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Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict

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I. INTRODUCTION

One of the most basic characteristics of the American criminal justice system is the so-called "presumption of innocence." While those words are nowhere found in the Constitution of the United States or in any state constitution, the constitutional requirement of a fair trial, coupled with the accused's right to confront the witnesses against him in a criminal prosecution, would have no meaning were it not for the underlying concept of the "presumption of innocence." Regardless of the source of this presumption which envelopes a criminal defendant from the moment charges are lodged against him,[1] the concept is now a basic characteristic of our legal system.

A second characteristic basic to our system of criminal prosecutions is that a person accused of a crime may be convicted only upon relevant evidence proving the commission of the crime charged.[2] Furthermore, the evidence must be sufficient to estab-

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1. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 805 (2d ed. 1972) [hereinafter cited as MCCORMICK].
2. FED. R. EVID. 402; NEB. REV. STAT. § 27-402 (Reissue 1979). Nebraska adopted the language of federal rule 402 and many other provisions of the Federal Rules of Evidence in Act of May 22, 1975, L.B. 279, 1975 Neb. Laws 528 (codified at NEB. REV. STAT. §§ 27-101 to -1103 (Reissue 1979)). The authors' research indicates that, with only a few changes, the Federal Rules of Evidence have been adopted by twenty states: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maine, Michigan, Minnesota, Montana, Nebraska,

lish guilt beyond a reasonable doubt[3]—another critical characteristic of our criminal justice system.

It is fundamental that the defendant in a criminal trial cannot be convicted solely upon the basis that he is a "bad person" and therefore is deserving of reprobation and punishment by society.[4] It is not surprising, then, that the Federal Rules of Evidence as well as the statutes of most states, including Nebraska, provide generally that evidence of other crimes, wrongs, or acts is not admissible to prove that a person acted in conformity with his or her character.[5]

The basis for this rule should be obvious. Our system of criminal justice intends the government to bear a heavy burden before one accused of a crime can be found guilty of the crime charged. Therefore, if one charged with a crime is to have the benefit of the

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Nevada, North Dakota, New Mexico, Ohio, Oklahoma, South Dakota, Washington, and Wisconsin.

3. Speiser v. Randall, 357 U.S. 513, 525-26 (1958); State v. Alvarez, 189 Neb. 276, 202 N.W.2d 600 (1972).

4. United States v. Bledsoe, 531 F.2d 888, 891 (8th Cir. 1976) (evidence of bad acts draws the attention of the jury away from the real issues); State v. Casados, 188 Neb. 91, 95, 195 N.W.2d 210, 213 (1972) (introduction into evidence of wholly independent offenses prohibited since may result in conviction because defendant is a bad man rather than because of his specific guilt of the offense charged).

5. NEB. REV. STAT. § 27-404(2) (Reissue 1979) adopted the language of FED. R. EVID. 404(b) which states:

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

For a general discussion of the rule and its application, see Fallon & Bursell, *Similar Fact Evidence and Corroboration*, 1978 CRIM. L. REV. 188 (1978); Kyser, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535 (1974); Logan, *Evidence of Subsequent Acts*, 1934 LAW Q. REV. 386; Mount, *Ohio's "Similar Acts Statute": Another Interpretation*, 9 AKRON L. REV. 316 (1975); Sklar, *Similar Fact Evidence—Catchwords and Cartwheels*, 23 MCGILL L.J. 60 (1977); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956); Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 U. KAN. L. REV. 161 (1978); Comment, *Admissibility of Evidence Under Indiana's "Common Scheme or Plan" Exception*, 53 IND. L.J. 805 (1978); Comment, *Other Crime Evidence in Louisiana*, 33 LA. L. REV. 614 (1973); Note, *Admissibility of Other Offense Evidence After State v. Houghton*, 25 S.D.L. REV. 166 (1980); Note, *Identity: A Non-Statutory Exception to Other Crimes Evidence*, 36 LA. L. REV. 1101 (1976).

Alaska, Arizona, Arkansas, Colorado, Delaware, Montana, Nebraska, North Dakota, New Mexico, South Dakota, Washington, and Wyoming have adopted the exact wording of FED. R. EVID. 404(b). Florida, Hawaii, Maine, Michigan, Minnesota, Nevada, Ohio, Oklahoma, and Wisconsin have made minor or technical changes in 404(b) while preserving the substance of the rule.

presumption of innocence and is to be afforded a fair and impartial trial which our Constitution guarantees,[6] the accused must be insulated from factors which are irrelevant to the charges filed. Both logic and experience compel the conclusion that confronting an accused with evidence of other bad acts irrelevant to the crime charged often leads to interference with the accused's right to a fair trial. Such evidence may result in a conviction, but in a system governed by the guarantees of fair and impartial trials under due process of law,[7] the criminal trial process cannot be purely result-oriented. It would be impossible to honor the presumption of innocence if evidentiary rulings were made on the basis of a result we decided in advance to seek.

On the other hand, some factors can never be established by direct evidence. Thus, there developed early in the law the right to introduce circumstantial evidence to prove a fact when direct evidence could not otherwise be obtained.[8] Generally, the introduction of circumstantial evidence is based upon a belief that the existence of one fact or circumstance can justifiably compel a conclusion that a second fact or circumstance also exists.[9] That is not to say, however, that circumstantial evidence is always admissible. The most important factor controlling the admissibility of circumstantial evidence is a requirement that it be introduced only "under proper conditions,"[10] that is, it must be offered to prove an issue in the case. This initial showing essentially amounts to demonstrating a probative relationship between the fact to be proved by circumstantial evidence and a fact at issue in the proceeding. Such a relationship is normally inferred through the application of logic or from a comparison with man's experience.[11] The term most frequently used by lawyers to describe this relationship is "relevancy."[12] Evidence that a criminal defendant has on other occasions conducted himself in a reprehensible or illegal manner is not, standing alone, probative of his guilt of a crime alleged to have been committed on a particular occasion. That is the very essence of the statutory prohibition against the introduction of "evidence of other crimes, wrongs, or acts . . . to prove the character of a per-

6. U.S. CONST. amend. V; NEB. CONST. art. I, §§ 11-12.
7. U.S. CONST. amends. V, XIV, § 1; NEB. CONST. art. I, § 3.
8. *See, e.g.*, Stevenson v. Stewart, 11 Pa. 307 (1849) (great latitude allowed in receiving indirect, sometimes called circumstantial, evidence). The use of circumstantial evidence had its roots in, and was made necessary because of, the secrecy of many crimes. *See* Hess v. State, 5 Ohio 5 (1831); Finn v. Commonwealth, 26 Va. (5 Rand.) 701 (1827).
9. MCCORMICK, *supra* note 1, § 185.
10. *Id.*
11. *Id.*
12. *Id.*

son in order to show that he acted in conformity therewith."[13] But just as the law's preference for direct evidence yields under certain conditions to allow the introduction of circumstantial evidence, so, too, does the general rule against the introduction of evidence relating to the accused's bad character or conduct contain exceptions which allow such evidence to be used against a criminal defendant in limited circumstances.[14]

The most common of these exceptions is found both in Federal Rule 404(b) and the statutes of most states, including Nebraska.[15] While, as earlier noted, the statute first prohibits the introduction of evidence of other crimes, wrongs, or acts merely to prove an accused's propensity to commit a crime, it further provides: "It [evidence of other crimes, wrongs, or acts] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[16] Similar to the rationale underlying the admission of circumstantial evidence, the justification for the above exceptions to the rule against the introduction into evidence of other bad acts is based upon the reasonable conclusion established by an analysis of human experience that people often act in a similar manner under similar conditions. Thus, when both acts, though separated in time, are sufficiently similar or otherwise logically related, it is possible to conclude that they were motivated by the same particular desire to accomplish a common goal.[17]

The fact that one has previously acted in a particular manner may be reliable evidence that the actor intended to carry out a criminal plan and may prove that the criminal motive or intent has continued to the current act being prosecuted. The fact that a criminal defendant was involved in a prior crime may reasonably be considered evidence of the defendant's present knowledge that a similar or same act committed at a later time was unlawful, and therefore help to establish the defendant's criminal motive or intent or knowledge in the crime being prosecuted. However, because evidence of other bad acts is likely to affect the deliberations of a jury, great care must be exercised when permitting its introduction, even if it appears at first blush that such evidence will aid in convicting the accused.

As with circumstantial evidence generally, the key to admissibility of evidence of other bad acts must, of necessity, be its relevance to the issues being tried. Therefore, not all prior or

13. FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979).
14. FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979).
15. FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979).
16. FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979).
17. MCCORMICK, *supra* note 1, §§ 185, 190.

subsequent crimes, wrongs, or acts may reasonably establish the truth of the matter. For example, the fact that one subsequently commits an act may not have the same effect as if one had previously committed the same act. The fact that someone may have knowledge of a fact tomorrow, as evidenced by his behavior, does not necessarily or logically establish that one had similar knowledge yesterday.

In each instance, before evidence of another crime, wrong, or act may be introduced, a determination should be made as to the act's relevancy to the issues being tried. Relevancy is not limited to the categories of exceptions described in the rule. The plain language employed by both the federal and state statutes makes it clear that these categories of exceptions are only for purposes of illustration and not intended to be absolute.[18] However, an argument can be made that the categories are both closed and absolute.[19] The result has been that too often the admissibility of evidence of other bad acts is based upon the relationship of the evidence to one of the listed categories rather than its relevancy to a fact in issue in the criminal trial. Accordingly, some courts limit their inquiry to simply determining whether the offered evidence of another crime, wrong, or act, prior or subsequent,[20] fits into one of the designated categories. If it does fit, the evidence is admitted. If it does not fit, the evidence is rejected, regardless of whether the evidence is truly relevant to the issues involved[21] and regardless of

18. Both FED. R. EVID. 404(b) and NEB. REV. STAT. § 27-404(2) (Reissue 1979) introduce their identical lists of categorical exceptions with the words "such as," indicating that the listing is merely illustrative of the possible exceptions to the general exclusionary rule. *See* MCCORMICK, *supra* note 1, § 190, at 448, where it is stated: "Some of these purposes are listed below but warning must be given that the list is not complete, for the range of relevancy outside the ban is almost infinite . . . ." *Accord*, 10 MOORE'S FEDERAL PRACTICE ¶ 404.21[2] (2d ed. 1976). Even though evidence of a purpose other than those enumerated is admissible, the evidence must be related in nature to the crime charged. *Id.* (Supp. 1980-1981).

19. The Fifth Circuit, in holding that evidence is admissible under the "itemized exceptions," seems to imply that evidence will be admitted only if it falls within one of the enumerated categories. *See* United States v. Bloom, 538 F.2d 704, 708 (5th Cir. 1976). The court in *Bloom* adopted a four-part test as a prerequisite to the admission of other crimes or acts under 404(b), increased to a five-part test in United States v. Myers, 550 F.2d 1036 (5th Cir. 1977). The additional prerequisite is that the "evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) of the Federal Rules of Evidence." *Id.* at 1044. Thus, under the Fifth Circuit approach, one can argue that the only purposes sanctioned by the rule are those which are specifically enumerated. *See also* People v. Porter, 13 Ill. App. 3d 437, 300 N.E.2d 314 (1973) (evidence of other crimes inadmissible unless related to one of the specific exceptions defined by case law).

20. *See* notes 71-72 & accompanying text *infra*.

21. *See* notes 59-60 & accompanying text *infra*.

whether the introduction of such evidence denies the accused his constitutional right to a fair and impartial trial, unaffected by irrelevant but prejudicial evidence.

Relevancy is the key to the entire analysis of the admissibility of evidence of other crimes, wrongs, or acts. Therefore, the proper inquiry is the probative relationship between the evidence and a fact at issue in the case before the court, not the relationship of the evidence to a categorical list of exceptions.

The purpose of this article is to carefully analyze the rule and its exceptions so that both lawyers and judges may better determine when evidence of other crimes, wrongs, or acts is admissible and when the introduction of such evidence violates both the rule and its exceptions. To properly make such an analysis, it is necessary to examine the history of the rule in order to determine the true basis for the prohibition against the introduction of evidence of other crimes, wrongs, or acts and the exceptions which permit the introduction of such evidence if relevant to an issue at hand. Also, because courts sometimes fail to distinguish between prior and subsequent acts when considering the introduction of evidence of other crimes, wrongs, or acts, this article will outline the differences between prior and subsequent acts which courts should recognize in determining admissibility. Finally, we will formulate a rule which more fully reflects the true purpose and proper application of the rule governing the introduction of evidence of other crimes, wrongs, or acts.

II. HISTORICAL NOTE

The early history of the rule prohibiting the introduction of evidence of other crimes, wrongs, or acts and the development of certain exceptions at common law which pre-dated the adoption of the current federal rule is set out in two seminal articles by Julius Stone.[22] As a basis for the conclusions which will be drawn herein, we have paraphrased certain of Stone's historical conclusions which we believe aid in examining the rule in light of the requirement that, to be properly admissible, other bad acts evidence must be relevant to an issue being tried.

In order to free ourselves from the burden of constantly defining terms, we will begin by briefly explaining the two different approaches which have developed with respect to the admissibility of

22. For a full discussion of the history of the general rule, see Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) [hereinafter cited as Stone, *America*]; Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) [hereinafter cited as Stone, *England*].

evidence of other bad acts. One approach, called the "inclusionary rule," allows the admission of any evidence of other bad acts without regard to categories, so long as the evidence passes the fundamental relevancy test.[23] The other approach, called the "exclusionary rule," prohibits the introduction of all other bad acts evidence unless it is properly offered under one of the categorical exceptions.[24] The former is generally viewed as the English rule, while the latter as the American rule.[25] While one might conclude that the inclusionary rule would permit the introduction of evidence of other bad acts more often than the exclusionary rule, in truth and in fact, because of the manner in which relevancy is applied by the English courts, one finds that the English inclusionary rule may be indeed more limiting than the American exclusionary rule.

The history of both the general rule and its exceptions long predates the Federal Rules of Evidence. Stone noted one much-quoted passage from Foster, *Crown Law*,[26] with respect to an early formulation of the rule which seems to best set out the purpose of the rule:

> The rule of rejecting all manner of evidence in criminal prosecutions that is *foreign to the point in issue*, is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. . . . And had not those concerned in state prosecutions out of their zeal for the publick service, sometimes stepped over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case. Since the common-law grounded on the principles of natural justice hath made the like provision in every other.

Writings such as Foster's *Crown Law*, give us some initial insight into the purpose of the rule. That purpose clearly seems consistent with both our historical and our modern notion of fair trial. However, a careful examination of the statement quoted from Foster indicates that the rule prohibiting evidence of other crimes, wrongs, or acts is based not upon a notion of fairness, but upon the concept of relevancy. Certainly it is true that any evidence which may result in convicting the accused may be "unfair" to the accused and therefore of some "prejudice" to him. However, such "prejudice" is not a concern of the rule if the evidence offered is relevant to prove something other than the accused's propensity to commit crime. Thus, Foster's rule prohibits only evidence of other crimes "that is foreign to the point in issue."[27] This language sup-

23. Stone, *England, supra* note 22, at 965, 973-74.
24. *Id.* at 957-58.
25. *Id.* at 965; Stone, *America, supra* note 22, at 989.
26. M. FOSTER, CROWN LAW 246 (1st ed. 1762), *quoted in* Stone, *England, supra* note 22, at 958-59 (emphasis added).
27. *Id.*

ports the notion that Foster's rule refers to relevancy rather than to mere evidence of other crimes, wrongs, or acts.

Rex v. Cole,[28] in 1810, apparently established the rule in England that excludes other bad acts evidence which merely demonstrates the propensity of a defendant to do acts similar to those charged.[29] However, the early history in England concerning the development of a general rule governing admissibility of other bad acts is not at all clear. Moreover, there appears to have been no recognized or accepted rule among the early English legal textwriters. Like many areas of the common law which just simply grew, various ideas and concepts were applied in what appears to be a haphazard fashion, all in the name of the same rule and all obviously based on each writer's unique perception of what the rule was intended to accomplish. Because some of the early statements were broad generalizations, by 1830 the common understanding of the English rule came to be that evidence of other bad acts was rarely, if ever, admissible.[30] In truth and in fact, such was not the case. It is, however, important to keep this perception in mind when attempting to understand why such a rule developed and how the American rule, though stated in one form, has been applied by many courts in what appears to be a totally contrary manner.

It has been suggested that in the middle of the 19th century, beginning with the case of *Regina v. Geering*,[31] a relaxation of the presumed tradition of exclusion and the development of categorical exceptions had begun. Stone argues forcefully that such a suggestion is incorrect. He states that the judges of this period were not consciously creating and applying exceptions to the general rule. Rather, decisions as to the admissibility of evidence of other bad acts were based solely on the concept of relevancy. Thus, any conclusion that the courts of this period actually recognized the exceptions is founded on wishful hindsight.[32]

The confusion concerning whether the rule in England was one of exclusion or inclusion may be due to the fact that during the middle of the 19th century, judges began to recognize specific exceptions to the earlier rule precluding the introduction of evidence of other bad acts. The earliest exception apparently permitted the admission of similar bad acts evidence to show guilty knowledge. This exception was developed in forgery and receiving stolen prop-

28. Noted in Stone, *England, supra* note 22, at 959, 960-61.

29. Stone, *England, supra* note 22, at 959, 960-61.

30. *Id.* at 957.

31. 18 L.J.R. 215 (1849), *cited in* Stone, *England, supra* note 22, at 961.

32. Stone, *England, supra* note 22, at 961-62.

erty cases.[33] The most often mentioned rationale for the exception was the difficulty of proving such knowledge in an inherently secretive crime without resort to evidence of similar bad acts committed by the accused.[34]

Once the courts began to think in terms of exceptions to a general rule which would allow admissibility, there was a constantly increasing tendency to cite precedent relating to the particular type of case. Little by little, categories of exception began to develop which permitted the evidence, if relevant, to be introduced.[35] This category development largely occurred between 1851 and 1894. Always, however, the question of relevancy was the key which opened the gate of admissibility. Thus, the mere fact that the evidence fell within one of the excepted categories was not enough to allow the evidence to be admitted.[36]

The first clear statement that the rule had become one of exclusion with a closed list of exceptions is found in the argument of defense counsel in the case of *Regina v. Winslow*[37] in 1860. *Winslow* was followed by *Blake v. Albion Life Assurance Society*,[38] an insurance fraud case, where other crime evidence was admitted to show intent. This categorical approach continued until nearly the end of the century. If relevant evidence fell within a category which constituted an exception to what was otherwise regarded as an exclusionary rule, such evidence was admissible.

At this point, the rule in England was identical to the rule in America,[39] and, except for our frequent disregard of the question of relevancy, it is very similar to the rule in America today. However, in 1894 an English case was decided which led to the eventual

33. *Id.* at 963-65.
34. *Id.* at 963.
35. *Id.* at 966, 970.
36. *Id.* In essence, just because the evidence may have, on its face, appeared to have fallen into the exceptions was not sufficient. The evidence had to first be relevant to an issue of the case.
37. 8 Cox Crim. Cases 397 (1860), *cited in* Stone, *England, supra* note 22, at 968.
38. 4 L.R. 94 (C.P.D.), 14 Cox Crim. Cases 246 (1878), *cited in* Stone, *England, supra* note 22, at 971.
39. *See, e.g.*, State v. Bassett, 26 N.M. 476, 194 P. 867 (1921), where the court stated:
> These various statements of the so-called exceptions to the general rule are but statements that any evidence which tends to show the guilt of the person on trial is admissible, regardless of the fact that it may show the guilt of the defendant of another crime. If it is necessary or proper to show motive, intent, absence of mistake or accident, a common scheme or plan, the identity of the person charged, it is necessary or proper to show the same because it tends to show the guilt of the accused. In such cases other acts or crimes may be shown if they are relevant, regardless of their criminal character.

Id. at 479, 194 P. at 868. *See also* Herman v. State, 75 Miss. 340, 346, 22 So. 873, 876 (1897); Copperman v. People, 56 N.Y. 591, 593 (1874).

abandonment of the rigid categories of exceptions and the reaffirmation of the admissibility of all relevant other bad acts evidence unless such evidence was relevant only with regard to the accused's propensity to commit the crime. In *Makin v. Attorney General of New South Wales*,[40] the defendants were convicted of murdering an infant left in their care. The evidence showed that the infant had been left with the defendants and that his body was found buried in the garden of their house. Evidence was offered that the bodies of ten other babies were found buried in the gardens of three houses where the defendants had lived. Although there was no evidence of the cause of death in the charged offense, the evidence of the other similar facts was admitted.

Makin established a broad rule of admissibility based on relevance except where the only relevance was to show propensity to commit a crime.[41] Nevertheless, the *Makin* opinion stimulated the continuation of the "exception" analysis in England for the next thirty years.[42] It is thought that this practice developed because the *Makin* opinion listed two ways in which similar fact evidence could be relevant: to show design and to show lack of accident.[43] But it should be borne in mind that even though so-called exceptions were recognized in subsequent cases, the ultimate test in England continued to be *relevancy*. The English courts freely created new categories based on relevance: relationship in 1904;[44] purpose in 1906;[45] motive in 1906;[46] corroboration of witness in 1909;[47] passionate relationship in 1910;[48] identity in 1915;[49] and fact relevant to main fact in 1915.[50]

Since American courts generally adopted the English law on this subject, it is not surprising to find that the development of the

40. [1893] 19 A.C. 57 (P.C.), *cited in* Stone, *England, supra* note 22, at 973.
41. Stone, *England, supra* note 22, at 974-75.
42. *Id.* at 975.
43. *Id.* at 974.
44. Rex v. Mean, [1904] 21 T.L.R. 172 (C.C.R.), *cited in* Stone, *England, supra* note 22, at 975 n.95.
45. Rex v. Bond, [1906] 2 K.B. 389, *cited in* Stone, *England, supra* note 22, at 975 n.97.
46. Rex v. Bond, [1906] 2 K.B. 389, *cited in* Stone, *England, supra* note 22, at 975 n.100.
47. King v. Chitson, [1909] 2 K.B. 945, *cited in* Stone, *England, supra* note 22, at 975 n.99.
48. Alfred Stone, 6 Crim. App. 89 (1910), *cited in* Stone, *England, supra* note 22, at 975 n.96.
49. Perkins v. Jeffery, [1915] 2 K.B. 702, *cited in* Stone, *England, supra* note 22, at 975 n.94.
50. Perkins v. Jeffery, [1915] 2 K.B. 702, *cited in* Stone, *England, supra* 22, at 975 n.98.

American case law throughout the 19th century generally followed the pattern established in the English cases previously discussed.

The history of the rule in America was very similar to the history of the rule in England until the turn of the 19th century.[51] Stone observes that the pre-1840 American decisions on point gave lip service to the English authorities upon whom the American courts claimed to almost exclusively rely.[52] However, while purporting to apply the English rule, the American opinions apparently transformed it into something different. The first change came about through a relaxation of the general exclusionary rule so as to allow the admission of similar bad acts evidence to establish guilty knowledge in inherently secretive crimes such as forgery, counterfeiting, and receiving stolen property.[53] This categorical exception approach characterizes the course of the history of the rule in America. In 1898 the Supreme Court of Nebraska observed: "[T]he general doctrine [excluding evidence of other offenses] has been varied or there has been a departure therefrom, to a greater or lesser degree in cases of a particular or peculiar nature in some, if not all jurisdictions."[54] But even in this period in which the categorical exceptions emerged, relevancy continued to be the final test of admissibility.[55]

Although by 1840 the American rule was far from firmly established, the concept of exceptions to a general rule of exclusion began to enter into the cases. Thus, in *Commonwealth v. Stone*,[56] evidence of similar acts was admitted to show scienter in a prosecution for passing bad notes. The court justified this result because it fell within an exception to the general rule.[57]

While in England the rule continued to be founded upon a notion of relevancy, in America the similar acts rule was developing into a broad rule of exclusion with a limited number of exceptions. American decisions indicate that the courts were moving from a matter of strictly determining relevancy to that of determining whether the offered evidence fit within any of the previously devel-

51. Stone, *America, supra* note 22, at 990-91. The rule was taken from English law in the form which was accepted at the beginning of the 19th century. *Id.* at 991. As late as 1871 the typical American decisions relied more heavily on the English cases than on the American ones. *Id.* at 993.

52. Stone, *America, supra* note 22, at 993.

53. *Id.* at 995. State v. Smith, 5 Day 175, 178 (Conn. 1811); State v. Van Houten, 3 N.J. (2 Pen.) 495, 497 (1810). Both are cited in Stone, *America, supra* note 22, at 993.

54. Davis v. State, 54 Neb. 177, 184, 74 N.W. 599, 601 (1898).

55. *See* Stone, *America, supra* note 22, at 996-1000.

56. 45 Mass. (4 Met.) 43 (1842), *cited in* Stone, *America, supra* note 22, at 992 n.30, 1033 n.96.

57. Stone, *America, supra* note 22, at 1003.

oped exceptions to the rule of exclusion.[58] It is important for further analysis to keep in mind that as the American rule developed, it was intended to limit admissibility to a greater extent than was either the original American rule or the English rule. It does not, however, appear that this goal was achieved. If evidence did not fall within one of the enumerated categories, it was inadmissible no matter how relevant it might be.[59] If, on the other hand, evidence fell into one of the enumerated categories, it was nevertheless admissible no matter how irrelevant or prejudicial.[60]

While various exceptions to the rule against the admissibility of evidence of other crimes have now been established by statute in most jurisdictions,[61] one is unable to find a specific case or series of cases which may be considered the progenitor of any specific exception. However, a 1921 New Mexico decision, *State v. Basset*,[62] listed all of the exceptions as we formulate them today: motive, intent, absence of mistake or accident, common scheme or plan, and identity.[63]

The historical development of the modern list of exceptions was just as inconsistent as were the decisions which produced the American rule. For a time it appeared that evidence of other bad acts was admissible only in connection with a few particular classes of crimes.[64] Another idea which found favor and which is still applied to some of the present exceptions was that evidence of other bad acts was never admissible unless the corpus of the charged offense was proved.[65] Very similar was the notion that such evidence was not admissible in crimes where the law presumed criminal intent.[66]

As *Makin*'s case is considered a landmark in English law, *People v. Molineux*,[67] is thought to have been the starting point in the development of the modern American rule and its departure from

58. *Id.* at 1003-04.
59. *Id.* at 1011-16.
60. *Id.* at 1031-33.
61. 1 JONES ON EVIDENCE § 4.15, at 412 (6th ed. 1972).
62. 26 N.M. 476, 194 P. 867 (1921).
63. *Id.* at 479, 194 P. at 868.
64. *See* Stone, *America*, *supra* note 22, at 1016. The first exceptions to the rule of exclusion were limited to a few peculiar crimes such as fraud, embezzlement, counterfeiting, or uttering a forged instrument where intent or knowledge were key elements and were difficult to prove.
65. *Id.* at 1018.
66. *See* State v. Willson, 113 Or. 450, 492, 233 P. 259, 269-70 (1925) (an illegal abortion involves no question of intent, either the act was done or it was not; as with robbery, the act which constitutes the offense is sufficient to prove intent).
67. 168 N.Y. 264, 61 N.E. 286 (1901).

English authorities.[68] In *Molineux* the conflict between the inclusionary English rule and the exclusionary American rule came face-to-face. Molineux was indicted in connection with the poisoning death of Mrs. Adams. The poison was actually administered accidently by a third person who had been the real intended victim. The prosecution was allowed to introduce statements of a dying victim in a previous poisoning incident in order to establish defendant's motive and demonstrate the significance of some of the circumstances surrounding the crime. However, the New York Court of Appeals held the evidence inadmissible.

The case produced several opinions, one of which has become an oft-cited authority for the modern American rule. The opinion listed the five exceptions to the rule of exclusion which are now enshrined in our own rules of evidence: Federal Rule 404(b) and Nebraska Revised Statutes section 27-404(2). They were: (1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme or plan of which the charged act is a part, and (5) identity.[69] The exceptions were treated by many subsequent decisions as though they constituted an exclusive list.[70] Thus the rule came to be that all evidence of other bad acts was excluded unless relevant to the five listed categories. Obviously, this rule was far more limited than the English rule from which it emerged.

While the history of both the English and American rules may be of particular interest to scholars of legal evolution, it further offers an important lesson to the modern lawyer. The English rule, whether viewed as inclusionary or exclusionary, has always embraced the concept of relevancy. Unless and until the relevancy of the evidence to a fact in issue is established, the evidence is held inadmissible. In contrast, as the American rule developed, it departed from the general concept of relevancy and thus resulted in three serious defects. First, case law viewed the categories, such as those listed in Rule 404(b), as closed and absolutely exclusive. Second, too often the question of admissibility was treated as an issue to be decided on the basis of whether the proffered evidence could in some manner be squeezed into one or all of the cubicles represented by the listed exceptions. Third, the decisions made little distinction between prior and subsequent acts.[71] Rarely did

68. Stone, *America*, *supra* note 22, at 1023.

69. Stone, *America*, *supra* note 22, at 1025-27. *See* FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979).

70. *See, e.g.*, People v. Porter, 13 Ill. App. 3d 437, 441, 300 N.E.2d 314, 316-17 (1973) (evidence of other crimes is not admissible unless it relates to one of the specific exceptions); State v. Willson, 113 Or. 450, 233 P. 259 (1925) (exceptions are carefully limited and guarded by the courts, and their number should not be increased).

71. *See, e.g.*, Clark v. State, 246 Ark. 1151, 1154-55, 442 S.W.2d 225, 227 (1969) (evi-

the opinions include a discussion or analysis of whether the offered evidence was relevant.[72] If we are to assure ourselves and the participants in the American criminal justice system that what we say about a presumption of innocence and the right to a fair trial is indeed the truth, a careful, analytical examination of relevancy must be exercised by the trial judge before evidence of other bad acts may be admitted. Without such an approach, there is a hollow ring to our frequent declarations that ours is not a criminal trial process in which defendants are convicted merely because they are "bad" people.

One need only examine the various categories to readily see how relevancy is the touchstone of the entire rule and plays a significant role in preventing the admission of evidence of other crimes, wrongs, or acts which simply tends to prejudice the trier of fact and dim the presumption of innocence.

We shall now examine and apply the test of relevancy to the various categories enumerated in the present exceptions to the rule. This examination will reveal the harm which can result by ignoring relevancy and simply applying a categorical test.

III. RELEVANCY

Federal Rule 401 and Nebraska Revised Statute section 27-401 both provide as follows: "Relevant evidence means evidence having a 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."[73] If we accept the notion that at a minimum, all evidence offered at trial must always be relevant to be admissible, then we must read Federal Rule 404(b) or Nebraska Revised Statute section 27-404(2) as including Rule 401 or section 27-401.[74] With that in mind, we now turn to an examination of the various exceptions, category by cate-

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dence of the same crime committed prior or subsequent to that charged is admissible); Critchlow v. State, 264 Ind. 458, 471, 346 N.E.2d 591, 598 (1976) (evidence is not inadmissible because the incident occurred subsequent to, rather than prior to, the crime charged); Berlin v. State, 12 Md. App. 48, 59-60, 277 A.2d 468, 474 (1971) (evidence of prior and subsequent offenses may be admissible).

72. *See, e.g.*, People v. Rivers, 171 Cal. App. 2d 335, 340-41, 340 P.2d 648, 651 (1959) (evidence of oral copulation admitted to show preparation for illegal abortion without discussion of relevancy); State v. Williams, 307 Minn. 191, 194, 239 N.W.2d 222, 225 (1976) (evidence of other robbery at later date admissible because identity was in issue). *But see* People v. McCoy, 185 Cal. App. 2d 98, 105-06, 8 Cal. Rptr. 70, 75 (1960) (evidence of other crimes must be examined with care to determine whether or not it is relevant to the crime charged).

73. FED. R. EVID. 401; NEB. REV. STAT. § 27-401 (Reissue 1979).

74. FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979).

gory, to see what, if any, limitations must be imposed when considering the admissibility of such evidence. The exceptions are proof of: (a) motive, opportunity, and intent, (b) preparation and plan, (c) knowledge, and (d) identity.[75] We will also examine the admissibility of such evidence with respect to other categories.

A. Motive or Intent

In common usage, intent and motive are not infrequently regarded as one and the same thing. Both are mental states. In law, however, there is a distinction between them. Motive has been defined in the law as the "reason that nudges the will and prods the mind to indulge the criminal intent."[76] Motive is "the moving power which impels to action for a definite result."[77] It is an "inducement or state of feeling that impels and tempts the mind to indulge in a criminal act."[78]

Intent has been defined as the "design, resolve, or determination with which a person acts."[79] Intent, in criminal law, means a state of mind which negates accident, inadvertance, or casualty.[80] Intent is the purpose with which the accused acted to use a particular means to obtain a desired result.[81]

If evidence of another crime, wrong, or act may not be introduced in evidence to establish motive or intent unless it is relevant as defined by Federal Rule 401, then the defendant's state of mind at the time of the alleged act must be at issue.[82] In examining when state of mind may be proved by other acts, it is clear that evidence of another crime, wrong, or act committed by the accused *subsequent* to the act charged cannot reasonably be offered in evidence to establish the fact that the accused was previously moti-

75. FED. R. EVID. 404(b) lists the exceptions as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." For the purposes of this discussion, however, they are regrouped.

76. Slough & Knightly, *supra* note 5, at 328.

77. State v. Curry, 43 Ohio St. 2d 66, 70, 330 N.E.2d 720, 724 (1975).

78. J. WIGMORE, EVIDENCE §§ 396-397 (3d ed. 1940) [hereinafter cited as WIGMORE]. Slough & Knightly, *supra* note 5, at 328 (citing J. WIGMORE, EVIDENCE §§ 117-118 (3d ed. 1940)).

79. Witters v. United States, 106 F.2d 837, 840 (D.C. Cir. 1939).

80. People v. Williams, 6 Cal. 2d 500, 58 P.2d 917 (1936); State v. Rowley, 197 Iowa 977, 195 N.W. 881 (1923); State v. O'Donnell, 176 Iowa 337, 157 N.W. 870 (1916); J. MAY, MAY'S LAW OF CRIMES § 24 (4th ed. 1938); WIGMORE, *supra* note 78, §§ 300, 302, 307, 363; Slough & Knightly, *supra* note 5, at 328.

81. Jones v. State, 13 Ala. App. 10, 68 So. 690 (1915); Slough & Knightly, *supra* note 5, at 328.

82. State v. Ray, 191 Neb. 702, 217 N.W.2d 176 (1974); State v. Hoffmeyer, 187 Neb. 701, 193 N.W.2d 760 (1972); State v. Sjogren, 39 Or. App. 639, 593 P.2d 1188 (1979).

vated or intended to commit a criminal act.[83] The state of one's mind at a subsequent time should not be admitted to establish the state of one's mind at a prior time. Evidence of such a subsequent act does not have a 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. The fact that one was tempted to indulge in a criminal act or had a particular state of mind at a prior time may be admissible to show the motive or intent at a subsequent time. But evidence that one was tempted to indulge in a criminal act or had a particular state of mind at a subsequent time cannot possibly establish either prior motive or intent. Therefore, by employing the requirement of relevancy as defined in Federal Rule 401, not all prior acts would be admissible to prove motive or intent, and subsequent acts would *never* be admissible to prove a prior motive or intent.

B. Preparation and Plan

An analysis of preparation and plan results in reaching a conclusion similar to that of motive and intent. Professor Wigmore, in his now famous work on evidence, discusses plan or design in the following manner:

> The peculiarity of intent, as a factum probandum, is that an act is assumed as done by the defendant, and the issue is as to the kind of state of mind accompanying it. Design or plan, however (with reference to present bearings), is not a part of the issue, an element of the criminal fact charged, but is the preceding mental condition which evidentially points forward to the doing of the act designed or planned.[84]

By its very definition, plan or design refers to a time prior to the commission of the act. An individual's act, committed prior to the commission of a crime, may indeed be relevant to the issue of preparation or plan.[85] By the same token, one's act committed subsequent to the crime charged cannot possibly be relevant to establish a prior preparation or plan and should therefore be excluded. To permit the introduction of evidence of a subsequent act in order to establish the fact that one had a plan or design prior to doing the accused act defies both reason and logic, and would

83. *See* Commonwealth v. Jones, 363 A.2d 1281 (Pa. Super. Ct. 1976) (subsequent acts are not probative of the intent of a prior act). *But see* State v. Lee, 25 Ariz. App. 208, 542 P.2d 413 (1975); People v. Tipton, 78 Ill. 2d 477, 401 N.E.2d 528 (1980); State v. Hoffman, 195 Neb. 200, 237 N.W.2d 403 (1976); State v. Dancy, 43 N.C. App. 208, 258 S.E.2d 494 (1979) (subsequent acts may be admissible to show intent).

84. WIGMORE, *supra* note 78, § 300(3), at 238.

85. State v. Barlow, 177 Conn. 391, 418 A.2d 46 (1979) (prior illegal sales of drugs show intent to make subsequent sales); State v. Johnson, 205 Neb. 778, 290 N.W.2d 205 (1980) (forgery case).

properly be excluded through application of the relevancy requirement of Federal Rule 401.

C. Knowledge

The difficulties encountered in the category "knowledge" appear to be even greater than in the categories already discussed. An analysis of the few cases that have attempted to discuss and define knowledge lead one to the conclusion that the introduction of another criminal act, whether prior or subsequent, to prove the accused's knowledge may be permitted only for the purpose of establishing the accused's knowledge that the act being committed was unlawful and not for the purpose of establishing general knowledge about a matter.[86] The accused may claim that he acted without knowledge that the act had criminal consequences. In such case, the introduction of evidence of a prior crime, wrong, or act may be relevant to establish the fact that the accused knew that the subsequent act committed was unlawful, and thus the act could not have been committed in an innocent state of mind. Proof of knowledge becomes a necessity for certain offenses such as uttering of forged or counterfeit paper and possessing stolen goods.[87]

The distinction, then, between prior and subsequent acts becomes even more significant with respect to the knowledge category than perhaps any of the other categories. While there appears to be a split of authority in this area, a majority of the courts hold that either subsequent or prior acts are admissible to establish knowledge.[88] In such cases the only inquiry made by the courts is whether the two acts are too remote in time.[89] A minority

86. United States v. Adderly, 529 F.2d 1178 (5th Cir. 1976) (prior gambling convictions to show knowledge of illegal gambling); United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974) (involvement in murder shows knowledge that car was stolen); Asher v. United States, 394 F.2d 424 (9th Cir. 1968) (involvement in other robberies shows knowledge that plan to rob not hoax); State v. Boykin, 285 Minn. 276, 172 N.W.2d 754 (1969) (knowledge that goods were stolen); State v. Palumbo, 113 N.H. 329, 306 A.2d 793 (1973) (knowledge that bills were counterfeit used to prove intent to defraud); State v. Kerekes, 622 P.2d 1161 (Utah 1980) (prior illegal business deal used to establish knowledge of defendant regarding illegality of present deal).

87. WIGMORE, *supra* note 78, § 300(1), at 237.

88. *See, e.g.*, United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975); United States v. Cochran, 499 F.2d 380, *rehearing denied*, 502 F.2d 1168 (5th Cir. 1974); *cert. denied*, 419 U.S. 1124 (1975); Sears v. United States, 490 F.2d 150 (8th Cir.), *cert. denied*, 417 U.S. 949 (1974); United States v. Goodwin, 470 F.2d 893 (5th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973); United States v. Hampton, 457 F.2d 299 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972); Kennard v. People, 171 Colo. 194, 465 P.2d 509 (1970); State v. Ellis, 208 Neb. 379, 303 N.W.2d 741 (1981); State v. Kibler, 1 Or. App. 208, 461 P.2d 72 (1969).

89. *See* cases cited in note 88 *supra*.

of courts subscribe to the theory that subsequent acts showing knowledge are never admissible to prove prior knowledge.[90] It is suggested that the minority view is clearly the correct one. What one knows tomorrow may be learned only at that time and could not be evidence of one's knowledge yesterday. Thus, it would defy logic to suggest that one should be permitted to introduce evidence of another crime, wrong, or act subsequently committed in order to establish that the accused knew that a prior act was unlawful or illegal.

D. Identity

As with knowledge, the identity exception has occasionally been misunderstood by the courts. Wigmore notes that before evidence of another crime may be introduced for purposes of identity, the device used must be so unusual and distinctive as to be like a signature.[91] More than a mere similarity in the classification of the acts and attendant circumstances must be shown or the evidence is simply not relevant within the meaning of Federal Rule 401 and its state counterparts. This distinction is clearly noted by a decision of the California Supreme Court[92] wherein the court, in reviewing a judgment of conviction for first degree murder, found that evidence of a prior uncharged rape involving a different victim was inadmissible. In refusing to admit such evidence, the court stated:

> On the issue of identity the evidence of the Lopez crime is not only cumulative, it is also irrelevant. Few of the asserted similarities between the Lopez and Santana offenses aid in placing defendant at the scene of the alleged murder. . . . If the victim had been attacked in a distinctive manner that was identical to a previous crime defendant had committed, then the evidence of the other crime might have probative value. But the only claimed connection that has any logical relevance is evidence of "sexual activity" in both cases and the probable use of a wrench. Even if both facts were established . . . it could not reasonably be claimed that the two offenses were committed in a particularly distinct manner that tends to inculpate defendant.[93]

Likewise, federal cases which have reviewed the question of identity have generally held that mere similarity does not establish identity so as to permit the introduction of other crimes, acts, or wrongs for the purpose of establishing identity. Rather, the acts must bear such a high degree of similarity as to mark them as the

90. *See, e.g.*, Waller v. United States, 177 F.2d 171, 176 (9th Cir. 1949); Witters v. United States, 106 F.2d 837 (D.C. Cir. 1939); State v. Tuell, 112 Ariz. 340, 541 P.2d 1142 (1975); State v. Hays, 17 Ariz. App. 202, 496 P.2d 628 (1972).

91. WIGMORE, *supra* note 78, §§ 306, 410-413.

92. People v. Guerrero, 16 Cal. 3d 719, 548 P.2d 366, 129 Cal. Rptr. 166 (1976).

93. *Id.* at 725, 548 P.2d at 369, 129 Cal. Rptr. at 169.

handiwork of the accused, much like a fingerprint.[94] The rationale of the cases makes sense. Unless the crime is so distinctive in nature that there is a reasonable likelihood that it could not have been committed by anyone else, the admission of such evidence only establishes the accused's propensity or disposition to commit a crime and is, under the clear language of the rule or state statutes, irrelevant and inadmissible. Anything less would seem to totally eliminate the prohibition of Rule 404(a). Unlike the categories previously discussed, it appears that the distinction between prior and subsequent acts, when attempting to establish identity, is not significant.[95] The matter of the similarity, however, and its relevancy becomes extremely important.

The other acts offered to prove the act involved in the charged offense must of necessity be nearly exact. For example, the mere fact that all of the acts offered involved crimes of violence is insufficient. As noted, identity within the meaning of the federal rule is like a fingerprint. Fingerprint evidence is admissible only because fingerprints are so unique that they can be used to identify the accused.[96] So too with the identity exception. Before evidence of another crime is admissible, the crime must have been committed in such a unique manner that one can easily recognize it as having been committed by the accused. Otherwise the evidence will serve merely to establish the accused's propensity to commit crimes.

E. Other Categories

Although discussion in this article has been limited to the categories suggested by the Federal Rule and the Nebraska statute, we suggest that courts should not limit admissibility of other bad acts evidence to those categories.[97] The language clearly indicates that

94. United States v. Silva, 580 F.2d 144 (5th Cir. 1978); United States v. Meyers, 550 F.2d 1036 (5th Cir. 1977); United States v. Solomon, 490 F. Supp. 373 (S.D. Ga. 1980) (25 facts from prior crimes were the same); State v. Chance, 92 Ariz. 351, 377 P.2d 197 (1963) (same car and disguise); Henderson v. State, — Ind. —, 403 N.E.2d 1088 (1980) (same time, appearance, and threats in separate crimes); Randolf v. State, 266 Ind. 179, 361 N.E.2d 900 (1977) (rape under similar circumstances); People v. Williams, 15 Mich. App. 683, 167 N.W.2d 358 (1969) (similar shell casings and crime); State v. Moore, 197 Neb. 294, 249 N.W.2d 200 (1976) (same method of operation and apparel in separate rapes); Commonwealth v. Patterson, 372 A.2d 7 (Pa. Super. Ct. 1977) (same apparel, time of night, and area).

95. United States v. Meyers, 550 F.2d 1036 (5th Cir. 1977).

96. Moenssens, *Admissibility of Fingerprint Evidence and Constitutional Objections to Fingerprinting Raised in Criminal and Civil Cases*, 40 CHI.-KENT L. REV. 85, 86 (1963).

97. *See* United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); People v. Spillman, 63 Mich. App. 256, 234 N.W.2d 475 (1975); State v. Houghton, — S.D. —, 272 N.W.2d 788 (1978); MCCORMICK, *supra* note 1, § 190.

the listed categories were intended to be merely illustrative. By using the very words "it may, however, be admissible for other purposes *such as*,"[98] the language contemplates that evidence of other bad acts may be introduced and admitted if relevant under the probative test, regardless of whether it specifically falls within one of the stated categories.

In most instances this will involve the introduction of a prior crime, wrong, or act as opposed to a subsequent act. However, the entire area of knowledge can be expanded by disregarding a rigid categorical test and looking to the relevancy of the proffered other bad acts evidence. Thus, not only could evidence of another crime or bad act be introduced to prove the accused's knowledge that the instant act was illegal, but also to prove his knowledge with respect to a host of other issues. For example, the fact that an accused knew how to use a particular weapon in a previous crime could be relevant to show his knowledge as to the use of the weapon in the charged offense. While this does not fall within the category of "knowledge" as discussed above, it would nevertheless be relevant and admissible. So also might evidence of the commission of a prior crime or wrong be admissible to prove knowledge of a location or the wealth of an individual.

Furthermore, the commission of a prior or subsequent crime might be relevant and therefore admissible to prove that the accused was or was not in a particular location at or about the time the instant crime is alleged to have been committed. The list of possibilities may be endless.

By interpreting the catchwords as closed categories, the statute is open to misuse as a rule of mechanical application. McCormick, writing on this matter, states the proposition as follows:

> There is an important consideration in the practice as to the admission of evidence of other crimes which is little discussed in the opinions. This is the question of rule versus discretion. Most of the opinions ignore the problem and proceed on the assumption that the decision turns solely upon the ascertainment and application of a rule. If the situation fits one of the classes wherein the evidence has been recognized as having independent relevancy, then the evidence is received, otherwise not. This mechanical way of handling these questions has the advantage of calling on the judge for a minimum of personal judgment. But problems of lessening the dangers of prejudice without too much sacrifice of relevant evidence can seldom if ever be satisfactorily solved by mechanical rules. And so here there is danger that if the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the

98. FED. R. EVID. 404(b); NEB. REV. STAT. § 27-404(2) (Reissue 1979) (emphasis supplied).

classification.[99]

Although McCormick is concerned primarily with the problem that fixed categories will cause judges to admit evidence without considering its prejudicial effect, we suggest that more importantly, fixed categories will result in the admission of evidence without regard to its relevancy to the issues, though the end result may be the same. One need not reach the issue of prejudice unless and until one has concluded that the evidence is relevant. We suggest that if the matter of relevancy is rigidly applied in determining whether evidence of other crimes, wrongs, or acts should be admitted in evidence, the establishment of fixed categories is of little importance, nor should it be. If, indeed, evidence of other crimes, wrongs, or acts which are relevant is admissible because of the belief that it is proper circumstantial evidence, then adhering to an established set of categories which precludes the admission of otherwise relevant and admissible evidence should not be permitted.

IV. CONCLUSION

It is to ignore reality to suggest that juries do not view persons who have committed previous or subsequent crimes in a totally different light than persons who, unknown to them, have committed such acts. As noted at the outset, the principal reason for excluding other crimes, wrongs, or acts is to preserve the impartial attitude of the jury which is so zealously protected when the panel is selected. Jurors are instructed to disregard everything except that which is properly and sterilely presented at trial. Jurors are to direct their attention solely to the issues at hand and not attempt to balance the scales by convicting a person because of another crime or because of a belief that the accused deserves punishment for some other, as yet unpunished, deed.

In many modern cases, if the prosecution can in some manner persuade the court that evidence of other crimes, wrongs, or acts may possibly fit within any of the categories of exceptions, the evidence is admitted. This results even though the prosecution cannot articulate to which of the many exceptions the evidence is directed or show that the evidence is relevant to the issues involved.[100]

It is therefore our position and suggestion that Rule 404(b) and

99. MCCORMICK, *supra* note 1, § 190, at 452-53.

100. *See generally* United States v. Luttrell, 612 F.2d 396 (8th Cir. 1980); Stephens v. State, 239 Ga. 446, 238 S.E.2d 29 (1977); Johnson v. State, 154 Ga. App. 793, 270 S.E.2d 214 (1980); State v. Masqua, 210 Kan. 419, 502 P.2d 728 (1972); State v. Bethea, 184 Kan. 432, 337 P.2d 684 (1959); State v. Ellis, 208 Neb. 379, 303 N.W.2d 741 (1981); State v. Johnson, 205 Neb. 778, 290 N.W.2d 205 (1980); State

its various state counterparts should be read as if providing that evidence of other crimes, wrongs, or acts is not admissible to prove the propensity or tendency of an individual to commit a crime. This is specifically and precisely what the words of 404(b) have traditionally meant in the common law and what they must mean today to be consistent with the history of the rule and the American notion of criminal justice. Additionally, Rule 404(b) should be read as if providing that evidence of other crimes, wrongs, or acts may be introduced if offered for a purpose other than to establish the propensity or tendency of the accused to commit a crime and if relevant to an issue in the case. Such an interpretation would compel courts to consider relevancy as defined by the Federal Rule or the Nebraska statute in each instance before permitting the introduction of such evidence.

Thus, Rule 404 would be read as if Rule 401 were an integral part of the rule. Rule 404(b) would be read as if it provided:

> Evidence of other crimes, wrongs, or acts, though not admissible to prove propensity or disposition, may be offered for other purposes if, and only if, the evidence has a 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.

Unless and until the court determines that the evidence is relevant within the meaning of Rule 401, it should not be admitted. The mere fact that the evidence seems to fit within one or more of the categorical exceptions to Rule 404(b) does not make it relevant or admissible. A greater burden should be placed upon prosecutors to establish the relevance of the offered evidence so that an appellate court, when reviewing the evidence, can better determine the propriety of its admission.

The final inquiry which the trial court should perform after all is said and done is to determine whether the evidence, even though relevant under Rule 404(b), is so highly prejudicial as to fall within the prohibitions contemplated in the development of Rule 403.[101] If, indeed, the true purpose of Rule 404 is to be followed and we intend to promote the basic principles of the American criminal justice system, Rule 404 in its entirety should be interpreted as providing that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the propensity or disposition of a person to commit a crime. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; provided, however, the evidence has a ten-

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v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979); Dooley v. State, 484 P.2d 1324 (Okla. Crim. App. 1971).

101. *See* State v. Ellis, 208 Neb. 379, 390-91, 303 N.W.2d 741, 749 (1981), in which the court held that the "other crimes" rule is a rule of relevance.

> dency 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; and provided further that the evidence, even though relevant, may be excluded if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Perhaps such a rule would make it clear to the triers of fact that severe limitations are imposed upon the admission of evidence of other crimes, wrongs, or acts and, to lawyers and judges, that such evidence is not to be admitted into evidence upon a simple assertion by the prosecution that somewhere in the exceptions to the rule prohibiting such evidence one may find a cubicle into which the offered evidence might be placed.

The basis for the rule excluding evidence of other crimes, wrongs, or acts has been a part of both the English common law and the American criminal justice system for too long to be ignored.[102] The value and purpose of the rule, when properly applied, have proven its worth. The evils of ignoring the true meaning of the rule have likewise been clearly established by the cases over the years. Yet, if we believe that a fair trial is essential to a free society, then those entrusted with the supervision of the trial, as well as those entrusted with the review of the trial and the declaration of the law, must exercise great caution to see that the historic purpose for excluding evidence intended only to prove propensity or disposition to commit a crime and to inflame the triers of fact against the accused is maintained. A decision improperly convicting an accused also convicts our criminal system and much of what we stand for as a free and open judicial society committed to the principles of "presumption of innocence" and the unquestioned right to a fair and impartial trial.

102. FED. R. EVID. 403; NEB. REV. STAT. § 27-403 (Reissue 1979).