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## Other Crimes Evidence to Prove the *Corpus Delicti* of a Child Sexual Offense

Amber Donner-Froelich

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# COMMENTS

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### I. INTRODUCTION

A grand jury indicted Daniel Lowell Coler on three counts of rape and one count of sexual battery of his daughter, Mary Coler.<sup>1</sup> Testimony at the trial revealed that:

[T]he first time Defendant raped his daughter Mary was after the mother moved out and before Christmas, 1972. The daughter was then seven years old. He forced her to perform fellatio on him, after which he forced her to submit to sexual intercourse. This occurred approximately every week or every other week thereafter . . . . At the trial [a] Dr. Benrubi testified that, upon his examination of Mary, he discovered a complete absence of the posterior hymenal ring and a great deal of scarring on the posterior fourchette, the aspect of the entrance of the vagina immediately next to the hymenal ring. This was not a congenital anomaly. Dr. Benrubi stated that, in his opinion, this condition was caused by the repeated penetration of the vagina at an early age by some object equal or greater than the diame-

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1. Coler v. State, 418 So. 2d 238 (Fla. 1982).



ter of the vaginal entrance at a time when the vagina was not ready to receive such object . . . Dr. Benrubi testified that he had never before seen as much scarring as he did on the examination of this child.<sup>2</sup>

The defendant's three children testified at the trial that "[the defendant] made the children eat a cucumber which, just prior thereto, he had inserted into [Mary]'s rectum."<sup>3</sup> Mary and one of the defendant's sons further testified that their father ordered the son to have sexual intercourse with his sister, threatening to amputate his penis with a pair of scissors if he refused.<sup>4</sup>

Outraged, the trial court sentenced Coler to death.<sup>5</sup> The Supreme Court of Florida vacated the death sentence<sup>6</sup> and ordered a new trial. The supreme court held inadmissible and prejudicial all testimony not relating to the four specific incidents charged in the indictment.<sup>7</sup>

The typically loathsome nature of sexual offenses has led many outraged courts<sup>8</sup> to admit evidence of the defendant's prior deviant sexual behavior in spite of the "other crimes evidence rule," which disallows evidence of other crimes of the defendant when offered to prove that the defendant committed the charged act.<sup>9</sup>

Outrage, however, is not a sound basis for carving an exception to a rule which has as its theoretical underpinning a notion basic to our criminal justice system: the presumed innocence of the defendant.<sup>10</sup> On the other hand, courts have endeavored to

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2. *Id.* at 242-44 (Alderman, J., dissenting).

3. *Id.* at 239.

4. *Id.* at 243.

5. *Id.* at 238.

6. The court held that the death sentence was "grossly disproportionate and excessive punishment for the crime of sexual assault and therefore forbidden by the eighth amendment as cruel unusual punishment." *Id.*

7. *Id.* at 239.

8. For a discussion of several of these jurisdictions, see *infra* text accompanying notes 49-109.

9. For codified rules, see, e.g., FED. R. EVID. 404(b); OHIO REV. CODE ANN. § 2945.59 (Page 1981); S.D. CODIFIED LAWS ANN. § 19-12-5 (1979). For jurisdictions maintaining a common law rule, see, e.g., *State v. Ibrahimov*, 187 Conn. 348, 352, 446 A.2d 382, 384 (1982); *State v. Wrenn*, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978); *Cravens v. State*, 663 S.W.2d 668, 670 (Tex. Ct. App. 1983).

10. See *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) ("'concomitant to the presumption of innocence,'" is that "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is'"); *Slough & Knightly, Other Vices, Other Crimes*, 40 IOWA L. REV. 325, 325 (1956).



compensate for the inherent uniqueness<sup>11</sup> of sexual offenses by carving exceptions to the other crimes rule.<sup>12</sup> This article surveys the various theoretical explanations for the exceptions to the other crimes rule in the area of sexual crimes and concludes that other sexual offense evidence may be introduced, under limited circumstances, against an alleged sexual offender without violating the rule barring evidence of other crimes to prove propensity.

## II. THE RULE BARRING PROPENSITY EVIDENCE (THE OTHER CRIMES EVIDENCE RULE)

Evidence of other acts by a person, whether criminal or not,<sup>13</sup> are generally inadmissible to prove that the person acted in conformity with such other acts. In other words, evidence of a person's prior acts is inadmissible to prove that the person has a propensity to commit such acts.<sup>14</sup> Under the Federal Rules of Evidence and many codified state versions<sup>15</sup> of the other crimes rule, however, evidence of prior acts is admissible when relevant for any purpose other than propensity.<sup>16</sup> Conceptually, the rule barring propensity

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11. See Liles & Bulkley, *Prior Sexual Acts of the Defendant as Evidence in Prosecutions for Child Sexual Abuse*, in *CHILD SEXUAL ABUSE AND THE LAW* 199, 199 (J. Bulkley ed. 1984) ("[T]hese offenses frequently leave no physical evidence. Furthermore, they usually occur in a clandestine manner . . .").

12. *Id.*

13. See, e.g., FED. R. EVID. 404(b) ("other crimes, wrongs, or acts"); M. GRAHAM, *EVIDENCE—TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 509 (1983).

14. *Michelson v. United States*, 335 United States 469 (1948). This rule can be traced to the 1850's. Stone, *Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938) ("[I]n the beginning the law said: 'Let no similar facts be admitted,' and no similar facts were admitted.").

Many jurisdictions have codified the rule. See, e.g., S.D. CODIFIED LAWS ANN. § 19-12-5 (1979):

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.

*Id.* See also FED. R. EVID. 404(b) (same).

15. For a list of states adopting the Federal Rules of Evidence in various forms, see 1 J. WEINSTEIN, *WEINSTEIN'S EVIDENCE, STATE ADAPTATIONS OF THE FEDERAL RULES OF EVIDENCE* (1985).

16. See M. GRAHAM, *supra* note 13, at 508.



evidence looks like this:<sup>17</sup>

	Inference No. 1	Inference No. 2
THE ITEM OF EVIDENCE	THE INTERMEDIATE INFERENCE	THE ULTIMATE INFERENCE
The Prior Act	Defendant's Subjective Character	Action Consistent with Defendant's Character

Evidence of prior acts is inadmissible only where both Inference No. 1 and Inference No. 2 exist.

Inference No. 1 provides that because the defendant committed the prior act, the defendant is the type of person that commits such acts. The danger of this inference lies in its prejudicial nature. It draws the jury's attention to the type of person the defendant is, thus tempting the jury to convict the defendant because he is a bad man, rather than because they believe the defendant is guilty of the charged crime.<sup>18</sup>

Inference No. 2 provides that because the defendant has a bad character, the defendant must have committed the crime. The danger of Inference No. 2 lies in the jury's potential to overestimate the probative value of the prior acts evidence.<sup>19</sup> Studies suggest that jurors are greatly influenced by evidence of a person's prior criminal behavior.<sup>20</sup> The defendant's prior behavior, however, is only slightly related to his conduct on a particular occasion.<sup>21</sup>

The rule barring propensity evidence is designed to avoid the two dangers discussed above. The rule applies, however, only when the intermediate inference—that the defendant is a bad man—is coupled with the ultimate inference—that the defendant committed the crime charged. The rule barring propensity evidence is inapplicable where the ultimate inference arises from a different intermediate inference. When prior acts are admitted to prove disputed issues in the case,<sup>22</sup> such as the identity of the defendant, the absence of mistake or accident, or the defendant's intent, no violation of the other crimes evidence rule exists.<sup>23</sup>

Wigmore, in what was later called the "exclusionary" rule,<sup>24</sup>

17. E. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 2.18, at 2-48 (1984).

18. *Id.* at 2-49.

19. *Id.*

20. See, e.g., Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758, 776 (1975).

21. E. IMWINKELRIED, *supra* note 17, § 2.18, at 2-49 to -50.

22. For cases and authorities discussing the issues for which other crimes evidence may be admissible, see M. GRAHAM, *supra* note 13, at 508-12.

23. *Id.* at 508.

24. 22 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5239, at 432 (1978).



determined that other crimes evidence was not admissible unless relevant to prove specific exceptions, such as design, plan, motive, identity or intent.<sup>25</sup> Professor Stone, in a frequently cited article, argued against such a "spurious" articulation of the rule because it fostered pigeonholeing.<sup>26</sup> Stone argued for the "English rule," later called the "inclusionary" rule,<sup>27</sup> which allowed for the admissibility of all relevant evidence except that which was relevant only to show a general disposition to commit the charged crime.<sup>28</sup>

The "spurious" nature of Wigmore's articulation of the rule is most clearly manifested in the area of evidence of other sexual offenses of a defendant.<sup>29</sup> Many courts, when confronted with the question of the admissibility of a defendant's other sexual offenses, have allowed such evidence, using Wigmore's "magic shibboleths,"<sup>30</sup> rather than making individualized determinations of the relevancy of the other crimes evidence.<sup>31</sup> In order to rationalize the admission of these prior acts, courts often designate an exception for which the prior acts are relevant, such as to prove a common scheme or plan, when in fact, no such issue exists.<sup>32</sup>

25. J. WIGMORE, CODE OF EVIDENCE 81 (3d ed. 1942).

26. See Stone, *supra* note 14.

27. C. WRIGHT & K. GRAHAM, *supra* note 24, § 5239, at 432.

28. Stone, *supra* note 14, at 1004.

29. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 212-13 (1965).

30. *Id.*

31. In other words, courts have failed to determine whether the evidence is relevant to prove the propensity of the defendant to commit the crime or whether it is relevant to prove a disputed issue in the case. *Id.*; Note, *Evidence of Similar Transactions in Sex Crime Prosecutions—A New Trend Toward Liberal Admissibility*, 40 MINN. L. REV. 694, 698 (1956) ("[R]ationalizing the admission of independent transactions under standard or other exceptions may merely be a more subtle method of contraverting the rule.").

32. In order for other crimes evidence to be relevant to a plan or common scheme of the defendant, the identity of the defendant must be at issue and there must be a "true plan." See E. IMWINKELRIED, *supra* note 17, § 3.20, at 3-50. A "true plan" refers to the notion that "the prosecutor may prove any uncharged crime by the defendant which shows that the defendant in fact and in mind formed a plan including the charged and uncharged crimes as stages in the plan's execution." *Id.* § 3.21, at 3-53. The following are examples of cases misapplying the plan or common scheme rationale. *Daly v. State*, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983) (The court held evidence of uncharged sexual offenses of the defendant admissible under the common scheme or plan rationale where the defendant's identity was not at issue and where the court failed to show the existence of a true plan.); *State v. Sills*, — N.C. —, —, 317 S.E.2d 379, 384 (1984) (In a prosecution for first degree sexual offenses against a child, the court held admissible evidence of prior sexual offenses of the defendant where there existed no issue of identity or a true plan.); *Hancock v. State*, 664 P.2d 1039, 1041 (Okla. Crim. App. 1983) (The court held testimony regarding prior sexual activity of defendant admissible under the identity or common scheme or plan exceptions even though the prosecution did not allege that the other crimes and the charged crime were part of a larger plan and even though the defendant did not dispute his identity.).



Additionally, several courts have claimed that "lewd disposition" and "depraved sexual instinct" are legitimate purposes for allowing evidence of prior acts.<sup>33</sup> On the other hand, other courts recognize evidence of other crimes, proffered to show the defendant's lewd disposition and other similar theories, for what it is—propensity evidence. These courts have expressly carved an exception to the rule barring propensity evidence in the area of sexual offenses.<sup>34</sup>

Admitting evidence of prior sexual acts of the defendant for a purpose which is not at issue in the case, or for the purpose of showing lewd disposition or other similar theories, is inconsistent with the rule barring propensity evidence because the prior acts are admitted, in fact, for the purpose which the rule prohibits—to show the propensities of the defendant to commit the crime charged.<sup>35</sup> This inherent inconsistency has caused much confusion

For a more detailed discussion of the pervasive misapplication of the plan or common scheme rationale, see Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 Mo. L. Rev. 1 (1985); Comment, *Admissibility of Evidence Under Indiana's "Common Scheme or Plan Exception"*, 53 IND. L.J. 805 (1978); Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. Rev. 261, 280-84 (1977); Note, *Admissibility of Similar Crimes*, 18 BROOKLYN L. Rev. 80 (1952).

33. See, e.g., *Collins v. State*, 669 S.W.2d 505, 507 (Ark. Ct. App. 1984) ("[W]here the charge involves unnatural sexual acts proof of prior similar offenses . . . shows not that the accused is a criminal but that he has a 'depraved sexual instinct' . . .") (quoting *Alford v. State*, 223 Ark. 330, 335, 266 S.W.2d 804, 807 (1954)); *Brooks v. State*, 242 So. 2d 865, 869 (Miss. 1971) ("The 'acid test is [the uncharged crimes] logical relevancy to the particular excepted purpose or purposes' for which the evidence of prior offenses is sought to be introduced, 'and the considerations justifying the reception of evidence of other similar crimes has been held by some courts to be peculiarly applicable in prosecutions for sexual offenses.'") (quoting 29 AM. JUR. 2d Evidence § 321 (1967)). See Note, *supra* note 31, at 698.

34. See, e.g., *Johnson v. State*, — Ind. —, —, 472 N.E.2d 892, 911 (1985) ("Other similar acts of sodomy, in this case anal intercourse, would be admissible under the depraved sexual instinct exception."); *State v. Ferguson*, 100 Wash. 2d 131, 133-34, 667 P.2d 68, 70 (1983) ("This court has often invoked an exception in similar cases to permit evidence of collateral sexual misconduct when it shows a lustful disposition directed toward the offended female.").

35. See, e.g., E. IMWINKELRIED, *supra* note 17, § 4.11, at 4-29 ("In sex offense cases, many jurisdictions have carved out a notable exception to that general prohibition; the courts allow the prosecutor to offer evidence of the defendant's disposition for various types of sexual conduct.") (footnote omitted); Note, *Evidence—The Emotional Propensity Exception*, 1978 ARIZ. ST. L.J. 153, 155 ("Under [the sexual crime] exception, evidence of similar acts by the defendant is admissible to show the defendant's disposition to commit the sex crime charged.") (footnote omitted); Note, *supra* note 31, at 695:

An inexorable corollary of the inadmissibility rule is that no evidence may be admitted to show a propensity on the part of the accused to perpetrate crimes in general or crimes of the type charged, nor to illustrate wickedness or depravity. Recently, however, courts have freely admitted evidence for precisely these purposes in sexual offense cases.



in the law regarding the admissibility of prior sexual acts of the defendant.<sup>36</sup>

The confusion and inconsistency may also be the result of the dichotomous nature of the various articulated rationales which allegedly compel the rule barring propensity evidence.<sup>37</sup> On the one hand, evidence of other crimes is excluded because it is believed to be "irrelevant to prove the conduct in question."<sup>38</sup> On the other hand, evidence of other crimes may be excluded "not because it has no appreciable probative value, but because it has too much."<sup>39</sup> Some courts are apparently of the view that if the other crimes evidence is highly probative, it is therefore admissible.<sup>40</sup> Other courts apparently admit other crimes evidence only if it fits within one of the traditional exceptions, regardless of relevancy.<sup>41</sup>

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*Id.*

36. See *infra* text accompanying notes 49-109.

37. Cf. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952):

In no area of circumstantial evidence is it so necessary as [in the area of evidence of other crimes] to have at hand a set of basic principles providing a rational method for determining the problem of admissibility; and probably in no area of judicial administration is there greater uncertainty, due in part to a lack of analysis with respect to logical relevancy, and in part to the substantial confusion in the cases concerning the policies of exclusion.

*Id.* at 403.

38. 22 C. WRIGHT & K. GRAHAM, *supra* note 24, § 5236, at 436. "As Wigmore says, it has long been accepted in our law . . . [t]hat 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person'. . . . The reason for this is that our knowledge of the causes of human conduct is too weak to provide any major premise that will support the desired inference." *Id.* (footnotes omitted). See also Slough & Knightly, *supra* note 10, at 333 ("To state that a man is disposed to commit murder, or disposed to commit larceny, therefore he most likely has committed murder or larceny on this occasion is tantamount to a rejection of all common sense rules of relevancy.").

39. 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 646 (3d ed. 1940).

40. See, e.g., *State v. Kristich*, 226 Or. 240, 246, 359 P.2d 1106, 1109 (1961) ("In this case the probative relevance of the [other sexual offense] evidence overbalanced the prejudice the evidence may have created."). See also 22 C. WRIGHT & K. GRAHAM, *supra* note 24, § 5236, at 461 ("[C]ourts will admit other crimes evidence to prove the doing of the charged act where the evidence is highly probative or the need for such proof is unusually great. A good example of this is the use of other crimes evidence in sex offenses.") (footnotes omitted).

41. See, e.g., *Lafayette v. State*, 694 P.2d 530, 531 (Okla. Crim. App. 1985) (The court held the other sexual offense evidence "support[ed] the state's burden of proof by tending to establish intent and opportunity" where intent and opportunity were not disputed issues.). See also Imwinkelried, *supra* note 32, at 13 ("In many [spurious plan] cases, the evidence is logically irrelevant on that theory because the crimes were not committed with a unique *modus operandi*. . . . In other cases, the evidence is legally irrelevant because the issue of the defendant's identity was not in dispute.") (footnotes omitted); Slough & Knightly, *supra* note 10, at 326 ("This excessive rash of exceptions [regarding jurisdictions



A penetrating look at the other crimes rule reveals the following. Other crimes evidence may or may not be probative of the charged crime, or, it may be somewhere between highly probative and slightly probative of the charged crime. The degree of probative value depends on many factors, such as the similarity of the prior crimes to the charged crime, as well as the nature of the crime itself.<sup>43</sup> The rule barring propensity evidence, however, is premised on notions other than relevancy. Specifically, the rule guards against two concerns: "(1) that the jury may convict a 'bad man' who deserves to be punished—not because he is guilty of the charged crime but because of his prior or subsequent misdeeds, and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged."<sup>44</sup> The notion of relevancy comes into play only when the proffered other crimes evidence is relevant to a purpose *other than* to prove propensity.<sup>44</sup> Thus, although the evidence may in fact be probative of propensity, the other crimes evidence is *not* excluded where its introduction proves a material issue in the case.<sup>45</sup>

Some courts that have adopted an exception to the rule barring propensity evidence have based the exception on the unique nature of sexual crimes. Because in most sexual crimes "the critical issue will be the credibility of the prosecuting witness vis-à-vis that of the accused,"<sup>46</sup> the corroborating nature of the other crimes evidence makes introduction of the proffered evidence especially compelling.<sup>47</sup> The tension between the necessity of the other crimes

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adopting the exclusionary rule] may have stylized certain principles affecting the operation of the general rule, but rigid formulae have all but jettisoned any sane attempt at rationalization of individual fact situations."); *supra* notes 29-32 and accompanying text.

42. Notable is the fact that with respect to aberrant sexual behavior, current data suggests that other sexual crimes of the defendant are not probative of the charged crime because of the low recidivism rate among persons engaging in aberrant forms of sexual behavior. See, e.g., E. IMWINKELRIED, *supra* note 17, § 4.16 at 4-38; Gregg, *supra* note 29, at 233; Slough, *Relevancy Unraveled*, 6 KAN. L. REV. 38, 51 (1957).

43. M. GRAHAM, *supra* note 13, at 508. (quoting *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979)); see Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 763-64 (1961).

44. M. GRAHAM, *supra* note 13, at 508.

45. See, e.g., *Williams v. State*, 110 So. 2d 654, 659 (Fla. 1959); MICH. COMP. LAWS ANN. § 768.27 (West 1982). Cf. Slough & Knightly, *supra* note 10, at 325 ("It is one thing to rule out evidence of crime which reflects only a vague propensity, it is another thing to rule out evidence of other crimes relevant to the facts in issue.").

Note, however, that even if the other crimes evidence is relevant to a material issue in the case, it may still be subject to exclusion under FED. R. EVID. 403.

46. Comment, *supra* note 32, at 263; Liles & Bulkley, *supra* note 11, at 199.

47. *People v. Covert*, 249 Cal. App. 2d 81, 88, 57 Cal. Rptr. 220, 224; Comment, *supra* note 32, at 263. See also Gregg, *supra* note 29, at 218.



evidence, and the rule which prohibits such evidence, has contributed to the confusion and inconsistency among the courts with respect to the admissibility of other sexual offense evidence.<sup>48</sup> What follows is an analysis of representative jurisdictions that have attempted, but failed, to establish an exception in sexual offense cases to the rule barring propensity evidence that is theoretically sound and consistently applied.

### III. REPRESENTATIVE JURISDICTIONS

#### A. California

California is perhaps the most interesting of the various jurisdictions that have explicitly recognized an exception to the other crimes rule where the prosecutor proffers evidence of uncharged sexual offenses in a sexual crime case. California was one of the first states to expressly maintain such an exception.<sup>49</sup> Initially, California limited the exception by allowing only evidence of prior sexual offenses against the victim.<sup>50</sup> Some California courts subsequently extended the exception to allow evidence of prior sexual offenses against third parties.<sup>51</sup> Eventually, three lines of case law developed: one which allowed evidence of prior sexual crimes under the "common scheme or plan" rubric,<sup>52</sup> another which al-

48. Cf. 22 C. WRIGHT & K. GRAHAM, *supra* note 24, § 5236, at 462. ("The need for [other sexual offense] evidence has led some courts to rely on debateable assumptions . . .").

49. See, e.g., *People v. Anthony*, 185 Cal. 152, 196 P. 47 (1921); *People v. Sylvia*, 54 Cal. 2d 115, 351 P. 2d, 781, 4 Cal. Rptr. 509 (Ct. App. 1960). See Notes and Recent Decisions, 39 CALIF. L. REV. 584 (1951); Note, *supra* note 31.

50. *Anthony*, 185 Cal. at 157, 196 P. at 49 ("Our rule confining the testimony to the crime charged in the information has only been relaxed so far as to permit testimony of similar conduct with the complaining witness."). One author articulated the justifications for California's departure as follows:

(1) the alarmed and horrified attitude of the public in such cases; (2) the recognition of valid medical grounds to differentiate sex crimes from other offenses; (3) the strong probability that defendant will anticipate use of evidence of similar acts upon the complaining witness, and will not be prejudiced by surprise; (4) the claim that this evidence shows a passion towards one person and hence tends to prove intentional commission of the alleged act.

Notes and Recent Decisions, *supra* note 49, at 585 (footnote omitted).

51. See, e.g., *People v. Cox*, 102 Cal. App. 2d 285, 227 P.2d 290 (Ct. App. 1951); *People v. Boyd*, 95 Cal. App. 2d 831, 213 P.2d 724 (Ct. App. 1950); *People v. Herman*, 97 Cal. App. 2d 272, 217 P.2d 440 (Ct. App. 1950). But see *People v. Westek*, 31 Cal. 2d 469, 190 P.2d 9 (1948). For a discussion of these cases, see Notes and Recent Decisions, *supra* note 49, at 584.

52. See, e.g., *People v. Ing*, 65 Cal. 2d 603, 422 P.2d 590, 55 Cal. Rptr. 902 (1967). See also *People v. Covert*, 249 Cal. App. 2d 81, 57 Cal. Rptr. 220 (Ct. App. 1967) (discussion of California cases espousing the "common scheme or plan" theory), *disapproved on other grounds*, *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978). In



lowed evidence of prior sexual crimes to show the "lewd disposition" of the defendant,<sup>53</sup> and finally, a line of cases that espoused the "corroboration" rationale.<sup>54</sup>

Recently, however, California courts have severely narrowed or rejected these earlier decisions. With respect to the corroboration theory, the Supreme Court of California, in *People v. Stanley*,<sup>55</sup> held that the "prosecuting witness cannot give testimony regarding defendant's prior offenses *with that witness*, for such evidence 'add[ed] nothing to the prosecution's case . . . [and] involve[d] a substantial danger of prejudice to defendant.'"<sup>56</sup> In *People v. Thomas*,<sup>57</sup> the defendant was convicted of committing lewd and lascivious acts on the body of his step-daughter, a child under the age of fourteen. On appeal to the supreme court, the prosecution argued that the testimony of defendant's natural child, concerning the defendant's prior sexual acts against her, was admissible to corroborate the testimony of the defendant's step-daughter.<sup>58</sup> *Thomas* disapproved of prior case law which allowed "evidence of all prior offenses with persons other than the prosecuting witness if the sole asserted purpose for the admission of such evidence was

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discussing the "common scheme or plan" theory, the *Covert* court noted:

There are sound reasons of policy and logic for viewing *common scheme or plan* as the occasion for admissibility in most of these sex cases. The offense almost always occurs in private. The only direct witnesses are the prosecuting witness and the defendant. Although circumstantial evidence supplies occasional corroboration, conviction usually hinges upon the credibility of the prosecuting witness. In this kind of case beyond any other, the defendant's plea of innocence challenges the credibility of the alleged victim. The challenge inheres in the very nature of the contest and usually demands an answer long before the prosecution's turn for rebuttal.

249 Cal. App. 2d at 88, 57 Cal. Rptr. at 224. For a discussion of the "common scheme or plan" theory in sex crime cases, see *supra* note 32.

53. See, e.g., *People v. Sylvia*, 54 Cal. 2d 115, 351 P.2d 781, 4 Cal. Rptr. 509 (1960). For a discussion of the lewd disposition theory, see *supra* notes 33-36 and accompanying text.

54. See, e.g., *People v. Creighton*, 57 Cal. App. 3d 314, 129 Cal. Rptr. 249 (Ct. App. 1976) *disapproved*, *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978); *People v. Kazee*, 47 Cal. App. 3d 593, 121 Cal. Rptr. 221 (Ct. App. 1975), *disapproved*, *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978); *People v. Covert*, 249 Cal. App. 2d 81, 57 Cal. Rptr. 220. The corroboration rationale refers to the notion that other crimes evidence is especially compelling in the area of sexual offenses because of the absence of evidence of the crime other than the victim's testimony. See *supra* text accompanying notes 46-48.

55. 67 Cal. 2d 812, 433 P.2d 913, 63 Cal. Rptr. 825 (1967).

56. *People v. Thomas*, 20 Cal. 3d 457, 469, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978) (quoting *Stanley*, 67 Cal. 2d at 819, 433 P.2d at 917, 63 Cal. Rptr. at 829).

57. *Id.*

58. *Id.* at 468, 573 P.2d at 438, 143 Cal. Rptr. at 220.



to corroborate the prosecuting witness."<sup>59</sup> The *Thomas* court reasoned that such a broad exception, lacking a requirement of remoteness or similarity of the prior sexual offenses, would swallow the rule barring propensity evidence.<sup>60</sup> The corroboration theory was thus narrowed by the court's articulation of a concomitant requirement of non-remoteness and similarity.

If *Thomas* nibbled at the corroboration theory, then *People v. Tassell*<sup>61</sup> took a bite at both the common scheme or plan rationale and the lewd disposition theory.<sup>62</sup> The *Tassell* court noted that "[a]bsent . . . a 'grand design,'<sup>63</sup> talk of 'common plan or scheme' is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility—the defendant's disposition."<sup>64</sup> Apparently, the California courts have come full circle from their original, virtually unlimited exception to the other crimes rule in sexual crime cases.<sup>65</sup>

## B. Arizona

Arizona is another jurisdiction which expressly recognizes an

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59. *Thomas*, 20 Cal. 3d at 469, 573 P.2d at 439, 143 Cal. Rptr. at 221.

60. *Id.*

61. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984).

62. Ironically, *Tassell* was decided *subsequent* to the passage of Proposition 8, which amended California's constitution by enacting the "Right to Truth-in-Evidence" concept. The "Right to Truth-in-Evidence" provision provides that, subject to a balancing test of probativeness versus prejudice, the court must admit evidence of prior bad acts that have any tendency to discredit a witness. CAL. CONST. art. I, § 28(d). Proposition 8, however, may not be controlling where the defendant does not testify. Furthermore, Proposition 8 was not controlling in *Tassell* because the offenses predated the effective date of Proposition 8. *People v. Tassell*, 36 Cal. 3d 77, 82 n.1, 201 Cal. Rptr. 567, 569 n.1, 679 P.2d 1, 3 n.1 (1984). For a discussion of Proposition 8, see Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984).

63. The *Tassell* court defined grand design as "a 'single conception or plot' of which the charged and uncharged crimes are individual manifestations." *Id.* at 84, 679 P.2d at 5, 201 Cal. Rptr. at 571.

64. *Id.* (footnote omitted). The court's rejection of the lewd disposition theory is actually implicit. The Supreme Court of California, throughout the *Tassell* opinion, evidenced its distaste for any theory which in fact rested on the use of other offenses to prove disposition. Additionally, *Tassell* may have implicitly rejected *Thomas*, by holding that, with respect to the common scheme or plan theory, where identity is not at issue, the striking similarity among the prior crimes and the charged crimes is irrelevant. *Id.* at 89, 679 P.2d at 8, 201 Cal. Rptr. at 574.

65. For a recent case following *Tassell*, see *People v. Gordon*, 165 Cal. App. 3d, 839, 212 Cal. Rptr. 174 (Ct. App. 1985) (prior acts of defendant against prosecutrix inadmissible where neither identity nor intent is at issue). But see *People v. Moon*, — Cal. App. —, — 212 Cal. Rptr. 101, 105 (Ct. App. 1985) ("*Tassell* involved the relevance of prior offenses against other individuals, not against the same victim.")



exception to the other crimes rule with respect to aberrant sexual offenses. The Supreme Court of Arizona, in *State v. MacFarlin*,<sup>66</sup> surveyed the development of Arizona's propensity exception,<sup>67</sup> holding in spite of recognition of "sharp criticism"<sup>68</sup> of such exception, that where the charge involved "the element of abnormal sex acts such as sodomy, child molesting, lewd and lascivious [behavior], etc., there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts."<sup>69</sup> Apparently, in an attempt to allay criticism, the court required nearness in time<sup>70</sup> and similar "abnormal" sex acts.<sup>71</sup>

In *State v. Treadaway*,<sup>72</sup> the Supreme Court of Arizona added a unique twist to its propensity exception. In situations where the prior crimes sought to be introduced were remote in time, the court required reliable expert medical testimony that indicated the prior act "tend[ed] to show a continuing emotional propensity to commit the act charged."<sup>73</sup> As in *McFarlin*, the court restricted the propensity exception in response to criticism. The court acknowledged that because most statistical studies indicated that sexual offenders have a low rate of recidivism, "prior similar acts may be less probative for sex crimes than for other crimes, and [thus the statistical evidence] supported the criticism of this exception."<sup>74</sup> The court's requirement of expert medical testimony regarding the defendant's disposition was apparently an attempt to exclude the possibility that the prior crimes were irrelevant to the crime charged.

The *Treadaway* Court's unique attempt at combatting the inherent dangers of an exception to the rule barring propensity evidence has been severely limited. The supreme court held it inap-

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66. 110 Ariz. 225, 517 P.2d 87 (1973).

67. For a more detailed analysis, see Note, *Evidence—The Emotional Propensity Exception*, 1978 Ariz. St. L.J. 153.

68. *McFarlin*, 110 Ariz. at 228, 517 P.2d at 90.

69. *Id.*

70. *Id.* at 228, 517 P.2d at 90; Note, *supra* note 67, at 153.

71. See *State v. Corcoran*, 119 Ariz. 573, 583 P.2d 229 (1978) (because the prior crime was similar and near in time, *McFarlin*, not *Treadaway*, controlled); *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975) (emotional propensity for sexual aberration exception did not apply to prior bad act of rape which did not entail sodomy, child molestation or lewd and lascivious behavior). See also *State v. Cousin*, 136 Ariz. 83, 664, P.2d 233 (Ct. App. 1983); *State v. Jerousek*, 121 Ariz. 420, 590 P.2d 1366 (1979).

72. 116 Ariz. 163, 568 P.2d 1061 (1977).

73. *Id.* at 167, 568 P.2d at 1065.

74. *Id.*



plicable to other crimes committed by the defendant *against the same victim*. In *State v. Garner*,<sup>75</sup> the Supreme Court of Arizona upheld the admissibility of evidence of the defendant's prior sexual acts against his adopted son in a trial concerning child molestation.<sup>76</sup> The court determined that the facts were distinguishable from both *McFarlin* and *Treadway* because the defendant's prior act and the charged act were committed against the same victim.<sup>77</sup> The *Garner* court fashioned a sweeping rule: "In a case involving a sex offense committed against a child, evidence of a prior similar sex offense committed against the same child is admissible to show the defendant's lewd disposition or unnatural attitude toward the particular victim."<sup>78</sup> The supreme court's rejection of the requirement of expert testimony regarding the defendant's disposition where the uncharged offenses were against the victim of the charged offense, and its articulation of a broad exception to the other crimes evidence rule, was a regression to Arizona's much criticized sexual offense exception.

### C. Rhode Island

Rhode Island, another jurisdiction adopting the lewd disposition theory, has similarly responded to criticism by requiring that evidence of prior crimes be used "sparingly" and only when "reasonably necessary."<sup>79</sup> In *State v. Jalette*,<sup>80</sup> the Supreme Court of Rhode Island noted "that the indiscriminate use of 'other crimes' evidence poses a substantial risk to an accused's right to a fair trial,"<sup>81</sup> given the merely average rate of recidivism among sexual offenders<sup>82</sup> and the inflammatory nature of the evidence.<sup>83</sup>

The *Jalette* court, in fashioning the above-mentioned preconditions to the introduction of other crimes evidence in sexual offense cases, derived its rule from the Supreme Court of California

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75. 116 Ariz. 443, 569 P.2d 1341 (1977).

76. *Id.* at 447, 569 P.2d at 1345.

77. *Id.* *Garner* made no attempt to rationalize this distinction.

78. *Id.*

79. *State v. Jalette*, 119 R.I. 614, 382 A.2d 526 (1978).

80. *Id.*

81. *Id.* at 627, 382 A.2d at 533.

82. The *Jalette* court cited *Commonwealth v. Boulden*, which noted that because "sex offenders are no more likely to repeat than other offenders . . . there is no more reason to admit prior offenses to show depravity or propensity in a sex case than in any other case." *Id.* at 626, 382 A.2d at 533 (quoting from *Commonwealth v. Boulden*, 179 Pa. Super. 328, 344, 116 A.2d 867, 874 (Super Ct. 1978)).

83. *Jalette*, 119 R.I. at 614, 382 A.2d at 533 ("[E]vidence of other sexual behavior is, by its very nature, uniquely apt to arouse the jury's hostility.").



case of *People v. Kelley*.<sup>84</sup> The *Kelley* court determined that evidence of other nonremote sexual crimes against the prosecutrix was admissible to show the accused's lewd disposition or intent toward the prosecutrix, whereas such evidence regarding third persons was subject to the traditional exceptions. Where the defendant's intent was at issue, however, the other sexual offense evidence was admissible only if absolutely necessary.<sup>85</sup> In *Jalette*, the Supreme Court of Rhode Island adopted this rule, but modified it by noting that other sexual crimes evidence "should be sparingly used by the prosecution and only when reasonably necessary."<sup>86</sup> Apparently, the *Jalette* court restricted the introduction of evidence of other crimes against the prosecutrix by requiring that the evidence be admitted only when reasonably necessary; but, conversely, the court broadened the introduction of evidence of other crimes against third parties when intent was at issue, by admitting such evidence where reasonably necessary.<sup>87</sup> In *State v. Pignolet*,<sup>88</sup> the supreme court acknowledged *Jalette's* expansion of the introduction of other crimes evidence against third parties.<sup>89</sup> *Pignolet*, however, further expanded the *Jalette* rule. In its discussion of the exceptions to the rule barring propensity evidence, the *Pignolet* court cited a 1935 Supreme Court of Rhode Island opinion, which noted that evidence of prior bad acts was admissible if "interwoven with the offense for which the defendant [was] tried . . ."<sup>90</sup> The *Pignolet* court used this language to hold that the testimony of a sister of the victim of sexual abuse was admissible in an action against the stepfather where the "[sister]'s testimony indicate[d] that defendant's conduct toward [the victim] was not a series of isolated incidents but instead was part of an ongoing pattern of behavior that defendant exhibited toward both of his young stepdaughters."<sup>91</sup> The *Pignolet* court's misguided use of the "interwoven" language effectively discarded the *Jalette* court's requirement that prior bad acts of the defendant against third parties be

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84. 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1973). For a discussion of California case law, see *supra* notes 49-65 and accompanying text.

85. 66 Cal. 2d at 240-43, 424 P.2d at 954-56, 57 Cal. Rptr. at 370-73.

86. *Jalette*, 119 R.I. at 627, 382 A.2d at 533.

87. As opposed to absolutely necessary.

88. — R.I. —, 465 A.2d 176 (1983).

89. *Id.* at —, 465 A.2d at 180 ("We stated that rather than show *absolute* necessity for such material, evidence of this type 'should be used sparingly and only when *reasonably* necessary. . . .'). *Id.*

90. *Id.* (quoting *State v. Colangelo*, 55 R.I. 170, 173-74, 179 A. 147, 149 (1935)).

91. *Id.*



admitted into evidence pursuant to the traditional exceptions. The "interwoven" language used by the 1935 supreme court, notwithstanding *Pignolet's* implication, did not create a unique exception to the propensity rule, but was merely a poorly worded statement of the traditional exceptions to the other crimes evidence rule.<sup>92</sup> Because the *Pignolet* court failed to articulate an actual issue for which the other crimes of the stepfather were relevant, the introduction of the other crimes was merely propensity evidence.<sup>93</sup>

Although it purported to follow *Jalette*, the *Pignolet* court espoused a new rule with respect to evidence of other crimes of the defendant committed against a child<sup>94</sup> other than the prosecutrix: such evidence was admissible when the uncharged conduct was "closely related in time, place, age, family relationships of the victims, and the form of the sexual acts."<sup>95</sup>

#### D. Florida

Florida is another jurisdiction which has struggled to reconcile the inconsistencies inherent in adopting an exception to the rule

92. The *Colangelo* court articulated its "interwoven" exception as follows: "Any circumstance that is incidental to or connected with the offense under investigation in such a way that it tends to establish guilty knowledge, intent, motive, design, plan, scheme, system, or the like, is proper evidence according to the overwhelming weight of authority." 55 R.I. at 174, 179 A. at 149.

93. In support of this, the *Pignolet* court commented: "Both later incidents, coupled with defendant's first assault attempt, are relevant, material, and highly probative of defendant's lecherous conduct toward these young girls . . ." *Pignolet*, \_\_\_\_ R.I. at \_\_\_\_, 465 A.2d at 182.

Furthermore, even if there existed an element of the prosecution's case which warranted the use of the other crimes evidence, the *Pignolet* court failed to apply correctly the *Jalette* test of admissibility. Justice Kelleher and Chief Justice Bevilacqua, dissenting in *Pignolet*, noted that "at no time did the trial justice give any consideration to the necessity for presenting [the sister's] testimony." *Id.* at \_\_\_\_, 465 A.2d at 185 (Bevilacqua, C.J., Kelleher, J., dissenting).

Finally, even if the trial court did consider the necessity of the other crimes testimony, the supreme court's standard of review (or absence thereof) rendered the *Jalette* precondition to admissibility useless. The *Pignolet* court determined that the trial court made the *Jalette* inquiry into the necessity of the other crimes testimony because (a) "[t]he prosecutor represented to the court that she believed the evidence of the sister was necessary to meet the state's burden of proof," and (b) if the defendant would have testified, the sister's testimony would have been admissible on rebuttal. *Id.* at \_\_\_\_, 465 A.2d at 182. If the prosecutor merely has to claim that the other crimes evidence is necessary, or if the court is permitted to conjure up hypothetical situations which would allow the admission of other crimes evidence, then the *Jalette* requirement of necessity is without substance.

94. The *Pignolet* rule appears to be limited to sex offenses committed against children. See *State v. Bernier*, \_\_\_\_ R.I. \_\_\_\_, 491 A.2d 1000 (1985); *State v. Cardoza*, \_\_\_\_ R.I. \_\_\_\_, 465 A.2d 200 (1983).

95. *Pignolet*, \_\_\_\_ R.I. at \_\_\_\_, 465 A.2d at 181.



barring propensity evidence. *Williams v. State*,<sup>96</sup> decided in 1959, is the seminal case on point. In *Williams*, a prosecution for rape, the defendant hid in the prosecutrix's parked car, forced her to drive to a secluded area and raped her. The prosecution, in order to rebut the defendant's statement to the police that he had mistaken the victim's car for that of his brother's,<sup>97</sup> sought to introduce evidence of an incident occurring approximately six weeks before the attack on the prosecutrix. The evidence consisted of testimony by a woman and a police officer that at the same parking lot, the woman noticed the defendant in the back seat of her car as she approached. She screamed and caught the attention of the testifying police officer. The defendant claimed that, having mistaken the woman's car for that of his brother's, he crawled in the back to take a nap. The woman's car was a black Plymouth whereas the victim's car was a green Buick.<sup>98</sup>

In *Williams*, the Supreme Court of Florida, faced with the question of what circumstances allow "similar fact evidence which tends to reveal the commission of a collateral crime,"<sup>99</sup> sought to establish the general proposition from which such analysis must begin: "The test of admissibility is relevancy."<sup>100</sup> The court noted that the arguments advanced for excluding other crimes evidence—undue prejudice, collateral issues and immateriality—"disregard[ed] the basic principle of the admissibility of all relevant evidence having probative value in establishing a material issue."<sup>101</sup> The *Williams* court further stated "that *relevant* evidence will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime."<sup>102</sup>

After surveying prior case law in Florida, the *Williams* court upheld the admission of the woman's testimony regarding the prior incident.<sup>103</sup> The court held the evidence admissible as relevant to establishing a plan, scheme or design, to meet the anticipated defense of consent, to identify the accused, and to establish a general pattern of criminality.<sup>104</sup> In so holding, the court fell prey to what has befallen most of the courts which have established an excep-

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96. 110 So. 2d 654 (Fla. 1959).

97. At trial, the defendant denied making this statement. *Id.* at 657.

98. *Id.* at 657-58.

99. *Id.* at 658.

100. *Id.* at 660.

101. *Id.* at 658.

102. *Id.* at 659.

103. *Id.* at 663.

104. *Id.*



tion to the rule barring propensity evidence. Although purporting to allow only evidence tending to establish a material issue, the court nevertheless allowed evidence which tended to establish issues not in dispute. Plan, scheme, or design, and general pattern of criminality are not issues in a sexual battery charge,<sup>105</sup> and identity was not an issue in *Williams* because the defendant admitted committing the act, but claimed that the prosecutrix consented.<sup>106</sup> Furthermore, although lack of consent was an issue in *Williams*, introduction of other crimes committed against a victim other than the prosecutrix to prove lack of consent is relevant only because it shows the defendant's propensity to commit such crimes.<sup>107</sup>

On the other hand, the court's affirmance in *Williams* of the admissibility of the other crimes evidence may not have been erroneous. Because the defendant initially claimed to be mistaken about whose car he was climbing into, the other crimes testimony may have been relevant to establishing the defendant's lack of mistake.<sup>108</sup> The sweeping language of the *Williams* opinion, however, has predictably led to confusion in Florida with respect to the appropriate evidentiary rule and its application in the area of other sexual crimes.<sup>109</sup>

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105. See *Coler v. State*, 418 So. 2d 238-39 (Fla. 1982) ("State of mind is not a material fact in a sexual battery charge, nor is intent an issue."), *cert. denied*, 459 U.S. 1127 (1983).

106. *Williams*, 110 So. 2d at 656.

107. E. IMWINKELRIED, *supra* note 17, at § 6.03.

108. Because the defendant later denied making the statement and changed his defense to consent, the issue may have been irrelevant. See also *Cotita v. State*, 381 So. 2d 1146, 1147 (Fla. 1st DCA 1980) (The court misstated the exception to the rule barring propensity evidence by noting that evidence of other crimes is relevant to establish "a pattern of criminality," but the evidence of the other crimes was admissible to show the bias of the defendant's mother, where the defendant's mother sought to negotiate with the mother of the victim to withhold charges against her son.) *Id.* at 1153 (Booth, J., dissenting).

109. See, e.g., *Potts v. State*, 427 So. 2d 822, 824 (Fla. 2d DCA 1983) ("Evidence of these past acts had 'identifiable points of similarity' and a 'level of uniqueness' sufficient to qualify as similar fact evidence."); *Hodge v. State*, 419 So. 2d 346 (Fla. 2d DCA 1983):

The testimony concerning [a victim other than the prosecutrix] was clearly admissible under the line of decisions which has permitted similar fact testimony for the purpose of showing 'a pattern of criminality' . . . . In presenting its case in chief, the state could not run the risk of assuming that the lack of consent would not be an issue. Therefore, because [the victim other than the prosecutrix]'s testimony was relevant to an issue in the case, it was properly admitted even if it had the incidental effect of blackening [the defendant's] character in the eyes of the jury.

*Id.* at 347; *Espey v. State*, 407 So. 2d 300, 301 (Fla. 4th DCA 1981) ("To us, all this certainly is relevant to demonstrate a unique common scheme or plan to systematically ravage and deflower the helpless young members of his own household."); *Gibbs v. State*, 394 So. 2d 231, 232 (Fla. 1st DCA) ("The existence of a lustful attitude towards his stepdaughter, proven by prior sexual assaults, makes it more likely or probable that appellant possessed a



The sprinkling of case law discussed above attests to the difficulties of maintaining an exception in sexual crime cases to the rule barring propensity evidence. Each jurisdiction has proven its inability to consistently articulate and apply its own version of the sexual crime exception.<sup>110</sup> This is not surprising given that, generally speaking, sexual crime exceptions are in complete derogation of the rule barring propensity evidence.<sup>111</sup> One solution is to develop a scheme which provides for admission of evidence of other sexual offenses for a purpose other than to prove the defendant's propensity to commit sexual crimes, in addition to the purposes traditionally recognized, such as intent or identity. The evidence will thus fit neatly within the confines of the rule barring propensity evidence, thereby eliminating the confusion with respect to the admissibility of prior sexual offenses.

#### IV. CORPUS DELICTI

##### A. *Other Crimes Evidence to Prove the Corpus Delicti*

The scheme alluded to above entails the use of other sexual crimes to prove the *corpus delicti*. Literally, the term *corpus*

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similar state of mind toward his stepdaughter on the date of the alleged offense. This is relevancy beyond mere propensity."), *aff'd*, 406 So. 2d 1113 (1981); *Summit v. State*, 285 So. 2d 670 (Fla. 3d DCA 1973) ("Turning to the case sub judice, we find the testimony of the victim and her sister regarding prior similar conduct on the part of the defendant with them to show the character of the deed as to motive and intent to be relevant and admissible."); *Gossett v. State*, 191 So. 2d 281, 283 (Fla. 2d DCA 1966) ("We conclude that the trial judge had authority . . . to permit the evidence of former acts of the two defendants in connection with the children involved in the instant case to show a pattern of criminality that makes the prior crimes relevant to the commission of the acts in question.").

For a series of Florida cases that correctly apply the other crimes evidence rule, see *Sias v. State*, 416 So. 2d 1213, 1215 (Fla. 3d DCA 1982):

Where the identity of the defendant was at issue, the court, in discussing evidence of prior crimes, noted "that there be something so unique or particularly unusual about the perpetrator or his *modus operandi* that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged.

*Id.* at 1215; *Drake v. State*, 400 So. 2d 1217, 1219 (Fla. 1981) ("The material issue to be resolved by the similar facts evidence in the present case is identity, which the state sought to prove by showing [defendant's] mode of operating."), *cert. denied*, 104 S. Ct. 2361 (1984); *Duncan v. State*, 291 So. 2d 241, 243 (Fla. 2d DCA 1974) ("To begin with, neither a 'continuing course of conduct,' 'plan or scheme' nor 'modus operandi' is an end in and of itself which may be proved in a criminal case. If they were, then by whatever reason therefore so would propensity be admissible.").

110. Terms such as "lewd disposition" and "sexual aberration" are simply euphemisms for evidence which exhibits the defendant's propensity to commit sexual crimes. See *supra* text accompanying notes 33-35.

111. *Id.*



*delicti* means the body of the crime.<sup>112</sup> According to Wigmore, every crime includes three concepts: (1) the occurrence of a specific kind of injury or social loss, (2) someone's criminality as the source of the social loss, and (3) the accused's identity as the culpable party.<sup>113</sup> The *corpus delicti* encompasses both the notion of the occurrence of injury or social loss and the notion that the injury or loss was occasioned by someone's criminality.<sup>114</sup>

Although many courts are reluctant to admit other crimes evidence to prove the *corpus delicti*,<sup>115</sup> a growing number of authorities are questioning the soundness of this reluctance.<sup>116</sup> Moreover, a number of cases have allowed other crimes evidence to prove the *corpus delicti*.<sup>117</sup>

*United States v. Woods*<sup>118</sup> is the seminal case permitting the use of other crimes evidence to prove the *corpus delicti*. In *Woods*, the defendant was convicted for the first degree murder of her eight-month-old preadoptive foster son, who allegedly died from smothering.<sup>119</sup> During the trial, the court admitted the following evidence. Beginning in 1945, while in the custody or control of the defendant, nine children suffered a minimum of twenty episodes of cyanosis.<sup>120</sup> Of the nine children, seven died and five sustained multiple episodes of cyanosis.<sup>121</sup>

On appeal, the *Woods* court found the other instances of cyanosis particularly relevant to the infant's death.<sup>122</sup> The court deter-

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112. 1 UNDERHILL'S CRIMINAL EVIDENCE § 35, at 62 (6th ed. 1973).

113. 7 J. WIGMORE, *supra* note 39, § 2072, at 524.

114. *Id.*

115. E. INWINKELRIED, *supra* note 17, § 4.01, at 4-2; 22 C. WRIGHT & K. GRAHAM, *supra* note 24, § 5236, at 460. Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Unexplained Deaths as Proof of the Corpus Delicti*, 6 RUT.-CAM. L.J. 173, 179 (1974).

116. E. INWINKELRIED, *supra* note 17, § 4.01, at 4-3; Stone, *supra* note 14, at 1018; Comment, *supra* note 115, at 179-82. But see Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPPERDINE L. REV. 297, 308 n.40 (1982). ("Note that prior acts of the defendant can never be used to establish the occurrence of the *actus reus* itself.")

117. See, e.g., *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973); *People v. Maler*, 23 Cal. App. 3d 973, 100 Cal. Rptr. 650 (Ct. App. 1972); *People v. Lisenba*, 14 Cal. 2d 403, 94 P.2d 569 (1939); *State v. Schleigh*, 210 Or. 155, 310 P.2d 341 (1957); *People v. McClard*, 81 Or. 510, 160 P. 130 (1916).

118. 484 F.2d 127 (4th Cir. 1973).

119. *Id.* at 128.

120. *Id.* at 130. Cyanosis, a blue color which occurs around the lips, arises from a lack of oxygen. *Id.* at 129.

121. *Id.* at 130.

122. *Id.* at 133.

Thus, with regard to no single child was there any legally sufficient proof that



mined that, although the evidence may have been admissible under the accident and *modus operandi* exceptions,<sup>123</sup> it preferred to rest its decision on "broader" grounds, rejecting the opportunity to mechanically fit the other crimes evidence into a recognized exception.<sup>124</sup> The court held that the other crimes evidence was admissible to prove the *corpus delicti* of murder.<sup>125</sup>

In support of its finding, the *Woods* court distinguished an earlier case, *State v. Donaluzzi*,<sup>126</sup> which stood for the proposition that other crimes evidence was not admissible to prove the *corpus delicti*.<sup>127</sup> The court found *Donaluzzi* inapposite because "*Donaluzzi* may be read to mean only that the exclusive use of prior acts, without more, cannot establish the *corpus delicti*."<sup>128</sup> It determined that the prosecution's expert witness, who testified that he was seventy-five percent certain that the victim died of

defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and [the victim] is considered collectively is the conclusion that some or all of the other children died at the hands of the defendant. We think also that when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime.

*Id.*

123. *Id.* at 133-34.

124. *Id.* at 134. The court recognized the difficulties of applying the accident and *modus operandi* exceptions to the facts of *Woods*. *Id.* With respect to the accident exception, the court noted that it is ordinarily "invoked only where an accused admits that he did the acts charged but denies the intent necessary to constitute a crime, or contends that he did the acts accidentally." *Id.* With respect to the *modus operandi* exception (dubbed the handiwork or signature exception in *Woods*), the court rejected the defendant's argument "that cyanosis among infants is too common to constitute an unusual and distinctive device unerringly pointing to guilt on her part [noting that this argument] would not be without force, were it not for the fact that so many children at defendant's mercy experienced this condition." *Id.* For a critical analysis of this portion of the *Woods* holding, see Note, *Evidence—Proof of Prior Events Admissible Generally and Specifically to Demonstrate Corpus Delicti Because the Relevance of and the Need for the Evidence Outweighed its Prejudicial Effect*, 52 TEX. L. REV. 585, 586-87 (1974).

125. Arguably, the language of the opinion implies that other crimes evidence is not sufficient without independent proof of the *corpus delicti*. The court may have considered as independent evidence the expert testimony introduced by the prosecution that there existed a 75% certainty that the victim's death resulted from homicide by smothering. *Woods*, 484 F.2d at 130. One authority has questioned the soundness of the independent evidence requirement in *Woods*. See Comment, *supra* note 115, at 182-83 (The possible imposition of a requirement of independent evidence in *Woods* is ill-advised.). But see E. IMWINKELREID, *supra* note 17, § 4.03, at 4.13 (The existence of the pathologist's testimony was critical.); *infra* text accompanying notes 133-40.

126. 94 Vt. 142, 109 A. 57 (1920). *Donaluzzi* involved the illegal sale of intoxicating liquor. *Id.* at 144, 109 A. at 58.

127. *Woods*, 484 F.2d at 135.

128. *Id.* For a discussion of whether the *Woods* holding encompassed the requirement of independent evidence to prove the *corpus delicti*, see *supra* note 125.



homicidal smothering, was sufficient independent proof of the *corpus delicti* to permit admission of the other crimes evidence.<sup>129</sup> The court distinguished the remaining authorities supporting the proposition that other crimes evidence was inadmissible to prove the *corpus delicti* by noting that those cases involved situations "in which there was a total lack of any evidence of corpus delicti, or mere dictum that corpus delicti might not be proved by evidence of prior acts."<sup>130</sup>

The *Woods* court drew support from confession cases and arson cases in which courts have allowed evidence of prior crimes to prove the *corpus delicti*.<sup>131</sup> Finding no reason to distinguish the confession and arson cases, the court determined that sufficient authority existed to find the other crimes evidence admissible to prove the *corpus delicti* of murder.<sup>132</sup>

The cases which expressly maintain that other crimes evidence is not admissible to prove the *corpus delicti* may be inapplicable for a more compelling reason than that articulated by the *Woods* court. Those cases were decided in jurisdictions which do not sub-

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129. *Woods*, 484 F.2d at 135.

130. *Id.* Several reasons have been articulated to explain the tendency of courts to disallow other crimes evidence to prove the *corpus delicti*. One may be the simple fact that the issue of whether the crime occurred rarely arises. Comment, *supra* note 115, at 179. On the other hand, the historical development of the notion of *corpus delicti* may shed light on the traditional aversity to other crimes evidence as proof of the *corpus delicti*. Four English cases dramatically influenced the concept of *corpus delicti*. In each of these cases, the defendants were convicted of murder, some of them were hung, yet the alleged victim subsequently reappeared. *Id.* at 179-80 n.35.

131. *Woods*, 484 F.2d at 136.

132. At least one author has criticized the appropriateness of the confession and arson analogies. See generally Note *Evidence—Evidence of Prior Similar Incidents is Admissible to Show the Corpus Delicti of Murder*, 43 CIn. L. Rev. 437 (1974). The author noted that the confession cases may not be appropriate given the rationale of the requirement of corroborating evidence. "The rationale behind the requirement of substantial independent corroborating proof is the court's reluctance to convict a defendant solely on his own word without being able to ascertain its trustworthiness." *Id.* at 442.

Furthermore the author determined the arson cases were decided pursuant to recognized exceptions to the rule barring propensity evidence, such as the common plan or scheme exception. *Id.* at 442-43. This distinction, however, is not convincing. The courts in several of the arson cases mechanically applied the traditional exceptions, so that the opinions purport to appropriately admit evidence of other crimes under a traditional exception, but in fact admit the evidence solely to prove the *corpus delicti*. See, e.g., *State v. Smith*, 221 S.W.2d 158 (Mo. 1949) (The court held prior arson crimes admissible to prove intent yet defendant's intent was not at issue.); *State v. Schleigh*, 210 Or. 155, 310 P.2d 341 (1957) (The court held prior arson crimes admissible to prove motive yet the defendant's motive was not at issue.). Additionally, even if it were true that the arson cases are not authority for the proposition that other crimes evidence is admissible to prove the *corpus delicti*, the author gave no explanation for disallowing other crimes to prove the *corpus delicti*.



scribe to Wigmore's definition of *corpus delicti*. In those jurisdictions, the *corpus delicti* includes only the notion of social loss or injury and does not include the notion that the loss or injury was occasioned by someone's criminality.<sup>133</sup> Where the *corpus delicti* is restricted to this narrower definition, exclusion of other crimes evidence may be defensible.

In those jurisdictions, other crimes evidence may *not* be introduced to prove that there has been a loss or injury occasioned on the alleged victim. Theoretically, ignoring for a moment the victim's testimony,<sup>134</sup> other crimes evidence admitted to prove solely loss or injury is inappropriate because the complete lack of evidence of the charged crime renders any discussion of the probative value of other crimes evidence wholly speculative.<sup>135</sup>

Moreover, in these jurisdictions which define *corpus delicti* narrowly, in order to convict a defendant, the jury must draw the inference that he is guilty of the charged crime solely from the defendant's past misconduct, without tangible proof of any elements of the crime.<sup>136</sup> This inference constitutes the forbidden use of prior crimes as proof of the defendant's propensity to commit such crimes.<sup>137</sup> Most importantly, to convict a defendant with no tangible evidence of the loss or injury, except the victim's testimony, defies one's sense of justice.

Conversely, in those jurisdictions which describe the *corpus delicti* as including both the loss or injury and someone's criminality,<sup>138</sup> the categorical exclusion of other crimes to prove the *corpus delicti* cannot be justified.<sup>139</sup> Where the problem lies in the ambi-

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133. E. IMWINKELREID, *supra* note 17, § 4.01, at 4-2. Comment, *supra* note 115, at 180-81.

134. The inability of the victim to testify is not a theoretical proposition in some child sexual offense cases. The child may be held incompetent to testify because of her immaturity. See Comment, *infra* p. 245 (*The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. Miami L. Rev. 245 (1985)).

135. See Trautman, *supra* note 37, at 388 ("Thus Fact A [the other crimes evidence] will be said to be relevant to Fact B [the charged crime] when, according to human experience, it is so related to Fact B that Fact A, considered either by itself or in connection with other facts renders probable the past, present or future existence or nonexistence of Fact B."). If the circumstances of the charged crime are unknown, the preceding relevancy analysis is impossible to undertake. The problem of relevancy, however, usually does not arise where the alleged crime is a sexual offense because, at the very least, the victim will testify as to the alleged crime.

136. Comment, *supra* note 115, at 180-81.

137. *Id.* at 181 n.38.

138. The majority of jurisdictions maintain Wigmore's definition of *corpus delicti*. J. WIGMORE, *supra* note 39, § 2072, at 525.

139. E. IMWINKELREID, *supra* note 17, § 6.04, at 6-7; Comment, *supra*, note 115, at 181-



guity of the cause of the loss, and there exists proof of the loss or injury, there is no compelling reason why a court should not admit other crimes evidence. The same notion is found in the traditional exceptions: other crimes evidence is admissible to resolve ambiguity regarding the defendant's state of mind or identity, but not to prove the propensity of the defendant to commit the charged crime.<sup>140</sup>

### B. *Other Sexual Crimes to Prove the Corpus Delicti of the Child Sexual Offense*

This Comment argues that where the *corpus delicti* is at issue in a sexual offense trial, the prosecution should be able to introduce other sexual offense evidence to prove the *corpus delicti*, provided the prosecution also proffers independent evidence of the loss or injury, and the other crimes evidence meets certain relevancy requirements.<sup>141</sup> In a nutshell, in order for other crimes evidence to be admissible to prove the *corpus delicti* of a sexual offense, the following requirements must be met:

- 1) There must be *independent proof* of the loss or injury;
- 2) The prior crime and the charged crime must be *similar*;
- 3) The defendant must have *control* over the victim;
- 4) The *corpus delicti* must be at issue.

When other crimes evidence is admitted under these conditions, the rule barring propensity evidence will not be violated.

#### 1. INDEPENDENT PROOF OF THE LOSS OR INJURY

In *Woods*, as in most cases admitting other crimes evidence to prove the *corpus delicti*, the loss or injury was not at issue, primarily because it was *res ipsa loquitur*: the burnt building proves a fire, the corpse proves a death. Thus, independent proof of the loss usually exists, which is required when other crimes evidence is offered to prove the *corpus delicti*.<sup>142</sup> Similarly, in order for prior

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140. Comment, *supra* note 115, at 182. Cf. Note, *Evidence—Proof of Particular Facts—Evidence that Defendant May Have Committed Similar Crimes is Admissible to Prove Corpus Delicti of Murder*, 87 HARV. L. REV. 1074, 1080 (1974) ("But although each prior occurrence in *Woods*, taken individually, would not provide sufficient proof that [the infant]'s death resulted from homicide, a cumulative inference of human design from a series of arguably natural deaths is not inherently weaker than an inference from similar facts would be about the defendant's state of mind or identity.").

141. See *infra* notes 146-55 and accompanying text.

142. For a discussion of the necessity of independent proof of the *corpus delicti*, see *supra* notes 133-40 and accompanying text.



child sexual offense evidence to be admissible to prove the *corpus delicti*, there must be independent evidence of the loss or injury, and the other sexual crimes evidence must be proffered to prove the second element of the *corpus delicti*—the fact of criminality.<sup>143</sup>

Evidence of other sexual offenses should generally be limited to sexual offenses committed against children, because of the requirement of independent proof of the loss or injury.<sup>144</sup> Although proof of loss of virginity of an adult female does not make out a *prima facie* case of rape because the woman may have consented to the sexual act, or may have engaged in sex prior to the alleged offense, proof that a child is no longer a virgin is strong evidence of a loss or injury to the child because, generally, it is a crime to have sex with a child.<sup>145</sup> In other words, physical evidence found on the body of a child which points to sexual activity constitutes the requisite independent evidence of the social loss or injury.

## 2. SIMILARITY OF THE PRIOR CRIME AND THE CHARGED CRIME

A second criteria required by most courts that have allowed other crimes evidence to prove the *corpus delicti* is similarity between the other crimes and the charged crime.<sup>146</sup> In *Woods*, almost all of the children, including the victim, experienced cyanosis, yet were seemingly healthy. Most of the medical examiner's explanations contained in the autopsies were later proven to be logically impossible or highly unlikely.<sup>147</sup> Requiring a high degree of similarity insures the relevance of the uncharged act to the charged act. The more similar the prior sexual act is to the charged sexual act, the more relevant the prior sexual acts evidence is likely to be.<sup>148</sup>

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143. For a discussion of the elements of the *corpus delicti*, see *supra* notes 112-14 and accompanying text.

144. Another justification limiting the rule to child sexual crimes is the greater necessity for evidence corroborating a child's testimony regarding the alleged crime. See 22 C. WRIGHT & K. GRAHAM, *supra* note 24, § 5236, at 462.

145. In most jurisdictions it is a crime to have sexual intercourse with a female not of age. See, e.g., CAL. PENAL CODE § 261.5 (West 1985); FLA. STAT. ANN. § 794.05 (West 1976); N.Y. PENAL CODE § 130.35 (McKinney 1975). In this context the independent proof of the loss or injury *cannot* be the testimony of the prosecutrix. Otherwise, the requirement of independent evidence would be illusory because the victim will almost always testify to the existence of a crime.

146. E. IMWINKELRIED, *supra* note 17, § 4.03, at 4-12.

147. *Woods*, 484 F.2d at 130-32.

148. Cf. Trautman, *supra* note 37, at 388.



### 3. DEFENDANT'S CONTROL

Another aspect of the cases allowing other crimes evidence to prove the *corpus delicti* is the notion of the defendant's control.<sup>149</sup> In *Woods*, the victims were in the custody or control of the defendant.<sup>150</sup> The control requirement is important because it ensures the existence of an objective intermediate inference.<sup>151</sup> Where the defendant can be connected with a number of similar incidents, the inference of the defendant's perpetration of the charged crime from his prior acts does not violate the other crimes evidence rule.<sup>152</sup> In other words, the higher the number of prior sexual offenses committed by the defendant in the custody or control of the child, the more probable it is that the defendant committed the charged sexual offense, or alternatively, the more improbable the possibility that the child victim fabricated her testimony.<sup>153</sup>

### 4. *Corpus Delicti* AT ISSUE

The requirements of the independent evidence of the *corpus delicti*, similarity between the other crimes and the alleged crime, and the defendant's control, insure that the rule barring propensity evidence will not be violated. Where these requirements are met,<sup>154</sup> and the *corpus delicti* is at issue,<sup>155</sup> the other sexual crimes

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149. E. IMWINKELRIED, *supra* note 17, § 4.03, at 4-12.

150. *Woods*, 484 F.2d at 130.

151. For a discussion of the permissible inferences pursuant to the other crimes evidence rule, see *supra* text accompanying notes 17-23.

152. 22 C. WRIGHT & K. GRAHAM, *supra* note 24, § 5236, at 465.

153. See E. IMWINKELRIED, *supra* note 17, § 4.01, at 4-4.

Although the objective improbability of fabrication inference looks dangerously like the corroboration rationale used presently by a number of courts, the corroboration rationale, standing alone, is less persuasive in terms of maintaining the integrity of the rule barring propensity evidence. Particularly in child sexual offense cases, the existence of the *corpus delicti* is frequently at issue. Thus, other crimes evidence to prove the *corpus delicti* fits neatly within the framework allowing other crimes evidence to prove a purpose other than propensity. On the other hand, the credibility of a witness is always at issue. Thus, a flat corroboration theory will invariably allow evidence of other sexual crimes, thereby rendering the rule barring propensity evidence superfluous.

154. Admittedly, the foregoing requirements greatly decrease the scope of the permissible use of other sexual crimes evidence to prove the *corpus delicti*. As will be seen in the textual discussion that follows, these limitations, however, are absolutely necessary to the integrity of the rule barring propensity evidence and the maintenance of a system which insures that the defendant receives a fair trial. See *infra* notes 156-57 and accompanying text.

155. The rule barring propensity evidence requires that the other crimes evidence must be proffered to prove an actual issue in dispute other than the propensity of the defendant to commit the charged crime. See *supra* text accompanying notes 17-23.



are relevant to prove the likelihood of the occurrence of the alleged act, irrespective of the defendant's peculiar propensities.

## V. CONCLUSION

Sexual offenses, by their nature, are reprehensible. Just as reprehensible, however, is the use of normal human reactions to sexual offenses, especially against children, to force judges and jurors away from the actual issues in dispute. The lewd disposition exception and its variations are a form of this manipulation. This Comment has attempted to hone the normal reactions of horror and disgust for aberrant sexual offenses against children by establishing an avenue for the prosecution to introduce, under limited circumstances, evidence of prior sexual offenses of the defendant. Where the prosecution possesses evidence of the defendant's prior sexual offenses, and where the *corpus delicti* of the charged sexual offense is at issue, the prosecution may introduce the evidence, provided that the other sexual offenses are similar in kind, the defendant is in a control relationship with the victim or victims, and independent proof of the loss or injury of the charged crime exists. The requirement of independent evidence will generally limit the permissible other acts evidence to that of sexual offenses committed against children.

The extremely limited circumstances which allow the admission of other sexual crimes to prove *corpus delicti* is unavoidable. The court-carved exceptions to the other crimes rule in sexual crime prosecutions generally violate the rule barring propensity evidence.<sup>156</sup> Introduction of evidence of other sexual offenses to prove the defendant's propensity to commit such offenses has threatened the integrity of our judicial system and has led to conviction of the innocent.<sup>157</sup>

Under the analysis set out in this Comment, in the trial of Daniel Lowell Coler,<sup>158</sup> the prosecution's proffered evidence would have fared as follows. The testimony concerning the cucumber in-

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156. See *supra* text accompanying notes 35-36.

157. Cf. Howson, *Child Sexual Abuse Cases: Dangerous Trends and Possible Solutions*, 1985 *THE CHAMPION* 6,6 ("[T]here exists a percentage of cases, however large or small, in which allegations of child sexual abuse are made against an individual, which allegations are unfounded."); *The Youngest Witness: is there a 'witch hunt' mentality in sex-abuse cases?*, *Newsweek*, Feb. 18, 1985, at 72 ("The pendulum of enforcement, it seems, has swung too far.")

158. For a discussion of the facts in that trial, see *supra* text and accompanying notes 1-7.



cident would not be admissible if no detectable injury remained on the child, i.e., there was no independent proof of the injury, and because the cumcumber incident was not similar in kind to the charged crime of rape. The testimony concerning the defendant's threat to his son and the son's sexual intercourse with his sister would not be admissible because the offenses are not similar in kind to the charged offense. The victim's testimony concerning the defendant's sexual intercourse with her would be admissible because there was independent proof of the loss—the doctor's testimony concerning Mary's injuries, the prior crimes and the charged crime were similar in kind—rape, and the victim was in the custody of her father when the prior and charged incidents occurred.<sup>159</sup> Limiting the types of allowable evidence will thus insure that the jury learns only of the relevant evidence, and is precluded from learning of any highly prejudicial and irrelevant evidence.

AMBER DONNER-FROELICH

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159. Note, however, the evidence is still subject to scrutiny under Fed. R. Evid. 403.