University of Richmond Law Review

Volume 3 | Issue 1 Article 5

1968

The Law Whose Life Is Not Logic: Evidence of Other Crimes in Criminal Cases

James W. Payne Jr.
University of Richmond

THE LAW WHOSE LIFE IS NOT LOGIC: EVIDENCE OF OTHER CRIMES IN CRIMINAL CASES

*James W. Payne, Jr.**

INTRODUCTION

IT is not the intention of the author to concentrate on generalizations in this article, but an introductory comment of a general character on this topic seems unavoidable. Assume that *D* is on trial for the rape of his fourteen-year-old daughter. He elects not to take the witness stand, claiming this right under the Fifth Amendment. (a) Could *W*, an older daughter, testify that *D* raped her several times when she was fourteen years old? (b) Could the prosecutor introduce evidence of a conviction of *D* for raping *W* when she was fourteen years old—*i.e.*, would the foregoing offer of proof be admissible for any purpose? Obviously, more facts may be needed depending upon the circumstances of a particular case, but these will be added; meanwhile, the basic problem situation is posed.

PRIVILEGE AGAINST SELF-INCRIMINATION

It was not always so, but beginning around 1650 the common law developed the privilege as a reaction against pressure in the form of inquisitorial proceedings conducted by the sovereign to force the suspected religious heretic to cooperate in furnishing evidence against himself.[1] The privilege as embodied in the Fifth Amendment has two basic aspects. First, the defendant in a criminal case cannot be forced to take the witness stand and testify at all. If he does, he has waived the privilege, at least as far as the subject matter of this testimony is concerned.[2] Nor may the prosecution comment on the failure of the accused to testify without committing reversible error.[3] Second, a witness in any judicial or quasi-judicial proceeding may not refuse to give testimony under oath, but he may refuse to answer

*Professor of Law, University of Richmond. LL.B., University of Richmond, 1948, B.A., 1952; LL.M., Harvard, 1954. Member, Virginia Bar.

[1] *See* MAGUIRE, EVIDENCE OF GUILT § 1.02 (1959).

[2] *See* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925), and cases cited therein. *Cf.* Smith v. Commonwealth, 182 Va. 585, 30 S.E.2d 26 (1944). *See also* People v. Barthel, 231 Cal. App. 2d 827, 833-34, 42 Cal. Rptr. 290, 294-95 (1965).

[3] *See* Griffin v. California, 380 U.S. 609 (1965). *Cf.* De Luna v. United States, 308 F.2d 140, 1 A.L.R.3d 969 (5th Cir. 1962); Blair v. Commonwealth, 166 Va. 715, 185 S.E. 900 (1936).

specific questions if, under the circumstances of that case, there is a possibility that any reasonably conceivable answer might tend to incriminate the witness—*i.e.*, reveal that the witness has committed a criminal act[4] or an act carrying with it the possibility of a penalty or forfeiture.[5]

If this article were a treatise on the privilege, the author would be forced to explore the vast and subtle array of rules that have developed in addition to, supplementary to, and by way of expansion of these "core" rules of the Fifth Amendment. That is not the province of this article, but the reasons for retention of the privilege, outlined in such meager fashion, are relevant to the problems discussed herein.

The first argument in favor of retention of the privilege is that it prevents police brutality. Indeed the *Escobedo-Miranda* complex of cases[6] seems primarily concerned with this aspect of the privilege, applying the Sixth Amendment's guarantee of counsel to the states to afford complete protection to the rights of the suspect under the Fifth Amendment.[7] One answer to this argument is that the Due Process Clause of the Fourteenth Amendment can be and has been applied to safeguard the accused against unduly coercive police tactics ranging from physical brutality to prolonged questioning which might break the will of the accused and result in a truthful or false confession.[8] This application of the Fifth Amendment tolls the bell

[4] *See* Malloy v. Hogan, 378 U.S. 1 (1964); Hoffman v. United States, 341 U.S. 479, 486-87 (1951): "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." The Court, quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881), added that it must be " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." 341 U.S. at 488.

[5] *See* MAGUIRE, EVIDENCE OF GUILT § 2.03 (1959).

[6] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964). *See also* MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, CASES AND MATERIALS ON EVIDENCE 41-50 (Supp. 1967) [hereinafter cited as CASES ON EVIDENCE] (extensive discussion of these decisions, the problems raised thereby, and satellite cases); Davis v. North Carolina, 384 U.S. 737 (1966); Linkletter v. Walker, 381 U.S. 618 (1965); Angelet v. Fay, 381 U.S. 654 (1965); Jackson v. Denno, 378 U.S. 368 (1964). *See generally* Johnson v. New Jersey, 384 U.S. 719 (1966) (retroactivity).

[7] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[8] *See* MAGUIRE, EVIDENCE OF GUILT §§ 2.01, 2.02 (1959); MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 136 (1954) [hereinafter cited as MCCORMICK, EVIDENCE].

for Wigmore's originally untenable suggestion that the privilege was confined to judicial proceedings.[9] It is perhaps true, as a matter of proof, that the accused is better protected from false testimony regarding the fact of a confession or admission and the manner in which it was obtained if he can be assured of prompt access to *Miranda's* guarantees, despite the fact that the state has the burden of proving the fact of a confession and its voluntary character.[10] There can be, of course, a factual issue as to police procedures by way of compliance with these rules. Nor have all of the extensions or limitations on the rules been explored.[11] If, as would seem usual, the accused knows more about his connection with the crime than anyone else in the courtroom; and if, as is usually assumed, the jury might view his silence with a jaundiced eye which could fairly balance the dangers of impeachment of his testimony, some argument can be made thus far in favor of removing this rather massive grant of immunity via silence to the accused. If some undefined but general public sense of fairness or tradition dictates otherwise, the matter could be handled by local legislation.[12]

A second argument in favor of retention of the Constitutional privilege is that it encourages the police to exercise diligence in digging out evidence of the guilt of the accused.[13] This is allied with the rule that the *corpus delecti* cannot be established solely on the basis of an uncorroborated confession[14] and the current rules excluding involuntary and exculpatory admissions;[15] and, indeed, the force of the argument is somewhat diminished

---

[9] *See* Miranda v. Arizona, 384 U.S. 436 (1966); MAGUIRE, EVIDENCE OF GUILT § 2.03 n.2 (1959).

[10] *See* Miranda v. Arizona, 384 U.S. 436, 470, 473, 475 (1966).

[11] *See* CASES ON EVIDENCE 43 n.3 *et seq.*

[12] *See* MAGUIRE, EVIDENCE OF GUILT § 2.02 at 13: "Many advocates of privilege against self-incrimination strongly emphasize desire to obviate risk of brutality by police and others connected with prosecution. This invites from opponents the proposal of withdrawing privilege for any orderly public inquiry supervised by a judge or corresponding disinterested official. That proposal in turn rouses the response that police or jailers might use or threaten force as a preparation for, or a vengeful possibility after, the supervised open inquiry. Such response of course poses the unsolved problem of assuring proper conditions of detention, with a consequent further unpleasant risk, all too often realized. Deprived of assurance that the prosecutor can probe for a suspect's information by decent, orderly questioning, police are tempted to bully their prisoner into admissions suggesting lines of investigation usable to turn up other evidence of guilt. The privilege may *encourage* torture rather than the reverse."

[13] *See* MAGUIRE, EVIDENCE OF GUILT § 2.02 (1959).

[14] *See* Pepoon v. Commonwealth, 192 Va. 804, 811-12, 66 S.E.2d 854, 858-59 (1951); MCCORMICK, EVIDENCE § 110 (1954).

[15] *See* Escobedo v. Illinois, 378 U.S. 478 (1964); Fahy v. Connecticut, 375 U.S. 85 (1963); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

by these latter doctrines.[16] This reasoning is reminiscent of Kipling's suggestion that it is easier to sit in the sun rubbing red pepper in some poor devil's eyes than to run about in the sun searching for evidence. Jeremy Bentham damned the argument as "the fox hunter's reason." [17] Professor Maguire makes a comment that could be applicable despite *Miranda,* particularly in the case of the suspect who does not avail himself of *Miranda's* extension of privilege:

> Begin, then, with the proposition that privilege against self-incrimination is supportable only because it brings substantial benefit to the community by aiding the innocent, by tending to convict the guilty or at least on the whole not unduly impeding conviction, and by advancing good public policy in other ways. On the first two scores, we have a carefully framed argument that if a prosecutor (1) were lazy, unconscientious, or proud of his ability to turn a witness inside out, and (2) were guaranteed opportunity to interrogate a defendant exhaustively, with full official sanction to compel answers, he would tend to rely solely upon this opportunity, neglecting more laborious and showy forms of investigation and compilation of evidence. He might then trick an innocent person into conviction, or let a man guilty but nimble-witted steer his way to acquittal. This explanation should have its grain of salt. Suppose privilege against self-incrimination were abolished, but a requirement retained that the prosecutor must make his prima facie case without relying upon testimony from the defendant—this requirement being surely a minimum indispensable safeguard under good common law tradition. Bearing in mind the supplementary rule against admission of evidence of involuntary confessions, would there not remain very substantial incentive to proper industry by police and prosecuting officers?[18]

One argument does seem invulnerable except for the fact that it applies to relatively few people:[19] a witness might be less apt to dodge a subpoena when aware of or assured of the privilege. This, of course, does not affect the defendant in a criminal case whose presence is generally assured by quite different methods.

Despite all of the foregoing arguments, mostly calculated to punch logical holes in the current retention of the Fifth Amendment's privilege against self-incrimination, the most important argument in favor of the privilege is not lacking in sentiment or notable for logical analysis. The privilege,

---

[16] *Cf.* McCormick, Evidence §§ 110, 111, at 233 (1954).

[17] Maguire, Evidence of Guilt § 2.02 n.3 (1959).

[18] *Id.* at 12-13.

[19] *See id.* at 13.

historically, has created respect for the procedures whereby law is administered and justice sought.[20] There has been a felt need for the privilege, and it has been with us for a long time. It is not at all certain that abandoning it would do more than create public uneasiness as to some segments of our legal system. Again Professor Maguire notes in his pithy style: "But one point should certainly be made in favor of retaining the privilege. Accustomed personal safeguards, fixed in men's minds by usage of decades and centuries, are not lightly to be destroyed." [21]

Dean Erwin Griswold has referred to the privilege against self-incrimination as "one of the great landmarks in man's struggle to make himself civilized" [22]—as a step beyond the sovereign use of torture as a means of obtaining evidence. He also states:

> We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.
>
> If a man has done wrong, he should be punished. But the evidence against him should be produced, and evaluated by a proper court in a fair trial. Neither torture nor an oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse or to convict himself. If his crime is a serious one, careful and often laborious police work may be required to prove it by other evidence. Sometimes no other evidence can be found. But for about three centuries in the Anglo-American legal system we have accepted the standard that even then we do not compel the accused to provide that evidence. I believe that it is a good standard, and that it is an expression of one of the fundamental decencies in the relation we have developed between government and man.[23]

Dean Griswold also links the privilege with the familiar rule that a man is innocent until proved guilty.[24]

Evidence of Prior Crimes in Criminal Cases

It is axiomatic that the prosecution cannot introduce evidence tending to show that the defendant in a criminal case is a bad man or that he has

[20] *See* Griswold, The Fifth Amendment Today 73 (1955): "I believe the Fifth Amendment is, and has been through this period of crisis, an expression of the moral striving of the community. It has been a reflection of our common conscience, a symbol of the America which stirs our hearts."

[21] Maguire, Evidence of Guilt § 2.02, at 14 (1959).

[22] Griswold, The Fifth Amendment Today 7 (1955).

[23] *Id.* at 7-8.

[24] *See id.* at 9.

criminal propensities generally for the purpose of proving that the defendant committed the crime with which he is charged.[25] Equally familiar are rules permitting impeachment of the accused if he elects to testify.[26] These rules vary in scope, with some jurisdictions confining the prosecution's impeaching testimony in the nature of criminal behavior to proof of criminal convictions.[27] Generally, these must be convictions involving the commission of a felony or a misdemeanor involving moral turpitude.[28] In some jurisdictions proof of prior criminal activity not resulting in conviction is allowed.[29] All courts agree that such evidence, when offered to impeach, operates only to reflect on the credibility of the accused and that the evidence cannot be received as substantive proof, the defendant being entitled to a limiting instruction to this extent.[30] Trial lawyers generally are not so naive as to believe that these limitations as spelled out by the judge are adhered to by the jury.[31] Eminent scholars have also experienced difficulty with the distinction; but the case is one of half a loaf being better than none.[32]

Our specific problem is both related to and apart from the rules noted above. We are concerned with the admissibility of evidence of the defendant's criminal conduct when such evidence is offered to establish guilt. This kind of proof is necessarily an exception to Cardozo's fluent pronouncement:

> If a *murderous propensity* may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence . . . must first be declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one. . . . *In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar.* . . . Inflexibly the law has set its face against the endeavor to fasten guilt upon him by proof of *character or experience* predisposing to an act of crime. . . . The principle back of the exclusion is one, not of logic, but of policy. . . .

---

25 *See* Jones v. La Crosse, 180 Va. 406, 23 S.E.2d 142 (1942); McCormick, Evidence § 157 (1954); 1 Wigmore, Evidence §§ 55, 57 (3d ed. 1940); Model Code of Evidence rule 311 (1942); Uniform Rule of Evidence 55.

26 *See generally* McCormick, Evidence §§ 33, 50 (1954).

27 *See id.* § 42.

28 *See* Burford v. Commonwealth, 179 Va. 752, 20 S.E.2d 509 (1942); McCormick, Evidence § 43 (1954).

29 *E.g.*, Shailor v. Bullock, 78 Conn. 65, 61 A. 65 (1905). *See* Uniform Rule of Evidence 22(d): "[E]vidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible."

30 *See* McCormick, Evidence § 39 (1954).

31 *See* Medlin v. County Board of Education, 167 N.C. 239, 241, 83 S.E. 483, 484 (1914); Annot., 133 A.L.R. 1454, 1464 (1941).

32 *See* McCormick, Evidence § 39 & n.14 (1954).

> There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of a milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." [33]

But even Cardozo recognized the existence of many exceptions to his rule predicated upon relevancy for a different purpose,[34] and Professor Morgan expressly states in the Foreword to the *Model Code of Evidence:* "Such evidence [of other crimes or wrongs offered to prove the commission of a specified crime or wrong] is made inadmissible only where it is relevant solely as tending to prove a disposition to commit such a crime or wrong or to commit crimes or wrongs generally. If it is relevant for any other purpose, it is admissible." [35]

It is our concern to list and analyze the major exceptions to the rule of *People v. Zackowitz*[36] and to attempt partial refutation of Professor Morgan's rigid position by suggesting limiting factors, including an application of the policy underlying the privilege against self-incrimination, which should and do operate to exclude such evidence. Analytically, the privilege, conceived of as invalidating sovereign pressure to force an accused to give evidence against himself, is not applicable to such offers of proof.[37]

Professor McCormick offers a list of the major exceptions to the *Zackowitz* rule which does not purport to be complete.[38] Nor does the following material purport to exhaust the available case material, which has been described as akin to the sands in the sea.[39] It will be noted in this partial review of the legions of decisions, that the cases are often lacking in consistency; that they are not notable for precise definition; that they can be confusing in terminology; that distinctions are sometimes drawn without

---

[33] People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466, 468 (1930) (emphasis added). *See* 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940); CASES ON EVIDENCE 566-67 (5th ed. 1965).

[34] People v. Zackowitz, 172 N.E. at 468.

[35] Morgan, *Foreword* to MODEL CODE OF EVIDENCE 31 (1942).

[36] 254 N.Y. 192, 172 N.E. 466 (1930).

[37] *See* MAGUIRE, EVIDENCE OF GUILT § 2.082, at 94-95 (1959).

[38] MCCORMICK, EVIDENCE § 157 (1954).

[39] *See id.* n. 2.

any apparent logical basis; that the application of the rules will vary in statement and application according to jurisdiction; that there is some tendency to resort to solving phrases; and that often the exceptions, applied in slot machine fashion, unduly evade the rule and caveat so forcefully stated by Cardozo.

According to Professor McCormick's list, evidence of a prior crime is admissible when offered: *"To complete the story of the crime on trial by proving its immediate context of happenings near in time and place. This is often characterized as proving a part of the 'same transaction' or the 'res gestae.'"* [40]

This thought was present in Pound's dissent in *People v. Zackowitz:*[41]

> The possession of these dangerous weapons was a separate crime. . . . *The broad question is whether it had any connection with the crime charged. . . .*
>
> The people may not prove against a defendant crimes not alleged in the indictment . . . unless such proof tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial. These exceptions are stated generally and not with categorical precision and may not be all-inclusive. People v. Molineux, 168 N.Y. 264, 61 N.E. 286. . . . None of them apply here, nor were the weapons offered under an exception to the general rule. *They were offered as part of the transaction itself. . . .* The rule laid down in the Molineux case has never been applied to prevent the people from proving all the elements of the offense charged, although separate crimes are included in such proof. Thus in this case no question is made as to the separate crime of illegal possession of the weapon with which the killing was done. It was *"a part of the history of the case" having a distinct relation to and bearing upon the facts connected with the killing.*[42]

In *Timmons v. Commonwealth*[43] the same ambiguous thought is mingled with admissibility of other crime evidence to show malice, motive, intent, and "the degree of atrociousness of the crime." Here the defendant was found guilty of murder in the first degree for the killing of one Ann Bannon and sentenced to death for that offense. There was uncontradicted evidence

---

[40] *Id.* at 328 (emphasis added).
[41] 254 N.Y. 192, 172 N.E. 466 (1930).
[42] 172 N.E. at 470-71 (emphasis added).
[43] 204 Va. 205, 129 S.E.2d 697 (1963).

that the defendant shot and killed Mrs. Bannon and also shot her friend, one Mrs. Lewis, and finally that he raped both women. For our purposes we are interested in the following assignments of error on appeal. First, the contention that the trial court committed reversible error in admitting in evidence photographs of the dead woman and accompanying slides. With reference to this assignment, the court stated:

> *The photographs of the victim were relevant to show the degree of atrociousness of the crime, or the malice with which it was committed. The state of disarray of the deceased's clothes shed light on the motive and intent of the defendant, as revealed in his contemporaneous acts. The photographs clearly and simply show more than any witness, save defendant, actually saw at the time of the killing.* The question of their admissibility was one resting in the sound discretion of the trial court.[44]

The court, in discussing the cross-examination of another witness, made reference to the fact that "the defendant sought to magnify the depravity and brutality of his acts to give substance to the argument that he was insane." [45] But the court found that the defendant was sane, and there being no dispute as to what he did, it is difficult to avoid the conclusion that the photographs had an overwhelming tendency to influence the jury's mind and very little cogency for any other purpose. This seems a doubtful case of proper exercise of strict judicial discretion.[46]

---

[44] *Id.* at 214, 129 S.E.2d at 703 (emphasis added).

[45] *Id.* at 215, 129 S.E.2d at 703.

[46] *See also* Westry v. Commonwealth, 206 Va. 508, 144 S.E.2d 427 (1965) where the defendant was found guilty of murder in the second degree over a plea of not guilty. Defendant had argued that the homicide was committed by one Capps. The trial court admitted photographs of the body of the deceased taken after its discovery. On appeal the court commented:

> Defendant's contention is that these photographs were not relevant or material and tended only to inflame the jury. There is nothing to indicate that they had that effect. "The picture of the wounded body of a man in the repose of death should excite no more sympathy or prejudice than the exhibition of a living person with a bruised, broken, and torn body." *Id.* at 513, 144 S.E.2d at 431.

By way of comment it is difficult to see what the court would expect to find to indicate jury prejudice. The verdict was one of second degree murder and this kind of evidence is generally conceded to be prejudicial. The court refers to the "repose of death" as though this victim's appearance was relatively peaceful. The victim here had been shot and beaten about the head with sufficient force to break a gun barrel. The court adds:

> The photographs here afforded some corroboration of the medical testimony and of the testimony of Capps, and as was said . . . in *Timmons v. Commonwealth, supra,* they were admissible "to show the degree of atrociousness of the crime, or the malice with which it was committed." *Ibid.*

The court's willingness to admit evidence tending to show the "degree of atrociousness

Regarding the second assignment of error, which dealt with the testimony of Mrs. Lewis, the court stated: "There is no merit in the contention that it was error to permit Mrs. Lewis to testify as to the rapes upon her." [47] The court noted that counsel waived his right to except here by failure to object,[48] but indicated that this evidence of a separate crime would have been admissible anyway, using language that is consistent with Professor McCormick's rule:

> The killing and rapes all occurred within a few minutes. The offenses were so closely connected and interwoven as to be a continuous series of acts tending to show the intention and motive of the defendant. *It is impossible to separate them and get a complete view of the whole case and the reasons therefor....*
>
> ....
>
> Generally speaking, it is not proper on the trial of a criminal case to admit testimony of a prior independent crime; but there is an exception to the rule as well established as the rule itself that such testimony is admissible where it shows motive, intent, *or is related to or connected with or leads up to the offense for which the accused is on trial.*[49]

Note the alternative statement of the admissible purpose and, finally, the decision in *Compton v. Commonwealth*[50] where the defendant was prosecuted for breaking into a chicken house. He objected to evidence, offered and received in the trial court, that he had shot the owner of the chicken coop, for which offense he had been tried and convicted. The court stated, "This shooting occurred while the act of housebreaking was yet in progress and was so inseparably connected with it as to make the avoidance of all reference to it practically impossible. . . . The shooting was part of the *res gestae* and limited reference to it was admissible." [51]

Where *Timmons* tossed in motive and intent along with the history of

---

of a crime" or the "malice with which it was committed" appears to be another way of stating that the evidence shows what the defendant is capable of doing, and it is difficult for this writer to reconcile either the principle underlying the general rule of *Zackowitz* (admittedly the general rule in Virginia; *see* Timmons v. Commonwealth, 204 Va. at 215, 129 S.E.2d at 704) or the principle underlying the prohibition against making inquiry into the details of a crime or criminal convictions offered for impeachment purposes.

47 204 Va. at 215, 129 S.E.2d at 703.

48 *Ibid.*

49 *Id.* at 215, 129 S.E.2d at 703-04 (emphasis added).

50 190 Va. 48, 55 S.E.2d 446 (1949).

51 *Id.* at 55, 55 S.E.2d at 449; *see* Huffman v. Commonwealth, 168 Va. 668, 190 S.E. 265 (1937); Calvin v. Commonwealth, 147 Va. 663, 137 S.E. 476 (1927).

the case as facts to be established by prior crime evidence, the *Compton* case relied on a statement of the fact of close connection in time and the invocation of the Latin phrase *res gestae,* which means literally, "things done." If the rule admitting proof of prior crimes is handled in language laden with this degree of ambiguity, it amounts to little more than a poorly camouflaged statement of fiat which defies understanding and predictability, but does enable the prosecution to show the predisposition of the accused to commit a crime in order to secure a conviction. The same is generally true of the rule noted by Professor McCormick, and the cases cited by him as illustrative, insofar as the evidence of prior crimes can be imbedded in a rule allowing such evidence as part of the "history of the case" or as the "things done." The same "argument" would have dictated a different result in *Zackowitz.* The factor of substantial prejudice is obvious. The justification, insofar as practical convenience or necessity is part and parcel of the language in the cases noted thus far, seems as dubious as the cogency of the evidence to prove the crime with which the defendant is charged.

At least three limiting factors should be noted with reference to evidence of the kind under consideration. It has been asserted that

> originally this [exclusionary] rule [that we have labelled the *Zackowitz* rule] was a narrow one,—that if the offered evidence is relevant solely by a series of inferences which proceed from the other crimes to the disposition of the accused to commit such crimes, and thence to the probability of his having committed the crime charged, it is not admissible. Under this narrow rule evidence of other crimes (which does not depend upon evil dispositions as a basis of logical inference) may be freely admitted in the discretion of the trial judge whenever it is logically relevant to either an ultimate or intermediate probandum before the court; not just in case it can be fitted into the pigeonhole of an exception to the broad rule of exclusion, but rather because it is completely outside the scope of the rule of absolute exclusion.[52]

The author approves of a narrow application of the rule of exclusion, stated affirmatively, with the suggestion that "[i]t makes clear the basis of exclusion and directs the attention of the trial courts to the question of logical relevancy." [53] (1) But the author unequivocally concedes the first major limiting factor on the admission of an exception: the trial judge may exclude evidence of other crimes because of undue prejudice[54]—*i.e.,*

[52] Trautman, *Logical or Legal Relevancy—A Conflict in Theory,* 5 VAND. L. REV. 385, 404-05 (1952).

[53] *Id.* at 405.

[54] *Id.* at 409 and cases cited therein.

prejudice that is disproportionate to the cogency of the evidence. (2) At the risk of some redundancy and by way of emphasis there should be some showing of substantial necessity in the reception of the evidence. The authors of *Cases on Evidence* suggest that the fact to be shown should be in dispute or that the issue must be a relatively serious one.[55] Thus they state:

> But see State v. Winget, 6 Utah 2d 243, 310 P.2d 738 (1957), a prosecution for rape of defendant's eight-year-old daughter, in which the state was allowed to put in the testimony of defendant's seventeen-year-old stepdaughter that defendant had raped her four times when she was eight or nine years old and when she was twelve years old. The court reversed the conviction, adhering to a position taken in an earlier case, that evidence of similar sex acts with persons other than the complaining witness is inadmissible. A well-reasoned concurring opinion points out that, "[The evidence of the earlier offenses] might tend to establish the identity of the person who perpetrated the crime charged if there were any serious issue or doubt on the question of whether the daughter knew her own father, but here no such doubt is claimed. The same is true of the proof of criminal intent. The commission of the offense charged as testified by the complaining witness obviously shows the criminal intent of the person who perpetrated such offense." [56]

The authors add:

> In deciding the admissibility of other crime evidence, there surely ought to be the consideration of the necessity for such evidence in another sense. Peery v. State, 165 Neb. 752, 87 N.W.2d 378 (1958), was a prosecution for breaking and entering with intent to steal. A revolver was taken away from the house that had been burglarized. Although the police testified that they later found this revolver in defendant's possession, the trial court also admitted evidence of two crimes committed by defendant, subsequent to the burglary, in which, it was testified, he had used a revolver similar in appearance to the one taken in the burglary. The appellate court found no error in admitting the evidence. See State v. Lyle, 125 S.C. 406, 430, 118 S.E. 803, 812 (1923) (forgery case in which authorship of allegedly forged writing was in issue; despite availability of neutral standards of defendant's handwriting, prosecution chose to rely on standards indicating his guilt of other forgeries)....[57]

---

55 *See* CASES ON EVIDENCE 581 (5th ed. 1965).

56 *Ibid.* Is this something more than a sufficiency of evidence problem?

57 *Ibid.*

The problem posed by these cases would seem to differ from that raised in the preceding paragraph in the sense that in the latter instances there was simply no necessity for evidence of other crimes to establish relevant facts. This difference may embody considerations of degree, but the gap and the absence of necessity are more blatantly apparent in the latter cases. This is also law by shibboleth and an abandonment of judicial responsibility.

(3) Third, and admittedly related to our prior considerations, is the concept of "remoteness." It is axiomatic that the trial judge has discretion to exclude evidence where the cogency is slight and the prejudicial impact is excessive. This is true even under Professor Morgan's sweeping pronouncement. Note *Burnette v. Commonwealth*,[58] which combines this thought with the more absolute concept of relevancy. Here the defendant was prosecuted under a warrant charging that he did "store and offer for sale illegal type fireworks. . . ." [59] His punishment was fixed at six months in jail and a one hundred dollar fine. The defendant's store had been searched pursuant to a warrant, and the search had revealed legal fireworks on display and a quantity of illegal fireworks stored in boxes but not on display. During the trial, the sheriff testified that he saw some sailors go into the defendant's store, come out, and then proceed to use firecrackers (an illegal type of fireworks). The *trial court charged the jury that this evidence was admissible for the limited purpose of showing why a search warrant was obtained but not to show a sale of illegal fireworks. On appeal, the court held as a matter of law that the evidence as to the fireworks in boxes was not sufficient to show beyond a reasonable doubt a display of illegal fireworks from which an offer to sell might be inferred. The court further pointed out that, in view of the trial court's instruction, the evidence as to the sailors' conduct could not be used by the jury to infer an illegal sale by the defendant.* Therefore, there was no evidence of such a sale. The court assumed that a finding of either storing *or* selling illegal fireworks might establish a criminal offense. *However, since the jury's verdict was based, in part, upon a finding of an illegal sale, the court suggested that this might have influenced the jury as to the punishment imposed and remanded the case for a new trial.*[60]

Uniform Rule of Evidence 45 provides:

> Except as in these rules otherwise provided, the judge may in his

[58] 203 Va. 455, 125 S.E.2d 171 (1962).
[59] *Id.* at 456, 125 S.E.2d at 172.
[60] *Id.* at 457, 458, 460, 125 S.E.2d at 172, 174, 175.

> discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

The comment on the rule states as follows:

> This applies to frequently arising situations where the trial may get out of hand by the injection of collateral issues having only slight probative value and which would tend to confuse the jury or have illegitimate emotional appeal. [*E.g.*, evidence of insurance coverage in personal injury actions, evidence of the existence of prior accidents to show negligence, or lack of prior accidents to show care in the maintenance of premises, etc.] Obviously the judge should have some discretion to prevent the trial from going off on tangents of relative unimportance. Likewise some protection is needed from unfair surprise with respect to such matters. This represents the sort of thing which the trial judge does every day in actual practice and which is sanctioned here, in the assurance that the results of rare and harmful abuse of discretion will be readily corrected on appeal. It is a rule of necessity. Its sanction cannot be escaped if we are to have orderly and efficient trial procedure.[61]

Finally, in *State v. Goebel*[62] *D* was convicted of committing rape and sodomy on a young woman referred to as *A*. On appeal, the prosecution argued that evidence of an attempted rape on the person of *C* shortly before the assault on *A* should be admitted to show the plan, scheme, or bent of mind of the defendant.[63] The court replied:

> [W]e are of the opinion that this class of evidence, *where not essential to the establishment of the state's case,* should not be admitted, even though falling within the generally recognized exceptions to the rule of exclusion, when the trial court is convinced that its effect would be to generate heat instead of diffusing light, or, . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it. This is a situation where the policy of protecting a defendant from undue prejudice conflicts with the rule of logical relevance, and a proper determination as to which should prevail rests in the sound discretion of the trial

[61] UNIFORM RULE OF EVIDENCE 45.

[62] 36 Wash.2d 367, 218 P.2d 300 (1950).

[63] 218 P.2d at 303.

> court, and not merely on whether the evidence comes within certain categories which constitute exceptions to the rule of exclusion. . . .[64]

Professor McCormick states the second exception as follows: "To prove the existence of a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a part. This will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, and his intention, where any of these are in dispute." [65]

Presumably Professor McCormick is referring here to those decisions which allow such evidence to show a "common scheme or plan." If so, two comments are called for. First, the rule, as McCormick states it, joins in with the preceding material to illustrate how such exceptions are usually lumped together, intermingled, and offered in a multi-faceted manner and for multi-faceted purposes which makes it virtually impossible to discuss a single exception in isolation. Second, if McCormick is referring to the "common scheme" exception, his formulation of the rule is marked by a kind of lucidity that is not apparent in the cases. The courts accept, with regularity, evidence of prior wrongs or crimes to show a "common scheme or plan." [66] What is meant by this phrase in actual usage? Some of the cases support Professor McCormick's careful statement and may be found for illustrative purposes in his treatise.[67] From that point, meanings vary and there is an occasional effort, that seems almost studied, to admit evidence for this purpose when both cogency and definition appear as shadows in a darkened place. Some decisions, not supportable under the habit pattern rule, seemingly demand "conformity in pattern" between offenses charged.[68] For example, if the evidence is tendered to show the division of a "common batch" of contraband (*e.g.*, narcotics), it has been admitted. In this connection reference can be made to *United States v. Montalvo*[69] which apparently links the "common scheme" notion with evidence tending to show participation therein, *i.e.*, that the scheme was consummated, although the reasoning is devoid of the "common scheme" phrase, and ends, not with a bang, but a whimper. Here, one Rovira had been with the defendants while they were under surveillance which ended in a search disclosing the

[64] *Id.* at 306 (emphasis added). *See* Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955).

[65] McCormick, Evidence § 157, at 328 (1954).

[66] *See id.* § 157.

[67] *Id.* § 157 at 328 n.5.

[68] Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959); People v. Peete, 28 Cal.2d 306, 169 P.2d 924 (1946). *But see* State v. Marchand, 31 N.J. 223, 156 A.2d 245 (1959); People v. Peete, *supra* (dissent).

[69] 271 F.2d 922 (2d Cir. 1959).

defendants' possession of heroin. Rovira was observed twice driving at slow speed past defendant Montalvo's apartment building. He was then arrested in a nearby drugstore in possession of a penknife, the blade of which was caked with a small quantity of heroin. This latter fact, of course, tended to show an earlier commission of a crime. The court admitted the evidence of Rovira's conduct and possession of the incriminating knife stating:

> The evidence was not admitted to show that since William Rovira had committed another narcotics offense at some unspecified date, [not in issue here] he might be supposed capable of committing another one now. The government was seeking to show that Rovira, who had been with Montalvo earlier, was about to rejoin him to carry out the illegal enterprise. Rovira's possession of a tool whose suitability to that end was made plain by its previous use in a similar one, [was this evidence necessary to establish suitability or even the basis for arrest?] was relevant to that issue.[70]

The court pays deference to the discretion of the trial judge and concludes in limp fashion: "For if the evidence did not have a great tendency to lead, it had equally little to mislead." [71] The writer lacks the confidence of the court that such evidence had little tendency to mislead, but shares the court's apparent feeling that the evidence possessed slight cogency. It is diffifult to accept substantial belief that this evidence, dealing with a heroin-caked knife, would not prejudice a jury. The general rule, which sounds a bit like an evasion of the habit rule, has been stated in *State v. Bock*:[72]

> Proof of similar acts constituting separate and distinct crimes is admissible under an exception to the general rule, not for the purpose of showing specifically that defendant committed the crime with which he has been charged, but for the purpose of permitting the trier of facts to draw an inference from the evidence showing a general plan or scheme, consisting of a series of acts similar to that with which defendant is charged, that he did commit the crime with which he is charged.[73]

This language is, in the writer's opinion, both confusing and contradictory. It sounds like the judge is handing the jury its fish and chips with one hand and taking them away with another, since the jury obviously is sup-

[70] *Id.* at 927.
[71] *Ibid.*
[72] 229 Minn. 449, 39 N.W.2d 887 (1949).
[73] 39 N.W.2d at 891.

posed to consider this evidence on the issue of guilt. Perhaps the judge is stating that such evidence (of prior crimes) is not to be treated as conclusive, but surely there must be a more intelligible way of stating this to the jury.[74] The authors of *Cases on Evidence* furnish additional cases in their notes.[75]

A tangential problem in this area deals with the quantum of proof needed to establish the existence of other crimes. The general rule has been stated to the effect that such evidence must be substantial, but this is no requirement that the other crime be established beyond a reasonable doubt.[76]

Also, it has been noted with some caution that a history of sex offenses might be provable to show a propensity for committing a particular type of crime:

> If by disposition to commit crimes of widely different types under different factual situations independent of any particular objective or motive—a general criminal proneness, so to speak—the enormity of the proposition is such that evidence of one or two or three different types of crimes would seem at best very weak in probative value. So a rule of absolute exclusion based upon the policies of undue prejudice, surprise and collateral issues may be reasonable enough when the best that can be said for the evidence offered is a tendency to prove a proposition of such broad scope. But when the evidence offered shows clearly a disposition to commit the particular type of crime now charged, a much more narrow proposition is asserted, which in turn under the peculiar circumstances of some cases may have such a high probative value as to be near certainty. The sex cases, particularly those involving homosexuals, are an example. Because of the increasing belief that sexual psychopaths have a disposition to repeat their acts of aggression, the probative value of evidence of other such offenses is considered to be so high that some courts are beginning to question even the narrow rule of absolute exclusion. Is there a variable here that can be handled better under a rule of discretionary exclusion? It is not the purpose of this paper to attempt an answer to the question; but rather it is to emphasize that only by so identifying and defining the existing policies of exclusion can there be an evaluation and improvement for the future of this part of the law of evidence.[77]

---

[74] *Cf.* State v. Harris, 153 Iowa 592, 133 N.W. 1078 (1912); State v. Bock, 229 Minn. 449, 39 N.W. 2d 887 (1949); State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911); 22A C.J.S. *Criminal Law* § 688 (1961).

[75] CASES ON EVIDENCE 587-91 (1965). *See also* MCCORMICK, EVIDENCE § 157 (1954).

[76] Trautman, *Logical or Legal Relevancy—A Conflict in Theory,* 5 VAND. L. REV. 385, 409-10 (1952).

[77] *Id.* at 406.

In addition to the arguments noted in the footnote reference to *Cases on Evidence,*[78] and conceding a high rate of recidivism in such cases, the high probative value noted by Professor Trautman which seems pointed primarily toward the issue of identity or proof of the *corpus delecti* and the defendant as its perpetrator in its narrowest sense, *i.e.,* the use of the question for illustrative purposes, resembles the now rejected argument that evidence of financial need on *D*'s part tends to prove not only that he borrowed money, but that he borrowed from a particular person and signed a particular note.[79] The evidence is relevant from the viewpoint of strict logic but generally not admitted, Holmes observed, as a concession to the shortness of life.[80] This comment, of course, is by way of disagreement with Professor Trautman's suggestion, implied in part, but explicit on the problem of relevancy, that the evidence should be admitted.

Returning to the mainstream, we ask again what is meant by the phrase "common scheme or plan"? As Professor McCormick states the rule, motive or intent or some other specific factor is involved in the sense that the evidence of prior incidents shows a larger plan of which the offense charged is a part, and consequently, is admissible to show motive or some other specific fact.[81] This is not the meaning adopted in *State v. Little.*[82] The case involved a narcotics prosecution in which the defendant urged that the common plan exception was not available to the prosecution unless motive, intent, or knowledge was in issue. The court disagreed, stating: "It is clear that the exception relating to a common scheme or plan does not require, as claimed by defendant, that motive, intent or knowledge, which are separate exceptions, be in issue." [83] The court rejected the state's evidence of prior narcotics sales for the reason that there was no evidence of a series of sales from a "single quantity" [84] and no proof of "any planned relationship between the various sales." [85] The court added: "The evidence of prior sales is not relevant because it does not reasonably permit either part of the double inference necessary to show the plan or scheme: first, from the conduct to the plan; then, from the plan to its consummation by the act in issue." [86] Apparently the court means by common plan, either division of a

[78] *Supra* note 75.

[79] Stevenson v. Stewart, 11 Pa. 307 (1849). *See generally* James, *Relevancy, Probability and the Law,* 29 CALIF. L. REV. 689 (1941).

[80] Reeve v. Dennett, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887).

[81] MCCORMICK, EVIDENCE § 157, at 328 (1954).

[82] 87 Ariz. 295, 350 P.2d 756, 86 A.L.R.2d 1120 (1960).

[83] 350 P.2d at 761.

[84] *Ibid.*

[85] *Ibid.*

[86] *Ibid.*

single batch, in the case of sales of contraband, or in such a case or other cases, a planned relationship between the prior incidents of criminal or wrongful conduct, whatever that may mean. An inference is then to be drawn from the existence of a plan, thus vaguely defined, directly to the criminal act for which the defendant is being tried, if such act is by way of consummation of the plan. Surely, we are now playing a word game, or coming very close to it, in an effort to tiptoe around the exclusionary rule. Was the court saying that the *Zackowitz* rule does not apply if the evidence of prior crimes is, by virtue of special circumstances, unusually cogent to show that the defendant is guilty as charged—*i.e.*, that he did the act in question? Another way to state the question is simply this: Do we have a crystalized rule here that evidence under the circumstances noted by the court is so unusually cogent to show a defendant's proclivity for committing the crime in issue that it can be admitted for this purpose? If so, we have taken a tremendous slice out of the exclusionary rule—to the point where the application of the rule may depend on a very loose exercise of judicial discretion on the issue of cogency.[87] The same query could be made of the decisions in which "common scheme or plan" means no more than close proximity in time between the offense charged and prior acts plus substantial similiarity in the conduct involved in the offense charged and such prior acts.[88]

Professor McCormick notes some of the more narrow and well-defined instances or purposes for which prior wrongful conduct is provable.[89] These include identity of methods involving a distinctiveness so unusual as to be like a signature; passion or propensity for illicit sexual relations with a particular person (such is not provable by evidence of prior sexual relations with other persons. As additional illustrations, McCormick also notes the general inadmissibility of prior instances of unnatural sexual conduct to prove such offense in a particular case); negation of accident or mistake; and the showing of motive, intent, or identity.[90] All of this sounds very well, and indeed, a bit glib. It has been apparent that the cases have used a "kitchen sink" approach and relied on more than one of the items noted in most instances of departure from the *Zackowitz* rule. Perhaps this has been for safety's sake, as the difficulties involved in application can be severe and the lines drawn so thin as to be threadbare. The problem of application can be illustrated by reference to two decisions of the Court of Appeals of Virginia.

---

87 *See infra* note 109.

88 *Cf.* McCormick, Evidence § 157, at 322-33, and cases cited therein (1954).

89 *Id.* § 157.

90 *Id.* at 328-29. Even here the judges have limited the quantum of proof where it has been felt that sufficient evidence has been introduced to accomplish the purpose of the prosecution. *See* State v. Gilligan, 92 Conn. 526, 103 A. 649 (1918).

In *Williams v. Commonwealth*[91] the accused was sentenced to death after a jury verdict which found him guilty of murdering his wife with an axe. The defendant appealed, and the Court of Appeals stated that the only issue before the court concerned the question as to possible error on the part of the trial court in allowing the accused to be cross-examined regarding a previous attack made by him upon his wife and his conviction for a felony as a result of that attack.[92] The trial judge stated, "I think the Commonwealth has a right to show other instances in order to show intent, and that he beat her on this occasion," [93] but the Court of Appeals observed that the accused had not placed his character in issue in this case and that indeed he did not deny that he killed his wife by hitting her with an axe.[94] *The court noted that that fact was not in issue* and stated:

> It is a well established common law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. . . .
>
> The tendency of such evidence to inflame and prejudice the jury outweighs its evidentiary value. The accused is entitled to be tried on the accusation made in the indictment pending against him and not on some collateral charge which is not in issue and which he is not prepared to answer. This is no mere technical rule of law. It arises out of a fundamental demand for justice and fairness.[95]

The court concluded that "[e]vidence that he had previously beaten her, without more, did not tend to establish that he deliberately and premeditatedly killed her on this occasion." [96] The concurring opinion by Justices Spratley and I'Anson made the point that the evidence offered in the principal case would be admissible on the issue of intent if a proper limiting instruction had been offered by the court to the jury; but the Commonwealth offered no such instruction, and the court gave none.[97] That being true the *evidence should not have been admitted.*[98] Justices Eggleston,

---

[91] 203 Va. 837, 127 S.E.2d 423 (1962).
[92] *Id.* at 838-39, 127 S.E.2d at 424.
[93] *Id.* at 840, 127 S.E.2d at 425.
[94] *Id.* at 840-41, 127 S.E.2d at 425-26.
[95] *Id.* at 840-41, 127 S.E.2d at 426.
[96] *Id.* at 842, 127 S.E.2d at 426.
[97] *Id.* at 843, 127 S.E.2d at 427.
[98] *Ibid.*

Snead, and Carrico dissented[99] from the opinion of the majority. Justice Carrico agreed with the rule applied by the majority of the court to the effect that it is improper to admit in a prosecution for murder evidence of prior assaults of the accused upon his victim for the purpose of proving that the accused committed the crime for which he is charged, but noted that this familiar rule had always been subject to well-defined exceptions. The dissent added that such evidence should be admitted if it shows the conduct and feelings of the accused toward his victim, if it establishes prior relations, or if it tends to prove any relevant element of the offense charged. On this point the court felt that the decision in the earlier Virginia case of *O'Boyle v. Commonwealth*[100] was controlling. In a relatively lengthy opinion the dissent then argued with considerable force, and on the basis of impressive research, that the evidence should have been admitted for the purpose of establishing the existence of malice, motive, and intent.[101] The dissent concluded with the suggestion that there could be no objection to the fact that the defendant was asked on cross-examination whether or not he had previously been convicted of a felony, since no objection was made when the question was asked and no ruling of the trial court requested. In this same connection the dissent quoted § 19.1-265 of the Code[102] which provides: "Conviction of felony or perjury shall not render the convict incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit."

In *Rees v. Commonwealth*,[103] the defendant was convicted of murder in the first degree for the slaying of Carroll Vernon Jackson, Jr., in Virginia. One of the assignments of error involved the defendant's objection to evidence and exhibits pertaining to the death of Mrs. Mildred Jackson and her daughter.[104] The court noted the general rule that the commission of other crimes is not admissible evidence in a criminal prosecution and then stated that this rule is subject to the exception that such evidence is admissible if it "tends to show a possible motive, intent, or a common scheme embracing a commission of two or more crimes so closely related that proof of one tends to establish the other." [105] The court, in the principal case, held that the several deaths were "so intimately connected that all evidence of the death of the other members of the family should not be excluded.

---

[99] *Id.* at 843-49, 127 S.E.2d at 427-32.
[100] 100 Va. 785, 40 S.E. 121 (1901).
[101] 203 Va. at 845, 127 S.E.2d at 428.
[102] VA. CODE ANN. 1950 § 19.1-265 (Repl. vol. 1960).
[103] 203 Va. 850, 127 S.E.2d 406 (1962).
[104] *Id.* at 867-68, 127 S.E.2d at 418.
[105] *Id.* at 868, 127 S.E.2d at 418.

Moreover, the evidence tended to show a motive—abduction of Mrs. Jackson—for the murder of Jackson." [106] The trial court had excluded testimony to the effect that in August 1958, Rees stopped Mr. and Mrs. Tuozzo on a Maryland road and ordered Mr. Tuozzo, at pistol point, into the trunk of the car and that thereafter Rees made a perverted sexual attack on Mrs. Tuozzo. The trial judge had also excluded testimony that, in June of 1957 in Maryland, Rees attempted to tie the hands of one Mr. Adams and place him in the trunk of the car. Rees at that time was armed with a pistol, and Mr. Adams was accompanied by a young lady who escaped unharmed when a struggle ensued between Rees and Adams.[107] The court stated:

> In the admission and exclusion of evidence, the Court followed rules which have long been established in Virginia. The Court sought to observe a narrow but more or less precise line that separates the inadmissible from the admissible. . . .
>
> Thus, evidence of other crimes which tended to show the defendant's proclivity to crime or his attitude was excluded.
>
> Equally well established is the rule permitting the introduction of evidence that shows motive . . . and circumstances 'so intimately connected and blended with the main fact 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 any other facts apparently innocent.' " [108]

The narrow but more or less precise line referred to in this portion of the opinion in the *Rees* case may furnish a clue to the reasoning of the majority decision and at the same time serve to reconcile the majority opinion of the principal case with the penetrating dissent written by Justice Carrico. However, if it is true that any such reconciliation can be found in the language of the *Rees* case, it will be achieved on a tenuous level. It is difficult to find any logical distinction of significance between the evidence approved in the *Rees* case on the one hand and the evidence which the court would reject in the *Williams* case on the other hand.[109]

---

[106] *Id.* at 868, 127 S.E.2d at 419.

[107] *Id.* at 869, 127 S.E.2d at 419.

[108] *Id.* at 870, 127 S.E.2d at 420.

[109] *See generally* McCORMICK, EVIDENCE § 157, at 327 (1954):

> The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character. There are numerous other purposes for which evidence of other criminal acts may be offered. . . .

Such evidence is admissible "To show, by immediate inference, malice, deliberation,

Finally reference should be made to the entrapment cases. Here the accused is urging, by way of defense to the criminal charge against him, that he is an an otherwise innocent person who would not have committed the crime except for enticement or inducement from the police. It has been stated in *Sherman v. United States:*[110]

> At the trial the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibit only the natural hesitancy of one acquainted with the narcotics trade.
>
> . . . .
>
> . . . Entrapment occurs only when the criminal conduct "was the product of the *creative* activity" of law-enforcement officials.[111]

Thus there must be proof of inducement by the government agent. Then the prosecution is afforded an opportunity to defeat the claim of entrapment by showing predisposition or readiness on the part of the accused to commit the offense—this requires a searching inquiry into the prior conduct and disposition of the defendant.[112] The defendant's choice is graphically described by Mr. Justice Frankfurter:

> The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged. Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has

---

ill-will or the specific intent required for a particular crime." *Id.* at 330. In § 157 n.15 McCormick mentions a decision involving a wife-murder in which previous acts of violence to the wife were held to be provable for the purpose of establishing malice. It should be noted that Professor McCormick's general statement of the rule involved does include considerations of degree which inevitably affect a decision such as the one in the principal case. Professor McCormick also points out the reluctance of the courts in applying the standards of relevancy to admit evidence of the nature of the evidence involved in the principal case when the ultimate purpose of the state is to prove knowledge, intent, or some other state of mind. *E.g.,* Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955). *Cf.* Timmons v Commonwealth, 204 Va. 205, 129 S.E.2d 697 (1963); Adams v. Commonwealth, 201 Va. 321, 111 S.E.2d 396 (1959).

110 356 U.S. 369 (1958).

111 *Id.* at 371-72.

112 *Id.* at 373.

> sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.[113]

What then are the limits involved in this free inquiry which might leave intact the prospect of a free trial? It has been suggested that some element of corroboration should exist, that the evidence cannot relate to an event too remote in time, and, indeed, that there should be an arrest followed by an indictment or conviction.[114] In absence of those factors the defendant is helpless in rebuttal insofar as he may be forced to pit his word against the unsupported testimony of an officer.[115] It might also be noted that these requirements can go far in the direction of prejudice as far as the accused is concerned, since they are designed to assure positive proof of prior criminal activity. The court is wielding a two-edged sword here.

Finally, this is the kind of evidence that attracts publicity and invites either a miscarriage of justice, a new trial, or a change of venue. The value to the accused of the last two remedies borders on the speculative.[116]

CONCLUSION

It would be unrealistic, perhaps, to suggest that these myriad and well-entrenched exceptions to the *Zackowitz* rule be abandoned (nor is the suggestion the thrust of this paper). It is redundant to state again what seems obviously true—*i.e.*, that the trial judge exercise extreme caution in admitting this testimony. Some evidence is less prejudicial than other offers of proof, and, presumably and hopefully, the court functions on this basis. What more can be said by way of recommendation or conclusion?

This article began with a discussion of the privilege against self-incrimination. By way of repetition, analytically the privilege is not involved, there

---

113 *Id.* at 382-83 (concurring opinion).

114 Hansford v. United States, 303 F.2d 219, 226 (D.C. Cir. 1962). *Cf.* United States v. Cooper, 321 F.2d 456 (6th Cir. 1963).

115 *See* Hansford v. United States, 303 F.2d 219, 226 (D.C. Cir. 1962).

116 The judiciary cannot function properly if what the press does is calculated to disturb the judicial judgment in its duty and its capacity to act solely on the basis of what is before the court. Especially in the administration of the criminal law, independent courts are a prerequisite of a free society. The safety of society and the security of the innocent alike depend upon impartial and wise criminal justice.

. . . .

. . . .

Too often cases are tried in newspapers before they are tried in court, and thereby the assurance of a fair trial is enormously decreased. FRANKFURTER, OF LAW AND MEN 245-46 (1956). *See also* United States v Accardo, 298 F.2d 133 (7th Cir. 1962).

being no sovereign pressure to force the accused to furnish evidence against himself. But analytically, too, the policy undergirding the privilege is lurking near. Any rule castigating the exceptions discussed herein is difficult to state in policy terms, but the reason for balancing cogency and prejudice involves analagous considerations to the rule allowing the accused to refrain from taking the stand. Such a rule would not unduly hinder proof of guilt and would convict the guilty in conformity with rules designed to protect the innocent. The present practice allows evasion of the general exclusionary rule and opens the door to its evils under the vaguest pretexts or solving phrases. This practice can involve surprise and certainly substantial prejudice to the defendant, and, with the advancement of news media, surprise and prejudice to the jury and to the public. Assuredly, something more than traditional judicial discretion is called for here. Even in the entrapment cases it has been urged with force that the focus of attention in the evidence should be on the conduct of the police and not that of the defendant.[117] Perhaps the two largest services rendered by the ancient privilege are related and yet separable for purposes of statement. The privilege still functions as a protection to the innocent man, and it stands as a reminder of our traditional concern for the individual. These are not trivial functions, and the policies can be and are being substantially diminished by a free-wheeling use of the ill-defined exceptions to the *Zackowitz* doctrine.

The writer has already made two suggestions. First, as a practical matter there would seem to be little hope that the exceptions to the exclusionary rule will be either more precisely defined than they are now or that they will be abandoned. Surely, though, careful and critical consideration should be given to the notion that evidence of prior crimes forms a part of the *res gestae* and equally careful consideration given to Professor McCormick's relatively precise formulation of the "common scheme" exception to the exclusionary rule.[118] Second, it has been suggested that this kind of dynamite might well lie outside the normal broad scope of judicial discretion. What is here proposed is admittedly a compromise, but hopefully a workable one. It is suggested that such evidence be ruled inadmissible unless it can be shown by the prosecution that it is essential to the proof of an element of the crime allegedly committed by the accused and, indeed, that its use in this sense not be merely cumulative. This rule of necessity has been adopted or hinted at before in the authorities.[119] It admittedly involves some degree

---

[117] Sherman v. United States, 356 U.S. 369, 382-83 (1958) (concurring opinion).

[118] See text at note 40.

[119] *See, e.g.*, State v. Goebel, 36 Wash.2d 367, 218 P.2d 300, 306 (1950); McCormick, Evidence § 157 (1954).

of judicial discretion, but a much narrower degree than has been employed heretofore, and the general rule will be one of exclusion. The rule proposed will not solve all of the problems confronting an accused in this area, but it will bring him substantially closer to Cardozo's ideal that the defendant before the bar of justice starts life anew;[120] it will lend more meaning to the presumption of innocence now reduced statistically to something approaching a cliché, and it will render more than lip service to the currently vague but significant policies undergirding a privilege that analytical arguments cannot cast aside. As to the latter, tradition plays a part; and it may well be true that the privilege expresses in part a step toward civilization that the English language is not well-equipped to describe with precision.

[120] People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466, 468 (1930).