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Evidence - The Impotence of Wyoming Rule of Evidence 404 in Crime Trials: Brown v. State

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EVIDENCE—The Impotence of Wyoming Rule of Evidence 404 in Sex Crime Trials: *Brown v. State,* 736 P.2d 1110 (Wyo. 1987).

After a trial by jury in the Third Judicial District Court Walter Brown was found guilty of incest in violation of Wyoming Statute section 6-4-402(a).[1] The trial court admitted into evidence testimony of the victim's half-sister, Kate Brown. Kate testified that Walter Brown had sexual intercourse with her before the charged incident of August 1985.[2] Kate could not state precisely when the prior acts of incest took place but testified that the last had occurred in 1979 when she was twelve years old.[3] Although defense counsel objected to admission of this other bad acts evidence as a violation of Wyoming Rule of Evidence 404, the trial court admitted Kate Brown's testimony for the purpose of showing: motive, modus operandi, continuing scheme or plan and to corroborate the victim's testimony.[4] These are recognized purposes for the admission of other crimes, wrongs, or acts under Wyoming Rule of Evidence 404(b). Walter Brown included the trial court's disposition of his evidentiary objection as an issue on appeal.[5]

The Wyoming Supreme Court affirmed the trial court's admission of other bad act evidence. However, the court did not attempt to support all four of the trial court's purposes for admission. It based its affirmance solely upon the admissibility of the evidence to show Walter Brown's motive to commit incest.[6]

Background

Wyoming Rule of Evidence 404 is identical to its federal counterpart.[7] In relevant part Rule 404 provides that:

> a) Character Evidence Generally
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> Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on any particular occasion, except:
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> . . . .
>
> b) Other Crimes, Wrongs, or Acts

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1. Wyo. Stat. § 6-4-402 (1977, Rev. 1983).
   a) A person is guilty of incest if he knowingly commits sexual intrusion, as defined by W.S. 6-2-301(a)(vii), or sexual contact, as defined by W.S. 6-2-301(a)(vi), with an ancestor or descendant or a brother or sister of the whole or half-blood. The relationships referred to herein include relationships of:
      i) Parent and child by adoption;
      ii) Blood relationships without regard to legitimacy; and
      iii) Stepfather and stepchild.
   b) Incest is a felony punishable by imprisonment for not more than five (5) years, a fine of not more than five thousand dollars ($5,000.00), or both.
2. Brown v. State, 736 P.2d 1110, 1111 (Wyo. 1987).
3. Record at 349, 350, *Brown*, 736 P.2d at 1110 (No. 7-335).
4. *Id.* at 385.
5. *Brown*, 736 P.2d at 1111.
6. *Id.* at 1113.
7. Because Wyo. R. Evid. 404 is identical to the federal rule, Wyoming finds federal cases addressing this rule persuasive. *Brown*, 736 P.2d at 1111 n.1.

> 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.

Rule 404(b) is a component of a meticulously drafted body of rules[8] that have one ultimate purpose: to guide the trial court to a truthful and efficient resolution of conflicting factual contentions.[9] In furtherance of this goal the Rules of Evidence state that evidence tending to make the existence of a fact to be proved more or less probable is relevant, and as such is generally admissible.[10]

The United States Supreme Court has recognized that when the fact to be determined is whether or not the accused committed a criminal act, evidence that the accused has committed very similar acts cannot be said to be irrelevant.[11] Since the defendant's predilection to commit crime is relevant, a rule requiring its exclusion seems contrary to the purpose of the Rules of Evidence as a whole.[12] This superficial conflict is resolved by the underlying policy of Rule 404(b). This policy, as articulated by the

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8. S. REP. No. 1277, 93rd Cong., 2nd Sess. (1974). In recommending passage of bill H.R. 5463 to establish uniform rules of evidence in federal courts, the Senate Judiciary Committee gave background on the formation of the rules. "H.R. 5463 is the culmination of 13 years of study by distinguished judges, Members of Congress, lawyers and others interested in and affected by the administration of justice in the Federal courts." *Id.*

9. WYO. R. EVID. 102 is identical to FED. R. EVID. 102. Both state: "These rules shall be construed to secure fairness in administration, elimination of unjustified expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." WYO. R. EVID. 102; FED. R. EVID. 102.

10. WYO. R. EVID. 401 is identical to FED. R. EVID. 401. Both state: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." WYO. R. EVID. 401; FED. R. EVID. 401.

WYO. R. EVID. 403 is identical to its FED. R. EVID. 403. Both state: "Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations, of undue delay, waste of time, or needless presentation of cumulative evidence." WYO. R. EVID. 403; FED. R. EVID. 403.

11. Michelson v. United States, 335 U.S. 469, 475-76 (1948).

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. (footnotes omitted).

Id.

12. *Id.* at 476 n.9.

> The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear than an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to bad character.

Id. (citing Reg v. Rowton, 10 Cox's Criminal Cases 25, 29-30 (1865)).

United States Supreme Court,[13] is that evidence of the accused's propensity to commit crime is not excluded because it is irrelevant. Rather, the evidence is excluded due to its effect upon the jury.

For almost three hundred years courts have recognized the undesirable influence propensity evidence has upon the jury, and have required its exclusion.[14] More recently in *United States v. Burkhart*, the Tenth Circuit Court of Appeals articulated the policy concerns that prompted Rule 404(b).[15]

But, perhaps the unfair prejudice produced by propensity evidence is best understood in human terms. Courts and commentators[16] have shown an awareness to the visceral reaction we all feel when confronted with another who has committed reprehensible crimes. A prior bad act may have little probative value regarding the crime charged; but bolstered by emotion its significance is heightened and may dwarf the more rational evidence of the case. At the turn of the century Professor Wigmore identified the tendency of other crimes evidence to foster the perception that the defendant is an evil man. The jury then may become vengeful wishing to punish the defendant in spite of rather than based on the evidence of the case.[17] Contemporary authorities in the field of evidence have recognized that admission of evidence that the accused has committed acts that are profoundly similar to the crime charged allows the jury to draw the inference that because the defendant has committed a similar crime he also committed the crime charged.[18] This is the propensity inference that Rule 404 prohibits.

These influences distort the jury's perception of the evidence in the prosecution's case-in-chief. Therefore the jury's ability to correctly resolve

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13. *Id.* at 475; *see also* FED. R. EVID. 404 advisory committee's note, *reprinted in* 56 F.R.D. 183, 220 (1973) ("While its basis lies more in history and experience than in logic an underlying justification can be fairly found in terms of the relative presence and absence of prejudice in the various situations.").

14. 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940) ("[F]or nearly three centuries, ever since the liberal reaction which began with the Restoration of the Stuarts, this policy of exclusion, in one or another of its reasonings, has received judicial sanction, more emphatic with time and experience.").

15. United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972). Three reasons were given why courts are reluctant to admit other crimes evidence. First, the accused is required to face charges not included in the indictment. Second, prior crimes testimony has the predominant quality of showing the defendant as a generally bad man. Showing that a man is generally bad has never been allowable in our system. A man has a right to be tried on the truth of the specific charge. Third, once evidence of prior crimes is introduced the trial is for all practical purposes over, the guilty verdict follows as a mere formality. This is true regardless of the caution employed in instructing the jury. *Id.*

16. *See, e.g.*, State v. Saltarelli, 655 P.2d 697, 699 (Wash. 1982); Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965); Note, *Evidence of Defendant's Other Crimes: Admissibility in Minnesota*, 37 MINN. L. REV. 608, 614 (1953); Note, *Other Vices Other Crimes*, 41 IOWA L. REV. 325, 333-34 (1956).

17. 1J. WIGMORE, EVIDENCE § 194 (1904).

18. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 140, at 199 (1985); United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act . . . well beyond mortal capabilities.").

the factual issues of the case is diminished.[19] The exclusion of propensity evidence helps preserve the probity of the trial by preventing the inaccuracy that results from its admittance.[20] Rule 404(b) furthers the ultimate goal of the Rules of Evidence: that truth will be ascertained and cases justly determined.

Wyoming has developed an approach which differentiates the application of this rule on the basis of the type of crime involved. In particular, a rule of per se admissibility in sex crime cases is now firmly established.

The genesis of Wyoming's rule of per se admissibility is found in *Strand v. State*[21] where the defendant was charged with the rape of his daughter. The Wyoming Supreme Court affirmed the trial court's admission of evidence which showed other acts of sexual intercourse between the defendant and his daughter.[22] The court stressed that the evidence could only be considered for the purpose of showing defendant's "lustful disposition and intent."[23]

The next Wyoming case addressing the issue was *State v. Quirk*.[24] There the defendant appealed his conviction for statutory rape of his daughter.[25] The defendant contended that his daughter's testimony concerning prior acts of sexual intercourse with the defendant was improperly admitted. The court affirmed admission of the evidence to corroborate the testimony of the victim.[26]

In *State v. Koch*,[27] the defendant was convicted for having carnal knowledge of a girl who was under the age of eighteen. The victim was the defendant's step-daughter. On appeal the defendant contended that the step-daughter's testimony of previous acts of sexual intercourse between herself and the defendant was admitted in error. Citing *Strand* and *Quirk* the court disagreed, ruling the evidence permissible to prove identity, corroboration of the testimony and the relation and intimacy of the parties.[28] However, the court admonished the prosecutor for his opening statement in which he announced that he would prove the defendant was guilty of sexual intercourse with another young girl. The court noted that such declarations were wholly improper in this case.[29] The trial court had already ruled that evidence of the defendant's prior acts with a girl other

19. *Burkhart*, 458 F.2d at 204.

20. FED. R. EVID. 403 advisory committee's note ("The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis at one extreme, to nothing more harmful than merely wasting time, at the other extreme.") *reprinted in* 56 F.R.D. 183, 218 (1973). *See also Burkhart*, 458 F.2d at 204.

21. 36 Wyo. 78, 252 P. 1030 (1927).

22. *Id.* at 85, 252 P. at 1032.

23. *Id.*

24. 38 Wyo. 462, 268 P. 189 (1928).

25. *Id.* at 464, 268 P. at 190.

26. *Id.*

27. 64 Wyo. 175, 189 P.2d 162 (1948).

28. *Id.* at 183, 189 P.2d at 164.

29. *Id.* at 196, 189 P.2d at 170.

than the victim was inadmissible. But, because the defendant did not raise the issue on appeal the court declined to order a reversal.[30]

This line of cases clearly established that in the context of sexual offenses, defendant's other similar acts were admissible if they involved the victim in the charged offense.[31]

Elliott v. State[32] considerably expanded the admission of other sexual acts evidence to include defendant's other sex acts with a third party. *Elliott* involved a prosecution for second degree sexual assault. The defendant was the victim's step-father. At trial, the victim's older sister was allowed to give testimony that she had been sexually assaulted by the defendant prior to the crime charged. On appeal the defendant contested the admissibility of the older sister's testimony. The court affirmed, noting that in cases involving sexual assaults, statutory rape, and incest, the majority of jurisdictions have allowed the admission of defendant's similar acts with third parties.[33] The court held such evidence admissible for the purpose of proving the motive of the defendant.[34]

Justice McClintock concurred specially, agreeing that the testimony of the victim's sister was admissible. However, he could not agree that the testimony established a motive for the crime. Instead Justice McClintock found the evidence to be admissible to establish a continuing plan or characteristic method.[35]

Since *Elliott,* the motive purpose of Rule 404(b) appears to have become an open door through which other sex acts evidence is consistently allowed to enter in Wyoming's sex crime trials. In *Vasquez v. State,*[36] the defendant appealed his rape conviction on the grounds that evidence of his prior rape of the victim was admitted in error. The court disagreed, affirming the trial court's reliance upon the *Elliott* rationale that prior acts of similar sexual conduct are probative of defendant's motive, and can establish a particular course of conduct.[37]

The court used similar reasoning to decide the case of *Evans v. State.*[38] Evans, the appellant, was found guilty of sexual assault in the first degree. At trial a woman other than the victim gave testimony that she had been raped by the appellant one year before the charged sexual assault took place. Appellant contended that such evidence was admitted in error. The court began its analysis by quoting from *United States v. Oliphant*[39] for

30. *Id.*
31. Elliott v. State, 600 P.2d 1044 (Wyo. 1979).
32. *Id.* (It is interesting to note that John D. Troughton the Attorney General successfully representing the State in *Elliott*, was the trial court judge in *Brown v. State*).
33. *Id.* at 1048, *compare* C. MCCORMICK, EVIDENCE § 190, at 558-61 (1972) (The author observes that cases involving other crimes evidence are "as sands of the sea" but notes that only "a number of jurisdictions now admit other sex offenses with other persons".).
34. *Elliott*, 600 P.2d at 1048.
35. *Id.* at 1050.
36. 623 P.2d 1205 (Wyo. 1981).
37. *Id.* at 1208.
38. 655 P.2d 1214 (Wyo. 1982).
39. 525 F.2d 505, 507 (9th Cir. 1975).

the proposition that where there exists a striking similarity between the charged crime and the prior acts, the evidence is admissible as relevant to a common scheme, system or design. However, the court went on to quote from *Elliott*, eventually reaching the conclusion that the sexual assaults were sufficiently similar to be relevant to appellant's motive.[40] Beginning with *Elliott*, the Wyoming Supreme Court has used the motive exception to 404(b) as a beam to bridge the gap between admitting evidence of the defendant's other sex acts with the victim and admitting evidence of the defendant's sex acts with third parties. Wyoming's faith in the strength of this beam is demonstrated by the court's reliance upon it in subsequent decisions.

PRINCIPAL CASE

Brown v. State reaffirmed the *Elliott* rationale of admitting the defendant's other sexual misconduct in sex crime trials. But, in contrast to *Elliott* the court did not merely follow the lead of other jurisdictions to arrive at a decision. Rather the court explained the reasoning behind its use of the motive exception to Rule 404. The factual backdrop of *Brown* provided the court with an opportunity to expound its view on the use of the motive exception in sex crime trials. The trial court had allowed into evidence the testimony of the victim's half-sister who testified that Brown had sexual intercourse with her before the alleged incestuous incident for which Brown was on trial.[41]

In a plurality opinion written by Chief Justice Brown, joined by Justice Thomas,[42] the court approved the admission of other sex acts to show defendant's motive to commit incest. The court based its holding upon three grounds. First,

> Incest involves aberrant sexual behavior-it is a type of sexual deviancy that is difficult to understand. Therefore, a trier of fact might well wonder what would motivate the accused to behave in such a bizarre manner. The evidence of prior sexual acts then was probative under the motive exception because of the unusual behavior involved.[43]

Second, the court reasoned that "[i]f the accused had a predilection to deviant sexual practices with young female relatives, it would not be unreasonable for the trier of fact to determine that he had a motive to commit the acts complained of by the victim in this case."[44]

Third, evidence of other sexual acts was admissible to show that, because the older sister was unavailable, the accused was motivated to incest with the present victim.[45] The court went on to state that this ap-

40. *Evans*, 655 P.2d at 1219.
41. *Brown*, 736 P.2d at 1110.
42. *Id.*
43. *Id.* at 1113.
44. *Id.*
45. *Id.*

plication of the motive exception was consistent with the rule established in *Elliott.*

Justice Cardine provided the third vote for affirmance in a special concurrence, agreeing with Justices Brown and Thomas on the admissibility of the other sex acts evidence. However, he expressed concern that no clear rule of law had been established to determine when other bad act evidence is, or is not, admissible. Addressing the problem, Justice Cardine would require that courts assess the relevancy of the evidence, balance prejudice against probative worth and determine that the evidence is offered for a legitimate purpose.[46]

In dissent, Justice Urbigkit criticized the court's view on admission of other sex acts to show the defendant's motive. He believed that the court had simply redefined motive as disposition, inclination or propensity; in other words, bad character.[47] Justice Urbigkit reemphasized his point by calling for motive to be distinguished from propensity or inclination,[48] so that convictions are based on guilt, not character.[49] His criticism proceeded to distinguish all of the authorities cited by the majority with the exception of *Elliott.* Though Justice Urbigikit recognized that the majority's opinion was consistent with the precedent set in *Elliott* he expressed his disagreement with the rationale of that case. He pointed out that Rule 404(b) is a general rule of evidence, which contains no exception for sexual assault cases.[50] Because he could find no support for such an exception, he therefore found *Elliott* to render Rule 404(b) meaningless and was unable to adhere to stare decisis.[51] Emphatically reflecting a similar point of view, Justice Macy's complete dissent is as follows: "I dissent. This case has just struck the final death blow to Rule 404, W.R.E., and all that remains is the spirit of the rule."[52]

ANALYSIS

In sex crime trials, Wyoming has consistently allowed evidence of a defendant's other sex acts to be admitted under the motive exception of Rule 404(b). This approach, as applied in *Brown,* has three inherent flaws: First, the court's reasoning in applying the motive exception defeats the purpose of Rule 404(b) by allowing the jury to hear criminal propensity evidence. Second, the court is affirming admission of evidence where the danger of unfair prejudice outweighs probative value. Third, routine admission of propensity evidence can deny the accused a fair trial in violation of the United States Constitution's fourteenth amendment.

46. *Id.* at 1117 (Cardine, J., concurring).
47. *Id.* at 1119 (Urbigkit, J., dissenting).
48. *Id.* at 1124.
49. *Id.* at 1119.
50. *Id.* at 1125.
51. *Id.*
52. *Id.* at 1128 (Macy, J., dissenting).

The Purpose of Rule 404(b)

The court's reasoning in applying the motive exception allows the jury to hear propensity evidence, which can produce decisions based upon the forbidden propensity inference, and emotion rather than reason. The court gave three reasons for admitting the contested evidence under the motive exception. Notwithstanding these three reasons the court allowed the jury to hear forbidden propensity evidence in a sex crime trial. The first basis for admission stresses that incest involves aberrant behavior that is difficult to understand. Other acts of similar behavior are then admissible to explain the defendant's motive for such behavior.[53] The rationale behind the first basis allows invariable admission of the accused's other sex acts in sex crime trials. Where the accused is charged with a crime involving unusual sexual behavior, then acts of similar behavior are admissible. The court reasoned that the unusual nature of the other sexual acts provides the jury with a reason why the accused committed the crime charged.[54] The logic seems clear: because Brown had sexual intercourse with his step-daughter he was likely to be motivated by an appetite for sex with very young girls. Therefore he was more likely to have had sexual intercourse with the prosecutrix. This argument describes the propensity inference that Rule 404(b) was drafted to preclude.[55]

The court's reasoning finds that the more unusual the sexual aberration involved, the more rarely will it manifest itself in observable behavior. Therefore evidence of prior incidents of similar behavior tend to show a heightened probability that the accused committed the aberrant crime charged. The relevance of prior similar acts evidence is therefore increased.[56] What the court's reasoning fails to recognize is that the danger of the jury drawing the forbidden propensity inference is markedly heightened by the similarity of the sexual behavior involved.[57] Where the accused is charged with a crime of deviant sexual behavior, evidence of other similarly bizarre acts may lead the jury to too readily accept that the defendant is guilty of the crime charged. The jury then unfairly prejudges the accused, in essence robbing him of the presumption of innocence.[58]

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53. *Id.* at 1113 (majority opinion). *See supra* quoted material in text accompanying note 43.

54. *Brown*, 736 P.2d at 1113. Motive supplies "the reason that nudges the will and prods the mind to indulge the criminal intent." United States v. Beechum, 582 F.2d 898, 912 n.15 (1978) (quoting Slough & Knightly, *Other Vices Other Crimes*, IOWA. L. REV. 325, 328 (1956)).

55. Ali v. United States, 520 A.2d 306, 311 (D.C. App. 1987). The appellant's conviction for sexual assault was reversed and remanded because other crimes evidence was improperly admitted. The evidence that appellant had unlawful sexual contact with the younger sister had only one logical inference, that because the defendant had done so with the younger sister he must also have done so with the prosecutrix. This is precisely the inference of propensity forbidden. *Id.*

56. *See* WYO. R. EVID. 401 (which defines "relevance"). "Where evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged." United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied* 440 U.S. 920 (1978).

57. *See* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 140, at 191 (1985).

58. State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954).

Rule 404(b) does not prohibit propensity evidence because it is irrelevant, rather it is the distractive effect upon the jury that unfairly prejudices the defendant and requires the exclusion of such evidence.[59] The court's reliance upon the shared unusual nature of prior acts and the crime charged in no way lessens the fact that the jury is diverted from consideration of the particular crime before them. The jury must determine the defendant's guilt of the particular crime charged. It must not, however, convict him on the basis of other acts unrelated to the crime charged. Indeed the defendant may have paid the price for previous crimes and should not be subject to prosecution for them a second time.[60]

In *Brown*, the court's second justification for admitting evidence of other bad acts rests upon a misinterpretation of Rule 404(b) which equates propensity with motive.[61] The court read the rule as allowing other bad acts evidence to show the accused's propensity for sexual deviance. Having once established propensity the jury is free to determine that the accused had a motive to commit the crime charged.[62]

The court cited no jurisdiction which similarly interprets Rule 404(b). Neither is this interpretation supported by the plain language of the Rule nor the purpose behind its enactment. The language of Rule 404(b) explicitly *prohibits* the admission of other bad acts to prove the character of a person in order to show he acted in conformity with that character. However, *other bad acts* evidence may be admitted for *another purpose*, such as to show motive. The Rule prohibits the admission of evidence to show the defendant's criminal propensity. Other bad acts evidence cannot be admitted to first show the accused's propensity, upon which the accused's motive will then be derivatively based.[63]

An example of the proper use of other acts evidence to establish motive, contrasted with Wyoming's application, may be illustrative. In a prosecution for mailing threatening letters to a policeman, evidence that the policeman had previously issued three speeding tickets to the defendant was properly admitted to show defendant's motive for threatening the policeman.[64] Suppose instead, the defendant had previously been con-

59. *See* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 136, at 129-30 (1985) ("[E]vidence law labors under the ambivalent conviction that prior crimes evidence is relevant to prove conduct, but that the jury cannot be trusted to put the evidence in the proper perspective.").

60. Appellant unsuccessfully presented a double jeopardy argument. *Brown*, 736 P.2d at 1113. This is a separate issue and is not discussed in this casenote.

61. *Id.* at 1113. *See supra* quoted material in text accompanying note 44.

62. *Brown*, 736 P.2d at 1113 ("If the accused had a predilection to deviant sexual practices with young female relatives, it would not be unreasonable for the trier of fact to determine that he had a motive to commit the acts complained of by the victim in this case."). THE AMERICAN HERITAGE DICTIONARY, 2nd College Ed. (1983), defines predilection as: "A disposition in favor of something." *Id.* at 976. Propensity is defined as: "An innate inclination or bent." *Id.* at 943. While not wishing to engage in semantics it seems safe to assume that Rule 404(b) prohibits both propensity and predilection evidence.

63. United States v. Bowman, 720 F.2d 1103, 1105 (9th Cir. 1983) ("Evidence of prior crimes is admissible whenever relevant to an issue other than the defendant's criminal propensity.").

64. United States v. Goehring, 585 F.2d 371 (8th Cir. 1978).

victed of mailing threatening letters. Wyoming would allow admission of the prior conviction because "[i]f the accused had a predilection to [mailing threatening letters], it would not be unreasonable for the trier of fact to determine that he had a motive to commit the acts complained of in this case."[65]

In the real case, evidence of the circumstances surrounding the issuance of the speeding tickets did establish a reason why the defendant wrote the threatening letters. But in the hypothetical, propensity is established and a motive is then said to be derived from that propensity, even though the prior acts evidence fails to illuminate in the slightest the defendant's reason for writing threatening letters to the policeman. Clearly, Wyoming's interpretation eviscerates the rule of all its significance by distorting the meaning of motive.

The purpose of Rule 404(b) is (1) to prevent the conviction of an accused because he is a "bad man" who deserves to be punished, not because of the crime charged but because of prior or subsequent misdeeds, and (2) to preclude the inference that because he has committed other crimes he is more likely to have committed the crime for which he is charged.[66] Or in general terms, to prevent the jury from unfairly prejudging the accused.[67] The court's approach, which first requires proof of propensity from which a motive is derived, compromises the purpose of Rule 404(b). Once the propensity evidence is admitted the prejudicial effect occurs. This effect is not ameliorated simply because the jury may *derive* a motive from that showing of propensity.

The court's third reason for admitting Kate Brown's testimony rests upon a presumption of the accused's propensity for incest. The court held the other crimes evidence was admissible to show that the accused was motivated to incest with the victim because the older daughter was unavailable.[68] This reasoning loses all validity unless it is presumed that the accused has a propensity for incest. The inference is that because Walter Brown desired sexual intercourse with Kate he was inclined towards incest with the victim. This inference is logically suspect and legally abhorrent. Bearing in mind that Kate was an adopted daughter, does it follow that because Walter Brown had intercourse with her he was also inclined towards intercourse with Kathy, his natural daughter? Even if the inference had some factual validity, it is still precisely the propensity inference that Rule 404(b) prohibits.[69]

Improper Balancing

Brown demonstrates that the court is affirming admission of other bad acts evidence where the danger of prejudice outweighs probative value.

65. *Brown*, 736 P.2d at 1113. The words "mailing threatening letters" have been substituted for the words "deviant sexual practices" in the cited opinion.
66. Bishop v. State, 687 P.2d 242, 245 (Wyo. 1984).
67. *Michelson*, 335 U.S. at 475-76.
68. *Brown*, 736 P.2d at 1113.
69. *Ali*, 520 A.2d at 311.

Such errors in the balancing process are especially damaging to the jury's ability to determine the validity of the specific allegations against the defendant.

The Advisory Committee's note to Rule 404(b) requires that once other bad acts evidence is offered for a permissible purpose the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence.[70] Acknowledging the complexity and discretionary nature of the trial court's determination, it is nevertheless clear that the *Brown* decision affirmed a balance which incorrectly weighed the competing values of probative worth and prejudice.[71]

The balance between probative worth and prejudice is influenced by many considerations. A major factor in the balance is the prosecutor's need for the particular proof. The less the need for the evidence the more the balance tips towards excluding prejudicial evidence. The extent to which the particular matter is in issue, and the extent to which the evidence is necessary to resolve that matter, are primary components of prosecutorial need for the evidence.[72]

In *Brown*, the accused's motive was not in dispute. He did not contend that he had no motive for incest, his defense was that the act of incest did not take place at all. Where prior acts evidence does not go to an important issue of the case, prejudicial effect of such evidence weighs more heavily in the balance than probative value.[73]

Furthermore, it was unnecessary for the state to introduce evidence of prior bad acts to show Brown's motive for incest. In *People v. Honey*,[74] the Colorado Supreme Court considered the necessity of using prior bad acts to show motive. The court held that where motive or intent are to be inferred from commission of the act itself and the prior act indicates no aspect of intent that cannot be discerned from the act in the instant case, then evidence of the prior act is unnecessary to show the intent or motive of the defendant in the case in question.[75]

If Brown's motive for having sex with his daughter could be discerned from the act itself, then other crimes evidence would be unnecessary.

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70. FED. R. EVID. 404 advisory committee's note, *reprinted in* 56 F.R.D. 183, 221 (1973).

71. *Brown*, 736 P.2d at 1113. "Evaluating the evidence in this case in light of our previous decisions and decisions from other courts as well, we cannot say that the danger of unfair prejudice outweighed the probative value of evidence of prior acts of sexual misconduct involving appellant." *Id.*

72. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 140, at 199 (1985). *See also* United States v. Benton, 637 F.2d 1052, 1057 (5th Cir. 1981) (the court stated that in making the balance between probative value and prejudice, the need for the evidence is an important factor to be considered).

73. United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1978).

74. 596 P.2d 751, 755 (Colo. 1979).

75. *Id. See also* Fallen v. United States, 220 F.2d 946, 948 (5th Cir. 1955), *cert. denied*, 350 U.S. 924 (1955) (the court held that where proof of the criminal act carries with it the implication of motive, evidence of other like crime is not needed to establish motive and is not admissible for such purpose).

Because the evidence is not needed, the danger of it unfairly prejudicing the defendant outweighs its probative worth.

A Missouri appellate court decision supports the position that the motive for incest can be discerned from commission of the act itself. In *State v. McElroy*,[76] the defendant appealed his conviction for incest on the ground that prior crimes evidence was improperly admitted. The trial court had permitted a daughter other than the alleged victim to testify that McElroy had sexual contact with her and had threatened incest.[77] The Missouri Court of Appeals reversed, holding that the evidence failed to conform to any of the exceptions to the rule excluding other crimes evidence.[78] Regarding relevancy to motive, the court held that motive and intent for incest are inherent in commission of the crime itself. Evidence of similar acts with a person other than the prosecutrix could not be admissible to show the accused's motive for incest with the prosecutrix.[79]

Along similar lines is *State v. Ramirez*[80] where the Washington Court of Appeals recognized that the state's need to prove the defendant's purpose for committing an illegal sex act is a function of how readily that purpose can be inferred. Where the jury can infer that an act was committed for the purpose of sexual gratification, then other sex acts evidence is unnecessary and inadmissible to prove this purpose.[81] The reasoning of the Missouri and Washington appellate courts applies equally well to *Brown*. It was unnecessary for the state to present other crimes evidence, which had a high risk of undue prejudice, to show defendant's motive for incest.

Another important element of the balance between prejudice and probative value is the nature of the other acts evidence. Some crimes are more likely than others to produce emotional reaction and the concomitant risks of prejudice.[82] In sex crime cases the risk of prejudice is at its highest.[83] The act of incest is even more likely to influence the jury's emotions, so much so that it feels compelled to punish the defendant for his other crimes. There also exists the fiction, often passed off as simple intuition, that incest offenders are more likely to be habitual or compulsive offenders.[84] This assumption,though erroneous,[85] tempts the jury to a decision based upon a propensity inference.

Experts in the field of evidence have voiced concern that the courts are finding ways to make other crimes evidence fit the motive exception

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76. 518 S.W.2d 459 (Mo. Ct. App. 1975).
77. *Id.* at 461-62.
78. *Id.*
79. *Id.*
80. 46 Wash. App. 223, 730 P.2d 98 (1986).
81. *Id.* 730 P.2d at 101.
82. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 140, at 199 (1985).
83. State v. Salterelli, 655 P.2d 697 (Wash. 1982).
84. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965).
85. Grunfeld & Noreik, *Recidivism Among Sex Offenders*, 9 INT'L J. L. & PSYCHIATRY 95 (1986).

to Rule 404(b) without making the required balance between evidence's probative value and prejudicial effect.

> [I]f judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit into one of the approved classes, they lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.[86]

The Wyoming Supreme Court's approach to admitting other crimes evidence in sex cases accentuates the validity of such concerns. Kate Brown's testimony of intercourse between herself and Walter Brown was unnecessary to show Walter Brown's motive for incest, yet the likelihood of the testimony producing unfair prejudice was extreme. The failure to recognize this gross imbalance sets a damaging precedent. It can only diminish the jury's ability to accurately determine the accused's culpability for the particular crime charged.

The Fourteenth Amendment

Routine admission of propensity evidence brings the basic integrity of Wyoming's sex crime trials into question and may deny the accused a fair trial in violation of the United States Constitution's fourteenth amendment. Evidentiary rules are generally matters of state law for state legislatures to enact and state courts to interpret.[87] Therefore evidentiary errors do not usually raise issues of federal constitutional significance. However, an evidentiary scheme which routinely allows other crimes evidence to be admitted may violate the fourteenth amendment to the United States Constitution.[88]

The United States Supreme Court has previously acknowledged the effect of propensity evidence upon the trial, holding that propensity evidence may deny the accused a fair opportunity to defend against the crime charged.[89] The Tenth Circuit Court of Appeals has likewise recognized that erroneous admission of other crimes evidence affects the "fundamental fairness" of the trial itself.[90] In a previous decision the tenth circuit held that denial of a fair trial is also a denial of due process demanded by the fourteenth amendment. Failure to afford the accused those protections required by the fourteenth amendment renders a trial and criminal conviction illegal and void.[91]

The Seventh Circuit Court of Appeals has addressed the constitutional ramifications of other crimes evidence admitted in error. While the court of appeals could formulate no precise guidelines, it stated that where the

86. C. MCCORMICK, EVIDENCE § 190, at 453 (2nd ed. 1972).
87. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).
88. United States v. Pate, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1970).
89. *Michelson*, 335 U.S. at 476.
90. United States v. Burkhart, 458 F.2d 201, 205 (10th Cir. 1972).
91. Baker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942), *cert. denied*, 317 U.S. 681 (1942).

probative worth of relevant evidence is greatly outweighed by prejudice to the accused, then admission of the evidence may deny the accused fundamental fairness and due process of law.[92]

The foregoing authorities indicate that the trial court's admission of other crimes testimony was not merely an evidentiary question and therefore a matter of state law. Rather the error may have so prejudiced Walter Brown's defense that a violation of the fourteenth amendment is implicated.

CONCLUSION

In *Brown v. State*, the court set a troubling precedent. When the court's reasoning is followed by the district courts, other crimes evidence will be virtually admissible per se, in sex crime trials. There is a danger that these trials will deny the accused the fundamental fairness that forms the basis of our judicial system. The reasoning set forth in *Brown* should therefore be re-examined by the court. A greater awareness of the need to insulate the trier of fact from propensity evidence is required. In this way the rights of those accused of sex crimes will receive much needed support.

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92. *Pate*, 426 F.2d at 1083.