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State of Louisiana v. Jackson: Evidence of Allegations of Prior Sexual Abuse by Accused in an Intra-Family Context

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NOTES

State of Louisiana v. Jackson: Evidence of Allegations of Prior Sexual Abuse by Accused in an Intra-Family Context

I. THE *JACKSON* CASE AND THE COURT'S HOLDING

In *State v. Jackson*,[1] the defendant was charged with three counts of molesting his granddaughters, ages seven and ten.[2] The defendant's granddaughters testified that on several occasions defendant kissed them and touched their breasts and buttocks. At a pre-trial *Prieur* hearing,[3] the court considered the admissibility of testimony from the defendant's three adult daughters—one was the mother of one of the victims—who testified their father molested them when they were minors. The defendant's daughters testified not only that their father kissed and fondled their breasts and buttocks, but one daughter also testified her father had sexual intercourse with her, and another testified her father fondled her vagina and exposed himself to her.

The trial court decided to exclude from trial all evidence that the defendant molested his daughters when each was a similar age to the victims. The court of appeal denied the state's application for supervisory writs.[4] However, the Louisiana Supreme Court granted writs.[5] *Held*: In a case against a grandfather for molestation of his granddaughters with "intention of arousing or gratifying sexual desires" (an element of the crime), evidence of prior molestations by the accused of his descendants that are similar to the acts in question is admissible to prove the accused's intent to gratify sexual desires "negat[ing] any [future] defenses that [the accused] acted without intent or that the acts were accidental" and to prove the defendant's plan to "systematically engage" in sexual relations with family members as they matured physically.[6] According to the Louisiana Supreme Court, the evidence of similar acts was admissible even though the purported offenses against his daughters occurred fifteen to twenty years before

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1. 625 So. 2d 146 (La. 1993).

2. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious acts upon the person or in the presence of any child under the age of seventeen, . . . with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

La. R.S. 14:81.2 (1994).

3. A *Prieur* hearing is a pre-trial hearing to determine the admissibility at trial of certain evidence. State v. Prieur, 277 So. 2d 126 (La. 1973).

4. *Jackson*, 625 So. 2d at 146.

5. *Id.*

6. *Id.* at 152.

the offenses against his granddaughters.[7] Further, the court held the testimony of the adult daughters that the defendant had sexual intercourse with one daughter, exposed himself to another daughter, and fondled his daughters' vaginas was inadmissible.[8] In these situations, the court found the prejudicial effect of the evidence outweighed its probative worth, and this evidence therefore was irrelevant.[9]

II. THE LAW PRIOR TO *JACKSON*

Traditionally, English and American courts refused to admit evidence of a defendant's bad moral character in a criminal prosecution when offered to prove conduct on a particular occasion.[10] This rule developed out of the Anglo-Saxon insistence that the prosecution had to prove that the accused committed a specific crime, not merely that the accused is a bad person.[11] Although character evidence may have been relevant, it was inadmissible in the prosecution's case-in-chief because of its prejudicial effect on the defendant.[12] The prosecution could, however, introduce character evidence in rebuttal if the defendant introduced evidence of his good character.[13]

Three reasons were advanced to justify the exclusion of prior bad acts of the accused: (1) the strong tendency of a jury to believe an accused is guilty of a charge merely because of their belief that an accused is a bad person; (2) the burden which would be placed on an accused to defend against such claims; and (3) the tendency of a jury to find an accused guilty of a charged crime because he escaped punishment for his previous crimes.[14]

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7. *Id.*

8. *Id.*

9. *Id.* (citing La. Code Evid. art. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.").

10. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 129 (1993). For further discussion on the rule for admissibility of character evidence, see generally 1A John H. Wigmore, Evidence in Trials at Common Law §§ 54.1-61 (1992); 2 John H. Wigmore, Evidence in Trials at Common Law §§ 242, 300-307 (1992); 1 McCormick on Evidence §§ 186-195 (John W. Strong ed., 4th ed. 1992); Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence §§ 404(01)-404(22) (1994).

11. David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529 (1994); *see also* 1A Wigmore, *supra* note 10, at 1212.

12. *See generally* Wigmore, *supra* note 10.

13. Unless and until the defendant introduces evidence of his good character, the long established rule forbids the prosecution from introducing evidence of the defendant's bad character. State v. Sutfield, 354 So. 2d 1334, 1336 (La. 1978).

14. 1A Wigmore, *supra* note 10, at 1215; *see also id.* at 1212 ("It is objectionable not because it has no appreciable probative value, but because it has too much . . . ."). In State v. Goza, 408 So. 2d 1349 (La. 1982), the court stated that "[t]he introduction of other crimes evidence involves constitutional problems because of the danger that a defendant may be tried for charges of which he has no notice and for which he is unprepared and which unfairly prejudice him in the eyes of the jury." *Id.* at 1353.

While the general rule remains that *other crimes evidence*[15] is not admissible to prove character, there are exceptions.[16] Although not admissible to prove bad character, a bad act may be admissible to prove intent, motive, plan, or knowledge.[17] Louisiana courts, as well as courts across the country, have had difficulty implementing this rule.[18] Defining these concepts and balancing the probative value of evidence against the risk of prejudice, including how temporal remoteness affects the decision on the admissibility of the evidence, are particularly troublesome issues.[19]

Intent has been regarded as the state of mind with which the act is done.[20] For evidence of other crimes to be admissible to prove intent, the element of

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15. The phrase *other crimes evidence* is used to denote crimes or acts that the prosecution claims to have been committed by the defendant. These may include charged and uncharged crimes occurring before or after the act in question. *See* William A. Jones, *Other Crimes Evidence in Louisiana*, 33 La. L. Rev. 614 (1973); *see generally* George W. Pugh et al., Handbook on Louisiana Evidence Law 296 n.1 (1994).

16. Louisiana's rules of evidence as to the admissibility of character evidence generally follow the common law and the later embodiment of the Federal Rules of Evidence. *Compare* La. Code Evid. art. 404(B)(1):

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

with Fed. R. Evid. art. 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

There are, however, significant limitations in Louisiana's adaptation. *See* La. Code Evid. art. 1103:

> Article 404(B) and 104(A) neither codifies nor affects the law of other crimes evidence, as set forth in State v. Prieur, 277 So. 2d 126 (La. 1973), State v. Davis, 449 So. 2d 466 (La. 1984), and State v. Moore, 278 So. 2d 781 (La. 1973) and their progeny, as regards the notice requirement and the clear and convincing standard in regard to other crimes evidence. Those cases are law and apply to Articles 404(B) and 104(A), unless modified by subsequent state jurisprudential development.

17. La. Code Evid. art. 404(B). Article 404(B)'s predecessors were La. R.S. 15:445-446 (repealed 1989). Although 404(B) contains a longer list, it generally accords with rules applied by the Louisiana courts under the Louisiana Revised Statutes. *See* Pugh et al., *supra* note 15, at 295 cmt. k.

18. For further discussion on the difficulty Louisiana courts have with the admissibility of other crimes evidence, see Huey L. Golden, Comment, *Knowledge, Intent, System and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 La. L. Rev. 179 (1994).

19. La. Code Evid. art. 403.

20. Jones, *supra* note 15, at 614; *see also* 2 Wigmore, *supra* note 10, at 43.

intent must be a *real issue* at trial.[21] *Plan* encompasses two different concepts.[22] First, *plan* may refer to a cause of action in which each crime is an "integral part of an over-arching plan explicitly conceived and executed by the defendant."[23] Second, *plan* may refer to a particular scheme or system in which the circumstances are so peculiar and similar that one could logically reason the acts were committed by the same person.[24]

Courts have also had difficulty with the issue of *remoteness in time* between the charged act and the other crimes. The probative worth of other crimes evidence is reduced the further removed temporally the other crime is from the charged act. When weighing the probative worth of evidence against its prejudicial effect, however, courts consider not only remoteness in time, but also differences as to location and types of offenses.[25]

Louisiana courts have undergone several shifts in interpreting the rules of admissibility of other crimes evidence. Prior to the 1950's, Louisiana courts were exceptionally protective of the rights of the accused.[26] For example, in 1923, in *State v. Norphlis*,[27] the defendant was charged with theft for stealing a dress and hosiery from a local shop. At trial, the state introduced as evidence items from a prior theft allegedly committed by the defendant at the same shop against the defendant to prove system and intent.[28] The Louisiana Supreme Court reversed the conviction, finding that the previous thefts were not part of a single system (plan) and stating that intent was not a material issue in the case.[29]

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21. State v. Moore, 278 So. 2d 781 (La. 1973) (holding no proof of intent was required in prosecution for aggravated rape, thus any evidence tending to prove intent was not admissible).

22. State v. Spencer, 257 La. 672, 243 So. 2d 793 (1971). For a discussion of these concepts of plan as embraced by other courts across the country, see Mary C. Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 608 n.27 (1989). *But see* Bryden & Park, *supra* note 11, at 547 (recognizing a possible third meaning of plan, that is an "unlinked" or "spurious" plan).

23. McCormick, *supra* note 10, at 801. *See, e.g.*, State v. Mayer, 589 So. 2d 1145, 1150 (La. App. 5th Cir. 1991); *writ denied*, 609 So. 2d 251 (1992).

24. State v. Prieur, 277 So. 2d 126, 128-29 (La. 1973). Although the predecessor to Article 404(B) did not speak of "plan," it was deemed subsumed under the concepts of system or *modus operandi*. *Modus operandi* is defined as a method of operating or doing things. Black's Law Dictionary 1004 (6th ed. 1990).

25. State v. Humphrey, 381 So. 2d 813, 815 (La. 1980). For a general discussion, see John S. Herbrand, Annotation, *Admissibility of Evidence of Subsequent Criminal Offenses by Proximity as to Time and Place*, 92 A.L.R. 3d 545 (1992).

26. George W. Pugh & James R. McCelland, *Developments in the Law, Evidence*, 43 La. L. Rev. 413 (1982). An early example is State v. Bates, 46 La. Ann. 849, 15 So. 204 (1894), in which the court held evidence of the defendant's prior theft of billiard balls was inadmissible to prove system and intent because neither was a real issue in the case. The court said that for the evidence to be admissible at all, "it must bear directly and materially upon, and have some connection with, the issue before the jury." *Id.* at 850, 15 So. at 205.

27. 165 La. 893, 116 So. 374 (1928).

28. *Id.*

29. The court stated that intent was not an issue "as [it] seldom is in the case of larceny." *Id.*

Even before 1950, however, this protective attitude towards the rights of the accused was not universal. For example, in the 1928 sexual offense case of *State v. Cupit*,[30] the Louisiana Supreme Court held that evidence of a previous rape of a niece eight years prior to the charged act was admissible to show guilty knowledge and intent in the defendant's trial for assault with intent to commit rape of a different fourteen-year-old niece.[31]

Between 1950 and 1973,[32] the court continued a more relaxed attitude of admissibility of other crimes evidence in sex cases.[33] Further, the court reflected a more receptive attitude towards admissibility of other crimes evidence in other cases as well.[34] For example, in *State v. Skinner*,[35] in the defendant's trial for possession and sale of marijuana, the prosecution was allowed to introduce evidence of the sale of marijuana to a different undercover narcotics agent seven days after the charged incident to prove knowledge, system, and intent.[36]

In 1973, however, a majority of the Louisiana Supreme Court had "serious misgivings" of past approval of admission of other crimes evidence.[37] In *State v. Prieur*, the court said it "believe[s] this Court has gone as far as possible, if not too far, in approving admission of evidence of stale, unrelated offenses without prior notice and other appropriate safeguards."[38] Most significantly, the court stated the "spirit of our constitutional provisions . . . requires the establishment of safeguards [as a] prerequisite to the admissibility of such evidence."[39] The court set strict standards the prosecution must follow to introduce other crimes evidence, standards which require notice, hearing, and evidence that is not a "subterfuge for depicting the defendant's bad character."[40]

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at 894, 116 So. at 375. *See also* Jones, *supra* note 15, at 621.

30. 189 La. 509, 179 So. 837 (1938).

31. The idea, in *Cupit*, of admitting other crimes evidence in the sexual context was carried further in State v. Bolden, 257 La. 60, 241 So. 2d 490 (1971).

32. Some commentators have made such distinctions. *See* Jones, *supra* note 15, at 617.

33. *See Bolden*, 257 La. at 60, 241 So. 2d at 490 (holding despite the fact that intent was not at issue according to traditional notions, evidence that the defendant attempted to commit aggravated rape on a different victim was admissible to show intent).

34. *See generally* Jones, *supra* note 15, at 623.

35. 251 La. 300, 204 So. 2d 370 (1967).

36. *Id.* at 337, 204 So. 2d at 383.

37. State v. Prieur, 277 So. 2d 126, 130 (La. 1973).

38. *Id.* at 130.

39. *Id.* at 130.

40. *Id.* at 130. The court set the following standards:

> When the state intends to offer evidence of other criminal offenses under the exceptions outline in R.S. 15:445 and 446: (1) The State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are part of the res gestae, or convictions used to impeach defendant's testimony. (2) In the written statement the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other acts or offenses. (3) Prerequisite to the admissibility

In *Prieur,* the court held evidence of the defendant's purported prior armed robbery of a gas station was not admissible to prove knowledge, intent, or system in the present charge of armed robbery of a bus driver.[41] In another significant case decided the same year, *State v. Moore,*[42] the court further clarified the rules of admissibility of other crimes evidence by stating that for other crimes evidence to be admissible, the matter at issue must be real and genuine and not one the prosecution conceives to be at issue merely because of a plea of not guilty.[43]

A. Prieur *and its Progeny's Interpretations of the Intent Exception*

In the context of specific intent cases, if the facts unambiguously pointed to the required intent, there was strong indication that intent was not a "real issue" in the case unless the question of intent was placed at issue by the defendant.[44] Arguably, the contrary principle also developed; therefore, the prosecution could introduce other crimes evidence in its case-in-chief.[45] In *Prieur,* since the court deemed the facts to be unambiguous on the issue of intent, other crimes evidence to show intent was inadmissible in the prosecution's case-in-chief. The Louisiana Supreme Court stated had the defendant injected intent as an issue by

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of the evidence is a showing by the State that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered. (4) When the evidence is admitted before the jury, the court, if requested by defense counsel, shall charge the jury as to the limited purpose for which the evidence is received and is to be considered. (5) Moreover, the final charge to the jury shall contain a charge of the limited purpose for which the evidence was received, and the court shall at this time advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment or one responsive thereto.

Id. at 130.

41. *Id.* at 129. Armed robbery, at that time, was a specific intent crime.

42. 278 So. 2d 781 (La. 1973).

43. *Id.* at 787.

44. Jones, *supra* note 15, at 618. *See also* State v. Prieur, 277 So. 2d 126, 129 n.2 (La. 1973). In situations in which intent is not placed at issue, the court has generally excluded such evidence. In State v. Ambercrombie, 375 So. 2d 1170 (La. 1979), *cert. denied,* 446 U.S. 935, 100 S. Ct. 2151 (1980), evidence of prior threats against church personnel and of vandalism of the church was held inadmissible to prove intent in the prosecution of defendant for first-degree murder of a priest. The court said intent was not a real issue because the defendant contended he had not done the act at all—not that he lacked the requisite intent. *Id.* at 1175. *See also* State v. Welch, 615 So. 2d 300 (La. 1993); State v. Martin, 377 So. 2d 259 (La. 1979). *But see* State v. Medlock, 297 So. 2d 190 (La. 1974). For examples of intent being placed at issue by the defendant's introduction of evidence of accident, see State v. Kahey, 436 So. 2d 475 (La. 1983); State v. McKeever, 407 So. 2d 662 (La. 1981); State v. Driggers, 554 So. 2d 720 (La. App. 2d Cir. 1989). For an example of the defendant asserting the defense of innocent intent, thus placing intent at issue, see State v. LeCompte, 371 So. 2d 239 (La. 1978).

45. *See, e.g.,* State v. Morris, 362 So. 2d 1379 (La. 1978). Even in this context, the probative value must be weighed against the prejudicial effect. La. Code Evid. art. 403.

introducing evidence of accident or inadvertence, the lower court might have properly admitted the evidence.[46]

B. Prieur *and Its Progeny's Interpretations of the Plan/System Exception*

In *Prieur*, evidence of the robbery of a gas station was not admissible as evidence of a plan/system in the prosecution of the defendant for robbing a bus driver.[47] However, the court noted the evidence would have been admissible to prove system if the prosecution had introduced evidence indicating the defendant had robbed a different bus driver on the same corner, at the same time of day, and just a few weeks before the crime in question.[48]

Post-*Prieur* decisions have held that for evidence of other crimes to be admissible to prove system, the other crimes must manifest peculiar and distinctive similarities to the charged crime. In *State v. Ledet*,[49] the court held evidence which tended to show the defendant kidnapped and sexually assaulted another victim five months after the charged act of aggravated rape was not admissible under the system rubric.[50] The acts, the court reasoned, were not distinctively similar to demonstrate the perpetrator was the same person.[51] Likewise, in *State v. Frentz*,[52] the court held evidence that the defendant had similar sexual acts with two other boys under the same circumstances was inadmissible in defendant's current charge of aggravated crime against nature with a person under the age of seventeen.[53]

Frentz[54] and *Ledet*[55] further articulated the principle that system evidence could not be admitted when used to prove the doing of the charged act—it could only be admitted to prove the identity of the perpetrator.[56] Presumably, in the former case, the evidence is excluded because its principal value is to show propensity of a person to do this kind of act. Hence, admissibility is barred by

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46. *Prieur*, 277 So. 2d at 129 n.2.

47. *Id.* at 128.

48. *Id.* at 129.

49. 345 So. 2d 474 (La. 1977).

50. *Id.* at 478-79. The court stated the acts in question were more "noteworthy for their differences than for their similarities." *Id.* at 478.

51. *Id.* at 479. *See also* State v. Lee, 340 So. 2d 1339, 1343 (La. 1976), *cert. denied*, 431 U.S. 941, 97 S. Ct. 2653 (1977) (holding the acts were strikingly similar and established the relevancy of the extraneous offense to the robbery system employed by the defendants).

52. 354 So. 2d 1007 (La. 1978).

53. The defendant was the teacher of all of the victims and hired each boy to help him clean his home. Each boy testified that when he went to the teacher's home to clean, the teacher committed a similar sexual act upon him. The defendant admitted the boys went to his home but denied any sexual activity took place. *Id.* at 1009.

54. 354 So. 2d at 1009.

55. 345 So. 2d 474, 479 (La. 1977).

56. *Frentz*, 354 So. 2d at 1009; *Ledet*, 345 So. 2d at 479. For a discussion of similar ideas articulated in other state courts, see Bryden & Park, *supra* note 11, at 544-46; Reed, *supra* note 10, at 204.

the rule against admissibility of character evidence. In the latter case, the evidence has a value independent of propensity; it is relevant to show identity—that the defendant is one of the few people capable of doing the charged act.

Reconciling the above principle with *State v. Hatcher*, however, is difficult.[57] In *Hatcher*, the issue was not who was the perpetrator of the act but whether the act was performed.[58] The court, with some difficulty,[59] upheld the lower court's decision to admit the other crimes evidence introduced to prove system in the defendant's prosecution for aggravated crime against nature.[60] In this case, the defendant admitted coitus but consistently denied fellatio with the victims.[61] The court stated, "[i]n an unusual case, such as the present one, in which the defendant causes the very doing of the act to become a genuine issue, his design, scheme, etc., may be relevant to that issue."[62] The significance of this distinction is difficult to understand. Nevertheless, the court reaffirmed its holdings in *Ledet* and *Frentz*.[63]

Two Louisiana court of appeal cases are inconsistent with the holdings of *Frentz* and *Ledet*.[64] In *State v. Driggers*,[65] the second circuit approved the admission of other crimes evidence in the defendant's prosecution for indecent behavior with a juvenile and for aggravated oral sexual battery to show a pattern or system that the defendant "generally took advantage of one-on-one situations with female juveniles [and] that he was motivated by unnatural interest in prepubescent and adolescent females."[66] In the third circuit decision of *State v. Howard*,[67] the defendant was charged with the aggravated rape of his eleven-year-old daughter. The court approved admission of purported prior sexual offenses by the defendant with the victim's step-sister to prove a plan to

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57. 372 So. 2d 1024 (La. 1979). In *Hatcher*, the court set out the following requirements for admissiblity of other crimes evidence to prove system: 1) the evidence of other crimes and the evidence of defendant's connection to them must be clear and convincing; 2) the modus operandi employed by the defendant in both the other bad act and the crime charged must be so peculiarly distinctive that one must logically conclude they were done by the same person; 3) the other bad act must be relevant for some purpose other than to show defendant is a bad person who probably committed the crime; 4) the other bad act must tend to prove a material fact genuinely at issue in the case; and 5) the probative worth of the evidence must outweigh its prejudicial effect. *Id.* at 1033.

58. *Id.*

59. *See id.* at 1037.

60. The defendant was also charged with forcible rape. However, the other crimes evidence in question was not relevant to that charge. *Id.* at 1029.

61. The defendant appeared to each young girl as a talent scout, showed them a newspaper clipping, and had forced sexual acts with each victim. *Id.* at 1027-28.

62. *Id.* at 1035.

63. *Id.* at 1035-36. The court also upheld the holding of State v. Jackson, 352 So. 2d 195 (La. 1977).

64. *See* Pugh et al., *supra* note 15, at 298 (stating that these cases have "hearken[ed] back to the Pre-*Prieur* approach").

65. 554 So. 2d 720 (La. App. 2d Cir. 1989).

66. *Id.* at 724.

67. 520 So. 2d 1150 (La. App. 3d Cir. 1987), *writ denied*, 526 So. 2d 790 (La. 1988).

systematically engage in sexual relations with his daughters.[68]

The Louisiana Supreme Court in *State v. Bailey*,[69] however, indicated disapproval of *Driggers*. In *Bailey*, the supreme court rejected the lower court's reliance on *Driggers* and held that in the prosecution of the defendant for molestation of his youngest child, evidence of the defendant's purported molestation of his two oldest daughters was inadmissible.[70] The court said the testimony did not "establish the defendant's particular motive for committing the charged crime against the prosecutrix . . . and it otherwise fails to establish a pattern of committing sexual offenses against the same prosecutrix."[71]

The *Driggers* and *Howard* decisions also are inconsistent with the Louisiana Supreme Court decision in *State v. Jamison*.[72] In the defendant's prosecution for aggravated rape of his daughter and step-daughter, the supreme court in *Jamison* held the trial court should not have admitted evidence of molestations of other family members. The court stated the evidence of bad acts with someone other than the victim should have been excluded because it did not establish the defendant's particular system for committing the charged crime against the prosecutrix, and the probative value was substantially outweighed by the danger of unfair prejudice.[73]

C. Prieur *and its Progeny's Interpretations of Remoteness*

Prior to *Jackson*, with respect to the significance of remoteness of other crimes evidence, Louisiana courts have stated that balancing the probative worth of evidence against its prejudicial effect is a fact-sensitive analysis in which remoteness between the other crime and the charged act, among other things, should be taken into consideration.[74] The Louisiana Supreme Court has not articulated any time frame as to when the evidence is too remote to be admitted.[75] In one case, *State v. Driggers*, the court of appeal concluded evidence of other crimes committed twenty-six years before the charged act was not too remote to deplete the probative worth of the evidence.[76]

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68. *Id.* at 1154.

69. 588 So. 2d 90 (La. 1991) (per curiam).

70. *Id. See also* Pugh, *supra* note 15, at 298 n.4.

71. 588 So. 2d at 90 (citing State v. Sutfield, 354 So. 2d 1334 (La. 1978); State v. Acliese, 403 So. 2d 665 (La. 1981)).

72. 617 So. 2d 480 (La. 1993).

73. *Id.* at 481.

74. State v. Humphrey, 381 So. 2d 813 (La. 1980).

75. *See, e.g., Humphrey*, 381 So. 2d at 813.

76. 554 So. 2d 720 (La. App. 2d Cir. 1989). *See also* State v. Howard, 520 So. 2d 1150 (La. App. 3d Cir. 1987), *writ denied*, 526 So. 2d 790 (La. 1988). Similarly, other states' courts have admitted evidence of sexual acts with different victims despite the long passage of time between the other crime and the charged act. *See, e.g.*, Cooper v. State, 325 S.E.2d 877 (Ga. 1985); State v. Stephens, 466 N.W.2d 781 (Neb. 1991). *But see* State v. Strobel, 554 N.E.2d 916 (Ohio 1988). *See generally* Reed, *supra* note 10, at 154-56.

III. THE *JACKSON* CASE AND ITS EFFECT ON PRIOR JURISPRUDENCE

Since the *Jackson* court relied in part on a 1938 Louisiana Supreme Court case and two post-*Prieur* court of appeal decisions,[77] only speculation about the ramifications of *Jackson* on the prior jurisprudence can be offered. The court in *Jackson* did not analyze the significance of the post-*Prieur* supreme court cases discussed above. The court did not expressly overrule any of its post-*Prieur* decisions; and by excluding evidence of the defendant's purported other acts of actual intercourse with his daughters,[78] the court indicated continued adherence to at least parts of its post-*Prieur* approach.[79] A question remains as to whether *Jackson*'s holding is limited to sex cases with children (or even narrower, to misconduct between family members) or whether its precepts apply generally to all crimes. If the latter is accurate, the court is rejecting strict application of the rule prohibiting character evidence as implemented in cases such as *State v. Sutfield*,[80] which was cited by the court with approval earlier the same year.[81] In *Sutfield*, an armed robbery case, the court excluded evidence in the prosecution's case-in-chief that tended to show the defendants were addicted to narcotics. The court found this evidence "had little, if any, relevance for a purpose other than to show a probability that the defendants committed the crime on trial because they were men of criminal character."[82] The court also stated any probative value of the evidence was clearly outweighed by its prejudicial effect.[83]

By citing *Driggers*, *Cupit*, and *Howard*, the supreme court implied that its reasoning in *Jackson* applies to special circumstances present in sexual misconduct cases with children. If so, with the *Jackson* case, Louisiana joins a national trend toward the admissibility of other crimes evidence in child molestation cases.[84]

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77. 625 So. 2d 146 (La. 1993).

78. *Id.* at 152.

79. *Id.* The court classified this evidence as "irrelevant." *Id.* at 151-52. In this writer's opinion, this classification is questionable. That the defendant purportedly committed more extreme sexual acts in the past, i.e., having intercourse with one daughter, seems to be relevant to the question of whether he fondled his grandchildren. *See generally* 1A Wigmore, *supra* note 10, at 1212.

80. 354 So. 2d 1334 (La. 1978).

81. State v. Jamison, 617 So. 2d 480, 481 (La. 1993).

82. 354 So. 2d at 1338.

83. *Id.* at 1338.

84. A national trend has developed in courts and legislatures to reform evidence rules in child molestation cases. *See* Josephine Bulkley et al., A Judicial Primer on Child Sexual Abuse 63 (1994); *see also* Evidence Rule 414 which states in part:

> (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant . . . .

Fed. R. Evid. 414. For a discussion of this rule, see Bryden, *supra* note 11, at 566; Reed, *supra* note 10, at 145.

Although the facts in *Jackson* are similar to those of *Jamison* and *Bailey*, two of the court's more recent pronouncements on the subject, neither the prosecution's nor the defendant's briefs to the Louisiana Supreme Court for *Jackson* cite the aforementioned cases.[85] The court's decision in *Jackson*, admitting evidence of the defendant's sexual acts with his daughters that occurred fifteen to twenty years before the charge of molestation of his granddaughters, is inconsistent with the holding of *Jamison*.[86] One may be able to distinguish *Jamison* and *Bailey* because the accused's intent was not an issue in those cases.[87] Like *Jackson*, however, those cases concerned whether the charged physical act had in fact been committed. To show the act had been committed, trial courts had admitted other crimes evidence to show a pattern of conduct, as contemplated in *Jackson*.[88] Further, *Jamison*'s holding establishes a more general concept—limiting admissibility of other sex crimes to acts with the alleged victims of the charged acts—which should apply to situations similar to *Jackson*.[89]

In addition to the inconsistency with *Jamison* and *Bailey*, the *Jackson* case has great significance in other areas of other crimes evidence law. In *Jackson*, intent was determined to be a real issue in the prosecution's case-in-chief although there was no indication that the defendant would place intent at issue.[90] It is difficult to determine from evidence at a pre-trial hearing whether the purported facts were ambiguous as to the question of intent. Without referring to the above suggested distinctions, the Louisiana Supreme Court in *Jackson* stated that evidence to prove intent was deemed admissible in the prosecution's case-in-chief to "negate any defense that he [defendant] acted without intent or that the acts were accidental."[91] Does this mean that the court is unwilling to accept the suggested distinction as a general matter or that it is unwilling to accept it where the substance of the crime requires a specific intent to "arous[e] or gratif[y] . . . sexual desires?"[92] The answer is not clear.

The ruling that other crimes evidence was admissible to prove plan is inconsistent with much of the post-*Prieur* jurisprudence. Certainly, the other

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85. Memorandum in Support of Application for Writ of Certiorari, State v. Jackson, 625 So. 2d 146 (La. 1993) (No. 93-KK-0424); Response to Application for Writ of Certiorari, State v. Jackson, 625 So. 2d 146 (La. 1993) (No. 93-KK-0424).

86. The case was taken by the supreme court on a supervisory writ after a *Prieur* hearing was held at the district court. There was no evidence in the case, nor in the briefs to the supreme court, that the defendant had asserted an innocent intent. *Id.*

87. *See* State v. Jamison, 617 So. 2d 480 (La. 1993); State v. Bailey, 588 So. 2d 90 (La. 1991).

88. 617 So. 2d at 480; 588 So. 2d at 90.

89. 617 So. 2d at 480; 588 So. 2d at 90.

90. Relying on State v. Cupit, 189 La. 809, 179 So. 837 (1938), the court reasoned that since specific intent was an "essential ingredient" of the crime charged, the jurisprudence has recognized the principle that "evidence of similar but disconnected" other crimes is admissible to prove intent. 625 So. 2d at 150.

91. *Id.* at 150.

92. La. R.S. 14:81.2 (1994).

crimes evidence in this case does not fit under the first notion of plan.[93] The *Jackson* court followed the second notion of plan/system[94] and reasoned the "distinctive similarities between the generational molestations call for their admission."[95] In *Frentz* and *Ledet*, however, evidence proffered to prove system was excluded even when the acts occurred within a few months of each other since the similarities were not particularly distinctive.[96] The *Jackson* court applied a more relaxed application of these concepts.[97] Although one can share the court's great concern with the problem of sexual abuse of children, in this writer's opinion, the narrower approach reflected in *Frentz* and *Ledet* is the preferable approach.[98]

IV. CONCLUSION

Even though evidence of other crimes in child molestation cases arguably has probative worth as has been suggested,[99] it is arguably very prejudicial as well. Because of the horrible nature of the crime and the increased societal debate about child sexual abuse, a jury that hears allegations of prior acts of abuse is more likely to convict the defendant for the instant charge.[100] While the courts have and should recognize the unique circumstances when the victim of a crime is a child,[101] the court should carefully balance any special concerns with the protections afforded to the accused by the criminal justice system. In *Jackson*, the evidence was highly prejudicial and should have only been admitted, if at all, on rebuttal.

Recent congressional legislation has gone beyond the *Jackson* decision toward abolishing the character evidence rule in child molestation cases.[102] It

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93. McCormick, *supra* note 10. Under this concept, the father would have had to contemplate all the various acts of misconduct at one time—which is inconceivable since the acts occurred fifteen to twenty years apart. Golden, *supra* note 18, at 199-200; *see generally* Reed, *supra* note 10, at 202.

94. State v. Prieur, 277 So. 2d 126 (La. 1973).

95. 625 So. 2d at 150.

96. State v. Frentz, 354 So. 2d 1007, 1009 (La. 1978); State v. Ledet, 345 So. 2d 474, 478-79 (La. 1977).

97. Even if the other crimes evidence does not fit under the notions of plan, the court could conceivably be adopting a new exception specifically for child molestation cases. Courts across the country have been willing to admit evidence by broadly interpreting plan as in *Jackson*. *See generally* Bryden & Park, *supra* note 11, at 548; *see, e.g.*, State v. Oliphant, 250 N.W.2d 443 (Mich. 1976); State v. Brigham, 638 A.2d 1043 (R.I. 1994); State v. Friedrich, 398 N.W.2d 763 (Wisc. 1987). *But see* People v. Tassel, 679 P.2d 1 (Cal. 1984).

98. 354 So. 2d at 1007; 345 So. 2d at 474. *See generally* Bulkley, *supra* note 84, at 86 (citing Edward Imwinkelreid, Uncharged Misconduct Evidence 36 (1984 & Supp. 1992)).

99. Bulkley, *supra* note 84, at 85.

100. Hutton, *supra* note 22, at 605.

101. Hutton, *supra* note 22, at 604 (listing special exceptions including: broadening the rules to admit a child's hearsay statements, video taping of a child's statement, and removing child witnesses.).

102. *See supra* note 84.

is inconsistent to allow character evidence in child molestation cases, but to retain the rule of general exclusion of such evidence for other crimes such as murder.[103] Recidivism[104] rates are not higher for child molesters than for violent offenders. In fact, incest offenders generally have lower rates of recidivism than other offenders.[105] While the age of the victim may magnify the need for other crimes evidence, it also magnifies the danger that the admission of such evidence will divert the jury's attention and will prejudice the defendant. Because of the current instability of distinguishable data[106] and because of the strong, established precedent against allowing character evidence to enter into a trial, the character evidence rule should remain intact for child molestation cases. As one commentator stated, "[t]here is nothing unique about sex offenses which justifies a special rule. It is, however, the public reaction to evidence in sex crimes which makes them unique."[107]

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103. Bryden & Park, *supra* note 11, at 558-59.

104. Recidivision is "a tendency to relapse into previous condition or mode of behavior." Webster's New Collegiate Dictionary 957 (1979).

105. Bulkley, *supra* note 84, at 8. *See also* Reed, *supra* note 10, at 154; Hutton, *supra* note 22, at 616; Bryden & Park, *supra* note 11, at 572.

106. Bulkley, *supra* note 84, at 7-9. *See also* Reed, *supra* note 10, at 223, 242.

107. Reed, *supra* note 10, at 217.