

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4691 HJUD HB 237

8672

based on our common experience in dealing with people and the conclusion from that experience that people are more often than not truthful. In like manner, the individualized propensity inference in the fistfight hypothetical is based on the assumption, derived from common experience, that a person who has been violent on some occasions is more likely than a person who has not been violent to behave violently on any given occasion.

Finally, in some instances the underlying assumption about the relationship among various phenomena or events in the real world is itself dependent upon a propensity inference. For example, the assumption that an individual is more likely than not to tell the truth is based on common experience which demonstrates that people generally have a propensity for truth-telling. Similarly, in the fistfight hypothetical, the defendant's prior violence is relevant to show violence on a particular occasion only if the factfinder assumes that people generally—or at least people similarly situated with the defendant in an identifiable manner—who have been violent on some occasions have a propensity to be violent on other occasions. Indeed, whenever the relevance of a piece of evidence is dependent upon an assumption about how people behave, the assumption necessarily encompasses a propensity inference: The behavior of third persons generally or of a particular individual on other occasions is relevant to show the individual's behavior on the occasion in question only if the factfinder assumes that the behavior is of a type that people have a propensity to repeat.

B. Permissible Individualized Propensity Inferences from a Defendant's Bad Conduct

Courts traditionally have permitted the use of specific acts evidence to show intent or absence of accident.²⁸ Thus, in order to show malice, the prosecutor may be able to introduce evidence that a murder defendant had previously beaten the victim.²⁹ Or in a theft prosecution in which the defendant claims to have picked up an apparently lost wallet, the prosecutor may be able to show that in similar circumstances the defendant had in fact stolen wallets from other individuals.³⁰

In both examples the prior acts evidence may have a prejudicial

FED. R. EVID. 801-804, is based on the premise that when a person's statement is offered to prove the truth of the matter asserted, there are substantial dangers of insincerity, misstatement, inaccurate perception, or inaccurate memory. Unless there are circumstances, described in the hearsay exceptions, that appear to minimize these dangers, or unless the statement is made in court where it can be subjected to immediate cross-examination, the statement will not be admissible. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 330-38.

28. See C. McCORMICK, *supra* note 2, § 190, at 450-51.

29. See *Dunson v. State*, 202 Ga. 515, 522, 43 S.E.2d 504, 508 (1947).

30. See *People v. Williams*, 6 Cal. 2d 500, 502-03, 58 P.2d 917, 918 (1936); cf. *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), discussed at text accompanying notes 101-25 *infra*.

with people and the conclusion often than not truthfully inferred in the fistfight derived from common experience occasions is more likely to have violently on any given

assumption about the relationship in the real world is itself. For example, the assumption that the truth is based on what people generally have a fistfight hypothetical, the violence on a particular people generally—or at least in an identifiable manner—a propensity to be violent because of a piece of evidence people behave, the assumption: The behavior of individual on other occasions is the occasion in question or is of a type that people

by Inferences from a fact

of specific acts evidence in order to show malice, that a murder defendant prosecution in which apparently lost wallet, the circumstances the defendant.

may have a prejudicial

a person's statement is offered without dangers of insincerity, memory. Unless there are circumstances to minimize these dangers, subjected to immediate cross-examination.

44, 508 (1947).

P.2d 917, 918 (1936); cf. (en banc), cert. denied, 440 U.S. 905 (1979).

impact on the factfinder, and a dispute about the defendant's involvement in the prior acts could result in time-consuming, distracting litigation of collateral issues. Nonetheless, the probative value of prior assaults on the same victim to show malice or prior similar thefts to rebut the defendant's claim that he found a lost wallet is probably somewhat greater than the probative value of prior fistfights in the previously discussed hypothetical. It would arguably be appropriate, therefore, to conclude that the greater probative value justifies admitting the evidence.

One cannot, however, distinguish the fistfight hypothetical from the malice and theft cases on the ground that only the former involves a propensity inference, for the inferential process of proof is identical in all three situations. From the defendant's prior fistfights, assaults on the victim, or thefts the factfinder is asked to make an individualized propensity inference: Because the defendant committed the bad acts in the past, he has a propensity to commit the kind of act in question (or to do so with the requisite criminal intent).³¹

Moreover, in each case, the individualized propensity inference is based on an assumption about human behavior that encompasses a more general propensity inference. Just as people who have committed violent acts on some occasions are more likely than people who have not been violent to act violently on other occasions, people who have manifested a culpable mental state on some occasions are more likely than people who have not manifested such a mental state to behave culpably on other occasions.³²

C. Permissible Generalized Propensity Inferences from a Defendant's Bad Conduct

The preceding fistfight and intent hypotheticals have been

31. See C. MCCORMICK, *supra* note 2, § 188, at 445 ("[S]pecific acts will generally not be received to prove that the person whose character is sought to be shown, engaged in certain conduct, or did so with a given intent, on a particular occasion.") (emphasis added).

32. On some occasions specific acts evidence that requires the factfinder to make an individualized propensity inference may pose no threat of prejudice. Consider, for example, a case in which the defendant is charged with a liquor store robbery which occurred at 6:00 p.m. To show that the defendant was probably in the vicinity of the store at the time of the robbery, the prosecutor offers to prove that the defendant regularly rode home from work on a bus that passes by the liquor store shortly before 6:00 p.m. From the fact that the defendant had ridden the same bus in the past, the factfinder is asked to infer that the defendant has a propensity, not shared by people generally, for riding on the same bus. This individualized propensity inference, is based on the more general propensity inference that people who ride the same bus on some occasions are likely to do so on other occasions. Because the act of riding a bus is morally neutral, there is no potential for prejudice. Cf. text accompanying notes 48-54 *infra* (discussion of permissible generalized propensity inferences from neutral conduct). Indeed, the morally neutral quality of the activity coupled with its apparently routine, regularized nature would probably lead courts to place the evidence in the habit rather than the character category. See notes 7, 10 *supra*.

characterized as involving an "individualized" propensity inference because the propensity ascribed to the defendant is not a propensity ascribed to the populace at large or to any independently identifiable group. Rather, at least from the immediate perspective of the factfinder, the propensity is ascribed to the defendant *because* of his specific acts.

In contrast to these examples of individualized propensity inferences, some traditionally permissible uses of specific acts evidence involve what might be characterized as a "generalized" propensity inference. In these latter cases, it seems appropriate to regard the factfinder as beginning with the assumption that individuals in some identifiable group have a propensity to behave in a particular manner.³³ Proof of the defendant's specific act merely identifies the defendant as being included in or specifically excluded from the relevant group.³⁴

Consider, for example, the commonly recognized use of specific acts evidence to prove the identity of the defendant as the perpetrator of a crime.³⁵ Evidence that a defendant had previously assaulted another victim by forcing the victim to disrobe, binding the victim's hands and feet with vines of ivy, tying the ivy in an unusual knot, and with a silver penknife proceeding to inflict stab wounds that formed the letter "V" on the victim's chest would probably be admissible to identify the defendant as the perpetrator of an assault carried out in a similar manner.³⁶

There are two ways to characterize the relevance of this other crime evidence. First, one might regard the similar assault as showing that the defendant has an individualized propensity for committing assaults in a unique manner. The inferential process of proof involved in viewing the evidence in this manner is identical to the inferential process of proof in the previously described uses of specific acts evidence.³⁷ Alternatively, one might argue that, regardless of the defendant's propensities, the other crime is relevant to identify the defendant simply because no other person would be likely to commit the crime charged in the same unusual manner. In other words, the similarity in methods of perpetration is better explained by the theory, derived from common experience, that one

33. The "group" can, but need not, be the entire population. Compare text accompanying note 27 *supra* (propensity of people generally to be truthful) with text accompanying notes 40-41 *infra* (propensity of guilty defendants to obstruct justice).

34. Compare note 41 and text accompanying notes 40-41 *infra* (defendant included) with text accompanying note 38 *infra* (defendant excluded).

35. See C. MCCORMICK, *supra* note 2, § 190, at 449 (characterizing this use of specific acts as proving that the crime in question was the "handiwork" of the defendant).

36. Cf. *Durns v. United States*, 562 F.2d 542, 544-45, 548 (8th Cir.), *cert. denied*, 434 U.S. 959 (1977) (evidence of attempted kidnapping of third person by similar means admissible in kidnapping prosecution).

37. Because the defendant has committed one unusual assault, the factfinder is asked to infer that the defendant has a propensity, not shared by people generally, to commit such assaults. This individualized propensity inference is based on the more general propensity inference that people who are violent on some occasion are more likely than people who have not been violent to behave violently on the occasion in question.

individualized" propensity inference of a defendant is not a propensity of any independently identifiable individual from the perspective of the factfinder, but *because* of his specific acts. Individualized propensity inferences of specific acts evidence involve "realized" propensity inference. In so regard the factfinder as beginning with individuals in some identifiable group in a particular manner.³³ Proof of the defendant as being included in a relevant group.³⁴

Recognized use of specific acts evidence of a defendant as the perpetrator of a previously assaulted another victim, including the victim's hands and feet in an unusual knot, and with a silver key that formed the letter "V" on the key, is possible to identify the defendant in a similar manner.³⁶

The relevance of this other crime is similar to an assault as showing that the defendant has a propensity for committing assaults in a particular manner. Proof of the defendant's propensity for committing assaults in a particular manner is relevant in viewing the defendant's propensity for committing assaults in a particular manner.³⁷ Alternatively, proof of the defendant's propensities, the defendant simply because no other methods of perpetration in the same unusual methods of perpetration is better than common experience, that one

entire population. Compare text accordingly to be truthful) with text accompanying the defendant's propensities to obstruct justice).

Notes 40-41 *infra* (defendant included) (defendant excluded).

Note 49 (characterizing this use of specific acts evidence as "handiwork" of the defendant).

Notes 544-45, 548 (8th Cir.), *cert. denied*, 1981 (finding of third person by similar means).

In an unusual assault, the factfinder is asked to identify the defendant by people generally, to commit the crime is based on the more general propensity of people on the occasion are more likely than people on the occasion in question.

individual (who we happen to know is the defendant) probably committed both crimes, rather than the theory that two individuals may have fortuitously perpetrated the crimes in the same manner. This view of the evidence, however, necessarily requires a generalized propensity inference. The only factor that makes commission of the other crime relevant to identify the perpetrator of the charged crime is the assumption that some individual had a propensity to commit both crimes, and this assumption is dependent upon the inference that people generally have a propensity *not* to perpetrate a crime in the same unusual manner in which another person has perpetrated a crime. Thus, proof that the defendant committed the prior crime places him outside the universe of people who share this generalized propensity. At the same time, such proof identifies the defendant as the individual having a propensity to commit the crime in an unusual manner.³⁸

A similar inferential process of proof is involved in cases in which the prosecutor offers to prove that a criminal defendant has intimidated a witness or attempted to obstruct justice in some other manner.³⁹ In one sense the obstruction evidence may be marginally relevant in a manner that would require the factfinder to make an individualized propensity inference. Proof that the defendant committed an illegal act by obstructing justice shows a propensity to act illegally, from which one can infer that the defendant acted illegally by committing the crime charged. Traditionally, however, obstruction evidence is not admitted for that purpose. Rather, it is admitted because the obstruction is viewed as an admission by the defendant that he is guilty of the crime charged.⁴⁰ Yet, the obstruction evidence is relevant as an admission only if one assumes that guilty criminal defendants in general have a propensity to obstruct justice in order to avoid the consequences of a possible guilty verdict. Proof of the defendant's obstruction identifies the defendant as belong-

38. Cf. Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 229 (1954):

[T]he similar fact evidence shows only that the accused had the common characteristic at [the time the prior crime was committed]. The commission of the crime [charged] shows only that the [perpetrator of the crime charged] had that characteristic at a particular but different time. . . . The accused is "identified" [as the perpetrator of the crime charged] . . . because the accused had the characteristic on previous occasions and he therefore is likely to have still had it on the instant occasion.

39. In contrast to the preceding hypotheticals, in which the specific act evidence involved conduct engaged in prior to the commission of the charged crime, the act of obstruction will have occurred subsequent to the charged crime. The timing of the crime charged and the other acts, however, has no necessary bearing on the nature of the inferential process of proof. In the preceding identity hypothetical, for example, it would not matter which of the two similar crimes was committed first. See *People v. Massey*, 196 Cal. App. 2d 230, 235, 16 Cal. Rptr. 402, 405-06 (1961) (similar burglary perpetrated subsequent to crime charged).

40. See G. McCORMICK, *supra* note 2, § 190, at 451.

ing to the class of people—in this case, 'guilty defendants—who share generalized propensity.⁴¹

For several reasons, the fact that the preceding identity and obstruction hypotheticals may appropriately be characterized as involving only generalized propensity is not a sufficient basis for distinguishing them from impermissible uses of specific acts evidence. First, the distinction between individualized and generalized propensity inferences obviously cannot account for the existing state of the law. As the analysis in the preceding section demonstrated,⁴² courts sometimes admit specific acts evidence that requires the factfinder to make an individualized propensity inference.

Second, the factors that justify exclusion of some specific acts are not necessarily minimized simply because the propensity inference is a generalized one. The problems of prejudice, time-consumption, and distraction of the factfinder from the central issues of the case exist because bad acts evidence is offered against the defendant, not because of the nature of the propensity inference.⁴³

Moreover, the probative value of the bad acts evidence is not dependent upon the nature of the propensity inference. Of course, in the absence of empirical data, one can make only an intuitive guess based on common experience about the probative value of any propensity inference. It seems plausible, however, to view the individualized propensity inference in the previously discussed intent hypotheticals⁴⁴ as at least as strong, if not stronger, than the generalized propensity inference underlying the use of specific acts of obstructing justice to show guilt. Innocent defendants may have nearly as great a propensity as guilty defendants to obstruct justice simply because they fear possible conviction.

41. An almost identical propensity inference is often the key to the relevance of specific acts evidence offered to show motive. *See id.* at 450-51. Consider, for example, a case in which the defendant is charged with the murder of a police officer who was approaching the defendant on the street. To show that the defendant had a motive for the killing and, therefore, committed the act or did so intentionally, the prosecutor offers evidence that 15 minutes before the killing the defendant had broken into a house. *See State v. Simborski*, 120 Conn. 624, 630, 182 A. 221, 224 (1936). To the extent that the evidence is relevant to show motive and not merely that the defendant is the type of individual who engages in antisocial behavior, the relevance of the evidence is dependent upon the assumption that people generally have a propensity to avoid situations that they perceive as the first step toward arrest and possible conviction. Or, on a more general level, the propensity to avoid arrest may be characterized as a propensity to maximize freedom of action. Proof of the robbery does not ascribe an individualized propensity to the defendant but rather it identifies him with a group of people, *see note 33 supra*, who have a propensity to avoid contact with the police.

42. *See text accompanying notes 28-32 supra*.

43. Some generalized propensity inferences can be characterized in terms that are sufficiently broad to make them appear on their face neutral. *See note 41 supra*. If the propensity inference cannot be articulated in neutral terms, however, it is only because the specific act which gives rise to the propensity inference is itself not neutral.

44. *See text accompanying and following notes 28-30 supra*.

tion. On the other hand, when a prior crime is offered to prove the defendant's identity as the perpetrator of the crime charged, the unusual manner in which both crimes were committed may make the evidence highly probative.⁴⁵

Finally, although the distinction between individualized and generalized propensity inferences may be helpful in describing the manner in which the factfinder is likely to view specific acts evidence,⁴⁶ the distinction itself is in one important sense illusory. In terms of the nature of the inferential process of proof, there is simply no qualitative difference between an individualized and a generalized propensity inference. Rather, the distinction is solely a function of how one initially describes the relevant inference. For example, in the previously discussed fistfight hypothetical,⁴⁷ the characterization of the inference from prior assaults to violence on the occasion in question as an individualized propensity inference was based on the premise that the factfinder is likely to view the evidence as showing that the defendant, unlike most other people, has a propensity for violent behavior. As the analysis pointed out, however, this view of the evidence is necessarily dependent upon the assumption, derived from common experience, that people who have been violent on some occasions have a propensity to be violent on other occasions. If one initially focuses on this general assumption, then proof of defendant's prior violence merely identifies the defendant as being within the relevant group of people sharing a generalized propensity. In short, the necessary inferences in the process of proof are identical regardless of whether one initially focuses on a generalized or an individualized propensity inference.

D. Permissible Generalized Propensity Inferences from a Defendant's Neutral Conduct

In some instances, traditionally admissible specific acts evidence that requires the factfinder to make a generalized propensity inference poses, at least in theory, no threat of prejudice. Consider, for example, a situation in which a prison escapee claims that his flight was a spontaneous response to duress, and the prosecutor then offers to prove that the prisoner had arranged to have a car waiting outside the prison wall at the time of the escape.⁴⁸ The specific acts involved in arranging for the

45. The probative value of similar crimes evidence to identify the defendant as the perpetrator of the crime charged probably depends not only on the uniqueness of the manner in which the crimes are perpetrated but also in part on the degree of publicity given to the means of perpetrating the crime or crimes that occurred earlier in time. The fact that an unusual method of perpetrating a crime is a matter of public knowledge may increase the likelihood that two or more individuals would perpetrate crimes in the same unusual manner.

46. See text accompanying notes 33-34 *supra*.

47. See text accompanying note 24 *supra*.

48. See *United States v. Cluck*, 542 F.2d 728, 736 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976).

car constitute plans made in preparation for the escape, and to rebut the duress claim the factfinder is asked to infer that individuals who plan a certain course of action tend to follow through with those plans.

This propensity inference is similar to the generalized propensity inferences discussed in the preceding section: The propensity for acting in conformity with one's intentions is an attribute that the factfinder, on the basis of common experience, would tend to ascribe to people generally, and the defendant's actions merely suggest what the particular intention is. In contrast to the specific acts in all of the previously discussed hypotheticals, however, making arrangements for a car to be at a particular location at a specified time is "neutral." It is not a crime to engage in such conduct, nor is the conduct morally blameworthy. Thus, proof of the specific acts would not have a prejudicial impact on the factfinder.⁴⁹ Moreover, since the specific acts that show the defendant's propensity are themselves neutral, the characterization of the propensity manifested by those acts—in this case a generalized propensity to follow through with one's intentions—is also necessarily neutral and, therefore, nonprejudicial.⁵⁰

A similar situation may arise when the prosecutor offers specific acts evidence to show a defendant's knowledge.⁵¹ If a defendant accused of heroin possession claims that he did not know that the substance was heroin, the prosecutor would be permitted to rebut this claimed lack of knowledge by showing that the defendant on previous occasions had knowingly possessed heroin.⁵² From knowledge on a previous occasion, the factfinder is asked to infer knowledge on the present occasion, and this is a type of generalized propensity inference: A person who has obtained knowledge of some fact has a propensity to retain that knowledge.⁵³ As was true in the escape hypothetical, the propensity

49. Evidence is prejudicial only if it may lead the factfinder to reach a decision on the ground that an individual is a bad (or good) person rather than solely on the strength of the proof that the individual engaged in the conduct in question. See note 3 *supra* and accompanying text.

50. The particular intent—the intent to escape—inferred from the planning activity is not "neutral" in the sense of being nonculpable, but it is neutral in the sense of being nonprejudicial. Proof of this intent is essential to establish the defendant's guilt.

51. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 220.

52. See *United States v. Wixom*, 529 F.2d 217, 219-20 & n.2 (8th Cir. 1976), discussed in S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 141-42 (2d ed. 1977).

53. One might argue either (1) that possession is not an *act* or (2) that obtaining knowledge is not a *physical* act, and that, therefore, the specific acts evidence rules should be inapplicable to this situation. The first argument should be rejected because it is the mental process of obtaining knowledge that is relevant to the case, and the second argument is only another way of stating that the activity in question is neutral: one does not normally associate moral culpability with the mere acquisition of knowledge. As the following textual analysis will point out, the theoretically neutral nature of the prior activity is not a sufficient basis for distinguishing between admissible and inadmissible evidence of prior activity.

In fact, courts and commentators traditionally treat prior possession—at least if it is

SPECIFIC ACTS EVIDENCE

OWA LAW REVIEW 777 [1981]

for the escape, and to rebut the inference that individuals who plan a breakthrough with those plans.

to the generalized propensity inference: The propensity for acting is attributed to the factfinder, not to people generally, and is not what the particular intention is. All of the previously discussed inferences for a car to be at a particular location are "neutral." It is not a crime to be in a morally blameworthy location. Thus, the prejudicial impact on the factfinder that shows the defendant's prior characterization of the propensity for a generalized propensity to follow is not necessarily neutral and, therefore,

the prosecutor offers specific acts evidence.⁵¹ If a defendant accused of a crime knows that the substance was not on previous occasions had evidence on a previous occasion, on the present occasion, and the inference: A person who has a propensity to retain that propensity hypothetical, the propensity

factfinder to reach a decision on the matter other than solely on the strength of the evidence in question. See note 3 *supra* and

inferred from the planning activity it is neutral in the sense of being sufficient to establish the defendant's guilt. See note 3, at 220.

20 & n.2 (8th Cir. 1976), discussed in EVIDENCE MANUAL 141-42 (2d ed.

is not an act or (2) that obtaining the specific acts evidence rule is not rejected because it is relevant to the case, and the second question in question is neutral: one does not acquire knowledge. As the neutral nature of the prior act is an admissible and inadmissible

prior possession—at least if it is

inference here is a neutral one, and at least if the act of prior possession occurred in the defendant's capacity as a former narcotics officer or in some other legal context, evidence of the prior possession would not itself be prejudicial.

Despite the absence of a potential for prejudice in the preceding examples, the concerns underlying the exclusion of some specific acts evidence are not diminished simply because the relevant specific acts and, therefore, the relevant propensity inferences are neutral. If there is a dispute about the act or nature of the defendant's involvement in the act, the problem of distracting the factfinder with possibly time-consuming litigation of a collateral matter remains. More importantly, the specific acts that give rise to the neutral propensity inference may not themselves be neutral. The specific instances of prior possession by a heroin defendant are likely to have been instances of illegal possession, and the prison escapee's activity in arranging for a car may have included a plan to have a stolen car at the prison wall. Although the illegal nature of these prior acts is not itself relevant to the required propensity inference, informing the factfinder of the illegality of the acts creates the same potential for prejudice that inheres in the other uses of specific bad acts.

There may, of course, be instances in which the illegality of the specific act is sufficiently incidental that the illegality need not be mentioned to the factfinder. Perhaps, for example, the escapee's plan to have a car outside the prison wall could be adequately explained without any reference to the car theft. In other cases, however, it may be impossible to present adequate proof of the acts without at least an implicit suggestion of their illegality. Consider, for example, the possibility of introducing evidence of prior heroin possession without specific details showing that the possession was illegal. The factfinder may in any event assume that the possession was illegal, in which case avoiding more detailed information about the incident would not minimize the potential prejudice. Alternatively, the factfinder may expect that any proof of prior possession will encompass details of the possession. In such a situation, the unexplained failure to present the details may lead the factfinder to disbelieve a truthful assertion of prior possession.⁵⁴

There undoubtedly will be instances in which the probative value of a neutral propensity inference coupled with the practical necessity of explaining the illegal nature of the prior act that gives rise to the inference will outweigh the countervailing concerns of prejudice, consumption of time, and distraction from the central issues of a case. The point

illegal—as being governed by the specific acts evidence rules. See authorities cited in notes 51-52 *supra*. See also FED. R. EVID. 404(b) (defining specific acts evidence rule in terms of "other crimes, wrongs, or acts") (emphasis added).

54. See generally Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011 (1978).

to be made here is simply that the existence of a theoretically neutral specific act and propensity inference does not necessarily minimize any of the concerns that exist in contexts in which bad acts are relevant in a propensity sense.

E. Permissible Generalized Inferences from the Conduct of Third Persons

In a relatively small number of cases in which specific acts evidence is offered, the relevance of the evidence arguably is not dependent on a propensity inference. Consider, for example, a murder prosecution in which the state's theory is that the victim was killed with a .38-caliber pistol, and the prosecutor offers to prove that two days prior to the murder the defendant stole such a pistol.⁵⁵ Or consider a prosecution for theft from a liquor store in which the prosecutor offers evidence that two hours before the theft the defendant held up a filling station in the same neighborhood.⁵⁶

The evidence in each case is admittedly relevant in a propensity sense. The factfinder might infer that people who steal guns have a propensity to murder or that people who hold up filling stations have a propensity to steal from liquor stores. The relevance of the evidence, however, is not dependent upon these propensity inferences. Mere possession of the weapon shows the ability of the murder defendant to commit the homicide. Similarly, presence in the neighborhood shows the ability of the theft defendant to commit the crime.

If evidence in either of these examples is offered solely to show that the defendant had the ability to commit the crime, there are two bases for characterizing evidence as falling outside the propensity prohibition. First, the prohibition is applicable only to specific acts evidence,⁵⁷ and possession or presence arguably is not an "act" within the meaning of the prohibition.⁵⁸ Second, evidence that shows only the physical capability of committing an act does not show a tendency to commit the act and, therefore, is arguably not "propensity" evidence.

55. *Cf. United States v. Waldron*, 568 F.2d 185, 187 (10th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978) (prosecution for bank robbery; to show defendant had possession of weapons used in robbery and found in getaway car, prosecution permitted to introduce evidence of defendant's prior theft of the weapons); *United States v. Leftwich*, 461 F.2d 586, 589 (3d Cir. 1972) (prosecution for bank robbery in which prosecutor permitted to show that three days prior to robbery defendant stole getaway car).

56. *Cf. United States v. Cover*, 560 F.2d 1010, 1013 (8th Cir. 1977) (prosecution for interstate transportation of stolen automobile in which prosecutor permitted to show that several days before theft defendant escaped from prison located near place of theft).

57. *But see* FED. R. EVID. 404(b) (rule applicable to "other crimes, wrongs, or acts") (emphasis added).

58. *Cf. note 53 supra* (discussion of illegal possession offered to prove mental activity in acquiring knowledge).

a theoretically neutral
necessarily minimize any of
acts are relevant in a

n the Conduct

specific acts evidence
is not dependent on a
murder prosecution in
ed with a .38-caliber
vo days prior to the
der a prosecution for
ers evidence that two
g station in the same

ant in a propensity
real guns have a pro-
stations have a pro-
e of the evidence,
y inferences. Mere
urder defendant to
neighborhood shows the

solely to show that
here are two bases
ensity prohibition.
ts evidence,⁵⁷ and
he meaning of the
ysical capability of
mit the act and,

. 1977), cert. denied,
ant had possession of
mitted to introduce
y. Leftwich, 461 F.2d
secutor permitted to

977) (prosecution for
mitted to show that
r place of theft).
es, wrongs, or acts")

rove mental activity

Nonetheless, the relevance of the evidence ultimately depends upon an inference that is at least very similar to the previously described propensity inferences. For example, just as the factfinder may be asked to infer, on the basis of common experience, that people who behave violently on some occasions are more likely than other people to behave violently on a specific occasion, the factfinder is asked to infer, on the basis of common experience, that people who possess the instrumentalities for committing a crime or who are near the scene of a crime are more likely than other people to commit the crime.⁵⁹

Even if one does not attach the propensity label to evidence offered to show the ability of a defendant to commit a crime, there is no practical justification for distinguishing such evidence from the previously discussed proof of theoretically neutral acts that require a neutral generalized propensity inference. In both instances, the evidence shares the following characteristics: First, there are potential problems of time consumption and distraction of the factfinder in litigating possibly disputed collateral issues; second, the illegal or "bad" nature of the specific acts is not critical to the relevance of the evidence; third, it may nonetheless be practically impossible to explain adequately the relevance of the evidence without reference to the illegal nature of the acts; fourth, if the illegality is explained to the factfinder, the evidence is potentially prejudicial; and fifth, in some instances the probative value of the evidence may outweigh the countervailing concerns of prejudice, consumption of time, and distraction of the factfinder.⁶⁰

The frequent characterization of the specific acts evidence rule as a prohibition against the use of specific acts for propensity purposes suggests that the scope of the prohibition depends upon the nature of the inferential process of proof involved in the use of specific acts evidence. Thus, the preceding discussion classified specific acts evidence in terms of the inferential process in which the factfinder must engage to find the evidence relevant. As the analysis pointed out, many of the traditionally permissible uses of specific acts evidence necessarily require the factfinder to make a propensity inference. Moreover, although there are minor variations in the process of proof among the different uses of specific acts evidence, these variations do not correspond with the tradi-

59. Cf. text preceding note 27 *supra* (discussion of alibi evidence).

60. These same factors are present in one type of situation in which specific acts evidence is offered for what is clearly in theory a nonpropensity purpose. Occasionally, courts will admit evidence of other crimes committed in close physical and temporal proximity to the crime charged to help complete the story of the crime charged. See *State v. Villavicencio*, 95 Ariz. 199, 201, 388 P.2d 245, 246 (1964). Apparently the theory underlying this use of specific acts evidence is that in the absence of the evidence, the factfinder would have an incomplete and possibly misleading picture of the nature of the defendant's involvement in the crime charged. See *United States v. Carrillo*, 561 F.2d 1125, 1127 (5th Cir. 1977). See generally note 54 *supra* and accompanying text.

tional distinctions between admissible and inadmissible specific acts evidence, nor do they relate to the underlying rationales for excluding some specific acts evidence. Therefore, neither the existence of a propensity inference nor any other factor inherent in the inferential process of proof provides a viable basis for giving content to a rule prohibiting the use of some specific acts evidence.

II. THE MEANING OF CHARACTER

The initial discussion of the prohibition against the use of specific acts to prove character to show action in conformity with character suggested two attributes inherent in the concept of character: a connotation of some moral quality and an implication about the manner in which an individual is likely to behave.⁶¹ As the preceding analysis has shown, however, there is not and probably should not be an absolute prohibition against the use of specific bad acts for propensity purposes. Thus, in giving content to the prohibition against the use of some specific acts evidence, one cannot simply equate character evidence with propensity evidence. All character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence. The question, therefore, necessarily arises whether one can give some additional independent content to the term character or character trait.

There would appear to be only two substantially overlapping factors that may be helpful in distinguishing character evidence from other bad acts propensity evidence. First, case law and scholarly commentaries dealing with specific acts evidence suggest that the character label is used when the evidence has an indirect bearing on an issue and, therefore, a relatively low probative value.⁶² For example, evidence of a defendant's previous assaults on third persons offered to prove that the defendant was the first aggressor would probably be regarded as impermissible character evidence.⁶³ Evidence of previous assaults by the defendant on the murder victim, however, might not be regarded as character evidence.⁶⁴ Second, simply as a matter of common usage, describing a particular propensity as a character trait may seem more appropriate in some instances than in others. Thus, an individual's propensity for violence demonstrated by assaults on various third persons might readily be described as a character trait for violence. In contrast, violence directed only against a particular individual arguably does not manifest a propensity that is commonly thought of as a "character trait."

61. See text accompanying notes 6-10 *supra*.

62. See, e.g., *United States v. Beechum*, 582 F.2d 898, 910-11 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), discussed at text accompanying notes 101-25 *infra*; R. LEMPERT & S. SALTZBURG, *supra* note 3, at 211-12; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 124-25 (1978).

63. See text accompanying notes 22-24 *supra*.

64. See note 29 *supra* and accompanying text.

This general sense of what constitutes character is an inadequate basis for distinguishing between permissible and impermissible uses of specific acts evidence for propensity purposes. First, it is simply too imprecise for meaningful application on a case-by-case basis. For example, even if one concludes that in a murder prosecution evidence of the defendant's assaults on random third persons would be regarded as inadmissible character evidence but that previous assaults on only the victim would be viewed as noncharacter and, therefore, potentially admissible evidence, how should the following evidence be classified: previous assaults against only those third persons who, like the murder victim, are (a) all redheads, (b) all members of the same family, (c) all between the ages of four and six, or (d) all between the ages of twenty and twenty-five? Perhaps it would be appropriate to view the fact that the various victims happened to be between the ages of twenty and twenty-five as fortuitous and, therefore, to place the character label on this evidence. It is less clear, however, which, if any, of the other proofs of specifically directed violence should be regarded as manifesting a character trait.

Second, and more importantly, the general sense of what constitutes a character trait is not sufficiently related to the factors which justify excluding some specific acts evidence.⁶⁵ The prohibition against use of specific acts to prove character to show action in conformity with character encompasses one of these factors: Specific act character evidence tends to have a relatively low probative value. There is no necessary relationship, however, between some independently derived notion of what constitutes a character trait and problems of prejudice, time consumption, and distraction of the factfinder from the central issues of the case. The time consumption and distraction concerns arise whenever the prior acts are numerous or there is a dispute about the nature of the act or a party's participation in it. These potential problems are in no way dependent upon whether the acts tend to show something that might be labeled a character trait.

Similarly, the potential for prejudice from specific acts evidence is not related to the question whether the evidence is offered to prove character or to show some other fact. Potential prejudice exists whenever there is a danger that the factfinder will be influenced not simply by the probative value of the evidence but also by its conclusion that a party is a bad person and, therefore, particularly deserving of punishment.⁶⁶ Any bad act, of course, has the potential for influencing the factfinder's decision in such a manner, and thus in one sense any specific bad act is evidence of a general character for badness. Yet, it is clear from the established precedent for permitting bad acts to be used in a propensity sense to prove such issues as motive, intent, or identity that this general

65. See note 4 and text accompanying notes 2-3 *supra*.

66. See note 3 *supra* and accompanying text.

way in which bad acts tend to show character is not sufficient to place the acts within the character evidence prohibition.

The primary determinants in applying the character prohibition appear to be the probative value of the specific acts evidence and whether the relevant propensity can, as a matter of common usage, readily be labeled as a character trait. Prejudice, however, is not a function of either of these factors. The degree of prejudice associated with any specific act evidence is a function of how the factfinder is likely to respond to the badness of the act. Consider, for example, two prosecutions for heroin possession. In one case the defendant claims he did not know the substance was heroin. In the other the defendant claims that the heroin was in the sole possession of his companion. To rebut the first defendant's claimed absence of knowledge, the prosecutor offers to prove that the defendant had previously sold heroin to school children. To establish the second defendant's possession the prosecutor offers to prove that on two previous occasions the defendant had possessed heroin. The latter evidence is more likely than the former to fall within the character evidence prohibition,⁶⁷ but in the eyes of the factfinder the sale of heroin to school children is likely to be more prejudicial.

Although the term character is frequently the focal point of the rules governing the admissibility of specific acts evidence, the preceding analysis has shown that the concept of character does not adequately embrace the justifications for exclusion of some specific acts evidence. To illustrate this proposition more fully and to demonstrate the potential consequences of the failure on the part of rule drafters to deal with this problem, the analysis will now turn to an evaluation of the specific acts evidence provisions in the Federal Rules of Evidence.

III. THE FEDERAL RULES APPROACH TO SPECIFIC ACTS EVIDENCE⁷

Federal Rule of Evidence 404(b) is a typical formulation of the inclusionary approach to specific acts evidence.⁶⁸ It provides an absolute prohibition against the use of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." It further provides that such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, [etc.]."⁶⁹

67. Compare *United States v. Bloom*, 538 F.2d 704, 711 (5th Cir. 1976) (Tuttle & Clark, JJ., concurring specially), cert. denied, 429 U.S. 1074 (1977) (prior narcotics sales evidence offered to show "a willingness of the defendant to deal in drugs generally" is improper character evidence) (quoting trial judge) with *People v. Cervantes*, 177 Cal. App. 2d 197, 190, 2 Cal. Rptr. 107, 109 (1960) (evidence of other similar narcotics offenses admissible to show "defendant's knowledge of the narcotic nature of the substance").

68. See text accompanying notes 14-17 *supra*.

69. The full text of FED. R. EVID. 404(b) reads as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the

As a traditional statement of the inclusionary approach, rule 404(b) is commendable for several reasons. First, the rule has the virtue of dealing with the admissibility of specific acts evidence in terms that are likely to be familiar to trial attorneys and judges, who have primary responsibility for their application. Second, whether by design or not, the rule avoids the term "propensity." Third, the prohibition against specific acts to prove character provides at least symbolic recognition that it is important to be cautious about the use of specific acts evidence. Fourth, by providing that specific acts evidence may be admissible "for other purposes, such as proof of motive,"⁷⁰ rule 404(b) makes it clear that its list of permissible purposes is not exclusive and that there is no need to pigeonhole the evidence into one of the traditional permissible categories.⁷¹ Finally, by providing that the evidence "may" be admissible for other purposes, the rule suggests that admissibility for some legitimate purpose is not automatic.⁷² Rather, as the Advisory Committee's Note explicitly states,⁷³ the admissibility decision should be made in light of rule 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed 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."⁷⁴

Despite these positive features of rule 404(b), serious consideration should be given to amending it. As the preceding analysis has shown, neither the frequent equation of "character evidence" with "propensity evidence"⁷⁵ nor the term "character" itself⁷⁶ provides a viable basis for

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.

70. *Id.* (emphasis added).

71. See text accompanying note 16 *supra*.

72. See text accompanying note 16 *supra*.

73. Advisory Committee's Note, FED. R. EVID. 404(b), 56 F.R.D. 183, 221 (1972); see note 74 *infra*.

74. FED. R. EVID. 403.

It is not clear whether the rule 404(b) Advisory Committee's Note reference to rule 403 is intended to suggest that the rule 403 balancing test itself, which favors admissibility, see text accompanying and following notes 98-99 *infra*, should be applied to specific acts evidence. The rule 404(b) Advisory Committee's Note states:

The determination must be made whether the danger of undue prejudice outweighs [not substantially outweighs] the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.

Advisory Committee's Note, FED. R. EVID. 404(b), 56 F.R.D. 183, 221 (1972); see *United States v. Beechum*, 582 F.2d 898, 923 n.16 (1978) (en banc) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979) ("The Note's reference to Rule 403 is only to the kinds of facts 'appropriate' under Rule 403, not to that rule's 'substantially outweighed' test.").

75. See text accompanying notes 19-60 *supra*.

76. See text accompanying notes 61-67 *supra*.

distinguishing between the permissible and impermissible uses of specific acts evidence. Particularly because the Federal Rules of Evidence have been utilized and probably will continue to be utilized as a model for state evidentiary rules,⁷⁷ it is unfortunate that the Federal Rules do not provide a more satisfactory approach to the problem.

A second problem with rule 404(b) is its inconsistency with the basic approach of the Federal Rules to questions of admissibility. Rule 404(b) contemplates the use of a balancing test to evaluate the admissibility of specific acts evidence falling outside the character prohibition,⁷⁸ and as a result, the rule recognizes that on some occasions specific acts evidence which is not character evidence will be inadmissible. Therefore, the term character cannot be simply a label attached to all inadmissible specific acts evidence. As noted previously,⁷⁹ however, if "character" is given some independent content, the only thing that is likely to distinguish specific act character evidence from other specific act propensity evidence is the relatively low probative value of the former. In short, the only functional purpose served by the prohibition against specific acts to prove character to show action in conformity with character is to exclude evidence of low probative value.

No other federal rule of evidence serves a similar purpose. Rather, the entire thrust of the Federal Rules is to favor the admissibility of even marginally probative evidence unless there is some important reason to exclude it. The basic definition of relevance in rule 401 requires only a minimal relationship between an item of evidence and the proposition it is offered to prove,⁸⁰ and rule 402 provides that "all relevant evidence is admissible, except as otherwise provided" by the Constitution, a statute, or court rule.⁸¹ Rule 403 provides that relevant evidence "may be excluded if its probative value is *substantially outweighed*"⁸² by countervailing considerations such as prejudice or consumption of time, and each of the specific exclusionary provisions in the Federal Rules, except the provision in rule 404(b), is based primarily on factors other than low probative value. For example, the hearsay rule⁸³ is based on the premise that the factfinder may not fully appreciate the extent to which out-of-court declarations may be fabricated or inaccurate;⁸⁴ the prohibition against introducing evidence of offers of compromise to show liability⁸⁵ is

77. See, e.g., NEV. REV. STAT. §§ 27-101 to -1103 (1979); N.M. STAT. ANN. §§ 101-1102 (1978); N.D. CENT. CODE §§ 101-1102 (1974 & Supp. 1979).

78. See text accompanying notes 72-74 *supra*.

79. See text accompanying notes 62-64 *supra*.

80. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 140-50. For the text of rule 401, see note 1 *supra*.

81. FED. R. EVID. 402.

82. FED. R. EVID. 403 (emphasis added), reproduced in part at text accompanying note 74 *supra*.

83. FED. R. EVID. 801-802.

84. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 330-37.

85. FED. R. EVID. 408.

based primarily on the ground that exclusion of this evidence facilitates out-of-court settlements;⁸⁶ the restrictions on the use of prior convictions to impeach a witness⁸⁷ are based on large measure on the potentially prejudicial impact of such evidence.⁸⁸

A third reason for reevaluating rule 404(b) is the fact that the rule may inadvertently have liberalized the extent to which specific acts evidence is admissible. The primary purpose of the prohibition against the use of specific acts evidence to prove character traditionally has been to protect against the use of prejudicial specific acts evidence except in those situations in which the specific acts have a fairly direct bearing on some critical issue in a case.⁸⁹ There is no substantial indication that the drafters of the Federal Rules intended to depart from this purpose.⁹⁰ Nonetheless, rule 404(b), when it is applied in conjunction with other rules to concrete issues of admissibility, may in fact offer very little protection against the use of specific acts evidence.

As noted previously,⁹¹ the question of admissibility is most likely to arise in a criminal prosecution when the prosecutor offers specific bad act evidence against the defendant. Since the defendant's culpability will in some sense almost always be an issue, a prosecutor should have no difficulty in overcoming the minimal relevance hurdle of rule 401⁹² with respect to almost any bad act allegedly committed by the defendant. Moreover, given the elusive nature of the term "character"⁹³ and the fact that the list of permissible uses for specific acts evidence in rule 404(b) is not exclusive,⁹⁴ it should be relatively easy for an imaginative prosecutor to articulate some noncharacter purpose for which any particular specific act is relevant.

Once the relevance and character hurdles have been overcome, there are likely to be only two bases for excluding the evidence. First, the

86. See R. LEMPert & S. SALTzBURg, *supra* note 3, at 191-93.

87. FED. R. EVID. 609.

88. See R. LEMPert & S. SALTzBURg, *supra* note 3, at 272-77.

89. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979); *id.* at 918-19 (Goldberg, J., dissenting); *United States v. Fosher*, 568 F.2d 207, 212 (1st Cir. 1978); C. MCCORMICK, *supra* note 2, § 188, at 445, § 190, at 447-48.

90. Congress amended the beginning of the second sentence of the Supreme Court's proposed rule 404(b) by replacing the words "this subdivision does not exclude evidence when offered" with "[i]t may, however, be admissible." See H.R. REP. NO. 93-650, 93d Cong., 1st Sess. (1973) reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081. According to the Report of the House Judiciary Committee, this amendment "properly placed greater emphasis on admissibility than did the final Court version." *Id.* It is not clear, however, whether this concern with "emphasis of admissibility" was one of substance or form. See note 74 *supra*. See also 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 47-49 (1975).

91. See note 3 and text preceding note 22 *supra*.

92. See note 1 and text accompanying note 79 *supra*.

93. See text accompanying notes 6-10, 61-65 *supra*.

94. See text accompanying notes 70-71 *supra*.

defendant may object that he did not in fact commit the prior act or that his involvement with it was not as culpable as the prosecutor's evidence suggests. This objection, however, is itself a relevance objection: If the defendant did not commit the prior act or did not do so with the culpability suggested by the prosecutor's evidence, the specific act is simply not probative or at least not as probative as it otherwise would be.

When the relevance of evidence "depends upon the fulfillment of a condition of fact"⁹⁵—in this case showing the culpable nature of the defendant's involvement in the prior act—Federal Rule of Evidence 104(b) provides that the condition is satisfied by "the introduction of evidence sufficient to support a finding of the fulfillment of the condition."⁹⁶ Thus, the court would overrule the defendant's objection if the factfinder could reasonably believe the prosecutor's version of the defendant's involvement with the prior act.⁹⁷ In a case involving conflicting evidence on this issue, the rule 104(b) test is likely to be satisfied.

The defendant's final, and probably best, argument for excluding specific acts evidence would be that the judge should apply rule 403⁹⁸ to exclude relevant but prejudicial, distracting, and time-consuming evidence.⁹⁹ In contrast to the traditional notion that prejudicial specific acts evidence should not be admitted unless there is a good reason to do so, however, rule 403 provides that a court may exclude relevant evidence only if its probative value is "substantially outweighed" by the countervailing factors. Thus, the balance is likely to be struck in favor of admissibility.

Although some courts have taken the position that the Federal Rules of Evidence merely codified the existing law with respect to specific acts evidence,¹⁰⁰ a recent Fifth Circuit case, *United States v.*

95. FED. R. EVID. 104(b).

96. *Id.*

97. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 1133-37. See generally Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978).

98. FED. R. EVID. 403, reproduced in part at text accompanying note 74 *supra*.

99. The existence of a dispute regarding the defendant's involvement in the prior acts could strengthen or provide an independent basis for the defendant's rule 403 objection. Even if the rule 104(b) preliminary fact test is satisfied, see text accompanying notes 95-97 *supra*, doubt about the defendant's involvement in the prior acts tends to diminish the probative value of the evidence, and litigating the question of the defendant's involvement could be distracting and time consuming.

100. See, e.g., *United States v. Jacobson*, 578 F.2d 863, 866 (10th Cir.), cert. denied, 439 U.S. 932 (1978); *United States v. Long*, 574 F.2d 761, 765 (3d Cir.), cert. denied, 439 U.S. 985 (1978); *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977).

In some circuits there appears to be no substantial difference between the method of analysis employed prior to the adoption of the Federal Rules and method of analysis mandated by a literal reading of the Federal Rules. See, e.g., *United States v. Long*, 574 F.2d 761, 765-66 (3d Cir.), cert. denied, 439 U.S. 985 (1978). Compare *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974) with *United States v. Masters*, 622 F.2d 83, 85-86 (4th Cir. 1980). Other circuits, however, continue to

Beechum,¹⁰¹ illustrates how a literal reading of the Federal Rules may increase the extent to which specific acts evidence is admissible. *Beechum*, a substitute letter carrier, was suspected of stealing items from the mail, and in an attempt to verify this suspicion, postal inspectors placed an envelope containing a silver dollar in a mailbox on *Beechum*'s route. When the envelope was brought to the post office, the inspectors found the silver dollar missing and subsequently arrested *Beechum*. A search incident to his arrest revealed that *Beechum* was in possession of the silver dollar and two unsigned credit cards issued in the names of people on *Beechum*'s mail route. *Beechum* was charged with possession of the silver dollar with knowledge that it had been stolen from the mail. He based his defense on the claim that he had found the silver dollar in the mailbox and had planned to return it.¹⁰² The question before the Fifth Circuit was whether the trial judge erred in admitting evidence showing *Beechum*'s possession of the two credit cards.

The court began its analysis by equating rule 404(b) with the "venerable principle" that specific acts evidence "should not be admitted *solely* to demonstrate the defendant's bad character."¹⁰³ At the same time, the court acknowledged that specific acts evidence "relevant to an issue such as intent" may be admissible,¹⁰⁴ and concluded that the credit card evidence was relevant to show intent *if* *Beechum* had stolen the credit cards.¹⁰⁵ Although there was no direct evidence that *Beechum* had wrongfully acquired the cards, the question of the defendant's wrongful acquisition was simply one of relevance.¹⁰⁶ The court found that the evidence was sufficient to permit the factfinder to infer wrongful acquisition¹⁰⁷ and, therefore, concluded that the evidence should be admissible unless, pursuant to rule 403, its probative value was substantially outweighed by the danger of unfair prejudice.¹⁰⁸ After an extensive and thoughtful consideration of the factors relevant to balancing probative value and prejudice, the court held that it was proper to admit the credit card evidence.¹⁰⁹

The court's conclusion that the question whether *Beechum* wrongfully possessed the credit cards was simply a question of relevance—although consistent with a literal reading of the Federal Rules¹¹⁰—consti-

apply limitations on the use of specific acts evidence that are inconsistent with a literal reading of the Federal Rules. *See, e.g.*, authorities cited at note 112 *infra*.

101. 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

102. *Id.* at 903-05.

103. *Id.* at 910 (emphasis added).

104. *Id.*

105. *Id.* at 912-13.

106. *Id.* at 913; *see* text accompanying notes 95-96 *supra*.

107. 582 F.2d at 916.

108. *Id.* at 913, 916.

109. *Id.* at 914-15 & nn.18-20, 917.

110. *See* text accompanying notes 95-97 *supra*.

tuted an explicit departure from precedent. Prior to *Beechum*, the Fifth Circuit had taken the position,¹¹¹ still adhered to in some circuits,¹¹² that the relevant aspects of the specific acts evidence must "be established by plain, clear, and convincing evidence."¹¹³ *Beechum's* rejection of this requirement will permit proof of specific acts that might not previously have been admitted because of a dispute about the nature of the defendant's involvement in those acts.

Even in cases in which the defendant's culpability with respect to the prior acts is clearly established, *Beechum's* analysis may have expanded the permissible uses of specific acts evidence. The court assumed that rule 404(b) "establish[es] two watertight compartments: extrinsic acts evidence which relates 'solely to . . . the defendant's character' . . . and that which is relevant for other purposes."¹¹⁴ As the dissent in *Beechum* pointed out, however, "there simply are no such watertight compartments to be found . . ."¹¹⁵ Indeed, "evidence which is probative 'solely' of bad character and not of any fact related to the elements of the crime . . . is irrelevant."¹¹⁶ Moreover, specific acts evidence offered against a defendant is unlikely to be irrelevant, for "it is nearly impossible to imagine any 'extrinsic offense' which . . . did not . . . have at least some tendency to make it less probable than it would be without the evidence" that the defendant was innocent.¹¹⁷ Evaluating the admissibility of such evidence solely in terms of the rule 403 balancing test,¹¹⁸ which favors admissibility,¹¹⁹ would, in the dissent's view, substantially increase the extent to which prejudicial specific acts evidence is admissible.¹²⁰

The impact of *Beechum* on cases in which the defendant's culpability with respect to prior acts is clearly established depends ultimately on how courts apply the rule 403 balancing test in individual cases. In terms of the question of admissibility, it does not appear from the published opinions that the Fifth Circuit subsequent to *Beechum*¹²¹ has departed substantially from its prior case law or from the law in circuits which view the Federal Rules as merely incorporating the traditional approach to

111. See *United States v. Broadway*, 477 F.2d 991, 995 (5th Cir. 1973).

112. See, e.g., *United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980); *United States v. Herrera-Medina*, 609 F.2d 376, 379-80 (9th Cir. 1979); *United States v. Dolliole*, 597 F.2d 102, 106-07 (7th Cir.), cert. denied, 442 U.S. 946 (1979). See also *United States v. Maestas*, 554 F.2d 834, 836-37 n.2 (8th Cir.), cert. denied, 431 U.S. 972 (1977).

113. *United States v. Beechum*, 582 F.2d at 910 & n.12.

114. *Id.* at 920 (Goldberg, J., dissenting).

115. *Id.* (Goldberg, J., dissenting).

116. *Id.* (Goldberg, J., dissenting).

117. *Id.* at 921 (Goldberg, J., dissenting) (emphasis original).

118. See text accompanying note 108 *supra*.

119. See text accompanying and following notes 98-99 *supra*.

120. 582 F.2d at 921 (Goldberg, J., dissenting); see note 74 *supra*.

121. See, e.g., *United States v. Shavers*, 615 F.2d 266, 271 (5th Cir. 1980); *United States v. Foshee*, 606 F.2d 111, 112 n.3 (5th Cir. 1979); *United States v. Smith*, 605 F.2d 839, 845 (5th Cir. 1979).

specific acts evidence.¹²² Nonetheless, as the *Beechum* dissent correctly pointed out, the majority's "venerable principle"¹²³ that specific acts are inadmissible to prove character to show action in conformity with character rests on the premise "that extrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence."¹²⁴ The analytical approach of the majority, however, would make all specific acts evidence admissible unless its prejudicial impact "substantially outweighed"¹²⁵ its probative value.

IV. A RATIONAL APPROACH TO SPECIFIC ACTS EVIDENCE

Since neither "propensity"¹²⁶ nor "character"¹²⁷ is a concept that provides a viable basis for distinguishing between permissible and impermissible uses of specific acts evidence, the prohibition against use of specific acts to prove character to show action in conformity with character can serve only two functions. First, it provides a seemingly convenient label—character (or propensity)—that can be used in a shorthand fashion to describe inadmissible specific acts evidence. Some formulations of the specific act prohibition, however, explicitly contemplate that a balancing of probative value and prejudice may result in the exclusion of noncharacter specific acts evidence.¹²⁸ Thus, the utility of the term character as a label for inadmissible specific acts evidence is marginal. Moreover, whatever convenience the label may have is more than offset by the fact that it is derived from a rule that on its face appears to impose an independent substantive limitation on the use of specific acts evidence. Finally, there is simply no need for an evidentiary rule the function of which is only to provide a label for describing some inadmissible evidence.

Second, the prohibition against use of specific acts to prove character constitutes a symbolic recognition of the need to be cautious about admitting specific acts evidence.¹²⁹ It would be preferable, however, to have a rule which addresses the problems inherent in the use of specific acts evidence directly rather than symbolically. The analysis here will suggest that such a rule could easily be formulated.

The first step in a rational approach to the admissibility of specific acts evidence would be to abolish the purported distinction between

122. See note 100 *supra* and accompanying text.

Given the intuitive manner in which one must evaluate both probative value and prejudice, see notes 2-3 *supra*, this conclusion is necessarily impressionistic.

123. 582 F.2d at 910.

124. *Id.* at 920 (Goldberg, J., dissenting).

125. FED. R. EVID. 403 (emphasis added).

126. See text accompanying notes 19-60 *supra*.

127. See text accompanying notes 61-67 *supra*.

128. See FED. R. EVID. 404(b), discussed at text accompanying notes 78-79 *supra*.

129. See *United States v. Beechum*, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979).

character and noncharacter or propensity and nonpropensity evidence, and to state simply and directly that the admissibility of specific acts evidence depends on a careful balancing of probative value against the concerns with prejudice, time consumption, and distraction of the factfinder. There is ample precedent for use of such a balancing test in a variety of contexts.¹³⁰ Moreover, specific acts that are currently inadmissible pursuant to the character evidence prohibition would presumably continue to be inadmissible because their generally low probative value¹³¹ would not be sufficient to outweigh the specifically articulated countervailing concerns. Finally, such a formulation of the rule governing admissibility of specific acts evidence would have the benefit of specifically focusing on the criteria that should be used in evaluating the admissibility of *all* specific acts evidence.

The precise form that should be given such a rule depends primarily upon two factors. First, evidentiary rules have their primary application in the trial context, where there may be only a limited amount of time to prepare and present arguments concerning admissibility.¹³² Thus, to promote ease and consistency of application at the trial court level, a specific acts evidence rule should be set forth as clearly and briefly as possible in familiar, unambiguous terms.

The concern with consistency of application may suggest the desirability of attempting to restrict trial judges' discretion by replacing or at least augmenting the relevant factors set forth in a provision like rule 403¹³³ with more specific language mandating exclusion or admissibility. With one possible exception discussed below,¹³⁴ however, such an approach would probably be undesirable. There are simply too many varieties of specific acts evidence with varying degrees of probative value and prejudice. An attempt to account for all of these situations would, at best, make the rule lengthy and cumbersome. At worst, the failure to anticipate a particular situation could create an erroneous impression

130. Courts traditionally have had the discretionary power to exclude otherwise admissible evidence of all types on the basis of factors such as undue prejudice, confusion of the issues, or unwarranted time consumption. See C. MCCORMICK, *supra* note 2, § 185, at 438-41. Moreover, both the drafters of the Federal Rules of Evidence, see text accompanying notes 72-74 *supra*, and other proponents of the inclusionary rule approach to specific acts evidence, see text accompanying and following notes 14-15 *supra*, have urged courts to utilize a balancing approach in determining the admissibility of specific acts evidence falling outside the "character" prohibition.

131. See text accompanying notes 62-64 *supra*.

132. Moreover, even an improper evidentiary ruling by the trial court may not provide a basis for reversal on appeal. See FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ."); R. LEMPERT & S. SALTZBURG, *supra* note 3, at 2 (noting reluctance of appellate courts to reverse trial courts on the basis of erroneous nonconstitutional evidentiary rulings).

133. FED. R. EVID. 403, reproduced in part at text accompanying note 74 *supra*.

134. See text accompanying notes 146-50 *infra*.

about how that situation should be dealt with. Moreover, any concern with possible inconsistent application of the rule should be at least partially offset by the fact that trial courts are accustomed to utilizing a general balancing test in numerous contexts.¹³⁵

The second, and more difficult, issue to consider in formulating a specific acts evidence rule is how to define the relationship between the probative value of such evidence and the countervailing factors that may justify exclusion. The most significant of these countervailing factors is likely to be prejudice. Probative value and prejudice, however, are not opposite sides of the same coin. Rather, they exist independently and in varying degrees in different types of specific acts evidence. Moreover, in the absence of adequate empirical data, one can make only an intuitive, common sense estimate about the extent to which any item of evidence is probative or prejudicial. In short, the nature of the balancing process is inherently imprecise. Thus, the most important aspect of a balancing test is whether it is phrased in a manner that tends to favor admissibility or exclusion of the evidence.

One might, for example, begin with the intuitive premises that specific acts evidence frequently has a relatively high degree of probative value and that factfinders are not likely to be substantially prejudiced by such evidence. If these premises are sound, it would arguably be appropriate to formulate a balancing test that, like rule 403, favors admissibility.¹³⁶

135. See note 130 *supra*.

136. If the Federal Rules of Evidence were to take this approach to the admissibility of specific acts evidence, the present Rules should be amended in the following manner:

First, since rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided . . .," and since rule 403 sets forth a balancing test that favors admissibility, rule 404(b) should be eliminated.

Second, it may be desirable to have a provision stating that specific acts evidence may, subject to rule 403, be admissible. *Cf.* FED. R. EVID. 406 (acknowledging that habit evidence may be admissible). Such a provision, although technically unnecessary if the rules are literally applied, would clarify the purpose underlying the elimination of the current rule 404(b). In the absence of this type of provision or a clear statement of legislative purpose, failure of the Federal Rules to deal directly with the specific acts issue could be interpreted as an acceptance of the traditional common-law approach to specific acts evidence. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 735-44 (2d ed. 1977).

Third, there should be clarifying amendments to rules 404(a), 405(a), and 405(b). Rule 404(a) precludes proof of character to show action in conformity with character except in limited, specifically designated situations, and rule 405(a) provides that whenever character evidence is admissible, it may be proved by reputation or opinion evidence. Rule 405(b) provides that character may also be proved by specific acts when character is "an essential element of a charge, claim, or defense." The effect of these rules is to permit reputation and opinion evidence to prove character to show action in conformity with character only in the limited situations set forth in rule 404(a), and to permit proof of character by all three types of evidence—reputation, opinion, and specific acts—whenever character is an essential element of a claim or defense.

Use of the term "character" in these contexts has not presented major theoretical or

On the other hand, as noted previously,¹³⁷ the traditional prohibition against use of specific acts to prove character to show action in conformity with character manifests a belief that there is a need to be particularly concerned about prejudicial impact of specific acts evidence. If this intuitive belief seems sound, it would be more appropriate to articulate the balancing test in a manner favoring exclusion of the evidence. For example, the rule might provide:

Except as otherwise provided by Act of Congress or by these rules, evidence of other crimes, wrongs, or culpable acts is not admissible for any purpose unless the court determines that the probative value of such evidence outweighs the danger of prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.¹³⁸

practical problems, and the substance of these rules could be maintained with the following amendments: (1) delete rule 405(a) and amend rule 404(a) to provide that *reputation or opinion evidence* cannot be used to prove character to show action in conformity with character except in the limited situations there specified; (2) delete rule 405(b), or perhaps, for the sake of clarity, retain the substance of 405(b) and provide that when character is an essential element, "proof may [also] be made [of] by *reputation, opinion, or specific instances of his conduct.*" FED. R. EVID. 405(b) (with proposed deletion of "also" and "of" and insertion of italicized language).

One final clarifying amendment, which is not related to the proposed deletion of rule 404(b), may also be desirable. The Federal Rules, as currently drafted, appear to contemplate only two situations in which character evidence may be relevant: when character is an essential element of a claim or defense or when character is relevant to show action in conformity with character. There may, however, be other purposes for which character evidence is sometimes relevant. For example, in an alienation of affection action, the defendant may wish to prove the bad character of the plaintiff to show that this bad character, rather than the conduct of the defendant, was the cause of the alienation. See 1 J. WIGMORE, EVIDENCE § 54 (3d ed. 1940). See generally Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle With Missing Pieces*, 48 U. CIN. L. REV. 1 (1979). To account for this type of situation, the amended version of rule 405(b) could be phrased in terms that, subject to other provisions, permitted specific acts, opinion, or reputation evidence to be used in *all* instances in which a party offers to prove a person's character. Such an amendment would have the added benefit of demonstrating the absence of an explicit prohibition against the use of specific acts to prove character to show action in conformity with character. Moreover, the amendment would not affect the traditional rule 404(a) limitations on the use of reputation or opinion evidence to prove character to show action in conformity with character. Those limitations, as noted previously, can be retained simply by stating them in terms of restrictions on the use of reputation and opinion evidence.

137. See note 90 and text accompanying notes 89-90, 125-25 *supra*.

138. The factors to balance against probative value are identical to the factors set forth in Federal Rule of Evidence 403, and except for addition of the term "culpable," the language describing the kinds of evidence to which the proposed rule is applicable is identical to the language in Federal Rule of Evidence 404(b).

The limitation of the proposed rule to "culpable" acts probably does not represent a change—or at least not a substantial change—from existing law. Such a limitation, for example, is arguably implicit in rule 404(b), which uses the unmodified term "acts" in conjunction with "crimes" and "wrongs." In any event, the limitation is consistent with

In contrast to the rule 403 balancing test, which provides for exclusion only if prejudice and the other countervailing factors outweigh probative value,¹³⁹ this proposed balancing test would permit the admission of specific acts evidence only if its probative value outweighs the countervailing factors.¹⁴⁰ The effect of this reversal of the rule 403 balancing test is to replace a policy favoring admissibility¹⁴¹ with one

the primary basis for the traditional restrictions on the use of specific acts evidence—a fear that proof of a criminal defendant's bad acts will be prejudicial. If one fears that courts will read the term "culpable" too narrowly or believes that the proposed rule should be equally applicable to nonculpable acts that present time consumption and distraction concerns, the term culpable could simply be eliminated.

The "except as otherwise provided" clause is designed to serve several purposes. First, it may be desirable to have somewhat different provisions governing the use of specific acts or prior convictions offered to impeach the credibility of a witness. See, e.g., FED. R. EVID. 608(b), 609. The "except" clause prevents the proposed balancing test from affecting these impeachment provisions.

A second possible exception to the proposed specific acts balancing test could exist for situations in which character is an essential element of a claim or defense. Since specific acts evidence has traditionally been admissible for this purpose, see FED. R. EVID. 405(b); C. McCORMICK, *supra* note 2, § 187, at 443-44, one should arguably apply a balancing test in this context that tends to favor admissibility. On the other hand, the relatively high probative value of specific acts evidence when character is itself an essential element may mean that the balance under even the proposed rule would almost always be struck in favor of admissibility.

Finally, if a defendant is charged under a recidivist statute, prior crimes that establish the recidivism element obviously should be admissible. The essential nature of the prior crimes evidence in this situation should lead to the conclusion that the probative value of the evidence outweighs the countervailing concerns. Moreover, a statutory recidivism provision arguably should be viewed as an implicit exception to the balancing rule. Nonetheless, for the sake of clarity it may be desirable to have an explicit evidentiary rule that exempts prior crimes offered to prove a recidivism charge from the proposed balancing test.

The adoption of the proposed balancing test would require some clarifying amendments to existing evidentiary rules. See note 136 *supra*.

139. The rule requires that the countervailing factors "substantially" outweigh probative value. See text accompanying note 74 *supra* (quoting rule 403). On the significance of the term "substantially," see text accompanying and following notes 144-45 *infra*.

140. Cf. FED. R. EVID. 609(a) (prior felony convictions not involving dishonesty or false statement admissible to impeach credibility only if "probative value . . . outweighs . . . prejudicial effect to . . . defendant"); FED. R. EVID. 609(b) (if ten years have elapsed from date of conviction or release from confinement, whichever is later, probative value of prior conviction offered to impeach credibility must "substantially" outweigh prejudice).

The fact that the rule 609(a) balancing test is phrased in terms of prejudice "to the defendant" creates some difficulties. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 330-32 (2d ed. 1977). Compare *United States v. Thorne*, 547 F.2d 56, 57-58 (8th Cir. 1976) (suggesting that rule 609(a) does not protect government against prejudicial impact of prior convictions), with *United States v. Jackson*, 405 F. Supp. 938, 942-43 E.D.N.Y. 1975) (granting of defendant's motion *in limine* to exclude evidence of his prior convictions conditioned on defendant's not suggesting pristine personal background and not using prior convictions to impeach prosecution witnesses).

141. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 115 (2d ed. 1977).

favoring exclusion. As a practical result, whereas rule 403 makes the task of obtaining an exclusionary ruling relatively difficult, the proposed rule would place a greater burden on the proponent of specific acts evidence.

Since the nature of the balancing process is inherently imprecise,¹⁴² additional protection against the use of prejudicial specific acts evidence could be obtained by requiring that the trial judge, as a condition of admissibility, be firmly convinced that the probative value outweighs the countervailing factors. This requirement could be set forth in a separate sentence specifically stating, for example, that the judge must be "firmly convinced" or "convinced beyond a reasonable doubt" that the probative value outweighs the countervailing factors.¹⁴³

An alternative, but less desirable, method of articulating the need for the trial judge to be firmly convinced that probative value outweighs prejudice would be to provide in the balancing test itself that the probative value must "*substantially* outweigh" the countervailing factors. Because this language is common in other balancing test formulations,¹⁴⁴ it has the virtue of being familiar to trial lawyers and judges. The term "substantially," however, is subject to misinterpretation. It suggests, for example, that evidence which is slightly more probative than prejudicial may be excluded because the evidence is not *substantially* more probative. Yet, in a rational evidentiary system any evidence that is in fact even slightly more helpful than harmful should be admitted.¹⁴⁵ If, for the sake of familiarity, the term "substantially" is used in the balancing test, the accompanying advisory committee note or other legislative history should point out that the purpose of the term is solely to emphasize the need for the trial judge to be firmly convinced that the evidence is at least slightly more helpful than harmful.

In addition to the nature of the balancing test, there is one further issue that merits consideration in drafting a rule governing the admissibility of specific acts evidence. In the context of discussing the use of bad acts against a criminal defendant, a number of courts have taken the position that, as a condition of admissibility, the prosecutor must establish the defendant's involvement and culpability in the prior acts by clear and convincing evidence.¹⁴⁶ In contrast, as noted previously,¹⁴⁷ a literal reading of the Federal Rules would treat the question of the defendant's involvement in the prior acts simply as a relevance issue. As a result, the specific acts evidence may be admissible if a reasonable person

142. See text following note 135 *supra*.

143. See generally Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

144. See, e.g., FED. R. EVID. 403, 609(b).

145. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 115 (2d ed. 1977); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1787-90 (1980).

146. See C. MCCORMICK, *supra* note 2, § 190, at 451-52; text accompanying notes 111-13 *supra*.

147. See text accompanying notes 95-97, 106-09 *supra*.

could conclude from the evidence that the defendant was culpably involved in the acts.

One might argue that the latter result is desirable because if the factfinder believes the defendant's version of the events, it will simply disregard the evidence. There are, however, at least two countervailing concerns. First, the factfinder may discount the probative value of the prosecutor's evidence but nonetheless be prejudiced against the defendant. For example, the mere possibility that the defendant may have engaged in the act, if it involved particularly dangerous or blameworthy conduct, may lead the factfinder to be less favorably disposed to the defendant than it would otherwise be.¹⁴⁸ Second, the defendant may not be able to present adequately his version of the prior act without electing to testify in his own defense. Yet, the defendant may prefer to exercise his fifth amendment¹⁴⁹ right not to testify. A defendant, of course, may feel pressured to testify simply because of the strength of the prosecutor's case or for any number of other reasons. If the introduction of potentially prejudicial evidence is the primary motivating factor for this choice, however, it arguably would be desirable to have a more stringent check against admissibility of the evidence in the first instance.¹⁵⁰

Such a check could be incorporated into a general balancing test by adding to the proposed rule a sentence setting forth the nature of the determination that must be made as a condition of admissibility. Alternately, the rule could be phrased as conditioning admissibility on two factors: First, proof, by some designated standard, of the preliminary fact of the individual's involvement in the prior act; and second, satisfaction of the balancing test.¹⁵¹

148. If the prosecution seeks to introduce disputed evidence of several bad acts, there is also a potential "cumulative effect" problem. For example, even if the nature of the defendant's involvement in each of the acts is subject to substantial doubt, the factfinder may conclude simply from the number of incidents allegedly involving the defendant that the defendant probably was culpably involved in at least one such incident.

149. U.S. CONST. amend. V.

150. Cf. FED. R. EVID. 608(b) (providing, *inter alia*, that "the giving of testimony . . . does not operate as a waiver of [the] privilege against self-incrimination when examined with respect to matters which relate only to credibility"). The Advisory Committee's Note to rule 608 explains the purpose of this provision as follows:

While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that the accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality.

Advisory Committee's Note, FED. R. EVID. 608(b), 56 F.R.D. 183, 269 (1972). Similarly, the right to remain silent may not possess much vitality if evidence of a defendant's unsubstantiated involvement in prior crimes is readily admissible.

151. Although the proposed balancing test, *see* text accompanying note 138 *supra*, is

V. CONCLUSION

The traditional prohibition against the use of specific acts evidence to prove character to show action in conformity with character is based on the premise that the probative value of such evidence is not sufficiently great to outweigh the countervailing concerns of prejudice, time consumption, and distraction of the factfinder from the central issues of a case. Under both the exclusionary and inclusionary formulations of the specific acts evidence rule, however, potentially prejudicial bad acts are frequently admissible. Thus, there is substantial merit to any formulation of the rule which, like rule 404(b), recognizes the importance of balancing probative value against prejudice and the other countervailing concerns that may warrant exclusion of concededly relevant evidence.

Nonetheless, recognizing the need to balance probative value against prejudice and other countervailing concerns is only the first step in a rational approach to the admissibility of specific acts evidence. As this Article has demonstrated, neither the concept of "character" nor the fact that the relevance of specific acts evidence depends upon a "propensity" inference provides a viable basis for distinguishing between admissible and inadmissible specific acts evidence. It would be desirable, therefore, to eliminate the traditional prohibition against the use of specific acts to prove character, and to evaluate the admissibility of *all* specific acts evidence in terms of a balancing test.

The concerns underlying the traditional character evidence prohibition suggest the desirability of articulating the balancing test in a manner less favorable to admissibility than the test in Federal Rule of Evidence 403. Moreover, it may be desirable to provide, as independent conditions of admissibility, that a trial judge must be firmly convinced both that the probative value of specific acts evidence outweighs the countervailing factors and that a criminal defendant whose bad acts are otherwise admissible was culpably involved in those acts. Regardless of how one thinks the specific acts evidence rule should be formulated, however, the critical task from the standpoint of a rule drafter should be to focus specifically on the nature of the balancing test. Since the balancing process is inherently imprecise, the most important function of a rule setting forth a balancing requirement is to give an indication whether and under what circumstances there should be a preference for admission or exclusion of the evidence.

applicable to specific acts evidence generally, the justifications for imposing this preliminary fact requirement relate primarily to problems arising in the use of specific acts evidence against criminal defendants. Thus, it may seem appropriate to limit the requirement to this type of situation. If the preliminary fact requirement is to have limited applicability, it probably should be set forth, for the sake of clarity, as a separate sentence in the rule rather than as a limited condition of admissibility in the balancing test itself.

Original sponsors: Ulmer, Hudson,
Grussendorf, et al.

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 237 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to physical and sexual offenses
7 against children; amending the definitions of the
8 crimes of murder in the second degree and assault in
9 the first degree; relating to the joinder of offenses
10 of the same or similar character and the admissibil-
11 ity in a criminal proceeding of evidence of prior
12 acts; amending Rule 8(a) of the Alaska Rules of
13 Criminal Procedure; amending Rule 404(b) of the
14 Alaska Rules of Evidence; and providing for an effec-
15 tive date."

16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

17 * Section 1. AS 11.41.110(a) is amended to read:

18 (a) A person commits the crime of murder in the second degree if

19 (1) with intent to cause serious physical injury to another
20 person or knowing that the conduct is substantially certain to cause
21 death or serious physical injury to another person, the person causes
22 the death of any person;

23 (2) the person knowingly engages in conduct [INTENTIONALLY
24 PERFORMS AN ACT] that results in the death of another person under
25 circumstances manifesting an extreme indifference to the value of
26 human life; or

27 (3) acting either alone or with one or more persons, the
28 person commits or attempts to commit arson in the first degree, kid-
29 napping, sexual assault in the first degree under AS 11.41.410(a)(1)

1 or (1), sexual assault in the second degree, burglary in the first
2 degree, escape in the first or second degree, or robbery in any degree
3 and, in the course of or in furtherance of that crime, or in immediate
4 flight from that crime, any person causes the death of a person other
5 than one of the participants.

6 * Sec. 2. AS 11.41.200(a) is amended to read:

7 (a) A person commits the crime of assault in the first degree if

8 (1) that person recklessly causes serious physical injury
9 to another by means of a dangerous instrument;

10 (2) with intent to cause serious physical injury to another,
11 the person causes serious physical injury to any person; or

12 (3) the person knowingly engages in conduct [INTENTIONALLY
13 PERFORMS AN ACT] that results in serious physical injury to another
14 under circumstances manifesting extreme indifference to the value of
15 human life.

16 * Sec. 3. AS 11.41.434(a) is amended to read:

17 (a) An offender commits the crime of sexual abuse of a minor in
18 the first degree if

19 (1) being 16 years of age or older, the offender engages in
20 sexual penetration with a person who is under 13 years of age or aids,
21 induces, causes, or encourages a person who is under 13 years of age
22 to engage in sexual penetration with another person; [OR]

23 (2) being 18 years of age or older, the offender engages in
24 sexual penetration with a person who is under 16 years of age and who

25 (A) is entrusted to the offender's care by authority of
26 law; or

27 (B) is the offender's son or daughter, including an
28 illegitimate or adopted child, or a stepchild; or

29 (3) being 18 years of age or older, the offender engages in

1 sexual penetrator with a person who is under 16 years of age, and the
2 victim at the time of the offense is

3 (A) residing as a member of the social unit in the
4 same household as the offender and the offender is in a position
5 of authority over the victim; or

6 (B) temporarily entrusted to the offender's care.

7 * Sec. 4. AS 11.41.436(a) is amended to read:

8 (a) An offender commits the crime of sexual abuse of a minor in
9 the second degree if

10 (1) being 16 years of age or older, the offender engages in
11 sexual penetration with a person who is 13, 14, or 15 years of age and
12 at least three years younger than the offender, or aids, induces,
13 causes or encourages a person who is 13, 14, or 15 years of age and at
14 least three years younger than the offender to engage in sexual pene-
15 tration with another person;

16 (2) being 16 years of age or older, the offender engages in
17 sexual contact with a person who is under 13 years of age or aids,
18 induces, causes, or encourages a person under 13 years of age to
19 engage in sexual contact with another person;

20 (3) being 18 years of age or older, the offender engages in
21 sexual contact with a person who is under 18 years of age and who

22 (A) is entrusted to the offender's care by authority
23 of law; or

24 (B) is the offender's son or daughter, including an
25 illegitimate or adopted child, or a stepchild; [OR]

26 (4) being 16 years of age or older, the offender aids,
27 induces, causes, or encourages a person who is under 16 years of age
28 to engage in conduct described in AS 11.41.455(a)(2) - (6); or

29 (5) being 18 years of age or older, the offender engages in

1 sexual contact with a person who is under 16 years of age, and the
2 victim at the time of the offense is

3 (A) residing as a member of the social unit in the
4 same household as the offender and the offender is in a position
5 of authority over the victim; or

6 (B) temporarily entrusted to the offender's care.

7 * Sec. 5. AS 12.55.025(e) is amended to read:

8 (e) Except as provided in (g) and (b) of this section, if the
9 defendant has been convicted of two or more crimes, sentences of
10 imprisonment shall run consecutively. If the defendant is imprisoned
11 upon a previous judgment of conviction for a crime, the judgment shall
12 provide that the imprisonment commences at the expiration of the term
13 imposed by the previous judgment.

14 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

15 (h) If the defendant has been convicted of two or more crimes
16 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455 in which the
17 victim or victims of the crimes were minors and the judgment on any of
18 the convictions has not been entered, the court shall impose some
19 consecutive period of imprisonment for each conviction.

20 * Sec. 7. AS 12.55.155(c) is amended to read:

21 (c) The following factors shall be considered by the sentencing
22 court and may aggravate the presumptive terms set out in AS 12.55.125:

23 (1) a person, other than an accomplice, sustained physical
24 injury as a direct result of the defendant's conduct;

25 (2) the defendant's conduct during the commission of the
26 offense manifested deliberate cruelty to another person;

27 (3) the defendant was the leader of a group of three or
28 more persons who participated in the offense;

29 (4) the defendant employed a dangerous instrument in

1 furtherance of the offense;

2 (5) the defendant knew or reasonably should have known that
3 the victim of the offense was particularly vulnerable or incapable of
4 resistance due to advanced age, disability, ill health, or extreme
5 youth or was for any other reason substantially incapable of exercising
6 normal physical or mental powers of resistance;

7 (6) the defendant's conduct created a risk of imminent
8 physical injury to three or more persons, other than accomplices;

9 (7) a prior felony conviction considered for the purpose of
10 invoking the presumptive terms of this chapter was of a more serious
11 class of offense than the present offense;

12 (8) the defendant's prior criminal history includes conduct
13 involving aggravated or repeated instances of assaultive behavior;

14 (9) the defendant knew that the offense involved more than
15 one victim;

16 (10) the conduct constituting the offense was among the most
17 serious conduct included in the definition of the offense;

18 (11) the defendant committed the offense pursuant to an
19 agreement that the defendant either pay or be paid for the commission
20 of the offense, and the pecuniary incentive was beyond that inherent
21 in the offense itself;

22 (12) the defendant was on release under AS 12.30.020 or
23 12.30.040 for another felony charge or conviction or for a misdemeanor
24 charge or conviction having assault as a necessary element;

25 (13) the defendant knowingly directed the conduct constituting
26 the offense at an active officer of the court or at an active or
27 former judicial officer, prosecuting attorney, law enforcement officer,
28 correctional employee, fire fighter, emergency medical technician,
29 paramedic, ambulance attendant, or other emergency responder

1 during or because of the exercise of official duties;

2 (14) the defendant was a member of an organized group of
3 five or more persons, and the offense was committed to further the
4 criminal objectives of the group;

5 (15) the defendant has three or more prior felony convictions;
6

7 (16) the defendant's criminal conduct was designed to obtain
8 substantial pecuniary gain and the risk of prosecution and punishment
9 for the conduct is slight;

10 (17) the offense was one of a continuing series of criminal
11 offenses committed in furtherance of illegal business activities from
12 which the defendant derives a major portion of the defendant's income;

13 (18) the offense was a crime

14 (A) specified in AS 11.41 and was committed against a
15 spouse, a former spouse, or a member of the social unit comprised
16 of those living together in the same dwelling as the defendant;
17 or

18 (B) specified in AS 11.41.410 - 11.41.460 and was
19 committed against a minor, and the defendant has engaged in the
20 same or similar conduct involving the same or another victim who
21 was a minor;

22 (19) the defendant's prior criminal history includes an
23 adjudication as a delinquent for conduct that would have been a felony
24 if committed by an adult;

25 (20) the defendant was on furlough under AS 33.30 or on
26 parole or probation for another felony charge or conviction;

27 (21) the defendant has a criminal history of repeated in-
28 stances of conduct violative of criminal laws, whether punishable as
29 felonies or misdemeanors, similar in nature to the offense for which

1 the defendant is being sentenced under this section;

2 (22) the defendant knowingly directed the conduct constitut-
3 ing the offense at a victim because of that person's race, sex, color,
4 creed, physical or mental disability, ancestry, or national origin;

5 (23) the defendant is convicted of an offense specified in
6 AS 11.71 and the offense involved the delivery of a controlled sub-
7 stance under circumstances manifesting an intent to distribute the
8 substance as part of a commercial enterprise;

9 (24) the defendant is convicted of an offense specified in
10 AS 11.71 and the offense involved the transportation of controlled
11 substances into the state;

12 (25) the defendant is convicted of an offense specified in
13 AS 11.71 and the offense involved large quantities of a controlled
14 substance;

15 (26) the defendant is convicted of an offense specified in
16 AS 11.71 and the offense involved the distribution of a controlled
17 substance that had been adulterated with a toxic substance.

18 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to
19 read:

20 (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
21 the same indictment or information in a separate count for each of-
22 fense if the offenses charged, whether felonies, misdemeanors or both,

23 (1) are of the same or similar character and it can be
24 determined before trial that it is likely that evidence of one charged
25 offense would be admissible to prove another charged offense,

26 (2) [OR] are based on the same act or transaction, or

27 (3) are based on two or more acts or transactions connected
28 together or constituting parts of a common scheme or plan.

29 * Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

1 (b) Other Crimes, Wrongs, or Acts.

2 (1) Evidence of other crimes, wrongs, or acts is not admissible
3 to prove the character of a person in order to show that he acted in
4 conformity therewith. It may, however, be admissible for other pur-
5 poses, such as proof of motive, opportunity, intent, preparation,
6 plan, knowledge, identity, or absence of mistake or accident.

7 (2) In a prosecution for a crime involving a physical or sexual
8 assault or abuse of a minor, evidence of other acts by the defendant
9 toward the same or another child is admissible to show a common scheme
10 or plan if admission of the evidence is not precluded by another rule
11 of evidence and if the prior offenses

12 (i) are not too remote in time;

13 (ii) are similar to the offense charged; and

14 (iii) were committed upon persons similar to the pros-
15 ecuting witness.

16 * Sec. 10. Section 9 of this Act is retroactive and applies

17 (1) to evidence of acts committed before the effective date of
18 this Act; and

19 (2) in trials involving offenses committed before the effective
20 date of this Act.

21 * Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

DRAFT

LETTER OF INTENT
CSHB 237(Judiciary)

Sections 1 and 2

The changes to AS 11.41.110(a)(2) and 11.41.200(a)(3) are solely intended as technical amendments to make it clear that the language "intentionally performs an act" means "knowingly engages in conduct". This amendment thus conforms the statutes to the interpretation provided in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982).

Sections 3 and 4

The addition of AS 11.41.434(a)(30) and 11.41.436(a)(5) recognizes that the most serious forms of child sexual abuse are often committed by those who live in the same household as the victim or who are temporarily entrusted with the victim's care. Despite having no legal authority over the victim, such persons are nonetheless in a position of power such that even older children often find it impossible to thwart their advances. Because other subsections of these statutes already cover sexual misconduct with persons under the age of 13, the new changes apply only to victims from 13 to 15 years old. The cutoff at 16 years of age was specifically chosen instead of the 18-year-old cutoff in other subsections dealing with persons with legal or biological ties to the victim.

Sections 5 and 6

In enacting these sections, which require judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose whatever consecutive time as it decides is appropriate pursuant to the sentencing considerations in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children is to express the Legislature's preference for judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense. In some cases, the court may find that only a minimal period of consecutive time to serve may be necessary while in other cases the court may find that a lengthy consecutive term is required. Another purpose of this amendment is to allow judges to fashion some consecutive period of suspended time, with conditions of probation, to assure that offenders being released from prison have an adequate period of supervision by the court or the Department of Corrections.

Section 7

AS 12.55.155(c)(18)(B) has been amended to create a new aggravating factor for repeated sexual misconduct toward minors. This change reflects the Legislature's intent that, although most judges already take into account prior misconduct in sentencing, it should be specifically recognized as a statutory aggravating factor. It is not necessary that a conviction have been entered to constitute this aggravating factor. This factor is also intended to apply to incidents not resulting in convictions. Prior convictions already trigger imposition of presumptive sentencing, or can constitute a separate aggravating factor if there are three or more felonies (AS 12.55.155(c)(15)) or if there are repeated instances of similar conduct (AS 12.55.155(c)(21)). Convictions used for those purposes are not intended to trigger this aggravating factor. As used in this aggravating factor, the phrase "same or similar conduct" is not intended to require a strict analysis of statutory elements of offenses.

Section 8

The amendment to Rule 8 of the Alaska Rules of Criminal Procedure is specifically intended to reverse the decision in Johnson v. State, 730 P.2d 175 (Alaska App. 1986) to permit multiple offenses to be joined for trial when evidence of one offense is admissible to prove another. It is intended that the determination that evidence will likely be cross-admissible be made before trial. This determination depends to a large extent on the state of the prosecution's evidence. The courts should be given great latitude to structure these pretrial proceedings to rely as much as possible on offers of proof and other non-testimonial showings, so as to avoid conducting a mini-trial, and to avoid situations where defendants use this procedure to obtain pretrial depositions to which they are not otherwise entitled. The determination on cross-admissibility may also turn on the precise parameters of a person's defense. A defendant who declines, in an *ex parte in camera* hearing, to disclose a defense, which could have been anticipated at this point in the proceedings and which would render evidence of other offenses inadmissible, should be deemed to have waived any objection to joinder.

Section 9

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery." 731 P.2d at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." *Id.* at 590-1. However, having heard testimony about patterns of behavior of many of these offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct,

particularly as to non-family members, and that it is appropriate to re-draw the line. The Legislature therefore specifically intends to reverse the decision in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The intent of the Legislature is that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. As used in this rule, the phrase "similar acts" is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements. Although specific statutory citations are not included in the language of the rule, it is the intent of the Legislature that this evidentiary provision will apply not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children.

3. Definition of "Authority Over Child". The last troublesome portion of the Repeated Sexual Abuse of a Minor provision is the definition of "having authority over a child" found in Section 8. This broad language presumes that all members of a social unit have authority over a child when in fact they may not. Examples of the problematic application of this provision include a romantic relationship between a young teenager and an exchange student or step-sibling who is living in the family unit.

C. PRIOR INCONSISTENT STATEMENTS (DELETED BY HESS)

This section, which was drafted to combat perceived problems caused by Brower v. State, was deleted by the HESS committee. This portion of the bill stated that in a prosecution for any offense, evidence of a prior inconsistent statement is sufficient to support a conviction despite a complete dearth of corroborating evidence.

The question whether an uncorroborated prior inconsistent statement is sufficient to support a conviction is a uniquely judicial determination, not one susceptible to legislative fiat. The federal constitution prohibits conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358. A court's holding on a question of the sufficiency of certain evidence is an interpretation of the constitutional requirement of proof beyond a reasonable doubt. Thus, the Court of Appeals' decision in Brower took no radical or novel position; the Brower holding is consistent with all other courts which have considered this question. The constitutional minimal standard for the proof required for a conviction cannot be reduced by legislative action.

D. CHANGES TO EVIDENCE RULE 404

The bill proposes a new subsection to Evidence Rule 404. The proposed new section states that, notwithstanding A.R.E. 404(b), in a prosecution for physical or sexual assault on a child, evidence of prior acts by the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

This raises serious constitutional problems. In a very long line of cases, the Alaska appellate courts have held that evidence of prior bad acts by a defendant are not admissible to prove the defendant's propensity to commit crimes. E.g., Eubanks v. State, 516 P.2d 726 (Alaska 1973); Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980); Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd, 726 P.2d 546 (Alaska 1986). The rationale for these cases is rooted in the constitutional guarantee of due process and the requirement of proof beyond a reasonable doubt. U.S. Const., amend. VI; Alaska Const., art. I, subsection 7. When evidence of a defendant's character, as shown through prior bad acts, is admitted to show his propensity to commit a crime, there is a grave likelihood that the jury will convict the defendant because he appears to be a bad person, not because the evidence proves beyond a reasonable doubt that he committed the crime with which he was charged. Michaelson v. United States, 335 U.S. 469 (1948).

the complaining witnesses' sisters who were allegedly seduced under similar circumstances at roughly the same age as the complaining witness.

3. Evidence of Abuse Outside the Family Can Be Admissible.

Evidence of abuse of other victims not in the same family but in the same class is admissible if the defendant's plan or pattern of sexual misconduct is relevant. Soper appears to authorize admission of evidence concerning sexual assaults of non-family victims so long as the victims are members of a "limited class [having] highly relevant common characteristics." 731 P.2d at 590. For example, in recent trials where the defendant was charged with sexual abuse of a child in a daycare situation, the state successfully argued that Soper authorized admission of evidence concerning sexual abuse on other children in the daycare.

Other cases upholding admission of evidence concerning abuse on non-family victims include Oswald v. State, 715 P.2d 276 (Alaska App. 1986); Moor v. State, 709 P.2d 498 (Alaska App. 1985).

4. Bolden v. State -- Similar in concept to the Rape Shield Law.

The only time a prior bad act is not admissible in this context is when there is no nexus or connection between the prior act and the charged conduct.

Bolden v. State, 720 P.2d 957 (Alaska App. 1986), illustrates the rule that evidence of sexual abuse of uncharged victims not part of the same class as the victim is ordinarily inadmissible. Bolden was charged with sexually abusing two of his daughters. At trial the state presented testimony by other girls that they had been sexually molested by the defendant. The Court of Appeals found that the evidence was inadmissible because neither identity nor intent was an issue at the trial and the acts did not establish a common scheme or plan.

The Bolden rule, which disallows evidence of other sexual assaults where the only purpose for such testimony is to show the defendant's propensity to commit such acts, is comparable to the rape shield law protection for victims. That is, the fact that a victim may have engaged in a certain type of sexual practice on one occasion with one partner is not admissible to prove the victim consented to such practice on another occasion with the defendant.

In summary, in all situations in which prior bad acts by the defendant are relevant and probative of the issues at hand, the Court of Appeals and Supreme Court have upheld their admissibility. If it is not relevant and is admitted only to show that the defendant has done this in the past, there is a great danger that the defendant will be convicted because he is a "bad person" regardless of whether there is sufficient evidence to support the charges at hand.

Prior bad acts, relevant to show only disposition, are also excluded because admitting such evidence prolongs trials, causing added expense to all parties and the court system. Rather than have a five-day trial focused on the criminal act alleged in the indictment, if prior bad acts were invariably admissible, trials could take two to three times as long, as witnesses are called by both sides to establish and refute incidents entirely collateral to the real issues at trial. Longer trials also mean longer transcripts; increasing the cost of appeals means more defendants would need public defenders.

The existing Rules of Evidence, as interpreted by the Alaska courts, broadly opens the door to evidence of prior bad acts when such evidence is probative of something other than criminal disposition, such as motive, intent, opportunity and common scheme or plan. The Alaska Supreme Court and Court of Appeals have in many instances allowed evidence of a defendant's prior abusive conduct to come in at trial, including abuse of the named victim, abuse of other victims in the family and abuse of victims outside of the family who are similarly situated to the named victim. Following are brief summaries of the cases in this area of the law.

1. Evidence of Other Abuse on Named Victim is Ordinarily Admissible.

In Burke v. State, 624 P.2d 1240 (Alaska 1980), the Alaska Supreme Court established the rule that evidence of earlier assaults on the same victim is admissible. The Supreme Court held that it was proper for a victim to testify to the whole history of assault by her step-father, the defendant.

A recent Court of Appeals decision, Patterson v. State, 732 P.2d 1102, 1103 (Alaska App. 1987), explained the justification for the well-established Burke rule: "First, to establish an ongoing relationship between the victim and the accused; and, second, to place an offense in context and to show the background of the offense." In Patterson, the court approved admitting evidence of a prior sexual assault on the named victim even though that assault occurred nearly two years earlier.

The "same victim" rule is also followed in cases charging physical assaults on children. The Court of Appeals in Garner v. State, 711 P.2d 1191, 1193 (Alaska App. 1986), held that it was proper to admit evidence indicating prior physical abuse by the defendant during the four-month period before the child's death.

2. Evidence of Abuse of Other Victims in the Same Family is Ordinarily Admissible.

In Soper v. State, 731 P.2d 587 (Alaska App. 1987), the Court of Appeals expanded Burke to cover testimony of abuse on other family members. The court in Soper said:

The limited exception for lewd disposition recognized in Burke should be extended to cover the testimony of



Official Business

Alaska State Legislature

House

P.O. BOX V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

March 2, 1988

TO: All Members of the House

FROM: Representative Fran Ulmer

SUBJECT: House Bill 237, "An Act relating to murder, assault, and the physical and sexual abuse of children; the admissibility of certain evidence in criminal prosecutions; amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date"

Child sexual assault and child abuse in Alaska have reached epidemic proportions. While we would like to ignore these problems because they make us so uncomfortable, we have to recognize that they do exist. Newspaper stories, radio and TV news provide daily reminders. These are problems which need our resources, not only in terms of protection for the victims, but treatment of the abusers. We need to assure that our criminal justice system doesn't victimize the abused. Our laws and procedures must send a clear message that abusive, violent behavior against children will not be tolerated. Your favorable consideration of House Bill 237 can be a part of the solution to protecting our children.

House Bill 237 was introduced to make it easier to obtain successful convictions in child abuse and child sexual assault cases. My goal in introducing this bill is to pass legislation that will assure that the criminal justice system is able to fully and fairly prosecute those individuals who repeatedly engage in abusive behavior against children. Recent court of appeals decisions have narrowly restricted the admission of evidence of an offender's patterns of behavior, and prevented the joinder of related cases. These restrictions have resulted in fewer cases being charged, cases being charge-reduced and others being brought and lost.

March 2, 1988
Page 2

House Bill 237 tightens the prosecution of these offenses. It allows related cases to be tried together, includes an aggravating factor for repeated sexual misconduct toward minors, and includes babysitters and live-in boyfriends in the class of person covered in the first degree sexual abuse of a minor definition, clarifies the legislature's preference for consecutive sentencing for multiple offenders, and expands the admissibility of evidence of similar abusive behavior.

The House Judiciary Committee Substitute represents a careful balance between protections for the accused and protections for the victims. It is a compromise bill that is supported by the Department of Law, the Public Defender, Office of Advocacy, Department of Health and Social Services, Department of Public Safety, the Council on Domestic Violence and Sexual Assault, the Fairbanks Sexual Abuse Task Force, the Anchorage Sexual Abuse Task Force, the Homer Society to Prevent Exploitation of Children, Alaska Juvenile Crime Commission, KIDPAC, Victims for Justice, and the League of Women Voters. I would sincerely appreciate your support of House Bill 237.

STATE OF ALASKA



REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

M E M O R A N D U M

February 4, 1988

TO: Representative John Sund, Chair
House Judiciary Committee

FROM: Representative Fran Ulmer

SUBJECT: House Bill 237

As Dana Fabe and I indicated to you the other day, the latest draft of CSHB 237 has been approved by representatives of both the Public Defender Agency and the Department of Law. The new draft has been substantially rewritten to provide some degree of judicial discretion in consecutive sentencing for child abuse (Section 6), a pretrial procedure for trial joinder determinations (Section 8), and a compromise provision to allow limited evidence of prior acts of child abuse (Section 9). It is this last topic that is specifically addressed in this memorandum.

Last week committee staff prepared and circulated a memo discussing Evidence Rule 404 and the change which I have proposed in HB 237. Most of the memo is an accurate discussion of the rationale behind the general rule that excludes the admissibility of prior bad acts of the defendant. However, it totally omits any discussion of the long-standing exception to that general rule of exclusion, the admissibility of prior lewd and lascivious conduct by the defendant. That and that alone is what is at issue in Section 9 of the bill, the proposed amendment to Rule 404.

In many jurisdictions, as well as in the federal courts, Rule 404(b) (which on its face is identical to the federal rule), is interpreted as a rule of inclusion, not exclusion. That means that in spite of the general rule of excluding evidence of bad acts, courts at common law have always recognized that one of the permissible purposes of such evidence is "[t]o show a passion or

propensity for unusual and abnormal sexual relations". McCormick on Evidence, E. Cleary (3rd ed. 1984) at page 560. Although such evidence was once confined to prior acts with the particular victim, "a number of jurisdictions now admit other sex offenses with other persons." Id. at 561, especially cases and articles cited in footnote 24.

The basis for this exception is that in prosecutions for depraved acts . . . the prosecuting witness is not likely to be believed, since the evidence standing alone and entirely unconnected with anything which led to or brought it about would appear . . . unnatural or improbable in itself . . . Thus the evidence lends credence to the testimony of the prosecution that might otherwise be disbelieved.

Grey v. State, 404 N.E. 2d 1348, 1352 (Ind. 1980) (quoting from other cases; citations omitted).

Under Alaska Rules of Evidence 404(b), which is similar to the rules in other states, prior acts by a defendant are admissible to prove things such as motive, plan, scheme, or intent. In other states, prior sexual misconduct is admissible to show that the defendant has pedophile tendencies and therefore a "motive" to commit another similar offense. As the Wyoming Supreme Court stated, when there is a conflict in the testimony between the victim and the defendant, this kind of evidence is important.

Given this evidentiary conflict a finder of fact would be extremely interested in other information that might be available to help resolve the issue. Evidence of motive would be such information. One who is a paraphiliac, whose preference or addiction for unusual sexual practices occurs in the form of pedophilia, could well be recognized as having a motive to commit the acts complained of by the victim.

Elliott v. State, 600 P.2d 1044, 1048-9 (Wyo. 1979).

Other courts admit such evidence to show a "depraved sexual instinct", McKim v. State, 476 N.E.2d 503 (Ind. 1985), or a "common design". People v. Thomas, 573 P.2d 433 (Calif. 1978). Some courts are much more direct and recognize a specific exception for evidence of an "emotional propensity for sexual aberration". State v. McFarlin, 517 P.2d 87 (Ariz. 1973). Even in Alaska the courts recognize the importance of evidence of a "lewd disposition" when the prior conduct concerns the same

victim, Burke v. State, 624 P.2d 1240 (Alaska 1980), or members of the same family. Soper v. State, 731 P.2d 587 (Alaska App. 1987).

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery." 731 P.2d at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." Id. at 590-1. However, the Legislature believes that the judiciary has drawn the line much too narrowly in excluding other evidence of prior misconduct, particularly as to non-family members, and that it is appropriate to re-draw that line. This new provision is specifically intended to overturn decisions such as Bolden v. State., 720 P.2d 947 (Alaska App. 1986), which reversed a conviction because the trial judge permitted the introduction of evidence of prior instances of abuse against young girls outside of the victim's immediate family.

Whether such evidence is described as "motive", "instinct", "intent", "common design", or simply an exception to the general rule, it should be admitted unless there is some other specific reason under Rules 401-403 for its exclusion or limitation. Trial judges will still have the discretion to exclude evidence if it is otherwise prejudicial, unduly misleading, or cumulative under Rule 403, or is irrelevant under Rules 401-402. Although evidence of prior abuse would be admissible under new Rule 404(b)(2), the trial judge would still have authority under Rule 403 to preclude, as unfairly prejudicial, detailed and explicit evidence of the prior victim's injuries, for example. Similarly, the trial judge would have the discretion under Rule 403 to cut off evidence of other abuse when it reaches the point of causing delay, wasting time, or being cumulative.

The trial judge's determination of relevance is specifically required by new Rule 404(b)(2)(i), (ii), and (iii). The decision on relevance turns on remoteness, similarity of offenses and similarity of victims. For example, a judge would probably determine that a prior physical assault on a 17-year old should not be admitted in a prosecution for assault on an infant because neither the offenses nor the victims are similar. The judge might also determine that an offense committed twenty years earlier is too remote to have any probative value.

I sought assistance from the National Center for State Courts in finding material which could shed additional light upon this evidentiary debate. Today I received a copy of one chapter of a report from the American Bar Association, Child Sexual Abuse and the Law (4th ed. 1983). The conclusion of the report is that, although courts should weigh probative value against prejudicial impact (as in Evidence Rule 403), ". . . such evidence represents an essential aspect of the crime, about which the jury or judge should have knowledge in reaching an informed decision."

Evidence of prior criminal acts by the accused is therefore generally inadmissible to show that the defendant committed the crime of which he is currently charged. However, most jurisdictions have recognized a special exception to this rule in prosecutions for sexual offenses. This special exception allows evidence of prior sexual acts to be admitted "to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial".

The admission of prior sexual acts also tends to dispel the notion that the present charge or accusation is fabricated or the product of the child's fantasy.

Finally, evidence of prior sexual acts clearly demonstrates the continuing nature of child sexual abuse committed by a parent. While a criminal prosecution must focus on specific occurrences, it is the long duration of the abuse which is the essence of this offense. To deprive the trier of fact of key information relating to the fundamental nature of the crime seems irrational.

Original sponsors: Ulmer, Hudson,
Grussendorf, et al.

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 237 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to crimes against persons, and to
7 the physical and sexual assault and sexual abuse of
8 children; amending Rule 8(a) of the Alaska Rules of
9 Criminal Procedure; amending Rule 404(b) of the
10 Alaska Rules of Evidence; and providing for an effec-
11 tive date."

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

13 * Section 1. AS 11.41.110(a) is amended to read:

14 (a) A person commits the crime of murder in the second degree if

15 (1) with intent to cause serious physical injury to another
16 person or knowing that the conduct is substantially certain to cause
17 death or serious physical injury to another person, the person causes
18 the death of any person;

19 (2) the person knowingly engages in conduct [INTENTIONALLY
20 PERFORMS AN ACT] that results in the death of another person under
21 circumstances manifesting an extreme indifference to the value of
22 human life; or

23 (3) acting either alone or with one or more persons, the
24 person commits or attempts to commit arson in the first degree, kid-
25 napping, sexual assault in the first degree under AS 11.41.410(a)(1)
26 or (2), sexual assault in the second degree, burglary in the first
27 degree, escape in the first or second degree, or robbery in any degree
28 and, in the course of or in furtherance of that crime, or in immediate
29 flight from that crime, any person causes the death of a person other

1 than one of the participants.

2 * Sec. 2. AS 11.41.200(a) is amended to read:

3 (a) A person commits the crime of assault in the first degree if

4 (1) that person recklessly causes serious physical injury
5 to another by means of a dangerous instrument;

6 (2) with intent to cause serious physical injury to another,
7 the person causes serious physical injury to any person; or

8 (3) the person knowingly engages in conduct [INTENTIONALLY
9 PERFORMS AN ACT] that results in serious physical injury to another
10 under circumstances manifesting extreme indifference to the value of
11 human life.

12 * Sec. 3. AS 11.41.434(a) is amended to read:

13 (a) An offender commits the crime of sexual abuse of a minor in
14 the first degree if

15 (1) being 16 years of age or older, the offender engages in
16 sexual penetration with a person who is under 13 years of age or aids,
17 induces, causes, or encourages a person who is under 13 years of age
18 to engage in sexual penetration with another person; [OR]

19 (2) being 18 years of age or older, the offender engages in
20 sexual penetration with a person who is under 18 years of age and who

21 (A) is entrusted to the offender's care by authority of
22 law; or

23 (B) is the offender's son or daughter, including an
24 illegitimate or adopted child, or a stepchild; or

25 (3) being 18 years of age or older, the offender engages in
26 sexual penetration with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 4. AS 11.41.436(a) is amended to read:

4 (a) An offender commits the crime of sexual abuse of a minor in
5 the second degree if

6 (1) being 16 years of age or older, the offender engages in
7 sexual penetration with a person who is 13, 14, or 15 years of age and
8 at least three years younger than the offender, or aids, induces,
9 causes or encourages a person who is 13, 14, or 15 years of age and at
10 least three years younger than the offender to engage in sexual pene-
11 tration with another person;

12 (2) being 16 years of age or older, the offender engages in
13 sexual contact with a person who is under 13 years of age or aids,
14 induces, causes, or encourages a person under 13 years of age to
15 engage in sexual contact with another person;

16 (3) being 18 years of age or older, the offender engages in
17 sexual contact with a person who is under 18 years of age and who

18 (A) is entrusted to the offender's care by authority
19 of law; or

20 (B) is the offender's son or daughter, including an
21 illegitimate or adopted child, or a stepchild; [OR]

22 (4) being 16 years of age or older, the offender aids,
23 induces, causes, or encourages a person who is under 16 years of age
24 to engage in conduct described in AS 11.41.455(a)(2) - (6); or

25 (5) being 18 years of age or older, the offender engages in
26 sexual contact with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

see comment p3

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 5. AS 12.55.025(e) is amended to read:

4 (e) Except as provided in (g) and (h) of this section, if the
5 defendant has been convicted of two or more crimes, sentences of
6 imprisonment shall run consecutively. If the defendant is imprisoned
7 upon a previous judgment of conviction for a crime, the judgment shall
8 provide that the imprisonment commences at the expiration of the term
9 imposed by the previous judgment.

10 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

11 (h) If the defendant has been convicted of two or more crimes
12 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455; in which the
13 victim or victims of the crimes were minors and the judgment on any of
14 *OK gives broad discretion to the judge* the convictions has not been entered, the court shall impose some
15 consecutive period of imprisonment for each conviction.

16 * Sec. 7. AS 12.55.155(c) is amended to read:

17 (c) The following factors shall be considered by the sentencing
18 court and may aggravate the presumptive terms set out in AS 12.55.125:

19 (1) a person, other than an accomplice, sustained physical
20 injury as a direct result of the defendant's conduct;

21 (2) the defendant's conduct during the commission of the
22 offense manifested deliberate cruelty to another person;

23 (3) the defendant was the leader of a group of three or
24 more persons who participated in the offense;

25 (4) the defendant employed a dangerous instrument in fur-
26 therance of the offense;

27 (5) the defendant knew or reasonably should have known that
28 the victim of the offense was particularly vulnerable or incapable of
29 resistance due to advanced age, disability, ill health, or extreme

1 youth or was for any other reason substantially incapable of exercis-
2 ing normal physical or mental powers of resistance;

3 (6) the defendant's conduct created a risk of imminent
4 physical injury to three or more persons, other than accomplices;

5 (7) a prior felony conviction considered for the purpose of
6 invoking the presumptive terms of this chapter was of a more serious
7 class of offense than the present offense;

8 (8) the defendant's prior criminal history includes conduct
9 involving aggravated or repeated instances of assaultive behavior;

10 (9) the defendant knew that the offense involved more than
11 one victim;

12 (10) the conduct constituting the offense was among the most
13 serious conduct included in the definition of the offense;

14 (11) the defendant committed the offense pursuant to an
15 agreement that the defendant either pay or be paid for the commission
16 of the offense, and the pecuniary incentive was beyond that inherent
17 in the offense itself;

18 (12) the defendant was on release under AS 12.30.020 or
19 12.30.040 for another felony charge or conviction or for a misdemeanor
20 charge or conviction having assault as a necessary element;

21 (13) the defendant knowingly directed the conduct constitut-
22 ing the offense at an active officer of the court or at an active or
23 former judicial officer, prosecuting attorney, law enforcement offi-
24 cer, correctional employee, fire fighter, emergency medical techni-
25 cian, paramedic, ambulance attendant, or other emergency responder
26 during or because of the exercise of official duties;

27 (14) the defendant was a member of an organized group of
28 five or more persons, and the offense was committed to further the
29 criminal objectives of the group;

1 (15) the defendant has three or more prior felony convic-
2 tions;

3 (16) the defendant's criminal conduct was designed to obtain
4 substantial pecuniary gain and the risk of prosecution and punishment
5 for the conduct is slight;

6 (17) the offense was one of a continuing series of criminal
7 offenses committed in furtherance of illegal business activities from
8 which the defendant derives a major portion of the defendant's income;

9 (18) the offense was a crime

10 (A) specified in AS 11.41 and was committed against a
11 spouse, a former spouse, or a member of the social unit comprised
12 of those living together in the same dwelling as the defendant;
13 or *OK*

14 (B) specified in AS 11.41.410 - 11.41.460 and was
15 committed against a minor, and the defendant has engaged in the
16 same or similar conduct involving the same or another victim who
17 was a minor;

18 (19) the defendant's prior criminal history includes an
19 adjudication as a delinquent for conduct that would have been a felony
20 if committed by an adult;

21 (20) the defendant was on furlough under AS 33.30 or on
22 parole or probation for another felony charge or conviction;

23 (21) the defendant has a criminal history of repeated in-
24 stances of conduct violative of criminal laws, whether punishable as
25 felonies or misdemeanors, similar in nature to the offense for which
26 the defendant is being sentenced under this section;

27 (22) the defendant knowingly directed the conduct constitut-
28 ing the offense at a victim because of that person's race, sex, color,
29 creed, physical or mental disability, ancestry, or national origin;

1 (23) the defendant is convicted of an offense specified in
2 AS 11.71 and the offense involved the delivery of a controlled sub-
3 stance under circumstances manifesting an intent to distribute the
4 substance as part of a commercial enterprise;

5 (24) the defendant is convicted of an offense specified in
6 AS 11.71 and the offense involved the transportation of controlled
7 substances into the state;

8 (25) the defendant is convicted of an offense specified in
9 AS 11.71 and the offense involved large quantities of a controlled
10 substance;

11 (26) the defendant is convicted of an offense specified in
12 AS 11.71 and the offense involved the distribution of a controlled
13 substance that had been adulterated with a toxic substance.

14 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to
15 read:

16 (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
17 the same indictment or information in a separate count for each of-
18 fense if the offenses charged, whether felonies, misdemeanors or both,

19 (1) are of the same or similar character and it can be
20 determined before trial that it is likely that evidence of one charged
21 offense would be admissible to prove another charged offense,

22 and no unfair prejudice to the A would result from the joinder of charges

(2) [OR] are based on the same act or transaction, or

23 (3) are based on two or more acts or transactions connected
24 together or constituting parts of a common scheme or plan.

25 * Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

26 (b) Other Crimes, Wrongs, or Acts.

27 (1) Evidence of other crimes, wrongs, or acts is not admissible
28 to prove the character of a person in order to show that he acted in
29 conformity therewith. It may, however, be admissible for other

1 purposes, such as proof of motive, opportunity, intent, preparation,
2 plan, knowledge, identity, or absence of mistake or accident.

3 (2) In a prosecution for a crime involving a physical or sexual
4 assault or abuse of a minor, evidence of other acts by the defendant
5 toward the same or another child ^{may be} [is] admissible to show a common scheme
6 or plan if the prior offenses

7 (i) are not too remote in time;

8 (ii) are similar to the offense charged; and

9 (iii) were committed upon persons similar to the pros-
10 ecuting witness.

11 * Sec. 10. Section 9 of this Act is retroactive and applies

12 (1) to evidence of acts committed before the effective date of
13 this Act; and

14 (2) in trials involving offenses committed before the effective
15 date of this Act.

16 * Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

Original sponsors: Ulmer, Hudson,
Grussendorf, et al.

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 237 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to crimes against persons, and to
7 the physical and sexual assault and sexual abuse of
8 children; amending Rule 8(a) of the Alaska Rules of
9 Criminal Procedure; amending Rule 404(b) of the
10 Alaska Rules of Evidence; and providing for an effective date."
11

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

13 * Section 1. AS 11.41.110(a) is amended to read:

14 (a) A person commits the crime of murder in the second degree if

15 (1) with intent to cause serious physical injury to another
16 person or knowing that the conduct is substantially certain to cause
17 death or serious physical injury to another person, the person causes
18 the death of any person;

19 (2) the person knowingly engages in conduct [INTENTIONALLY
20 PERFORMS AN ACT] that results in the death of another person under
21 circumstances manifesting an extreme indifference to the value of
22 human life; or

23 (3) acting either alone or with one or more persons, the
24 person commits or attempts to commit arson in the first degree, kid-
25 napping, sexual assault in the first degree under AS 11.41.410(a)(1)
26 or (2), sexual assault in the second degree, burglary in the first
27 degree, escape in the first or second degree, or robbery in any degree
28 and, in the course of or in furtherance of that crime, or in immediate
29 flight from that crime, any person causes the death of a person other

1 than one of the participants.

2 * Sec. 2. AS 11.41.200(a) is amended to read:

3 (a) A person commits the crime of assault in the first degree if

4 (1) that person recklessly causes serious physical injury
5 to another by means of a dangerous instrument;

6 (2) with intent to cause serious physical injury to another,
7 the person causes serious physical injury to any person; or

8 (3) the person knowingly engages in conduct [INTENTIONALLY
9 PERFORMS AN ACT] that results in serious physical injury to another
10 under circumstances manifesting extreme indifference to the value of
11 human life.

12 * Sec. 3. AS 11.41.434(a) is amended to read:

13 (a) An offender commits the crime of sexual abuse of a minor in
14 the first degree if

15 (1) being 16 years of age or older, the offender engages in
16 sexual penetration with a person who is under 13 years of age or aids,
17 induces, causes, or encourages a person who is under 13 years of age
18 to engage in sexual penetration with another person; [OR]

19 (2) being 18 years of age or older, the offender engages in
20 sexual penetration with a person who is under 18 years of age and who

21 (A) is entrusted to the offender's care by authority of
22 law; or

23 (B) is the offender's son or daughter, including an
24 illegitimate or adopted child, or a stepchild; or

25 (3) being 18 years of age or older, the offender engages in
26 sexual penetration with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 4. AS 11.41.436(a) is amended to read:

4 (a) An offender commits the crime of sexual abuse of a minor in
5 the second degree if

6 (1) being 16 years of age or older, the offender engages in
7 sexual penetration with a person who is 13, 14, or 15 years of age and
8 at least three years younger than the offender, or aids, induces,
9 causes or encourages a person who is 13, 14, or 15 years of age and at
10 least three years younger than the offender to engage in sexual pene-
11 tration with another person;

12 (2) being 16 years of age or older, the offender engages in
13 sexual contact with a person who is under 13 years of age or aids,
14 induces, causes, or encourages a person under 13 years of age to
15 engage in sexual contact with another person;

16 (3) being 18 years of age or older, the offender engages in
17 sexual contact with a person who is under 18 years of age and who

18 (A) is entrusted to the offender's care by authority
19 of law; or

20 (B) is the offender's son or daughter, including an
21 illegitimate or adopted child, or a stepchild; [OR]

22 (4) being 16 years of age or older, the offender aids,
23 induces, causes, or encourages a person who is under 16 years of age
24 to engage in conduct described in AS 11.41.455(a)(2) - (6); or

25 (5) being 18 years of age or older, the offender engages in
26 sexual contact with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 5. AS 12.55.025(e) is amended to read:

4 (e) Except as provided in (g) and (h) of this section, if the
5 defendant has been convicted of two or more crimes, sentences of
6 imprisonment shall run consecutively. If the defendant is imprisoned
7 upon a previous judgment of conviction for a crime, the judgment shall
8 provide that the imprisonment commences at the expiration of the term
9 imposed by the previous judgment.

10 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

11 (h) If the defendant has been convicted of two or more crimes
12 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455; in which the
13 victim or victims of the crimes were minors ~~and the judgment on any of~~
14 ~~the convictions has not been entered,~~ the court shall impose some
15 consecutive period of imprisonment for each conviction.

16 * ~~Sec. 7.~~ AS 12.55.155(c) is amended to read:

17 (c) The following factors shall be considered by the sentencing
18 court and may aggravate the presumptive terms set out in AS 12.55.125:

19 (1) a person, other than an accomplice, sustained physical
20 injury as a direct result of the defendant's conduct;

21 (2) the defendant's conduct during the commission of the
22 offense manifested deliberate cruelty to another person;

23 (3) the defendant was the leader of a group of three or
24 more persons who participated in the offense;

25 (4) the defendant employed a dangerous instrument in fur-
26 therance of the offense;

27 (5) the defendant knew or reasonably should have known that
28 the victim of the offense was particularly vulnerable or incapable of
29 resistance due to advanced age, disability, ill health, or extreme

1 youth or was for any other reason substantially incapable of exercis-
2 ing normal physical or mental powers of resistance;

3 (6) the defendant's conduct created a risk of imminent
4 physical injury to three or more persons, other than accomplices;

5 (7) a prior felony conviction considered for the purpose of
6 invoking the presumptive terms of this chapter was of a more serious
7 class of offense than the present offense;

8 (8) the defendant's prior criminal history includes conduct
9 involving aggravated or repeated instances of assaultive behavior;

10 (9) the defendant knew that the offense involved more than
11 one victim;

12 (10) the conduct constituting the offense was among the most
13 serious conduct included in the definition of the offense;

14 (11) the defendant committed the offense pursuant to an
15 agreement that the defendant either pay or be paid for the commission
16 of the offense, and the pecuniary incentive was beyond that inherent
17 in the offense itself;

18 (12) the defendant was on release under AS 12.30.020 or
19 12.30.040 for another felony charge or conviction or for a misdemeanor
20 charge or conviction having assault as a necessary element;

21 (13) the defendant knowingly directed the conduct constitut-
22 ing the offense at an active officer of the court or at an active or
23 former judicial officer, prosecuting attorney, law enforcement offi-
24 cer, correctional employee, fire fighter, emergency medical techni-
25 cian, paramedic, ambulance attendant, or other emergency responder
26 during or because of the exercise of official duties;

27 (14) the defendant was a member of an organized group of
28 five or more persons, and the offense was committed to further the
29 criminal objectives of the group;

1 (15) the defendant has three or more prior felony convic-
2 tions;

3 (16) the defendant's criminal conduct was designed to obtain
4 substantial pecuniary gain and the risk of prosecution and punishment
5 for the conduct is slight;

6 (17) the offense was one of a continuing series of criminal
7 offenses committed in furtherance of illegal business activities from
8 which the defendant derives a major portion of the defendant's income;

9 (18) the offense was a crime

10 (A) specified in AS 11.41 and was committed against a
11 spouse, a former spouse, or a member of the social unit comprised
12 of those living together in the same dwelling as the defendant;
13 or

14 (B) specified in AS 11.41.410 - 11.41.460 and was
15 committed against a minor, and the defendant has engaged in the
16 same or similar conduct involving the same or another victim who
17 was a minor;

18 (19) the defendant's prior criminal history includes an
19 adjudication as a delinquent for conduct that would have been a felony
20 if committed by an adult;

21 (20) the defendant was on furlough under AS 33.30 or on
22 parole or probation for another felony charge or conviction;

23 (21) the defendant has a criminal history of repeated in-
24 stances of conduct violative of criminal laws, whether punishable as
25 felonies or misdemeanors, similar in nature to the offense for which
26 the defendant is being sentenced under this section;

27 (22) the defendant knowingly directed the conduct constitut-
28 ing the offense at a victim because of that person's race, sex, color,
29 creed, physical or mental disability, ancestry, or national origin;

1 (23) the defendant is convicted of an offense specified in
2 AS 11.71 and the offense involved the delivery of a controlled sub-
3 stance under circumstances manifesting an intent to distribute the
4 substance as part of a commercial enterprise;

5 (24) the defendant is convicted of an offense specified in
6 AS 11.71 and the offense involved the transportation of controlled
7 substances into the state;

8 (25) the defendant is convicted of an offense specified in
9 AS 11.71 and the offense involved large quantities of a controlled
10 substance;

11 (26) the defendant is convicted of an offense specified in
12 AS 11.71 and the offense involved the distribution of a controlled
13 substance that had been adulterated with a toxic substance.

14 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to
15 read:

16 (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
17 the same indictment or information in a separate count for each of-
18 fense if the offenses charged, whether felonies, misdemeanors or both,

19 (1) are of the same or similar character and it can be
20 determined before trial that it is likely that evidence of one charged
21 offense would be admissible to prove another charged offense,

22 (2) [OR] are based on the same act or transaction, or

23 (3) are based on two or more acts or transactions connected
24 together or constituting parts of a common scheme or plan.

25 * Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

26 (b) Other Crimes, Wrongs, or Acts.

27 (1) Evidence of other crimes, wrongs, or acts is not admissible
28 to prove the character of a person in order to show that he acted in
29 conformity therewith. It may, however, be admissible for other

1 purposes, such as proof of motive, opportunity, intent, preparation,
2 plan, knowledge, identity, or absence of mistake or accident.

3 (2) In a prosecution for a crime involving a physical or sexual
4 assault or abuse of a minor, evidence of other acts by the defendant
5 toward the same or another child is admissible to show a common scheme
6 or plan if the prior offenses

7 (i) are not too remote in time;

8 (ii) are similar to the offense charged; and

9 (iii) were committed upon persons similar to the pros-
10 ecuting witness.

11 * Sec. 10. Section 9 of this Act is retroactive and applies

12 (1) to evidence of acts committed before the effective date of
13 this Act; and

14 (2) in trials involving offenses committed before the effective
15 date of this Act.

16 * Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, No. 501 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVVI);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG);
Cordova Women's Resource Center (CWRC); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRC); MEN, Inc.;
Men's Support Network (MSN); Safe & Fear-Free Environment (SAFE);
Sitkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SWPS);
Tundra Women's Coalition (TWC); Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

Testimony House Judiciary HB 237

Tuesday May 5, 1987

Margot Dick
Coordinator

Alaska Network on Domestic Violence and Sexual Assault

The Network is a membership organization comprised of 20 dv/sa programs throughout the state. 2500 of the 10,000 clients who will come through our programs this year are children. They have either been witnesses to violence, the object of violence and/or sexually assaulted.

Our programs are also responsible for the introduction of personal safety curriculums in schools throughout state. In addition, some of our programs provide treatment for child sexual assault victims.

I want to give you some context in order to explain our position on this bill. The response to the victimization of children is a crisis, in and of itself in this state, not just in our legal system but in our communities. This is an issue that clearly, we are not very adept at handling. It is a terribly emotional issue because abuse of the type this bill addresses has been a hidden problem that has terrible and long-term repercussions on its victims.

In cases of child sexual assault, we are seeing more and more of what I call the worst case scenarios. This is the situation where a child discloses, and the police response is inadequate because they are not properly trained in obtaining a report; the social worker's response is inadequate because their caseload is approaching 100 to 1; prosecution is inadequate because our legal system is not structured to deal with small children and crimes committed against them by people who are in some cases supposed to be looking out for their well being. Treatment is usually not available. When it is, it is wholly inadequate because it is looked to to heal a child who has not only been victimized repeatedly, often by someone entrusted with the child's care, but to heal a child who has been abused by the total ineptitude of the system set up to intervene upon the child's behalf.

If the child's family, or at least some family members are supportive, then at least the child has that support. But, sometimes these children are not supported by their families, and then they must suffer through that trauma along with the trauma caused by such clumsy intervention. I am not blaming police, social workers, prosecutors, or counselors.

These people are some of the most dedicated of any you will find. But, they are stretched too thin, they lack training and the institutional structure they operate in is not prepared to handle with these kinds of cases. So, when the system fails, as it too often does, then these children must go back to an abusive situation with an abuser who has not been treated or punished. And, then these children really have been wronged, not only by the abuser, but by their family, and by their community. And, the possibility of that child ever disclosing again is about zero.

This worst case, but not uncommon, scenario must be balanced, on the other hand, by the defendant's rights to a fair trial, to be protected from wrongfully being punished for a crime if they did not commit it. The basis of our legal system is founded upon principles that protect defendants' rights to a greater degree than anywhere else in the world, and for good reason. You, as legislators, for better or for worse, are faced with attempting to balance these two important demands of justice.

This bill is an attempt to chip off one part of the problem we face in dealing with the issue of abuse of children and address to it. Even if this bill passes, I think it is important to acknowledge that we still have a long way to go, and it is not going to be easy. But, this is an inroad to a part of the problem.

The concept of "pattern or practice of abuse" is soundly based in what we know about the conduct of an offender who abuses a child. This conduct is repeated behavior, it is not a single incident. We really are not talking about a simple assault, we are talking about a practice of assaulting. Sharon Brogan, who directs the sex offender treatment program at MEN Inc., has stated that she has never seen a sex offender who offended just one time. Doctor Gene Abel, one of the country's leading experts conducted a study in New York State Prison System that showed offenders offended both inside and outside of the family; and that the number of victims they had ranged from dozens to in the hundreds.

Suzanne Segroi, another leading expert on sex offenders, last year completed a study on the treatability of them. She believes that of the population she studied, approximately 20% are too dangerous to release, 40% may be treatable, and 40% may not be treatable at all. Some sex offenders may need to be monitored for the rest of their lives.

Ask anyone who works with physically abused and neglected children, and they will tell you that the abusive behavior these children are subjected to is repeated, and that it is generational. Abused children become the next generations abusers and victims. Sons of abusers have a 100% greater chance of being abusers when they grow up, than sons of non-abusers.

Page 3

The question has been raised as to why not simply continue to charge offenders with separate counts rather than create a new law codifying the concept of a "pattern or practice of abuse or neglect". The answer is because we are talking about something that is fundamentally different from simple assault. We are talking about a violation of trust and an abuse of power created by an adult who is following a pattern of conduct that leads to the repetitious abuse of a child.

Adults have to be held responsible for their behavior around children. There is no alternative to this. The adult is the responsible party, not the child. When an adult repeatedly acts so irresponsibly as to violate that trust of responsibility, abuse and exploit the power that is inherent in it, by physically assaulting a child in order to vent uncontrollable anger or manipulating a child by using them sexually, we are talking about a different crime than a single assault charge.

Whatever some of you may think of this bill, one thing that it is serving to do, which I think is very important, is to hold the nature of these crimes up to the light. More people need to understand why they are so difficult to deal with. It is also important to acknowledge, that while this bill can serve as a big step in developing the dialogue on this issue and could go a long way in addressing prosecution of these crimes, it is not a panacea. We have a lot of work ahead of us. We urge your favorable consideration of this bill, and we look forward to additional careful consideration and thought given to this issue, because it is so important and it is complex.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____ Bill Version: HB 229
 Publish Date: _____
 Revision Date: _____ Agency Affected: Alaska Court System
 Title: An act relating to homicide by BRU: Trial Courts
 abuse
 Sponsor: Hudson, Ulmer, Larson, ... Components:
 Requestor: House Judiciary

<u>EXPENDITURES/REVENUES</u>		<u>(Thousands of Dollars)</u>				
		FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
Personal Services		.	.	.	.	.
Travel		.	.	.	.	.
Contractual	10 copies	.	.	.	.	.
Supplies		.	.	.	.	.
Equipment		.	.	.	.	.
Land & Structure		.	.	.	.	.
Grants & Claims		.	.	.	.	.
TOTAL OPERATING		1.0	0.0	0.0	0.0	0.0
CAPITAL		.	.	.	.	.
REVENUE		.	.	.	.	.

<u>FUNDING:</u>		<u>(Thousands of Dollars)</u>				
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	.	.	.	.	.	.
Other	.	.	.	.	.	.
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

<u>POSITIONS:</u>						
Full-time	.	.	.	.	.	.
Part-time	.	.	.	.	.	.
Temporary	.	.	.	.	.	.

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Karla Forsythe, General Counsel Phone: 264-8228
 Division: Alaska Court System Date: 5-5-87
 Approved by: *Stephanie J. Cole* Date: 5-5-87
 Agency: Alaska Court System

- Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management & Budget
 Impacted Agency(ies)
 Senate Secretary

January 24, 1988

MEMORANDUM

TO: Rep. John Sund, Chair,
House Judiciary Committee

FROM: John Hartle, PA, JH
House Judiciary Committee Staff

RE: Amendments to Alaska Rule of Evidence 404; HB 237

Section 10 of the proposed draft Committee Substitute for House Bill 237¹ amends the Alaska Rules of Court, adding a new subsection (c) to Alaska Rule of Evidence 404. The new subsection would allow presentation to trial juries evidence of prior crimes, wrongs, or acts of the defendant in order to show a propensity to commit crimes of physical and sexual assault against children.

Alaska Evidence Rule 404(b) prohibits the use of prior acts evidence to show propensity:

(b) 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,

¹ 1/22/88 Chenoweth Work Draft # 5-08090X, offered by Rep. Ulmer

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The draft amendment to rule 404 adds a new subsection:

(c) Notwithstanding (a) and (b) of this rule, in a prosecution for a crime involving

- (1) a physical assault upon a child, evidence of other acts of physical assault by the defendant toward the same or another child is admissible; and
- (2) a violation of AS 11.41.434 - 11.41.460, evidence of other acts described in AS 11.41.434 - 11.41.460 by the defendant toward the same or another child is admissible.

Issues presented by the proposed new Court Rule center on the relevance of propensity evidence, its probative value, and prejudicial effect against the defendant. Also presented is the trial court administration issue of admitting evidence of issues collateral to the issues at trial. The proposed rule of evidence raises Constitutional due process issues of fundamental fairness, and proof beyond a reasonable doubt.

The present Alaska Rule of Evidence 404, which is identical to the Federal rule, does not allow admission of evidence of other crimes, wrongs, or acts for the purpose of proving a

propensity by the defendant to offend. Evidence of other crimes, wrongs, or acts is admitted in the prosecution case-in-chief when relevant to other issues at trial. The present rule lists other purposes for which prior bad act evidence will be admitted, including for example, evidence that the crime charged is of a common plan or scheme with an earlier crime.

Evidence of prior acts by the defendant is always admissible in the sentencing hearing, including hearsay evidence of uncharged acts in the Presentence Report, where it is used to aggravate or mitigate the sentence, once guilt has been determined. The question here is to what extent the defendant's prior crimes should be used by the prosecution to show guilt of the specific crime charged.

"In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused.²"

"Showing that a [defendant] is generally bad has never been under our system allowable. The defendant has a right to be tried on the truth of the specific charge contained in the indictment."³

² Williams v. New York 337 U.S. 241 (U.S. Supreme Ct. 1949)

³ U.S. v. Burkhart 458 F.2d 201 (10th Circuit 1972)

The reasons for excluding prior bad act evidence are, first, because the defendant would be required to answer to charges not stated in the indictment. Second, the inference of guilt of the crime charged could be outweighed by the prejudice the evidence may generate against the accused. Third, the rule guards against turning every trial into a series of mini-trials on prior charged and uncharged acts of the defendant.

If the State has evidence of prior criminal acts, normally, the most appropriate course of action is to charge the defendant with them. If the evidence is of acts which the defendant has been previously charged and acquitted, the matter properly should rest there, and the accused should not have to defend against these charges again. If the evidence is of acts for which the defendant has been previously charged and found guilty, his or her debt to society has been paid, and the appropriate use for evidence of prior convictions is, after conviction in the present case, as a factor in aggravation of sentence, not at trial as proof of guilt or innocence of the crime charged.

The proposed new Court Rule does not limit the newly-admissible evidence to convictions; "acts" include uncharged wrongs and other behavior. The prosecution and defense would thus be free to bring in evidence corroborating and refuting

each alleged prior act offered to prove the accused acted in conformity with character, i.e. did or did not have a propensity to commit the crime. The trial lawyers could thus debate the accused's entire life history for evidence of his or her tendencies. Evidence could, for example, be brought in from custody actions decided years before the crime alleged. This could lengthen trials substantially.

Under the proposed Evidence Rule 404(c), the court would have no authority to keep from the jury evidence of any prior crimes, wrongs, or acts.

Admitting this type of evidence is the exact opposite of the approach taken in Alaska's rape shield law,⁴ which strictly limits admission of evidence of the victim's history as it may be unfair or prejudicial.⁵

In 1931, Judge McDermott wrote, regarding propensity evidence of prior bad acts:

"The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay

⁴ AS 12.45.045

⁵ Susan Orlanski, Public Defender, Appellate Division, testified to the example of a prostitute victim in a sexual assault trial where consent to the act is at issue. The fact that the prostitute may have consented to certain acts in the past has little bearing on whether there was consent in the instance at trial.

attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible.⁶"

Judge Friendly, in United States v. Kahner⁷, wrote on the question of relevancy, that evidence of prior bad acts should be excluded

"where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it."

⁶ Coulston v. United States, 51 F.2d 178 (10th Cir. 1931) 51 F.2d at 180 n.1.

⁷ 317 F.2d 459, (CA 1963) cert. denied

FINAL REPORT OF RECOMMENDATIONS
STATE OF ALASKA
DIVISION OF FAMILY AND YOUTH SERVICES
INTERNAL REVIEW TASK FORCE

Submitted to:

Yvonne M. Chase, Director, DFYS

December 18, 1987

TABLE OF CONTENTS

Background	i
Task Force Members	ii
Introduction	iii
PART ONE—TASK FORCE RECOMMENDATIONS	
I. Caseload/Workload/Job Responsibilities	Part One-1
II. Orientation/Training	Part One-5
III. Communication	Part One-8
IV. Supervision and Management	Part One-12
V. Work Environment	Part One-16
VI. Indian Child Welfare	Part One-20
VII. Legal Issues	Part One-21
VIII. Foster Care	Part One-24
IX. Case Transfers	Part One-25
X. DFYS/Military Relationships	Part One-32
 PART TWO—RECOMMENDATIONS FOR POLICY CHANGE	 Part Two-1
 PART THREE—RECOMMENDATIONS FOR LEGISLATIVE CHANGE	 Part Three-1
 PART FOUR—RECOMMENDATIONS FOR FURTHER STUDY	 Part Four-1
 PART FIVE—RECOMMENDATIONS WITH FISCAL IMPACT	 Part Five-1

BACKGROUND .

In October, 1987, Division of Family and Youth Services Director Yvonne M. Chase initiated an internal review of DFYS operations by creating an Internal Review Task Force. Seven field office staff members were appointed to the Task Force, and two state office staff members were assigned to provide support, to examine the agency's protective services system and to develop recommendations for improvements.

The Internal Review Task Force was directed to survey and consult with other DFYS staff, to examine previous reports and audits, to identify problem areas and to propose solutions which would fall into three major categories: those which would require legislative sanction or action; those which could be implemented immediately by adjusting or adding to agency policy; and those which would require further analysis.

Working within a two and one-half month timeframe, Task Force members solicited information, ideas, and suggestions from other DFYS staff, studied previous reports, and prepared written materials which were the topic of the three meetings of the group. Decisions of the Task Force, while not always initially unanimous, were reached by consensus.

Robert J. Hunner, Executive Director of Northwest Resource Associates, facilitated the meetings of the Task Force and prepared the final report.

STATE OF ALASKA

DIVISION OF FAMILY AND YOUTH SERVICES
INTERNAL REVIEW TASK FORCE

Michelle Decker, Community Care Licensing Specialist I, Anchorage

Floy MacPhee, Staff Manager, Fairbanks

Rahn Parker, Regional Social Services Manager, Nome

Laurie Richardson, Social Worker III, Sitka

Kathleen Stout, Social Worker III, Dillingham

David Teel, Social Worker III, Anchorage

Stephen Wilson, Social Worker IV, Fairbanks

TASK FORCE SUPPORT:

Robert J. Hunner, Northwest Resource Associates, Seattle
(Task Force Facilitation and Report Preparation)

Frank Barthel, Social Services Program Coordinator, State Office
(Staff Support)

Russell Webb, Social Services Program Coordinator, State Office
(Staff Support)

VII. Legal Issues

Major Premises:

A significant portion of DFYS work is prescribed by law. When the law is used with a family, it should be recognized that we are dealing with a complex and formal system that has many statutes and precedents and that the laws on the books can and do change.

Therefore, the Task Force carefully examined the DFYS interface with the legal system to address an identified need to improve communications between DFYS staff and legal staff to ensure that we more often provide a united front to meet the best interests and needs of children and families. In some cases, regulations and statutes need simple revisions; in others, the Task Force recommends that particular regulations or statutes be promulgated or eliminated.

Recommendations:

- A. DFYS should seek legislation to eliminate the mandated Report of Abuse/Harm, the report from DFYS to the Department of Law required under AS47.17.025(a). The proposed Management Information System will satisfy the needs which were intended to be met by the Report of Harm.
- B. Due to the large number of inappropriate referrals received by DFYS during custody disputes, the Task Force recommends an amendment to AS 47.10.010(c) to read, "In a controversy concerning custody of a minor, the court may appoint a guardian of the person and property of a minor and may order support from either or both parents. Custody of a minor may only be given to the Department of Health and Social Services when conditions covered under AS 47.10.010(a) (2)(A-F) exist." This will not prohibit the court from remanding a child to the custody of DFYS if there are child protection concerns.
- C. DFYS should seek an amendment to AS 47.10.141(b), to add the sentence, "If an authorized representative of the Department of Health and Social Services or a facility or contract agency of the department assesses that there is no risk of harm to the child if returned to parental care, the peace officer shall transport that child to parental care." This change is necessary because sometimes police require DFYS to assume custody of runaways taken into "protective custody."

- D. In some jurisdictions, D.A.'s provide inadequate representation in DFYS matters. In addition, A.G.'s often refuse to initiate proceedings desired by social workers, substituting their judgment for the social worker's. To address these problems:
1. A formal protocol should be established which addresses the role and expectation of the A.G., and the role and expectation of the social worker.
 2. Letters to the A.G. and to the D.A. should be sent from the Commissioner's office which address the concerns presented.
 3. State Office should survey all social workers, supervisors, line workers and A.G.'s to assess and evaluate relationships between social workers and A.G.'s. This information should be used in the development of training.
- E. Under current regulations, pre-school programs may be legally exempt from both DFYS licensing and Department of Education certification by identifying their programs as "primarily educational." This exemption should be eliminated. Such programs should be required to be either licensed by DFYS or certified by the Department of Education.
- F. Youth Services should handle all cases involving delinquent youth (including those under the age of 12), unless identified CPS issues exist. If both delinquency and CPS apply to a case, the nature of the intake should be the primary issue, unless the child is endangered, and then, the current joint case staffing policy between Family Services and Youth Services should be implemented.
- G. DFYS staff are experienced in dealing with the effects of presumptive sentencing, particularly on child victims. The present statute results in fewer confessions, unnecessarily disrupts families, prevents treatment and may further victimize child victims. As a result, the Task Force is strongly opposed to presumptive sentencing in incest cases.
- DFYS must take a vocal stance against presumptive sentencing. DFYS should initiate an interagency study of presumptive sentencing in incest cases with the goal of allowing more flexibility for treatment where the threat of incarceration is a disincentive to treatment.
- H. DFYS should give further consideration to seeking an amendment to AS11.41.436(a) to add "(5) is of any age and is a sibling or person accepted as a member of the familial unit."

- I. There is a need for a clear, written definition of community standards on what constitutes abuse and neglect, including specific criteria and guidelines for screening cases, to be developed by DFYS with local input. The Task Force recommends that State Office provide guidelines for the regions to begin to develop these standards.

- J. Alaska statutes may need to be promulgated to meet Federal requirements regarding a situation of intervention on behalf of siblings of an identified abused or neglected child. The Task Force recommends that DFYS undertake a study of this issue.

- K. Alaska statutes do not meet Federal requirements regarding abuse and neglect in out-of-home care, such as foster care. The Task Force recommends further study of this issue.

- L. New funds should be provided to the Department of Law in order to provide litigation support funding for DFYS cases.



alaska judicial council

1031 W. Fourth Avenue, Suite 301, Anchorage, Alaska 99501 (907) 279-2526

EXECUTIVE DIRECTOR
Harold M. Brown

NON-ATTORNEY MEMBERS
Leona Okakok
Hilbert J. Henrickson, M.D.
Renee Murray

ATTORNEY MEMBERS
William T. Council
James D. Gilmore
Barbara L. Schuhmann

November 24, 1987

CHAIRMAN, EX OFFICIO
Warren W. Matthews
Chief Justice
Supreme Court

M E M O R A N D U M

TO: Hal Brown

FROM: Teri Carns *TC*

RE: 3-Judge Panel

Attached is a preliminary analysis of the data that are currently available from the three-judge sentencing panel. The data have been revised to include the ten July through November, 1987 cases that are in draft form. Please let me know if you would like additional analysis.

TABLE 1

Types of Offenses Referred to 3-Judge Panel
(November 23, 1987)

<u>Offense</u>	<u>No. of Offenders</u>	<u>% of Offenders</u>
Sexual Assault I/ Sex Abuse I (Victim is minor)	18	26.5%
		} 33.9%
Sexual Assault I (adult victim)	5	7.4%
Robbery I	16	23.5%
		} 44.1%
Assault I	14	20.6%
Manslaughter	6	8.8%
Misc. involving Controlled Substance II	2	2.9%
MICS III	1	1.5%
Misconduct involving Weapons I	2	2.9%
Custodial Interference	1	1.5%
Arson I	1	1.5%
Unknown Offense	<u>2</u>	<u>2.9%</u>
	68	100.0%

TABLE 2

Year Originally Filed, Cases Referred to 3-Judge Panel
(November 23, 1987)

<u>Year Filed</u>	<u>N</u>
1981	1
1982	1
1983	3
1984	12
1985	26
1986	23
1987	1
Unknown	<u>1</u>
	68

TABLE 3

Court Location of Cases Referred to 3-Judge Panel
(November 23, 1987)

<u>Court Location</u> *	<u>N</u>	<u>%</u>	<u>% of 1984 Convictions by Court Location**</u>
Anchorage	40	58.8%	42.6%
Fairbanks	14	20.6%	19.6%
Kenai	1	1.5%	N/A
Ketchikan	4	5.9%	3.3%
Kodiak	1	1.5%	4.4%
Barrow	2	2.9%	3.8%
Palmer	5	7.4%	8.5%
Unknown	<u>1</u>	<u>1.5%</u>	<u>--</u>
	68	100.1%	

* Superior Court locations with no referrals to the 3-judge panel during this period were Bethel, Juneau, Kotzebue, Nome, Sitka and Valdez.

** Comparison data taken from Alaska Felony Sentences: 1984, published by the Alaska Judicial Council in 1987. The comparison data did not include cases from Kenai, Nome and Kotzebue.

TABLE 4

3-Judge Panel Sexual Offense Cases
(November 23, 1987)

	<u>Sexual Assault I/Abuse I (Minor)</u>	<u>Sexual Assault I (Adult)</u>
Anchorage 1984	4	
1985	3	3
1986	2	
Unknown Year	1	
Fairbanks 1984	1	
1985		
1986	4	
Kodiak 1984	1	
Palmer 1985		1
1986	1	
Ketchikan 1985		1
Unknown Location 1985	<u>1</u>	<u>1</u>
	18	5

<u>N of Sexual Assault I/ Sexual Abuse I Convictions Statewide of Cases Filed in 1984</u>	<u>N of Cases Filed in 1984 with Sexual Assault/ Abuse Convictions that were referred to 3-Judge Panel</u>	<u>% of 1984 Comparable Convictions</u>	<u>N & % with Same Sentence (e.g., the pres.)</u>	<u>N & % w/reduced Sentence</u>
64	6	9.4% of 64	2 (33%)	4 (67%)
Same for Robbery I, 1985 (0 referred 1984)				
(1984) 34	(1985) 6	17.6% of 34	1 (17%)	5 (83%)

TABLE 5

Panel Action

<u>Type of Offense</u>	<u>Sentence Reduced</u> *	<u>Original Sentence Imposed</u> **	<u>Sentenced Increased</u>
Sexual Assault I (minor)/ Sexual Abuse I	15 (83.3% of 18)	3 (16.7%)	
Sexual Assault I (adult)	3 (60.0% of 5)	2 (40.0%)	
Robbery I	11 (68.8% of 16)	5 (31.2%)	
Assault I	12 (85.7% of 14)	2 (14.3%)	
Manslaughter	5 (83.3% of 6)	1 (16.7%)	
Misc. re Controlled Subs. II	1 (50.0% of 2)	1 (50.0%)	
MICS III	(0.0% of 1)	1 (100.0%)	
Misconduct re Weapons I	2 (100%)	(0%)	
Custodial Interference I	1 (100%)	(0%)	
Arson I	1 (100%)	(0%)	
Unknown Offense	— (0% of 2) 51 (75.0% of 68)	— (0%) 15 (22.1%)	<u>2 (100%)</u> 2 (2.9%)

* "Sentence reduced" includes all instances where the sentence imposed by the 3-judge panel was shorter than the presumptive sentence for the offender; and sentences in which the length was the same as the presumptive but the sentence was made non-presumptive.

** "Original" sentence is the presumptive sentence applicable to the offender being considered, taking into account prior record and offense.

TABLE 6
Comparison of 3-Judge Panel Cases to Other Cases
in Same Period
 (November 23, 1987)

Type Offense	N ref. to 3-Judge, 1. 1985-1987	% of Panel Cases 2. 1985-1987	% of all cases this type, 3. 31-month period*	Est. N, this type case, 4. 31-month period**	Est. this type case as % of all convictions 5. for 31-month period***
Sex. Asslt. I/ Abuse I	18)23	26.5%)33.9%	14.4%)	160	4.8%
Sex. Asslt. I (adult)	5	7.4%			
Robbery I	16	23.5%	18.8%	85	2.5%
Assault I	14	20.6%	46.7%	30	0.9%
Manslaughter	6	8.8%	24.0%	25	0.7%
Misconduct re Control. Subs. II	2	2.9%	4.4%	45	1.3%
MICS III	1	1.5%	0.4%	275	8.2%
Misconduct re Weapon I	2	2.9%	8.7%	23	0.7%
Custodial Interference I	1	1.5%	33.3%	3	0.1%
Arson I	1	1.5%	33.3%	3	0.1%
Unknown Offense	2 68	2.9% 100.0%	N/A 10.5%	N/A 649	-- 19.3%

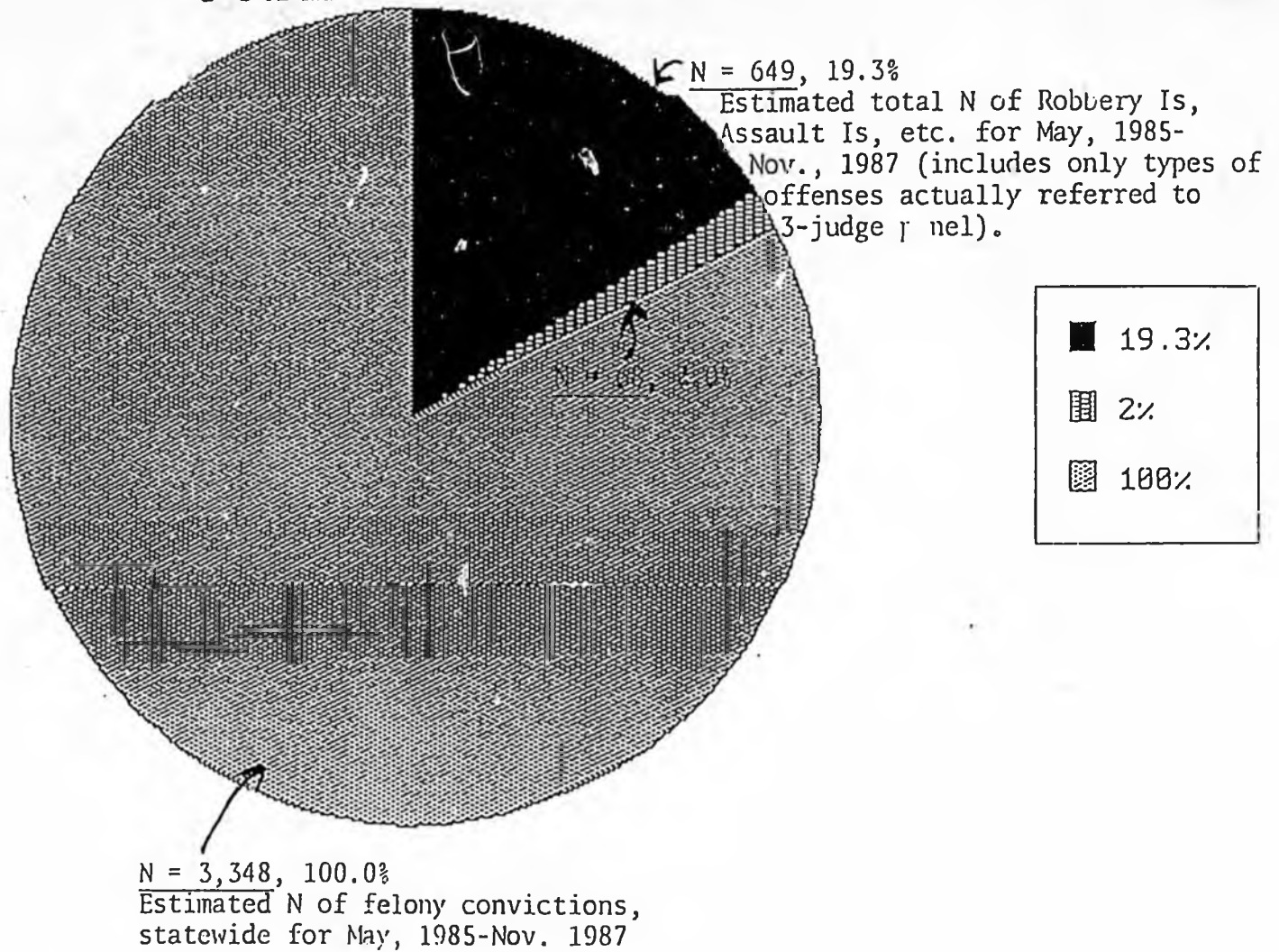
* The percentages in Column 3 were derived by dividing the N from column 1 (N referred to 3-judge panel in 1985-1987) by the N from Column 4 (the estimated N of the same type of cases for the entire 31-month period). For example, 16 Robbery I cases were decided by the 3-judge panel during the study. For approximately the same period, there were an estimated 85 Robbery I convictions statewide. Thus an estimated 18.8% of the Robbery I convictions were referred to the 3-judge panel by the sentencing judge.

** The N (number) of convictions for this offense in 1984 (see Alaska Felony Sentencing 1984, Appendix A for base data) was multiplied by 2.5 to obtain a conservative estimate of the number of convictions for the same offense in the period May, 1985-November, 1987 covered by the available 3-judge panel dispositions.

*** The N of all convictions for the 31-month period May, 1985-November, 1987 was estimated by a) increasing the N of 1984 cases studied (N=1128) by 13% to account for Kenai, Nome and Kotzebue cases not on PROMIS (N=1275); b) increasing 1275 by 2% (the % of increase in felony dispositions in the 1986 Court Report between FY'84 and FY'85) (new N = 1300); c) 31 months = 108 (1300 / .12 to obtain N of cases/mo.) x 31 = 3348 cases in the May, 1985 to November, 1987 period.

The two periods do not overlap entirely, of course. The cases are reported in the period during which they were decided by the 3-judge panel. Typically, the offenses actually occurred a year or more prior to that time. The data presently available indicate that the number of convictions levelled off in 1986 and have declined very slightly in 1987. Therefore, these estimates are reasonable approximations of the numbers and types of felony

3-JUDGE PANEL-FIGURE 1



3-Judge Panel

Sixty-eight cases (68) were decided by the three-judge panel between May, 1985 and November 1987. Table 1 shows the types of offenses involved. Almost equal numbers of Robbery I (16 cases) and Sexual Abuse I/Sexual Assault I (minor) (18 cases) were considered by the panel, with lesser numbers of Assault I (N = 14), Manslaughter (N = 6) and Sexual Assault I (adult victim) (N = 5). One or two each of a variety of other offenses were also reviewed by the panel.

The majority (58.8%) of the cases were from Anchorage, although Anchorage felony convictions were only 42.6% of the statewide felony convictions studied in 1984 (Anchorage's percentage would have been noticeably lower if 1984 cases for Kenai, Kotzebue and Nome had been available for study). Fairbanks cases constituted 20.6% of the 3-judge panel's work and 19.6% of the 1984 felony convictions (comparison data is taken from the Council's report, Alaska Felony Sentences: 1984 unless otherwise noted). Ketchikan had 4 cases before the panel (5.9% of the panel's cases), but only 3.3% of the 1984 felony convictions. Six court locations--Bethel, Juneau, Kotzebue, Nome, Sitka and Valdez--appeared to have no cases before the panel (however, the location of one of the panel's 68 cases was not recorded in the summaries).

The panel's action on each case is summarized on Table 5. In 75.0% of the 68 cases, the offender's sentence was reduced, at least to the extent of making the sentence non-presumptive. Usually the reduction also involved a reduction in the length of jail time to serve. The percentages of sentences reduced varied among the different types of offenses. Only 60% of the Sexual Assault I (adult victim) offenders had reduced sentences, and 68.8% of the Robbery I offenders. A higher percentage of the sexual cases involving minors received reduced sentences (83.3%) as did the typical Assault I (85.7%) and Manslaughter (83.3%) cases being heard by the panel.

In 22.1% of all cases, the 3-judge panel found that the original presumptive sentence should be imposed. Those cases were remanded to the trial judge with instructions to impose the presumptive sentence. In 2 cases (2.9% of the 68 cases), the 3-judge panel increased the presumptive sentence. In one of the 2 cases (Wickman, FAS86-2327), the panel said the judge had the authority to specify aggravating factors and increase the sentence. In the other case (Kuvaas, KN84-299), the panel agreed with the sentencing court that the 7-year presumptive was too lenient and increased the sentence to 12 years with 5 suspended and 5 years probation.

Table 6 and Figure 1 show how the number and type of cases decided by the 3-judge panel during the 31-month period (May, 1985-November, 1987) compare to the estimated numbers of these types of convictions during the same period. For example, Assault I convictions are less than one percent (0.9%) of the estimated total number of convictions, but 20.6% of the cases decided by the panel. These data indicate that only a few types of offenses are likely to be referred by trial judges to the 3-judge panel. Typically, these offenses are Class A or Unclassified offenses that have lengthy presumptive sentences for first offenders and proportionately longer sentences for repeat felony offenders. Other types of offenses subject to presumptive sentencing (e.g., repeat felony offenders convicted of Class B or C offenses) are very unlikely to be referred to the panel.

Table 6 shows that among the felony offenses likely to be referred to the 3-judge panel only an estimated 10.5% (68 of 649) actually were decided by the panel during the two-year period. This finding emphasizes the fact that only a small percentage of offenders are considered by the sentencing judge to be appropriate subjects for the panel. Table 6 also shows that the percentages referred vary by type of offense. Only 14.4% of Sexual Assault I/Abuse I offenses go to the 3-judge panel, as compared to 18.8% of Robbery I offenses, 46.7% of Assault I offenses, and 24.0% of Manslaughters.



alaska judicial council

1031 W. Fourth Avenue, Suite 301, Anchorage, Alaska 99501 (907) 279-2526

EXECUTIVE DIRECTOR
Harold M. Brown

NON-ATTORNEY MEMBERS
Leona Okakok
Hilbert J. Henrickson, M.D.
Renee Murray

December 1, 1987 .

ATTORNEY MEMBERS
William T. Council
James D. Gilmore
Barbara L. Schuhmann

CHAIRMAN, EX OFFICIO
Warren W. Matthews
Chief Justice
Supreme Court

Representative Fran Ulmer
1700 Angus Way
Juneau, Alaska 99801

RE: Presumptive Sentencing/Child Abuse/3-Judge Panel

Dear Fran:

Thank you for buying breakfast.

Suggestions have surfaced recently to the effect that Superior Court judges and 3-judge panels have been unlawfully avoiding presumptive sentencing standards--especially in the area of sexual abuse. To get a feel for this we decided to make a "thumbnail sketch" of 3-judge panel activity. Teri Carns reviewed and analyzed what data was available and talked with Dana Fabe. I spoke with Judges Carlson and Shortell, chief judges of the 3-judge panel since inception and Anchorage District Attorney Dwayne McConnell. We also reviewed previous studies on sentencing and in-house data collected from a number of state and municipal agencies.

As a preliminary matter, you should know that District Attorney McConnell states that there has been no change of policy in his office concerning the prosecution of sexual assault cases. There is no more or no less "charge bargaining" occurring in these cases. The standards for prosecution are the same. About the same number of cases are being brought to their attention and the same number of prosecutors are assigned to prosecute the cases as in prior years. In summary, there has been no change in policy or in resources dedicated by the state to the prosecution of sexual abuse cases.

During the first 5 years that the 3-judge panel was in existence few cases were referred--maybe 8 to 10 per year--and no permanent record was kept of the cases heard. Judge Shortell became chief judge of the 3-judge panel in 1985 and started the practice of publishing summaries for each case heard. The analysis therefore includes only cases from May of 1985 through November of 1987.