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Knowledge, Intent, System, and Motive: A Much Needed Return to the Requirement of Independent Relevance

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I. INTRODUCTION

There are few truths more reliable in common experience than the adage that a person behaves in conformity with his character; that the outward manifestation of personality comports with the inner self.[1] Therefore, in a trial of a person for stealing, it would seem quite relevant that she has stolen before. After all, it is more likely, in the large scheme of things, that "once a thief, always a thief." Used as circumstantial evidence in the trial for a present theft, an earlier theft would be relevant to establish that this proven thief has stolen in the instant case.[2]

Louisiana Code of Evidence articles 401 and 402 posit the general rule which applies to all evidence. If the evidence tends to establish or disestablish a material point in controversy, then, unless there is a specific constitutional or legislative exception, the evidence is admissible.[3] Thus, unless this obviously relevant evidence is specifically excluded by the Code of Evidence or other law, evidence of a prior act will be admissible to prove propensity.

Despite the obvious relevance and probity of character as evidence, there is a firmly entrenched rule that "[e]vidence of a person's character or a trait of his character ... is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion ...."[4] Article 404 provides

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1. "[O]ur sins testify against us ...." Isaiah 59:12 (King James).

2. [E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how he acted (and perhaps with what state of mind) in the matter in question. By and large, persons reputed to be violent commit more assaults than persons known to be peaceable.

1 McCormick on Evidence § 188, at 793 (John W. Strong et al. eds., 4th ed. 1992) (footnote omitted).

The fact that a defendant has committed another crime has logical relevancy; it tends to show that he has a "criminal disposition" and thus is more likely to have committed this particular crime than a defendant without such a propensity. If the evidence indicates that defendant has committed the same type of crime, e.g., proof of another theft in a prosecution for theft, the evidence has even greater relevancy.

George W. Pugh, Louisiana Evidence Law 31 (1974).

3. La. Code Evid. art. 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

La. Code Evid. art. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Louisiana, this Code of Evidence, or other legislation. Evidence which is not relevant is not admissible."

4. La. Code Evid. art. 404(A). Fed. R. Evid. 404(a) provides: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ...." Both the Federal Rules of Evidence and the Louisiana Code of Evidence list exceptions which are substantially similar. None of these exceptions are pertinent to this paper.

the legislated exception to the general rule that all relevant evidence is admissible.

The reason why relevant and probative evidence is excluded generally is its prejudicial effect on the jury. McCormick puts it this way:

> [E]vidence of character in any form—reputation, opinion from observation, or specific acts—generally will not be received to prove that a person engaged in certain conduct or did so with a particular intent on a specific occasion, so-called circumstantial use of character. The reason is the familiar one of prejudice outweighing probative value. Character evidence used for this purpose, while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise.[5]

Thus, it is not a question of probity or relevance; it is a question of prejudice.

Because of the tension between the need for this obviously probative and relevant evidence and the very real prejudice it may cause to a defendant, the American legal system has created many exceptions to the general rule that character evidence cannot be used to prove propensity towards certain behavior. This comment will not attempt to address all, or even most, of these exceptions. Rather, this comment will concentrate on a few, distinct exceptions. Further limiting the scope, this comment will only address the applicability of these exceptions when the prosecutor in a criminal action offers evidence of specific acts of the defendant against the defendant.

The exceptions to be discussed are those generally termed "knowledge," "intent," "motive," and "plan." These exceptions are ones in which specific instances of conduct can be presented against a defendant and result, in fact if not in theory, in establishing the defendant's propensity towards specific criminal behavior.

The course this comment will take is as follows: (1) a general introduction to the rationale behind each of these exceptions—the requirement of independent relevance; (2) a brief look at peripheral procedural issues impacting on this area of the law; (3) a review of Louisiana cases, followed by an analysis of the reasoning applied in those cases; (4) a brief discussion of a relatively new doctrine which is radically and detrimentally affecting this area of the law—the depraved sexual instinct; and (5) a conclusion of the current state of the law, followed by some modest recommendations.

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5. McCormick, *supra* note 2, § 189, at 793. *See also*, Pugh, *supra* note 2, at 31:

> Evidence relevant *solely* to show a defendant's criminal disposition is termed *character evidence*, and the state's use of character evidence has generally been deemed to create an inordinate risk of unjust convictions because of these factors: the strong possibility of the jury convicting defendant merely because he is a bad man; the injustice of attacking defendant on an issue for which he is probably unprepared; and the danger of confusing the jury by proof of collateral issues.

(footnotes omitted).

II. THE REQUIREMENT OF INDEPENDENT RELEVANCE

What, exactly, is "independent relevance"? If, as traditionally accepted, the evidence must not be introduced solely to establish propensity, then the evidence must tend to establish some other thing.[6] And, as Articles 401 and 402 provide, the other thing must be relevant.

The first sentence of Article 404(B) posits the general rule that specific instances of a person's conduct are inadmissible if the purpose of introducing the evidence is solely to establish the defendant's propensity towards certain behavior. The second sentence of that article, while appearing to establish an exception to this general rule, in reality establishes that specific instances of a person's conduct *are* admissible if the evidence is introduced to prove something *other* than a person's propensity towards specific behavior. This is the rule of independent relevance. Article 404(B)(1) states:

> Except as provided in Article 412, 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, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.[7]

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6. Abraham P. Ordover, in *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135 (1989), notes the conceptual difficulty in distinguishing whether evidence of a specific act of a defendant is or is not inadmissible character evidence:

> Sometimes we lawyers are too clever. We create conceptual distinctions which, though capable of articulation, are not always capable of application either by ourselves or by the juries that ultimately must deal with them. . . .
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> Take, for instance, the conceptual distinction between the first and second sentences of Rule 404(b) of the Federal Rules of Evidence. The first sentence provides for the exclusion of evidence of a defendant's other bad acts and crimes when that evidence is offered by the prosecution to prove that the defendant has a criminal disposition or a propensity for committing crime. The second sentence creates an exception for evidence offered not to prove character but some relevant issue in the case, such as intent, identity, lack of accident, motive or some other non-character issue.
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> Our ability to distinguish between the improper first-sentence purpose and the proper second-sentence purposes is frequently limited.

Id. at 135 (footnotes omitted).

7. It should be noted that, subsequent to the writing of this comment, the Louisiana Legislature, in 1994 La. Acts No. 51 (3d Ex. Sess.), amended Article 404(B) to read as follows:

> B. Other crimes, wrongs, or acts. (1) Except as provided in Article 412, 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, absence of mistake or accident, *provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes*, or when it relates to conduct that constitutes an integral part of the act or transaction that is the

Each of these exceptions to the general rule exists because it has independent relevance; i.e., it serves to establish a critical element of the prosecution's case against the defendant, rather than solely to attack her character.[8] Nonetheless, it is indisputable that each of these exceptions allows evidence of past bad acts before the jury. The jury could attach undue weight to these acts, resulting in convicting the defendant, not of the crime for which she is charged, but for being, in general, a "bad character." Thus, these exceptions should be used with great caution.[9]

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subject of the present proceeding.

(emphasis added).

The Amendment added the italicized notice requirement. In the same act, the Legislature added a note to Article 404 which states: "The burden of proof in a pretrial hearing held in accordance with *State v. Prieur* shall be identical to the burden of proof required by Federal Rules of Evidence Article 404."

It is unknown what the ultimate effect of this amendment will be, but it is an effort by the legislature to bring Article 404(B) more in line with its federal counterpart. Fed. R. Evid. 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Although the ultimate effect of this amendment is unknown at the time of this writing, some possibilities are discussed *infra* text accompanying note 26.

> 8. [W]hile other crimes evidence is inadmissible when relevant only to show defendant's criminal disposition, it may be admissible if it bears some relevancy independent of character. . . . [I]t is generally recognized that the admissibility of defendant's other crimes turns on the independent relevancy *vel non* of the evidence to some material issue other than defendant's character.

Pugh, *supra* note 2, at 31-32 (footnotes omitted). It should be noted that by "a critical element of the prosecution's case," it is not meant that each of these exceptions are elements of the crime with which the defendant is charged. In some cases, such as intent and knowledge, the exceptions are elements of a crime in the traditional sense. In other cases, such as motive and system, they are, rather, essential for the prosecutor to establish in order to convince the jury of the defendant's guilt.

9. Specific instances of an accused's conduct has been held admissible to corroborate the victim's testimony in sexual abuse cases, to prove that the act happened, and to prove the lustful disposition of the defendant. *See infra* part VIII.

Thus, it would seem that Louisiana has adopted the inclusionary approach to La. Code Evid. art. 404(B). The exclusionary approach posits that the list is exclusive, and unless the other uncharged act fits within one of the enumerated exceptions, the act is inadmissible character evidence. The inclusionary approach posits the notion that the list is illustrative only. If the act is introduced for some other purpose than to establish propensity, then the act is not introduced for the purpose of showing that the defendant is a bad woman. As such, the uncharged act falls outside the prohibition of Article 404(B). *See generally* Amber Donner-Froelich, Comment, *Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. Miami L. Rev. 217 (1985); Edward G. Mascolo, *Uncharged-Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 Conn. B.J. 281 (1993).

An attentive reader of Article 404(B) will notice that many of the enumerated exceptions are, or can be, elements of a criminal charge, such as identity, intent, knowledge, preparation, or plan. Further, the other exceptions, while not usually an element of any crime, are familiar as necessary elements a prosecution frequently must establish in order to get a conviction. These exceptions, such as motive, opportunity, or absence of mistake, are elements which any successful prosecutor will try to establish.

For example, in a typical prosecution, the state must prove beyond a reasonable doubt the following: a crime was committed; the defendant committed the crime; and the defendant held, at the moment of the commission of the crime, the requisite criminal intent if the crime has that element. As can be seen, identity is an essential element in *each* criminal prosecution. Intent is almost always an essential element of a crime. Knowledge is frequently an essential element of a criminal charge, such as in a prosecution for the possession of stolen goods.

Further, as earlier noted, the prosecution should establish that the defendant had the opportunity to commit the crime, that the defendant had a motive to commit *this* crime, and sometimes that the defendant planned or prepared for the crime.

While the correlation is not perfect, clearly there is a great degree of similarity between the enumerated exceptions in Louisiana Code of Evidence article 404(B) and the elements that a prosecutor must or should establish at trial.

Therefore, unless "independent relevance" has some other meaning, *any time* a defendant pleads not guilty, the prosecution would be able to introduce other acts of the defendant to establish her identity, knowledge, intent, and other listed exceptions. Recognizing this, the courts have established the general principle that the evidence must be germane to some "genuine" issue at trial.[10]

It will become clear, as the cases in this comment are examined, that some courts are confused as to when one of these elements becomes a "genuine issue" at trial. The following example will illustrate the problem. In a typical prosecution of a murder, the police investigation uncovers evidence, such as fingerprints, witnesses, and a murder weapon, which convinces the prosecuting attorney that murder was committed and that a particular person has committed the murder. Further investigation will or will not uncover that person's opportunity[11] and motive for the crime. As the investigation progresses, the prosecuting attorney will know whether there are fingerprints, blood-type matches, witnesses, and other

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10. *See, e.g.*, State v. Martin, 377 So. 2d 259, 263 (La. 1979).

11. If the defendant intends to offer an alibi as a defense, then La. Code Crim. P. art. 727 comes into play. That article provides in part:

> A. Upon written demand of the district attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such time as the court may direct, upon the district attorney a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

direct or circumstantial evidence which he can present to the grand jury to indict a particular person for the commission of the crime.

As soon as the defendant has been arrested for the crime, she has the right to a determination whether the state had probable cause to arrest her unless the grand jury has already indicted her.[12] At this preliminary examination, the prosecution must establish, through the introduction of evidence, that probable cause exists that the defendant committed a crime. The defendant may or may not introduce evidence, but the prosecution must do so to detain the defendant—else the presumption of innocence is not rebutted.

In this hearing, or during the grand jury's investigation, the theory of the prosecution's case becomes clear. In a general sense, the defendant gets an idea of what evidence will be presented against her.[13] Although Louisiana's provisions in criminal discovery are not as liberal as the civilian counterpart, there are provisions which provide a defendant with the means to discover much which was not disclosed by the prosecuting attorney at the preliminary examination or at the grand jury hearing.[14]

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12. La. Code Crim. P. art. 292 provides in part: "The court, on request of the state or the defendant, shall immediately order a preliminary examination in felony cases unless the defendant has been indicted by a grand jury."

La. Code Crim. P. art. 296 provides in part:

> If the defendant has not been indicted by a grand jury for the offense charged, the court shall, at the preliminary examination, order his release from custody or bail if, from the evidence adduced, it appears that there is not probable cause to charge him with the offense or with a lesser included offense. If the defendant is ordered held upon a finding of probable cause, the court shall fix his bail if he is entitled to bail.

13. *See generally* La. Code Crim. P. arts. 291-298.

14. La. Code Crim. P. art. 718 provides in part:

> Subject to the limitation of Article 723, on motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the state, and which:
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> (1) are favorable to the defendant and which are material and relevant only to the issue of guilt or punishment, or
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> (2) are intended for use by the state as evidence at the trial, or
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> (3) were obtained from or belong to the defendant.

La. Code Crim. P. art. 719 provides:

> Upon motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph, or otherwise reproduce any results or reports, or copies thereof, of physical or mental examination, and of scientific tests or experiments, made in connection with or material to the particular case, that are in the possession, custody, control, or knowledge of the district attorney and intended for use at trial. Exculpatory evidence shall be produced under this article even though it is not intended for use at trial.

La. Code Crim. P. arts. 716 (statements by the defendant), 717 (defendant's prior criminal record), 721 (hearsay statements of co-conspirators), 722 (confessions and inculpatory statements of codefendants), and 729 (time and scope of motion by defendant) are also available to the defendant. There are constitutional dimensions to the area of discovery as well. See generally Brady v.

Thus, prior to trial, the defense has an idea of the prosecution's theory of the case and what evidence will be introduced against her to prove that theory. By the same token, the prosecution knows what issues will be hotly contested and which will not. He knows whether there is an eyewitness to the killing, and he knows whether there is evidence that links the defendant to the crime sufficiently that he can attempt a successful prosecution. From this knowledge, the prosecutor knows what will be a genuine issue at trial. He knows what evidence will be needed to establish his theory of the case.

If the prosecution's case is relatively weak in terms of direct evidence linking the defendant to the crime, such as few or no eye-witnesses to the crime, then the prosecution must more heavily rely on circumstantial evidence to prove the defendant committed the crime. In a case such as this, prior acts of the defendant which are similar would tend to establish both identity and system.

If the degree of similarity is great, then the other acts, independent of evidence relevant to the present crime, would tend to establish the "signature" of the defendant. Since the defendant once committed an almost identical and unique act, the likelihood of another person doing the same act is virtually impossible. This leads to the inference that the defendant committed the act under evaluation.[15] On the other hand, if the prosecution has an eyewitness to the crime and has sufficient direct and circumstantial evidence to link the defendant to the crime, then the other acts of the defendant are unnecessary to establish identity and should be excluded.[16]

Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and its progeny.

15. See McCormick, *supra* note 2, § 190, at 801-03, which defines these types of crimes as

> crimes by the accused so nearly identical in method as to earmark them as the handiwork of the defendant. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies or rapes. The pattern and characteristics of the crime must be so unusual and distinctive as to be like a signature.

(footnotes omitted).

The Louisiana test has been articulated as follows:

> In order to be admissible the extraneous offense must meet several tests: (1) there must be clear and convincing evidence of the commission of the other crimes and the defendant's connection therewith; (2) the modus operandi employed by the defendant in both the charged and the uncharged offenses must be so peculiarly distinctive that one must logically say they are the work of the same person; (3) the other crimes evidence must be substantially relevant for some other purpose than to show a probability that the defendant committed the crime on trial because he is a man of criminal character; (4) the other crimes evidence must tend to prove a material fact genuinely at issue; (5) the probative value of the extraneous crimes evidence must out weigh its prejudicial effect.

State v. Hatcher, 372 So. 2d 1024, 1033 (La. 1979) (on rehearing) (citations omitted). *See also* State v. Carr, 620 So. 2d 288 (La. App. 1st Cir. 1993). The Louisiana Supreme Court reversed the first circuit because the lower court incorrectly applied the test. State v. Carr, 620 So. 2d 1325 (La. 1993). Nevertheless, the test was correctly stated.

16. In a case such as this, the evidence should be excluded, not because the evidence has lost any of its relevance, but because it is "merely repetitive and cumulative, is . . . a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and [does not] serve[] the actual purpose for which it is offered." State v. Prieur, 277 So. 2d 126, 130 (La. 1973).

This is true of the other exceptions. If the prosecution is able to establish through traditional means that the defendant did the act under evaluation, then the other acts of the defendant should not be admissible, since there is no genuine dispute as to that element of the crime.[17]

One manner in which a genuine dispute arises is in the case where the defendant places that element at issue.[18] For example, if the defendant admits to committing the proscribed act but denies that she knew doing so would have criminal consequences, then the argument arises that the prosecution should be able to introduce other acts of the defendant to rebut the defendant's claim of innocent intent or lack of guilty knowledge.[19]

However, at least until recently, a defendant's mere plea of "not guilty" did not put any of these elements at issue.[20] As will be seen, this rule is currently weakened.[21]

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17. For a case which exemplifies how this exception should *not* be employed, see State v. Davis, 411 So. 2d 2 (La. 1982). The defendant was convicted of second degree murder. The evidence at issue was testimony that the defendant had beaten the victim three times in the past. The defendant testified that he had only beaten the victim once. The defendant claimed that the victim had died as a result of smoking marijuana, getting drunk, and falling down too many times. Ruling that the evidence was admissible, the court stated:

> Evidence of these prior beatings does seem relevant. The theory of defense throughout the case appeared to be that the victim was intoxicated and was falling on her face. The three extraneous acts introduced to the jury have independent relevance to prove that the defendant did inflict the injuries sustained by the victim and are not too remote.

Id. at 5. As noted earlier, it is not a question of relevance; it is a question of prejudice. This statement translates into: "He beat her three times before, therefore he probably did it this time as well." This is a clear violation of the prohibition against the use of character evidence to establish propensity.

18. A classic example of this is when the defendant admits the act but asserts that the state has acted to entrap her. This defense tries to establish that, had the state not tempted the defendant into criminal behavior, she would not have engaged in the behavior. To negate this defense, the prosecution is allowed to introduce other, similar acts to prove the defendant's predisposition to commit the crime. The distinction between predisposition and propensity is nebulous indeed and goes beyond the scope of this paper. For a thoughtful discussion of this subject, see W. H. Johnson, III, *Proving a Criminal Predisposition: Separating the Unwary Innocent From the Unwary Criminal*, 43 Duke L.J. 384 (1993).

19. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 479, 679 S. Ct. 213, 220 (1948).

20. Ordinarily, the mere plea of not guilty does not place the question of intent at issue. Essentially, the defendant is contending by this plea that he did not commit the crime, not that the act was done without the requisite criminal intent. There is substantial authority in support of the proposition that a plea of not guilty does not place intent in issue unless the defendant's theory of the case is based upon one of the many lack-of-intent defenses. Defenses that would place intent in issue include entrapment, coercion, and mistake or accident. Intent would also be placed in issue if the defendant claimed that he had once joined a conspiracy but left it before the criminal enterprise.

Ordover, *supra* note 6, at 151-52 (footnotes omitted).

21. *See* Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991); State v. Thompson, 532 So.

III. PROCEDURAL SAFEGUARDS

Because of the almost certain possibility that a jury will improperly use evidence of prior acts, Louisiana has established a variety of procedural safeguards against prosecutorial abuse. As will be seen, however, because the need for this evidence is great in some cases to sustain a conviction, there are countervailing jurisprudential doctrines which allow convictions to stand—even when these safeguards are violated.

In Louisiana, the courts have established a test for admissibility, which has been quoted in several cases.[22] It should be noted that this test applies any time the prosecution attempts to invoke the exceptions to introduce other crimes evidence against a defendant in the prosecution's case-in-chief. These safeguards are *not* applicable in the following situations: cross-examining a character witness of acts of a defendant;[23] introduction of criminal convictions of a defendant when the defendant chooses to testify;[24] rebuttal witnesses called by the prosecution

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2d 1160 (La. 1988). *Estelle* is discussed more fully *infra* note 75. *Thompson* is discussed more fully *infra* text accompanying notes 63-69.

22. *See, e.g.*, State v. Code, 627 So. 2d 1373, 1381 (La. 1993); State v. Jackson, 625 So. 2d 146, 149 (La. 1993).

23. The defendant has, by putting her good character at issue, "opened the door" to her own character. By doing so, it is proper for the prosecution to rebut the defendant's claim that she is too good of a woman to have committed the crime. By the same token, the relevance of the specific acts of the defendant are not introduced to impugn the character of the defendant; rather, the evidence is relevant to determine whether the character witness has sufficient knowledge of the defendant to form a correct opinion of her reputation. *See* La. Code Evid. art. 608(C): "A witness who has testified to the character for truthfulness or untruthfulness of another witness may be cross-examined as to whether he has heard about particular acts of that witness bearing upon his credibility." For a critical look at this practice, see Tarleton D. Williams, Jr., *Witness Impeachment by Evidence of Prior Felony Convictions*, 65 Temp. L. Rev. 893 (1992).

24. La. Code Evid. art. 609.1 provides in part:

> (A) General criminal rule. In a criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions, subject to limitations set forth below.
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> (B) Convictions. Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.
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> (C) Details of convictions. Ordinarily, only the fact of a conviction, the name of the offense, the date thereof, and the sentence imposed is admissible. However, details of the offense may become admissible to show the true nature of the offense:
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> (1) When the witness has denied the conviction or denied recollection thereof;
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> (2) When the witness has testified to exculpatory facts or circumstances surrounding the conviction; or
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> (3) When the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.

La. Code Evid. art. 803(22) provides:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or

when the defendant has put character at issue;[25] or when the other acts introduced by the prosecution are integral parts of the crime which is under evaluation.

First, the court must establish by clear and convincing evidence that the other crime or act occurred and that the defendant committed the act.[26]

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imprisonment in excess of six months, to prove any fact essential to sustain the judgment. This exception does not permit the prosecutor in a criminal prosecution to offer as evidence the judgment of conviction of a person other than the defendant, except for the purpose of attacking the credibility of a witness. The pendency of an appeal may be shown but does not affect admissibility.

25. *See* State v. Kelly, 456 So. 2d 642, 649 (La. App. 2d Cir.), *writ denied*, 461 So. 2d 312 (1984).

26. *See, e.g.*, State v. Talbert, 416 So. 2d 97, 99 (La. 1982). This would ordinarily be determined by a pre-trial hearing under La. Code Evid. art. 104(A). The so-called "Prieur" hearing is discussed *infra* note 27. However, it seems sufficient that the hearing is conducted prior to the introduction of the evidence. Article 104 provides, in pertinent part:

> A. Questions of admissibility generally. Preliminary questions concerning the competency or qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Paragraph B. In making its determination it is not bound by the rules of evidence except those with respect to privileges.
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> B. Relevancy conditioned on fact. Subject to other provisions of this Code, when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

In the federal system, both the standard of proof and the timing of the satisfaction of that burden are significantly different. *See* Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496 (1988). The defendant was convicted for possession of 500 stolen video tapes. The other crimes evidence at issue was that the defendant had previously sold stolen televisions from the same store as he sold the stolen tapes. The district judge did not establish prior to trial that the televisions in the previous alleged crime were, in fact, stolen. In answering whether such a preliminary finding is necessary, the court stated:

> We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). . . . In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.
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> Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). . . .
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> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.

Id. at 689-90, 108 S. Ct. at 1501 (footnote omitted) (citations omitted).

See also United States v. Mihm, 13 F.3d 1200 (8th Cir. 1994); United States v. Fitzherbert, 13 F.3d 340 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1627 (1994). *Compare* United States v. Ridlehuber, 11 F.3d 516, 522-23 (5th Cir. 1993): "[T]he Court must address the threshold question of whether the government offered sufficient proof demonstrating that the defendant committed the

Second, the defendant must be given advance notice of the intention of the prosecutor to use other crimes evidence at trial. This notice must describe with some degree of particularity the offenses which the prosecution intends to offer.[27]

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alleged extrinsic offense. 'If the proof is insufficient, the judge must exclude the evidence because it is irrelevant.'" (citations omitted) (quoting United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978), *cert. denied*, 440 U.S. 920, 99 S. Ct. 1244 (1979)). However, since the judge must first determine that the defendant committed the act, this would be a 104(a) determination rather than a 104(b) conditional relevance test.

While *Huddleston* is a federal case, the reasoning might be applicable in Louisiana as our La. Code Evid. art. 104(B) also allows for conditioned relevance. However, La. Code Evid. art. 1103, which statutorily adopts the clear and convincing standard, limits that standard only to La. Code Evid. arts. 104(A) and 404(B).

The 1994 amendment to Article 404(B) and the accompanying note (*see supra* note 7), indicate that the Legislature intends for the pre-trial hearing to follow *Huddleston*'s test; i.e., whether a reasonable jury could conclude that the defendant committed the act under evaluation as discussed earlier in this footnote.

Since this is a note to Article 404, it is guidance only—not law. La. Code Evid. art. 1103, as discussed above, would be the law, requiring the state to prove that the defendant committed the act by clear and convincing evidence.

For a critical look at *Huddleston*, see Bennett L. Gershman, Symposium, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 (1992); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. Rev. 447 (1990); Ordover, *supra* note 6. See Judith M.G. Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules*, 38 Baylor L. Rev. 331 (1986), for a discussion of the differing standards which have been applied.

27. State v. Prieur, 277 So. 2d 126 (La. 1973). This protection arises from the Due Process clauses of the U.S. Const. amend. XIV and La. Const. art. I, § 10. *See, e.g.*, State v. Plater, 606 So. 2d 824, 827 (La. App. 2d Cir. 1992). In the federal system, the notice requirements are expressly provided for in Fed. R. Evid. 404(b).

The safeguards articulated in *Prieur* are:

> (1) The State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are a part of the res gestae, or convictions used to impeach defendant's testimony.
>
> (2) In the written statement the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other acts or offenses.
>
> (3) Prerequisite to the admissibility of the evidence is a showing by the State that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered.
>
> (4) When the evidence is admitted before the jury, the court, if requested by defense counsel, shall charge the jury as to the limited purpose for which the evidence is received and is to be considered.
>
> (5) Moreover, the final charge to the jury shall contain a charge of the limited purpose for which the evidence was received, and the court shall at this time advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment or one responsive thereto.

Prieur, 277 So. 2d at 130.

La. Code Evid. art. 1103 appears to statutorily adopt this standard. However, that article states: "Those cases are law and apply to Articles 404(B) and 104(A), unless modified by subsequent state

Third, the judge must give the jury limiting instructions on the use of the evidence.[28]

Fourth, the prosecution must establish that the other crimes or acts satisfy one of the exceptions listed in Article 404(B)(1).[29]

Finally, the judge must be satisfied that the probative value of the evidence outweighs the prejudicial effect of the evidence.

In addition to the test indicated above, it should also be noted that Louisiana Code of Criminal Procedure article 770[30] and the doctrine of harmless error[31] impact on this area of the law.

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jurisprudential development." This appears to mean that it is not merely *Prieur* (and *Hamilton* and *Moore*) which were adopted, but all of their progeny as well.

Finally, it should be noted that this is a procedural protection. If the defense counsel fails to timely object, then the protection is lost. *See, e.g.*, State v. Kahey, 436 So. 2d 475, 483 (La. 1983); State v. Wisinger, 618 So. 2d 923, 927 (La. App. 1st Cir.), *writ denied*, 625 So. 2d 1063 (1993); State v. Berryhill, 562 So. 2d 1105, 1110 (La. App. 4th Cir. 1990); State v. Burrow, 565 So. 2d 972, 975 (La. App. 5th Cir. 1990), *writ denied*, 592 So. 2d 60 (1991).

Note also that no *Prieur* notice need be given if the other crimes evidence is used for impeachment purposes. *See Prieur* safeguard number 1, *supra*. *See also* State v. Talbert, 416 So. 2d 97 (La. 1982). Nor is there any requirement of a *Prieur* notification if the other crimes evidence is used to establish a continuing scheme. *See, e.g.*, State v. Martin, 377 So. 2d 259 (La. 1979). Nor is notice required if the other crimes evidence is admitted as part of the body, or res gestae, of the crime. *See, e.g.*, State v. Dupre, 369 So. 2d 1303 (La. 1979).

It is also unknown whether the placement of the language in the 1994 amendment to Article 404(B) means that the prosecution in a criminal case only has to provide notice for the enumerated exceptions (plan, preparation, etc.)—but not when the act is part of the res gestae. The placement of the amendment, separating the enumerated exceptions from the res gestae exception, would suggest that this was the intent of the Legislature. This would be in accord with the above cited jurisprudence.

28. *See* State v. Prieur, 277 So. 2d 126 (La. 1973).

29. Again, this would seem to be a La. Code Evid. art. 104(A) pre-trial determination which would be accomplished at the *Prieur* hearing.

30. La. Code Crim. P. art. 770 provides in part:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> . . . .
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> . . . .
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

31. For a case in which the doctrine of harmless error is applied, see State v. Romero, 574 So. 2d 330, 335 (La. 1990). Evidence of 52 other crimes of medicaid fraud was admitted against a defendant charged with 100 counts total. The supreme court applied harmless error analysis, concluding there was no "reasonable possibility that the evidence might have contributed to the verdict." The harmless error doctrine is also applied in State v. Abercrombie, 375 So. 2d 1170, 1176

In summary, the procedural safeguards provide (1) that there be a pre-trial (pre-introduction) determination by clear and convincing evidence that the act was committed and that the defendant committed the act; (2) that the defense be given adequate advance notice of the State's intent to introduce evidence of other specific bad acts; (3) that those acts to be introduced be described with some particularity; (4) that the evidence to be introduced "fits" within one of the enumerated exceptions listed in Article 404(B) or otherwise has independent relevance; and (5) that the probative value of the evidence outweighs its prejudicial impact upon the defendant's right to a fair trial. With these procedural issues concluded, an examination of the individual exceptions of intent, knowledge, design, and motive can begin.[32]

(La. 1979), *cert. denied*, 446 U.S. 935, 100 S. Ct. 2151 (1980). Inadmissible other crimes evidence was introduced. The court applied harmless error analysis in this fashion: the offense "was not of a nature that would inflame a jury to the point that it would be influenced to convict a defendant of first degree murder." *See also* State v. Kahey, 436 So. 2d 475 (La. 1983); State v. Vernon, 385 So. 2d 200 (La. 1980); State v. Wisinger, 618 So. 2d 923, 927 (La. App. 1st Cir.), *writ denied*, 625 So. 2d 1063 (1993). In State v. DeRoche, 629 So. 2d 1267, 1273 (La. App. 5th Cir. 1993), the court said: "[T]he proper standard [of review] to be used is whether there is a reasonable possibility that the evidence might have contributed to the verdict, and whether the reviewing court is prepared to state beyond a reasonable doubt that it did not."

Justice Dennis, in State v. Burnette, 353 So. 2d 989, 993-94 (La. 1977), provides powerful reasoning why harmless error analysis in these kinds of cases is improper:

> The State argues that its groundless accusations in the presence of the jury that the defendants had made attempts on the lives of prosecution witnesses should be disregarded as "harmless error." In considering such an argument we are bound by the legislative intention of Louisiana Code of Criminal Procedure Article 921 . . . . Although this law is expressed in the negative, it clearly imposes an affirmative obligation upon this Court to reverse a conviction whenever it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right. Since the defendants were deprived of a mistrial which the legislature has expressly stated "shall be ordered," there undoubtedly was a substantial violation of a statutory right. . . .
>
> The State's brief, nevertheless, seemingly urges us to weigh the evidence and affirm the convictions because the evidence is overwhelmingly in favor of conviction. But our constitution prohibits this Court from deciding the factual question of guilt or innocence and restricts our scope of review to questions of law in criminal cases. Thus it would be a violation of the constitution and our oaths to weigh the evidence or decide upon the question of guilt or innocence or to disregard reversible error of law.

(citations omitted).

32. It should be noted although courts and, most especially, prosecutors tend to group these distinct exceptions into a singularity, they are quite different, based on differing and, indeed, often conflicting, rationales. See State v. Code, 627 So. 2d 1373, 1382 (La. 1993), for an extreme example of this. The State, in its *Prieur* notice to the defense, said its intent was to use other crimes evidence for the purpose of showing "motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident." It seems rather doubtful that each of these exceptions could conceivably be a material issue in the same trial. See also State v. DeRoche, 629 So. 2d 1267, 1270-71, (La. App. 5th Cir. 1993), in which the court, later finding that the contested evidence was admissible, had no problem with such broad and conflicting rationales advanced by the prosecution at the *Prieur* hearing:

IV. INTENT

Because there is confusion between the general evidentiary problem of establishing a defendant's intent with the rationale of this exception, this section begins with a brief discussion of the former before delving into the latter.

All criminal acts are thought to possess some form of *mens rea* or culpable intent.[33] The general rule is, for the act to have criminal consequences, the actor must have held the requisite criminal intent at the time of the act.

Generally, there are two levels of culpable intent. While these different levels are expressed differently depending upon the jurisdiction, Louisiana's approach to dividing intent into general and specific criminal intent is one to which other states adhere.[34] Specific intent is a higher degree of culpable intent, requiring the state establish this as an independent element of the crime. General intent is established by the act itself. For example, in a prosecution for simple battery, a general intent crime, the prosecution must only establish that the defendant intended to hit (batter) the victim.[35] Conversely, in a case of second degree battery, a specific intent crime, the prosecution must not only prove that the defendant battered the victim, but also that she had the intent to commit serious bodily harm.[36] Thus, in specific intent cases, both the act and the state of mind are essential elements of the crime. In general intent crimes,

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> The defendant argues that the state never identified for which purposes under C.E. 404(B) they intended to introduce the other crimes evidence. However, at the hearing, the state said, quoting from art. 404(B), that it intended to introduce the evidence to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the transaction that is the subject of the present proceedings.

A mere recitation of La. Code Evid. art. 404(B) should be insufficient for a trial court to find the contested evidence is admissible. *Prieur*, incorporated in La. Code Evid. art. 1103, requires the prosecutor at the *Prieur* hearing to state with particularity the exception it relies upon for admissibility. *Prieur*, 277 So. 2d at 130. Merely reciting a laundry list of often conflicting rationales for admissibility should satisfy neither a trial judge nor an appellate judge that the prosecution has fulfilled his mandated responsibilities.

33. In this sense, culpable intent is used with the meaning that, without this state of mind, the proscribed act does not have criminal consequences.

34. La. R.S. 14:10 (1987) provides:

> Criminal intent may be specific or general:
>
> (1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.
>
> (2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

35. *See* La. R.S. 14:35 (1987).

36. *See* La. R.S. 14:34.1 (1987).

the act establishes the state of mind, relieving the prosecution from having to prove a culpable state of mind.[37]

Ordinarily, proof of intent at the time of the criminal act is established through circumstantial evidence. Unless the defendant is willing to get on the witness stand and testify, not only that she did the proscribed act, but also that she intended the criminal consequences of that act (as in the television world of Perry Mason), then intent must be established through the introduction of other evidence.

If establishing a defendant's intent as noted above was the purpose of Article 404(B), then evidence of specific bad acts of a defendant would be admissible in *every case* in which intent was an essential element of the crime charged. However, the accepted rationale for the exception of intent in Article 404(B) is otherwise, as illustrated by the following passage:

> [I]f A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference . . . is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or . . . because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result . . . excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends . . . to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.[38]

As can be seen, it is the similarity of the past act to the act under evaluation which gives rise to the inference of criminal intent. The greater the similarity,

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37. *See, e.g.*, State v. Clark, 338 So. 2d 690 (La. 1976). In a prosecution for distribution of methamphetamine under La. R.S. 40:968 (1992), the court, finding evidence of another drug sale was not admissible to establish intent, stated: "R.S. 40:968 only requires that the prohibited acts be 'knowingly or intentionally' done and thereby only requires a general criminal intent. Since this intent is established by mere proof of voluntary distribution, intent was not an issue in the case." *Id.* at 692 (footnote omitted).

38. 2 John H. Wigmore, Evidence § 302, at 241 (Chadbourn rev. 1979).

the more likely the same state of mind is held by the actor in performing both acts.[39] This is Wigmore's "Doctrine of Chances."[40]

Further, it is critical to understand that "the *act itself is assumed to be done*,—either because (as usually) it is conceded, or because the jury is instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent."[41]

Thus this rule applies to situations where the defendant has admitted the act but has denied she acted wrongfully; i.e., she did not intend the criminal consequences of her act. A classic example is when the defendant is charged with rape. If the defendant admits the act, but asserts the act was voluntary, then evidence of prior rapes against the same person would tend to negate that assertion of an innocent state of mind. In this case, the defendant has "placed intent at issue," making this element a "real and genuine contested issue at trial."[42]

The following cases will illustrate the confusion in determining whether intent is a "genuine issue" at trial, so evidence of previous bad acts of the accused can be admitted to establish the defendant's intent in the instant case.[43] In some cases, the court correctly isolates the issue; in others, the court does not.

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39. It is conceivable that an act could have been innocently done once, but where defendant is proved to have committed other similar acts, the likelihood of innocent intent is considerably diminished. For evidence of another crime to be admissible, it is generally held that it must have been similar to the crime in question. Although intent is a material fact, where the requisite intent is an inescapable conclusion from the act, it is uniformly held that other crimes evidence is inadmissible. However, if defendant's evidence disputes the element of intent, the state may use the other crimes evidence in rebuttal.

Pugh, *supra* note 2, at 34.

40. Wigmore, *supra* note 38, § 302, at 241.

41. *Id.* at 245.

42. State v. Shaheen, 440 So. 2d 999, 1000 (La. App. 4th Cir.), *writ denied*, 443 So. 2d 586 (1983). The defendant was convicted of selling obscene materials. The evidence at issue was four earlier convictions for selling obscene movies and books. The court stated:

> The defendant has not alleged that he was unaware of the nature of the magazine or that he did not possess "guilty knowledge" which is an essential element of obscenity. It is possible during trial the defendant may raise certain defenses, whereby "intent" would become a contested issue. The defendant's plea of not guilty, without more, however, does not make "intent" a real and genuine contested issue.

Id. at 1000 (footnote omitted).

43. Since the Louisiana Code of Evidence was adopted in 1988, some of these cases were decided under previous law, notably La. R.S. 15:445 and 446 (repealed 1989):

> § 445. Inference of intent; evidence of acts similar to that charged.
>
> In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction.
>
> § 446. Evidence where knowledge or intent is material and where offense is one of system.
>
> When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the defendant as tend to establish such

In *State v. Germain*,[44] the defendant was accused of manslaughter. The victim was the three-year-old daughter of his wife. Physical examination of the child "revealed that the child had bruises of all colors over her entire body."[45] The pathologist testified that the child "was bruised over her entire body . . . that the cause of death was 'an acute subdural hemorrhage[,]'" and that there were so many bruises on the child's brain that they were "'too many to count.'"[46]

The wife waived her privilege and testified against her husband that her husband would get drunk and beat the child, and the day before the child died, the defendant had hit the child in the stomach, causing her to fall and strike her head. When, the next day, the child could not be kept awake, the defendant and his wife took the child to the hospital—where the child subsequently died.[47]

The husband's defense was that it was the wife who beat the child, although he did admit to disciplining the child. Further, the husband said he had no intent of harming the child when he did discipline her.[48]

The issue in this case was the admissibility of the other bad acts of the husband in beating the child to which the wife testified. The court, in answering this question, articulated a test which is now the accepted test in this jurisdiction:

> Generally, evidence of other acts of misconduct is not admissible; however, there are statutory and jurisprudential exceptions to this exclusionary rule, when the evidence of other acts tends to prove a material issue and has independent relevance other than showing that the defendant is a man of bad character. Even if independently relevant, the probative value of such evidence must be weighed against its prejudicial effect.[49]

In resolving that the wife's testimony of the husband's other bad acts had independent relevance and was admissible, the court stated:

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knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged.

See generally William A. Jones, Jr., Comment, *Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., in the Case in Chief*, 33 La. L. Rev. 614 (1973).

For other cases in which the defendant claimed innocent intent, see State v. Talbert, 416 So. 2d 97 (La. 1982). Defendant allegedly raped the victim approximately one month earlier. In the present prosecution, the defendant claimed that the act was consensual. The prior act was allowed to establish lack of innocent intent. *Id.* at 100. In State v. Smith, 513 So. 2d 438 (La. App. 2d Cir. 1987), the defendant, charged with armed robbery, claimed he had no idea his partner had the intent to rob the store. Evidence of a similar armed robbery in which the defendant participated was allowed. *Id.* at 443.

44. 433 So. 2d 110 (La. 1983).

45. *Id.* at 112.

46. *Id.* at 113.

47. *Id.*

48. *Id.* at 113-14.

49. *Id.* at 117 (citations omitted).

> Defendant asserted as his defense that he hit the child to discipline her, but that he never intended to harm her. By this assertion of innocence, or lack of intent, defendant directly put the question of his having the requisite criminal intent for the commission of the crime at issue.[50]

State v. Driggers[51] involved allegations that the defendant engaged in indecent behavior with his six-year-old granddaughter. The testimony at issue was of six other witnesses who alleged the defendant engaged in similar acts with them in the past.

The evidence included: (1) Testimony by the defendant's niece that approximately eighteen years earlier the defendant "grabbed her hand and put it in his overalls to make her touch his penis. . . . [He] exposed his penis and asked her to kiss it. . . . [He] fondled her and inserted his finger into her vagina. . . . [He] rubbed her . . . almost every time she visited."[52] (2) Testimony by a former next-door neighbor that twenty-six years earlier, when the witness was nine, the defendant "put his hand in her underwear and fondled her vagina."[53] (3) Testimony by a former next-door neighbor that fifteen years earlier, when the witness was nine, on two occasions the defendant "looked at pornographic magazines while he fondled her and masturbated."[54] On another occasion, he "pulled her clothes down and rubbed his penis on her."[55] Finally, he once "made her rub his penis with her hand."[56] (4) Testimony by a friend of the defendant's daughter that seven or eight years earlier, when the witness was twelve or thirteen, the defendant once "put his hand into her underwear to fondle her vagina."[57] On other occasions, the defendant "took her pants off to fondle her vagina and . . . fondled her breasts."[58] (5) Testimony by a former neighbor that twenty-four to twenty-six years earlier, when the witness was ten or twelve, the defendant attempted to molest her but failed when she "ran out the back door."[59] (6) Testimony by the defendant's sister-in-law that twenty years earlier, the witness' daughter, who was then twelve, told her "that the defendant had put his hands down her pants to touch her vagina."[60]

The state argued that defendant put intent at issue by claiming "that the offenses with which he is charged occurred with innocent intent or were inadvertent, accidental, unintentional, or without guilty knowledge."[61]

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50. *Id.* at 118.
51. 554 So. 2d 720 (La. App. 2d Cir. 1989).
52. *Id.* at 722.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 723.
60. *Id.*
61. *Id.* at 722. It is important to note the defense, on appeal, contended "that intent is not at

The court allowed the testimony to be admitted to establish the intent of the defendant, stating:

> Given that defendant claimed that the acts were unintentional or accidental, material issues in the instant case will be defendant's specific intent to commit indecent behavior with his granddaughter and his general criminal intent to commit the offense of oral sexual battery. . . .
>
> . . . .
>
> Intent may be proved by evidence of acts or conduct that tends to establish the fact of intent. If the defendant has committed similar criminal activity in the past, this shows a willfulness on his part to commit these same crimes today, thereby reducing the possibility that the crime in question was committed through ignorance, was unintentional, or was with innocent intent or without guilty knowledge.[62]

These two cases, with the reservations noted, are ones in which the court properly applied the rationale of the exception. The defendant claimed an innocent intent, allowing the prosecution to introduce the evidence to rebut that assertion. The following cases, on the other hand, illustrate examples of the improper use of other crimes evidence to establish propensity in the guise of establishing intent.

In *State v. Thompson*,[63] the defendant was charged with manslaughter. The victim was his girlfriend. The testimony at issue was that of the victim's friend that the defendant had, at a neighborhood bar two days before the shooting, "pulled a black gun from his pants, pointed it at Lisa's face and told her, 'You didn't get me no beer.'"[64] The victim's friend further testified that the defendant "held the gun to Lisa's face for about fifteen minutes while they were walking down the street and during the incident Lisa seemed afraid."[65]

The defendant, while telling several conflicting stories, essentially claimed his girlfriend had shot herself, either accidentally or purposefully. Thus, this is not a case where the act was admitted, as in *Germain*; rather, this is a case where the defendant claimed he did not do the act. Nonetheless, the supreme court held this testimony was admissible as tending to establish the intent of the defendant.[66]

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issue because he does not claim that the alleged conduct was accidental, only that it never occurred." *Id.* at 725. However, the court answered this by apparently accepting the state's argument that the "defendant's argument is disingenuous in light of a statement which he made during the investigation of the matter that suggests that the conduct in question may have occurred inadvertently." *Id.* The court's reliance on the prosecution's assertion that the defendant had made an out-of-court statement which impacted on the defendant's intent, rather than the defendant's assertion at trial that the acts never happened, is extremely suspect. However, if the court is granted its premise, its reasoning seems correct.

62. *Id.* at 724-25 (citation omitted).
63. 532 So. 2d 1160 (La. 1988).
64. *Id.* at 1163.
65. *Id.*
66. *Id.* at 1164.

The court reasoned that, since the State did not specify in the bill of particulars which section of Louisiana Revised Statutes 14:31 was at issue, the applicable provision was Louisiana Revised Statutes 14:31(2)(a), which includes "a homicide committed, without any intent to cause death or great bodily harm . . . [w]hen the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any *intentional misdemeanor directly affecting the person.*"[67]

Finding the State was required to prove the element of intent, the court stated: "Defendant's defense was that Lisa shot herself either accidentally or intentionally. By this assertion, defendant placed intent directly at issue. The evidence of the prior assault was . . . relevant to rebut this defense."[68]

The court seems to be saying: (1) if a statute has intent as an element of a crime; (2) and the defendant denies that she has committed the act; (3) then the defendant has placed intent "at issue;" (4) thus making admissible evidence of other bad acts of the defendant to establish her intent in the instant case to *rebut* the unasserted defense. If the court's statement is taken at face value, then the court appears to have forgotten the rationale behind the rule.

The defendant in this case did not put intent at issue. The defendant put *identity* at issue. He did not assert, "I did the act, but I did it without criminal intent." Instead, he asserted, "I did not do the act; someone else did."[69]

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67. La. R.S. 14:31 (Supp. 1994) (emphasis added).

68. State v. Thompson, 532 So. 2d 1160, 1164 (La. 1988). In a similar, but highly contrasting, vein, see State v. Humphrey, 412 So. 2d 507 (La. 1981). The defendant was convicted of two counts of manslaughter in the deaths of his two infant children. On original hearing, the court held testimony by his common-law wife that, three days prior to the deaths, the defendant had slapped and beaten both children, to be admissible to establish the intent of the defendant. The defendant's defense, however, was not innocent intent, rather, it was that he did not kill the children. On rehearing, the court recognized this:

> In the present case, there was no real issue of whether defendant acted with general criminal intent, since there is no suggestion that the person who committed the battery resulting in the homicide did not clearly intend to use force or violence upon the person of the children. Manslaughter, as charged here, is an *unintended* killing resulting from a battery. The truly crucial issue in this case was the identity of the person who beat the children to death, and the entire defense was oriented toward the contention that this defendant did not commit the crime. There is no contention that although his beating killed them, his use of force against the children either was accidental or was the reasonable, privileged use of force to discipline minors.

Id. at 521 (citation omitted). The court admitted the evidence—but to establish identity rather than intent. *See also* State v. Welch, 615 So. 2d 300, 302 (La. 1993):

> [I]n this case, intent did not become an actively disputed issue at trial. Welch did not claim that he accidentally struck the victim, or that he had not intended to inflict serious harm. Rather, he denied the attack altogether. In this regard . . . absent an active dispute over the issue of intent, the Fourth Circuit's rationale for admitting the evidence sanctioned the introduction of such evidence for its prohibited use of demonstrating the defendant's prior violent character, to show that he acted "in conformity therewith," which is not allowed.

69. While there may be an argument that this evidence should be admissible to establish

State v. Jackson[70] is the supreme court's latest pronouncement of the standard when attempting to introduce prior bad acts by the defendant to establish intent at the time of the charged act. It is a troubling case, incorporating the worst of the reasonings in both *Driggers* and *Thompson*.

In this case, strikingly similar factually to *Driggers*, the defendant was charged with three counts of molesting a juvenile. The victims were his granddaughters, aged ten and seven at the time of the alleged crimes. The evidence at issue was testimony by his three daughters that the defendant had previously molested them. At the *Prieur* hearing,[71] the State introduced the following evidence: (1) The first daughter's testimony that twenty-four years earlier, when the witness was twelve, her father would "kiss her, feel her and then 'stick his penis in' her."[72] (2) The second daughter's testimony that on at least two occasions, twenty-one to twenty-two years earlier, when the witness was eleven or twelve, her father "kissed her and touched her privates, including her breasts."[73] (3) The third daughter's testimony that, from fifteen to twenty-two years earlier, when the witness was between the ages of eight and fifteen, her father "would kiss her all over, hold her tight, fondle her and expose himself to her."[74]

In resolving whether this evidence should have been allowed at trial, using reasoning reminiscent of *Thompson*, the court stated:

> The state believes the testimony of the defendant's daughters shows he took advantage of one-on-one situations with immediate family female juveniles and was motivated by an unnatural interest in adolescent/pre-pubescent females. In order to obtain a conviction, the state will have to prove beyond a reasonable doubt all the elements required for the crime of molestation of a juvenile. One of those elements is that defendant had the intention of arousing or gratifying the sexual desires of either himself or the victims. In other words, the state will have to prove specific intent. "This court has recognized the principle that where the element of intent is regarded as an essential ingredient of the crime charged, it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed."[75]

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identity, this exception is ordinarily used for so-called "signature" crimes, of which this is not one. *See* McCormick, *supra* note 2, § 190, at 801-03.

70. 625 So. 2d 146 (La. 1993).

71. *See supra* note 27.

72. *Jackson*, 625 So. 2d at 148.

73. *Id.*

74. *Id.*

75. *Id.* at 149-50 (quoting State v. Cupit, 189 La. 509, 515, 179 So. 837, 839 (1938)). In the federal system, the Supreme Court recently addressed this question in Estelle v. McGuire, 112 S. Ct. 475 (1991), and came to a similar conclusion. In *Estelle*, the defendant had been found guilty in a California state court of the second degree murder of his infant daughter and sought habeas corpus relief. One issue was the introduction of expert testimony to establish battered child syndrome, which was allowable under California law. The federal court of appeals held that this evidence was inadmissible. Reversing this ruling, the Court stated:

Unlike *Driggers*, the court did not find any out-of-court statement by the defendant which could be used to establish that the defendant had, in fact, put intent at issue. Further, the court, unlike *Thompson*, acknowledged the defendant had not made intent an issue by simply denying the act. Addressing this, the court stated: "Therefore, in this case, the evidence of other crimes committed by defendant will be useful in proving that the defendant did not act innocently, and will negate any defense that he acted without intent or that the acts were accidental."[76]

This is quite unfortunate language. First, in almost every crime, intent is an essential ingredient of the crime charged. Second, the court held the admission of this evidence is allowable not only to rebut a defense of innocent intent, but to admit the evidence so as to *negate the possibility of the defense.* The first is the questionable reasoning which the court employed in *Thompson*. The second is new for this jurisdiction, and is a major shift towards allowing the admission of this evidence—even when the defense of innocent intent or accident is not asserted by the defendant.

If this is the state of the law in admitting past bad acts of the defendant to establish intent, then there will be few instances when a similar past act of the defendant would not be admissible.[77] The evidence would be admissible whether the defendant claimed innocent intent or accident or merely alleged, as in *Jackson*, that she did not do the act in question. The problems with this reasoning were well expressed by the dissent in *State v. Bolden*,[78] in which evidence of a rape occurring two years earlier against a different victim was admitted to establish the intent of the defendant at the time of the alleged rape for which he was charged:

> This decision may well have substituted for trial of the offense charged a trial of the defendant's predisposition and propensity for committing such an offense based on his past record of conduct. Under the possibilities presented by this holding, that sometimes gossamer cloak of innocence with which we clothe a defendant is totally ripped aside, and a defendant will now be enshrouded with the sackcloth of presumption of

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> This ruling ignores the fact that the prosecution must prove all the elements of a criminal offense beyond a reasonable doubt. In this second degree murder case, for example, the prosecution was required to demonstrate that the killing was intentional. By eliminating the possibility of accident, the evidence regarding battered child syndrome was clearly probative of that essential element, especially in light of the fact that . . . prior to trial [the defendant alleged] that Tori had injured herself by falling from the couch. . . . [T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.

Id. at 481 (citation omitted).

76. State v. Jackson, 625 So. 2d 146, 150 (La. 1993). *Compare* State v. Martin, 377 So. 2d 259, 263 (La. 1979): "The mere theory that a plea of not guilty puts everything material at issue is not enough . . . . The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of evidence."

77. *See, e.g.*, State v. Bourque, 622 So. 2d 198 (La. 1993); State v. Fink, 601 So. 2d 694 (La. App. 5th Cir. 1992).

78. 257 La. 60, 241 So. 2d 490 (1970).

> guilt founded on past unsavory conduct. And since trial is no longer limited to the offense charged but is now open for the presentment of the entire panorama of a defendant's past life, how will he prepare his defense?[79]

This reasoning, however, might be limited to analogous situations, i.e., allegations of child abuse where other victims belatedly come forth, especially when "the defendant is well acquainted with the persons accusing him of other crimes . . . [so as to] be in a position to point out credibility problems and/or ulterior motives. . . . [The defendant] will also be better able to explain his alleged actions than if the accuser were a stranger or even a third party known to him."[80]

V. KNOWLEDGE

This exception is more properly termed "guilty knowledge,"[81] as this is the relevant inquiry.[82] This exception applies when the question is: Did the defendant know at the time of the offense that the act she was committing had criminal consequences?[83]

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79. *Id.* at 66-67, 241 So. 2d at 492 (Barham, J., dissenting). One author puts it this way:

> We observe in our passages through life that people are known by the friends they make and the company they keep. Similarly, we learn that a man's reputation precedes him. Not surprisingly, therefore, the Bible informs us that "our sins *testify* against us . . . ." Thus, our deeds and misdeeds form markers of different phases of our lives, and will follow us wherever our different paths may lead us, including to, and on occasion into, the courtroom. But if our sins are to testify against us, what impact will this have upon the presumption of innocence? Put another way, can the presumption stand for something more than an empty phrase before the onslaught of the collective misdeeds of our past?

Mascolo, *supra* note 9, at 1-2.

80. *Jackson*, 625 So. 2d at 152. *See also infra* part VIII.

81. *See, e.g.*, State v. Silguero, 608 So. 2d 627 (La. 1992).

82. Guilty knowledge should be distinguished from consciousness of guilt. *See* State v. Burnette, 353 So. 2d 989 (La. 1977). The defendants were convicted of aggravated kidnapping. The State's theory was that the defendants, Burnette and Granger, suspected that two other persons, Johnson and Mulvey, had been hired to kill them. Thinking so, the defendants lured the victims away from a lounge to a remote spot where Mulvey was killed. Johnson was taken to Mississippi and killed. This case only dealt with the kidnapping aspect of these crimes.

The other crimes evidence at issue was the prosecutor's references, made during his opening statement, to the firing upon of a trailer of one of the State's witnessess and to the defendant, Burnette, coming from Texas into Louisiana with the purpose of killing another of the State's witnesses.

The court indicated the evidence of these two crimes would be admissible to establish that the defendant knew himself to be guilty of the crimes with which he had been charged. However, since the prosecution made no attempt to connect the defendant to the uncharged crimes, the evidence was ruled inadmissible. *Id.* at 993.

83. *Knowledge* signifies an awareness of a fact. In some crimes, it may be an element of the crime. For example, a prosecution for receiving stolen property requires that defendant know the property was stolen. Evidence that defendant knowingly bought stolen property from the *same* person on a prior occasion is generally admissible. The connection between

Here, again, the act is established. What is at issue is whether the defendant knew her act to be criminal.[84] For example, in the case where a person is caught red-handed in possession of stolen goods, the only defense is the defendant did not know the goods in her possession were stolen. Without this knowledge, the act is not criminal.[85]

In such a case, use of similar examples of the defendant's possession of stolen goods in which her guilty knowledge has been established would tend to prove that, in this case, the defendant also possessed guilty knowledge.[86] As in the case of intent, Wigmore's "Doctrine of Chances" dictates that the greater the similarity between the uncharged and the charged acts, the greater the relevance and probity of the uncharged act.

In *State v. Silguero*,[87] the defendant was caught red-handed with his own suitcase filled with marijuana. He claimed his friend "gained access to the suitcases by making an unauthorized duplicate set of keys to defendant's storage unit."[88] He denied knowledge that the suitcases contained marijuana until the bags had already been transported within the state to Lafayette, whereupon he confronted his friend and found out the contents.

At issue was the prosecution's question to the defendant on cross-examination: "Do you know if those—the marijuana that was found in these suitcases was part of the same marijuana that was found in your storage building?"[89]

Resolving this issue, the court explained:

> Defendant, on direct-examination, sought to establish as a defense a lack of knowledge of the contents of the suitcases by providing an innocent explanation of how his suitcases had been removed from his storage unit and filled with marijuana without his knowledge. This defense directly placed his "guilty knowledge" at issue and made evidence

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transactions (same thief, similar circumstances) renders more probable the fact that defendant was aware of the nature of the property at the later transaction.

Pugh, *supra* note 2, at 33.

84. *Knowledge* signifies a being aware; and in the usual case of the present sort this knowledge refers to the nature of a thing used in the alleged crime. Even where the doing of the act involved is not disputed, a knowledge existing at the time of the act may be in dispute. Thus, proof of knowledge becomes a usual necessity for certain offenses, such as the uttering of forged or counterfeit paper and the possession of stolen goods; while it is rarely an element to be proved in other offenses, such as robbery, rape, and homicide.

Wigmore, *supra* note 38, § 300, at 237 (citation omitted).

85. In Louisiana, La. R.S. 14:69(A) (1986) provides:

> Illegal possession of stolen things is the intentional possessing, procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses.

86. In the federal arena, see Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496 (1988), discussed more fully *supra* text accompanying note 25.

87. 608 So. 2d 627 (La. 1992).

88. *Id.* at 628.

89. *Id.* at 629.

> of other crimes relevant to rebut that issue. . . . The state's evidence that less than two weeks after the purported commission of the charged offense defendant's storage unit contained not simply business supplies, but almost four times the marijuana transported to Louisiana directly challenged defendant's exculpatory account of events.[90]

In *State v. Martin*,[91] the defendant was convicted as a principal to forgery. He was charged with forgery by the false making of a signature to a check which he knowingly issued to Woolco Department Store with the intent to defraud. This was accomplished by having his concubine forge the signature, posing as the true account holder.[92] The state tried to establish through the testimony of the defendant's concubine that the defendant had forced her to commit the forgery by threatening to blow her head off, shoot her in all her joints so she would never be able to use her arms or legs again, cut her nose off, and leave her to bleed to death. She further testified to the defendant's involvement in the purchase and distribution of unlawful drugs.[93] The purpose of this testimony was to establish the "coercion intrinsic to the couple's relationship."[94]

In holding this evidence was not properly admissible, the court stated:

> The uncontroverted testimony of the state's witnesses is to the effect that Martin stole the check and driver's license used in the forgery, instructed Womack as how to perpetrate the crime, accompanied her to the store, approved her selection of the stereo, drove her and the stereo to his trailer, and retained possession of the fruits of the crime. The requisite knowledge and intent to make Martin a principal to the forgery were fully established by this uncontradicted evidence.
>
> Thus, in the absence of a defense that Womack committed the forgery without Martin's knowledge and assistance, "intent" or "knowledge" were not genuine matters at issue. Defendant's plea of not guilty, without more, did not make evidence of extraneous offenses admissible to prove "intent" or "guilty knowledge." The evidence must indicate that these are real and genuine matters at issue, independent of the defendant's general claim of innocence posed by his plea of not guilty, to permit the exceptionally allowed evidence of extraneous offenses and wrongful acts. The mere theory that a plea of not guilty puts everything material at issue is not enough for this purpose. The prosecution cannot credit the accused

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90. *Id.* at 630. This case demonstrates that evidence of other crimes or acts need not be of acts committed in the past in order to be independently relevant.

91. 377 So. 2d 259 (La. 1979) (on rehearing).

92. The defendant had broken into the account holder's car and stolen her purse which contained the account holder's driver's license. This identification was used to successfully pull off the forgery. *Id.* at 262. Defendant's concubine pleaded guilty prior to the prosecution of the instant case.

93. *Id.*

94. *Id.*

> with fancy defenses in order to rebut them at the outset with some damning piece of evidence.[95]

These two cases show the proper analysis to be used when other crimes evidence is sought to be introduced to establish the defendant's guilty knowledge. However, as noted earlier, these exceptions are often mixed up with intent, system, motive, and other exceptions. When the issue is properly isolated as in the cases above, the court seems to have a proper understanding of the correct analysis.[96] Note that these are relatively "easy" cases, i.e., a small-time forger in *Martin* and a low-level drug dealer in *Silguero*. In these types of cases, there is a greater likelihood the courts will intellectually analyze the independent relevance of the contested evidence and a correspondingly high likelihood the courts will come, by traditional analysis, to a correct conclusion. Contrawise, in cases such as *Driggers* and *Jackson*, there is an equally high likelihood a court will fail to scrutinize the evidence in terms of its independent relevance and a correspondingly high degree of likelihood the court will, by traditional analysis, come to the incorrect conclusion.

VI. PLAN

For this exception to be applicable, it is not necessary for the defendant to have admitted to the criminal act as in the case of knowledge or intent. In fact, it would be a rare case where the act is conceded by the defendant that this exception would be applicable.[97] Also, unlike the underlying rationale for intent and knowledge, design or plan is not an essential part of the criminal act in most instances.[98] Rather, the rationale for this exception is to allow the prosecution to establish in the jury's mind an understanding of the crime itself. And, in contrast to knowledge and intent, there is no necessity that any similarity exists between the uncharged and the charged crime.

The rationale for this exception is illustrated by the following:

> If, for example, it could be shown that a defendant had formed a settled purpose to obtain certain property, which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last, criminal act, that he had formed the purpose to accomplish the

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95. *Id.* at 263 (citations omitted).

96. *See, e.g.*, State v. Clark, 338 So. 2d 690 (La. 1976); State v. Slayton, 338 So. 2d 694 (La. 1976).

97. *See* Wigmore, *supra* note 38, § 301, at 238: "Design or plan . . . is the preceding mental condition which evidentially points forward to the doing of the act designed or planned. Thus, the peculiarity of design is that the act is not assumed to be proved, and the design is used evidentially to show its probable commission." (citations omitted).

98. Pugh, *supra* note 2, at 32.

> result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end.[99]

Thus, the reason for this exception is to allow evidence of "the existence of a larger plan, scheme, or conspiracy, of which the crime on trial is a part. Each crime should be an integral part of an overarching plan explicitly conceived and executed by the defendant or his confederates."[100]

In *State v. Mayer*,[101] the defendant was convicted of second degree murder of his wife. The evidence at issue was that the defendant had, four days earlier, entered the home of the wife's sister with a gun. While there, he held her at gunpoint and forced the sister to tell the defendant information on his wife's "whereabouts and daily activities."[102]

The prosecution's theory was that the defendant, upon leaving the courthouse "after a hearing in domestic court, obtained a gun, returned to the court, waited for and followed his wife to an intersection near her home, whereupon he intentionally murdered her."[103]

The court ruled evidence of the earlier crime against the victim's sister was properly introduced to establish a plan which culminated in the murder of the victim.[104]

As has been remarked earlier, the prosecution frequently throws the whole of the exceptions listed in Article 404(B) at the court in a barely disguised effort to get the evidence of other crimes before a jury by whatever means available. The prosecution knows this evidence is highly prejudicial and will go a long way towards convicting a defendant.[105]

In *Jackson*, the court, quoting from *Driggers*, discussed the evidence in connection with the possibility that it fit within the system or plan exception: "[T]he continuity and consistency with which the other crimes occurred indicate a *pattern* of behavior and not merely one or two isolated incidents."[106] The court held, as in *Driggers*, that "the testimony of defendant's three adult daughters that their father fondled their breasts and kissed them to be admissible to prove . . . plan."[107]

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99. Commonwealth v. Robinson, 16 N.E. 452, 454-55 (Mass. 1888). *Robinson* is cited in Wigmore, *supra* note 38, § 304, at 250.

100. McCormick, *supra* note 2, § 190, at 800-01 (footnotes omitted).

101. 589 So. 2d 1145 (La. App. 5th Cir. 1991), *writ denied*, 609 So. 2d 251 (1992).

102. *Id.* at 1150.

103. *Id.*

104. *Id.*

105. "[W]hile the government may be reluctant to admit it, the reasons proffered to admit extrinsic-acts evidence may often be a subterfuge for the real motive behind the use of this type of evidence, which, at least in part, is an urge to impugn the defendant's character." Mascolo, *supra* note 9, at 284.

106. State v. Jackson, 625 So. 2d 146, 151 (La. 1993) (quoting State v. Driggers, 554 So. 2d 720, 727 (La. App. 2d Cir. 1989)).

107. *Id.* at 152.

An attentive reader will recall that the testimony of the niece and neighbors molested by the defendant in *Driggers* occurred some seven to twenty-eight years earlier. And, in *Jackson*, the molestation occurred from fifteen to twenty-four years prior to the events for which the defendant was on trial. It stretches credibility to the limit to accept that these two defendants had conceived a plan that included, *at the time of making the plan*, the molestation of children who had yet to be born. Further, to adopt the reasoning in *Driggers* and *Jackson*, it must be believed that these defendants held this plan in their minds for that extraordinary length of time and, upon the event of the birth of the children and their subsequent aging to the proper range of their appetites, acted out the plans conceived close to three decades earlier.[108]

These two cases exemplify the improper analysis to be used when deciding whether a fact pattern satisfies the requirements of the exception to the admission of other crimes evidence to prove a defendant's system or design or plan.[109]

VII. MOTIVE

This exception is less like intent or knowledge and more like plan. Both intent and knowledge have independent relevance in the case at bar because they are essential elements of the charged crime. In a prosecution for intentional second degree murder, the prosecution must establish specific intent; in a prosecution for receiving stolen goods, the prosecution must establish the defendant's guilty knowledge. In the case of plan or motive, however, neither is normally an element of the crime which the prosecution is attempting to establish, rather the prosecution is trying to create in the jury's mind an understanding of the crime. Unlike knowledge or intent, and like plan, there is no need for any degree of similarity between the uncharged and charged acts.

In the case of motive, the issue is the *why* of the crime. In this case, the defendant denies she has committed the crime. By the introduction of evidence which provides a motive, the prosecution is able to establish the defendant was more likely to have committed the crime than a person without a similar motive. For example, if the defendant is on trial for murder, and it is discovered that the victim was blackmailing the defendant for embezzlement, then the presentation of this other crimes evidence would tend to establish a motive for commission of the murder.

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108. [T]he fact that a defendant planned to commit the crime in question, as evidenced by a plan and action upon it, certainly renders more probable the conclusion that defendant did commit that crime. If the plan contemplated the commission of another crime, the state's proof of this plan thus becomes a problem of other crimes evidence. It is generally held that unless this alleged plan contemplated *both* the other crime and the act charged in the indictment, it is inadmissible.

Pugh, *supra* note 2, at 32-33 (footnotes omitted).

109. *See also* State v. Hawkins, 633 So. 2d 301 (La. App. 1st Cir. 1993); State v. Howard, 520 So. 2d 1150 (La. App. 3d Cir. 1987), *writ denied*, 526 So. 2d 790 (1988).

As can be seen from the foregoing example, the relationship between the other act and the crime for which the defendant is charged must be singularly interwoven.[110] A general motive, such as greed or lust, shared by all with similar drives, is insufficient. For if the motive of greed were sufficient to establish the independent relevance required by Article 404(B), any time a person is charged with doing something criminal to acquire a pecuniary gain, then any act in which he has evinced a similar state of mind would be admissible.[111] So, too, would any lustful act be admissible against a defendant charged with a sexual crime. There should be more. There should be some connexity between *this* defendant and *this* crime. It should be some motive sufficiently unique that it points unerringly at *this* defendant.

In *State v. Lee*,[112] the defendant was convicted of manslaughter. The defendant had gone alone on a camping trip with a thirteen-year-old boy. While on this trip, the prosecution theorized that the defendant attempted to have sexual contact with the boy, and when rebuffed, shot him with a shotgun. The evidence at issue was that the defendant had had sex with another male friend.

In refusing to allow the evidence of the defendant's prior homosexual act, the court stated:

> [I]n order to have independent relevance, the motive established by the other crimes must be more than a general one, such as gaining wealth, which could be the underlying basis for almost any crime; it must be a motive factually peculiar to the victim and the charged crime. Evidence of defendant's homosexuality only establishes a general motive. Without additional evidence indicating a motive to commit the particular crime involved in this case, the evidence of homosexuality should not be admitted to prove motive.[113]

In *State v. Brown*,[114] the defendant was convicted of attempted first degree murder of a deputy sheriff who stopped the defendant for speeding. The evidence at issue was the stolen car the defendant was driving. The defendant claimed the deputy sheriff had been shot by a passenger.

Allowing the evidence of the theft of the car to be admitted, the court stated:

> Evidence that defendant had stolen the Thunderbird which he was operating is admissible as an exception to La.C.Cr.P. art. 770 because it establishes motive on part of defendant to commit the crime charged.

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110. If the defendant had a particular reason to accomplish a crime and the crime was effected, proof of defendant's motive renders more probable the fact that he was the actor. In order to have independent relevance, the motive reflected by other crimes should be factually peculiar to the victim and the crime charged.

Pugh, *supra* note 2, at 33-34 (footnotes omitted).

111. *See, e.g.*, State v. Sutfield, 354 So. 2d 1334, 1337 (La. 1978).

112. 569 So. 2d 1038 (La. App. 3d Cir. 1990).

113. *Id.* at 1042 (citations omitted).

114. 398 So. 2d 1381 (La. 1981).

> Motive has been defined as a reason the accused has for committing the charged offense. Motive is the cause or reason that moves the will and induces action for definite result.
>
> Defendant, the admitted driver of the Thunderbird, under normal circumstances would have no reason to have shot at the officer who was stopping him on a speeding charge, the punishment for which would probably have only been a fine. Defendant denied shooting the officer. He testified the officer was shot by Williams. It therefore became important to the State's case to establish a reason why defendant would have fired the shot. If defendant had stolen the automobile, a crime for which he could be sent to prison for many years, it was most important for him to avoid having the crime discovered, a very likely probability in the event he was arrested on the speeding charge. Proof that defendant had stolen the vehicle establishes a motive for defendant to fire upon the officer in order to avoid being arrested on the speeding charge.[115]

The courts in these two cases understand the proper use of motive as an exception to the general exclusion of character evidence to prove propensity. In *Lee*, the court recognizes that a person's particular sexual deviance is an aspect of character and, like greed to a thief, only implies a general motive shared by all in like circumstances. There is nothing particular about the defendant's alleged homosexuality in *Lee* which provided a nexus with the murder of the victim.

Likewise, in *Brown*, the court correctly found that the stolen car provided a particular motive to a particular person for killing the deputy sheriff when the defendant was stopped for speeding.[116]

In *State v. Bailey*,[117] the defendant was convicted of two counts of aggravated oral sexual battery. The alleged victims were his present stepdaughters and his former stepdaughters. At issue was the introduction of other, uncharged crimes committed against the same victims and testimony that the defendant had committed similar acts against other victims who were not members of the defendant's family.

The second circuit denied writs, relying on *State v. Driggers* to the effect that the testimony established the defendant's motive to "engage in such activities with prepubescent and adolescent girls with whom he is familiar and while he is alone with them or otherwise not being observed."[118]

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115. *Id.* at 1384 (citation omitted).

116. *See also* State v. Lafleur, 398 So. 2d 1074 (La. 1981). The defendant was convicted of the second degree murder of the son of his live-in concubine. The defendant had previously stated he wanted to "get rid" of the child because of the child's excessive "whining and whimpering." The contested evidence was the defendant's prior beatings of the child. *Id.* at 1080. The court held the evidence was admissible to establish a motive that was "factually peculiar to the victim and the charged crime . . . ." *Id.*

117. 588 So. 2d 90 (La. 1991) (per curiam).

118. State v. Bailey, No. 23-194-KW (La. App. 2d Cir. June 13, 1991). It should be noted that

The supreme court reversed in part the second circuit's writ denial.[119] As to the testimony of the stepdaughters, the court implied this evidence was admissible to establish motive.[120] However, the evidence that the defendant had engaged in somewhat similar activity with other, non-family members while they were of similar ages, was reversed. The brief per curiam opinion merely stated that such evidence did not "establish the defendant's particular motive for committing the charged crime against the prosecutrix . . . and it otherwise fails to establish a pattern of committing sexual offenses against the same prosecutrix."[121]

By affirming the admission of the testimony of the stepdaughters to establish the defendant's motive, the supreme court affirmed the reasoning in *Driggers*, which is criticized throughout this paper. As to the reversal of the second circuit's reasoning regarding the non-family members, the supreme court seems to have repudiated that part of *Driggers*' reasoning.[122]

In *State v. DeRoche*,[123] the defendant was convicted of the rape of a juvenile boy. The evidence at issue was testimony that the defendant had sexually abused two other juvenile boys. At the *Prieur* hearing, the state merely quoted the entire second sentence of Article 404(B) rather than identifying with particularity which of the enumerated exceptions it was relying upon for the admissibility of the contested evidence. With this "laundry-list" available, the appellate court found the evidence was admissible to prove defendant's motive or plan, i.e., molesting juvenile males.[124]

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the second circuit, in its writ denial, stated that none of the evidence would be admissible to establish the defendant's intent because "specific intent is not an element of the charged offenses and applicant has not otherwise made intent an issue. . . . Should, during trial, applicant claim that the acts alleged in the bill of information occurred through unintentional conduct, then, of course, intent would be placed at issue." (citation omitted). Therefore, the court relied on *Driggers* only for the element of motive—not intent.

119. 588 So. 2d 90 (La. 1991) (per curiam).

120. The supreme court affirmed the second circuit's decision as to this evidence for the reasons given in the second circuit's writ denial.

121. *Bailey*, 588 So. 2d at 90.

122. *But see* State v. Jackson, 625 So. 2d 146 (La. 1993); State v. Jamison, 617 So. 2d 480 (La. 1993) (per curiam). In *Jamison*, the defendant was charged with the aggravated rape of his stepdaughter and his daughter, both juveniles. He was acquitted of the charges relating to his daughter and convicted of those relating to this stepdaughter. At issue was testimony that the defendant had committed similar acts on two other juvenile, non-family members of the same approximate age as the victims, around the same time as the acts with which the defendant was charged. Also at issue was testimony that the defendant had committed similar acts with the alleged victims.

The third circuit allowed the testimony to be admitted. The supreme court reversed in part. As to the evidence that the defendant committed similar acts against the victims of the charged crime, the court held this evidence was admissible. The evidence that the defendant committed similar acts against other, non-family members was reversed. The court stated that the evidence did not "establish the defendant's particular system for committing the charged crime against the prosecutrix and fails to establish a pattern of committing sexual offenses against the same prosecutrix." *Id.* at 481.

123. 629 So. 2d 1267 (La. App. 5th Cir. 1993).

124. *Id.* at 1272.

The court misapprehends the rationales behind both of these exceptions. In order for the exception of motive to have independent relevance, there must be some factually peculiar connexity between the crime charged and the defendant that would distinguish the defendant from the general populace of like-minded child abusers, each who have the same motive.[125] For the plan exception to be independently relevant, the plan must be one of a larger scheme in which both crimes were contemplated upon formation of the plan in the defendant's mind.[126]

In *State v. Howard*,[127] the defendant was convicted of aggravated rape and aggravated crime against nature against his eleven-year-old daughter. The other crimes evidence was testimony by another daughter that the defendant forced her to have sex eight years earlier and had twice attempted to do so. These acts allegedly occurred when the witness was approximately the same age as the present victim.

In holding the evidence admissible to establish motive, the court said:

> In the instant case, the evidence of previous sexual assaults against a daughter at a period of time analogous to the current victim (pre-teen years) and under similar circumstances (appellant intoxicated and alone with the victim in that others are either away or asleep) demonstrated motive and a plan to systematically engage in non-consensual relations with his daughters as they matured physically.[128]

Likewise, in *Driggers*, the defendant was accused of molesting his niece and several neighboring girls over a period of twenty-eight years. The court held the evidence admissible to establish motive, stating:

> [T]he other crimes evidence would tend to demonstrate that the defendant generally took advantage of one-on-one situations with female juveniles, that he was motivated by an unnatural interest in pre-pubescent and adolescent females, and that the facts giving rise to the instant charges did not occur fortuitously or accidently, but were fully intended by the defendant.[129]

Later in the opinion, the court concluded that "the continuity and consistency with which the other crimes occurred indicate a pattern of behavior and not merely one or two isolated incidents. The significance of the other crimes lies as much in what motivates defendant to act as in what occurred. His apparent tendency to partake in pedophilic activities is of long standing and appears to be firmly

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125. *See, e.g.*, State v. Sutfield, 354 So. 2d 1334 (La. 1978).

126. *See generally* Pugh, *supra* note 2, at 32-33. Harmless error analysis was applied in *DeRoche*. The court found that, even if the evidence was improperly admitted, it was harmless error. *DeRoche*, 629 So. 2d at 1272-73. Therefore, the precedence of this case is questionable.

127. 520 So. 2d 1150 (La. App. 3d Cir. 1987), *writ denied*, 526 So. 2d 790 (1988).

128. *Id.* at 1154.

129. State v. Driggers, 554 So. 2d 720, 724 (La. App. 2d Cir. 1989).

entrenched."[130] In *Jackson*, the court quoted the above language from *Driggers*, adopting that case's reasoning fully.[131]

To accept that this evidence established the defendants' motives in committing the crimes is to discard the rationale for the exception. To say a defendant is "motivated by an unnatural interest in pre-pubescent and adolescent females" is to say he is a pedophile. Only pedophiles are so inclined in their sexual desires. As the court noted, this character "to partake in pedophilic activities is of long standing and appears to be firmly entrenched." Thus, the defendant is a well-established pedophile.

This reasoning is contrary to the accepted notion that the motive must be something peculiar to the defendant relative to the victim rather than a general motive, such as greed or propensity towards violence. The "motive reflected by other crimes should be factually peculiar to the victim and the crime charged."[132]

VIII. THE DEPRAVED SEXUAL INSTINCT: A SPECIAL EXCEPTION IN SEXUAL ABUSE CASES[133]

As can be seen from the cases criticized above, it is frequently in cases of sexual or child abuse that courts have a conceptual difficulty in properly applying Article 404(B). As noted earlier, this arises from the difficulty courts have in distinguishing between the first and second sentences of that article.[134]

Courts frequently attempt to force the contested evidence into one of the enumerated exceptions in Article 404(B), resulting in strained interpretations of the enumerated exceptions—interpretations not in accord with the traditionally accepted rationales for those exceptions possessing independent relevance.[135]

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130. *Id.* at 727. *See also* State v. Hawkins, 633 So. 2d 301 (La. App. 1st Cir. 1993). The defendant was convicted of molesting his step-daughter. The contested evidence was the defendant's conviction for incest with his daughter. The court stated: "The evidence of the defendant's conviction of incest was admitted to show that the defendant had a system of past deviant behavior with young female family members . . . ." *Id.* at 305.

131. State v. Jackson, 625 So. 2d 146, 151 (La. 1993). The court's reliance on *Driggers* throughout the case may settle the question of the precedential value of *Driggers*. *See* La. Code Evid. art. 404(B) author's note 4, at 298, *in* George W. Pugh et al., Handbook on Louisiana Evidence Law (West 1994): "In light of the Supreme Court's decision reversing in part the Second Circuit Court of Appeal's decision denying writs in State v. Bailey, 588 So. 2d 90 (La. 1991), the precedential force of State v. Driggers seems very weak indeed."

132. Pugh, *supra* note 2, at 33-34.

133. *See generally* David J. Kaloganides, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(B)*, 25 Loy. L.A. L. Rev. 1297 (1992).

134. *See generally* Ordover, *supra* note 6.

135. *See, e.g.*, State v. Tolliver, 621 So. 2d 17 (La. App. 2d Cir. 1993). In this case, the court lists some of the different reasonings used by courts to find that the evidence in sex crime cases is admissible:

> Generally, evidence of other sex crimes committed by the accused against the same victim or a similarly situated victim falls within one of the 404 B exceptions. For motive

This strained interpretation of the second sentence of Article 404(B) is unnecessary.[136]

The listing in Article 404(B) is not exclusive. This should be clear from the second sentence of the article which states: "It [evidence of specific instances of the defendant's conduct] may, however, be admissible for other purposes, such as . . . ." This "such as" indicates the list which follows is not exclusive.

Further, the courts have allowed evidence of prior acts against the same victim to prove the lustful disposition of the defendant towards that victim,[137] and to corroborate the testimony of the victim.[138] Although the Louisiana Supreme Court has yet to state that there is a separate exception in cases of child abuse,[139] or rapes of victims other than the victim of the crime with which the defendant is presently charged, there is little doubt that in the case of the rape of a single victim by the same defendant, there is a separate exception from those listed in Article 404(B).[140]

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or lustful disposition toward the particular victim, see *State v. Baker*, 535 So.2d 861 (La. App.2d Cir.1988), and *State v. Howard*, 520 So.2d 1150 (La.App. 3d Cir.1987). For plan, system, and opportunity, see *State v. Acliese*, 403 So.2d 665 (La. 1981), and *State v. Hanks*, 593 So.2d 971 (La.App. 5th Cir.1992). For intent, see *State v. Baker*, 552 So.2d 617 (La.App.2d Cir.1989), writ denied, and *State v. Moore*, 534 So.2d 1275 (La.App. 4th Cir.1988), writ denied.

Particularly, where the testimony shows that the factual circumstances of the prior acts and the crime charged are virtually identical, the evidence of the other crimes is corroborative of the victim's testimony and establishes a system or plan. *Baker*, 534 So.2d 861, *Hanks*, and *Acliese*, cited supra.

Id. at 19.

136. For a critical analysis of this trend, see Edward J. Imwinkelried, *The Use of a Defendant's Uncharged Misconduct to Prove Mens Rea: The Doctrine That Threatens to Engulf the Character Evidence Prohibition*, 130 Mil. L. Rev. 41 (1990).

137. State v. Jackson, 625 So. 2d 146 (La. 1993); State v. Acliese, 403 So. 2d 665 (La. 1981); State v. Long, 590 So. 2d 694 (La. App. 3d Cir. 1991).

138. *See, e.g.*, State v. Kahey, 436 So. 2d 475 (La. 1983).

139. "We have not recognized, however, an additional exception to the rule of exclusion which would establish as automatic 'substantial relevancy' for other crimes evidence in cases of child beatings or abuse." *Id.* at 488.

140. Evidence of other crimes related to the offense with which a defendant is charged is inadmissible unless it fits with certain special exceptions. Aside from related offenses admissible as part of the res gestae and convictions admissible for impeachment purposes, Louisiana statutes provide for three exceptions—acts relevant to show intent, knowledge or system. Louisiana courts have also recognized certain other exceptions including the admissibility of prior sex crimes committed against the same prosecutrix.

State v. Kelly, 456 So. 2d 642, 648 (La. App. 2d Cir.), *writ denied*, 461 So. 2d 312 (1984) (citations omitted). *See also* State v. Dixon, 628 So. 2d 1295 (La. App. 3d Cir. 1993); State v. Osborne, 593 So. 2d 888 (La. App. 2d Cir. 1992); State v. Esponge, 593 So. 2d 677 (La. App. 1st Cir. 1991); State v. Long, 590 So. 2d 694 (La. App. 3d Cir. 1991); State v. Rasberry, 564 So. 2d 740 (La. App. 2d Cir. 1990); State v. Baker, 552 So. 2d 617 (La. App. 2d Cir. 1989), *writ denied*, 559 So. 2d 136 (1990); State v. Baker, 535 So. 2d 861 (La. App. 2d Cir. 1988).

Nonetheless, the courts are unquestionably generous in allowing evidence of other extrinsic acts of the defendant when the crime at issue is child abuse or sexual abuse of any nature.

There are several rationales supporting the admissibility of this kind of evidence. First, proponents assert the prior sexual misconduct is not offered into evidence to show a general propensity for crime, but only to demonstrate a propensity toward criminal activity with the same person. Second, they argue the existence of similar crimes is probative of an ongoing relationship between the defendant and the victim, which makes repetition of the crime particularly likely. Finally, evidence of a lewd disposition is justified as providing necessary background information to explain and give credence to the victim's testimony.[141] Sometimes called the "Depraved Sexual Instinct" exception, this exception, which is not one of those enumerated in Article 404(B), seems to have been accepted by the Louisiana courts.[142] If so, this would go a long way in explaining the otherwise untenable reasoning in cases such as *Jackson* and *Driggers*.

IX. CONCLUSIONS AND RECOMMENDATIONS

The case law in Louisiana is tending towards an expansive reading of Article 404(B). Evidence which does not satisfy the traditional requirements of admissible other crimes evidence—possessing independent relevance other than propensity—is routinely being admitted into evidence. Upon appeal this evidence is either found to be properly admissible under the rule or, if inadmissible, is ruled to have been harmless error.[143]

This is wrong. The traditional rationales for these exceptions are as valid now as they were when established. Character evidence is just as probative and relevant as it ever was; it is also as prejudicial as it ever was. What has changed is societal attitudes towards crime, especially violent crime, and most especially crimes against women and children.

As noted throughout this comment, in cases of rape, child abuse, and sexual abuse against children or women, courts have adopted an expansive reading of Article 404(B). Through this expansion, courts have routinely admitted evidence of other acts of the defendant in circumstances where the court's stated rationale for the independent relevance does not satisfy any of the traditional rationales for admissibility.[144]

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141. Brian E. Lam, *The Admissibility of Prior Bad Acts in Sexual Assault Cases Under Alaska Rule of Evidence 404(b)—An Emerging Double Standard*, 5 Alaska L. Rev. 193 (1988).

142. For an examination of this exception in the federal arena and in other jurisdictions, see Donner-Froelich, *supra* note 9; Mary Christine Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact With a Child*, 34 S.D. L. Rev. 604 (1989); John McCorvey, *Corroboration or Propensity? An Empty Distinction in the Admissibility of Similar Fact Evidence*, 18 Stetson L. Rev. 171 (1988).

143. *See supra* part III.

144. *See, e.g.*, State v. Jackson, 625 So. 2d 146 (La. 1993); State v. Thompson, 532 So. 2d 1160

Nonetheless, in cases of child or sexual abuse, the defendants, perhaps even more than a common thief, need the protections afforded by the general exclusion of character evidence to prove propensity—few have not, at one point in their lives, taken the thing of another; few have abused children or sexually abused another person. If it is established in a jury's mind that a person once committed one of these sexually heinous crimes, it will be a heartless jury indeed that will not summarily convict the defendant. This may be true whether or not the prosecution has established that the defendant committed the crime for which he is being tried.

In *State v. Moore*,[145] then Justice Dixon summed it up in this fashion:

> Evidence of previous criminal activity does affect the opinion of those who sit in judgment. In fact, evidence of prior criminal activity has such a strong influence on the finders of fact, reasonable or unreasonable, logical or illogical, that such evidence, for this reason and this reason alone, may be "too prejudicial." If the identity of the defendant rapist is in doubt, it is too easy to believe that if he had committed such an offense before he would do so again. Rape is a horrible crime, committed by bad men. If the defendant committed such an offense before, it is too easy to believe that he is a bad man, and capable of the act with which he stands accused.[146]

In the same case, Justice Summers dissented. His dissent clearly demonstrates the tension discussed above:

> [T]he Court in total disregard of the reality of this bestial crime, embarks upon a spurious academic dialogue in an effort to justify its reversal of this conviction.
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> . . . .
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> . . . A new trial must be had, in which the victims of this defendant's crimes must again appear in public, in Court, and recount the gruesome details and the indignities to which they were subjected. If this is not feasible—and often it is not—this defendant must be discharged. This decision should offend the sensibilities of all decent citizens; it most assuredly offends every recognized version of judicial restraint.[147]

This author stands with Justice Dixon and rejects the position of Justice Summers. Our criminal justice system was founded on constitutional considerations of due process and fundamental fairness.[148] A defendant must only be

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(La. 1988); State v. Germain, 433 So. 2d 110 (La. 1983); State v. Talbert, 416 So. 2d 97 (La. 1982); State v. Humphrey, 412 So. 2d 507 (La. 1981); State v. Driggers, 554 So. 2d 720 (La. App. 2d Cir. 1989).

145. 278 So. 2d 781 (La. 1972).

146. *Id.* at 787.

147. *Id.* at 789-90 (Summers, J., dissenting).

148. *See generally* Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule*

tried for the crime for which she is charged and not for being a person of low character that, regardless of her guilt in the present proceeding, should be removed from society.

Present law suffices to effect this goal. There are ample procedural safeguards currently in place to adequately protect a defendant from being convicted solely on the basis of her bad character.[149] What is missing is a rigorous adherence to those safeguards.

First, the prosecution must give notice to the defendant and the court of the specific instances of conduct which it intends to introduce into evidence against the defendant.[150] Second, the prosecution must specify the exception it relies on under Article 404(B) and establish that the specific instance satisfies the requirements of the exception.[151] Third, there must be a determination made, by clear and convincing evidence prior to trial, that the defendant committed the offense which is to be admitted against her. This should be effected by a Louisiana Code of Evidence article 104(A) determination in a *Prieur* hearing.[152] Fourth, even if

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of Evidence 404(b), 70 Iowa L. Rev. 579 (1985).

149. *See supra* part III.

150. This would satisfy the constitutional requirements of due process, affording the defendant time to prepare his defense.

151. This requirement satisfies the element of independent relevance. Unfortunately, this is clearly one of the areas where our courts have not forced the prosecution to do its job under the law. *See* State v. Prieur, 277 So. 2d 126 (La. 1973). *Prieur* is incorporated statutorily at La. Code Evid. art. 1103. The courts refusal to force the prosecution to limit the range of exceptions to ones which are genuinely and materially at issue is part of the reason why this area of the law is so confused. Too, it is essential that the courts adhere to the traditional, and still recognized, rationales behind each of these exceptions.

If the exception is one listed in La. Code Evid. art. 404(B) and satisfies the traditional rationale for that specific exception, then the evidence will have independent relevance and the court's inquiry is finished. If the exception is not one which is specifically listed in La. Code Evid. art. 404(B), the court should jealously guard the purpose behind the rule and require the prosecution to establish why the evidence has independent relevance.

In the case of child or sexual abuse cases, it would seem appropriate for the courts to fashion a separate test for the admissibility of other crimes evidence. One author has suggested such a test from which this author draws:

First, there must be some evidence other than the word of the victim that the crime has occurred. Second, the prior offense must be substantially similar to the charged offense. Third, the defendant must have the ability, at the time of the commission of the uncharged offense, to exert substantial control over the victim. Finally, there must be a genuine issue at trial whether the crime has been committed. *See generally* Donner-Froelich, *supra* note 9.

152. See Judith M.G. Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules*, 38 Baylor L. Rev. 331 (1986), for a well-reasoned opinion of why the clear and convincing standard should be retained. Although couched in terms of the federal rules, the reasoning would seem equally applicable to Louisiana. This is especially true in cases where the prosecution relies heavily on the other crimes evidence for conviction, i.e., when the prosecution's case is relatively weak absent the extrinsic evidence of the defendant's other bad acts. While a jury may be reluctant to convict a person on scant evidence (such as the bare assertion of the alleged victim), as soon as evidence of the defendant's other crimes of the same nature are heard by the jury, there would be little question that the jury will give the other crimes evidence undue weight; that is: the jury will

satisfied that the conduct has been committed by the defendant and that the evidence is such that it satisfies the exclusionary exceptions to Article 404(B), the court must weigh the probative value and relevance against the potential for undue prejudice to a defendant, utilizing the balancing test articulated in Louisiana Code of Evidence article 403.[153] Fifth, if the evidence is admitted, the court should instruct the jury on the proper use of the evidence immediately upon its admission and in its final jury instructions.

This test is simply a reformulation of the requirements articulated in *Prieur* and the jurisprudence following that seminal case. Adherence to the already established rules and recognition of the rationales behind each of the exceptions to the general exclusion of character evidence—a return to the requirement of independent relevance—will solve many of the problems noted in the cases reported in this comment. In the cases where the evidence does not fall squarely within one of the enumerated exceptions, the courts must determine if the evidence has independent relevance, prior to the introduction of the evidence.

The rationale for the rule of independent relevance is simple: a person cannot be tried for being of bad character. Right or wrong, this doctrine is firmly entrenched in our legal system. Predicated on constitutional notions of fundamental fairness, this doctrine mandates that a defendant be tried only for the crime charged—not for being of criminal character. The failure of the courts to adhere to the requirement of independent relevance may well deprive the defendant of her constitutional right to a fair trial—to be prosecuted and convicted solely on the basis of the prosecution's introduction of evidence which establishes beyond a reasonable doubt her guilt of each and every element of the charged crime.

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more fully believe that the defendant, having committed the same act once, did so in the case at bar. The clear and convincing standard will alleviate many of these problems, as will the requirement that the determination be prior to the jury hearing the evidence.

Here, again, it should be noted by 1994 La. Acts No. 51, the legislature amended Article 404(B). A note accompanying the amendment indicates the legislature intends the pre-trial finding required by *Prieur* (that the defendant committed the uncharged act) to follow the federal jurisprudence, i.e., a reasonable jury could conclude the defendant committed the act. *See supra* text accompanying note 27.

153. Thus, the judge must exclude the evidence if it unduly prejudices the defendant. Prejudice means that the defendant is unable to adequately defend against the uncharged conduct, that the jury will improperly confuse the charged crime with the uncharged conduct, and that the defendant will not be afforded her constitutional right to have the prosecution prove, beyond a reasonable doubt, each and every element of the charged crime.