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Comment

Prior Misconduct Evidence In Missouri

I. INTRODUCTION

Although the rules and exceptions regarding the admissibility of evidence of prior misconduct during criminal trials are well established, the theories and logic underlying the black letter law have apparently eroded to mere words. State v. Sladek and State v. Bernard were two recent opportunities for the Missouri Supreme Court to examine the law of uncharged misconduct evidence. Unfortunately, the majority opinions in these cases did not address the central problems with this area of evidence but instead, they sidestepped the issues and created a new unprincipled exception. The new exception, signature modus operandi/corroboration, ignores the central reason that prior uncharged misconduct evidence is inadmissible: the prejudicial and irrelevant nature of character evidence when prosecuting a particular crime. Also, the new exception has been applied differently in the Western District of Missouri than in the Eastern District. The decisions from the two districts appear to be applying different legal standards while analyzing the same words.

Evidence of prior misconduct, when used to demonstrate the defendant’s propensity to commit a crime, is inadmissible. Evidence of misconduct that is not the subject of the present action is admissible to prove the present crime charged if it establishes 1) motive; 2) intent; 3) absence of mistake or accident; 4) a common scheme or plan; or 5) identity. The generic sound of the exceptions has led to misinterpretations of the basic principle underlying the rule. In an attempt to address this problem, the Missouri Supreme Court

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1. 835 S.W.2d 308 (Mo. 1992).
2. 849 S.W.2d 10 (Mo. 1993).
3. Sladek, 835 S.W.2d at 316-17 (Thomas, J., concurring); Bernard, 849 S.W.2d at 17.
8. Sladek, 835 S.W.2d at 315 (Thomas, J., concurring).
created a sixth exception: signature modus operandi/corroboration. This Comment will discuss the Sladek and Bernard cases, the adoption of the new exception, and the disparities in the exception's application between the districts.

II. PAST MISCONDUCT EVIDENCE GENERALLY

A 1901 case from New York, People v. Molineux, was the impetus for the present framework regarding past misconduct evidence. Federal Rule of Evidence 404(b) and Missouri's counterpart to Rule 404(b) use much of the original Molineux language. Federal Rule of Evidence 404(b) states:

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

The applicable section of Missouri's rule has been summarized as follows:

And evidence of other crimes, wrongs or acts may be admissible for proper more limited purpose, such as proof of motive, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

9. Bernard, 849 S.W.2d at 17.
10. The issues involving the admissibility of uncharged misconduct evidence are covered exhaustively in the premier treatise on such evidence by Professor Imwinkelreid. See generally IMWINKELREID, supra note 6.
11. 61 N.E. 286 (N.Y. 1901).
12. See supra note 7 and accompanying text.
13. FED. R. EVID. 404(b).
14. Missouri’s rules of evidence, formulated by caselaw, are summarized in Missouri Evidence Restated (Mo. Bar CLE 1984). For the sake of convenience, Missouri’s parallel to Federal Rule of Evidence 404(b) will be referred to as Missouri Rule 404(b), as it is numbered in Missouri Evidence Restated. Missouri’s version of the rule is actually derived from the following case law: State v. Williams, 652 S.W.2d 102 (Mo. 1983) (preparation); Rowe v. State, 806 S.W.2d 122 (Mo. Ct. App. 1991) (motive); State v. Vernor, 755 S.W.2d 283 (Mo. Ct. App. 1988) (intent); Newman v. State, 751 S.W.2d 93 (Mo. Ct. App. 1988) (identity); State v. Bebermeyer, 743 S.W.2d 516 (Mo. Ct. App. 1987) (knowledge); State v. Anderson, 687 S.W.2d 643 (Mo. Ct. App. 1985) (common scheme or plan); State v. Watson, 607 S.W.2d 189 (Mo. Ct. App. 1980) (absence of mistake or accident). See also IMWINKELREID, supra note 6, §§ 2:27-28.
The debated issue among scholars and jurisdictions is the effect of the second sentence in the federal rule and, more precisely, the words "such as." Does the use of these two words mean that the second sentence only provides examples of exceptions to the general rule, or is it an exhaustive list?\textsuperscript{15}

This debate led to the development of the fluctuating uncharged misconduct doctrine. The fluid nature of this legal area is evidenced by the number of cases reviewed on appeal regarding this issue.\textsuperscript{16} According to one article, the admissibility of uncharged misconduct evidence is the point of error most frequently asserted on appeal.\textsuperscript{17} Uniformity is crucial because the doctrine is equally applicable to both criminal and civil cases.\textsuperscript{18}

Whether uncharged misconduct evidence will be admitted is primarily a question of logical and legal relevancy. Usually, the logical relevancy requirement can be satisfied rather easily.\textsuperscript{19} Legal relevance, on the other hand, requires the judge to weigh the probative value of such evidence against the dangers of unfair prejudice, confusion of the issues, and misleading the jury.\textsuperscript{20} The determination of legal relevance is within the discretion of the trial court.\textsuperscript{21} The most prevalent danger in using prior misconduct evidence is the potential for creating jury bias. Such bias manifests itself as an inference of character or propensity for certain behavior and the conclusion that the defendant acted in conformity therewith. Other risks are also inherent in propensity evidence, namely:

[1] that the introduction of evidence of other crimes will mislead or confuse the jury . . . [2] that the defendant will be made to defend, not just against the charges brought, but against all of his prior, similar behavior which, for whatever reason, was not prosecuted by the State, and [3] that the jury, in its rush to punish the defendant for his past acts—which the jury must infer have gone unpunished—may overlook the fact that the State has

\textsuperscript{15} IMWINKLEREID, supra note 6, §§ 2:27-:28.
\textsuperscript{16} State v. Jones, 725 P.2d 312 (Or. 1986). A Westlaw search of key numbers 369, 370, and 371 revealed 11,607 state cases and 1,894 federal cases. \textit{Id.} at 317.
\textsuperscript{19} Evidence is "logically relevant" if such evidence tends to make the existence of any material fact more or less probable than it would be without the evidence. \textit{Sladek}, 835 S.W.2d at 314.
\textsuperscript{20} Edgell v. Leighty, 825 S.W.2d 325 (Mo. Ct. App. 1992) (relevancy). \textit{See also Missouri Evidence Restated, supra} note 14, § 403.
\textsuperscript{21} State v. Brown, 604 S.W.2d 10, 16 (Mo. Ct. App. 1980).
failed to prove the defendant was guilty of the charges brought.\textsuperscript{22}

The impact of prior misconduct evidence has been studied by research groups and individuals.\textsuperscript{23} These groups have found that when evidence of prior misconduct was admitted, more convictions were returned than in similar cases in which such evidence was disallowed.\textsuperscript{24} The evidence stigmatizes the defendant\textsuperscript{25} and has been deemed "the most prejudicial evidence imaginable against an accused."\textsuperscript{26}

The American justice system is said to punish acts, not people.\textsuperscript{27} Case law has intimated that if the government convicts an individual based upon his status or character, the individual's Eighth Amendment right to freedom from cruel and unusual punishment may be violated.\textsuperscript{28}

Some courts have observed that even judges may be swayed by past misconduct evidence.\textsuperscript{29} It would be "a feat of psychological wizardry verg[ing] on the impossible even for berobed judges" to separate the inference of guilt created by the bad character evidence from relevant evidence.\textsuperscript{30}

The uncharged misconduct doctrine attempts to remove such evidence and the intermediate inference of bad character from the trier of fact.\textsuperscript{31} The danger is that an ultimate conclusion could be drawn from the inference instead of evidence that directly implicates the defendant in the present crime. Schematically, the issue looks like this:

| Item sought to be admitted (prior crime) | inference of character | ultimate conclusion Defendant committed crime charged. |

\textsuperscript{22} Bernard, 849 S.W.2d at 22. (Robertson, C.J., concurring).

\textsuperscript{23} See IMWINKLER\textsuperscript{EID}, supra note 6, § 1:02.


\textsuperscript{25} James M. Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offense, 6 ARIZ. L. REV. 212, 218 (1965).

\textsuperscript{26} People v. Smallwood, 722 P.2d 197, 205 (Cal. 1986).

\textsuperscript{27} People v. Allen, 420 N.W.2d 499, 503-04 (Mich. 1988).

\textsuperscript{28} Robinson v. California, 370 U.S. 660 (1962).


\textsuperscript{31} Vowell v. State, 628 S.W.2d 599, 603 (Ark. Ct. App. 1982).
When prior misconduct is used as circumstantial evidence of the defendant's bad character, leading to the conclusion that the defendant is more likely to have committed the crime charged, the doctrine is violated per se.\footnote{IMWINKLEREID, supra note 6, § 2:18.} This analysis is mandated by the first sentence in Federal Rule 404(b).\footnote{See supra note 13 and accompanying text.} If the prosecution is to have prior misconduct evidence admitted, it must present the evidence under a different theory of admissibility. For example, a defendant's prior rape convictions cannot be used to persuade the factfinder that the defendant has a propensity for committing rape, but they may be admissible for other purposes.

This legal theory has support outside of jurisprudence. Psychologists believe that character is not an accurate indicator of behavior.\footnote{22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5239 (1978).} Instead, they argue that situational factors are more determinative of human behavior.\footnote{Robert G. Lawson, Credibility & Character: A Different Look at an Interminable Problem, 50 NOTRE DAME L. REV 758, 778-81 (1975).} This bar of prior misconduct evidence applies only to evidence that is offered to show character and actions in accordance therewith. A party may be able to get prior misconduct evidence admitted under either of two theories. First, a party may use the contested evidence not to show character, but for another purpose.\footnote{William Roth, Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach, 9 PEPP. L. REV. 297, 303 (1982).} For example, if a party is charged with counterfeiting, a court may find evidence regarding the defendant's prior involvement in robberies of ink, paper, and printing presses to be particularly relevant evidence. The other crimes do not merely create an inference of bad character; they are uniquely related to the counterfeiting charge, \textit{i.e.}, the defendant possessed the tools necessary to commit the present crime. Examples of other admissible purposes are listed in the second sentence of Rule 404(b).\footnote{FED. R. EVID. 404(b) (listing nine potentially valid uses of misconduct evidence). Evidence offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident may be admissible despite the exclusionary nature of Rule 404(b).}

Second, evidence of the defendant's character can be used to show conduct when the character is highly probative.\footnote{IMWINKLEREID, supra note 6, § 2:38.} This occurs when the defendant's character is so unique or consistent that its probative value outweighs the dangers of prejudicial use.\footnote{Id. § 2:22.} For example, imagine a defen-
dant who has such a rare, abnormal sexual propensity that proof of the propensity earmarks the defendant as the perpetrator. In such a situation, character serves to identify the defendant as the one who committed the charged crime.

When dealing with past misconduct evidence, there are inclusionary and exclusionary jurisdictions. A jurisdiction that follows an inclusionary approach admits misconduct evidence as long as the theory of relevancy is not to show character and actions in accordance therewith. In contrast, exclusionary jurisdictions only admit past misconduct evidence if the theory of relevancy is one of the enumerated exceptions in the second sentence of Rule 404(b). Missouri is not considered an inclusionary state.

The exclusionary categories are clear and distinct, but they are only examples of particularly relevant evidence. Evidence should not be limited to these five or six exceptions, since the proper question is one of relevancy. Relevancy is a facts and circumstances evaluation. One court characterized the exclusionary approach as creating "pigeon holes" and ignoring the rule's purpose: an assurance of relevancy. Arguably, the exclusionary approach follows a rule that is too narrow compared to the broader theory on which it was founded in that the only improper theory of relevancy is using character to show action in conformity therewith.

In inclusionary jurisdictions, it is immaterial that the theory of relevancy does not fit into one of the enumerated categories. In these jurisdictions, the enumerated exceptions are mere examples of particularly relevant uses of prior misconduct evidence; they are not meant to be an exhaustive list precluding all other theories of relevancy. This broader theory allows for the admission of prior misconduct evidence if its relevance is not based solely upon the defendant's propensity to commit the charged act.

40. Id.
41. Id.
42. Sladek, 835 S.W.2d at 315-16 (Thomas, J., concurring).
44. See IMWINKLEREID, supra note 6, §§ 2:27-:28.
45. Id. According to Professor Imwinkelreid, the traditional inclusionary states are California, Connecticut, Georgia, Idaho, Illinois, Indiana, Maine, Massachusetts, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, and Wisconsin. Id.
47. Woods, 484 F.2d at 134.
48. IMWINKLEREID, supra note 6, § 2:18.
49. 22 WRIGHT & GRAHAM, supra note 34, § 5239.
50. Id.
51. United States v. Unruh, 855 F.2d 1363, 1377 (9th Cir. 1987).
There are times when two crimes are both committed in such a unique way or upon such a distinct class of victims that the requirements of relevancy are met. When this occurs, the modus operandi of the crime works as a signature of the defendant, much in the same way that a fingerprint identifies a suspect. The threshold issue when applying this exception is whether the identity of the perpetrator is in question. The existence of the criminal activity is assumed. In such a case, the high degree of similarity between the defendant’s modus operandi during prior crimes and the presently charged crime meets the relevancy requirement.

A problem with this type of evidence is the possibility of "copycat" crimes. If a copycat committed one of the prior crimes attributed to the defendant, and this evidence is used as evidence in the present trial, the defendant is prejudiced. The court must recognize that such a problem may occur.

In order to utilize the identification exception to Rule 404(b), the party seeking to introduce the evidence must satisfy a two part test. The party must show 1) that both crimes were committed with the same or very similar modus operandi; and 2) that the methodology is so unique that both crimes can be attributed to one criminal. Upon showing these two elements, the party will have demonstrated that it is reasonable to conclude that the same person committed both of the crimes—an inference of identity. Missouri’s standard is set forth in State v. Koster:

[T]o prove other like crimes by the accused so nearly identical in method . . . earmark[s] them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature.

54. Bernard, 849 S.W.2d at 26 (Thomas, J., concurring).
55. Id. at 25.
56. Id. at 26.
57. IMWINKLEREID, supra note 6, § 3:10.
58. Id.
60. Id. at 491.
The first element of the test requires that the crimes be "nearly identical." Usually, courts will look to three factors to see if this requirement is met. First, were the crimes reasonably close together in time? This applies to uncharged acts that occurred after the charged crime as well as to acts that occurred prior to the charged crime. Second, did the two incidents occur in roughly the same geographic area? Third, are the methodologies of the two crimes unique and distinctive enough to merit admissibility? This factor is the most important of the three. If there are marked differences between the charged crime and the past misconduct sought to be introduced, the court should deny admissibility based upon the identity theory. Also, it is possible that two incidents are geographically and temporally separate, but the actual methodology is so unique that the court can conclude with reasonable certainty that the two acts were committed by the same person.

The second element of the identity test requires that the methodology be unique as between the charged crime and the uncharged misconduct. This element is the tool the courts use to sift through potential copycats and generic crimes. Because it is likely that there are optimal techniques with which to complete certain crimes, numerous criminals may implement the same methodology. When this situation arises, the court should deny admissibility.

Courts should admit the evidence only in distinctive cases that go beyond general crimes.

62. United States v. Farber, 630 F.2d 569, 571 (8th Cir. 1980).
63. Sladek, 835 S.W.2d at 313 n.1 (Thomas, J., concurring).
65. Id.
66. See United States v. Myers, 550 F.2d 1036, 1044-46 (5th Cir. 1977).
69. IMWINKLERED, supra note 6, § 3:12.
70. See id. § 3:14.
71. Id. § 3:12.
IV. COMMON PLAN OR SCHEME

The common plan or scheme exception is actually a subset of the identity exception. Both theories acknowledge that a crime has been committed; the sole question with each is, "Who was the perpetrator?" The identity theory seeks to mark the defendant because of his unique, signature-like methodology. A common plan or scheme theory of admissibility seeks to mark the defendant because of a logical link between the prior and present crime. The rationale for this exception is that the evidence is relevant to prove that the defendant is guilty because each of the acts of uncharged prior misconduct is a step toward committing the charged crime. Together, the activities show the defendant was carrying out a plan to commit the crime. As stated before, if a defendant is charged with counterfeiting, it is relevant to show that he had stolen ink that was of the type used in the present crime.

In analyzing common plan or scheme cases, the courts have found two categories: 1) True plans; and 2) spurious plans. As the names indicate, true plans are a sound basis for the admissibility of prior misconduct, but those considered "spurious" are not. True plan cases involve instances when the defendant considered the commission of the prior crime and the crime charged as necessary steps in the execution of an overall objective. State v. Kenley is demonstrative of this theory. Kenley involved a crime spree in which each crime led to the commission of the other. In such cases, the court is presented with

72. 22 WRIGHT & GRAHAM, supra note 34, § 5244.
73. See supra notes 65-67 and accompanying text.
75. See infra notes 79-82.
76. See supra notes 36-37 and accompanying text.
77. IMWINKLER & REID, supra note 6, § 3:20.
78. See id.
80. Id.
81. The state introduced evidence that the defendant had a large number of handguns, purchased ammunition, and practiced shooting the day prior to the charged crime. Then, on the day of the crime, the defendant robbed a liquor store, threatened the clerk, and kidnapped a female customer. After leaving the store, Kenley forced the woman to perform sexual acts. Shortly thereafter, he held up a tavern and shot and killed the victim when he was slow in obeying the defendant's orders. Then, the defendant left the tavern with a bartender and another woman. Eventually, the woman and bartender escaped while Kenley fired shots at them. A little later, he robbed a motel. That same morning, Kenley entered a Food Mart and demanded a car and a
evidence of very distinct activities, yet they are not signatures. The party seeking admission has to connect the other party with the uncharged acts in order to gain admission of such acts. 2 Finally, this theory requires a certain degree of mens rea. 3 The defendant must believe that each crime springs from the previous one. 4 The term of art used is that "the crimes [must be] related in fact and in mind." 5

Sometimes, courts have drifted from the true plan rationale into the spurious plan rationale without realizing the theoretical problems. 6 The use of the magical word "plan" does not determine the relevancy of the offered evidence. 7 Spurious plans are not really plans at all, but are attempts to avoid the strict requirements of the modus operandi/identity theory of admissibility. 8 The spurious theory usually is disguised as a plan to commit a series of similar crimes. 9 This type of evidence is directly proscribed by the first sentence of Rule 404(b). 10 When a court allows such evidence, the evidence might be used to determine the propensity of the individual to commit similar crimes, which is proving conduct through character. Criminal propensity in this sense is equivalent to character. When courts are presented with an argument of relevancy based alternatively on the identity theory or the common plan or scheme theory, they should closely examine the foundation of the common plan or scheme theory advanced in order to differentiate true plans from spurious ones. A party should be required to meet the strict standards of the identity test without sidestepping them by using the word "plan."

driver and was arrested as he attempted to leave the parking lot. The court admitted this evidence as evidence of a common scheme or plan which resulted in the victim's death. Id. at 80-81.

82. 2 JOHN H. WIGMORE, EVIDENCE § 304 (3d ed. 1979).
83. Kenley, 693 S.W.2d at 81.
84. See MCCORMICK, supra note 6, § 190.
85. IMWINKLEREID, supra note 6, § 3:21.
87. See IMWINKLEREID, supra note 6, §§ 3:21-:23.
89. See IMWINKLEREID, supra note 6, § 3:21-:23.
90. See supra note 13 and accompanying text.
V. State v. Sladek

Martin Sladek was charged and convicted of first degree sexual assault and first degree deviate sexual assault, in the Circuit Court of St. Louis County, by Judge Robert L. Campbell. Sladek was a practicing dentist in St. Louis county. The victim was an eighteen-year-old co-worker of Sladek. She called him at home complaining of a chipped tooth. Though the office was officially closed, Sladek agreed to meet her at the office later that day.

The victim helped Sladek prepare for the procedure. She was placed under both nitrous oxide and oxygen sedation. She noticed that the

91. 835 S.W.2d 308 (Mo. 1992).
92. Sladek, 835 S.W.2d at 309. The statutes in their pertinent parts read as follows:

MO. REV. STAT. § 566.040 (1986)—sexual assault in the first degree—
1. A person commits the crime of sexual assault in the first degree if he has sexual intercourse with another person to whom he is not married and who is incapacitated . . . .

MO. REV. STAT. § 566.070 (1986)—deviate sexual assault in the first degree—
1. A person commits the crime of deviate sexual assault in the first degree if he has deviate sexual intercourse with another person to whom he is not married and who is incapacitated or who is fourteen or fifteen years old.

MO. REV. STAT. § 566.010 (Supp. 1992)—Chapter definitions—As used in this chapter:
1) "deviate sexual intercourse" means any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person;
2) "sexual contact" means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person . . . .
3) "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results . . . .

93. Sladek, 835 S.W.2d at 308. The defendant knowingly waived his right to trial by jury and this waiver was never contested upon appeal. Id.
94. Id. at 309.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
concentration of nitrous oxide was unusually strong and claimed it eventually caused her to lose voluntary control of her arms and legs.

According to the complaint, Sladek forced himself upon the victim once she was totally incapacitated. He allegedly made her perform an involuntary act of sodomy and then raped her.

The trial court allowed the testimony of four of Sladek's former patients over the objections of the defense. Each of the four women testified that Sladek had initiated improper sexual contact during treatment.

L.G. testified that in October 1988, she went to Sladek's office and while he was working on her teeth, "he repeatedly placed his other hand on her breast... he worked his hand underneath the tissue [that she had pulled tight after he left briefly] and began rubbing her breast with the back of his hand." After becoming convinced that Sladek was intentionally fondling her, she shoved him. Only then did he end the "examination."

Two other witnesses, K.A. and R.C., testified that during examinations, Sladek repeatedly touched their breasts with his forearm and his free hand. The fourth witness, S.B., testified that Sladek made sexual advances toward her. She ended the treatment when the pain became too great, at which time Sladek told her that he would meet her at the office any time "even if it is 3:00 a.m." The following day, Sunday, Sladek called S.B. at her home four times, asking her to return his call.

Sladek testified that there was no improper contact between the present victim and himself on February 11, 1989. Also, he stated that any contact

100. Id. The victim stated that the gauges regulating the flow rate of the two gases read between five and six liters per minute of nitrous oxide and two to three liters per minute of oxygen. The State produced an expert who testified that two to three liters of nitrous oxide per minute would render an individual unable to move her limbs. Id.

101. Id.

102. Id.

103. Id.

104. Id. at 309-13.

105. Id. at 309-10.

106. Id. This incident is alleged to have occurred when the defendant was working in another dental office. Id. at 309.

107. Id.

108. Id.

109. Id.

110. Id.

111. Id.

112. Id.

113. Id.
that may have occurred with L.G., K.A., and R.C. was proper.\textsuperscript{114} To refute the possible negative inferences drawn from S.B.'s testimony, Sladek testified that it was customary for him to make follow up calls to patients.\textsuperscript{115}

The defense argued that admitting the four women's testimony was improper and so prejudicial that it required reversal of the verdict.\textsuperscript{116} The defense asserted that the contested testimonial evidence was neither relevant to the present crime charged nor was it within any of the common exceptions.\textsuperscript{117} In Missouri, uncharged crimes are generally inadmissible as evidence unless they are offered under a specifically enumerated theory of relevance.\textsuperscript{118} Therefore, according to the defense, the testimony should have been excluded.\textsuperscript{119}

The State, in response to the defendant's objection, argued that the evidence was proper because it tended to show a common plan or scheme by Sladek to target his patients for improper sexual purposes.\textsuperscript{120} Both the trial and appellate courts accepted the State's argument, but the Missouri Supreme Court reversed and remanded for a new trial.\textsuperscript{121} The court said, "The evidence from the other patients . . . [failed to] have a legitimate tendency to directly establish the guilt of Sladek."\textsuperscript{122} Thus, the lower court erred in admitting such evidence.

Judge Thomas concurred in the judgment, but believed that the law concerning prior misconduct (charged and uncharged) needed to be re-examined from a logical and realistic point of view.\textsuperscript{123} He argued that the common exceptions to the past misconduct rule had become mere words separated from their logical underpinnings.\textsuperscript{124} He was particularly interested in the answer to the question, "What is a common scheme or plan?"\textsuperscript{125} He advocated a delineation between two similar theories of relevancy.\textsuperscript{126} He would label one as "signature modus operandi/identity" and another as "signature modus operandi/corroboration."\textsuperscript{127} An interesting issue in

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\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 311.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 311-13.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 311-12.
\textsuperscript{121} Id. at 309, 313.
\textsuperscript{122} Id. at 313.
\textsuperscript{123} Id. at 313-18 (Thomas, J., concurring).
\textsuperscript{124} Id. at 314-16.
\textsuperscript{125} Id. at 315.
\textsuperscript{126} Id. at 316.
\textsuperscript{127} Id.
Thomas's concurrence is whether these new terms would be helpful or even proper. It is possible that a corroborate theory of relevancy would require an expansion of the rules of evidence.

VI. DISCUSSION OF SLADEK

A. The Majority Opinion

As previously stated, the State based its theory of admissibility on the common scheme or plan exception to the Missouri counterpart to Federal Rule 404(b). The prosecutor claimed stated that "Sladek had a common plan or scheme to make [his] patients the targets of his misdeeds." Missouri's standard regarding uncharged crimes evidence was stated in State v. Reese. It requires that the commission of the prior uncharged crimes directly establish the defendant's guilt in the present crime. The court set out the established exceptions listed in People v. Molineux. The court unfortunately stated the exceptions rather simply without detailing their foundational bases.

The majority concluded that, as a matter of law the Reese standard was not satisfied by showing that the defendant committed a crime of the same general nature as the one charged. The uncharged conduct must have a legitimate tendency to establish a material fact regarding the present crime. The test was whether the offered evidence, the testimony of the former patients, had some legitimate relevancy regarding the present claims against Sladek. "The fact that he (Sladek) may have touched the breasts of three former patients would have no tendency to prove that he gave the victim in this case nitrous oxide in sufficient quantity to disable her and thereafter rape her." The court proceeded to explain that the evidence, if of any value, would tend to subject Sladek to other criminal charges, but not

128. Id. at 311.
129. Id.
130. 274 S.W.2d 304 (Mo. 1954).
131. Id. at 307.
132. See supra note 7 and accompanying text. Molineux is, as aforementioned, the case that led to the development of the exclusionary view among American jurisdictions. The majority did not even consider or discuss the inclusionary approach. See supra notes 7, 42-51, 116-19, and infra notes 133-151 and accompanying text.
133. Sladek, 835 S.W.2d at 312.
134. Id.
135. Id.
136. Id.
necessarily the one presently before the court.\textsuperscript{137} "[E]vidence is not admissible on the theory that if a person will commit one offense he will commit another."\textsuperscript{138} The court said that even if Sladek had a common plan or scheme to take advantage of his patients, it did not see any logical relevancy between those alleged crimes and the rape in question.\textsuperscript{139}

The majority next examined the holding in \textit{State v. Dee}.\textsuperscript{140} According to the Supreme Court of Missouri, it was upon this case that the appellate court upheld Sladek's conviction.\textsuperscript{141} \textit{Dee} involved a male employee of the Division of Family Services (DFS).\textsuperscript{142} He was convicted of forcibly raping the mother of one of his clients.\textsuperscript{143} In \textit{Dee}, the State was allowed to introduce evidence that other women who reported to Dee at DFS were also subjected to various aggressive sexual advances.\textsuperscript{144} The court held that Dee had a common plan or scheme to use his position of power to manipulate these women and to obtain sexual gratification.\textsuperscript{145}

The court distinguished \textit{Dee} from the present case solely because Dee was in a position of power, while Sladek's patients were in his presence voluntarily.\textsuperscript{146} "Thus, \textit{Dee} and this case are not comparable."\textsuperscript{147} This distinction is weak, at best.\textsuperscript{148}

The final issue the majority addressed concerned the possible remedy for the admission of such improper evidence. Was a reversal to be granted in a court-tried case?\textsuperscript{149} Even though judges are allowed more discretion in cases tried without juries, the court felt it was evident, considering the statements made by the judge,\textsuperscript{150} that a reversal and remand for a new trial were necessary.\textsuperscript{151}

\begin{itemize}
\item 137. Id.
\item 138. Id.
\item 139. Id.
\item 140. 752 S.W.2d 942 (Mo. Ct. App. 1988).
\item 141. \textit{Sladek}, 835 S.W.2d at 312.
\item 142. \textit{Dee}, 752 S.W.2d at 944.
\item 143. Id. at 943. The child was under the concern of the DFS and thus the mother was somewhat powerless with respect to Dee. \textit{Id.} at 946-48.
\item 144. Id.
\item 145. \textit{Id.} at 947-48.
\item 146. \textit{Sladek}, 835 S.W.2d at 313.
\item 147. Id.
\item 148. \textit{See supra} notes 120-21 and accompanying text.
\item 149. \textit{Sladek}, 835 S.W.2d at 308.
\item 150. The trial judge in \textit{Sladek} stated that he would not have convicted him but for the testimony of the four alleged former victims. The judge felt that the testimony of the victim and the State's expert was especially weak. \textit{Id.} at 310-11.
\item 151. Id.
\end{itemize}
B. Judge Thomas's Concurrence

Judge Thomas said in his first paragraph that he was writing separately in an attempt to clarify the common scheme or plan exception. In doing so, Judge Thomas stated his hope that future decisions would be more consistent. He began by setting forth the general rule that "bad guy evidence" is not admissible.

Next, Judge Thomas discussed the relationship between logical relevancy and legal relevancy and how the latter may mandate the exclusion of logically relevant evidence when the dangers of the Missouri counterpart to Rule 403 are present. He then reiterated the discretionary role of the judge in such a balancing test. Even though prior misconduct evidence is probative and relevant to guilt, Judge Thomas stated strongly that the prejudicial nature of such evidence must be considered because of its practical effects upon the factfinder.

After dismissing the preliminary evidentiary issues, Judge Thomas delved into the substance of his concurrence: the titles of the exceptions give rise to confusion because of their "generic sound." Words such as "common scheme," "plan" and "identity" have become legal buzzwords that attorneys utilize irrespective of the legal foundation upon which they were originally recognized.

Judge Thomas addressed the defendant's argument that the common scheme or plan exception applied only in "single plan" cases. Citing State v. Kenley, Sladek argued that in order for this exception to apply, the State was required to show that he contemplated the commission of the rape and the four touchdowns prior to committing any of them.

Kenley involved a crime spree that encompassed robbery, rape, kidnapping, and murder. The Kenley court admitted evidence of the prior crimes because they "evince[d] a common scheme or plan pointing to

152. Sladek, 835 S.W.2d at 313-14 (Thomas, J., concurring).
153. Id. at 314.
154. Id.
155. Id.; see supra notes 20-22 and accompanying text.
156. Sladek, 835 S.W.2d at 314 (Thomas, J., concurring).
157. Id.
158. Id. at 315.
159. Id.
160. Id.
161. 693 S.W.2d 79 (Mo. 1985), cert. denied, 475 U.S. 1098 (1986).
162. Sladek, 835 S.W.2d at 315.
163. See supra note 81 and accompanying text.
defendant as the participant in the robbery that resulted in [the victim's] death." Judge Thomas said that this type of plan case could be characterized as "part of the same transaction (the charged crime)." After acknowledging this as a "common scheme or plan," Judge Thomas concluded that although the testimony of the four patients in the present case did not fall into this exception, it may have fallen within the identity exception.

His discussion of the identity exception focused primarily upon the signature modus operandi approach. Judge Thomas discussed Jones v. State as the classic example of an identity case. Jones involved two nearly identical robberies in Tennessee and Alabama. In both of the incidents, the victims were taken by a man identified as the defendant to a barn where they were subsequently robbed at gunpoint by an individual wearing a Halloween mask, a long black wig, and wielding a long barreled pistol. The defendant offered an alibi defense and denied any involvement in either of the incidents. The Alabama court upheld the admissibility of the Tennessee incident and stated the identity exception as follows:

Under the identity exception to the general exclusionary rule prohibiting the admission of other or collateral crimes as substantive evidence of the guilt of the accused, the other crime is not relevant to prove identity unless both that and the now-charged crime are "signature crimes" having the accused's mark and the peculiarly distinctive modus operandi so that they may be said to be the work of the same person.

This approach to the identity exception requires that the modus operandi be unique and so distinctive that a reasonable factfinder would feel compelled to find that both acts were committed by the same person. The language used by Missouri courts is that the modus of the crime be unique, such that

164. Sladek, 835 S.W.2d at 315 (quoting State v. Kenley, 693 S.W.2d 79, 82 (Mo. 1985), cert. denied, 475 U.S. 1098 (1986)).
165. Id.
166. Id.
167. Id. at 316.
169. Id. at 1386.
170. Id. at 1390.
171. Id.
172. Id.
173. Sladek, 835 S.W.2d at 316 (Thomas, J., concurring).
it becomes a constructive signature of one individual. Judge Thomas called this application the "signature modus operandi/identity" exception.

After explaining this theory of relevancy, Judge Thomas argued for a spin-off called "signature modus operandi/corroboration." He claimed that the holding in Dee was a situation in which corroboration would be the proper exception to apply. The typical identity theory was not applicable in Dee because the identity of Dee was not a contested issue. Rather, the issue was whether the alleged activity occurred at all.

In Dee, the appellate court had to decide whether the testimony of the other women was relevant under any theory. The Missouri Court of Appeals, Eastern District, upheld the admission of the testimony based upon a common scheme or plan. The Dee court characterized the scheme as one in which the defendant utilized his position to manipulate women. The facts of the case did not point to the existence of a single plan like the one in Kenley. It was not argued that Dee contemplated the sexual advances on all of the victims before acting. Judge Thomas appeared to recognize this deficiency in the Dee court's reasoning and therefore, without rejecting the holding of Dee, he presented an alternative legal theory, corroboration, to justify the admission of the contested evidence.

In support of corroboration, Judge Thomas stated that when the probative value of the modus operandi overcomes the possible prejudice in identity cases, such evidence "is probably equally strong in a case where it is offered to corroborate a victim's complaint."

After making these bold assertions, Judge Thomas addressed the potential dangers of his suggested approach. An initial problem with both of the modus operandi exceptions is that the degree of similarity required may

175. Sladek, 835 S.W.2d at 316 (Thomas, J., concurring).
176. Id.
177. Id. at 317.
178. Id.
179. Id.
180. Id.
181. Id.
182. Dee, 752 S.W.2d at 947.
184. Sladek, 835 S.W.2d at 315; see Dee, 752 S.W.2d at 947.
185. Sladek, 835 S.W.2d at 317 (Thomas, J., concurring).
186. Id.
187. Id. at 312.
become so relaxed over time that the exception swallows the rule. This problem, inherent in exceptions, is routinely addressed by the judiciary in other contexts and is thus assumed manageable. "Although we have called this exception corroboration, it really involves reasoning from the signature modus operandi based upon the propensity of the defendant to commit this type of crime to the conclusion that the defendant committed the crime charged." Judge Thomas acknowledged the theoretical problem presented by this reasoning: allowing one party to present evidence that leads the factfinder to reason through the other party's character to reach a verdict.

Judge Thomas offered five factors to offset the prejudicial nature of the evidence. These factors are as follows: 1) the modus operandi must be unique; 2) the modus operandi must be unusual; 3) the modus operandi possesses distinguishing characteristics unique to the individual; 4) the existence of repeated similar occurrences; and 5) temporal proximity between the charged crime and the offered evidence. All of these factors are to be considered in making a final judgment of relevancy.

Finally, Judge Thomas offered an alternate holding based on the application of his approach towards corroboration. Even though the four prior incidents involved illegal sexual activities in Sladek's office, they nonetheless were neither similar enough to the crime charged nor unique enough for Judge Thomas to hold that the previous patients' testimony was admissible under his corroboration approach. The methodology in the other four instances did not involve nitrous oxide as alleged in the present charge. Judge Thomas stated that if nitrous oxide had been used "[the prior acts] would likely qualify for admission under the . . . corroboration exception." The crimes alleged in the former patients' testimony did not satisfy the common plan or scheme exception because all of the incidents were

188. Id. at 315.
189. Id. at 317.
190. Id.
191. Id. at 316-317. According to Thomas, "unusual" in this context means something beyond unique. He would only admit evidence under this corroboration approach if it were so bizarre that it would earmark the party to such an extent that its probative value would overcome the legal relevancy problem of reasoning through character. Id. at 317.
192. Id. at 317.
193. Id. at 317-18.
194. Id.
195. Id. at 318.
196. Id.
not part of a single plan. Nor did they qualify as signature crimes, as they were not significantly similar to the crime charged.

VII. *STATE v. BERNARD*\(^{199}\)

Larry Bernard was charged and convicted of sexual abuse in the first degree\(^{200}\) and attempted forcible sodomy.\(^{201}\) He was convicted by a jury in the Circuit Court of Clinton County before Judge Stephen K. Griffin.\(^{202}\) The Missouri Court of Appeals, Western District, affirmed the verdict, but the Missouri Supreme Court reversed and remanded for a new trial.\(^{203}\)

The alleged victim was a fourteen-year-old male who was a member of the defendant's youth group at the time of the incident in October of 1988.\(^{204}\) Bernard tricked the victim into spending a night in a motel with him.\(^{205}\) The defendant convinced the victim to play strip rummy with him.\(^{206}\) At the conclusion of the game, both the defendant and the young male were clothed in only their underwear and subsequently crawled into a single bed to spend the night.\(^{207}\) After the victim fell asleep, Bernard proceeded to rub the victim's back, arm, and chest.\(^{208}\) Also, the defendant fondled the boy's genitals, and Bernard placed his erect penis against the victim's genitals.\(^{209}\) The victim repeatedly tried to push Bernard away, but Bernard forced the victim into submission.\(^{210}\) While the victim was in his underwear, Bernard took a photo of him.\(^{211}\) Upon leaving the motel, the defendant encouraged the victim to run or walk around his car either nude or in his underwear.\(^{212}\) The young male victim refused.\(^{213}\)

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197. *Id.*
198. *Id.*
199. 849 S.W.2d 10 (Mo. 1993).
201. *Id.* § 566.060.
202. *Bernard,* 849 S.W.2d at 10.
203. *Id.*
204. *Id.* at 12.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
Following his conviction, Bernard alleged error necessitating reversal based upon the admission of testimony by four former youth group members. Andrew, Bob, Charles, and Don testified at length concerning alleged uncharged acts of sexual abuse by Bernard that occurred during 1977-78. All four former members of the defendant's youth groups recounted stories of sexual abuse at sleepovers either at the church or at Bernard's house and weird "initiation" rituals involving sexual acts. Such acts included the licking of ice cream toppings off of other boys' genitals, taking photographs of boys naked, masturbating in front of the defendant, and performing the elephant walk. Also, the witnesses testified that Bernard, at various times, had touched or rubbed their genitals. All four witnesses stated that during their membership in the defendant's youth groups they were forced to run or jog naked in front of a slow-moving car driven by Bernard.

Bernard, as appellant, challenged the admission of this testimony as irrelevant and prejudicial. The Missouri Supreme Court held that all the testimony except the testimony regarding the naked boys and the slow moving cars was inadmissible under the newly adopted signature modus operandi/corroboration exception. The admission of the other evidence was so prejudicial that a new trial had to be ordered.

VIII. DISCUSSION OF BERNARD

A. The Majority Opinion

The importance of the Bernard decision is that Missouri adopted the signature modus operandi/corroboration exception that Judge Thomas argued for in his concurrence in Sladek. In a concurrence, however, Judge Thomas contended that the corroboration approach discussed in Sladek should not be adopted and Chief Judge Robertson's concurring opinion argued strenuously against the adoption of this approach.

214. Id.
215. Id. at 12-13.
216. Id. at 13, 17-19.
217. Id. at 17-19.
218. Id.
219. Id.
220. Id. at 18.
221. Id. at 19.
222. Id.
223. Id. at 20.
224. Id. at 17.
225. Id. at 21-24 (Robertson, C.J., concurring); id. at 24-27 (Thomas, J.,
The majority discussed the prior law of uncharged sexual misconduct in Missouri, particularly as it related to offenses against children.\textsuperscript{226} The court was disturbed by the "depraved sexual instincts" exception that was created two years earlier in \textit{State v. Lachterman}.\textsuperscript{227} "A blanket rule allowing evidence of any recent misconduct by the defendant with a child of the same sex as the victim may encourage the jury to convict the defendant because of his propensity."\textsuperscript{228} They thought that the \textit{Lachterman} exception was too broad but that the signature modus operandi/corroboration exception would serve the same purpose (admission of prior sexual misconduct) with less prejudicial effect upon defendants.\textsuperscript{229}

Without much explanation beyond the references in Judge Thomas's concurrence in \textit{Sladek}, Missouri created a new exception to the general bar of prior misconduct evidence.\textsuperscript{230} The new exception to the unchanged misconduct evidence rule adopted by the majority is as follows: "Evidence of prior sexual misconduct that corroborates the testimony of the victim [and that is] nearly identical to the charged crime and so unusual and distinctive as to be a signature of the defendant's modus operandi" is admissible.\textsuperscript{231} After announcing the new test, the majority applied it to the facts of the \textit{Bernard} case.\textsuperscript{232}

The testimony of the four former youth group members was barred except for references to the initiation activities involving naked boys running around a car driven by the defendant.\textsuperscript{233} All of the testimony relating to nude photographs, masturbation, fondling, and the sleepovers was barred because it was not deemed unusual or distinctive enough to meet the requirements of the new exception.\textsuperscript{234} This later testimony is commonplace in sexual abuse cases and did not "earmark" the defendant.\textsuperscript{235}

\textsuperscript{226} \textit{Id.} at 13-19.
\textsuperscript{227} 812 S.W.2d 759 (Mo. Ct. App. 1991).
\textsuperscript{228} \textit{Bernard}, 849 S.W.2d at 16.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.} at 17 (citing \textit{Sladek}, 835 S.W.2d at 317 (Thomas, J., concurring)).
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.} at 17-20.
\textsuperscript{233} \textit{Id.} at 19-20.
\textsuperscript{234} \textit{Id.} at 19.
\textsuperscript{235} \textit{Id.}
B. Chief Judge Robertson’s Concurrence

Chief Judge Robertson concurred in remanding the case for a new trial, but explicitly disagreed with the adoption of the signature modus operandi/corroboration exception. He outwardly acknowledged the outrage that sexual crimes create in society, but advised that society should not let its anger distort its judgment. According to the chief judge, the new exception placed the defendant’s right to a fair trial in peril.

Chief Judge Robertson believed that any value that signature modus operandi/corroboration evidence has is heavily outweighed by its dangers. The dangers he enumerated bear repeating. The risks include: 1) that misconduct evidence will mislead or confuse the jury; 2) that the jury will give undue weight to the propensity evidence ("once a criminal always a criminal"); 3) that the defendant will have to defend against misconduct not within the pleadings; and 4) that the jury, under a sense of justice, may punish the defendant for prior crimes with which the defendant was never charged.

Chief Judge Robertson stated that the relevance of the new exception went specifically against the underlying principle of the rule. It allows a party to introduce evidence that does nothing more than illuminate the defendant’s propensity to commit similar crimes and thus permit the jury to infer that the defendant committed the present crime.

Chief Judge Robertson also determined that, despite the "fundamental tenets" of the rule against prior crimes evidence, the evidence admitted in Bernard should have been rejected. First, Chief Judge Robertson believed that the testimony of the four men had no legitimate tendency to directly establish Bernard’s guilt, but merely implied a propensity for sexual misconduct. Second, the evidence admitted by the majority was not relevant to a material issue, but purely collateral; Bernard was not charged with having boys dance naked around a car but rather, with sexual assault and

236. Id. at 21 (Robertson, C.J., concurring). See also supra note 225 and accompanying text.
237. Id. at 21.
238. Id.
239. Id.
240. Id. at 22.
241. Id.
242. Id. at 22-23.
243. Id. at 23.
244. Id.
245. Id.
attempted forcible sodomy.\textsuperscript{246} Lastly, the type of evidence admitted under the new exception had nothing to do with corroborating the victim's story.\textsuperscript{247} Corroborating evidence is useful merely to confirm the evidence of another fact.\textsuperscript{248} An example of proper corroboration evidence would include testimony by an eyewitness to the crime who states that the crime actually occurred as the victim stated. The testimony of the four men did not corroborate the victim's story because they testified regarding other events and not the incident for which the defendant was convicted.\textsuperscript{249} Chief Judge Robertson believed that this testimony only served as indirect corroboration of the victim's story and was thus improper.\textsuperscript{250}

The chief judge went on to unveil the real theory underlying the relevancy of signature modus operandi/corroboration evidence. This new exception permits the prosecution to convince the jury that the defendant has a propensity for the type of crime charged and is thus more likely to have committed it.\textsuperscript{251} Chief Judge Robertson reminded the majority that the legislature had not sought to make propensity to commit a crime illegal.\textsuperscript{252} He also dismissed the majority's concern that the private nature of sexual crimes necessitated the new exception because the evidence in such cases is hard to obtain.\textsuperscript{253} The legislature would have considered these evidentiary difficulties in sexual abuse cases and the judiciary should not seek to punish defendants on grounds not authorized by the legislature.\textsuperscript{254} It is important to note that the majority did not restrict the signature modus operandi/corroboration exception to sexual crimes only, even though the unique evidentiary problems associated with such crimes provided the justification for the exception's adoption.\textsuperscript{255}

\textbf{C. Judge Thomas's Concurrence}

Judge Elwood Thomas concurred in the majority's order for a new trial but disagreed with the adoption of the new signature modus operandi/corroboration exception.\textsuperscript{256} Judge Thomas agreed with the majority

\begin{itemize}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} People v. St. Andrew, 161 Cal. Rptr. 634 (Cal. Ct. App. 1980).
\item \textsuperscript{249} \textit{Bernard}, 849 S.W.2d at 24.
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} \textit{Id.}
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textit{Id.}
\item \textsuperscript{255} \textit{See generally Bernard}, 849 S.W.2d at 10-21.
\item \textsuperscript{256} \textit{Bernard}, 849 S.W.2d at 24-25 (Thomas, J., concurring).
\end{itemize}
in their abolition of both the liberal trend of admission of prior crime evidence under the common plan or scheme exception and the *Lachterman* special exception for the sexual abuse of children.\(^{257}\) He candidly admitted that his concurrence in *Sladek*, which originally suggested the new exception, was improper and should not be adopted when the issue in the case is whether a crime occurred at all.\(^{258}\)

As Judge Thomas reanalyzed the propriety of a signature modus operandi/corroboration exception, he focused on the difference between cases in which the issue was whether the crime occurred at all, and cases in which the issue was whether the defendant committed the crime.\(^{259}\) In the latter kind of case, it is normally conceded that the crime occurred, but the defendant denies being the perpetrator. The distinction between these two types of cases mandates different approaches.

When the identity of the perpetrator is at issue, the unique and distinctive nature of the prior crimes is relevant because it serves the same function as a fingerprint.\(^{260}\) Judge Thomas cited to the *Jones* case as an example of the proper use of past crimes evidence.\(^{261}\) In *Jones*, it was uncontested that the robbery occurred, so the jury did not have to rely upon the uncharged crime evidence to prove that a crime occurred.\(^{262}\) By contrast, *Bernard* sought a very different use of the past crime evidence. The prosecution sought to prove that the defendant *committed* the charged crime because he may have had young men walk around a car naked ten years ago.\(^{263}\) Judge Thomas believed the presumption of free will in criminal cases bars the admission of the prior crime evidence for this purpose.\(^{264}\) What Bernard may have chosen to do ten years ago has "very little bearing on what choice he may or may not have made with the victim."\(^{265}\) Judge Thomas even opined that the distinctive nature of the prior conduct that makes the evidence relevant in identity cases actually detracts from its relevance in corroboration cases.\(^{266}\) When an activity is extremely odd, it is unlikely that it will be repeated. Thus, the only value the contested evidence in *Bernard* possessed was its ability to demonstrate a propensity on the part of the defendant to commit

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deviant sexual acts. Pure propensity evidence is barred entirely by the Missouri rules of evidence.\textsuperscript{267}

Judge Thomas retracted his suggestion in \textit{Sladek} for the new exception and requested that the court apply the traditional exceptions to the general bar to prior crimes evidence.\textsuperscript{268} He was admirably frank in admitting his mistake.

\textbf{IX. COMMENT}

\textit{A. District Split in Bernard's Application}

Now that \textit{Bernard} is the law in Missouri, the Western and Eastern District Courts of Appeals have attempted to apply it.\textsuperscript{269} Not surprisingly, these two districts have applied the new exception in greatly different ways. The Eastern District has been more apt to admit prior misconduct evidence than the Western District. Even though the test that the courts are applying is the same, the results are inconsistent.

Two demonstrative Eastern District cases are \textit{State v. Givens}\textsuperscript{270} and \textit{State v. Coleman}.\textsuperscript{271} The defendant in \textit{Givens} was convicted of sodomy and first degree sexual assault.\textsuperscript{272} The victim, T.K.G., was the defendant’s eleven year-old-daughter.\textsuperscript{273} She slept in a room with her two sisters and her one stepsister.\textsuperscript{274}

The contested evidence on appeal concerned the propriety of the admission of testimony of uncharged sexual misconduct by the defendant.\textsuperscript{275} The victim's sister and stepsister testified that they had been subjected to similar sexual assaults by the defendant.\textsuperscript{276} The \textit{Givens} court cited to the following language from \textit{Bernard} before applying the facts of the present case to the exception’s elements:

\begin{itemize}
  \item \textsuperscript{267} See \textit{supra} note 14 and accompanying text.
  \item \textsuperscript{268} \textit{Bernard}, 849 S.W.2d at 27 (Thomas, J., concurring).
  \item \textsuperscript{270} 851 S.W.2d 754 (Mo. Ct. App. 1993).
  \item \textsuperscript{271} 857 S.W.2d 363 (Mo. Ct. App. 1993).
  \item \textsuperscript{272} \textit{State v. Givens}, 851 S.W.2d 754, 754 (Mo. Ct. App. 1993).
  \item \textsuperscript{273} \textit{Id.} at 757.
  \item \textsuperscript{274} \textit{Id.}
  \item \textsuperscript{275} \textit{Id.} at 761.
  \item \textsuperscript{276} \textit{Id.}
\end{itemize}
For corroboration evidence to be of sufficiently increased probative value so as to outweigh its prejudicial effect, the evidence must be more than merely similar in nature to the sexual assault for which the defendant is charged... [it] should be nearly identical to the charged crime and so unusual and distinctive as to be a signature of the defendant's *modus operandi*.\(^{277}\)

The court held that the testimony of the sisters and the stepsister met the elements of the signature modus operandi/corroboration exception.\(^ {278}\) According to the Eastern District Court of Appeals, the testimonial evidence of the sisters was similar and distinctive enough.\(^ {279}\)

The court listed five threads of commonality between all of the girls' testimony that led to the satisfaction of the exception's requirements. The defendant would

1. come into his daughters' bedroom at night; 2. select one of them and pull them down to the foot of the bed or onto the floor; 3. fondle and sexually molest them in the presence of the other girls; 4. physically abuse them if they resisted his efforts; and 5. threaten to kill them and their mother if they told anyone what he was doing.\(^ {280}\)

These common elements of the girls' testimony supposedly earmarked the defendant and corroborated the victim's testimony.\(^ {281}\)

It appears that the facts the *Givens* court listed as corroborative of the defendant's activities do not identify behavior that is so distinctive and unique that only one person could have committed the acts. The young girls tell stories that are very similar, but they do not possess the requisite uniqueness that the naked boys moving around the car in *Bernard* did. As terrible and revolting the sexual abuse in this case is, there is nothing that distinguishes these sexual assaults from typical sexual assaults of minors.

In *State v. Coleman*,\(^ {282}\) the defendant was convicted for having deviate sexual intercourse with a six year old.\(^ {283}\) The trial court admitted testimony by two other alleged victims who claimed to have been similarly molested ten

\(^ {277}\) Id. at 762 (citing *Sladek*, 835 S.W.2d at 317-18 (Thomas, J., concurring)) (alteration in original).
\(^ {278}\) Id.
\(^ {279}\) Id. at 762-63.
\(^ {280}\) Id. at 763.
\(^ {281}\) Id.
\(^ {282}\) 857 S.W.2d 363 (Mo. Ct. App. 1993).
\(^ {283}\) Id. at 364.
years earlier. The court held that the other two victims' testimony was admissible under the new exception because there was a unique manner in which the defendant abused all three children. According to the evidence, the defendant would lubricate his hands with either saliva or water before he abused the young girls. There was no other distinctive factor. The other particulars relating to the abuse were typical in sexual abuse of minors cases.

Though sexual abuse is one of the most morally repulsive crimes in society, justice should not be lost in a modern day witch hunt. The alleged activity in Coleman was not so unusual to sexual abuse cases to justify admission of the other girls' testimony. Lubrication is not such a rare activity that only one abuser would ever utilize that method to achieve his own gratification.

The Western District is much more hesitant to allow prior misconduct evidence to be admitted under the signature modus operandi/corroboration exception. A brief discussion of three cases from that district will illuminate the disparity in application of the new exception between the districts. In each of these cases, the trial court held that the prior misconduct evidence was admissible, but the appellate court reversed and remanded because of Bernard.

In State v. Bird, the defendant was convicted of sodomizing two young males on his property. The contested testimony was that of another boy who stated that he had been molested by Bird in a similar manner. The two victims testified that Bird had led them into his barn or shed and showed them pornographic pictures of men and women engaging in intercourse. After showing the young boys the pornography, Bird allegedly performed fellatio upon each of the victims.

284. Id.
285. Id. at 365.
286. Id. at 364-65.
287. Id. at 365. Common factors included fondling of the young girls' vaginal areas and rubbing the defendant's penis on or near the victims' bodies. Id.
290. 854 S.W.2d 807 (Mo. Ct. App. 1993).
291. Id.
292. Id. at 807-08.
293. Id. at 807.
294. Id.

http://scholarship.law.missouri.edu/mlr/vol58/iss4/4
The contested testimony of the third boy stated that during the same summer in which the aforementioned acts occurred, he went to play with Bird's son and ended up looking at pornographic magazines with Bird. Bird then supposedly pulled down the boy's pants and began rubbing his penis.

Bird's attorney argued that the evidence unfairly attempted to demonstrate Bird's bad character and propensity for sexually molesting young boys on his farm. The trial court admitted the third boy's testimony under the Lachterman sexual deviance exception. When the case reached the appellate level, Bernard was the law.

The Western District Court of Appeals stated that the new exception under Bernard had three elements: 1) The uncharged acts must be nearly identical to the charged act; 2) the conduct must be unusual and distinctive; and 3) the charged and uncharged conduct should be minimally remote in time. Bird was the first case to consider remoteness as a separate element of the new exception. The appellate court held that Bird's alleged prior conduct was not distinctive or unusual enough to merit admission under Bernard.

State v. Phillips, a case similar to Bird, was decided on the same day. The victims in Phillips were young girls. Leroy Phillips was convicted of sexually assaulting his stepgranddaughter, C.M. One issue on appeal was whether the trial court properly admitted evidence from another young girl who stated that Phillips had sexually assaulted her a few years before.

The conduct that was the subject matter of the charge occurred in Phillips's house while his stepgranddaughter was visiting. Supposedly, Phillips molested C.M. on various beds in his house over a period of three years.

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295. Id. at 807-08.
296. Id. at 808.
297. Id.
298. Id.
299. Id. at 809.
300. Id.
301. Id. at 810.
303. Both cases were decided on April 20, 1993, but were before different appellate panels.
304. Phillips, 854 S.W.2d at 803.
305. Id.
306. Id. at 803-04.
307. Id. at 804.
years. The abuse involved the touching and fondling of C.M.'s vagina.

The other girl, J.G., testified that Phillips had sexually molested her on three occasions approximately three years earlier. The three incidents allegedly occurred while Phillips and J.G. were fishing, in his truck, and at the barber shop. J.G. said that Phillips had touched her vagina in the first two instances and attempted to touch her on the third.

The court held that nothing testified to by either C.M. (regarding only the uncharged conduct which allegedly occurred during the two years prior to the charged conduct) or J.G. evinced conduct that was so unusual or distinctive to warrant admission under Bernard. The judgment of conviction was reversed and remanded because the admission of the uncharged sexual misconduct constituted prejudicial error.

In State v. Thomas, the defendant was convicted of rape, but the jury was allowed to hear evidence that he had made a sexual advance toward another woman not involved in the charged incident. The victim (T.P.), the defendant, and the other woman (T.C.) were all students at the University of Missouri-Columbia at the time of the incident. Thomas knew both of the women prior to the incident.

The rape occurred in T.P.'s apartment on June 20, 1991. Before the rape, Thomas looked in each room and switched the lights on and off. Thomas made statements during the actual rape referring to his love for T.P. and how he was lonely and did not want her to stay with her boyfriend.

T.C. testified that Thomas had previously forced himself upon her in her apartment. She described the event in a fashion similar to T.P.'s description of the rape. T.C. stated that Thomas looked into all the rooms when

308. Id.
309. Id.
310. Id.
311. Id.
312. Id.
313. Id. at 807.
314. Id.
315. 857 S.W.2d 537 (Mo. Ct. App. 1993).
316. Id. at 538.
317. Id. at 538-39.
318. Id. at 538.
319. Id.
320. Id.
321. Id.
322. Id.
323. Id.
he arrived at her apartment, flipped the lights on and off, and then began "hugging her and touching her all over her body." The defense argued that the admission of T.C.'s testimony was prejudicial error. The trial court admitted T.C.'s testimony because it "had a legitimate tendency to directly establish the defendant's guilt of the crime charged." The trial court believed that Thomas's conduct amounted to a unique and special modus operandi method of sexual assault.

The appellate court disagreed with the trial court. They concluded that the acts of flipping on and off the lights, checking all the rooms in both apartments, mentioning the victims' boyfriends, and mentioning loneliness were not such unique and distinctive factors to meet the elements of the Bernard exception. "The actions noted are common, not unusual. Similarities between the incidents is [sic] not sufficient."

One can simply look to the results reached by the two districts and conclude that they are in actuality applying different tests. The Eastern District is much more liberal in admitting prior misconduct evidence. It appears that the Eastern District has forgotten the second element of the new exception test: unusual and distinctive conduct. All that appears to matter to the Eastern District is that the charged conduct occurred in a similar fashion as the uncharged misconduct. This is the danger that Judge Thomas warned of in his Sladek concurrence. If the Eastern District Court of Appeals' decisions are any indication of the future use of the Bernard exception, it is very possible for the exception to swallow the entire rule in semantic quicksand. Propensity evidence validated with a rule such as the one adopted in Bernard can only have the effect of robbing defendants of their right to be tried for their actions and not their character.

The Western District, which abides more by the letter of the exception as originally penned by Judge Thomas, refuses much of the same evidence that is admitted in the Eastern District. An example of such disparity is

324. Id.
325. Id.
326. Id.
327. Id.
328. Id.
329. Id.
330. Id.
331. Id.
332. See generally supra notes 270-87 and accompanying text discussing the two Eastern District cases.
333. See supra notes 182-190 and accompanying text.
evidenced by the holdings of *Bird* (Western District denying admission)\(^{334}\) and *Coleman* (Eastern District granting admission).\(^{335}\)

In *Bird*, the Western District denied admission of uncharged misconduct even though the evidence of similarity between the boys' abusive episodes contained unique circumstances.\(^{336}\) All the boys were in some kind of outer building when the abuse occurred.\(^{337}\) Also, the abuse was preceded by a viewing of pornographic material with the abuser.\(^{338}\) The actual abuse, fondling and fellatio, is not unique or particularly distinctive to the sexual abuse of young males and so the evidence of such uncharged misconduct was disallowed.\(^{339}\) In *Coleman*, the similarities in the circumstances surrounding the abuse of the girls were less distinctive than those in *Bird*. Lubrication by the defendant in the sexual abuse of young girls is commonplace. It is not a distinctive factor that specifically identified Phillip Coleman from other sexual abusers. One is left feeling that if the *Coleman* court had handled the *Bird* case all the evidence that was denied in *Bird* would have been admitted. A close examination of *Bernard* and the evidence which was admitted (testimony concerning naked boys jogging around a slow moving car) and that which was denied (testimony as to naked photographs, masturbation, fondling and sleep overs) illuminates how the *Coleman* case was decided wrongly. The admitted evidence in *Bernard* identifies Bernard and separates him from other pedophiles. This problem with consistency among the Eastern and Western Districts' application of the new exception is a manifestation of the underlying disease. Propensity evidence, admissible because of *Bernard*, is inherently prejudicial and dangerous to the legitimacy of Missouri's judicial system. It is a quagmire of uncertainty and unfairness that this state should avoid.

**B. Discussion of Sladek and Bernard**

1. The Majority's Opinion in *Sladek*

The *Sladek* majority's analysis of whether prior misconduct evidence is admissible revolved around whether "such proof has a legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial."\(^{340}\) This appears to be a stricter standard of logical relevancy than that which is usually required. Evidence that an individual committed a similar

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334. *Bird*, 854 S.W.2d at 809.
335. *Coleman*, 857 S.W.2d at 365-66.
336. *Bird*, 854 S.W.2d at 809.
337. *Id.*
338. *Id.* at 807-08.
339. *Id.*
340. *Sladek*, 835 S.W.2d at 311.
offense does not directly establish the defendant's guilt in the instant case.\textsuperscript{341} Propensity as such may be logically relevant but is barred by protections of legal relevancy (\textit{i.e.}, avoidance of prejudice).\textsuperscript{342}

The majority does not note this difference between logical and legal relevancy in its analysis. This omission only creates confusion as to the foundation of their conclusion. If the court expressly recognizes the factors in Missouri's version of Rule 403, then trial judges will have more guidance when deciding similar issues in the future.

In only one sentence did the majority mention the dangers of the contested evidence. They dismissed the potential dangers, saying "evidence of other crimes could have a dangerous and misleading probative force . . . ."\textsuperscript{343} This nonchalant treatment of the potential harm to defendants is worrisome. What makes the former patients' testimony dangerous? Maybe the majority correctly reasoned that such evidence could only be relevant if Sladek's propensity to commit similar crimes logically leads to the conclusion that he committed the present crime. Upon this realization of the underlying theory of relevancy, the court held that Missouri's counterpart to Federal Rule 404(b) barred that conclusion.\textsuperscript{344}

The most troubling part of the majority's decision is the way it interjects its own views regarding what evidence established (or in this case did not establish) a legitimate tendency to prove the crime charged. The trial judge was present when the evidence was originally offered and was inherently better able to decide whether the evidence was relevant.

This haphazard wielding of discretion is most evident in the majority's attempt to distinguish \textit{Dee} from the instant case.\textsuperscript{345} This court based its distinction upon Sladek's lack of authority over his patients in the same manner that Dee had over the mothers of his clients.\textsuperscript{346} A DFS employee is working within a government agency with regulatory procedures to handle complaints, while Sladek was working alone in his office under the guise of professional ethics. The court said that Sladek's patients were free to leave voluntarily and thus what allegedly occurred was less likely to be probative than what was alleged in \textit{Dee}. The deficiency in this arbitrary distinction is evident in this quote from the majority: "[O]ne of the patients did leave and refused to go back to see Sladek. Thus, \textit{Dee} and this case are not comparable."\textsuperscript{347} Sladek could have easily been seen as an authority figure exercising

\begin{enumerate}
\item \textit{Id.} at 312.
\item \textit{Id.} at 312-13.
\item \textit{Id.} at 313.
\item \textit{Id.} at 312.
\item See supra notes 155-57.
\item \textit{Sladek}, 835 S.W.2d at 311.
\item \textit{Id.} at 312.
\item \textit{Id.} at 312.
\item \textit{Id.} at 313.
\end{enumerate}
control over both the present victim (by virtue of her status as employee) and the contested witnesses (as patients). It appears that if a patient refused to come back, this fact would be at least as probative as the evidence admitted in *Dee*. The majority's dismissal of *Dee* was cursory and unsatisfactory.

Even though the court in *Dee* said that it based its verdict on the common plan or scheme exception, the facts demonstrate that the verdict rested upon a spurious plan. Spurious plans are used to show that the defendant committed a series of similar crimes that do not amount to a true plan or an identity case. In effect, a spurious plan's relevancy is based upon the sole proscribed theory—past crimes evince an inference of character that the defendant is more likely to have committed the present crime because he committed bad acts in the past. In *Dee*, his identity was not an issue; the only issue was whether he committed the alleged acts.

2. Judge Thomas's Concurrence

Judge Thomas's signature modus operandi/corroboration approach is an attempt to expand the present law of evidence and is not wise. This particular theory of relevancy is discussed by Professor Imwinkelried. The initial problem with the corroboration approach involves the nature of corroboration in general. "Corroborating evidence is merely evidence that confirms other evidence of fact." When a party is forced to specify which fact the evidence is used to corroborate, the offering party is usually forced into admitting that the evidence is used to show the propensity of the defendant to commit similar acts. Corroboration's foundation of relevancy is character and its inference of action in conformity therewith. This theory of relevancy is the only one directly proscribed by the applicable rules. In addition, a prosecution based upon propensity or status of an individual may have constitutional problems.

Judge Thomas acknowledged that his new category of evidence had this problem, but he believed that through his five factor analysis the prejudicial

348. See *supra* notes 77-90 and accompanying text for a discussion of the common plan or scheme exception.

349. See *supra* notes 86-90 and accompanying text for a discussion of spurious plan versus true plan and common scheme cases.

350. *See IMWINKLERIED, supra* note 6, § 6:05.

351. *Id.*

352. *Id.*

353. *See supra* notes 36-45, 50-51, and accompanying text for a discussion of the underlying theory of Rule 404(b) and the inclusionary approach.

354. *See supra* note 28 and accompanying text.
effect would be outweighed by its probative value.\textsuperscript{355} This assertion assumes that identity and corroboration evidence are used in the same way.

True identity cases assume a crime has been committed but the identification of the perpetrator is at issue.\textsuperscript{356} In corroboration cases, the evidence of the prior crime is used to prove that the alleged event occurred.\textsuperscript{357} The defendant’s previous touching of the breasts of his former patients has "very little to do with whether the defendant chose on this occasion to [rape and sodomize the victim]."\textsuperscript{358} The presumption that the defendant acted upon his free will makes evidence regarding past conduct irrelevant.\textsuperscript{359}

An illustration of how corroboration evidence is used by the factfinder was penned by Chief Judge Robertson in his concurrence in \textit{Bernard}.\textsuperscript{360} The ultimate conclusion of guilt based upon the testimony of the former patients follows a path like this: 1) The four patients said that Sladek initiated illegal sexual contact with them; 2) therefore, he did touch them; 3) therefore, he is a pervert who abuses his position to satisfy his sexual desires; 4) if he did this type of crime in the past he will most likely do it again; 5) therefore, it is reasonable to conclude that Sladek did it again; and 6) thus, what the victim said must be true.\textsuperscript{361} Suddenly, Sladek is on trial for five crimes instead of only one.

This is judicial activism at its worst. The legislature adopts the rules and has specifically excluded only one theory of relevancy when evaluating prior misconduct.\textsuperscript{362} It is this sole restriction Judge Thomas sought to abrogate in \textit{Bernard}. If corroboration is to be an accepted exception in Missouri then it could swallow the substance of the uncharged misconduct evidence rule.\textsuperscript{363}

\textsuperscript{355} \textit{Sladek}, 835 S.W.2d at 317 (Thomas, J., concurring).
\textsuperscript{356} See supra notes 259-264.
\textsuperscript{357} \textit{Bernard}, 849 S.W.2d at 25-27 (Thomas, J., concurring).
\textsuperscript{358} \textit{Sladek}, 835 S.W.2d at 317-18 (Thomas, J., concurring).
\textsuperscript{359} \textit{Bernard}, 849 S.W.2d at 25-27 (Thomas, J., concurring).
\textsuperscript{360} \textit{Id.} at 23-24 (Robertson, C.J., concurring).
\textsuperscript{361} \textit{Id.} at 24.
\textsuperscript{362} The statutory construction theory of exclusion mandates this interpretation. See, e.g., \textit{State ex rel County of St. Charles v. Mehan}, 854 S.W.2d 531, 536 (Mo. Ct. App. 1993).
\textsuperscript{363} See Peter Fallon & Ruport Bursell, \textit{Similar Fact Evidence and Corroboration,} 1978 CRIM. L. REV. 188-95.
3. The Bernard Case

The difference between the majority in Bernard and the concurrences by Chief Judge Robertson and Judge Thomas is a matter of degree. Both sides agree that the law of Lachterman and the cases that directly preceded its adoption were too liberal and were headed down a dangerous path, a path that threatened the genuine fairness a defendant is entitled to in court. "In a very real sense defendant starts his life afresh when he stands before a jury." This statement by Judge Cardozo encapsulates the fundamental problem with the majority's new exception. The American judicial system places individuals on trial for specific acts. Defendants are not placed in front of the jury to defend their entire life; rather, they must counter the allegation that has brought them into court. One's character, no matter how flawed, is not on trial. Only one question is before the judge and jury: "Did the defendant at the time in question commit this/these particular act(s) that the legislature made illegal?"

The majority in Bernard recognized the importance of this precept. Therefore, they halted the trend Missouri courts were taking with the common scheme or plan exception by adopting the new exception—signature modus operandii/corroboration. However, with all the good intentions and built-in safeguards in the test, the majority still failed to either recognize or adequately guard against the inherent flaw in the modus operandii/corroboration evidence. The problem is simple—the relevance of the new exception is based entirely upon the defendant's propensity to commit the charged crime. This theory of relevancy is barred by Federal Rule of Evidence 404(b) and the corresponding Missouri rule. For this reason alone, the Bernard exception should be discarded.

If the Missouri Supreme Court is unwilling to retract this unprincipled new exception, it will have to do a much better job policing the way in which the courts are applying the exception. The split between the Eastern and Western Districts is an exemplification of how this exception can expand quickly if it is unchecked. Less than two months after Bernard was decided, these two districts were applying greatly different standards under the same test. The danger that Judge Thomas initially warned about in Sladek, that the exception would become a slippery slope and the general rule of exclusion would gradually disappear, has already begun. It is the nature of this exception to expand in application over time. Another problem has been the

364. Bernard, 849 S.W.2d at 25 (Thomas, J., concurring).
366. See supra notes 269-339 for a discussion of the split between the districts in their early application of the Bernard exception.
367. Sladek, 835 S.W.2d at 317 (Thomas, J., concurring).
cases in which the exception has been applied. The sexual abuse of minors arouses so much rage in society’s eyes that the whole system can (and will) get caught up in the fever to punish those it can. Logic and law get thrown out in a hellfire of hate and disgust. The only practical cure is a total abrogation of the corroboration exception.

Chief Judge Robertson’s and Judge Thomas’s concurrences in *Bernard* argue for preservation of judicial integrity. They believe that the law should retract from *Lachterman* past *Bernard* to the traditional approach toward common plan or scheme. This will allow Missouri courts to be consistent in their handling of prior misconduct evidence. Most importantly, it will do away with the unprincipled ability of the jury to reach a conviction by reasoning through the defendant’s propensities.

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368. See *Bernard*, 849 S.W.2d at 24-27 (Robertson, C.J., concurring) (Thomas, J., concurring separately).

369. *Id.*