwriting samples from Molineux matched those on the package addressed to Cornish. Fourteen handwriting experts testified that Molineux addressed the package to Cornish and had written addresses on envelopes still in the private box rented to "Barnett." The

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97. *Id.* at 295.
98. *Id.* at 296.
court also admitted over defense objections evidence of Barnett's death. Defense counsel contended that such evidence was irrelevant to any issue before the court and was highly prejudicial. On appeal, the court of appeals unanimously held that the trial court committed reversible error by admitting evidence of the Barnett murder.\footnote{Id. at 317, 61 N.E. at 303.}

As the *Molineux* court recognized, the general rule excluding evidence of other crimes had been part of New York's common law of evidence for many years. In 1873, in *Coleman v. People*, the court of appeals noted that generally evidence of the accused's other criminal acts was inadmissible.\footnote{55 N.Y. 81 (1871). The court stated: The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in moral point of view such evidence may be. . . . It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one. Id. at 90.} In 1895, in *People v. Shea*, the court of appeals claimed that the general rule excluding evidence of other crimes derived from the accusative nature of American criminal trials.\footnote{147 N.Y. 78, 41 N.E. 505 (1895). The court explained: The impropriety of giving evidence showing that the accused has been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law itself has been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trial has existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question. Id. at 99, 41 N.E. at 511.} Like most jurisdictions, New York recognized a number of exceptions to the exclusionary rule, admitting evidence of other crimes when it established motive,\footnote{See Stout v. People, 4 Parker Cr. R. 132 (N.Y. 1858) (evidence of an incestuous relationship between the accused and his sister, the wife of the deceased, admissible in trial for murder to establish the defendant’s desire to be free of the deceased); People v. Wood, 3 Parker Cr. R. 681 (N.Y. 1858) (admitted evidence that the defendant, charged with the murder of his brother's wife, poisoned his brother and his brother's children to establish the accused's motive of acquiring his brother's estate).} guilty knowledge,\footnote{In a number of cases in which the defendant was accused of receiving stolen property, New York courts admitted evidence indicating that the defendant had on previous occasions received} intent,\footnote{Id. at 317, 61 N.E. at 303.} or when the other crime and the crime on trial were so similar as to constitute proof of the accused's character.\footnote{Id. at 317, 61 N.E. at 303.} The court of appeals noted that the accused must be convicted only of the crime charged.\footnote{Id. at 317, 61 N.E. at 303.}
common scheme or plan\textsuperscript{106} or an interwoven crime.\textsuperscript{107} Earlier New York case law did not fully resolve the issues raised by \textit{Molineux}, and the court of appeals seized the opportunity to fully explore admissibility of evidence of other crimes.

The court began by noting that the general rule of evidence applicable to criminal trials is that the state cannot offer evidence of any crime not alleged in the indictment, "either as a foundation for a separate punishment, or as aiding the proof that he [the accused] is guilty of the crime charged."\textsuperscript{108} According to the court, this rule, which was universally recognized and firmly established in all English-speaking lands, was rooted in the zealous regard for the liberty of the individual which distinguishes Anglo-American jurisprudence.\textsuperscript{109} Relying heavily on popular treatises on evidence in criminal law, the court delineated five exceptions to the exclusionary rule.\textsuperscript{110}

The court of appeals first recognized that other criminal act evidence could be admitted to prove motive where motive "was an essential ingredient of the evidence against a defendant."\textsuperscript{111} The court held, however, that the evidence did not fall within this exception, noting that evidence of the Barnett murder established neither the specific motive underlying the Adams murder nor a motive common to both of the murders.\textsuperscript{112}

Addressing the intent exception, the court distinguished intent from motive. According to the court, motive is the moving power which impels one to action for a definite result. In contrast, intent is the purpose to use a particular means to effect such results.\textsuperscript{113} The court further noted that in some cases intent may be inferred from the nature

\textsuperscript{106}In cases in which the accused was indicted for forging instruments, New York courts admitted evidence showing that at or near the same time that the instrument was forged the defendant passed or possessed similar forged instruments. Such evidence was admitted to establish the accused's intent. \textit{See}, \textit{e.g.}, \textit{People v. Everhardt}, 104 N.Y. 591, 11 N.E. 272 (1887). When a defendant stood indicted for obtaining goods under false pretenses, similar false representations made by the accused could be offered to show intent. \textit{Mayer v. People}, 80 N.Y. 364 (1880).

\textsuperscript{107} \textit{Hope v. People}, 83 N.Y. 418 (1881) (in bank robbery trial evidence that the bank's janitor's house had been illegally entered and the keys to the bank secured admissible to show a common plan).

\textsuperscript{108} 168 N.Y. at 291, 61 N.E. at 293.

\textsuperscript{109} \textit{Id.} at 291, 61 N.E. at 293-94.

\textsuperscript{110} \textit{Id.} at 293, 61 N.E. at 294.

\textsuperscript{111} \textit{Id.} at 294, 61 N.E. at 294.

\textsuperscript{112} The court stated that "whenever motive is to be established, it must be the motive which underlies the crime charged." \textit{Id.} at 295, 61 N.E. at 295.

\textsuperscript{113} \textit{Id.} at 297, 61 N.E. at 296.
of the act, but that in others, wilful intent or guilty knowledge must be established and cannot be inferred from the nature of the act. Concluding that intent to kill could be inferred from the act of preparing and dispatching the poison, the court rhetorically asked:

Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that, in the face of such irrefragable indicia of murderous intent, it is still necessary or proper to prove the commission of other similar crimes to establish intent?

After dismissing the applicability of the intent exception, the court recognized cases involving poisoning in which the prosecution rebutted with evidence of other criminal activity the possibility of accident or mistake. The court held, however, that the prosecution could not anticipate such a defense. The court noted that there was no uncertainty as to the cause of death and the same circumstances which established a felonious intent clearly negated the possibility of an accidental killing. According to the court, it would be a travesty to hold in a case involving such appalling and transparent criminality that it was necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake.

The fourth exception which the court recognized was a combination of the early English conspiracy cases with more recent cases which allowed proof of a criminal design or scheme evidenced by criminal activities not specified in the indictment:

It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which rendered impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of [a] system between the offense on

114. Id. at 305, 61 N.E. at 298-99.
115. Id. at 298, 61 N.E. at 296.
116. The court cited a series of famous murder cases. In Regina v. Gardner, 176 Eng. Rep. 313 (1863), the defendant was accused of poisoning his mother with arsenic. The defendant dealt in arsenic and offered evidence indicating that he accidentally administered arsenic to his mother. The court allowed the prosecution to introduce evidence that the accused's first wife died of arsenic poisoning. Id. In Regina v. Cotton, 12 Cox Cr. Cas. 400 (1873), the accused claimed that her stepson had been accidentally exposed to poisonous fumes from cleaning fluids. To rebut the defendant's claim, the court permitted evidence that the defendant's two other children and a lodger had died of arsenic poisoning. Id.
118. Id., 61 N.E. at 298-99.
trial and the one sought to be introduced. They must be connected as parts of the general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.\textsuperscript{120}

The court failed to find the required link between the Barnett and Adams murders. It stated that evidence that the same means were used in both murders merely proved that two distinct crimes may have been committed by the same person by similar means. The court of appeals refused to treat the two poisonings as part of a larger criminal plan.\textsuperscript{121}

The last exception recognized by the court permitted the prosecution to introduce evidence of other crimes to establish that the accused committed the charged offense.\textsuperscript{122} The \textit{Molineux} court warned that such evidence must be admitted only after rigid scrutiny because of the danger of unfair prejudice.\textsuperscript{123} After noting the dearth of cases affirmatively applying this exception, the court recognized that in some cases courts had admitted other crime evidence to establish identity when an object obtained by the accused in an earlier crime was employed in the commission of the charged offense.\textsuperscript{124} The court also noted that courts had admitted evidence under this exception when evidence of other crimes established the accused’s motive to commit the charged crime.\textsuperscript{125} These two applications of the identity exception were not

\textsuperscript{120} \textit{Id.} at 305, 61 N.E. at 299. The court cited Hester v. Commonwealth, 85 Pa. 139 (1877), to illustrate the \textit{Rule in Horne Tooke’s Case}. In \textit{Hester}, the accused were members of the labor organization known as “Mollie McGuires” and were indicted for murder following a highway robbery. The prosecution offered evidence of specific instances in which members of the organization had engaged in beatings, robberies and arson in the coal fields. The Pennsylvania Supreme Court held that the evidence of other criminal activity was relevant to prove a criminal conspiracy by defendants to engage in robbery and arson. The \textit{Molineux} court then cited cases which applied the same reasoning to the continuing criminal actions of a single individual. In Brown v. Commonwealth, 76 Pa. 319 (1874), the prosecution offered proof that the defendant killed two people at about the same time with similar weapons, even though the indictment only charged the defendant with the murder of the male victim. In People v. Foley, 64 Mich. 148, 31 N.W. 94 (1901), the defendant was charged with killing a child. Another child had been murdered in the same bed at or about the same time. The court affirmed Foley’s conviction, even though details of the second child’s grisly death were introduced at trial.

\textsuperscript{121} \textit{Id.} at 312-13, 61 N.E. at 301-02.

\textsuperscript{122} \textit{Id.} at 313, 61 N.E. at 302.

\textsuperscript{123} \textit{Id.} at 313-14, 61 N.E. at 302.

\textsuperscript{124} \textit{Id.}, 61 N.E. at 302. The court cited People v. Rogers, 71 Cal. 565, 12 P. 679 (1887), in which the defendant was indicted for a murder committed during the burglary of a home. Someone had entered the victim’s home through a window forced open with a chisel and a knife. The prosecution offered evidence indicating that the defendant had committed two other burglaries. In one he had obtained the knife and chisel used to enter the victim’s house, and in the other the pistol which had been used to kill the victim. The two earlier burglaries were held admissible to prove the defendant was the individual who committed the murder. \textit{Id.} at 567-68, 12 P. at 681.

\textsuperscript{125} 168 N.Y. at 315, 61 N.E. at 303. The court cited Rex v. Clewes, 172 Eng. Rep. 678 (1830), in which the prisoner was indicted for the murder of Hemming, an assassin whom Clewes had hired to murder Parker. When Hemming was detected in the course of murdering Parker, Clewes
applicable to the facts of *Molineux*. The court also discussed the admissibility of evidence indicating that the accused had committed another offense employing such an identical method as to establish that the charged crime was the accused's handiwork. The court stated that the mere similarity between methods and means employed in the execution of two crimes does not identify a defendant as the person guilty of the latter crime unless it is conclusively shown that he committed the former and that no other person could have committed the crime charged. The court provided little support for such a modus operandi exception. Finding that the prosecution had failed to provide the necessary foundation, the court refused to hold the evidence admissible under the modus operandi exception.

The court of appeals had exhausted its list of specific exceptions to the general rule. In its view, none of the exceptions permitted the introduction of evidence of Barnett's death to prove any issue in the trial. It therefore held that it was reversible error to admit the evidence of Barnett's murder. The court had gone to a familiar judicial inquiry. It had taken a general exclusionary rule, examined the known specific exceptions to it, and had concluded that the evidence offered at trial did not fall within these exceptions. It then was unwilling to grant a further exception to the exclusionary rule. Although the court had not intended to add a new exception to the rule, its examination of the identity exception helped to establish the modus operandi exception. *Molineux* neatly summed up and integrated the case of law of several centuries in a single decision that would have considerable impact on the criminal trial process for half a century or more. It was the basis for the jurisprudential development of the rule in both federal and state courts.

C. *Wigmore and Evidence of Other Crimes*

Wigmore addressed the admissibility of prior criminal activity in his discussion of circumstantial evidence and the limit of circumstantial proof. He classified the objects of circumstantial proof, the facta probanda, into three groups: (1) a human act; (2) a human quality, condition or state; and (3) a fact or condition of external nature. Wigmore also identified three modes of circumstantial proof: (1) prospectant proof, which includes both prior acts and reputation; (2) concomitant proof; and (3) retrospectant proof. Addressing the admissibility of prior criminal activity, Wigmore stated that there can never be a direct inference from an act of former conduct to the act charged. Whenever past conduct or acts provide the basis of inference to another act, an intermediate inference must be employed:

[T]here must always be a double step of inference of some sort, a tertium quid. In other words, it cannot be argued: “Because A did act X last year, therefore he probably did the act X as now charged.” Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once, and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies that may intervene are too numerous.

In his discussion of the “character rule,” Wigmore recognized that the common law prohibited prosecutorial use of the character of the accused to establish the double inference. Thus, evidence of prior acts could not be offered to establish the accused’s propensity to commit the act and the probability that he committed the act charged. Wigmore was enough of a scholar to locate beginnings of this exclusionary rule in the late seventeenth century, and he identified the social policy underlying the rule:

1. The overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts;
2. The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses;
3. The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated.

According to Wigmore, the exclusion of evidence of prior criminal activity offered to show propensity is an exception to the general rule

133. Id. § 43.
134. Id.
135. Id.
136. Id. § 193.
137. Id. § 194. Wigmore did not discuss the Treason Act of 1695.
138. Id.
that all relevant evidence is admissible. Wigmore argued that evidence of prior criminal activity should be excluded only when such evidence was offered solely to establish the accused’s propensity to commit the crime. He recognized the need for caution in determining the relevancy of such evidence, but argued that courts were overly cautious, excluding evidence “highly appropriate to show knowledge, intent, or design and amply fulfilling the proper test for that purpose.”

In *Principles of Judicial Proof*, Wigmore employed behavioral theory to support the position he articulated in his early multivolume treatise. Wigmore intended the *Principles of Judicial Proof* to be a law school elementary text. He thought that the rules of evidence should not be taught until students had some mastery over the means of direct and circumstantial proof of fact. Wigmore condensed salient portions of his evidence treatise and organized them into sections supported by citations to *Howell’s State Trials* and other sources of direct examination of trial records showing the modes of proof in litigation. Wigmore dedicated the book to Hans Gross, a leading exponent of “criminal psychology.” Wigmore included in his own treatment of proof excerpts from Gross’ writing on habit formation and the predictability of future human behavior from prior human conduct. Wigmore also used extracts from James Sully’s *The Human Mind* to illustrate his nascent science of proof. Wigmore’s own preference for a form of deterministic human behavioral science was manifested by his choice of these two individuals as source scientific treatises for his own work.

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139. *Id.* § 216. Wigmore stated:

Occasionally this principle is spoken of as though it involved an exception to some otherwise general rule. The truth is, however, that it is itself an illustration of the general principle, to which the character-rule is the exception. That general principle is that all facts affording any reasonable inference as to the act charged are relevant and admissible, including facts showing design, motive, knowledge, or the like, where these matters are in issue or relevant. To this general principle there is the important exception that conduct tending and offered to show bad moral character as evidence is inadmissible. Thus, so long as we avoid the realm of this exception and do not seek to attack the defendant’s character, we are within the scope and sanction of the great general principle. We are in no sense saved by a mere exception; and we are further reenforced by the fundamental cannon that admissibility for one purpose is not affected by inadmissibility for another.

*Id.*

140. *Id.*

141. *Id.*


143. *Id.* at 213.

144. H. Gross, *Criminal Psychology* (1897).


147. J. Wigmore, *supra* note 142, at 178-80, 210-12, 256-57.
Wigmore gave a great deal of space in his book to the problem of proof of a specific fact from inferred general disposition of the actor. Wigmore argued such matter was relevant to prove specific facts at issue, and limited only by judicial regard for the rights of the accused. Gross taught that the behavioral patterns of human individuals supplied regular, predictive descriptions of future activity by an individual. Although Gross was not a determinist in the sense that Watson and other American behavioralists were, he accepted a causal connection between human disposition and human actions. To Gross “a pattern of regular occurrences” with minor exceptions, were excellent predictors of future behavior. Likewise, Sully described “habit” as “mechanicality.” He stated that:

[I]n its most forcible manifestation, habitual movement approaches to a subconscious reflex. The oncoming of habit is shown by two principal criteria. First of all, repetition of movement tends to remove all sense of effort and to render the movement easy. . . . In the second place habit involves and manifests itself in a consolidation of the process of association involved. One of the most familiar characteristics of habit is a prompt succession of a movement on the occurrence of the idea of a desired object. . . . A further and more striking result of this fixing of associative connection is the coordination of a particular sense impression with appropriate motor responses.

All this was written before Watson’s and Skinner’s experimental programs with animal behavior characteristics established that animals could be conditioned to respond to exterior stimuli. The psychological basis for operant conditioning seems to be quite congruent with Wigmore’s rationalistic approach to proof of a specific incident from inferential proof of the “character” of the actor. Just as one can predict an animal’s response to exterior stimuli when past conditioning has fixed in its neurological structure a pattern of conduct and reward, one can predict a person’s response when exterior stimulus—drugs or an easy mark—is presented to one conditioned to respond with an antisocial action. The popularity of American stimulus-response learning theory gave scientific respectibility to the use of similar criminal acts to

148. *Id.* at 131-35.
150. A casual reading of Gross’ doctrine of “nature and nurture,” restated in *Principles of Judicial Proof*, shows that Gross ascribed a great deal of behavior to hereditary conditions, rather than to operant conditioning, or modification due to external stimuli.
152. 2 J. Sully, *supra* note 146, at 224.
prove, through the missing middle term of conditioned responses, that the individual who had repeatedly committed crimes in the past would similarly respond in the future to exterior stimuli.

III. Conclusion

The American rule regarding evidence of other crimes was drawn from English sources. It forbade the admission of other criminal acts of the accused at trial because of the substantial danger of undue prejudice to the accused arising from inferential proof of the accused's disposition to commit the crime. The rule permits proof of certain peripheral issues such as motive, intent, guilty knowledge, criminal plan, design or conspiracy and identity in structure. *Molineux* formulated a hearsay rule, a general prohibition, modified by a list of specific exceptions.

Wigmore attacked the rule early in the twentieth century. Adhering to the determinist theory of learning, he believed that an accused's prior criminal activity was relevant to the accused's propensity. In conformance with his American legal training, Wigmore accepted the policy limitations prohibiting use of such evidence. Wigmore advocated, however, the admission of such evidence when it was relevant to any issue at trial other than the propensity of the accused.