1956

Evidence of Similar Transactions in Sex Crime Prosecutions: A New Trend toward Liberal Admissibility

Minn. L. Rev. Editorial Board

EVIDENCE OF SIMILAR TRANSACTIONS[1] IN SEX CRIME PROSECUTIONS; A NEW TREND TOWARD LIBERAL ADMISSIBILITY

I

Perhaps no other rule of criminal evidence is better established in this country than that which states: Evidence that the accused has committed transactions of a similar nature but unrelated to the crime charged is inadmissible.[2] This rule is grounded upon a premise fundamental to the Anglo-American concept of justice: that a defendant should be tried solely for the crime specifically charged against him.[3] The rule has been subjected to many exceptions, suggesting that the exceptions now constitute the rule. Under standard exceptions, evidence of similar transactions is admitted where relevant to certain material elements of the crime in issue,[4] for example to establish the identity or to show the motive or intent of the perpetrator. "Standard exception" is merely a convenient label attached to those exceptions to the inadmissibility rule which, through frequent usage and passage of time, have gained universal acceptance. These standard exceptions allow admission of transactions: (1) to show intent, motive, absence of mistake or accident,[5] (2) to prove a plan, scheme, design, technique,[6] (3) to establish the identity of the perpetrator of the crime in issue,[7] (4) to show capacity to do the act,[8] (5) to complete the res gestae,[9] and for combinations of these. In addition to these standard exceptions, new exceptions have been invented to meet the exigencies of particular situations in which evidence of other transactions was relevant to a

1. While court opinions dealing with this type of evidence usually refer to similar "crimes" or "offenses," for the sake of uniformity and neutrality of meaning the word "transaction" will be used in this discussion.

2. 1 Wharton, Criminal Evidence § 232 (12th ed. 1955).

3. Keene v. Commonwealth, 307 Ky. 308, 312, 210 S. W. 2d 926, 928 (1948) (dictum).

4. See 1 Wharton, Criminal Evidence § 233 (12th ed. 1955).

5. Fikes v. State, 81 So. 2d 303 (Ala. 1955); State v. Simpson, 243 Iowa 65, 71-72, 50 N. W. 2d 601, 604 (1951) (dictum); State v. Bradford, 362 Mo. 226, 240 S. W. 2d 930 (1951).

6. See, *e.g.*, People v. Bennett, 287 P. 2d 866 (Cal. App. 1955); Allen v. State, 201 Ga. 391, 40 S. E. 2d 144 (1946); State v. DePauw, 74 N. W. 2d 297 (Minn. 1955).

7. See, *e.g.*, Dorsey v. State, 204 Ga. 345, 49 S. E. 2d 886 (1948); Turner v. State, 187 Tenn. 309, 213 S. W. 2d 281 (1948).

8. Commonwealth v. Ellis, 321 Mass. 669, 670, 75 N. E. 2d 241 (1947) (dictum). The court there suggested that evidence of other transactions bearing on capacity to do the act is relevant and admissible, but holds the evidence introduced as not pertinent to capacity.

9. See State v. Martinez, 67 Ariz. 389, 198 P. 2d 115 (1948). There the other transactions were inseparable from the crime charged, although the court does not specifically call it res gestae.

material issue but not admissible under one of the standard exceptions.[10]

An inexorable corollary of the inadmissibility rule is that no evidence may be admitted to show a propensity on the part of the accused to perpetrate crimes in general or crimes of the type charged, nor to illustrate wickedness or depravity.[11] Recently, however, courts have freely admitted evidence for precisely these purposes in sexual offense cases. At first confined almost exclusively to evidence of other transactions committed with or against the same person, the trend of liberal admissibility has more recently permitted inclusion of evidence of other transactions with or against persons other than the complainant.[12] An analysis of the application of the inadmissibility rule to prosecutions for sexual offenses may bring some of the problems in this area in focus, and alleviate confusion. The scope of this discussion will be limited to situations in which the alleged independent transactions were against or with persons other than the complainant,[13] since therein lies the latest encroachment on the rule. No attention will be accorded to cases in which the defendant failed to make timely objection to the admission, a usual prerequisite to raising the question of fundamental error.[14]

II

A survey of recent sexual offense cases where the prosecution sought to introduce evidence of independent transactions with or against other persons reveals a strong trend toward relaxation of the inadmissibility rule. Although the cases are not in complete agree-

10. See Note, 37 Minn. L. Rev. 608, 615 (1953) (dealing generally with evidence of other crimes).

11. Lovely v. United States, 169 F. 2d 386, 388-89 (4th Cir. 1948) (dictum); State v. Sauter, 125 Mont. 109, 116, 232 P. 2d 731, 734 (1951) (dictum); Commonwealth v. Boulden, 179 Pa. Super. 328, 340, 116 A. 2d 867, 872-73 (1955) (dictum).

The state may not initially attack the character of the accused nor may it prove bad character by particular acts. 1 Wharton, Criminal Evidence § 232 (12th ed. 1955). It has been suggested that a general denial of the charge by the accused places his character in issue. Such a proposition, if logically extended, would seem to allow blanket admission of all independent transactions.

12. It is not entirely accurate to use the expression "complainant" or "complaining party" because the person with or against whom the offense in issue has been committed does not always make the complaint.

13. In cases within the last ten years.

14. See People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098 (1904) (exception must be made before objectionable question is answered); Bunn v. State, 85 Okla. Crim. 367, 190 P. 2d 464 (1947) (conviction affirmed because of failure to object). *But see* Henderson v. State, 94 Okla. Crim. 45, 230 P. 2d 495 (1951) (although no objection was interposed, the court refused to overlook the prejudicial nature of the evidence of other crimes and modified the sentence).

ment, most courts do not exclude logically relevant circumstantial evidence of other transactions merely because it tends to show that the defendant is guilty of another crime.[15] On the other hand, despite the relaxation of the rule, many courts still exclude the evidence where its probative value is insignificant compared to its prejudicial effect.[16]

Of the standard exceptions, the exception for evidence tending to prove intent has been the most often employed in the class of cases under discussion. Evidence of other transactions has been introduced to negate innocent intent on the part of the accused[17] as well as to demonstrate an intent, for instance, to committee rape rather than robbery upon accosting a woman on the street.[18] Although intent is supposedly an element to be proved in every act which is a crime at common law,[19] sexual offenses such as rape, incest, and sodomy are crimes in which intent is inherent and can be inferred from the nature of the act.[20] Yet courts have admitted evidence of similar transactions in trials for these offenses under the intent exception,[21] declining to infer intent from the nature of the act.

Under the exception to show plan or scheme a group of related acts of the same character may be introduced in order to establish a probability that the defendant committed the one with which he is charged.[22] This exception ostensibly has been stretched when, through judicial discretion to admit or exclude evidence, a plan or scheme has been "inferred" from two or more entirely unrelated acts.[23] In one instance an act of indecent exposure at about the same date was admitted to show a design or plan by the defendant to rape his daughter.[24] A prerequisite to admissibility under this exception is that each act in the series definitely be traced to the accused.[25] It

15. People v. Carmelo, 94 Cal. App. 2d 301, 304, 210 P. 2d 538, 540 (1949) (dictum); Turner v. State, 187 Tenn. 309, 317, 213 S. W. 2d 281, 284 (1948) (dictum).

16. Harris v. State, 88 Okla. Crim. 422, 204 P. 2d 305 (1949); Day v. Commonwealth, 196 Va. 907, 86 S. E. 2d 23 (1955).

17. See People v. Kinder, 122 Cal. App. 2d 457, 265 P. 2d 24 (1954).

18. McKenzie v. State, 250 Ala. 178, 180, 33 So. 2d 488, 490 (1947) (dictum).

19. See Morissette v. United States, 342 U. S. 246, 250-52 (1952).

20. See State v. Alexander, 216 La. 932, 45 So. 2d 83 (1950); Young v. State, 159 Tex. Crim. 164, 165, 261 S. W. 2d 836, 837 (1953).

21. See Gerlach v. State, 217 Ark. 102, 229 S. W. 2d 37 (1950); People v. Westek, 31 Cal. 2d 469, 190 P. 2d 9 (1948); People v. Bennett, 287 P. 2d 866 (Cal. App. 1955).

22. 2 Wigmore, Evidence § 304 (3d ed. 1940).

23. See Commonwealth v. Kline, 361 Pa. 434, 65 A. 2d 348 (1949).

24. *Ibid.*

25. 2 Wigmore, Evidence § 304 (3d ed. 1940).

is doubtful whether this requirement is always met in the principal cases. On the theory that the likeness of the crime shown to have been committed by the accused to the one in issue is probatively relevant, several courts have stated that similar transactions with or against persons other than the complaining party may be admitted to illustrate a modus operandi.[26]

In addition to the standard exceptions various others have been employed to admit evidence of independent transactions in sexual offense prosecutions. Some of these have been "invented" to cope with a specific situation in which standard exceptions were inapplicable. A few are indistinguishable in substance from standard exceptions. Evidence of other transactions has been admitted where the courts have said it was pertinent to show the attitude of the accused,[27] his state of mind,[28] a passion or emotion of the same type;[29] to indicate a probability or the plausibility that the defendant committed the act in question;[30] to rebut an inference or defense raised by the accused;[31] to corroborate the prosecution or to explain the act charged.[32] Implicit in the application of some of these is the assumption that sexual offenders repeat their crimes.

In two states (California and Kansas), courts have openly admitted evidence to show a propensity to commit sex crimes.[33] They have emphasized the importance of the mental and emotional nature of the accused as a factor tending to prove his commission of the crime charged.[34] Evidence of unrelated transactions has been accepted by these courts as demonstrative of the defendant's "lewd, lustful, or lascivious nature or disposition," and his "disposition or tendency to commit the crime charged or crimes of that nature."[35]

26. See People v. Sullivan, 101 Cal. App. 2d 322, 225 P. 2d 645 (1950); Mosley v. State, 211 Ga. 611, 87 S. E. 2d 314 (1955).

27. See State v. Davis, 229 N. C. 386, 50 S. E. 2d 37 (1948).

28. See, *e.g.*, Commonwealth v. Ransom, 169 Pa. Super. 306, 82 A. 2d 547 (1951), *aff'd*, 369 Pa. 153, 85 A. 2d 125 (1952); Dorsey v. State, 204 Ga. 345, 49 S. E. 2d 886 (1948). *But see* Day v. Commonwealth, 196 Va. 907, 86 S. E. 2d 23 (1955).

29. State v. Jackson, 82 Ohio App. 318, 321-22, 81 N. E. 2d 546, 548 (1948) (dictum).

30. See, *e.g.*, People v. Herman, 97 Cal. App. 2d 272, 217 P. 2d 440 (1950); People v. Boyd, 95 Cal. App. 2d 831, 213 P. 2d 724 (1950).

31. See, *e.g.*, People v. Carmelo, 94 Cal. App. 2d 301, 210 P. 2d 538 (1949); State v. Cooper, 114 Utah 531, 201 P. 2d 764 (1949).

32. Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380 (1952); State v. Allen, 163 Kan. 374, 376, 183 P. 2d 458, 460 (1947) (dictum).

33. See, *e.g.*, People v. Herman, 97 Cal. App. 2d 272, 217 P. 2d 440 (1950); State v. Whiting, 173 Kan. 711, 252 P. 2d 884 (1953); State v. Allen, *supra* note 32. See also Dyson v. United States, 97 A. 2d 135 (Mun. Ct. App. D.C. 1953).

34. See note 33 *supra*.

35. See note 33 *supra*.

To ground an exception to the general inadmissibility rule on what jurists believe to be fact—that the sex offender is a degenerate or at least a person with a tendency to repeat his wrongful acts—is seemingly to accomplish what the rule is intended to prevent. However, rationalizing the admission of independent transactions under standard or other exceptions may merely be a more subtle method of controverting the rule.

III

An integral part of the inadmissibility rule is the requirement that, regardless of the exception under which proof of other transactions is admitted, the evidence must be of sufficient probative force to sustain a reasonable belief that the accused actually committed them.[36] Such a vague standard can easily be a weapon destructive of justice in the hands of a judge who, not wholly oblivious to public opinion, is caught up in the "war" against sex criminals. Though difficult to ascertain from the fact situations in reported cases, the standard of "reasonable belief" seems to have been changed to "any belief" in some instances.[37]

Within the last ten years, evidence of other transactions has been introduced in several ways in the cases under discussion. The most common method of introducing evidence to show commission of other transactions has been by direct testimony from persons with or against whom the transactions were alleged to have been perpetrated. Similarly, prosecutors have used statements from witnesses to the transactions and testimony as to conversations with defendants in which the other transactions were revealed.[38] Formal and informal confessions by the accused of the other transactions have been alluded to in some cases.[39]

The most subtle means of offering this evidence has been by inference. In one case, the prosecutrix testified that she had identified the defendant from police photographs.[40] In another, a witness recounted that he had seen the defendant on a chain gang while the defendant was serving a sentence for rape.[41] In still a third case,

36. Sneed v. State, 143 Ark. 178, 219 S. W. 1019 (1920).
37. See People v. Pazell, 399 Ill. 462, 78 N. E. 2d 212 (1948). There, after the trial court had admitted it, the appellate court refused to allow evidence of other transactions, implying that there was no reasonable basis for belief of their commission.
38. See State v. Pierce, 59 Ariz. 411, 129 P. 2d 916 (1942).
39. See Dyson v. United States, 97 A. 2d 135 (Mun. Ct. App. D.C. 1953); State v. Bradford, 362 Mo. 226, 240 S. W. 2d 930 (1951); Harris v. State, 88 Okla. Crim. 422, 204 P. 2d 305 (1949) (evidence held inadmissable).
40. People v. Maffioli, 406 Ill. 315, 94 N. E. 2d 191 (1950).
41. Sharpe v. State, 91 Ga. App. 147, 85 S. E. 2d 95 (1954) (reversed for prejudical testimony).

the chief of police told of meeting the accused prior to the charged statutory rape while investigating another statutory rape case.[42] Introduction by inference or innuendo has also been accomplished through questions directed to that end[43] and rebuttal evidence which has fallen short of positively establishing another transaction.[44] Though appellate courts rarely fail to exclude evidence introduced by inference or innuendo,[45] the greater frequency of introduction of other transactions by these means in the trial courts points up the attempt by prosecuting attorneys further to liberalize the general rule in sexual offenses or at least to take fullest advantage of the present liberal trend to gain convictions.

A basic requirement under the exceptions to the general inadmissibility rule is that the independent transactions admitted into evidence be of a similar nature to the act in issue.[46] Proof of non-sexual offenses perpetrated with or against others has not usually been accepted in the principal cases except to complete the res gestae,[47] nor would it be logically relevant for any other purpose.

Although determination of the similarity or dissimilarity of sexual acts is perhaps the function of the social scientist, some offenses on their face can be rejected as unlike. It is fundamental that homosexual acts are different than heterosexual acts and that crimes of force and of sexual intercourse, such as rape are dissimilar to those distinctly lacking aggression and absent intercourse, such as indecent exposure and window peeping.[48] Psychiatrists find a demarcation line between sexual offenses against young girls and those against post-puberty females.[49] Nevertheless, courts have, on occasion, failed to recognize these differences in admitting evidence of other transactions.[50]

42. Shearin v. State, 280 S. W. 2d 275 (Tex. Crim. 1955) (evidence disallowed on appeal).

43. See State v. Dietz, 5 N. J. Super. 222, 68 A. 2d 777 (App. Div. 1949) (evidence disallowed on appeal).

44. See People v. Pazell, 399 Ill. 462, 469, 78 N. E. 2d 212, 215 (1948).

45. See, *e.g.*, cases cited notes 43 and 49 *supra*. *But see* People v. Maffioli, 406 Ill. 315, 94 N. E. 2d 191 (1950).

46. This requirement is such an integral part of the exceptions to the rule that it does not appear to have been stated independently of them. Similarity of character is not required where the exception is to complete the res gestae. 1 Wharton, Criminal Evidence § 234 (12th ed. 1955).

47. See State v. Martinez, 67 Ariz. 389, 198 P. 2d 115 (1948).

48. See Piker, *A Psychiatrist Looks at Sex Offenses*, 33 J. Soc. Hyg. 392, 393 (1947). From information obtained February 20, 1956, in an interview with Dr. Bernard C. Glueck, Jr., Associate Professor of Psychiatry, University of Minnesota, and former psychiatric consultant at Sing Sing Prison.

49. See *Report of the New York State Sex Delinquency Research Committee* (to be published by the New York Legislature).

50. See State v. Bradford, 362 Mo. 226, 240 S. W. 2d 930 (1951); Commonwealth v. Kline, 361 Pa. 434, 65 A. 2d 348 (1949).

Generally, the other transactions to be introduced must be of a criminal nature to be allowed into evidence. However, the borderline between criminal conduct and acts of moral reprobation is not always clear in sexual offense cases.[51] In *People v. Tolson*,[52] the character of the other transactions of the accused, charged with rape, was merely offensive conduct toward several women which consisted of a request that they go for a ride with him and the pinching of the buttocks of one. The evidence was admitted.

Another prerequisite to the admission of proof of independent transactions is that they must not be too remote in time to be of evidentiary value.[53] The test of remoteness rests within the discretion of the trial judge and necessarily varies with the circumstances of the individual case. Except for isolated cases, this requirement has been adhered to in sexual offense prosecutions.[54]

For a time, some courts did not admit evidence of other transactions which were committed sebsequent to the crime being prosecuted. Recently, the test of admission of subsequent transactions has been whether or not they were relevant to the crime in issue.[55] This appears to be a wiser course to follow, for it is difficult to understand why more probative weight should be given to prior transactions than to those occurring subsequent to the offense charged.

When evidence of other transactions is received as relevant under one of the exceptions to the general inadmissibility rule, the trial judge is expected properly to limit the scope of its use by directing an appropriate instruction to the jury.[56] However, failure to give such an instruction has not been deemed to be error requiring reversal, and where evidence has been introduced and then ruled

51. An attempt to show illicit relations with adult women, where the accused was charged with rape of a young girl, was rejected as dissimilar. See State v. Hayes, 356 Mo. 1033, 204 S. W. 2d 723 (1947).

Frequently, the other transaction sought to be admitted is merely a violation of an ordinance or a sexual misdemeanor. See People v. Herman, 97 Cal. App. 2d 272, 217 P. 2d 440 (1950) (defendant photographed prosecutrix in acts of sexual intercourse); Commonwealth v. Boulden, 179 Pa. Super. 328, 116 A. 2d 867 (1955) (defendant allegedly showed a lewd picture to a young girl).

52. 109 Cal. App. 2d 579, 241 P. 2d 32 (1952).

53. State v. Moubray, 81 S. E. 2d 117 (W.Va. 1954); Melville, *Evidence as to Similar Offenses, Acts or Transactions in Criminal Cases*, 29 Dicta 235 (1952). Perhaps, in fairness to the accused, just as any doubts as to relevancy are resolved in his favor, so also should doubts as to remoteness in time be resolved in his favor. *Cf.* Harris v. State, 88 Okla. Crim. 422, 204 P. 2d 305 (1949); 1 Wharton, Criminal Evidence § 233 (12th ed. 1955).

54. See Melville, *supra* note 53 at 254.

55. See, *e.g.*, Mosley v. State, 211 Ga. 611, 87 S. E. 2d 314 (1955); Dorsey v. State, 204 Ga. 345, 49 S. E. 2d 886 (1948); State v. Bradford, 362 Mo. 226, 240 S. W. 2d 930 (1951).

56. Melville, *supra* note 53. For such an instruction see Commonwealth v. Young, 172 Pa. Super. 102, 107-08, 92 A. 2d 445, 447-48 (1952).

out, no case has been found where failure to give an instruction to disregard the evidence has been held to be fundamental error. In any event, the giving of these instructions can be little solace to a defendant after evidence of independent transactions has been introduced, for the effect of these instructions on a jury is at best negligible. "The human mind is not a slate, from which can be wiped out, at the will and instruction of another, ideas and thoughts written thereon."[57]

IV

Perhaps the reason courts have been slower to liberalize the inadmissibility rule where the other transactions have been with or against persons other than the complainant is that they have felt sexual transactions between the same two persons justify a valid inference of repetition while those between the defendant and other persons do not. Evidence of similar transactions with or against the identical person is accepted most often in sexual offenses based on consent, such as incest, statutory rape, and adultery.[58] A peculiar desire and opportunity to commit the offense in issue is demonstrated by proving another offense of this type with the same person.[59] Special desire to commit the crime in issue can also be shown, with less force, by evidence of another consensual offense with a person other than the complainant. It may be argued that even in nonconsensual offenses, the distinction between transactions with or against the same person and transactions with or against others is warranted, since the former would tend to prove not only a desire to commit the specific type of offense, but to commit it with a particular person.

The rationale behind the relaxation of the inadmissibility rule—whether hidden, as in the contorted application of exceptions, or patent, as where a disposition to commit crimes of the kind charged is shown—is that sex offenders have a tendency to repeat their acts.[60] The validity of this rational is essential to the argument for freer admissibility. Some psychiatric and sociological studies have been interpreted as proving there is no greater and perhaps even less recidivism among sexual offenders than among other criminals.[61] One recent survey purports to establish that sexual offenders perpetrating new crimes commit more nonsexual crimes than those

57. People v. Deal, 357 Ill. 634, 643, 192 N. E. 649, 652 (1934).
58. See 9 Wash. & Lee L. Rev. 86, 89-90 (1952).
59. *Id.* at 90.
60. 39 Calif. L. Rev. 584, 587 (1951); 23 Temp. L. Q. 133, 134-35 (1949); see Commonwealth v. Boulden, 179 Pa. Super. 328, 341-44, 116 A. 2d 867, 873-74 (1955).
61. *Id.* at 342-43 n. 2, 116 A. 2d at 873 n. 2.

of a sexual nature.[62] These studies become subject to suspicion of statistical bias and misinterpretation when it is observed for instance, that they are frequently based on the number of convictions obtained,[63] a factor not always indicative of the number of offenses actually committed.

The prevalent position among social scientists is that sex offenders do have a greater tendency to repeat their acts than other offenders.[64] The statistical and psychological support for this theory is stronger, though still not wholly satisfying.[65]

Granting, from the conflicting views of social scientists, that sexual offenders have a greater tendency to repeat their acts than nonsexual offenders, even the more favorable statistics would not seem to illustrate a really strong tendency toward recidivism.[66] It would appear that no less than a probability that sexual offenders repeat their acts could justify an evidentiary rule allowing admission of independent transactions to demonstrate a propensity to commit sex crimes of the kind in issue. Moreover, an exception to prove propensity to be applied alike to all sexual offenses would be illogical, for social scientists agree that the tendency to repeat sexual crimes varies materially with the particular type of offense involved.[67]

Indeed, only if it were certain that all sexual criminals were recidivists would an exception to show propensity be warranted considering the effect of admitting evidence for such a purpose on the rights of the accused. Advocates of strict adherence to the inadmissibility rule foresee prejudice to the accused as the inevitable and undesirable consequence of relaxing it. If evidence of other transactions is admitted, the defendant may be forced to meet charges of which he had no notice.[68] He may thus be unable to refute

62. *Ibid.*
63. *Ibid.*
64. Information obtained February 20, 1956, in an interview with Dr. Bernard C. Glueck, Jr., Associate Professor of Psychiatry, University of Minnesota, and former psychiatric consultant at Sing Sing Prison. This position is reflected in the *Report of the New York State Sex Delinquency Research Committee, supra* note 49. Dr. Glueck was a member of that Committee.
65. These studies are sometimes based on calculated estimates as to the number of offenses committed by the subjects. See the *Report of the New York State Sex Delinquency Research Committee, supra* note 49.
66. *Ibid.* Out of the 170 sex felons studied, only an estimated 35% were chronic or consistent offenders and an estimated 32% were first offenders.
67. See 20 CALIFORNIA SEXUAL DEVIATION RESEARCH 27 (1954); REPORT OF THE ILLINOIS COMMISSION ON SEX OFFENDERS 11 (1953); TAPPAN, THE HABITUAL SEX OFFENDER 14 (1950).
68. See Commonwealth v. Boulden, 179 Pa. Super. 328, 343-44, 116 A. 2d 867, 874 (1955); 1 Wigmore, Evidence § 194 (3d ed. 1940).

fabricated charges.[69] Of course, if the defendant has actually committed the other transactions, he may anticipate their introduction and be prepared to meet them.[70] In addition, proof of other transactions diverts the attention of the jury from the offense in question,[71] and confuses them by raising collateral issues.[72] Such evidence may prompt the jury to feel justified in condemning the accused, regardless of his guilt of the crime charged.[73]

It cannot be too strongly urged, that in an accusatorial system of justice such as ours, the specific crime in issue must be the focal point about which proof is to be marshalled.[74] To allow evidence of other transactions to show depravity or a propensity to commit sexual crimes is to predispose the minds of the jury to convict in an area where prejudice already abounds,[75] and is incongruous with a system of justice which accords to a defendant extensive safeguards of a fair trial.

V

Perhaps the remedy for the present trend toward liberal admissibility is to adopt the rule proposed by the American Law Institute[76] which provides:

> "Evidence that a person committed a crime on a particular occasion is inadmissible to prove that he committed a crime on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or to commit crimes generally."[77]

By utilizing standard exceptions, many courts have admitted evidence of other transactions where the resulting prejudice for outweighed the probative value. Often this has involved mentally stretching the exceptions to admit evidence not properly relevant under them, or recognizing the relevancy of the evidence under an exception although it was not introduced for that purpose. The

69. See note 68 *supra.*

70. Of course, a defendant may not be willing to confess similar transactions to his counsel.

71. See Commonwealth v. Boulden, 179 Pa. Super. 328, 344, 116 A. 2d 867, 874 (1955); 1 Wigmore, Evidence § 194 (3d ed. 1940).

72. See note 71 *supra.*

73. See note 71 *supra.*

74. See People v. Molineux, 168 N. Y. 264, 292-93, 61 N. E. 286, 294 (1901).

75. See Note, 37 Minn. L. Rev. 608, 614 (1953).

76. Model Code of Evidence rule 311 (1942). It is said that this was the original rule in this country. See Stone, *The Rule of Exclusion of Similar Fact Evidence: America,* 51 Harv. L. Rev. 988, 993-1000 (1938).

77. This is a paraphrase of the A. L. I. rule and is found in Commonwealth v. Boulden, 179 Pa. Super. 328, 335, 116 A. 2d 867, 870 (1955).

American Law Institute rule would eliminate the multitude of exceptions which have confused and undermined the present rule. Supposedly it would remedy the anomalous situation in which relevant evidence is excluded for want of an appropriate exception, yet slightly relevant, highly prejudicial evidence is admitted.[78] The proposed rule is so vague, however, that it gives the trial judge almost unlimited discretion to allow or deny admission, thus opening the door to the same abuses to which the present rule is subject.

Perhaps the recent trend toward relaxation of the inadmissibility rule is traceable to the response of the judiciary to public alarm over the ever-increasing number of sex crimes.[79] It is felt that handicapping the state in the prosecution of criminals is undesirable. It is also likely that a realization of the difficulty of obtaining proof of sexual offenses has been partially responsible for the trend.[80]

Continuance of the trend of liberal admissibility is almost certain to result in an increased number of convictions.[81] Though the solution to the overall social problem of the sex offender lies in sex education, therapy, law enforcement, and legislation, it may be argued that conviction of accused sex criminals on the basis of other transactions, admitted under liberal evidence rules, is a desirable social end, since chronic sex offenders will at least be removed from society to a place where they can do no harm and they may even be rehabilitated through therapy. However, persons innocent of the offenses charged against them may be convicted and it is difficult to accede to the proposition that the judiciary may waive basic constitutional rights in order to legislate desirable social ends.

78. *Ibid.* (by implication). Yet, as indicated previously, the rules as now applied in some jurisdictions allow the courts to admit any evidence of other transactions they care to.

79. See 39 Calif. L. Rev. 584, 587 (1951). Though there is an increase in the absolute number of sex crimes, there is evidence of a per capita decrease. See 20 California Sexual Deviation Research 26 (1954).

80. See 39 Calif. L. Rev. 584, 587 (1951).

81. See 23 Temp. L. Q. 133, 135 (1949).