Time for Change: Evidentiary Safeguards Needed in Trials for Sexual Offenses

I. INTRODUCTION

Deviate sexual crimes involve explosive legal and moral issues. Due to the highly emotional nature of such crimes an intensive effort should be made throughout the trial to insulate the jury from information which, while of little probative value, would unduly prejudice the jury against a defendant. Unfortunately for many defendants, Indiana courts have refused to provide evidentiary safeguards to limit juror prejudice in prosecutions for deviate sex crimes. Instead, the courts have actively fanned the passions of juries by permitting introduction of evidence showing that the defendant had participated in other deviate sexual activities. Such evidence may lead to a wrongful conviction based upon the jury's reaction to the testimony of the defendant's bad character.

The prejudicial impact of evidence indicating that the accused is a recidivist is widely recognized and is responsible for the fundamental rule prohibiting the introduction of evidence regarding other wholly independent offenses to support the implication that the defendant is guilty of the offense for which he is being tried.[1] Yet, in prosecutions involving deviate sexual offenses, the Indiana courts discard the prohibition against introduction of testimony showing prior offenses.[2] This disregard of fundamental evidentiary safeguards appears extremely unusual in light of the intensely emotional nature of prosecutions for sex crimes which heightens the possibility of juror prejudice. Admitting the evidence of prior sex crimes often inflames the passions and prejudices of a jury, thus making the defendant's conviction more likely. The ultimate accuracy of the jury's verdict is of little consequence to the discussion herein, but, rather, it is the manner in which the conviction is secured that is important. This Note will critically analyze the current Indiana practice whereby convictions for deviate sexual crimes are secured in part by the introduction of evidence indicating that the defendant has committed prior deviate sexual crimes.

Advocates of the current practice of always allowing a jury to consider evidence of prior sex offenses by the defendant find support for their position in a large body of case law. Those holdings state that such evidence should be admitted because of its relevancy, regardless of its accompanying prejudicial impact inherent

---

[1] I B. JONES, JONES ON EVIDENCE § 4:18 (6th ed. S. Gard 1972).

[2] Pieper v. State, 262 Ind. 580, 321 N.E.2d 196 (1975).

within the evidence. This Note will examine those cases and, by tracing their evolution into the current Indiana practice of admitting evidence of deviate sex crimes, show why the practice is inaccurate, misleading and dangerous.

II. Admissibility of Evidence Showing Prior Sexual Crimes by Defendant (An Exception to an Exception)

In order to be admissible, evidence must be relevant[3]—logically tending to prove a material fact.[4] Accordingly, evidence of prior crimes is generally inadmissible in a criminal case, because it serves to mislead the jury rather than to establish guilt or innocence of the accused.[5] Several well-established exceptions exist which permit evidence of prior crimes to be admitted if used for limited purposes.[6] Indiana law will admit evidence of prior crimes if it is relevant to some issue in the case, such as intent, motive, knowledge, plan or identity.[7] However, deviate sexual crimes have been specifically exempted from the general requirement that evidence of prior crimes be excluded unless shown to fall within these exceptions.[8] Thus, the admissibility of evidence showing prior deviate sexual activity is treated as an exception to an exception. The reasons for the evolution of this special treatment will be discussed later. At this point, it is sufficient to note that, as a result of the special status afforded deviate sex crimes, it is *always permissible* for the state, in actions involving abnormal sexual conduct, to introduce evidence of other improper acts of sexual intimacy committed by the defendant.[9]

To justify the automatic admission of highly prejudicial information showing prior sexual offenses the courts have intimated that such evidence is significant, relevant and necessary in aiding the

---

[3]McCormick's Handbook of the Law of Evidence § 184, at 433-34 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick].

[4]Stallings v. State, 250 Ind. 256, 235 N.E.2d 488 (1968).

[5]Lawrence v. State, 259 Ind. 306, 310, 286 N.E.2d 830, 832 (1972). *See also* Whitty v. State, 34 Wis. 2d 278, 292, 149 N.W.2d 557, 563 (1967), in which the Wisconsin Supreme Court stated that the character rule excluding prior crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes.

[6]McCormick, *supra* note 3, § 190.

[7]Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968).

[8]Lamar v. State, 245 Ind. 104, 107, 195 N.E.2d 98, 101 (1964).

[9]*Id.* at 109, 195 N.E.2d at 101.

jury in reaching a proper verdict.[10] In the process of establishing the broad and prejudicial practice whereby evidence of prior deviate sexual crimes is always deemed admissible, however, the Indiana courts have offered little more than a cursory explanation of why such information aids the jury in reaching a proper verdict. In order to understand the rationale behind the current evidentiary practice which always admits evidence of prior deviate sex crimes, one must clearly understand how the practice evolved.

III. Early Development of Evidentiary Practice Admitting Testimony Showing Prior Deviate Sex Crimes by Defendant

In tracing the growth of the current Indiana practice in which evidence of prior sex crimes is freely introduced by the state, it is readily apparent that the modern practice is too broad and lacks justification. Evidence of prior deviate sexual conduct was first admitted and upheld in Indiana by *State v. Markins*.[11] In sustaining the defendant's conviction for incest, the court assumed as a rule of logic and rudimentary law that it is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity.[12] As support for its own justification of why evidence of prior sexual crimes should be relevant in a subsequent prosecution, the court in *Markins* cited six other jurisdictions whose holdings were in accord with that of *Markins*.[13] The principal support for *Markins* was provided by *People v. Jenness*.[14] In *Jenness*, as was true in *Markins*, the defendant had been convicted of incest. The Michigan Supreme Court, in upholding the conviction of *Jenness*, offered several possible rationales as bases for allowing the jury to consider evidence showing prior acts of incest by the defendant. The primary reasons given for allowing the jury to hear evidence regarding prior sexual misconduct by the defendant were that such prior acts showed concert, demonstrated a common design, and illustrated habitual activities between the parties involved.[15]

---

[10]Merry v. State, 335 N.E.2d 249 (Ind. Ct. App. 1975).

[11]95 Ind. 464 (1884). *See also* Lovell v. State, 12 Ind. 18 (1859), in which the court did not allow evidence of a subsequent act, claiming that such evidence was irrelevant and prejudicial, but also noting that incest was outside of the common list of exceptions to the general rule of admissibility. *Lovell* was concerned with the exclusion of evidence while *Markins* dealt with the admission of evidence.

[12]95 Ind. at 465.

[13]*Id.* at 467-68 (citing Lawson v. State, 20 Ala. 65 (1852); Thayer v. Thayer, 101 Mass. 111 (1869); People v. Jenness, 5 Mich. 305 (1858); State v. Pippin, 88 N.C. 646 (1883); State v. Kemp, 87 N.C. 538 (1882); and State v. Bridgman, 49 Vt. 202 (1876)).

[14]5 Mich. 305 (1858).

[15]*Id.* at 322.

Significant problems exist in using the holdings of *Markins* and *Jenness* to support the modern practice in which courts always allow the jury to consider prior sexual misconduct by the defendant. The problems arise in part from the factual situations involved in *Markins* and *Jenness*. Both cases related to situations in which identical parties and crimes were involved. In fact, each court specifically based the relevancy of prior crimes on the fact that the later prosecution involved the same parties and crimes as the prior offenses.[16]

An additional problem arises when the *Jenness* decision is utilized to support the current practice of specifically exempting deviate sex offenses from the general evidentiary rule which prohibits the introduction of testimony showing prior crimes except when intended to prove intent, motive, knowledge, plan or identity. The language in *Jenness* clearly suggests that the decision to allow evidence of prior incestuous conduct was based upon the general exceptions to the rule of evidence rather than the creation of a new exception allowing evidence of prior crimes if the case was for a deviate sexual crime.[17] It is obvious that the Indiana Supreme Court overlooked or misinterpreted, the reasoning of the Michigan court when *Markins* cited *Jenness* for the proposition that: "The general rule undoubtedly is, that one crime cannot be proved in order to establish another independent crime, *but this rule does not apply to cases where the chief element of the offence [sic] consists in illicit intercourse between the sexes.*"[18] The reasoning of the Michigan court in *Jenness* simply does not support the broad proposition stated by *Markins*. Unfortunately, the language of *Markins* has been repeated numerous times until, eventually, sexual crimes now constitute a special exception to the evidentiary rule precluding information showing prior sex offenses by the defendant. Thus, the current practice whereby evidence of prior deviate sexual crimes is always admissible in a criminal prosecution is based, even in its inception, upon misanalysis and inadequate reasoning. Any examination of the other cases relied upon by the *Markins* court discloses a similar lack of clear reasoning.

In *Lawson v. State*,[19] the defendant was convicted of adultery. As in *Jenness*, the factual situation, having been restricted to identical parties and crimes, limits the scope of *Lawson*, rendering it in-

---

[16]State v. Markins, 95 Ind. at 466; People v. Jenness, 5 Mich. at 322.

[17]5 Mich. at 322-23. The opinion refers to "previous acts . . . show concert and a common design . . . ." *Id.* at 322.

[18]95 Ind. at 466-67 (citing 5 Mich. 305 (1858) (emphasis added)).

[19]20 Ala. 65 (1852).

adequate to support the current practice of always admitting evidence of prior sex offenses even if different parties and offenses are involved.

State v. Bridgman[20] was viewed by the Indiana Supreme Court in *Markins* as having great force.[21] As in *Lawson*, the charge against Bridgman involved adultery committed between identical adults. In upholding the defendant's conviction, the court used a phrase which the current practice echoes, with only a slight modification, when it stated: "*[I]t is always proper* to show what is spoken of . . . as an adulterous disposition."[22] The dictum of *Bridgman* appears to have added force to the *Markins* position that sexual deviancy is to be treated as a special exception to the rule of evidence prohibiting the admissibility of testimony showing prior crimes by the accused. The current Indiana practice in which evidence of prior deviate sex crimes will always be admissible appears to be little more than a rephrasing of the court's unsubstantiated and illogical statement regarding evidence tending to show an "adulterous disposition." The broad modern application of *Bridgman* ignores the fact that in *Bridgman* the court was concerned only with showing the defendant's willingness to commit adultery repeatedly with one specific partner. The modern cases have expanded the *Bridgman* view, without justification, to include instances where the defendant committed

---

[20]49 Vt. 202 (1876).

[21]State v. Markins, 95 Ind. at 468 (citing State v. Bridgman, 49 Vt. 202 (1876)).

[22]49 Vt. at 211. The actual reasoning for admitting evidence of prior claims in *Bridgman* supports a narrower proposition than that espoused by *Markins*. The evidence in *Bridgman* was admitted for the following reasons:

> The offenses charged in this case cannot, ordinarily, be committed till the restraints of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches, and the relations of the parties have been changed from those usually existing between the sexes, to the most intimate. On a trial for it, the prosecutor has to overcome the presumption that these restraints and safeguards have not been broken over. To do this, it is always proper to show what is spoken of . . . as an adulterous disposition, and . . . as a habit of adulterous intercourse. . . . Thus, it appears that the true relation of the parties to each other in this respect, is very material and proper to be shown; and there could be nothing more potent, to show that no barrier of modesty or manners was remaining between the parties, and to show the real relation between them, than the fact that they were in the habit of committing the act from time to time . . . . *But this relation of intimacy, as before suggested does not usually take place suddenly, and the fact of its existence at any time to that extent that intercourse was actually had, would be some evidence that the relation had been existing previously*; and offered with evidence of other acts so as to show the relation to be continuous through a period covering the time in question, would be quite material and convincing.

49 Vt. at 210-12 (emphasis added).

different crimes with several different persons. The shortcomings of such an expansion are obvious since the fact that one person commits adultery repeatedly with another person differs markedly from the situation where sodomy with one person is introduced to show a propensity to commit incest with another individual. *Markins*, *Bridgman*, *Lawson* and *Jenness* provide no foundation for expansion of their limited policy admitting evidence of prior crimes in sexual offenses involving identical crimes and parties to the much broader, modern position that such evidence should always be admissible even if different sex crimes and parties are involved. The problems of non-identical crimes and parties, plus the questionable creation of a special exception to the evidentiary rule precluding testimony of prior crimes, makes *Markins* a shaky foundation upon which to base the current Indiana practice.

The faulty analysis involved in *Markins* was soon obscured by *Ramey v. State*[23] and *Lefforge v. State*.[24] Those cases ignored the problems with the reasoning of *Markins* and simply cited the case to justify admission of evidence showing prior sexual crimes committed by the defendant so that a jury could better adjudge the character of the defendant.[25] Thus, by the process of repeated citation without substantive analysis, *Markins* emerged as the Indiana decision clearly establishing that deviate sex crimes constituted a special exception to the rule of evidence prohibiting introduction of testimony regarding prior crimes.

Over thirty years passed before Indiana courts again attempted to justify the treatment of deviate sexual crimes as a special exception to the evidentiary rule prohibiting the introduction of evidence regarding crimes by the defendant. In *Borolos v. State*,[26] the Indiana Supreme Court sustained a conviction for sodomy in which evidence of prior sex crimes by the defendant was considered by the jury. The prosecuting witness testified that the defendant would meet boys at a designated spot in the woods, at which time the defendant would give the boys money, cigarettes and moonshine in exchange for allowing the defendant to commit acts of sodomy upon them. The evidence regarding the defendant's method of conduct indicated that a common scheme or design was being utilized by the defendant, justifying the admision of the evidence on the basis of a general ex-

---

[23]129 Ind. 243, 26 N.E. 818 (1891).

[24]129 Ind. 551, 29 N.E. 34 (1891).

[25]*Lefforge* also cited Ramey v. State, 127 Ind. 243, 26 N.E. 818 (1891); Thayer v. Thayer, 101 Mass. 111 (1869); State v. Pippin, 88 N.C. 646 (1877); State v. Kemp, 87 N.C. 538 (1882); and State v. Bridgman, 49 Vt. 202 (1876).

[26]194 Ind. 469, 143 N.E. 360 (1924).

ception to the rule prohibiting evidence of prior crimes to be considered by juries in criminal cases.[27] In dictum, however, the court stated that the rule of admitting evidence of prior crimes with common schemes or plans is particularly applicable to trials for sexual offenses.[28] The language in *Borolos* is unclear as to whether the admissibility of the evidence was based upon the well-recognized general exceptions of intent, motive, knowledge, plan and identity, or if, instead, the court considered prior sexual crimes as constituting a separate and specialized exception to the rule prohibiting introduction of evidence of prior crimes.[29] Later Indiana courts evidently were not confused by the statement since later cases dogmatically assert that *Borolos* stands for the proposition that sexual crimes constitute a specialized exception to the evidentiary rule preventing juror consideration of prior crimes.[30] Due to the numerous citations to *Borolos* in later Indiana cases, *Borolos* must be considered as the key Indiana decision allowing juror consideration of evidence showing prior sex crimes.

An analysis of the cases relied upon in *Borolos* does not provide a definite conclusion regarding the court's intent, or explain why *Borolos* may be so assuredly cited in support for the admissibility of evidence showing prior deviate sex crimes. In general, the cases cited by *Borolos* tend to treat the admission of such evidence as being based upon the normal exceptions to the introduction of evidence showing prior crimes, rather than due to the carving out of a specialized exception in cases involving deviate sex crimes. The first case relied upon in *Borolos* was *State v. Place*,[31] a prosecution for assault with intent to commit sodomy. The crime was committed

---

[27]*Id.* at 473, 143 N.E. at 361.

[28]*Id.* The court in *Borolos* hinted at special treatment for sex crimes by stating:

> But where the evidence discloses a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, or offers an explanation of facts that, unexplained would tend to discredit the evidence introduced by the state, evidence of other crimes than the one charged in the indictment is sometimes admissible; and this rule is particularly applicable to trials for sexual offenses.

Id.

[29]*Id.*

[30]The significance of *Borolos* is indicated by its citation for the proposition that evidence of prior sex crimes is always admissible. *See* Gilman v. State, 258 Ind. 556, 282 N.E.2d 816 (1972); Miller v. State, 356 Ind. 296, 268 N.E.2d 299 (1971); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964); State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943).

[31]5 Wash. 773, 32 P. 736 (1893), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 361.

on a moving train in the state of Washington. Evidence introduced at trial disclosed that the defendant had committed a "like assault" upon another passenger just two hours earlier while aboard the same train. The distinctive factual situation in *Place* clearly made the evidence relevant to show the existence of common plan or identity. If the evidence were admitted on that basis, then no support may be drawn from *Place* to uphold the admission of the evidence based upon a special exception to evidentiary rules.

In *Barnett v. State*,[32] the defendant was prosecuted for acts of sodomy allegedly committed upon a small girl who had been lured into his automobile. Evidence of other assaults by a man with an auto matching the description of the defendant's was admitted at trial.[33] The evidence of similar attacks on small girls was considered highly relevant in determining the identity of the attacker since automobiles matching the description of the defendant's were rare in 1921. The ultimate use of the evidence to determine that the defendant was the attacker indicates that the admission of the evidence was based more upon the exception allowing evidence of prior crimes to prove identity, rather than upon an exception allowing the testimony solely because deviate sex crimes were involved.

Also relied upon by *Borolos* was *State v. Desmond*,[34] a prosecution for assault with intent to rape in which the defendant was charged with having lured three girls backstage after a theatrical performance under the guise of giving them free tickets for a later performance. At trial evidence was admitted indicating that the defendant had individually taken each girl backstage to a hidden location where he committed the assaults. The testimony of the first two assaulted girls was presented to secure the defendant's conviction for the third assault. The court was impressed by the similarity of details in the testimony of each girl indicating that the principal justification in allowing the evidence was that such testimony disclosed a common plan or intent by the defendant.[35] The introduction of testimony regarding prior sexual assaults cannot be rationalized in a manner which would support the admission of evidence based only upon the fact that a deviate sexual crime was involved. Thus, a significant number of the cases cited by *Borolos* admitted the evidence of prior sex crimes based upon the usual exceptions to the rule prohibiting such testimony.

---

[32]104 Ohio St. 298, 135 N.E. 647 (1922), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 361.

[33]104 Ohio St. at 302, 135 N.E. at 648.

[34]109 Iowa 72, 80 N.W. 214 (1921), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 362.

[35]109 Iowa at 76-77, 80 N.W. at 215.

Three of the cases cited by *Borolos* involve the admission of testimony regarding prior offenses to explain unique circumstances or peculiarities in the testimony of prosecuting witnesses. In *State v. Hummer*,[36] no written record was taken regarding a complaint made by the prosecuting witness charging that the defendant had molested her. To explain the unusual circumstance that no record of the complaint was made, the court allowed the prosecution to demonstrate that numerous other reports regarding the defendant filed by other individuals were never recorded. The large number of reports charging the defendant with sexual attacks was used to bolster the credibility of the prosecuting witness, resulting in the defendant's eventual conviction. This introduction of reports to show prior crimes by the defendant was clearly intended to explain a highly unusual factual situation instead of being admitted simply because of the involvement of a deviate sexual offense. In *Harmon v. Territory*,[37] evidence was admitted regarding a sexual attack upon the witness's sister immediately prior to the attack upon the prosecuting witness. The evidence was offered not to show the guilt of the defendant in a sex crime, but for the purpose of establishing why the sister failed to go to the aid of the prosecuting witness.[38] Finally, in *People v. Fultz*,[39] evidence showing that the defendant had repeatedly raped the minor witness over a period of several months prior to the charged offense was introduced to explain why the child suffered no pain, or swelling or laceration of her vagina during the alleged attack.[40] The defendant's conviction for incest was upheld because the evidence of prior crimes was utilized to explain a factual occurrence rather than merely to show the defendant's criminal disposition to commit deviate sexual offenses.[41]

In each case cited by *Borolos*, testimony of prior sexual crimes was admitted into evidence. The precise justification for allowing the introduction of that evidence varied. None of the cases cited by *Borolos*, however, admitted testimony regarding prior offenses simply on the basis that the cases involved deviate sex crimes. In light of the cases relied upon by *Borolos* and the unclear language present in that case, it is difficult to imagine why this Indiana case is

---

[36]72 N.J.L. 328, 62 A. 388 (1905), *cited in* Borolos v. State, 194 Ind. at 472, 143 N.E. at 362.

[37]15 Okla. 147, 79 P. 765 (1905), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 362.

[38]15 Okla. at 159-60, 79 P. at 769-70.

[39]109 Cal. 258, 41 P. 1040 (1895), *cited in* Borolos v. State, 194 Ind. at 477, 143 N.E. at 363.

[40]109 Cal. at 259, 41 P. at 1041.

[41]*Id.*

considered to stand for the proposition that evidence of prior offenses is always relevant in prosecutions for deviate sex offenses. The citation of *Borolos* as having firmly established that deviate sexual prosecutions must be specially exempted from the evidentiary rule prohibiting the introduction of prior crimes is at best questionable, and at worst a gross misanalysis of the case law behind the reasoning of *Borolos*.

The slow evolution of the evidentiary practice whereby Indiana courts admitted evidence of prior crimes was accelerated by *State v. Robbins*.[42] The defendant in that case was a local judge accused of conducting acts of sodomy within his private chambers. Evidence of prior deviate sexual activity by the judge was presented in order to render the charges more probable.[43] The Indiana Supreme Court held the evidence admissible on the ground that sexual crimes are not subject to the general rules regarding the admissibility of evidence.[44] In support of that belief, the court cited *Jenness*, *Barnett* and *Borolos*.[45] However, the court in *Robbins* did attempt to probe the reasons why sexual crimes constituted a special exception to the rules of admissibility of evidence. *State v. Reineke*[46] was seized upon as justification for the special treatment afforded evidence of prior deviate sex crimes.[47] The Ohio decision considered sexual offenses as

---

[42]221 Ind. 125, 46 N.E.2d 691 (1943). *Robbins* also reversed *Lovell* which had been viewed by *Markins* as a sound opinion relating to evidentiary practices in sex crimes. The reasoning for the reversal was stated:

> Our holding as to the fifth and sixth assignments (offenses occurring two days after the date of the offense for which he was being tried) is not compatible with the decision in *Lovell v. State*, (1859), 12 Ind. 18. The court therein lays most stress on the element of surprise, saying, ". . . it cannot be expected that he will be prepared to defend himself against any charge other than that exhibited against him." But in the Markins case the court did not let that argument deter it from holding that prior similar offenses were admissible in prosecutions for sexual crimes. Judge Elliott attempts to distinguish the Lovell case on the ground that prior acts "constitute the foundation of an antecedent probability; but where they follow the main offense their force and effect are materially different." We think this argument is met by Judge Wanamaker in the Reineke case. The probability of the offense having occurred is supported by the proof of subsequent acts, not too remote, although the weight of the evidence may not be so great as evidence of prior acts.

Id. at 139, 46 N.E.2d at 696.

[43]*Id.* at 135, 46 N.E.2d at 694. The trial court was held to have erred in excluding the evidence. *Id.*

[44]*Id.* at 129, 46 N.E.2d at 695.

[45]*Id.* (citing Borolos v. State, 194 Ind. 469, 143 N.E. 360 (1923); People v. Jenness, 15 Mich. 305 (1858); Barnett v. State, 104 Ohio St. 298, 135 N.E. 647 (1922)).

[46]89 Ohio St. 390, 106 N.E. 52 (1914).

[47]State v. Robbins, 221 Ind. 125, 137-38, 46 N.E.2d 691, 696 (1943) (citing State v. Reineke, 89 Ohio St. 390, 394, 106 N.E.2d 52 (1914)).

being "crimes in continuando," since it was a matter of common knowledge that the "lecherous and bestial disposition" of the defendant would continue to exist toward the prosecuting witness.[48]

The opinion in *Reineke* fails to provide a logical justification for admitting evidence of prior sexual offenses to show the defendant's criminal propensity. That failure is due, in part, to two reasons which emerge from a critical examination of *Reineke*. Each independently limit *Reineke* so as to render it useless as a basis for supporting *Robbins*. First, the evidence in *Reineke* was admitted only to indicate a predisposition towards sexual misconduct between the defendant and one particular party.[49] Without offering any justification, *Robbins* sought to apply the limited holding of *Reineke* to a third-party situation. The fallacy of such an expansion is obvious because the fact that one person desires to continue an adulterous relationship with another person to whom he is attracted has little or no bearing to a prosecution involving the same defendant but differing crimes and individuals. The dissimilarities are too striking to support the interchangability of the evidence. Second, the prejudicial impact of allowing the jury to consider the evidence of prior sexual misconduct was ignored in the *Reineke* analysis.[50] Such an oversight is significant because it was the fear of undue prejudice which was responsible for the creation of the evidentiary rule prohibiting the introduction of evidence showing prior sex crimes.[51]

IV. Modern Indiana and Federal Views Regarding Introduction of Evidence Showing Prior Deviate Sexual Offenses

Growing dissatisfaction with the old justification for always admitting evidence of prior sexual misconduct by the defendant resulted in the landmark Indiana decision of *Meeks v. State*.[52] The defendant in *Meeks* was convicted of rape through the introduction of evidence showing separate, but similar crimes by the defendant which occurred several weeks prior to the offense charged. The Indiana Supreme Court in *Meeks* issued an opinion which dramatically rejected the reasoning of those earlier decisions. Without elaborating, the court departed from the long line of cases originating with *Markins* which had held evidence of prior crimes to be admissi-

---

[48]State v. Reineke, 89 Ohio St. at 394, 106 N.E. at 53.

[49]*Id.*

[50]*See* State v. Reineke, 89 Ohio St. 390, 106 N.E. 52.

[51]B. Jones, *supra* note 1, § 4:18.

[52]249 Ind. 659, 234 N.E.2d 629 (1968). *Meeks* is significant because the case broke with the past doctrine of admissibility in sexual cases and adopted a completely opposite position.

ble in prosecutions for deviate sexual offenses based upon a special exception to the rules of evidence.[53] In rejecting the special treatment afforded prosecutions for sexual offenses, the court stated: "[T]here are limitations to the above doctrine."[54] The *Meeks* opinion did state the reasons for such limitations:

> The rule now being, if an individual is on trial for a crime involving abnormal sexual intercourse, evidence of other improper acts of sexual intimacy are always admissible. *We believe this can be a dangerous situation.* An individual on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for another felony.[55]

Recognition of the injustice of admitting evidence showing prior sexual crimes by the defendant was due, principally, to the Fourth Circuit decision in *Lovely v. United States*.[56] In that case the court ex-

---

[53]*Id.* at 662, 234 N.E.2d at 631.

[54]*Id.*

[55]*Id.* at 664, 234 N.E.2d at 632 (emphasis added).

[56]169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949). The rationale underlying *Lovely* clearly supports the language of *Meeks*. The *Lovely* court stated its rationale as follows:

> It is true, of course, that evidence which has a reasonable tendency to establish the crime charged in the indictment is not rendered inadmissible merely because it establishes another crime; and the question which arises with respect to this sort of evidence is whether or not it has such tendency. In ordinary cases, it is perfectly clear that evidence of other crimes committed by the accused has no such tendency and is properly excluded as irrelevant. Evidence of the commission of similar offenses closely related in time and place may, however, be relevant on such matters as identity, guilty knowledge, motive or intent, where these are in issue, or may tend to establish a criminal plan or design out of which the crime charged has originated; but it is well settled that such evidence is not admissible where it has no relevance or probative value except insofar as it may show a tendency or likelihood on the part of the accused to commit the crime . . . . The rule which this forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except insofar as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. *If such evidence were allowed, not only would the time of the courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial* . . . . It is the product of that same humane and enlightened public spirit which, speaking through our common law, has declared that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.

Id. at 388-89 (emphasis added).

cluded evidence of prior rapes committed by the defendant for use as evidence in his subsequent prosecution for rape on the ground: "[I]t showed merely that he was a bad man, likely to commit that sort of crime; and this is precisely what the prosecution is not allowed to show in a criminal case."[57] Prior to *Lovely*, the federal courts had allowed in rape cases evidence of prior sexual crimes to be presented before the jury.[58] Evidence of prior sexual crimes had been admissible in federal courts even if non-identical third parties were involved.[59] Sections of the *Lovely* opinion appear to pierce the language used by the earlier federal decisions in *Hodge v. United States*[60] and *Bracey v. United States*,[61] recognizing that the "disposition" mentioned by those opinions was little more than restating that the defendant was a bad man.[62] The relevancy of "criminal disposition" in deviate sex crimes was unchallenged in both *Hodge* and *Bracey*. Lacking relevance, such evidence should be excluded.

Unfortunately, the *Lovely* decision limited its reasoning to rape prosecutions. That restriction, although illogical, appears to be based upon a belief that crimes such as sodomy and incest are due to a perverted sexual instinct while crimes of rape do not reflect a similar instinct.[63] Such a conclusion, whether viewed from the position of a rape victim or a detached member of society, appears irrational and unbelievable. As stated at the outset of this Note, *all* deviate sex offenses involve highly emotional legal and moral issues. This conclusion remains constant whether the actual charge is rape or sodomy because the jury's reactions to prosecutions of this type are similar. The natural prejudice of a jury towards a deviate sex offender creates a situation in which the defendant may be wrongfully convicted due to emotional responses by that jury. Thus, it is essential that a defendant be provided adequate evidentiary safeguards to protect him from wrongful conviction. The safeguards afforded defendants in rape prosecutions by *Lovely* should be just as accessible to defendants on trial for other sexual offenses because the prosecutions involve similar charges and emotional responses by the jury. The *Lovely* distinction between evidence in rape prosecutions and evidence of other sexual crimes was not emphasized by the In-

---

[57]*Id.*

[58]Weaver v. United States, 299 F. 893 (D.C. Cir. 1924).

[59]Bracey v. United States, 142 F.2d 85 (D.C. Cir. 1944), *cert. denied*, 322 U.S. 762 (1944).

[60]126 F.2d 849 (D.C. Cir. 1942).

[61]142 F.2d 85 (D.C. Cir. 1944).

[62]169 F.2d at 388.

[63]*See* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

diana decision in *Meeks*. The lack of this distinction resulted in many later decisions declining to follow *Meeks* because, without such limiting language, *Meeks* signaled a complete rejection of the specialized exception to the rules of evidence fashioned by *Markins*, *Borolos* and *Robbins*. The refusal to follow *Meeks* in cases involving sexual offenses other than rape resulted in strong dissenting opinions by various judges attacking the court's retreat. The first of those dissents was found in *Kerlin v. State*,[64] a sodomy prosecution in which the dissent of Justice DeBruler criticized the practice of always permitting the state, in prosecutions involving abnormal sexual intercourse, to introduce evidence of other sex crimes. The justice considered such a practice as an "unjustified departure from the rule of relevance."[65] Justice DeBruler indicated that, in his opinion, the court in *Meeks* had rejected the "per se exception" to the rule of relevance previously afforded evidence of prior sex offenses.[66] The dissent of Justice DeBruler in *Kerlin* was echoed and amplified by the dissenting opinion of Justice Prentice in *Gilman v. State*.[67] In that opinion the justice argued that restriction of *Meeks* to only rape prosecutions was illogical:

> The majority opinion dismisses the *Meeks* case . . . with the comment that the only issue therein was one of consent, the sexual act having been admitted. I fail to see where this removes the case at bar from the rule. The evidence of the prior alleged offense in no way shows any of the five elements above enumerated and should have been excluded.[68]

In both *Kerlin* and *Gilman*, the dissenting justices recognized that, although the factual situations in those cases differed from that in *Meeks*, the principles and factors involved in the cases remained constant and interchangeable. In all the cases, evidence was allowed to show that the defendant had committed a prior sexual offense. Each case admitted the evidence as relevant in determining the defendant's criminal propensity. In light of these similarities, it is

---

[64]255 Ind. 420, 265 N.E.2d 22 (1970) (DeBruler, J., dissenting).

[65]*Id.* at 426, 265 N.E.2d at 26 (DeBruler, J., dissenting).

[66]*Id.*

[67]258 Ind. 556, 282 N.E.2d 816 (1972) (Prentice, J., dissenting).

[68]*Id.* at 559, 282 N.E.2d at 818 (Prentice, J., dissenting) (quoting Miller v. State, 256 Ind. 296, 302-03, 268 N.E.2d 299, 303 (1971)). Justice DeBruler, concurring in the dissent of Justice Prentice, indicated that the mere characterization of an offense as a deviate sex crime should not affect the normal balancing process between relevancy and prejudicial impact when he stated: "Calling this prior crime evidence of a 'depraved sexual instinct,' whatever that phrase means in modern terminology, does not make this highly prejudicial evidence relevant in any manner to the case at bar." *Id.* at 558, 282 N.E.2d at 819 (DeBruler, J., dissenting).

difficult to imagine why the opinion in *Meeks*, which viewed such practices as prejudicial, dangerous and unjustified, was ignored in both *Kerlin* and *Gilman*.

Despite the sound logic of *Meeks* and strong dissenting opinions by various judges, the Indiana courts have continued to adhere to the practice of always admitting evidence of prior deviate sex offenses in criminal prosecutions for sex crimes.[69] No explanation for the rejection of the *Meeks* reasoning has been given in recent opinions, other than the mere repetition of the *Markins* notion that evidence of prior sex crimes illustrates the defendant's criminal disposition.[70]

The post-*Meeks* upheaval in the Indiana Supreme Court is a result of the shallow pre-*Meeks* justification for admitting highly prejudicial information regarding prior sex offenses by the defendant. Typical of that shallow analysis is the justification offered by *Lawrence v. State*[71] in which the court stated: "The admissibility of prior convictions in such cases is justified only by their relevance to the issues. The undesirable tendency to prejudice remains, but the overriding interests of the State in arriving at the truth prevails."[72] The *Lawrence* reasoning requires several assumptions to remain viable. First, it assumes that, given the evidence of prior crimes, the jury will determine the truth despite their own prejudices. Second, the justification takes for granted that evidence of prior sexual offenses is a valid indication of recidivism. Finally, the *Lawrence* justification implies that, in prosecutions for sexual offenses, the search for truth outweighs all other considerations, including the possibility that undue prejudice may result from that search. The illogic of the final assumption is significant because, in the American legal system, no practice can be justified if the ultimate result of its application is the conviction of innocent individuals due to juror prejudice. Perhaps no innocent defendants have been convicted by Indiana courts because of jury consideration of evidence showing a history of deviate sex offenses by defendants. The potential for such a miscarriage of justice, however, is great in view of the jurors' constant exposure to highly prejudicial information containing little probative value.

If the scales of justice are to be weighted in favor of admitting testimony regarding prior deviate sexual offenses instead of shielding the defendant from the natural prejudice likely to flow from

---

[69]*See, e.g.*, Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968).

[70]*See, e.g.*, Merry v. State, 335 N.E.2d 249 (Ind. Ct. App. 1975).

[71]259 Ind. 306, 286 N.E.2d 830 (1972).

[72]*Id.* at 310, 286 N.E.2d at 833.

such a disclosure, the rationale for admitting that evidence should be clear and convincing. Unfortunately, the Indiana rationale for allowing such evidence is plagued by inconsistencies and basic misconceptions. The problems inherent in the current practice of always admitting evidence of prior deviate sex crimes illustrates that an ironclad solution regarding whether to admit such evidence is not possible. The Federal Rules of Evidence stress that in such situations, flexibility is necessary. Rule 403 regarding the exclusion of relevant evidence emphasizes that flexibility, stating: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . or needless presentation of cumulative evidence."[73] Exclusion of evidence showing prior crimes is specifically dealt with by Federal Rule 404(b) which 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. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[74]

The terms utilized by each rule reflect the realization that no mechanical solution can be offered to indicate when certain types of evidence must be excluded.[75] The federal evidentiary rules neither automatically admit nor exclude evidence of prior crimes. Instead, the rules allow the application of a balancing test to determine if the relevancy of the evidence outweighs its prejudicial impact.[76] Indiana law declines to follow the practice provided by the Federal Rules of Evidence, substituting instead its own automatic exception to the rules of evidence in which testimony showing prior sexual conduct is always admitted.[77] This refusal by the Indiana courts to consider the factors of relevancy and prejudice on a case-by-case basis has created a situation in which the defendant's right to a fair trial may be violated. To avoid the possibility of such a violation, the Indiana courts should adopt the flexible federal balancing test or otherwise provide for a more restrictive practice of admissibility in prosecutions for deviate sexual offenses.

Several possible alternatives are available to restrict the Indiana practice. The least restrictive of these alternatives would limit

---

[73]FED. R. EVID. 403.

[74]FED. R. EVID. 404(b).

[75]*See*, FED. R. EVID. 404(b) (Advisory Committee Note), 56 F.R.D. 183, 221 (1972).

[76]*Id.*

[77]*See generally* Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964).

the admission of evidence showing the defendant's involvement in prior sex offenses to prior *convictions*. Currently, evidence of any act involving a deviate sexual offense may be admitted to show the defendant's propensity to commit such crimes.[78] That evidence of prior crimes may consist of either actual conviction of the defendant or mere accusations of a sexual offense.[79] Restricting the admissibility of evidence showing prior deviate sex crimes to only those instances in which the defendant had been convicted of that prior offense would afford the defendant a minimal safeguard against prejudicial evidence.

If evidence only of prior convictions were admissible, courts would avoid the possibility of a defendant's conviction based solely on the accusation of a young girl.[80] Under current Indiana law, such evidence would be considered admissible. Thus, the suggested safeguard is a logical preventive measure which would serve a useful function, especially in cases involving sexual crimes.[81]

Another possible restriction limiting the admissibility of evidence showing prior sexual misconduct derives its basis from early case law weighing the relevance of such evidence. Those cases limited the admissibility of prior crimes to only those cases involving identical parties.[82] This limitation, based upon historical practice, restricted the admissions of highly prejudicial testimony to instances in which a high degree of probability existed of a continuing, illicit relationship. This early view was founded upon the assumption that certain crimes involve ongoing interpersonal emotional relationships.[83] Therefore, the courts validly concluded that, in situations such as adultery, the continuing nature of the relationship made evidence of prior sexual familiarity between the parties very relevant to the subsequent prosecution. The courts clearly intended the relevance of the evidence indicating prior crimes to be based on a defendant's previous adulterous attitude.[84] By restricting the current practice of always admitting evidence of prior sexual misconduct to only those instances involving identical parties, the courts would more closely follow the intentions of early case law, and, at

---

[78]*Id.* at 109, 195 N.E.2d at 101.

[79]Whitty v. State, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

[80]The reader should remember that the fertile imaginations of young girls were responsible for the Salem Witch Trials.

[81]Easterday v. State, 254 Ind. 13, 256 N.E.2d 901 (1970), recognized that young girls sometime create imaginary lovers, resulting in groundless but damaging accusations in trials for sexual offenses.

[82]*E.g.*, Lefforge v. State, 129 Ind. 551, 29 N.E. 34 (1891); Thayer v. Thayer, 101 Mass. 111 (1869).

[83]*See* State v. Bridgman, 49 Vt. at 211-12.

[84]*Id.*

the same time, restrict the admission of highly prejudicial evidence to only those instances in which it has a high degree of relevance.

The final restriction available to curtail the current practice of always admitting evidence of prior deviate sexual crimes in later criminal prosecution is to totally abolish that practice, adopting the position of *Meeks*. The current practice whereby evidence of prior sexual offenses may always be admitted to show the defendant's criminal propensity is based upon the unproven notion that sexual offenders are notorious repeaters of their crimes.[85] The continued existence of the special exception will result in the continued danger that innocent defendants will be convicted.

A final, yet significant benefit of the total abolition of evidence showing prior deviate sex crimes would be a decrease in the introduction of irrelevant, prejudicial information, thereby increasing the likelihood that the defendant would be treated fairly and equally by the law. All defendants are entitled to equal treatment by the judicial system. Restrictions upon the admissibility of evidence showing prior sexual misconduct would enhance the defendant's chances for equality since he would no longer be treated as a second-class citizen, tainted by his past actions. The continued existence of a specialized exception to the evidentiary rules perpetuates in deviate sexual prosecutions that unequal treatment and, thus, should be abolished to avoid undue prejudice to the defendant.

If the special exception status afforded evidence of prior deviate sex crimes were abolished, the result would not be the total exclusion of such evidence in all instances. The evidence still could be admitted under the general exceptions of showing intent, common scheme, plan, identity or motive, if the requirements for those exceptions were met. In extraordinary circumstances, evidence of prior sex crimes could be admitted to explain highly peculiar circumstances regarding the testimony of a prosecuting witness.[86] Thus, the abolition of the special exception status of evidence showing prior deviate sex offenses would not mean that such evidence was forever lost to the prosecutor. The evidence would be excluded only if it were introduced to show the criminal propensity or disposition of the defendant. In this regard, the prohibition against the introduction of any prior offense for the purpose of proving a criminal disposition may be viewed more as a limitation on the purpose for

---

[85]*See* State v. Reineke, 89 Ohio St. at 391, 106 N.E. at 53.

[86]Harmon v. Territory, 15 Okla. 147, 79 P. 765 (1905), clearly illustrates the necessity for allowing the jury to consider evidence of other sex offenses in order for the jury to more fully appreciate the unusual factual situation presented by the prosecutrix's testimony.

which such information may be used, rather than a complete ban upon the admissibility of evidence showing prior offenses.

VI. Conclusion

Balancing the prejudicial impact of evidence against its probative value is a difficult and imprecise task. Indiana courts have continually refused to even attempt such a balancing test in prosecutions for deviate sex crimes if evidence of prior offenses by the defendant is available. Instead, the courts have fashioned a special exemption from the rule of evidence prohibiting the introduction of testimony designed to show the defendant's criminal disposition. The scales are always weighted in favor of the state.

Based only upon notions of logic, precedent and the balancing of relevancy against prejudicial effect on defendants, it is difficult to understand the evolution of a special exception to the rule of exclusion for sexual crimes. To some extent, the exception must be a product of the emotional response of the courts to sexual crimes.[87] Judges, defendants and scholars have continually urged a retreat by the courts from this untenable position.[88] At some point, logic must overcome emotion and dictate that the possibility of undue prejudice to the defendant on trial for a sex offense is so great that the exclusion of evidence showing prior offenses by the defendant is justified. The Federal Rules of Evidence provide sufficient flexibility to allow that conclusion, but the per se exception to the rule of admissibility of evidence followed by Indiana courts does not provide for such a conclusion.

The current practice of automatically allowing evidence of prior

---

[87]Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 Ariz. L. Rev. 212 (1965).

[88]*See* notes 52-68 *supra* and accompanying text. *See also* Editorial Note, *Evidence of Defendant's Other Crimes: Admissibility in Minnesota*, 37 Minn. L. Rev. 608 (1953), in which the use of prior convictions as evidence in a later trial was criticized:

> The court has been most liberal in admitting evidence of other crimes in the sex crime cases, and has even admitted it to show an inclination of the defendant to commit the crime charged. The distinction between evidence showing an inclination, which can be shown in these cases, and a disposition, which is supposedly never admissible, is dubious at best . . . . The court's liberality in admitting evidence in this type of crime is somewhat illogical. Since natural prejudice against the sex offender is so great, it would seem that he should be afforded more, rather than less protection. The reason for this liberal admissibility is not clear but appears to rest on a belief that other acts which the prosecutrix show lust of the defendant for this particular girl rather than mere disposition to commit this type of crime.

Id. at 614.

deviate sex offenses to be considered by the jury in determining the defendant's guilt for another offense is inflexible and illogical. It should, therefore, be discarded. The time has arrived to provide all individuals on trial for sexual offenses the same evidentiary safeguards against irrelevant prejudicial testimony as those afforded to individuals on trial for other felonies.

DAVID F. SNIVELY