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Michael Patrick May
University of Baltimore School of Law

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COMMENT

EVIDENCE OF OTHER CRIMES AS SUBSTANTIVE PROOF OF GUILT IN MARYLAND

"The cases dealing with admissibility of prior criminal acts are narrowly decided. Indeed, the results often appear contradictory . . . ."[1]

I. INTRODUCTION

In a Maryland criminal trial, the prosecution may not introduce evidence of other crimes committed by a defendant in order to demonstrate a probability of guilt of the crime alleged.[2] The Maryland courts have consistently held that the past criminal history of an individual does not inexorably compel a conclusion of current criminal conduct or, more importantly, guilt of a particular crime.[3] This general rule of exclusion of other crimes committed by the defendant is founded upon the principle that no one should suffer a criminal conviction solely because of a bad character.[4]

It is well settled that in a criminal trial the burden is upon the state to prove that the defendant actually committed the crime alleged. The trier of fact may not infer that the defendant is guilty merely because of a possible criminal disposition evidenced by prior convictions. Indeed, Maryland decisions relying on the general rule of inadmissibility often note that the court is invoking the rule in an attempt to avoid situations in which a defendant is convicted solely

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1. Hoes v. State, 35 Md. App. 61, 67, 368 A.2d 1080, 1084 (1977).
2. The application of the rule is illustrated in State v. Jones, 284 Md. 232, 395 A.2d 1182 (1979), in which the court held that in a prosecution for homicide perpetrated in the commission of a robbery a prosecutor would not be able to introduce evidence of other robberies committed by the defendant.
3. The Maryland cases which enunciate this general rule are abundant. *See, e.g.*, Ross v. State, 276 Md. 664, 669, 350 A.2d 680, 684 (1976) (citing cases); Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977); Setzer v. State, 29 Md. App. 347, 348 A.2d 866 (1975).
4. Frequently those cases which state the general rule of exclusion note that it merely implements the policy against bad character evidence. *E.g.*, Ross v. State, 276 Md. 664, 350 A.2d 680 (1976). The *Ross* opinion states:

   > The frequently enunciated general rule in this state, followed uniformly elsewhere, is that in a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible. . . . This principle is merely an application of the policy rule prohibiting the initial introduction by the prosecution of evidence of bad character.

   Id. at 669, 350 A.2d at 684.

because the prosecutor has demonstrated that the accused is a "bad person" with anti-social propensities.[5]

Nonetheless, proof of other crimes may be legitimately relevant to some cases beyond the mere showing of criminal propensity. The state may wish to show that the specific crime with which the accused is charged is but one of a series designed to accomplish a single criminal objective. Similarly, the state's attorney prosecuting a defendant for shooting his wife could refute a defense of accident by demonstrating that the accused had made similar attempts in the past. Such considerations have led to the development of well established exceptions to the general rule of exclusion.[6] Traditionally in Maryland, evidence of other crimes is admissible when it demonstrates motive,[7] intent,[8] absence of mistake,[9] identity,[10] or a

5. *E.g.*, Dobson v. State, 24 Md. App. 644, 335 A.2d 124 (1975); Babb v. State, 7 Md. App. 116, 253 A.2d 783, *rev'd on other grounds*, 258 Md. 547, 267 A.2d 190 (1969); Gilchrist v. State, 2 Md. App. 635, 236 A.2d 299 (1967).

6. These exceptions to the general rule of exclusion are commonly referred to as the "MIMIC" exception. "MIMIC" is mnemonic which enables one to recall motive, intent, absence of mistake, identity, and common scheme.

7. *E.g.*, Veney v. State, 251 Md. 182, 246 A.2d 568 (1968) (Defendant attempting to avoid arrest for armed robbery killed police officer attempting to arrest him; evidence of the robbery held properly admitted.), *cert. denied*, 394 U.S. 948 (1969); Brown v. State, 220 Md. 29, 150 A.2d 895 (1959) (Defendant who feared prosecution for his numerous utterings of forged checks, killed police officer arresting him for one uttering offense; evidence of the other check offenses held properly admitted.).

8. *E.g.*, Wilson v. State, 181 Md. 1, 26 A.2d 770 (1942) (Woman who procured illegal abortion from defendant doctor testified in a way that the jury could have inferred that she had obtained another illegal abortion from the defendant the previous year; evidence of the former transaction admissible as showing an intent to perform unlawful abortions.); Isaacs v. State, 31 Md. App. 604, 358 A.2d 273 (1976) (In defendant's trial for murder, kidnapping, and larceny, female companion of defendant permitted to testify about prior crime spree involving numerous thefts; evidence of the former crime spree admissible apparently as demonstrative of the requisite intent for larceny.).

9. *E.g.*, Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977) (Defendant who shot his live-in girlfriend claimed that his shotgun had accidentally discharged; evidence that the defendant had shot the same victim five years earlier admissible.); Nelson v. State, 5 Md. App. 109, 245 A.2d 606 (1968) (In a prosecution for murder, evidence that defendant and his companions had exchanged racial insults with the victim and his companions held admissible on the grounds that the first incident demonstrated that participation in the second was not a mistake.).

No Maryland case, however, places an exclusive reliance upon the absence of mistake exception in admitting evidence of other crimes. In this context, see text accompanying notes 57 & 58 *infra*. Both *Hoes* and *Nelson* illustrate this assertion. In *Hoes* the evidence was ultimately admitted under the intent exception, and the *Nelson* court thought that five different exceptions applied to the situation before it. Indeed, in *Hoes*, despite the ultimate reliance placed on the intent exception, at the outset of the opinion the court of special appeals formulated the issue to be decided in a somewhat bizarre fashion, stating: "The primary question to be answered here is whether the shooting of a 'common law' wife by a one-armed man twice within five years could constitute a 'plan or scheme' to maim her." 35 Md. App. at 62, 368 A.2d at 1081.

10. *E.g.*, Cross v. State, 282 Md. 468, 386 A.2d 757 (1978) (In a burglary prosecution, the state attempted to identify the defendant through his vehicle

common scheme.[11] Additionally, Maryland courts recognize three other exceptions that are often overlooked:[12] res gestae,[13] handiwork or signature,[14] and sex crimes.[15]

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registration tag number which was allegedly obtained as the defendant fled the scene of another burglary he supposedly committed an hour later; evidence inadmissible because defendant's participation in the second burglary not clearly established.); Mollar v. State, 25 Md. App. 291, 333 A.2d 625 (1975) (Defendant related his past criminal record to his rape victim; record of his past crimes admissible to identify defendant.).

11. *E.g.*, Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972) (In a prosecution for assault and attempted rape in which the defendant, a doctor, gave the victim an injection to render her unconscious before molesting her, evidence that he had earlier perpetrated the same crime against the same victim in the same fashion held admissible as constituting a common scheme of sexual gratification.), *cert. denied,* 410 U.S. 977 (1973); Douglas v. State, 9 Md. App. 647, 267 A.2d 291 (1970) (In a robbery prosecution, testimony that the defendant contemporaneously robbed the victim's supervisor admissible as constituting a common scheme.).

    One could argue that both *Avery* and *Douglas* reached the right result for the wrong reason. Specifically, it would appear that in *Avery* the court should have relied upon the handiwork/signature or sex crimes exceptions, discussed *infra* at text accompanying notes 82–92 and 59–63 respectively, in admitting the evidence of the other crimes. Similarly, the *Douglas* court could better have relied upon the res gestae exception, discussed in text accompanying notes 102–08 *infra*, in admitting the evidence of the contemporaneous robbery. In any event, the *Douglas* decision as to the admissibility of the other robbery constituted dictum because defense counsel had failed to preserve the point for appeal. *Id.* at 651, 267 A.2d at 293.

    The confusion exhibited in the *Avery* and *Douglas* decisions typifies the ordinary judicial approach in Maryland to the admissibility of other crimes. In essence, courts frequently confuse the exceptions with each other, a phenomenon which inures to the benefit of neither the state nor the defendant. For a detailed discussion of the problem, and a possible solution, see text accompanying notes 135–58 *infra*.

12. The three additional exceptions are probably forgotten because the courts frequently emphasize the exceptions that comprise the "MIMIC" mnemonic, discussed at note 6 *supra*. In this light, consider the quotation attributed to an assistant state's attorney in Martin v. State, 40 Md. App. 248, 389 A.2d 1374 (1978). The case reports a colloquy between the court and the prosecutor who said: "That there is an abundance of case law in the State of Maryland and in the legal treatises that indicate [*sic*] that evidence of another crime is admissible. If it falls within one of the *five exceptions* to the general rule, such evidence is then admissible." *Id.* at 250, 398 A.2d at 1375 (emphasis added).
13. *E.g.*, Tull v. State, 230 Md. 596, 188 A.2d 150 (1963) (During a domestic disturbance, the defendant first shot his father-in-law and then his wife; the evidence as to the father-in-law was admissible in the trial for the murder of the wife under the res gestae exception.).
14. *E.g.*, McKnight v. State, 280 Md. 604, 375 A.2d 551 (1977) (In a trial for robbery accomplished by yoking the victim, that is, grabbing him from behind and choking him with one hand while rifling his pockets with the other, evidence that the defendant had committed other yokings not admissible under the handiwork exception because the modus operandi used by the defendant was not sufficiently distinctive.); Ellerba v. State, 41 Md. App. 712, 398 A.2d 1250 (1979) (In a trial for arson, testimony as to another arson committed by the defendant inadmissible under the handiwork exception because the defendant allegedly used two different methods to set the fires.).
15. *E.g.*, Wentz v. State, 159 Md. 161, 150 A. 278 (1930) (In an incest prosecution, the trial court admitted evidence that the defendant had had intercourse with

Commentators often remark that the numerous exceptions threaten to swallow the general rule of exclusion.[16] This situation creates confusion as to the admissibility of other crimes in specific instances, and causes reversals that could have been avoided if prosecutors and trial courts had clearer guidelines to follow.[17] The practicing attorney's problem is compounded in that most older opinions merely refer to some or all of the exceptions mentioned above without applying them to the facts.[18] Recent Maryland decisions, however, do not analyze the other crimes situations solely in terms of the general rule and its exceptions. Instead, these later decisions employ a two-step process. The courts first determine whether the evidence fits into one or more of the exceptions, and second balance the prejudicial effect of that evidence against its probative value.[19] Through this process the defendant obtains greater guarantees of fairness.[20]

As a result of the numerous exceptions to the rule of exclusion, and the varied approaches to its application, the process of determining whether a specific factual situation authorizes the use of other crimes evidence has become increasingly difficult. This comment examines the exceptions to the general exclusionary rule,[21] and explores the inadequacies of the Maryland approach. Finally, an elementary change with regard to the admissibility of other crimes evidence is recommended in an attempt to eliminate the current state of confusion.

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another of his daughters; evidence was improperly admitted because the testimony did not concern the same victim as the subject of the prosecution.).

16. *E.g.*, Annot., 42 A.L.R.2d 854 (1955); Annot., 40 A.L.R.2d 817 (1955); Annot., 15 A.L.R.2d 1080 (1951). All of these annotations contain this general assertion.
17. *See, e.g.*, State v. Jones, 284 Md. 232, 395 A.2d 1182 (1979) (string of successive robberies held not to demonstrate a common scheme because all resulted from separate decisions to rob someone).
18. *E.g.*, Pinkett v. State, 30 Md. App. 458, 352 A.2d 358 (1976); Polisher v. State, 11 Md. App. 555, 276 A.2d 102, *cert. denied*, 404 U.S. 984 (1971); Dyson v. State, 6 Md. App. 453, 251 A.2d 606 (1969).

    This failure to perform any factual analysis has been criticized by the court of appeals as being particularly unhelpful. Ross v. State, 276 Md. 664, 670, 350 A.2d 680, 685 (1976).
19. *E.g.*, Worthen v. State, 42 Md. App. 20, 399 A.2d 272 (1979) (While no existing exception was specifically discussed, trial court's admission of a purported prior offense was inadmissible because of its highly prejudicial and inflammatory effect.).
20. See notes 113–25 and accompanying text *infra*.
21. This comment does not purport to examine or analyze the Maryland law pertaining to issues of entrapment or impeachment which also involve the admissibility of other crimes evidence.

II. EXCEPTIONS TO THE GENERAL RULE OF EXCLUSION

A. *Exceptions Dealing with Mental State: Motive, Intent, Absence of Mistake, and Sex Crimes*

The motive exception to the general rule of exclusion, which the cases usually discuss first, provides that if another crime illustrates the motive behind the crime with which the defendant is charged, the court should admit the commission of the other crime into evidence. This is illustrated by *Brown v. State*.[22] In *Brown*, the defendant killed a police officer who was arresting him for uttering a worthless check. The Court of Appeals of Maryland upheld the trial court's admission of evidence that the defendant had uttered other worthless checks on the basis that the homicide was actuated by Brown's desire to escape prosecution for his prior criminal activity.[23]

Some Maryland courts that rely on the motive exception to admit evidence of other crimes effectively add another level to their analyses. In *Roberts v. State*,[24] the court of appeals affirmed an assault and battery conviction in which the trial court had admitted evidence of a prior theft involving the same defendant and victim. Testimony elicited at trial demonstrated that the defendant had received a jail sentence for the previous crime of larceny as a result of the victim's account of the incident. That testimony precipitated a motive of revenge, which caused the defendant to assault the victim. Thus in *Roberts*, the court broadened the motive exception to include not only the other crimes evidence, but its attendant circumstances as well.

Additionally, other cases admitting or excluding evidence of other crimes do so on the basis of more general motives such as hatred,[25] or broadly based criminal activity such as narcotics involvement.[26] This has resulted in a myriad of situations to which

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22. 220 Md. 29, 150 A.2d 895 (1959).
23. *Id.* at 37, 150 A.2d at 899. *See also* Veney v. State, 251 Md. 182, 246 A.2d 568 (1968) (Police sergeant was shot and killed on Christmas Day by an individual whom the sergeant attempted to arrest for a hold-up; evidence of the hold-up admissible at the trial of defendant for the sergeant's murder.), *cert. denied*, 394 U.S. 948 (1969).
24. 219 Md. 485, 150 A.2d 448 (1959).
25. *See, e.g.*, Lowery v. State, 202 Md. 314, 96 A.2d 20 (1953) (Defendant raped sister-in-law to show hatred for wife; testimony of defendant's threatening phone calls to wife admitted at trial for the rape.).
26. *See, e.g.*, Harrison v. State, 276 Md. 122, 345 A.2d 830 (1975) (In a homicide trial, marijuana found on defendant's person twenty days after the crime was erroneously admitted. The proof at trial did not show defendant to be a hit man or enforcer or otherwise connected with organized narcotics trafficking in such a way as to explain the motive for the murder.).

the motive exception could readily be envisioned to apply. Regardless of the fact patterns to which Maryland courts apply the motive exception, it suffers from the fundamental defect that no case actually defines the exception. In fact, no case relying on it specifies the meaning of the term "motive."[27] More importantly, no opinion distinguishes the motive exception from other qualifications to the general rule of exclusion. For example, many cases confuse the motive exception with common scheme,[28] an entirely separate qualification to the rule. These decisions indicate that there is a "connection between the different transactions as raises a fair inference of a common motive in each."[29] If two different crimes actually represent different aspects of a single criminal design, they are parts of a common scheme directed toward a single illegal purpose despite the semantic accuracy of declaring that the same motive actuated them.

Most commonly the cases fail to distinguish between motive and intent. Although such differentiation is possible,[30] numerous Maryland cases use the terms interchangeably.[31] Not surprisingly, therefore, a recent Maryland case referred to a trial court's jury instruction that used the two words synonymously as "commendable."[32] This imprecise terminology could conceivably engender a

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27. *But see* Martin v. State, 40 Md. App. 248, 389 A.2d 1374 (1978). The *Martin* court states: "[M]otive is . . . that which would appear to cause or produce the emotion that would in turn provoke or incite the commission of the criminal offense." *Id.* at 252 n.2, 389 A.2d at 1376 n.2 (quoting Rodriguez v. State, 486 S.W.2d 355 (Tex. Crim. App. 1972)).

    Martin, however, neither adopted nor implicitly approved this definition. In fact, the court of special appeals merely pointed out the confusion accompanying the designation of particular mental states as motive. Indeed the court hinted that employment of the term in any context might best be avoided. *Id.*

28. *See, e.g.,* Meno v. State, 117 Md. 435, 83 A. 759 (1912) (abortionist's behavior indicated consistent utilization of the same ploy).

29. Hunter v. State, 193 Md. 596, 601, 69 A.2d 505, 507 (1949); Purviance v. State, 185 Md. 189, 196, 44 A.2d 474, 477 (1945). Both these cases involved gambling violations in which the defendants consistently used the same methods to commit their crimes.

30. *See, e.g.,* 1 F. WHARTON, CRIMINAL EVIDENCE § 170 (Torcia ed. 1972). "Motive and intent are not synonymous. Motive is the inducing cause, while intent is the mental state with which the criminal act is committed." *Id.* § 170.

31. *E.g.,* Presley v. State, 224 Md. 550, 168 A.2d 510 (1961), *cert. denied,* 368 U.S. 957 (1962); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Jones v. State, 182 Md. 653, 35 A.2d 916 (1944).

32. Chandler v. State, 23 Md. App. 645, 651, 329 A.2d 430, 433 (1974). The instruction in relevant part stated:

> So, therefore, you are advised to consider testimony which I have admitted of other offenses, that is, these other times when allegedly the Defendant attacked his wife, with respect to the crime that the Defendant is on trial for in these proceedings, to the extent, and only to the extent, that it tends to establish a motive or an intent . . . . Where

situation in which courts unwittingly would admit evidence merely demonstrative of criminal propensity simply because they are unable to determine whether such evidence fits into any particular exception. Nevertheless, the decision of *Martin v. State* suggests that the judiciary must soon formulate a clear meaning of the motive exception, and that the trial courts may not admit motive evidence unless it is necessary for the prosecution to prove its case.[33] This notion meshes comfortably with the current policy of balancing probative value against prejudicial effect,[34] and with the idea that the intent exception applies only when intent is material to the case.[35]

The most basic statement of the intent exception is that "evidence of similar offenses is admissible when relevant to establish intent."[36] For instance, a defendant's prior batteries of a victim would tend to foreclose the suggestion of horseplay if the situation were to occur again. Similarly, a defendant's prior shopliftings could negate the possibly neutral or even innocent interpretation most observers would place on the removal of merchandise from its place of display to another area of a store.

Despite the apparent simplicity of the intent exception, courts relying on it often confuse it with other exceptions. Aside from the previously noted fact that courts often equate intent with motive,[37] some authority also tends to view the intent and res gestae exceptions as identical.[38] In addition, the common scheme exception appears to act as a surrogate for intent on occasion,[39] and some judicial writings indicate that intent and absence of mistake or accident are but opposite sides of the same coin.[40]

Although the intent exception suffers from a lack of definition, it has been used numerous times in Maryland to admit or exclude

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intent is material, the conduct of the accused is relevant to show that intent.

Id. at 650–51, 329 A.2d at 433.

To muddy the waters further, earlier in the *Chandler* opinion, the court of special appeals stated "that the admission of this evidence barely passed muster as being within the 'motive' exception to the rule." *Id.* at 650, 329 A.2d at 433.

33. Martin v. State, 40 Md. App. 248, 255, 389 A.2d 1374, 1377 (1978).
34. See notes 113–25 and accompanying text *infra*.
35. *See, e.g.*, Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Simms v. State, 39 Md. App. 658, 388 A.2d 141 (1978).
36. Simms v. State, 39 Md. App. 658, 670, 388 A.2d 141, 147–48 (1978).
37. *See, e.g.*, Presley v. State, 224 Md. 550, 168 A.2d 510 (1961), *cert. denied*, 368 U.S. 957 (1962).
38. *See, e.g.*, Tull v. State, 230 Md. 596, 188 A.2d 150 (1963).
39. *See, e.g.*, Westcoat v. State, 231 Md. 364, 190 A.2d 544 (1963).
40. *E.g.*, Andresen v. Maryland, 427 U.S. 463 (1976); Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977) (Defendant claimed mistake in shooting his paramour; case decided on basis of intent.).

evidence.[41] For instance, the intent qualification almost invariably appears in instances involving either white collar[42] or victimless[43] crimes.[44] Additionally, intent frequently refers to guilty knowledge.[45] Further, the intent exception often appears in cases requiring proof of specific intent.[46] The intent exception occasionally refutes defenses of mistake or accident.[47] Several courts, however, have stated that

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41. *E.g.*, Ross v. State, 276 Md. 664, 350 A.2d 680 (1976) (prosecutor attempted to use defendant's illegal transactions with informant dating back fifteen years to show intent to distribute narcotics); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955) (defendant's prior assaults on his girlfriend used to show he intended to kill her); Laws v. State, 6 Md. App. 243, 251 A.2d 237 (1961) (Prior robbery and shooting admissible in kidnapping trial to demonstrate intent. No analysis beyond this.).
42. *E.g.*, Andresen v. Maryland, 427 U.S. 463 (1976) (in a prosecution of an attorney for false pretense accomplished by misrepresentations as to the state of a title to real property, evidence of similar instances of deceit involving land admissible to show intent); Levy v. State, 225 Md. 201, 170 A.2d 216 (in a forgery prosecution, testimony that the defendant had uttered other forged checks apparently admissible to show fraudulent intent), *cert. denied*, 368 U.S. 865 (1961); Kain v. State, 222 Md. 511, 161 A.2d 454 (in a receiving stolen goods prosecution, testimony of two youths concerning transactions with the defendant in which no agreement concerning the price of stolen articles could be reached admissible to show guilty knowledge), *cert. denied*, 364 U.S. 874 (1960); Gordon v. State, 5 Md. App. 291, 246 A.2d 623 (1968) (in a prosecution of attorney for embezzling client's funds from escrow, testimony of two other attorneys detailing defendant's admissions of other thefts from escrow admissible as demonstrative of intent).
43. *E.g.*, Ross v. State, 276 Md. 664, 350 A.2d 680 (1976) (in a narcotics prosecution, testimony of informant as to his dealings with the defendant over fifteen years held inadmissible under the intent exception); Meno v. State, 117 Md. 435, 83 A. 759 (1912) (In an abortion prosecution, statement of a witness that defendant stated that he had performed similar operations on other girls was inadmissible under the intent exception.).
44. *But cf.* Douglas v. State, 9 Md. App. 647, 267 A.2d 291 (1970) (in a robbery prosecution, evidence that defendant had robbed another victim at the same time admissible as showing an intent to rob); Dyson v. State, 6 Md. App. 453, 251 A.2d 606 (1969) (in a prosecution for murder and child abuse, photographs showing prior abuse of the victim admissible as showing intent).
45. *E.g.*, Kain v. State, 222 Md. 511, 161 A.2d 454 (receiving stolen goods), *cert. denied*, 364 U.S. 874 (1960); Gordon v. State, 5 Md. App. 291, 246 A.2d 623 (1968) (embezzlement). In both these cases the court specifically referred to guilty knowledge.
46. *E.g.*, Ross v. State, 276 Md. 664, 350 A.2d 680 (1976) (while the prosecution was for possession of narcotics with intent to distribute, an informant's testimony of fifteen-year-old dealings with the defendant did not establish the requisite specific intent); Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977) (in a prosecution for assault with intent to maim, evidence adduced at the trial showing that the defendant had previously shot the victim admissible to establish the requisite specific intent).
47. Andresen v. Maryland, 427 U.S. 463 (1976) (evidence that defendant had committed similar acts of false pretense admissible to show a lack of inadvertence and the intent to defraud).

the exception only applies when intent is material to the case.[48] Nevertheless, as recently as 1976, the Court of Appeals of Maryland specifically criticized other courts for failing to refer to particular facts when applying the exception.[49]

The intent exception contains another possibly confusing aspect. In *MacEwen v. State*,[50] the Court of Appeals of Maryland stated:

> In the trial of a misdemeanor (and false pretenses is a misdemeanor) every element necessary to constitute the crime must be proved as a fact, and after the state, in a trial of a misdemeanor has made out a prima facie case of guilt of the crime charged, it may offer evidence, if relevant to the question of intent, that the [defendant] committed other acts of false pretense . . . .[51]

From this statement it would appear that in misdemeanor trials the state must make out its case before it may use the intent exception. The defendant in *Polisher v. State*[52] raised that contention, but the Court of Special Appeals of Maryland referred to *MacEwen* and noted that "this does not mean that the State must first establish *prima facie* every element of the crime charged, for it is the evidence of other offenses which may prove some of the elements of the crime charged."[53] It thus appears that the prosecution may rely upon the intent exception to help construct a prima facie case. Under this formulation, a prosecutor could use the exception to demonstrate intent itself in an appropriate situation. For example, dishonest entrepreneurs who consistently swindle their customers could claim a simple misunderstanding if juries were permitted to consider only one fraudulent transaction at a time.

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48. *See, e.g.*, Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955) (when the defendant killed his girlfriend and later testified that the shooting was accidental, the court held that evidence of two previous assaults upon the victim by the defendant was admissible under the intent exception); Simms v. State, 39 Md. App. 658, 388 A.2d 141 (1978) (in a felony murder prosecution in which the state's theory was that the defendant murdered the victim during an assault with intent to rape, evidence that the defendant had raped another victim and had assaulted another with the intent to rape admissible under the intent exception).
49. Ross v. State, 276 Md. 664, 350 A.2d 680 (1976). The *Ross* case states, "[T]he court in each merely approved the admission into evidence of prior narcotics transactions under the 'intent' exception to the general rule, stating the proposition virtually in the abstract without any reference to the necessary facts." *Id.* at 670, 350 A.2d at 685.
50. 194 Md. 492, 71 A.2d 464 (1950).
51. *Id.* at 501–02, 71 A.2d 468.
52. 11 Md. App. 555, 276 A.2d 102 (false pretense; defendant auto repairman repeatedly charged customers for work he and his subordinates never did), *cert. denied*, 404 U.S. 984 (1971).
53. *Id.* at 585, 276 A.2d at 117 (emphasis in original).

Additionally, the new Maryland theft statute contains what is tantamount to an intent exception.[54] Article 27, section 342(c) of the Maryland Annotated Code, which prohibits the crime formerly denominated receiving stolen goods, requires for a finding of guilt that the defendant obtain the property with either knowledge that it has been stolen or a belief that it probably has been stolen.[55] The statute eases the prosecution's burden when merchants are accused. Under the new statute the requisite knowledge may be inferred from the businessman's having been found with stolen property on at least two prior occasions, or from his acquisition of stolen property in a separate transaction in the year preceeding the possession charged.[56] Consequently, this provision aids the demonstration of intent or perhaps absence of mistake.

An exception to the general rule of exclusion of other crimes which is frequently overlooked by the courts involves the absence of mistake or accident.[57] Although no Maryland court relies exclusively upon the exception, it probably applies to the type of situation in which one who puts fungible property down temporarily has it stolen by another. An independent witness could interpret the occurrence in two ways: either that the second individual inadvertently picked up the wrong property, believing it was his; or that he simply stole it. If the jury were to examine these facts without any frame of reference, it would never find the second person guilty of theft. If, however, after the thief alleged mistake, the prosecution could demonstrate that he had done the same thing five times in the past, the possibilities of showing the occurrence of a criminal act and of obtaining a conviction greatly increase.

Unfortunately, no Maryland decision places an exclusive reliance upon absence of mistake or accident when admitting evidence of other crimes. Instead, the courts merely include the exception along with several others when they attempt to apply it.[58] Logic would seem to dictate that the exception should only apply to situations in which the prosecution must show the other crimes in order to refute a defendant's allegation of mistake or accident. Unless the exception is utilized in this manner prosecutors could unfairly and unduly prejudice a defendant by bringing up sordid details of his past before he even has a chance to put on his case.

The most troublesome exception to the rule of exclusion of other crimes is the sex crimes exception. In its simplest form, this

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54. Md. Ann. Code art. 27, §§ 340–345 (Supp. 1979).
55. Md. Ann. Code art. 27, § 342(c) (Supp. 1979).
56. *Id.* § 342(c)(2)(i) & (ii).
57. *E.g.*, Gordon v. State, 5 Md. App. 291, 246 A.2d 623 (1968); Thomas v. State, 3 Md. App. 708, 240 A.2d 646 (1968).
58. *See, e.g.*, Gordon v. State, 5 Md. App. 291, 246 A.2d 623 (1968).

qualification states that evidence of prior sexual offenses with the same victim is admissible to demonstrate the accused's propensity toward and passion for illegal sexual relations with that person.[59] Indeed, several Maryland opinions go to some length to explain that the prosecution may show predisposition toward illicit sexual activities with the victim but not with anyone else.[60]

Under the sex crimes exception if a divorced husband were charged with raping his former wife, the prosecution could conceivably buttress the case against the defendant by proving that the two had engaged in so-called perverted sexual activities with each other while they were still married. The admission of other crimes under such circumstances contravenes the premise underlying the exclusionary rule that prosecutors may not introduce evidence of other crimes merely to show propensity or disposition.[61] In effect the sex crimes exception represents an anachronistic and irrational reaction to "degenerate" offenders.[62] Evidence of an individual's past attacks on the same victim constitutes appropriate fare for a judicial determination of what sentence to impose, not guilt or innocence. If this is so, it would appear that the Maryland courts should seriously consider eliminating the sex crimes exception. Indeed, such a step would seem to be mandated in the absence of any compelling contemporary justification for the retention of what is most probably an outmoded legal principle steeped in emotionalism and unnecessary for the protection of society.[63]

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59. Wethington v. State, 3 Md. App. 237, 238 A.2d 581 (1968) (indecent exposure). *See also* Annot., 167 A.L.R. 565 (1947).
60. *E.g.*, Wentz v. State, 159 Md. 161, 150 A. 278 (1930); Wethington v. State, 3 Md. App. 237, 238 A.2d 581 (1968).
61. *Accord,* Note, 46 TUL. L. REV. 336 (1971). In assessing the sex crimes exception, this article states, "In short, highly inflammatory evidence of questionable probative value has been forced into an enumerated exception. The net effect is to allow the introduction of the very evidence the rule of exclusion was designed to prohibit — the bad character of the accused." *Id.* at 340.
62. Trautman, *Logical or Legal Relevancy, A Conflict in Theory,* 5 VAND. L. REV. 385 (1952). Trautman states that, "Because of the increasing belief that sexual psychopaths have a *disposition* to repeat their acts of aggression, the probative value of evidence of other such offenses is considered to be so high that some courts are beginning to question even the narrow rule of absolute exclusion." *Id.* at 406 (emphasis added). The article also lists studies which purport to demonstrate the recidivistic tendencies of the sex offender. *Id.* at 406 n.83.
63. Some contemporary research demonstrates that society may have less to fear from sex offenders than from other types of criminals. Slough & Knightly, *Other Vices, Other Crimes,* 41 IOWA L. REV. 325, 332–34 (1956). Furthermore, current medical research appears to debunk many of the myths about sex offenders. *See* Note, 46 TUL. L. REV. 336, 342 nn.44–47 (1971).

B. *Exceptions Predicated on Factual Considerations: Identity, Handiwork or Signature, Common Scheme, and Res Gestae*

In Maryland, evidence of other crimes is admissible if it identifies the defendant as the perpetrator of the offense charged.[64] For example, if a defendant were to provide a victim with an account of his past criminal exploits, such as by warning a hold-up target that he had killed a resisting grocer several years before, the courts would admit that testimony of the earlier crime in an attempt to identify the accused. Although a factual situation of this nature would seem to occur with relative frequency, until 1975 no Maryland court had examined the identity exception carefully.[65] In fact, a 1978 Court of Appeals of Maryland opinion decried this dearth of prior analysis.[66]

Currently, the identity exception is surrounded by sufficient controversy to require serious judicial scrutiny. Professor McCormick initiated the confusion when he wrote that "identity . . . evidence will usually follow, as an intermediate channel, some one or more of the other [exceptions]."[67] The Fourth Circuit construed this statement to mean that "the identity exception is not really an exception in its own right, but rather is spoken of as a supplementary purpose of another exception."[68]

This analysis was considered by the court of special appeals in *Mollar v. State*.[69] In that case a rapist regaled his victim with stories of his past criminal exploits and his talent for being arrested and incarcerated.[70] In fact, the defendant gave the victim such a detailed version of his criminal history that the prosecution used it to identify him, a fact that eliminated the problem of the victim's earlier identification of someone else.[71] In holding that the identity exception has an existence separate from any of its brethren, the court reasoned that "to hold otherwise would render the identity exception a purposeless existence."[72]

Even though the *Mollar* case apparently clarified matters, the identity exception continued to create problems. In *Cross v. State*,[73]

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64. *See, e.g.*, Mollar v. State, 25 Md. App. 291, 333 A.2d 625 (1975); Smithson v. State, 5 Md. App. 378, 247 A.2d 542 (1968).
65. Mollar v. State, 25 Md. App. 291, 333 A.2d 625 (1975), first subjected the identity exception to close examination in Maryland.
66. Cross v. State, 282 Md. 468, 476, 386 A.2d 757, 763 (1978).
67. C. McCormick, Evidence § 190 (2d ed. 1972) [hereinafter cited as McCormick].
68. United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).
69. 25 Md. App. 291, 333 A.2d 625 (1975).
70. *Id.* at 295, 333 A.2d at 627.
71. *Id.* at 296–97, 333 A.2d at 629.
72. *Id.* at 294, 333 A.2d at 627.
73. 282 Md. 468, 386 A.2d 757 (1978).

the court of appeals, without mentioning *Mollar*, focused on the same passage of McCormick quoted earlier as confusing.[74] To address the McCormick proposition, the court resorted to yet another treatise, written by Underhill. This work divided the identity exception into ten sub-exceptions.[75] The court applauded this "analysis" as "most useful,"[76] and included all ten sub-exceptions in the body of the opinion.[77] The court ultimately did not use this "most useful analysis," however, because the decision excluded the other crimes evidence on entirely different grounds.[78] Nonetheless, in *Simms v. State*,[79] a murder prosecution decided four months after *Cross*, the court of special appeals set out Underhill's ten sub-divisions of the identity exception and upheld the admission of other crimes on the basis of the sub-exception referring to ballistics evidence.[80] The problem with this approach is that it more closely resembles the resolution of a multiple choice examination than legal analysis. Furthermore, the Underhill sub-exception that pertains to modus operandi more accurately refers to the handiwork or signature exception to the rule of exclusion.[81]

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74. McCormick, *supra* note 67, § 190.
75. 1 H. Underhill, Criminal Evidence § 210 (Herrick ed. 1973) [hereinafter cited as Underhill]. Underhill lists the exceptions as follows:

> [E]vidence of other offenses may be received if it shows:
>
> (a) the defendant's presence at the scene or in the locality of the crime on trial;
>
> (b) that the defendant was a member of an organization whose purpose was to commit crimes similar to the one on trial;
>
> (c) the defendant's identity from a handwriting exemplar, "mug shot," or fingerprint record from a prior arrest;
>
> (d) the defendant's identity from a remark made by him;
>
> (e) the defendant's prior theft of a gun, car or other object used in the offense on trial;
>
> (f) that the defendant was found in possession of articles taken from the victim of the crime on trial;
>
> (g) that the defendant had on another occasion used the same alias or the same confederate as was used by the perpetrator of the present crime;
>
> (h) that a peculiar *modus operandi* used by the defendant on another occasion was used by the perpetrator of the crime on trial;
>
> (i) that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed;
>
> (j) that the witness' view of the defendant at the other crime enabled him to identify the defendant as the person who committed the crime on trial.

Id. § 210. Additionally, the treatise recently supplemented sub-exception (c) as follows: "or his identity through a ballistics test." *Id.* § 210 (Herrick ed. Supp. 1978).

76. Cross v. State, 282 Md. 468, 477, 386 A.2d 757, 763 (1978).
77. *Id.* at 477–78, 386 A.2d at 763.
78. *Id.* at 478–79, 386 A.2d at 764 (evidence excluded because the proof of the other crimes was not clear and convincing).
79. 39 Md. App. 658, 388 A.2d 141 (1978).
80. *Id.* at 664, 388 A.2d at 145.
81. Cross v. State, 282 Md. 468, 477 n.6, 386 A.2d 757, 763 n.6 (1978).

The handiwork or signature exception posits that evidence of other crimes is admissible "to prove other crimes by the accused so nearly identical as to earmark them as the handiwork of the accused."[82] This exception is best illustrated by the burglar who left a bathroom scale by the front door of each residence he broke into so that he could weigh the silver he stole. The thief's method was so distinctive that it became as unique as his signature. Under the handiwork or signature exception, if the burglar were apprehended later, while using the same ploy, evidence of the utilization of that method in any one crime would normally be admissible in a trial for any other.

While the handiwork exception appears simple in theory, it presents difficulties in application. The modus operandi employed by the defendant "must be so unusual and distinctive as to be like a signature."[83] While the techniques employed must resemble each other,[84] they cannot be of a sort which "fit into an obvious tactical pattern which . . . anyone disposed to commit a depredation of the sort for which the defendant is on trial [would use]."[85] Some prosecutors and lower courts fail to recognize this fact. This results in reversals of convictions obtained by evidence of other crimes which was improperly admitted under the handiwork qualification.[86] Courts also confuse the handiwork and common scheme exceptions.[87] For instance, situations arise in which an individual uses the same method repeatedly to perpetrate a particular type of crime. A physician might drug a female patient so that he could rape her.[88] A gambler might use the same bookkeeping methodology.[89] Yet, as

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82. Brafman v. State, 38 Md. App. 465, 472, 381 A.2d 687, 691 (1978) (quoting McCormick, *supra* note 67, at § 190).
83. *Id.* at 473, 381 A.2d at 691 (quoting McCormick, *supra* note 67, at § 190).
84. *Compare* Ellerba v. State, 41 Md. App. 712, 398 A.2d 1250 (1979) (evidence of separate arsons inadmissible at trial for one of them because means employed to set the fires differed) *with* Nasim v. State, 34 Md. App. 65, 366 A.2d 70 (1976) (evidence of separate arsons admissible at trial for one of them because means employed to set the fires substantially similar), *cert. denied*, 434 U.S. 868 (1977).
85. Drew v. United States, 331 F.2d 85, 93 (D.C. Cir. 1964), *quoted in* United States v. Foutz, 540 F.2d 733 (4th Cir. 1976); Lebedun v. State, 283 Md. 257, 390 A.2d 64 (1978); McKnight v. State, 280 Md. 604, 375 A.2d 551 (1977).
86. *E.g.*, Lebedun v. State, 283 Md. 257, 390 A.2d 64 (1978); McKnight v. State, 280 Md. 604, 375 A.2d 551 (1977).
87. *See, e.g.*, Cole v. State, 232 Md. 111, 194 A.2d 278 (1963) (similar modus operandi in cashing checks), *cert. denied*, 375 U.S. 980 (1964); Greenwald v. State, 221 Md. 245, 157 A.2d 119 (same modus operandi used by doctor issuing false certificates of pregnancy to facilitate circumvention of statutory age restrictions on marriage), *appeal dismissed*, 363 U.S. 721 (1960).
88. *E.g.*, Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972), *cert. denied*, 410 U.S. 977 (1973).
89. *E.g.*, Purviance v. State, 185 Md. 189, 44 A.2d 474 (1945).

Lebedun v. State[90] notes, "A method of operation is not, by itself, a common scheme, but merely a repetitive pattern."[91]

Despite *Lebedun*, however, a recent court of special appeals decision appears to admit handiwork evidence under the banner of common scheme in a situation in which jail inmates who were attempting to escape used the same method to smuggle a handgun into the institution as they had earlier used to procure illegal narcotics.[92] If the escape attempt and narcotics smuggling were clearly separate and unconnected crimes, logically they could not constitute parts of the same scheme. The fact that criminals applied the same ingenious stratagem to different kinds of crimes merely indicated the adaptability of the ploy, not the existence of an ultimate criminal purpose. Admission of such a modus operandi under the common scheme exception only confuses the issue.

Maryland courts permit evidence of other crimes to be introduced when it demonstrates a common scheme.[93] Maryland courts have frequently relied on this qualification to guide their rulings as to various questions of admissibility.[94] Generally the exception arises in situations in which criminals commit several crimes to accomplish a single illegal purpose. For instance, the situation in which an armed robber steals a car ahead of time to facilitate his escape from the bank he robs illustrates a common scheme.

Two recent Maryland cases, *State v. Jones*[95] and *Cross v. State*,[96] explain the common scheme exception in detail. As noted in *Jones*, "[M]ere proximity in time and location within which several offenses may be committed does not necessarily make one offense intertwine with the others. Immediateness and site are not determinative . . . . Nor does the fact that the offenses were committed by the same persons qualify them . . . ."[97] Rather, as stated in *Cross*, "there must be not merely a similarity in the results, but such a concurrence of

90. 283 Md. 257, 390 A.2d 64 (1978).
91. *Id.* at 280, 390 A.2d at 75, (quoting Cross v. State, 282 Md. 468, 386 A.2d 757 (1978)).
92. Whitfield v. State, 42 Md. App. 107, 400 A.2d 772 (1979), *rev'd on other grounds*, 287 Md. 124, 411 A.2d 415 (1980).
93. *See, e.g.*, Mason v. State, 12 Md. App. 655, 280 A.2d 753 (1971).
94. *E.g.*, Callahan v. State, 174 Md. 47, 197 A. 589 (1938); Isaacs v. State, 31 Md. App. 604, 358 A.2d 273 (1976); Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972), *cert. denied*, 410 U.S. 977 (1973); Douglas v. State, 9 Md. App. 647, 267 A.2d 291 (1970).
95. 284 Md. 232, 395 A.2d 1182 (1979).
96. 282 Md. 468, 386 A.2d 757 (1978).
97. State v. Jones, 284 Md. 232, 243, 395 A.2d 1182, 1188 (1979). In explaining the common scheme exception earlier, the *Jones* court stated:

> [T]o establish the existence of a common scheme or plan, it is necessary to prove that the various acts constituting the offenses naturally relate to one another by time, location, circumstances and parties so as to give rise to the conclusion that they are several stages of a continuing transaction.

Id. at 243, 395 A.2d at 1188.

common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."[98] In short, superficial concurrence or mere coincidence do not demonstrate a common scheme.

In addition to the confusion of common scheme and motive noted earlier,[99] courts often use the common scheme exception to admit evidence that demonstrates the totality of circumstances surrounding the defendant's actions. If a thief pilfers a number of checks and forges them at different locations to obtain money,[100] he is not implementing a plan which has as its ultimate purpose one fraudulent enrichment at the end. Nor are the thief's actions so unique as to qualify for handiwork or signature treatment.[101] Yet the jury might only be able to comprehend the case against the thief if it has an overview of all his actions. Here the res gestae exception, as opposed to the common scheme exception, should apply.

The general proposition regarding the res gestae exception was set forth in *Wilson v. State*.[102] "Evidence of declarations and acts which are an immediate accompaniment of the act charged and so closely connected with the main fact as to constitute a part of it, and without which the main fact might not be properly understood, are admissible as part of the res gestae."[103] Essentially, courts will admit the evidence of the other crimes if it helps the jury to understand the whole picture with regard to the defendant's activities. Unlike the court in *Wilson*, Maryland courts often apply this exception without specifically mentioning the term "res gestae." This practice has arisen in a variety of circumstances, including illegal abortion,[104] perverted practices,[105] pandering,[106] and the illegal sale of alcoholic beverages.[107] None of these cases, however, discussed why the jury needed to know the whole story to determine guilt of a specific crime.

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98. Cross v. State, 282 Md. 468, 475, 386 A.2d 757, 762 (1978) (quoting 2 J. WIGMORE, EVIDENCE § 410 (3d ed. 1940)).
99. See text accompanying notes 28 & 29.
100. *E.g.*, Ward v. State, 219 Md. 559, 150 A.2d 257 (1959); Thomas v. State, 3 Md. App. 708, 240 A.2d 646 (1968).
101. For an analysis of the handiwork or signature exception, see the text accompanying notes 82–92 *supra*.
102. 181 Md. 1, 26 A.2d 770 (1942).
103. *Id.* at 3, 26 A.2d at 772. *See also* Tull v. State, 230 Md. 596, 188 A.2d 150 (1963) (defendant shot father-in-law and wife in family dispute).
104. Avery v. State, 121 Md. 229, 88 A. 148 (1913) (illegal abortions on several different girls).
105. Blake v. State, 210 Md. 459, 124 A.2d 273 (1956) (act of sodomy contemporaneous with other perverted practices).
106. Mazer v. State, 231 Md. 40, 188 A.2d 552 (1963) (prostitute turned state's witness in pandering case also testified about illegal "sitting" activities).
107. Mitchell v. State, 178 Md. 579, 16 A.2d 161 (1940) (essentially contemporaneous illegal liquor sales).

While a judge might require information regarding the total context of the defendant's crimes in order to impose an appropriate sentence, providing a jury with this information might well unduly prejudice the defendant.[108]

III. CONSIDERATIONS OF FAIRNESS TO THE DEFENDANT

A. *Standard of Proof*

Even if evidence of the other crimes that the defendant is accused of committing falls within one or more of the exceptions discussed above, the prosecution cannot automatically introduce it. As a threshhold matter, the state must first prove that the accused in fact committed the other crimes. The difficulty rests in the burden of proof with respect to those crimes. The traditional criminal standard of proof beyond a reasonable doubt, however, creates unnecessary difficulty for the prosecutor whose case preparation focuses on the crime at bar. On the other hand, a standard of proof based on the usual civil standard of mere preponderance could readily create convictions supported by character assassination. To resolve this dilemma, Maryland courts require that before the prosecution may introduce any evidence of other crimes, it must first prove the defendant's involvement in those crimes by clear and convincing evidence,[109] a standard of proof falling between a reasonable doubt

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108. With the decision in State v. Jones, 284 Md. 232, 395 A.2d 1182 (1979), one might well question the viability of the res gestae exception. In *Jones*, the court of appeals held inadmissible evidence of essentially contemporaneous robberies committed by the defendant in a trial for a murder committed in the course of still another robbery. Note, however, that *Jones* did not mention res gestae and that each of the robberies involved an independent decision.

109. State v. Jones, 284 Md. 232, 395 A.2d 1182 (1979); Cross v. State, 282 Md. 468, 386 A.2d 757 (1978); Whitfield v. State, 42 Md. App. 107, 400 A.2d 772 (1979), *rev'd on other grounds,* 287 Md. 124, 411 A.2d 415 (1980).

The latest case concerning this issue, Offutt v. State, 44 Md. App. 670, 410 A.2d 611 (1980), contains the following statement: "We do not read *Cross* as requiring that evidence of the other crime must be clear and convincing. The only requirement is that the defendant's involvement be clear and convincing." *Id.* at 675, 410 at 614. The court of special appeals drew this somewhat obscure distinction because of the unusual facts of the case. In *Offutt,* a bungling hold-up man handed employees of two separate businesses a note stating, "Give me call your money." *Id.* at 671–73, 410 A.2d at 612–13. Because of the note's incomprehensibility, neither of the employees took the defendant seriously at first. Consequently, when the state introduced evidence of the second incident at the defendant's trial for the first incident, the defendant objected on the ground that the state had not proven the second crime by clear and convincing evidence. *Id.* at 675, 410 A.2d at 614. In dismissing this contention, the court of special appeals held that the state need only demonstrate the defendant's *involvement* in the other crime by clear and convincing evidence, not the *occurrence* of the other crime itself. Of course, had the defendant told the employees to give him "all," rather than "call," their money this dilemma would never have surfaced.

and mere preponderance. The state may satisfy this requirement by either circumstantial or direct evidence.[110]

In light of Maryland's use of the clear and convincing standard, acquittal of a prior offense does not necessarily preclude its introduction at a later trial. The result of the original trial could indicate nothing more than a technical failure of proof. Maryland recognizes this situation and allows the introduction of other crimes evidence despite an acquittal.[111] To insure fairness, however, the defendant may prove any acquittal, and failure to allow him to do so constitutes a denial of due process.[112]

B. Balancing Probative Value Against Prejudicial Effect

As mentioned above,[113] Maryland courts now employ a two-step process in determining whether to admit evidence of other crimes. Generally, judges have no difficulty in pigeonholing evidence of other crimes into one or several of the exceptions.[114] Yet there is a problem with such categorization in that it has an enormous potential for creating undue prejudice to the defendant.[115] Recognizing this factor, the more recent Maryland decisions require that before any information as to an accused's other crimes is admitted into evidence, it must be subjected to rigid scrutiny.[116] The prejudicial effect of evidence of other crimes committed by a defendant must be weighed against its probative value.[117] This process has led to the utilization of a balancing test which has been synthesized by Professor McCormick as follows:[118]

> [S]ome of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other crimes evidence in light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that

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110. Cross v. State, 282 Md. 468, 386 A.2d 757 (1978).
111. Womble v. State, 8 Md. App. 119, 258 A.2d 786 (1969) (failure to allow post conviction petitioner to prove acquittal amounted to denial of fair trial and due process).
112. *Id.* at 126, 258 A.2d at 789.
113. See text accompanying notes 19 & 20 *supra*.
114. *See* Cross v. State, 282 Md. 468, 474, 386 A.2d 757, 761 (1978).
115. United States v. Foutz, 540 F.2d 733 (4th Cir. 1976). *But see* Womble v. State, 8 Md. App. 119, 258 A.2d 786 (1969).
116. *E.g.*, Ross v. State, 276 Md. 664, 350 A.2d 680 (1976); Berger v. State, 179 Md. 410, 20 A.2d 146 (1941); Gorski v. State, 1 Md. App. 200, 228 A.2d 835 (1967).
117. *E.g.*, Worthen v. State, 42 Md. App. 20, 399 A.2d 272 (1979) (not only was the evidence excessively prejudicial, it also alluded to a sexual crime, which never occurred, against an infant).
118. McCormick, *supra* note 67, § 190.

> the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.[119]

Additionally, if the prosecution does not need a particular kind of evidence to prove an element of its case, such as motive, the courts automatically exclude the evidence as too prejudicial.[120] Although Maryland courts have noted that certain cases have a greater requirement for other crimes evidence because of the surreptitious nature of the crime charged,[121] the recent decision by the court of appeals in *Worthen v. State*[122] effectively abolishes the proposition that special categories of crimes should automatically receive more lenient treatment.[123]

Generally cases that focus on the impact of evidence of other crimes involve jury trials. Indeed, the McCormick multi-faceted balancing test focuses on jury contamination.[124] Implicit in such a formulation is the idea that a judge who sits as a trier of fact at a court trial is not prejudicially influenced by erroneously admitted evidence. Yet it strains logic to assert that a judge who commits a good faith error in admitting evidence will not be influenced by it. In fact there is some Maryland case authority that suggests that judges too may be impermissibly influenced by evidence they erroneously admit.[125]

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119. *Id.* § 190, *quoted in* Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977); Mollar v. State, 25 Md. App. 291, 333 A.2d 625 (1975). Despite its inherent awkwardness, "convincingness" is actually a word. 1 OXFORD ENGLISH DICTIONARY 548 (Compact ed. 1971).
120. Martin v. State, 40 Md. App. 248, 389 A.2d 1374 (1978).
121. *E.g.*, Nasim v. State, 34 Md. App. 65, 366 A.2d 70 (1976) (arson), *cert. denied*, 434 U.S. 868 (1977). One can also logically make the same assertion about most cases of first degree murder, burglary, and a host of other crimes.
122. 42 Md. App. 20, 399 A.2d 272 (1979).
123. *Id.* at 38, 399 A.2d at 283.
124. MCCORMICK, *supra* note 67, § 190. The *Cross* case underscores this, stating:
> The preferred method for submitting any evidence of other crimes to the court during trial would be by way of a proffer to the trial judge outside the presence or hearing of the jury. Such a proffer not only protects the jury from immediate prejudice, but also allows the trial judge to determine whether there is any way to limit the prejudicial aspects of evidence while retaining its probative character and whether the evidence should be properly introduced at that time.

Cross v. State, 282 Md. 468, 478 n.7, 386 A.2d 757, 764 n.7 (1978).
125. *See* Dobbs v. State, 148 Md. 34, 129 A. 275 (1925) (Offutt, J., concurring) (three judge trial panel erroneously admitted other crimes evidence). *See also* United States v. Hamrick, 293 F.2d 468 (4th Cir. 1961). The *Hamrick* case relates the following situation: "[T]he court requested and, over objection, received Hamrick's past criminal record and read therefrom. The court observed: 'You can tell more what kind of a snake you are dealing with if you can see his color.'" *Id.* at 469. On a more whimsical note, H.L. Mencken once wrote:
> Our rules of evidence, like our system of punishments, are full of irrationalities. They exclude a great many pertinent facts, for example,

C. *Temporal Remoteness*

A defendant's past criminal history, at some point in time, becomes too remote to have any legitimate bearing on a current case.[126] Even though the running of the statute of limitations as to the other crimes offered as proof does not bar their admission,[127] it would appear that under some circumstances, the courts should hold such evidence inadmissible as a matter of law. It is well settled in Maryland, however, that remoteness affects the weight rather than the admissibility of the evidence.[128] Notwithstanding this general principle, recent Maryland case law indicates that judicial thinking in this regard is changing. In 1976, the court of special appeals noted that a time lapse of six years renders proof of other crimes so remote as to be almost devoid of evidentiary value.[129] A year later, the court of special appeals implied that at some point the evidence will be so remote as to be inadmissible.[130] In short, remoteness now has two

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what sort of man is accused of the crime, and what sort suffered from it. The jury is supposed to hear and know nothing about the record of the accused, which is not mentioned until he has been found guilty and the judge is ready to sentence him. In Maryland, where persons charged with crime, including even capital crime, may elect to be tried by a judge or judges without a jury, this leads to frequent absurdities. The judge usually knows quite well what the accused's record is, but he is supposed to be ignorant of it until he has announced his verdict.

I long ago suggested that, in trials for murder or assault, it should be competent for the defense to introduce testimony showing the character of the victim. Certainly it is absurd to inflict the same punishment for killing or mauling a perfectly decent and innocent person, and doing the same to a gunman or other professional ruffian. I am willing to go further. That is, I am willing to admit evidence to show that the victim, though perhaps not a criminal himself, was of such small social value that his death or injury was no appreciable public loss. But in this field the lawyers and judges cling to the idea of equality before the law, though it has been cheerfully abandoned elsewhere, for example, in the field of labor relations.

H. MENCKEN, MINORITY REPORT 5–6 (1956).

126. *See generally* Annot., 88 A.L.R.3d 8 (1978); Annot., 78 A.L.R.2d 1359 (1961); Annot., 77 A.L.R.2d 841 (1961); Annot., 64 A.L.R.2d 823 (1959); Annot., 42 A.L.R.2d 854 (1955); Annot., 40 A.L.R.2d 817 (1955); Annot., 34 A.L.R.2d 777 (1954); Annot., 167 A.L.R. 565 (1947); Annot., 80 A.L.R. 1306 (1932); Annot., 63 A.L.R. 602 (1929).

127. Duncan v. State, 282 Md. 385, 384 A.2d 456 (1978) (dictum).

128. Purviance v. State, 185 Md. 189, 44 A.2d 474 (1975) (evidence of the same type of criminal activity a year earlier not barred on account of remoteness).

129. Gooch v. State, 34 Md. App. 331, 367 A.2d 90 (1976).

130. Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977). *Hoes* states that, "[T]he nature of the prior crime and the crime charged and the logical interrelationship of such crimes are the controlling factors in determining whether a particular lapse of time is sufficiently substantial to make the prior crime too remote." *Id.* at 70, 368 A.2d at 1086 (quoting 1 F. WHARTON, *supra* note 30, at 260). In a related area, note that the federal courts ordinarily impose a ten-year time limit on convictions used to impeach a witness. FED. R. EVID. 609(b).

separate but interrelated aspects. Defense counsel can first argue inadmissibility as a matter of law. If that argument fails, the advocate can later attempt to persuade the trier of fact that it should not give such stale evidence much significance in determining guilt.

D. Severance

When a defendant is charged with more than one crime, the state frequently attempts to join several of the alleged offenses at one trial. If the trial of several charges at once would unduly prejudice the defendant, for example by thwarting a strategic decision to testify about one crime but not another, the court may order severance of the various counts.[131]

Often courts are called upon to resolve disputes involving severance and the admissibility of evidence of other crimes together. This circumstance is so prevalent that in 1977 the court of appeals held: "A defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each individual offense would not be mutually admissible at separate trials."[132] Accordingly, while a prosecutor may try an individual for several different offenses at once, if the state, at a trial for one crime, could not admit evidence as to another it seeks to try at the same time, the trial judge must sever the charges. In other words, if an exception to the general rule of exclusion does not apply, or if it applies but its prejudicial effect outweighs its probative value, severance of the charges must result.

Maryland courts often use the same rationales in deciding questions pertaining to severance and to admissibility of evidence of other crimes. Judges excluding evidence of other crimes generally are seeking to avoid confusing or prejudicing jurors, or confronting a defendant with charges against which he is unprepared to defend.[133] Similarly, the joinder of similar offenses is disallowed because it may embarrass or confound the defendant in presenting separate defenses; it may lead to such a cumulation of evidence as to create an inference of guilt; it may increase latent hostility to the defendant; or it may lead the jury to infer a criminal disposition on the part of the

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131. Md. Rule 745(c). Additionally, note that Md. Rule 712, which refers to joinder of offenses and defendants in the charging document, appears to sanction joinder only when the offenses are of the same or similar character, part of the res gestae, or part of a common scheme. *Id.* This latter rule, however, only governs pleading and not the method by which the offenses are brought to trial. To illustrate, the joinder for trial of crimes alleged in several separate charging documents would not run afoul of Rule 712. It might, however, be improper under Rule 745(c) and the judicial construction thereof.

132. McKnight v. State, 280 Md. 604, 612, 375 A.2d 551, 556 (1977). The same quotation also appears in State v. Jones, 284 Md. 232, 239, 395 A.2d 1182, 1186 (1979), and Ellerba v. State, 41 Md. App. 712, 729, 398 A.2d 1250, 1259 (1979).

133. *E.g.*, Brafman v. State, 38 Md. App. 465, 381 A.2d 687 (1978) (rape).

defendant.[134] Actually then, because both severance and other crimes issues share the same basic concern for fairness to the defendant, they represent but slightly different facets of the same issue.

IV. A BETTER ALTERNATIVE

As Maryland case law amply demonstrates, current handling of other crimes issues hardly represents a prototype for fledging legal analysts. The rule as to other crimes evidence appears in one exclusionary principle with eight separate identifiable exceptions. One of these exceptions, identity, is further divided into ten sub-exceptions.[135] Additionally, courts determining that an exception applies must thereafter resort to a complicated balancing test to decide whether to admit evidence of other crimes.[136] Given this degree of complexity and outright confusion, any attorney or judge must necessarily encounter difficulty. In fact, numerous legal treatises and writings bluntly, and at times even vehemently, criticize the unwarranted complication accompanying the other crimes dilemma.[137]

The rule of exclusion and its exceptions had their genesis in a turn-of-century New York decision, *People v. Molineaux*.[138] In that case, the Court of Appeals of New York attempted to implement a policy against convictions predicated solely on a defendant's bad character, the basic concept now recognized in Maryland.[139] To accomplish this purpose, the New York court formulated a rule of exclusion of evidence of other crimes which it stated was not an absolute principle.[140] Consistent with this approach, the opinion then noted exceptions to the rule but observed that "the exceptions to the rule cannot be stated with categorical precision."[141] Nevertheless, the court then attempted to do just that, and furthermore implicitly recognized its formulation as exhaustive, saying, "Let us now

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134. State v. Jones, 284 Md. 232, 395 A.2d 1182 (1979) (homicide); McKnight v. State, 280 Md. 604, 375 A.2d 551 (1977) (robbery).
135. See note 75 *supra*.
136. See text accompanying notes 115 & 116 *supra*.
137. *E.g.*, Annot., 88 A.L.R.3d 8 (1978); Annot., 42 A.L.R.2d 854 (1955); Annot., 40 A.L.R.2d 817 (1955); Annot., 20 A.L.R.2d 1013 (1951); Annot., 15 A.L.R.2d 1080 (1951).
138. 168 N.Y. 264, 61 N.E. 286 (1901). Professor Stone attributes the first express formulation of the "MIMIC" exception to *Molineaux*. Stone, *The Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).
139. *See, e.g.*, Dobson v. State, 24 Md. App. 644, 335 A.2d 124 (1975); Gilchrist v. State, 2 Md. App. 635, 236 A.2d 299 (1967); Gorski v. State, 1 Md. App. 200, 228 A.2d 835 (1967).
140. People v. Molineaux, 168 N.Y. 264, 292, 61 N.E. 286, 294 (1901).
141. *Id.* at 293, 61 N.E. at 294.

endeavor to apply to the case at bar each of these exceptions to the general rule."[142] After the court determined that the proffered evidence fit into none of the categories it had devised, it reversed a conviction for murder by poisoning.[143]

The rule of exclusion formulated in *Molineaux* ultimately received richly deserved criticism. The most eloquent came from Professor Stone who derisively labeled the *Molineaux* exclusionary principle as the "spurious rule."[144] In fact, in his initial criticism of *Molineaux*,[145] Stone noted that while British courts unconsciously utilized and applied a rule of exclusion for a time, with the advent of the *Makin* case,[146] the English now adhere to what he termed the original or inclusionary rule which he stated as follows: "Evidence which is relevant merely as showing that a person has a propensity to do acts of a certain kind is not admissible to prove that he did any such acts."[147]

Current British Commonwealth cases, using essentially the same inclusionary rule as formulated by Stone, have set forth the criterion that unless the evidence of other crimes demonstrates propensity and nothing else, it is admissible.[148] Such a rule represents a better alternative to the confusion the exclusionary rule has spawned because it directly focuses on the policy the courts seek to implement. It seeks the avoidance of convictions bottomed solely on propensity.[149] Furthermore, those few American jurisdictions using

142. *Id.* at 294, 61 N.E. at 294.
143. *Id.* at 335, 61 N.E. at 310.
144. Stone, *The Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938).
145. Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933).
146. Makin v. Attorney-General for New South Wales [1894] A.C. 57. *Makin* states:
> In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

Id. at 65.
147. Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 976 (1933).
148. *See, e.g.*, Regina v. Lawson, [1971] 4 W.W.R. 350 (citing cases).
149. See the text accompanying note 139 *supra*.

an inclusionary rule at one time or another experienced no apparent difficulty applying that rule.[150] At the very least this approach would eradicate the cumbersome exclusionary rule and its eight ill-defined exceptions.

The inclusionary rule would avoid other disadvantages of the exclusionary rule as well. First, the exclusionary rule causes judges' concern to focus on precisely what constitutes a particular exception as opposed to whether the evidence offered only goes to propensity.[151] Second, the exclusionary rule may exclude evidence not solely demonstrative of a defendant's bad character because it fails to fall within an exception to the exclusionary rule; or it may admit proof of bad character simply because prosecutorial ingenuity in presentation causes it to fall within an exception.[152] The inclusionary rule does not risk these dysfunctional results, however, because its primary emphasis mirrors its purpose, the avoidance of convictions based solely on bad character.

Maryland can ill afford any of these deleterious by-products of the exclusionary rule. In fact the state's jurisprudence already

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150. *E.g.*, People v. Woods, 35 Cal. 2d 504, 218 P.2d 981 (1950); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955). In the *Woods* case, the court stated:

> It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge.

35 Cal. 2d at 509, 218 P.2d at 984. Since *Woods*, California has codified this rule in the following language:

> (a) [E]vidence of a person's character or a trait of his character . . . is inadmissible to prove his conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that the person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

CAL. EVID. CODE § 1101 (West 1966).

The *Day* case states:

> The accepted rule to be derived from the cases is that evidence which shows or tends to show the accused guilty of the commission of other offenses at other times is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense similar to that charged; but if such evidence tends to prove any other relevant fact of the offense charged, and is otherwise admissible, it will not be excluded merely because it also shows him to have been guilty of another crime.

196 Va. at 914, 86 S.E.2d at 26–27. For some reason, however, Virginia has now adopted the cumbersome exclusionary approach. *See, e.g.*, King v. Commonwealth, 217 Va. 912, 234 S.E.2d 67 (1977); Jordan v. Commonwealth, 216 Va. 768, 222 S.E.2d 573 (1976).

151. Stone, *The Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005–06 (1938).

152. Comment, *The Admissibility of Other Crimes in Texas*, 50 TEX. L. REV. 1409, 1410 (1972).

contains precedential authority for the admission of other crimes evidence that does not strictly fall within one of the exceptions to the rule of exclusion in a case involving rebuttal testimony.[153]

Furthermore, a 1973 Fourth Circuit case from the District of Maryland, *United States v. Woods*,[154] embraced the inclusionary approach to the other crimes issue. In that case, a defendant charged with the murder by suffocation of her infant foster son objected to the introduction of evidence demonstrating that beginning in 1945 the defendant had custody of or access to nine children who suffered at least twenty cyanotic episodes with seven deaths resulting.[155] While the evidence did not fit squarely into any of the exceptions to the exclusionary rule, the Fourth Circuit upheld admission of the evidence because it was not introduced solely to demonstrate criminal propensity.[156] Additionally, the court stated the following proposition of law:

> [E]vidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime, provided that the trial judge may exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused.[157]

In essence, then, while the *Woods* court refused to be bound by the strictures of the exclusionary rule's arbitrary categories, it still achieved the purpose of avoiding a conviction solely based on propensity. There is no reason whatsoever why Maryland could not adopt this approach. Aside from the many commentaries favoring it,[158] the wording of the inclusionary rule promotes an analysis of

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153. Setzer v. State, 29 Md. App. 347, 348 A.2d 866 (1975). The purported rebuttal evidence in *Setzer* was excluded because it did not serve to rebut defendant's testimony. Rather, it showed only propensity.
154. 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).
155. *Id.* at 130.
156. *Id.* at 134. *See also* Note, 87 HARV. L. REV. 1074 (1974).
157. United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

    Unfortunately, despite the clarity of the proposition in *Woods*, a recent Fourth Circuit case, United States v. Johnson, 610 F.2d 194 (4th Cir. 1979), frames the rule pertaining to evidence of other crimes in exclusionary terms. This formulation, however, was only dictum, as the court disposed of the case on the issue of whether a purported error at the trial was prejudicial. *Id.* at 196. The *Johnson* case did not mention *Woods*.
158. *E.g.*, Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L. REV. 763 (1961); Trautman, *Logical or Legal Relevancy, A Conflict in Theory*, 5 VAND. L. REV. 385 (1952); Stone, *The Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938); Comment, *The Admissibility of Other Crimes in Texas*, 50 TEX. L. REV. 1409 (1972); Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965); Note, 87 HARV. L. REV. 1074 (1974).

other crimes issues that is predicated upon the policy the law seeks to implement.

V. CONCLUSION

Although current Maryland law generates more confusion than clarity in the area of other crimes evidence, the situation is hardly without a remedy. The courts have an alternative, the *inclusionary* rule. This new rule could supplant with little difficulty the *exclusionary* rule and its exceptions which are now used by the Maryland courts. Additionally, under an inclusionary formulation, judges would still have the pertinent considerations of fairness to the defendant as useful guidelines for an analysis more immediately concerned with criminal propensity. In this manner, the courts could finally implement, rather than subvert, the policy behind the current rules pertaining to the admissibility of other crimes evidence.

Michael Patrick May