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PREDATORS AND PROPENSITY: THE PROPER APPROACH FOR DETERMINING THE ADMISSIBILITY OF PRIOR BAD ACTS EVIDENCE IN CHILD SEXUAL ABUSE PROSECUTIONS

Basyle J. Tchividjian[†]

I. INTRODUCTION

*On March 1, 2011, fourteen year old Kelly Peters told her father that Christopher Smith had repeatedly sexually abused her*¹.

Kelly Peters and her family have been good friends with the Smith family for approximately 10 years. The families often vacationed together and visited each other's homes for cook-outs and other social occasions. The Smiths have one child named Sabrina, who has become Kelly's best friend. Kelly's mother tragically died in 2010 after a long battle with cancer. During those difficult days, Kelly frequently stayed with the Smith family when her mother was away seeking medical treatment. Oftentimes during those visits, Christopher Smith was the only adult home with Kelly and Sabrina.

Kelly Peters alleges that during the past two years, Christopher Smith sexually abused her on four to five occasions. She remembers that the abuse began during her visits with the Smiths towards the end of her mother's life. Kelly recalls that the abuse always occurred when she and Mr. Smith were alone in his vehicle. On the first occasion, Chris Smith unzipped his pants, took out his penis, and told Kelly to touch it. Confused, but very trusting of Mr. Smith, Kelly complied with his request. After that incident, every time Mr. Smith was alone with Kelly in the car, he made her touch his penis. The last time this occurred, Kelly attempted to push Mr. Smith away but without success. Christopher Smith immediately looked at Kelly and stated, "This is our little secret, if you tell anyone you will never be able to see Sabrina again." About two weeks later, Kelly Peters was finally able to disclose the abuse to her father. Mr. Peters immediately reported Mr. Smith to the local police department and a subsequent prosecution ensued.

While investigating these crimes, the prosecutor has learned that other children have alleged that Christopher Smith sexually abused them. Though none of these prior allegations resulted in formal charges, the prosecutor wants to introduce them as "prior bad act evidence" in the trial against Christopher Smith.

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Collateral Abuse Evidence

1. Brian Smith

Brian Smith is the twenty-four year old nephew of Christopher Smith. His uncontroverted testimony is that when he was a child, Brian's family lived next door to his uncle. Because they lived next door and were family, Brian's parents often asked Chris to watch Brian when they would travel out of town. Brian alleges that when he was between nine and twelve years old, Christopher Smith sexually abused him on numerous occasions while he was staying at his uncle's house. The abuse primarily consisted of Christopher Smith ordering Brian into the spare bedroom where he touched Brian's penis with his hands. Brian does remember that after each episode of abuse, Christopher Smith threatened him about not seeing his parents again if he told anyone about their "little secret". When Brian was 14 years old, he finally disclosed this abuse to his mother who promptly reported the matter to law enforcement. A few weeks later, Brian's family was informed that the prosecutor was not going to file charges against Christopher Smith due to "lack of evidence."

2. Tommy Rickles

Tommy is a forty-five year old man whose uncontroverted testimony is that when he was eleven years of age, he attended a summer middle school youth camp. At camp, all of the boys slept in a large dormitory-style room. On the last night of camp, Tommy woke up and found a stranger kneeling by his bed touching his [Tommy's] penis underneath his pajamas. Tommy immediately screamed causing the stranger to turn around and escape through one of the dorm windows. The perpetrator was later identified as a seventeen-year-old camp cook named Christopher Smith. Criminal charges were never brought against Chris Smith due to Tommy being emotionally incapable to testify. After years of therapy, Tommy is now fully prepared to testify about what happened that evening at summer youth camp.

3. Susanna Phillips

Susanna Phillips is a seventeen year old girl whose uncontroverted testimony alleges that Christopher Smith sexually abused her when she was approximately five years old. Susanna's mother had met Mr. Smith through a mutual friend and they became acquaintances. Shortly thereafter, Christopher Smith informed Susanna's mother that he was having problems in his marriage and asked to sleep at her apartment for a couple of weeks. Susanna's mother agreed to this arrangement as long as Mr. Smith agreed to pay rent and furnish his own food. During this time, Chris stayed in Susanna's room while she slept on the living room couch. Susanna remembers one occasion when she was awoken during the middle of the night to discover that she was in her own bed, and Chris Smith was touching her privates with his hands. Shortly thereafter, Mr. Smith carried her back to the living room couch and went back to bed.

The testimonies provided by Brian Smith, Tommy Rickles, and Susanna Phillips are undoubtedly helpful to the prosecution in its case against Christopher Smith. All three demonstrate that the defendant has allegedly sexually victimized children in the past, thus

strengthening the claim made by Kelly Peters. However, “probative value” not “helpful,” is the legal standard in determining the admissibility of relevant prior bad acts. Are any of the proposed testimonies relevant? If so, are they probative? Whose testimony is more probative? Why? Is there a particular standard and analysis the court can use in deciding whether the jury should hear any of the three proposed testimonies? How does a court determine the admissibility of relevant evidence that is extraneous to the facts of the underlying child sexual abuse case, which will undoubtedly be prejudicial against the defendant?

Relevant prior bad act evidence can be admissible in child sexual abuse prosecutions if it is probative of the evidentiary basis for which it is being offered.² In recent years, “propensity” has been adopted by many jurisdictions as the fundamental basis for admitting collateral acts evidence in child sexual abuse prosecutions.³ The manner in which propensity is defined and determined can significantly impact whether such evidence is relevant. Furthermore, relevant prior bad act evidence is not admissible if its probative value is substantially outweighed by the prejudicial impact it will have upon the jury.⁴ The methodology used to implement this particular balancing analysis can greatly affect its outcome, and thus the admissibility of otherwise relevant collateral act evidence.

Since the early part of the 20th century, legislative bodies and the courts have attempted to develop workable standards and methods of analysis in which to evaluate the admissibility of prior bad act evidence in cases related to child sexual abuse. Unfortunately, these standards and methods fall short of their intended purpose. Not only do they promote inconsistencies in application and results, but more importantly, they do not possess a logical relationship to one’s

² See FED. R. EVID. 401, 402. See also, *Rademacher v. Berghuis*, No. 1:08-cv-871, 2011 U.S. Dist. LEXIS 114484, at *43 (W.D. Mich. August 11, 2011) (“evidence must be relevant to an issue or fact of consequence at trial”).

³ See FED. R. EVID. 414.

⁴ See FED. R. EVID. 403.

propensity to sexually victimize children. Without such a relationship, it is virtually impossible to determine the probative value of relevant evidence being offered to establish propensity.

A study concluded in 2001, found that pedophiles average approximately 11.7 separate child victims, with over 70.8 separate acts of molestation.⁵ This tragic data means that the availability of prior bad acts evidence is significant in many child sexual abuse prosecutions. However, availability does not necessarily equate to admissibility. Thus, all the more reason to insure that such critical evidence is carefully and systematically evaluated in an approach that is fair and consistent with its use and purpose. Such an approach will be the focus of this article.

Section II of this Article examines the history of prior bad act evidence in child sexual abuse cases, and how it has evolved from being admissible for limited purposes, to the more modern trend of propensity evidence. Section III scrutinizes and critiques the current methodology used to evaluate the probative value of relevant propensity evidence. Section IV analyzes the work of researchers and psychologists in describing the characteristics and behavioral patterns that are consistent among those who sexually victimize children. Section IV then utilizes these behavioral patterns to develop particular factors courts should consider when determining the probative value of propensity evidence. Section V proposes a new rule that incorporates these new factors into the court's analysis when evaluating prior sexual misconduct propensity evidence under Rule 403. Finally, Section V applies this proposal to the Christopher Smith case study to demonstrate its relevant and unique applicability to cases involving the sexual victimization of children.

⁵ GENE G. ABEL & NORA HARLOW, *The Abel and Harlow Child Molestation Prevention Study*, in STOP CHILD MOLESTATION BOOK (2001), available at <http://www.childmolestationprevention.org/pdfs/study.pdf>. The study distinguished between pedophiles as defined by the DSM-IV and those who molest children that do not fall under the clinical definition of pedophile. The study found that non-pedophile child molesters molest on average 2.9 children and commit an average of 6.5 acts of molestation.

II. HISTORY OF SIMILAR FACT EVIDENCE IN CHILD SEXUAL ABUSE CASES⁶

A. Early American Courts

Collateral act evidence has been deeply embedded in common law for generations.⁷ Prior to 1849, its definition and application had been limited primarily to cases of forgery and fraud.⁸ In the 1849 decision of *Regina v. Geering*, a court held for the first time that collateral crime evidence was admissible in a homicide case.⁹ The court held collateral crime evidence was admissible if it was relevant to a fact in issue even though it also points to the commission of a separate crime. The only exception to the admissibility of such evidence was if it was being offered solely to establish the bad character of the accused.¹⁰ Thus, for over a hundred years in England, relevant collateral crime evidence was widely admissible subject to only a few limitations.

⁶ The purpose of this section is to provide a brief background and overview of this topic. The history of similar fact evidence and the propensity exception have been thoroughly and accurately written about by other authors. *See, e.g.*, Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 958-73 (1934) (tracing the English history of the character evidence rule and its major exceptions); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) (explaining the American character evidence rule and similar acts exception in detail). *See also* Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713 (1981) (tracing the historical foundations of the American character evidence rule in English law); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127 (1993); Mary Katherine Danna, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS U. L.J. 277 (1996); JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF EVIDENCE (2d ed. 1913) (providing a thorough overview of early American cases on issues related to propensity evidence).

⁷ As used in this article the terms “similar fact evidence,” “collateral crime evidence,” and “prior bad acts evidence” will be used interchangeably.

⁸ *See Regina v. Winslow* (1860), 8 Cox C.C. 397 (Can.); and *Regina v. Oddy* (1851), 2 Den C.C. 264, 272 (Can.).

⁹ 18 L.J.M.C. 215 (1849).

¹⁰ This exception seems to have first surfaced in the early 1800s in the case of *Rex v. Cole*. *See* SAMUEL M. PHILLIPS, LAW OF EVIDENCE 69-70 (1st ed. 1814). This exception to the similar fact rule was reaffirmed in *Makin v. Attorney Gen. of New S. Wales*, [1894] A.C. 57 (Wales), which is often said to be the basis of the modern law. The privy council held,

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

Id. at 65.

The bad character exception to the admissibility of similar fact evidence was embraced by the early American courts.¹¹ The primary rationale behind this exclusion was the concern that the defendant would be convicted based upon his propensity to commit the crime, and not upon the evidence before the court.¹² This concern propelled American courts to prohibit the introduction of such evidence if the basis for its admissibility was to simply establish that the defendant had the propensity to commit the charged offense. However, relevant collateral act evidence continued to be admissible if it was offered for non-propensity purposes.¹³

B. Molineux and Federal Rule of Evidence 404

In 1901, the New York Court of Appeals developed a formal framework for the admissibility of prior bad act evidence that became the basis for Rule 404 of the Federal Rules of Evidence (“FRE 404”). In *People v. Molineux*,¹⁴ the court reaffirmed the well established rule that a defendant should be tried on the facts of the case and not upon his supposed propensity to

¹¹ See Quincy’s Mass. Reps. 90 (Mass. Super. Ct. 1763) (refusing to allow the state to introduce collateral evidence of defendant’s prior lustful and lewd acts in a prosecution for keeping a brothel). See also *People v. White*, 14 Wend. 111 (N.Y. Sup. Ct. 1835). In *People v. White*, the defendant’s conviction for possession of counterfeit bank bills with the intent to pass was reversed because the court had allowed the testimony of a witness who testified that the defendant had served a prior prison sentence. *Id.* The court held, “The only point of view in which it can be contended that it would have been competent for the public prosecutor to prove this fact is, that it went to show the bad character of the prisoner.” *Id.* at 113.

¹² See *State v. Lapage*, 57 N.H. 245, 289 (1876).

The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili*.

Id.

¹³ See 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 357, at 336 (Tillers ed., rev. ed. 1983).

¹⁴ 61 N.E. 286 (N.Y. 1901). For a thoroughly interesting and informative discussion about the facts and holding of *Molineux*, see Randolph N. Jonakait, *People v. Molineux and Other Crime Evidence: One Hundred Years and Counting*, 30 AM. J. CRIM. L. 1 (2002).

commit the charged offense.¹⁵ However, the court added that similar fact evidence could be admissible if relevant to establish motive, intent, absence of mistake or accident, identity, and common scheme or plan.¹⁶ The *Molineux* court reasoned that these purposes were not the basis for offering impermissible character evidence but for other relevant facts at issue in the trial.

Within a few short years, courts around the nation began applying the *Molineux* criterion to cases where the defendant had been charged with a sexual offense.¹⁷ This application was well illustrated by the Florida Supreme Court in *Williams v. State*.¹⁸ In *Williams*, the defendant hid in the back seat of the victim's vehicle to sexually assault the 17 year old complainant. When the defendant was arrested on the following day, he claimed that he thought the automobile belonged to his brother, and that he had crawled in the back seat to take a nap.¹⁹ The state presented evidence that approximately 6 weeks earlier a sixteen year old female went to get in her vehicle at the same parking lot and saw the head of a man in the back seat. She immediately ran and contacted the police. When questioned, the same defendant told the police that he had

¹⁵ The now famous passage that has stood the test of time, the court stated

The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged . . . This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta.

Molineux, 61 N.E. at 293.

¹⁶ *Id.* at 294.

The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) 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; (5) the identity of the person charged with the commission of the crime on trial.

Id.

¹⁷ See, e.g., *Abbott v. State*, 204 N.W. 74 (Neb.) (per curiam), *rev'd*, 206 N.W. 153 (Neb. 1925). The court used the *Molineux* rationale in admitting the defendant's prior "indecent" acts with children as evidence in prosecution for child molestation. *Id.* *Abbot* was subsequently overruled based upon the court's reconsideration of the facts, not the *Molineux* rationale. See *Abbot v. State*, 206 N.W. 153 (Neb. 1925) (holding prior sexual assault was admissible to establish defendant's common plan or scheme to commit sexual assaults in the same manner). For a more complete listing of cases using *Molineux* in sexual abuse cases, see Reed, *supra* note 6, at 382.

¹⁸ *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

¹⁹ *Id.* at 657.

mistakenly believed the car belonged to his brother and had crawled into the back seat to take a nap.²⁰ The Court allowed the testimony of the collateral crime witness because of its relevance to matters at issue in the trial. The Court stated,

In the immediate case at bar we think the evidence regarding the Judy Baker [collateral crime witness] incident was clearly admissible because it was relevant to several of the issues involved. It definitely had probative value to establish a plan, scheme, or design. It was relevant to meet the anticipated defense of consent. At the time when it was offered in the presentation of the State's main case it had a substantial degree of relevance in order to identify the accused. Finally it was relevant because it demonstrated a plan or pattern followed by the accused in committing the type of crime laid in the indictment.²¹

The *Molineux* rule allows for the admissibility of the defendant's prior sexual misconduct as long as the prosecution can establish that it is relevant to establish a general plan or scheme to commit sexual offenses,²² intent,²³ motive,²⁴ or identity.²⁵ Today, all states have embraced the *Molineux* framework through codified rules or court precedent. In 1975, the Federal Rules of

²⁰ *Id.* at 658.

²¹ *Id.* at 663. Though the court allowed the prior bad act evidence, it also emphasized the fundamental importance of relevance, stating that “[t]he matter of relevancy should be carefully and cautiously considered by the trial judge.” *Id.*

²² *See, e.g.,* *Coleman v. State*, 491 So. 2d 1086, 1087 (Ala. Crim. App. 1986) (holding that testimony by victim and five-year-old sister that stepfather abused them is admissible to show plan, scheme, or intent); *People v. Oliver*, 365 N.E.2d 618, 625 (Ill. App. Ct. 1977) (admitting Defendant's proximity to establish common scheme and design); *People v. Miller*, 418 N.W.2d 668, 675 (Mich. Ct. App. 1987) (holding prior sexual offenses admissible to indicate plan or scheme to molest the child victim); *State v. Jones*, 367 S.E.2d 139, 145 (N.C. Ct. App. 1988) (holding prior sex crime by defendant with step-granddaughter admissible to show common plan or scheme); *James v. State*, 204 P.3d 793, 797 (Okla. Crim. App. 2009) (holding that State demonstrated “common plan/scheme” by establishing that defendant molested young girls who had been put in his trust and care); *Salyers v. State*, 755 P.2d 97, 101-02 (Okla. Crim. App. 1988) (holding that prior sexual acts with minor children is admissible to show common scheme or plan); *State v. Medeiros*, 996 A.2d 115, 119-20 (R.I. 2010) (holding that Defendant's prior molestations of family members was sufficient to establish a common scheme or plan to sexually assault children of a particular age).

²³ *See, e.g.,* *State v. Holden*, 414 N.W.2d 516, 520 (Minn. Ct. App. 1987) (admitting evidence of acts committed outside statute of limitations to show prior intent); *State v. Means*, 363 N.W.2d 565, 569 (S.D. 1985) (admitting prior child molestation to demonstrate intent). *But see* *State v. Ramirez*, 730 P.2d 98, 101 (Wash. Ct. App. 1986) (holding that proof of touching victim's genitals establishes proof of intent and that other acts of child molestation with other victims are not relevant to prove intent).

²⁴ *See, e.g.,* *Burnett v. State*, 225 S.E.2d 28, 30 (Ga. 1976) (admitting testimony of four prior victims to establish defendant's motive or scheme); *State v. Smith*, 530 P.2d 1215, 1219 (Kan. 1975) (admitting prior convictions to show motive).

²⁵ *See, e.g., Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988) (admitting defendant's prior molestation of sister to show identity); *State v. Lopez*, 458 P.2d 851, 853 (N.M. Ct. App. 1969) (admitting evidence of subsequent rape within an hour in the same geographic area to establish identity); *State v. Stirling*, 516 P.2d 87, 88-89 (Or. Ct. App. 1973) (admitting similar sexual assaults upon two girls to show identity).

Evidence were enacted²⁶—with FRE 404 codifying the common law rule prohibiting bad character evidence and adopting the *Molineux* criterion.²⁷ Today, thirty-eight state jurisdictions have adopted the Uniform Rules of Evidence.²⁸ The remaining jurisdictions have adopted the *Molineux* rule through judicial adoption. Thus, in one way or another, all fifty states allow the prosecution to introduce prior bad act evidence against a defendant charged with a sexual abuse offense.²⁹

²⁶ The Federal Rules of Evidence became effective on July 1, 1975. Act of January 2, 1974, Pub. L. No. 93-595, 88 Stat. 1926 (1975), reprinted in 1974 U.S.C.C.A.N. 2215.

²⁷ Rule 404 states:

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

- (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
- (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
 - (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
 - (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
- (b) Other crimes, wrongs, or acts. 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.

FED. R. EVID. 404.

²⁸ See, e.g., *Uniform Rules of Evidence Locator*, LEGAL INFORMATION INSTITUTE (March 5, 2003), <http://www.law.cornell.edu/uniform/evidence.html>. The following states have adopted the Uniform Rules of Evidence:

Alaska	Indiana	Montana	Ohio	Utah
Arizona	Iowa	Nebraska	Oklahoma	Vermont
Arkansas	Kentucky	Nevada	Oregon	Washington
Colorado	Louisiana	New Hampshire	Rhode Island	West Virginia
Delaware	Maine	New Jersey	South Carolina	Wisconsin
Florida	Michigan	New Mexico	South Dakota	Wyoming
Hawaii	Minnesota	North Carolina	Tennessee	
Idaho	Mississippi	North Dakota	Texas	

Id. California and New Jersey have adopted their own rules of evidence, but both have a similar provision to Rule 404. See CAL. EVID. CODE §1101 (2010); N.J. R. EVID. 404.

²⁹ It must be noted that in jurisdictions that have adopted the Uniform Model Rules of Evidence, evidence must still satisfy the Rule 402 relevancy test and the Rule 403 balancing test. How these rules relate to the admission of similar fact evidence in sexual abuse cases will be addressed in section IIIA *infra*.

Though FRE 404 is often used to admit collateral crime evidence in child sexual abuse cases, it has many limiting aspects due to the character and nature of these offenses.³⁰ Accordingly, in the early years of the 20th century, courts began to broaden the basis for admitting character evidence in sexual offense cases.

C. Lustful Disposition—The Road Toward Propensity

The lustful disposition, or sometimes referred to as “bent of mind,”³¹ exception allows the prosecutor to admit relevant prior act evidence in a sexual abuse prosecution to establish that the defendant had a tendency to commit the sexual offense.³² Its exclusive purpose is to allow for the admissibility of relevant evidence regarding the defendant’s propensity to engage in sexually abusive behavior.³³ One of the earliest uses of the term “lustful disposition” was by the

³⁰ In many child sexual abuse prosecutions, the *Molineux* rule and Rule 404 criteria are not at issue. For example, in all jurisdictions, child sexual abuse is a strict liability crime, and thus, consent is not an available defense. Thus, in most child sexual abuse prosecutions, the defense must be a complete denial of committing the offense, making the defendant’s motive irrelevant. Additionally, only in limited circumstances will the issue of intent be relevant in a child sexual abuse offense. One occasion is when the defendant argues that unlawful touching of the child was accidental. *Shouldis v. State*, 38 So. 3d 753, 755-56 (Ala. Crim. App. 2008) (testifying that he [Defendant] “accidentally” touched child’s groin). Another instance may be when the defendant is charged with a non-strict liability offense—such as intentionally exposing himself to a child. *See, e.g.*, FLA. STAT. § 800.04(7) (2011). Additionally, statistics have repeatedly established that approximately 90% of child sexual abuse offenses are perpetrated by someone familiar to the child. Howard Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, BUREAU JUST. STATS. (2000), <http://bjjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>; Jan Hindman & James M. Peters, *Polygraph Testing Leads to Better Understanding Adult and Juvenile Sex Offenders*, 65 FED. PROBATION no.3, 8 (2001), <http://www.hiddenviolations.com/pdf/5.pdf>. Hence, identity is seldom a matter at issue in a child sexual abuse prosecution. Courts have admitted similar fact evidence in child sexual abuse cases for the purpose of establishing a common plan or scheme. *See cases cited supra* note 22. However, most courts require a fairly high relevancy standard in admitting similar fact evidence under common plan or scheme. *See, e.g.*, *State v. Jackson*, 930 A.2d 628, 637 (Conn. 2007) (quoting *State v. Ellis*, 852 A.2d 676 (Conn. 2004)) (internal quotation marks omitted) (“When evidence of prior [uncharged] misconduct is offered to show a common plan or [scheme], the marks which the . . . [charged and uncharged misconduct] have in common must be such that it may be logically inferred that if the defendant is guilty of one he must be guilty of the other.”); *see also Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993) (“Evidence of other act of sexual deviance . . . must be so similar to the crime on trial as to constitute a so-called signature crime.”).

³¹ *See, e.g.*, *Burris v. State*, 420 S.E.2d 582, 584 (Ga. Ct. App. 1992).

³² *See* EDWARD W. CLEARY, *MCCORMICK ON EVIDENCE*, 190, 560-61 (3d ed. 1984); WIGMORE, *supra* note 13, § 58.2, at 398-402.

³³ *See, e.g.*, *State v. DeJesus*, 953 A.2d 45, 49 (Conn. 2008). The court concluded that

Indiana Supreme Court in *Barker v. State*.³⁴ The defendant was charged with carnal knowledge of a female under the age of sixteen, and the trial court allowed the prosecutor to question the defendant about other occurrences of sexual activity between himself and the victim.³⁵ In upholding the conviction, the Indiana Supreme Court incorporated the lustful disposition exception and articulated its two-fold purpose. The court held that

[p]rovided they are not too remote in time or otherwise, such other acts are relevant and admissible to show the lustful disposition of defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged and to corroborate the testimony of the prosecutrix as to that act.³⁶

Under the lustful disposition exception, the prosecution can introduce evidence in its case-in-chief of the defendant's prior or subsequent sexual misconduct for the purpose of establishing the defendant's propensity to commit sexual offenses.³⁷ The jury is free to infer from the evidence of the collateral crime evidence that the defendant committed the charged

because strong public policy reasons continue to exist to admit evidence of uncharged misconduct in sexual assault cases more liberally than in other cases, we will maintain the liberal standard, but do so as a limited exception to the prohibition on the admission of uncharged misconduct evidence in sexual assault cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior.

Id. See also 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4:14 (rev. ed. 2009).

³⁴ 120 N.E. 593 (Ind. 1918).

³⁵ *Id.* at 595.

³⁶ *Id.* It must be noted that Indiana no longer recognizes the lustful disposition rule. See *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992).

³⁷ Since *Barker*, a minority of jurisdictions who have adopted the lustful disposition exception have also applied it to acts between the defendant and third parties—not just the prosecution witness. See, e.g., *Eubanks v. State*, 303 S.W.3d 450, 452 (Ark. 2009) (admitting prior sexual abuse of a different victim under a “pedophile exception” stating that “[w]e have approved allowing evidence of the defendant's similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship”); *State v. Lippert*, 181 P.3d 512, 516 (Idaho Ct. App.2007) (“Testimony of prior acts of sexual misconduct from other victims may also be relevant to corroborate the victim’s testimony.”); *State v. Davis*, 26 So. 3d 802, 807 (La. Ct. App. 2009) (“Other crimes, wrongs, or acts involving sexually assaultive behavior or which indicate a lustful disposition toward children may be admissible”); *State v. Raye*, 326 S.E.2d 333, 335 (N.C. Ct. App. 1985) (holding that prior sexual abuse of victim's sister is admissible to show an unnatural lust of defendant), *review denied*, 332 S.E.2d 183 (N.C. 1985); see REED, *supra* note 6, at 176 n.281 (citing relevant cases). At least one jurisdiction has expanded the lewd disposition exception to permit third-party testimony as evidence of the defendant’s propensity to commit sexual crimes. See *State v. Pignolet*, 465 A.2d 176 (R.I. 1983).

sexual offense.³⁸ The *Barker* court articulated that the lustful disposition exception is designed to either establish the propensity of the defendant's lewd character to commit such an offense or to corroborate the victim's testimony. The propensity purpose focuses upon the alleged offender and is supported by the notion that past behavior is the best predictor for future behavior.³⁹ This rationale is further bolstered by the widespread apprehension that sexual offenders are more likely than other criminals to reoffend.⁴⁰ Most jurisdictions that have adopted the lustful disposition exception have adhered to the recidivism concern.⁴¹ The corroboration purpose initially appears to focus upon the complainant and is based upon the difficult nature of proving sexual offenses involving children.⁴² For example, in admitting prior bad acts evidence to corroborate the testimony of a child complainant in a sexual abuse trial involving a family member, the Florida Supreme Court stated that "[c]ases involving sexual battery committed within the familial context present special problems. The victim knows the perpetrator, e.g., a parent, and identity is not an issue. The victim is typically the sole eye witness and corroborative

³⁸ Although the lustful disposition exception certainly broadens the scope of evidence that can be admitted against the defendant, the prosecution must still establish that the evidence is relevant to the material issues.

³⁹ See, e.g., ROLF LOEBER & DAVID P. FARRINGTON, *SERIOUS & VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* 70-71 (1998) ("The basic assumption, which is supported by the overwhelming evidence, is that those who are more frequently criminal, engage in more types of crime, or commit the more serious acts are at greater risk for future crime and for committing more harmful acts."); PATRICK A. LANGAN, *RECIDIVISM OF FELONS ON PROBATION, 1986-89*, at 6 (1992) (discussing the use of recidivism to predict future actions).

⁴⁰ See, e.g., Ron Langevin et al., *Lifetime Sex Offender Recidivism: A Twenty Five Year Follow Up Study*, *CANADIAN J. CRIMINOLOGY & CRIM. JUST.* 532 (2004), <http://ccoso.org/Canadianstudy.pdf> (finding an overall recidivism rate of sex offenders to be in excess of 70%); see also 137 CONG. REC. 6033 (1991) (United States Department of Justice summary of § 801 of proposed Comprehensive Violent Crime Control Act of 1991) ("It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime or that a person would fortuitously be subject to multiple false accusations by a number of different victims.").

⁴¹ See, e.g., *State v. DeJesus*, 953 A.2d 45, 77 (Conn. 2008) ("[W]hen human conduct involves sexual misconduct, people tend to act in generally consistent patterns of behavior, and . . . it is unlikely (although, of course, not impossible) that the same person will be falsely accused by a number of different victims.").

⁴² *Id.* at 76 ("[C]ourts allow prosecutorial authorities greater latitude in using prior misconduct evidence to bolster the credibility of the complaining witness and to aid in the obvious difficulty of proof."); *Cline v. State*, 685 S.E.2d 501, 504-505 (Ga. Ct. App. 2009) (admitting corroboration testimony to establish lustful disposition because there is seldom a competent witness other than the victim in child sexual abuse cases).

evidence is scant. Credibility becomes the focal issue.”⁴³ Hence, some commentators believe that collateral evidence in child sexual abuse cases admitted for the purpose of corroboration is based solely upon the unique nature of the offense and the danger posed to society and the child should the defendant be wrongfully acquitted.⁴⁴ Though the subject of the immediate focus of corroboration is the child and not the alleged perpetrator, its ultimate consequence is that it unveils evidence that focuses upon the defendant’s propensity to commit the offense.⁴⁵ Therefore, collateral fact evidence admitted for the stated purpose of corroboration can ultimately be categorized as propensity evidence.⁴⁶ Today, approximately twenty-three states and the District of Columbia follow some form of the “lustful disposition” exception created either by judicial application or legislative codification.⁴⁷

⁴³ See *Heuring v. State*, 513 So. 2d 122, 124 (Fla. 1987), *superseded by statute*, FLA. STAT. § 90.404 (2011), *as recognized in* *McLean v. State*, 934 So. 2d 1248 (Fla. 2006). The *Heuring* court did require that to be admissible, similar fact evidence had to be “strikingly similar” to the charged offense. *Id.* “Familial” was defined as the “relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and his or her grandfather, uncle, or guardian.” *Saffor v. State*, 660 So.2d 668 (Fla. 1995) *superseded by statute*, FLA. STAT. § 90.404 (2011), *as recognized in* *McLean*, 934 So. 2d.

⁴⁴ See George Franklin, *Section 1: Is The Florida Supreme Court Up to the Task of Being American’s Criminal Evidence Court?*, 55 U. MIAMI L. REV. 619, 629 (2001); *see also* Sara Sun Beale, Conference Paper, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 317 (1993).

⁴⁵ The greater similarity between the corroborative witness testimony and that of the alleged victim in the charged offense will likely have the net effect of demonstrating to the jury the defendant’s propensity to commit the offense.

⁴⁶ One writer perhaps sums it up best:

In many sex crimes, where the only eyewitnesses are the complaining witnesses and the perpetrator, and where there is a dearth of any independent physical evidence tending to establish the crime’s commission, admission of corroborative evidence serves the *dual purpose of reducing the probability that the prosecuting witnesses is lying, while at the same time increasing the probability that the defendant committed the crime.*

Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sexual Offenses*, 25 UCLA L. Rev. 261, 286 (1977) (emphasis added).

⁴⁷ States in which the lustful disposition is applied through judicial act: District of Columbia, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Nevada, New Mexico, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. States in which lustful disposition is applied through legislative act: (Arkansas) ARK. R. EVID. 404 (2006); (Georgia) GA. CODE § 24-2-2 (2011); (Louisiana) LA. CODE EVID. ANN. art. 412.2 (2011); (Maryland) MD. CODE ANN., EVID. § 5-404 (West 2006); (Nebraska) NEB. REV. STAT. § 27-404 (2006); (North Carolina) N.C. GEN. STAT. ANN. § 8C-1, Rule 404 (2006); (Oregon) O.R.S. § 40.170 (2006); (Pennsylvania) PA. R. EVID. 404 (2006); and (West Virginia) W.VA. R. EVID. 404(b) (1994).

D. The Codification of Propensity Evidence in Child Sexual Abuse Cases—Federal Rule of Evidence 414 and its State Progeny

On September 13, 1994, the lustful disposition exception to character evidence was signed into law as part of The Violent Crime Control and Law Enforcement Act of 1994.⁴⁸ Congress amended the Federal Rules of Evidence to include Rules 413 (“FRE 413”), 414 (“FRE 414”), and 415 (FRE 415”). FRE 413 allows the admission of similar fact evidence in adult sexual assault cases.⁴⁹ FRE 414 allows for the admission of prior bad act evidence in child molestation cases.⁵⁰ Lastly, FRE 415 applies FRE 413 and 414 to civil cases.⁵¹ Perhaps the most

⁴⁸ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 320935(a), 108 Stat. 1796, 2135-37 (codified at 42 U.S.C. § 13,701 et seq.). The lustful disposition provision of the Violent Crime Control and Law Enforcement Act of 1994 —section 320935—was codified in the FED. R. EVID. 414-415.

⁴⁹ Rule 413 reads:

Evidence of Similar Crimes in Sexual Assault Cases

- (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule 415, "offense of a sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved-
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code;
 - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
 - (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

FED. R. EVID. 413.

⁵⁰ Rule 414 reads:

Evidence of Similar Crimes in Child Molestation Cases

- (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.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

significant aspect of FRE 414 is that it allows for the admissibility of prior bad act evidence for its bearing upon “any matter for which it is relevant.”⁵² This expansion of admissible purpose was a distinct departure from the standard FRE 404(b) prohibition against character evidence.⁵³ In essence, FRE 414 is the codification of the lustful disposition exception in that it authorizes the admission of propensity evidence. In fact, the primary motive of the lawmakers in passing these three amendments was to insure that propensity evidence was admissible in sexual offense cases.⁵⁴ At the time of its passage, the author of the bill, Senator Robert Dole stated that “the new rules for sex offense cases authorize admission and consideration of evidence of an

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- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
 - (d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved -
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
 - (2) any conduct proscribed by chapter 110 of title 18, United States Code;
 - (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
 - (4) contact between the genitals or anus of the defendant and any part of the body of a child;
 - (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
 - (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

FED. R. EVID. 414.

⁵¹ Rule 415 reads:

Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

- (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
- (b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

FED. R. EVID. 415.

⁵² Evidence of offenses for which the defendant has not previously been prosecuted or convicted is admissible under Rules 413 and 414. *See* 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

⁵³ It is clear that these new rules are an exception to the traditional ban on character evidence and not simply a broadening of the type of evidence admissible under Rule 404(b). Had the drafters intended them to simply broaden Rule 404(b) evidence, Rule 404(b) would have been amended.

⁵⁴ For an informative discussion regarding the various justifications provided by lawmakers for passing these amendments, see Danna, *supra* note 6, at 290-91; see also the analysis statement which accompanied The Violent Crime Control and Law Enforcement Act of 1994, 137 CONG. REC. S3214, S3236 (daily ed. Mar. 13, 1991).

uncharged offense for its bearing ‘on any matter to which it is relevant.’ This includes the defendant’s propensity to commit sexual assault or child molestation offenses. . . .”⁵⁵ In fact, Senator Dole went even further and summarized a propensity and corroboration rationale that virtually mirrored the justification of the lustful disposition exception outlined by the court in *Barker*.⁵⁶ This dual purpose was also outlined by the principal drafter of the new rules, David J. Karp, senior counsel of the Office of Policy Development of the United States Department of Justice.⁵⁷ Since the passage of FRE 414, courts have actively applied these dual purposes when determining the admissibility of similar fact evidence in child sexual abuse cases.⁵⁸

Though no state has adopted them in their entirety, approximately eleven states have codified rules which are similar in substance and application to FRE 413 and FRE 414.⁵⁹ For example, in 2001 the Florida legislature amended Florida Rule of Evidence 404(2)(b) to read:

⁵⁵ See 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

⁵⁶ Senator Dole stated in Congress:

The reform effected by these rules is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases to which it applies. In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense.

Id.

⁵⁷ David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 21 (1994) (“Such cases [child molestation] regularly present the need to rely on the testimony of child victim-witnesses whose credibility can readily be attacked in the absence of substantial corroboration.”).

⁵⁸ See, e.g., *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998) (“This rule [Rule 414] allows the prosecution to use evidence of a defendant's prior acts for the purpose of demonstrating to the jury that the defendant had a disposition of character, or propensity, to commit child molestation.”); *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (holding that prior acts of sexual abuse were relevant to “bolster” the credibility of the victims.); see also *United States v. Roan*, 268 F. App’x 535, 536 (9th Cir. 2008) (admitting testimony under Rule 414 for the purpose of bolstering victim’s credibility).

⁵⁹ Some states have simply modified their 404(b) rule. See, e.g., ALASKA R. EVID. 404(b); ARIZ. R. EVID. 404(c); FLA. STAT. § 90.404(2) (2011); KAN. STAT. ANN. § 60-455(d) (2009); WIS. STAT. ANN. § 904.04(2)(b) (West 2011). Other states have enacted separate rules of evidence. See, e.g., ARIZ. REV. STAT. ANN. § 13-1420 (West 2001); CAL. EVID. CODE §§ 1101, 1108 (West 2003); COLO. REV. STAT. ANN. § 16-10-301 (West 2003) (creating a relaxed 404(b) standard); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2002); MO. ANN. STAT. § 566.025 (West 2011); OKLA. STAT. ANN. tit. 12, §§ 2413, 2414 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 38.37 (West 2011). See also Joyce R. Lombardi, Comment, *Because Sex Crimes are Different: Why Maryland Should (Carefully) Adopt the*

In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.⁶⁰

Similar to FRE 414, the Florida legislature indicated that Florida Rule of Evidence 404(2)(b) should be interpreted broadly in that prior bad act evidence in child sexual abuse cases could be introduced to establish the defendant's propensity to commit the charged offense through the corroboration of the victim's testimony.⁶¹ All in all, approximately thirty-three states and the District of Columbia have adopted some basis in which evidence of a defendant's prior sexual abuse of a child can be admissible as propensity evidence.⁶² Even within many of the jurisdictions that still follow the more traditional *Molineux*/FRE 404(b) approach, many jurisdictions apply a relaxed admissibility standard in sexual crime cases.⁶³ Regardless of the basis for which the evidence is offered, the issue of probative value ultimately becomes the decisive focus of analysis when determining the admissibility of similar fact evidence in child sexual abuse cases.

Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses, 34 U. BALT. L. REV. 103, 116 nn.115-16 (2004).

⁶⁰ FLA. STAT. § 90.404(2)(b).

⁶¹ The Florida legislature found the following:

WHEREAS, the Legislature finds that in cases of child sexual abuse, the credibility of the victim is frequently a focal issue of the case, and

WHEREAS, the Legislature finds that evidence which shows that an accused child molester has molested children at other times may be relevant to corroborate the victim's testimony, and

WHEREAS, the Legislature finds that evidence which shows that an accused child molester has molested children at other times may have a probative value which outweighs its prejudicial effect

FLA. S. JUD. COMM., CS for SB 2012 (2001).

⁶² See *supra* notes 47 and 59. The remaining jurisdictions continue to use some form of *Molineux*/404(b) analysis.

⁶³ See, e.g., *State v. Moore*, 819 P.2d 1143, 1149 (Idaho 1991) (using a broad definition of "plan" to introduce similar fact evidence in child sexual abuse case); *State v. Lippert*, 181 P.3d 512, 517 (Id. Ct. App. 2007) (using lustful disposition and Rule 404(b) common plan and scheme as a basis to admit testimony of prior sexual misconduct); *State v. Hammer*, 613 N.W.2d 629, 637 (Wis. 2000) (stating that the greater latitude rule in sexual abuse cases helps similar fact evidence to be admissible under WIS. STAT. ANN. § 904.04(2) (2011)); see also David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 547-549 (1994) (providing a brief but thorough explanation of how some courts have expanded the traditional understandings of 404(b) evidence for the purpose of admitting collateral crime evidence in child sexual abuse prosecutions).

III. THE CURRENT 403 BALANCING TEST AND ITS FAILURE AS APPLIED TO CHILD SEXUAL ABUSE PROSECUTIONS

A. Relevancy and the FRE 403 Balancing Factors

1. Relevancy—The Place to Start

It is important to note that at the time FRE 414 was drafted and adopted, the sponsors were explicit that FRE 414 was to be subject to Federal Rules of Evidence 401 (“FRE 401”)⁶⁴ and 403 (“FRE 403”).⁶⁵ The threshold determination of admissibility is always relevancy. Relevance is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁶⁶ Relevant evidence is deemed admissible.⁶⁷ Professor Graham C. Lilly wrote that “probative value is the presence of a logical relationship between the evidence and the ultimate proposition that the evidence is offered to support.”⁶⁸ Professor Lilly further

⁶⁴ Rule 401 states that “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.

⁶⁵ Rule 403 states that “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, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403. 140 CONG. REC. H8968, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (“In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court’s authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.”); 140 CONG. REC. H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl) (“The trial court retains total discretion to include or exclude this type of evidence . . .”). Federal courts have followed suit and have routinely applied Rules 402 and 403 to the admissibility of similar fact evidence under Rule 414. *See, e.g.*, *United States v. Carino*, 368 F. App’x 929, 930 (11th Cir. 2010) (“Evidence admissible under Rule 414 must also meet the requirements of other provisions of the Federal Rules of Evidence . . .”); *United States v. Rice*, 347 F. App’x 904, 905 (4th Cir. 2009) (evidence admitted under Rule 414 is subject to the Rule 403); *United States v. McKinney*, 345 F. App’x 206 (8th Cir. 2009) (Rule 414 is subject to Rule 403’s balancing test); *United States v. Castillo*, 140 F.3d 874, 882 (10th Cir. 1998).

⁶⁶ *See supra* note 64.

⁶⁷ Rule 402 states that “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” FED. R. EVID. 402.

⁶⁸ GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 2.1, at 26 (1st ed. 1987).

wrote that “[i]n sum, evidence is relevant if it (1) increases the probability [the first relationship] of (2) a consequential fact [the second relationship].”⁶⁹ Furthermore, the probability that is increased by the evidence only has to be marginal in order to be relevant.⁷⁰ In a prosecution for child sexual abuse, there is a clear logical relationship—i.e., propensity—between the underlying charges and the testimony concerning the defendant’s prior sexual misconduct upon a child. Prior acts of child sexual abuse offered under FRE 414 and its state progeny to establish the defendant’s propensity to sexually victimize a child no doubt marginally increases the probability that the defendant committed the act for which he is charged.⁷¹

The courts are the ultimate gatekeeper of determining the admissibility of relevant evidence, and the gate is FRE 403.⁷² Regardless of whether the jurisdiction follows a traditional FRE 404(b) approach, a common law lustful disposition approach, or a codified lustful disposition approach such as FRE 414, the analysis will eventually arrive at the FRE 403 balancing test.⁷³ This rule provides the trial judge with discretion to refuse admission of relevant evidence for a number of reasons, including but not limited to, the fact that the evidence is substantially outweighed by its prejudicial effect.⁷⁴ The FRE 403 admissibility gate is presumed to be open when relevant collateral act evidence is offered under FRE 414. This presumption is

⁶⁹ *Id.* § 2.1, at 28.

⁷⁰ *See, e.g., Sanders v. State*, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000) (“The trial court has the discretion to admit even marginally relevant evidence.”).

⁷¹ One exception to this fairly low threshold of relevance in a child sexual abuse case is if the collateral act is too dissimilar to the charged offense. For example, the defendant is charged with molesting a child, and the prior bad act evidence involved the defendant sexually harassing his co-worker.

⁷² *See supra* note 65.

⁷³ Because of its narrow limitations, there is a greater likelihood evidence offered under 404(b) may be determined irrelevant.

⁷⁴ “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” FED. R. EVID. 403 advisory committee’s note. *See also Old Chief v. United States*, 519 U.S. 172, 180 (1997) (“The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”). Some commentators have referred to Rule 403 as determining which evidence is “legally relevant.” *See EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS* 83, 84 (2d ed. 1989) (stating that evidence that is relevant under Rule 401 may be excluded by the court because in some other aspect it renders the information “legally irrelevant”).

based upon three critical facts. First, evidence determined to be relevant is deemed to be admissible under FRE 402 (“FRE 402”).⁷⁵ Second, the plain reading of FRE 403 conveys that relevant evidence can only be excluded if its probative value is “substantially outweighed” by certain enumerated concerns.⁷⁶ Thus, relevant evidence that simply tips the scales in favor of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence may still be admissible. Third, the sponsors of FRE 414 clearly intended that prior bad act evidence offered to establish propensity be presumptively admissible. Senator Robert Dole remarked, “[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.”⁷⁷ Though some courts have adopted an explicit standard of presumptive admissibility,⁷⁸ most jurisdictions simply apply a more relaxed approach to FRE 403 when evaluating the admissibility of evidence under FRE 414.⁷⁹ Thus, upon approaching the analysis and admissibility of prior sexual misconduct evidence in child sexual abuse prosecutions, it must be recognized that in most cases such evidence is going to establish some degree of propensity. The central issue under a FRE 403 analysis will be whether the admission of such relevant evidence will substantially “lure the fact

⁷⁵ See *supra* note 67.

⁷⁶ WEBSTER’S II DICTIONARY 699 (3d 2005) (defining substantial as “considerable”).

⁷⁷ 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

⁷⁸ See, e.g., *United States v. Sioux*, 362 F.3d 1241, 1243 (9th cir. 2004) (stating that prior child sexual abuse is presumptively admissible under Rule 414); *United States v. Levy*, 594 F. Supp. 2d 427, 439 (S.D.N.Y. 2009) *aff’d* in 385 F. App’x 20 (2d Cir. 2010) (stating that the presumption is that the probative value of the Rule 414 propensity evidence is not outweighed by the risk of unfair prejudice).

⁷⁹ For example, in reversing the trial court’s decision to exclude FRE 414 collateral act evidence, the Eighth Circuit Court of Appeals in *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997) held, “[i]n light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, we think the District Court erred in its assessment that the probative value of T.T.’s testimony was substantially outweighed by the danger of unfair prejudice.” See also *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997) (holding that under Rule 414, the courts “liberally admit” prior acts of sexual misconduct); *United States v. Begay*, No. 08-2149, 2009 WL 301828 (10th Cir. Feb. 9, 2009).

finder into declaring guilt on a ground different from proof specific to the offense charged.”⁸⁰ There is no doubt that courts may still find that the probative value of proposed prior sexual misconduct evidence is substantially outweighed by its prejudicial effect.⁸¹ Evidence that may damage a defendant’s case, however, does not automatically establish the necessary unfair prejudice required by FRE 403. In fact, since propensity is the basis of admissibility under FRE 414, courts have consistently held that it is not unfairly prejudicial to admit evidence that suggests the defendant has a propensity to abuse children.⁸²

There is no doubt that the admission of prior sexual misconduct evidence in a child sexual abuse prosecution is highly prejudicial. It exposes the jury to additional amounts of repugnant evidence related to the sexual abuse of children, while again pointing the finger at the defendant. For example, in *United States v. Levy*, the defendant was charged with possession and distribution of child pornography.⁸³ The government was allowed to introduce evidence under FRE 414 of the defendant’s prior sexual abuse of his minor niece, as well as prior statements by the defendant regarding his large child pornography collection. In evaluating and balancing the admissibility of this collateral act evidence under FRE 403, the court distinguished between *highly* prejudicial evidence and *unfairly* prejudicial evidence. The court stated:

It is true, as *Levy* argues, that much of this evidence was highly prejudicial. Many of the videos, for example, were immensely disturbing, as they showed young girls—some only six years old or even younger—being subjected to horrendous acts. But the evidence was not *unfairly* prejudicial, as this was conduct that *Levy* chose to engage in, and this was evidence that showed, convincingly, that *Levy*

⁸⁰ *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

⁸¹ *See, e.g., United States v. Hough*, 385 F. App’x 535, 537 (6th Cir. 2010) (holding that probative value of prior child sexual abuse evidence was substantially outweighed by its unfair prejudice in child pornography prosecution).

⁸² *See, e.g., United States v. Davis*, 624 F.3d 508, 512 (2d Cir. 2010) (stating that when determining whether similar fact evidence is highly prejudicial or unfairly prejudicial, court gives much deference to congressional intent of liberal admissibility); *United States v. Gabe*, 237 F.3d 954, 960 (8th Cir. 2001) (stating that prior sexual misconduct testimony is prejudicial for the same reason it is probative in that it tends to prove propensity of defendant to molest children); *State v. Martin*, 926 P.2d 1380, 1387 (Mont. 1996) (stating that probative evidence is often “inherently prejudicial” but mere prejudice is not sufficient to make similar fact evidence inadmissible).

⁸³ 594 F. Supp. 2d 433 (S.D.N.Y. 2009).

had a sexual interest in children and the intent and desire to commit the charged crimes.⁸⁴

It is precisely this type of propensity evidence that forms the basis of FRE 414 and its state equivalents. The *Levy* court articulated this rationale when it concluded:

Indeed, this case demonstrates that Rule 414 makes sense, for it shows that the reasoning behind allowing propensity evidence in child molestation cases is sound. That *Levy* chose to have a large collection of child pornography, including disturbing videos of young girls being sexually molested, that he seemingly took pride in collecting and trading child pornography, that he kept a filing system and maintained contact information on other traders and collectors, and that he seemed to have a particular desire to have “REAL pics [sic] of [himself] in the act,” all tended to prove that it was more probable that he committed the act charged in Count One.⁸⁵

Other than providing courts with some direction regarding the presumption of admissibility, lawmakers provided no additional guidance on how to evaluate FRE 414 propensity evidence under FRE 403. Thus, the judiciary has been left with the complicated task of developing a method to balance these evidentiary rules when determining the admissibility of prior sexual misconduct testimony in child sexual abuse prosecutions.

2. The FRE 403 Balancing Factors—The Decisive Focus

In its report to Congress, the Judicial Conference of the United States recommended against the passage of FREs 413-415.⁸⁶ In the alternative, it proposed amending FRE 404 which would have allowed for the introduction of prior bad act evidence in sexual assault and child molestation cases. The proposed amendment also clarified that FREs 404 and 405 (“FRE 405”) would be subject to the other rules of evidence, including FRE 403.⁸⁷ As part of the recommended amendment to FRE 404, the Judicial Conference proposed the following factors to be considered by courts when determining admissibility under FRE 403:

⁸⁴ *Id.* at 440.

⁸⁵ *Id.*

⁸⁶ Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 159 F.R.D. 51 (1995).

⁸⁷ *Id.* at 54.

- (i) proximity in time to the charged or predicate misconduct;
- (ii) similarity to the charged or predicate misconduct;
- (iii) frequency of the other acts;
- (iv) surrounding circumstances;
- (v) relevant intervening events;
- (vi) other relevant similarities or differences.⁸⁸

These factors were not adopted because Congress summarily rejected the Judicial Conference Report and recommended amendments. For almost two decades since the passage of FRE 414 and its state equivalents, courts have been attempting to develop a system of analysis in determining the admissibility of similar fact evidence in sexual abuse cases.⁸⁹ What has emerged is an ever-growing list of judicially-created factors, which attempt to balance the probative value of collateral act propensity evidence against its prejudicial impact upon the accused.⁹⁰ While some jurisdictions mandate judges to address specific court created factors, others allow courts wide discretion as to what factors may be considered, and how they are applied.⁹¹

⁸⁸ *Id.* at 55.

⁸⁹ In codifying the lustful disposition exception, some state jurisdictions have included specific enumerated factors courts must consider when determining whether the probative value of similar fact evidence in sexual abuse cases substantially outweighs the danger of unfair prejudice. *See, e.g.*, ARIZ. R. EVID. 404(c); 725 ILL. COMP. STAT. ANN. 5/115-7.3(c) (West 2011); WASH. REV. CODE ANN. § 10.58.090(6) (West 2011).

⁹⁰ From this point forward, when discussing the Rule 403 balancing test and factors, Rule 414 and its state equivalents will not be distinguished from those jurisdictions that maintain a lustful disposition exception since both allow the admission of propensity evidence in sexual abuse prosecutions.

⁹¹ *See, e.g.*, United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007) (discussing the split among circuits on whether district courts must address specific factors when conducting a balancing test for prior offenses admissible under Rule 414); *see also* New Jersey v. Covell, 725 A.2d 675, 680 (N.J. 1999) (stating that admissibility of other-crime evidence is left to the discretion of the trial court because it has intimate knowledge of the case and is in the best position to engage in the balancing process). Certain jurisdictions have created additional requirements that must be satisfied before the court can even consider weighing the 403 factors. *See, e.g.*, United States v. Benally, 500 F.3d 1085, 1090 (10th Cir. 2007). Evidence admissible under FED. R. EVID. 414

must meet three threshold requirements before it may be considered for admission . . . (1) the defendant is accused of a crime involving child molestation, (2) the evidence proffered is evidence of the defendant's commission of another offense . . . or child molestation, and (3) the evidence is relevant.

Id. *See also* United States v. Stamper, 106 F. App'x 833, 835 (4th Cir. 2004). The court stated that [e]vidence offered under Rules 413 and 414 must satisfy three elements: (1) the defendant must be accused of an offense of sexual assault or child molestation; (2) the evidence proffered must pertain to the defendant's commission of another sexual assault or child molestation; and (3) the evidence must be relevant.

Id.

These court created factors tend to focus upon the similarities between the charged offense and the prior bad acts evidence. The rationale supporting this focus is the belief that the greater the similarity is between the prior act and the charged act, the greater its propensity, which results in greater probative value.⁹² The Florida Supreme Court in *McLean v. State* put it most succinctly when it stated that “the less similar the prior acts, the more likely that the probative value of this evidence will be ‘substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.’”⁹³

When evaluating the similarities between the underlying offense and the prior bad act, courts have developed factors that take into consideration both the physical nature and the situational nature of the similarities.⁹⁴ The physical nature of the similarities incorporates the specific type of sexual abuse perpetrated.⁹⁵ The situational nature of the similarities often includes: location of abuse,⁹⁶ gender of victims,⁹⁷ age of victims,⁹⁸ nature of the relationship

⁹² See, e.g., *United States v. Summage*, 575 F.3d 864, 878 (8th Cir. 2009) (finding that “strikingly similar” evidence of sexual molestation is highly probative); *United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir. 1982) (stating that the probative value is determined by the similarity between charged offense and extrinsic offense).

⁹³ 934 So. 2d 1248, 1259 (Fla. 2006). See also *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 156 (3d Cir. 2002) (“[W]here the past act is not substantially similar to the act for which the defendant is being tried, and/or where the past act cannot be demonstrated with sufficient specificity, the propensity inference provided by the past act is weaker, and no presumption in favor of admissibility is warranted.”).

⁹⁴ 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 4:86 (3d ed. 2007).

⁹⁵ See, e.g., *United States v. Walker*, 261 F. Supp. 2d 1154, 1157 (D.N.D. 2003) (stating that the defendant committed acts of “oral sexual contact” upon both the complainant and similar fact witness); *LaValley v. State*, 30 So. 3d 513 (Fla. 2009) (stating that the defendant fondled the breasts and vagina of similar fact witness and complainant); *Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001) (finding that the “specific sexual acts” were similar against child in charged offense and child in previous offense); *State v. Merida*, 960 A.2d 228, 230 (R.I. 2008) (finding that both similar fact witness and complainant were digitally penetrated by defendant).

⁹⁶ See, e.g., *United States v. Seymour*, 468 F.3d 378, 385 (6th Cir. 2006) (stating that the complainant and collateral crime witnesses were all “assaulted on a bed”); *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997) (stating that prior sexual abuse and abuse in the charged case occurred in the same geographic locations); *State v. Weatherbee*, 762 P.2d 590, 592 (Ariz. Ct. App. 1988) (finding that complainant and witness were both abused in the “family home”); *Moore v. State*, 659 So. 2d 414, 415 (Fla. Dist. Ct. App. 1995) (using a chart to break location factor down to “general location” and “specific location”).

⁹⁷ See *United States v. Benally*, 500 F.3d 1085, 1090-91 (10th Cir. 2007) (stating that complainant and similar fact witnesses were “young females”); *State v. Jacobsen*, 930 A.2d 628, 634 (Conn. 2006) (considering it a similarity that only boys were sexually molested by defendant); *Payne v. State*, 674 S.E.2d 298, 300 (Ga. 2009) (affirming

between the defendant and complainant,⁹⁹ and types of methods used by the defendant in gaining trust and access to the child.¹⁰⁰ Additional FRE 403 factors considered by the courts in determining the admissibility of prior bad act evidence in child sexual abuse cases include, the interval of time elapsed between the acts,¹⁰¹ remoteness of the prior acts,¹⁰² the frequency of the prior acts,¹⁰³ and the presence or lack of intervening circumstances.¹⁰⁴ The list used to determine the admissibility of collateral act evidence in child sexual abuse cases has no limit and continues to expand.¹⁰⁵ Unfortunately, the failure of a uniform set of factors has created significant inconsistencies amongst the courts regarding the factors and how they are applied. Most importantly, the underlying nature of the currently applied factors is not related to the issue and

admission of similar fact evidence where both the complainant and prior sexual misconduct witnesses were females).

⁹⁸ See, e.g., *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001) (finding sufficient similarity in that the complainant and prior abuse witnesses were both between six and seven years old at the time of abuse); *Ritchie v. State*, 808 So. 2d 71, 75 (Ala. Crim. App. 2001) (“Although the victims in the present case were males and the victims of the prior acts were females, the acts of abuse shared many similarities. All of the victims were between eight and ten years of age.”); *Grier v. State*, 27 So. 3d 97, 98 (Fla. Dist. Ct. App. 2009) (finding sufficient similarity in that each victim abused by the defendant was between the ages of fourteen and seventeen).

⁹⁹ See, e.g., *United States v. Hawpetoss*, 478 F.3d 820, 824-826 (7th Cir. 2007) (finding that the prior bad acts were similar to the charged offense as all the acts “involved children with whom the defendant had a familial or quasi-familial relationship”); *LaValley v. State*, 30 So. 3d at 516 (stating that the sexual abuse of both the complainant and similar fact witness “occurred within the familial context, inside the home”); *Ohio v. Ervin*, 2002 Ohio App. LEXIS 4235 (Ohio Ct. App. 2002) (establishing a similarity in that both complainant and similar fact witnesses were defendant’s daughters).

¹⁰⁰ See, e.g., *People v. Huy Ngoc Nguyen*, 109 Cal. Rptr. 3d 715, 732 (Ct. App. 2010) (finding a similarity because the “defendant developed a relationship with each victim through ‘community involvement, church, or whatever, and then gain[ed] the confidence of [the victim and used] that to accomplish a rape.’”). *Commonwealth v. Ardinger*, 839 A.2d 1143, 1144 (Pa. Super. Ct. 2003) (finding a sufficient similarity in that defendant “developed a relationship of trust” with both the complainant and similar fact witness prior to molestations).

¹⁰¹ See, e.g., *Adrian v. People*, 770 P.2d 1243, 1246 (Colo. 1989) (stating that the interval of time between the charged offense and prior sexual misconduct is a relevant consideration for the court).

¹⁰² See, e.g., *State v. Scott*, 828 P.2d 958, 961 (N.M. Ct.App. 1991) (stating that remoteness considerations include time, number, and nature of prior incidents compared to the charged offense).

¹⁰³ See e.g., *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (holding that the frequency of prior acts must be considered when determining the admissibility of defendant’s prior sexual misconduct).

¹⁰⁴ See e.g., *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998) (holding that the presence or lack of intervening events is a consideration when determining the admissibility of similar fact evidence in sexual abuse prosecutions).

¹⁰⁵ For a list of additional factors used in the various federal circuits, see Victoria B. Lutz, *Balanced Evidence: Discretion of the Gatekeeper to Admit Prior Convictions and Acts*, 77 DENV. U. L. REV. 507, 531 (2000). For a review of suggested factors by legal commentators, see Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 WIS. L. REV. 1221, 1264 (1997); CHRISTOPHER C. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 162 (2d ed. Supp. 2006).

determination of one's propensity to sexually victimize children. As a result, there is minimal consistency in how prior bad act evidence is evaluated and admitted in child sexual abuse cases.¹⁰⁶

B. THE PROBLEMS

1. Problem #1: Inconsistency in Factors

a. Federal Court's Factors

The factors that are considered when engaging in a FRE 403 balancing analysis in federal sexual abuse prosecutions often vary from jurisdiction to jurisdiction. For example, the Ninth Circuit has adopted the following factors that must be evaluated when balancing the admissibility of prior sexual misconduct evidence under FRE 403:

- (1) the similarity of the prior acts to the acts charged,
- (2) the closeness in time of the prior acts to the acts charged,
- (3) the frequency of the prior acts,
- (4) the presence or lack of intervening circumstances, []
- (5) the necessity of the evidence beyond the testimonies already offered at trial. . . . and,
- [(6) any other factor that a district judge believes to be] relevant to individual cases.¹⁰⁷

On the other hand, the Tenth Circuit has developed a different set of factors that must be considered, such as:

- 1) how clearly the prior act has been proved;
- 2) how probative the evidence is of the material fact it is admitted to prove;
- 3) how seriously disputed the material fact is; and
- 4) whether the government can avail itself of any less prejudicial evidence.¹⁰⁸

¹⁰⁶ The author acknowledges that Rule 403 is designed to provide the trial court significant discretion regarding the admissibility of evidence. The overarching concern is that the trial courts have been provided such a virtually bare and inaccurate roadmap to make such critical determinations.

¹⁰⁷ *United States v. LeMay*, 260 F.3d at 1028 (internal quotation marks omitted).

¹⁰⁸ *See, e.g., United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998).

Though the Ninth Circuit provides the trial judge with discretion to consider other “relevant” evidence, the focus of the analysis is significantly different between the circuits. For instance, Ninth Circuit courts must evaluate closeness in time of the prior acts to the acts charged. This is not, however, an enumerated factor in the Tenth Circuit. Additionally, other circuits have adopted factors that vary in degree from both the Ninth and Tenth circuits.¹⁰⁹ Still, other circuits do not specify any particular factors, leaving that responsibility exclusively to the trial judge.¹¹⁰ The application of inconsistent factors when evaluating the prejudicial effect of prior sexual misconduct evidence is not just limited to the federal courts but is also seen in state courts.

b. A Sample Review of State Factors: Arizona, Florida, Georgia and Washington

State jurisdictions that have adopted the common law lustful disposition exception or have a code provision similar to FRE 414, also apply differing factors when evaluating the admissibility of prior sexual misconduct under their rule equivalent to FRE 403. For example, Arizona law allows courts to admit propensity evidence in criminal cases involving sexual misconduct.¹¹¹ The Arizona legislature has enumerated specific factors that must be considered by the court when conducting a Rule 403 balancing analysis:

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;
- (iii) the strength of the evidence that defendant committed the other act;

¹⁰⁹ *See, e.g.*, *United States v. Sriyuth*, 98 F.3d 739, 748 (3d Cir. 1996) (requiring third circuit courts to consider the actual need of the prior sexual misconduct evidence in light of the contested issues, other available evidence, and the overall strength of the proposed evidence).

¹¹⁰ *See, e.g.*, *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997) (“So long as the sentencing court does not rely on misinformation, its ‘discretion is largely unlimited either as to the kind of information [the court] may consider, or the source for which it may come’”).

¹¹¹ The Arizona statute reads as follows:

Sexual offense; evidence of similar crimes; definition

- A. If the defendant is charged with committing a sexual offense, the court may admit evidence that the defendant committed past acts that would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is relevant.

ARIZ. REV. STAT. ANN. §13-1420(A) (West 2011).

- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.¹¹²

Similarly, Florida law also allows for the admissibility of previous molestations by the defendant to establish propensity.¹¹³ However, the Florida courts, not the legislature, have adopted a non-exclusive list of factors that should be evaluated when determining the admissibility of prior sexual bad acts:

- (1) the similarity of the prior acts to the act charged regarding the location of where the acts occurred, the age and gender of the victims, and the manner in which the acts were committed;
- (2) the closeness in time of the prior acts to the act charged;
- (3) the frequency of the prior acts;
- (4) the presence or lack of intervening circumstances.¹¹⁴

Unlike Arizona and Florida, Georgia has adopted the lustful disposition exception through judicial application. Although the Georgia courts focus on the “totality of the similar facts,”¹¹⁵ they have not developed an enumerated list of factors. Georgia decisions have held, however, that remoteness cannot be a factor for admissibility because it goes to the weight and credibility of the evidence.¹¹⁶ Additionally, in *Payne v. State*, the Georgia Supreme Court recently held that courts must focus on the similarities and not the differences between the prior sexual misconduct and the charged offense.¹¹⁷

¹¹² ARIZ. R. EVID. 404(c)(1)(C).

¹¹³ FLA. STAT. § 90.404(2)(b) (2011).

¹¹⁴ McLean v. State, 934 So. 2d 1248, 1262 (Fla. 2006).

¹¹⁵ Cline v. State, 685 S.E.2d 501, 505 (Ga. Ct. App. 2009).

¹¹⁶ *Id.* at 505. *See also* Wright v. State, 576 S.E.2d 64, 66 (Ga. Ct. App. 2003).

¹¹⁷ 674 S.E.2d 298, 299 (Ga. 2009). The court found that the similarities between sexual abuse perpetrated upon an eleven year old step-daughter and an adult woman were sufficiently similar despite their great dissimilarity of age. *Id.* The court held that “[w]hen considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences . . .” *Id.*

In 2008, the Revised Code of Washington was amended to allow for the introduction of prior sexual misconduct evidence for the purpose of establishing propensity.¹¹⁸ The statute specifically requires courts to weigh each of the following factors when conducting a Rule 403 balancing analysis:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.¹¹⁹

A sampling review of the above four states demonstrates their differences when it comes to factors considered when engaging in a Rule 403 balancing test to determine the admissibility of prior sexual misconduct evidence. For example, where remoteness (or similarly identified as closeness in time) is an identifiable factor in Arizona, Florida, and Washington, it is explicitly disregarded as a factor in Georgia.¹²⁰ Arizona and Washington courts are required to consider the strength of the other act evidence as a factor when conducting a Rule 403 determination in sexual abuse prosecutions.¹²¹ On the other hand, Florida and Georgia do not require consideration of such a factor. Perhaps the greatest difference between these four jurisdictions is the factor relating to the similarity between the prior bad acts and the charged offense. Unlike the other three states, Arizona law requires the judge to evaluate the “similarity *or dissimilarity*

¹¹⁸ WASH. REV. CODE § 10.58.090 (2011).

¹¹⁹ § 10.58.090(6).

¹²⁰ See *supra* note 115.

¹²¹ Washington requires the court to examine whether the prior act was a conviction. This factor seems to be relevant to establish the strength of the evidence. See *State v. Johnson*, No. 63478-0-I, 2011 Wash. App. LEXIS 810 (Wash. Ct. App. 2011) (finding that the prior conviction strengthened the credibility of the prior sexual misconduct evidence).

of the other act.”¹²² At the other end of the spectrum, Georgia explicitly requires the courts to focus exclusively upon the similarities and not to even consider the dissimilarities.¹²³ Though Florida and Washington explicitly mention the consideration of the similarities under a Rule 403 balancing test, their rules are silent as to whether courts can also inquire into the dissimilarities between the charged offense and the uncharged offense.¹²⁴

Whether in federal or state court, the inconsistency of which factors are considered by the court can cause dramatically differing results as to the admissibility of prior bad act evidence in child sexual abuse prosecutions.

2. Problem #2: Inconsistency in Application

Even when courts apply identical factors during a Rule 403 analysis, inconsistencies often arise in how the factors are applied. Three primary application inconsistencies include: application of the factors to prior bad acts perpetrated only against the complaining witness, whether the consideration of enumerated factors are mandatory or discretionary, and the manner of application and interpretation of the varying factors.

Approximately nine of the states that have adopted some form of the lustful disposition exception have limited the admissibility of prior bad acts evidence to acts involving the same complainant.¹²⁵ The rationale supporting this limitation is that collateral bad acts between the

¹²² ARIZ. R. EVID. 404(c)(1)(C)(ii) (emphasis added).

¹²³ See *supra* note 117.

¹²⁴ Florida courts seem to implicitly follow the “similarity only” analysis by finding that the less similar the evidence, the greater the likelihood that it will be prejudicial against the defendant. See, e.g., *Bruce v. State*, 44 So. 3d 1225, 1230 (Fla. Dist. Ct. App. 2010) (“[A]s the similarity between the prior act and the charged crime becomes more attenuated, it will not only be less relevant and less likely to be admissible, but it will be more likely that its unfair prejudicial value will substantially outweigh any probative value.”).

¹²⁵ See, e.g., *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1307 (Mass. 1994); *Thompson v. State*, 988 A.2d 1011, 1014 (Md. 2010); *Hicks v. State*, 441 So. 2d 1359, 1361 (Miss. 1983); *State v. Young*, 661 S.W.2d 637, 639 (Mo. Ct. App. 1983); *State v. Di Giosia*, 70 A.2d 756, 759-60 (N.J. 1950); *State v. Landers*, 853 P.2d 1270, 1274 (N.M. Ct. App. 1992); *Hawkins v. State*, 782 P.2d 139, 141 (Okla. Crim. App. 1989); *State v. McKay*, 787 P.2d 479, 480 (Or. 1990); *Commonwealth v. Knowles*, 637 A.2d 331, 333 (Pa. Super. Ct. 1994). Pennsylvania courts have recently

defendant and the complainant establish a specific “sexual inclination of the defendant toward the victim.”¹²⁶ In these jurisdictions, prior bad acts involving the defendant and other victims are never admissible because of its prejudicial impact upon the defendant.¹²⁷ This disparity creates a significant inconsistency in the admissibility of evidence and in the outcome of child sexual abuse cases. To illustrate from the case study, these jurisdictions would prohibit all three collateral act witnesses from testifying against Christopher Smith due to the fact that they involve individuals other than the complainant.

In addition to the inconsistency of 403 factors applied by the courts, federal and state jurisdictions also differ on whether the application of these factors is mandatory or discretionary. For example, the Ninth Circuit mandates the district court to consider specific factors when considering the admissibility of the prior bad act evidence in a child sexual abuse prosecution. In affirming the district court’s decision to admit such evidence, the court in *United States v. LeMay* held that district court judges “must” evaluate certain enumerated factors.¹²⁸ On the other hand, the Seventh and Tenth Circuits do not mandate the trial courts to apply a specified list of factors.¹²⁹ Though other circuits have not explicitly made a determination regarding this issue,

admitted similar fact evidence involving differing victims if such is introduced under Rule 404 and not the lustful disposition exception. *See* *Commonwealth v. Ardinger*, 839 A.2d 1143, 1144 (Pa. 2003).

¹²⁶ *McKay*, 787 P.2d at 480; *see also* *Acuna v. State*, 629 A.2d 1233, 1238 (Md. 1993). The Maryland court stated

Thus, in a sex offense prosecution, when the State offers evidence of prior sexual criminal acts of the same type by the accused against the same victim, the law of evidence already has concluded that, in general, the probative value, as substantive evidence that the defendant committed the crime charged, outweighs the inherent prejudicial effect.

Id.

¹²⁷ Since the adoption of Rules 413, 414, and 415, federal courts allow the consideration of prior bad acts evidence involving other victims. *See* *United States v. Mann* 193 F.3d 1172, 1173 (10th Cir. 1999) (stating that federal courts are to liberally admit evidence of prior uncharged sex offense).

¹²⁸ *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001). The ninth circuit stated that

These factors are: (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. (internal quotation marks omitted).

¹²⁹ *See, e.g.,* *United States v. Hawpetoss*, 478 F.3d 820, 825 (7th Cir. 2007) (adopting a “more flexible approach” regarding factors considered by the district courts); *United States v. Guardia*, 135 F.3d 1326, 1328 (10th Cir. 1998).

there is a tendency to be sympathetic to the less rigid approach by providing the trial court greater freedom in determining which factors to consider.¹³⁰

This application inconsistency is also found amongst state jurisdictions. Similar to FRE 414, an Illinois statute authorizes the admissibility of prior bad act evidence to establish propensity in a sexual abuse prosecution. Unlike its federal counterpart, the Illinois statute provides trial judges with a non-exhaustive list of factors that may be considered when conducting a 403 analysis. Additionally, the statute does not mandate the courts to consider the enumerated factors, but simply states, “[i]n weighing the probative value of the evidence against undue prejudice to the defendant, the court *may* consider . . . [followed by enumerated factors].”¹³¹ Other state jurisdictions use more stringent language but fall short of an explicit mandate. The Florida Supreme Court in *McLean* addressed the applicability of factors by stating, “[i]n assessing whether the probative value of evidence of previous molestations is substantially outweighed by the danger of unfair prejudice, the trial court *should* evaluate . . . [followed by list of court created factors].”¹³² Similar to the Ninth Circuit, a handful of states mandate the trial court to consider specified enumerated factors when considering prior

The Tenth Circuit does not mandate a review of particular factors; however, it does require a clear record of the reasoning behind the trial court’s findings. *Id.*

¹³⁰ *See, e.g.*, *United States v. Kelly*, 510 F.3d 433, 437 (4th Cir. 2007) (“[T]he Seventh’s Circuit’s more flexible approach seems preferable in view of this circuit’s general view that a district court has ‘wide discretion’ in admitting or excluding evidence under Rule 403.”).

¹³¹ 725 ILL. COMP. STAT. 5/115-7.3(c) (2011) (emphasis added). “In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider: (1) the proximity in time to the charged or predicate offense; (2) the degree of factual similarity to the charged or predicate offense; or (3) other relevant facts and circumstances.” *Id.*

¹³² *McLean v. State*, 934 So. 2d 1248,1262 (Fla. 2006) (emphasis added).

In assessing whether the probative value of evidence of previous molestations is substantially outweighed by the danger of unfair prejudice, the trial court should evaluate: (1) the similarity of the prior acts to the act charged regarding the location of where the acts occurred, the age and gender of the victims, and the manner in which the acts were committed; (2) the closeness in time of the prior acts to the act charged; (3) the frequency of the prior acts; and (4) the presence or lack of intervening circumstances. This list is not exclusive. The trial courts should also consider other factors unique to the case.

Id.

bad act evidence in child molestation prosecutions. For example, in *People v. Falsetta*,¹³³ the California Supreme court discussed the importance of carefully weighing the evidence under CAL. EVID. CODE § 352 (2011).¹³⁴ The Court held, “[r]ather than admit or exclude every sex offense a defendant commits, trial judges *must* consider such factors as . . . [list of court created enumerated factors].”¹³⁵ Some states have even incorporated this factor review mandate into their rules of evidence.¹³⁶ Mandating trial courts to consider particular factors when conducting a 403 balancing test significantly affects the outcome of such an analysis and creates further inconsistent results between jurisdictions. Furthermore, by requiring a trial court to review certain listed factors, the legislature and/or higher courts undoubtedly place a significant amount of credence upon the ability of such factors to actually assist the court in ascertaining the probative value of the prior bad act propensity evidence.

Last, the manner of application and interpretation of the varying factors is anything but consistent and defined. The 403 balancing test was perhaps best described by the Washington Supreme Court when it wrote that the role of the trial court is to determine, “where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.”¹³⁷ This statement rings even more true when considering how courts are to apply and define the plethora of factors

¹³³ 986 P.2d 182 (Cal. 1999).

¹³⁴ *Id.* at 189. Section 352 of the California Evidence Code is the equivalent of FRE 403. Section 352 states: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” CAL. EVID. CODE § 352 (2011).

¹³⁵ *Falsetta*, 986 P.2d at 189-90 (emphasis added).

Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

Id.

¹³⁶ *See, e.g.*, ARIZ. R. EVID. 404(c)(1)(C) (2011); WASH. REV. CODE § 10.58.090(6) (2011).

¹³⁷ *State v. Goebel*, 218 P.2d 300, 306 (Wash. 1950).

that have been developed to “assist” in evaluating the admissibility of prior sexual misconduct evidence. Though jurisdictions have developed this analysis criterion, trial courts have minimal guidance on how to apply and “weigh the articulated factors.”¹³⁸ Inherent with any Rule 403 analysis is the virtual impossibility of quantifying the factors. Absent specific guidelines that assess and define the manner in which the factors are to be applied, the incremental probative value or prejudice cannot be measured with any degree of exactitude.¹³⁹ To make matters worse, courts have no objective method in how to determine which similarities and dissimilarities are significant for the purpose of evaluating the admissibility of prior bad act evidence under Rule 403. In articulating this problem, Professor Charles Ehrhardt points out, “[i]n compiling any list of similarities, the items to be included depend upon the person compiling the list, creating a risk that the person making the list may skew the factors consciously or subconsciously in order to achieve a desired outcome.”¹⁴⁰ As a result, this critical balancing process often finds itself unpredictable and arbitrary. In addition to the virtual impossibility of quantifying these factors, some scholars argue that there is minimal correlation between probative value and prejudice, and thus, they exist independent of each other.¹⁴¹ Weighing these independent intangibles against each other has been likened to judging a contest between apples and oranges in which it is impossible to pick a winner.¹⁴² As a result of the inability to quantify factors and accurately correlate between probative value and prejudice, the trial courts are left with the “discretion” to

¹³⁸ State v. Johnson, No. 63478-0-I, 2011 Wash. App. LEXIS 810 (Wash. Ct. App. 2011)

¹³⁹ C.R. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L. J. 281, 347 (1979).

¹⁴⁰ See Charles W. Ehrhardt, *Section I: Is the Florida Supreme Court Up to the Task of Being America’s Criminal Evidence Court? When Children and the Elderly Are Victims: Balancing the Rights of the Accused Against Those of the Victim*, 55 U. MIAMI L. REV. 645, 657 (2001).

¹⁴¹ See Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 805 (1981); see also Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487 (2005) (stating that “the Rule 403 balance can break down into canned formulas, circular reasoning, and empty gestures”). For a detailed discussion regarding the correlation aspects between probative value and prejudice, see 2 IMWINKELRIED, *supra* note 33, § 8:26.

¹⁴² Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 73 (1979).

intuitively guess at which point the unfair prejudice of a factor substantially outweighs its probative value.

A good example of this dilemma is the age factor adopted by many jurisdictions when evaluating the admissibility of prior bad act evidence in a child sexual abuse prosecution. Generally, a “substantial similarity” is found for purposes of a Rule 403 analysis when the complainant and collateral witness are similar in age.¹⁴³ At what point does the age difference between the complainant and similar fact witness tip the scales towards substantial unfair prejudice? The answer to this question is often based upon the other similarities (or differences, depending upon the jurisdiction) that exist between the charged offense and the prior bad act evidence. For example, in *Payne v. State*, the court affirmed the admission of collateral act testimony involving the sexual assault of an adult woman in a prosecution for child molestation.¹⁴⁴ The court held that the unfair prejudice of the age difference was outweighed by the numerous similarities between the charged offense and the prior sexual misconduct.¹⁴⁵ Though the court admitted the prior bad act evidence despite the age disparity, it did not address the correlation between the prejudice of the age disparity and the probative value of the similarities. In other words, the court intuitively “guessed” an imprecise point at which the significant age difference between the witnesses was no longer relevant in the Rule 403 analysis.¹⁴⁶ Furthermore, the court provided no rationale for its assumption that it was necessary

¹⁴³ *United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000) (holding that a substantial similarity existed because victim and collateral act witness were “about the same age”).

¹⁴⁴ 674 S.E.2d 298, 300 (Ga. 2009).

¹⁴⁵ *Id.*

¹⁴⁶ A further shortcoming in this approach is the exclusive focus on chronological age. For example, a perpetrator may offend against an 8 year old and a 14 year old. However, if the 14 year old is severely delayed, and is functioning more like an 8 year, the chronological age difference should be immaterial in assessing the similarities between the two witnesses.

to establish sufficient similarities between the charged offense and the prior sexual misconduct to tip the scales in favor of probative value.¹⁴⁷

Because of the subjective nature of the value and relevance of these factors, the development of consistent and fair analysis guidelines is virtually impossible. As a result, trial judges are left with having to engage in an exercise of subjective good faith guessing when evaluating the admissibility of prior bad act evidence under Rule 403. This dilemma was summed up best in a concurring opinion where the judge wrote, “[a]fter five years of reflection, I agree with Professor Ehrhardt that the district courts’ efforts to identify relevant factors in this analysis have added little to the existing case-by-case method.”¹⁴⁸

3. Problem #3: Too Much Emphasis on Similarity

As mentioned above, the similarities between the charged offense and the prior bad act are the overarching factors considered when a court conducts a FRE 403 balancing test in child sexual abuse prosecutions.¹⁴⁹ The requirement to demonstrate similarities between the charged and uncharged acts are embedded in cases where the evidence is being offered under FRE 404(b) for the purpose of establishing identity, intent, or absence of mistake.

The relevant purpose of admitting prior bad acts evidence to establish identity is to show that the charged and uncharged offenses were perpetrated by “one and the same man.”¹⁵⁰ In establishing such identity, commentators hold that the law requires the prosecutor to demonstrate that 1) the “same” or strikingly similar methods were used in both offenses, and that 2) the

¹⁴⁷ This is not limited to the age factor. The same problem exists in the application of all factors used in the 403 balancing test when determining the admissibility of prior bad act evidence in sexual abuse prosecutions.

¹⁴⁸ *Farrill v. State*, 759 So. 2d 696, 702 n.2 (Fla. Dist. Ct. App. 2000). Although this case was decided prior to the adoption of FLA. STAT. §90.404(2)(b) (2011), the issue of Rule 403 factor analysis has not changed.

¹⁴⁹ *See supra* notes 94-100.

¹⁵⁰ *R. v. Morris*, [1970] 54 Crim. App. 69, 80 (Eng.).

methods are so unique that both offenses can be ascribed to one person.¹⁵¹ The uncharged offense does not have to be identical but must be similar enough as to possess signature quality.¹⁵² Such a similarity between the two acts creates a strong inference that the same person committed both offenses.¹⁵³ Thus, logical sense dictates that the inference of identity is strengthened by the greater the number of similarities.¹⁵⁴

Similarities between the charged and uncharged offense must also be established when the prosecution attempts to prove the defendant's knowledge or intent, or when the prosecution endeavors to disprove that the defendant acted with innocent intent—absence of mistake.¹⁵⁵ Such similarity requirements are based upon what Wigmore has identified as the “doctrine of chances.”¹⁵⁶ At the heart of this doctrine is that the more often the defendant commits a particular act, the less likely it was committed with innocent intent or by mistake. In providing the rationale for this doctrine, Wigmore states, “[s]ince it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance.”¹⁵⁷

In cases where the issues are identity, knowledge, or intent, the necessity that the prior bad acts be similar is directly related to the logical relevance for which the evidence is being offered. However, this is not the case when collateral act evidence is offered to establish

¹⁵¹ See 1 IMWINKELRIED, *supra* note 33, § 3:10.

¹⁵² See, e.g., *United States v. Pham*, 17 F. App'x 778, 780-81 (10th Cir. 2001).

¹⁵³ See 1 IMWINKELRIED, *supra* note 33, § 3:10.

¹⁵⁴ *Id.* § 3:12, at 3-76.

¹⁵⁵ See, e.g., *United States v. Garcia*, 291 F.3d 127, 137-38 (2d Cir. 2002) (stating that similarities between the acts makes prior act relevant to establishing knowledge or intent); *Abernathy v. State*, 925 S.W.2d 380, 381-82 (Ark. 1996) (stating that the requirement of similarities between the prior act and the charged act applies when offered to prove absence of mistake).

¹⁵⁶ 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 302 (Chadbourn rev. ed. 1979).

¹⁵⁷ *Plante v. State*, 692 S.W.2d 487, 491-92 (Tex. Crim. App. 1985) (quoting WIGMORE, *supra* note 156, § 302), *superseded on other grounds by* TEX. R. EVID. 401-403.

propensity under either the lustful disposition exception or FRE 414 and its state equivalents.¹⁵⁸ The similarities between the prior bad act and the charged offense are not relevant to determine one's propensity to sexually victimize children. As this issue is examined further, it is crucial to remember that similarity is a function of relevance rather than the other way around. Hence, when the logical relevance of the collateral crime evidence is to establish the defendant's propensity to abuse children, little emphasis should be placed upon the similarities when conducting the FRE 403 analysis. The admissibility of this evidence depends on its probative value in establishing propensity, not merely on its similarity. For example, suppose a person is charged with inserting his tongue into his ten year old daughter's mouth at the family home during late night hours. The prior bad evidence involves the defendant touching a three year old boy's penis in the church nursery during Sunday morning worship. The prosecutor offers the collateral act evidence to establish the defendant's propensity to sexually victimize children under a state equivalent to FRE 414. Assuming that the court finds sufficient relevance under FRE 402, an application of the commonly accepted "similarity factors" under the FRE 403 balancing test would likely result in the exclusion of such evidence.¹⁵⁹ However, common sense dictates that the probative value of the prior act of molestation is not substantially outweighed by the alleged unfair prejudice because of the lack of similarities between the two offenses. The prior bad act certainly establishes that the defendant has a propensity to sexually victimize children. Since the adoption of FRE 414, courts have consistently held that prior acts of child molestation suggest a propensity to sexually abuse children and are not substantially outweighed

¹⁵⁸ Professor Charles Ehrhardt suggests that the use of the term "similar fact evidence" is misleading since the evidentiary act does not have to be similar to be admitted; it has to be relevant. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 404.9 (West Group, 2000).

¹⁵⁹ Insufficient similarities between the specific sexual abuse perpetrated in that the charged act involved defendant inserting his tongue in his daughter's mouth, while the prior bad act involved the sexual touching of a child's penis. Additionally, the location of abuse, the age and gender of the victim, and the nature of the relationship between the defendant and the victims were all substantially different.

by unfair prejudice.¹⁶⁰ The logical relevance and probative value of propensity evidence does not become substantially outweighed by unfair prejudice simply because it does not satisfy a list of similarity factors adopted by the courts. Courts must move away from applying factors that focus on similarities, and begin to focus on factors that are specific to the defendant's propensity to sexually abuse children. Such a more tailored focus will result in a greater uniformity of factors, a greater uniformity in application, and a more accurate FRE 403 assessment of the proffered evidence.

IV. AUTHORITY, TRUST, AND PHYSICAL FORCE/THREATS—THE FACTORS THAT MATTER

Understanding the behavior and methods used by those who sexually victimize children is paramount in determining the appropriate focus of a FRE 403 analysis when evaluating the admissibility of prior sexual misconduct. An expert in the area of child abuse research recently stated, “[o]ur research can only have an impact if it reaches the right people.”¹⁶¹ The “right people” in the context of prior bad evidence are the prosecutors who present the prior bad act evidence, the defense attorneys who will argue that the probative value of such evidence is substantially outweighed by unfair prejudice, and the judges who make the final determination.

A critical starting place in this determination is to possess a definitional understanding of sexual abuse and those who perpetrate it. A clinical definition of child sexual abuse “is the involvement of adults, older children, or adolescents in sexual activities with children who cannot give appropriate consent and who do not understand the significance of what is happening to them. Such activities violate family and societal taboos. Sexual abuse includes, for example,

¹⁶⁰ See, e.g., *United State v. Summage*, 575 F.3d 864, 878 (8th Cir. 2009) (quoting *United States v. Gabe*, 237 F.3d 954, 960 (8th Cir. 2001)) (“‘Because propensity evidence is admissible under Rule 414,’ the fact that evidence of prior acts suggests a propensity to molest children, ‘is not unfair prejudice.’”).

¹⁶¹ Jennifer J. Freyd, *What Juries Don't Know: Dissemination of Research on Victim Response is Essential for Justice*, TRAUMA PSYCHOL. NEWSL. (APA), Fall 2008, at 15-18.

sexual touching of the genitalia, oral sex, attempted or actual sexual intercourse, or including children in child pornography.”¹⁶²

“Pedophile” is perhaps the most commonly used clinical term to identify individuals who sexually victimize children. It is not a criminal or legal term, but is primarily used by a psychologist or psychiatrist for diagnostic purposes.¹⁶³ The Diagnostic and Statistical Manual of Mental Disorders (“*DSM-IV-TR*”) defines pedophile as one who has recurrent sexually arousing fantasies, sexual urges, or behaviors involving children thirteen years or younger.¹⁶⁴ The *DMV-IV-TR* also requires that the individual be at least 16 years of age and at least 5 years older than the child.¹⁶⁵ Additionally, to be classified as a pedophile, one either must have acted out on the above-referenced urges, or “the sexual urges or fantasies cause marked distress or interpersonal difficulty.”¹⁶⁶ However, if any of the above criteria are missing, one cannot be clinically diagnosed as a pedophile. For example, an adult who repeatedly engages in sexual activity with a 14 or 15 year old is not classified as a pedophile.¹⁶⁷ “Child molester” is perhaps the most

¹⁶² John M. Leventhal, *Overview of Child Maltreatment*, in *CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE* (Angelo P. Giardino & Randell Alexander, eds., 3d ed. 2005). Another clinical definition of sexual abuse’s constituent parts:

Sexual abuse consists of any sexual activity—verbal, visual or physical—engaged in without consent. The child is considered unable to consent due to developmental immaturity and an inability to understand sexual behavior. Verbal sexual abuse can include sexual threats, sexual comments about the child's body, lewd remarks, harassment or suggestive comments. Visual sexual abuse includes the viewing of pornographic material, exhibitionism and voyeurism. Physical sexual abuse includes intercourse, cunnilingus, fellatio, sodomy, digital penetration, masturbation in front of the child or of the adult by the child, fondling of the breast and genitals and exposure of the child's body to others. These may be performed on the child, or the child may be forced to perform any or all of the above.

DIANE MANDT LANGBERG, *COUNSELING SURVIVORS OF SEXUAL ABUSE* 62 (Tyndale House 1997).

¹⁶³ Ryan C. W. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 *MAYO CLINIC PROC.* (Special Article) no.4, 457, 457 (2007).

¹⁶⁴ APA, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* §302.2 (4th ed., text rev. 2000).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Even though this person would not fall under the clinical definition of a pedophile, it is not uncommon for health professionals to still diagnose such an individual as a pedophile. See KENNETH V. LANNING, *NAT’L CTR. FOR MISSING AND EXPLOITED CHILD., CHILD MOLESTERS: A BEHAVIORAL ANALYSIS* 19 (5th ed. 2011), available at http://www.missingkids.com/en_US/publications/NC70.pdf. Though not mentioned in the *DMV-IV-TR*, hebephilia

common term to describe one who sexually victimizes children. Child molester is defined as, “[a]ny older child or adult who touches a child for his or her own sexual gratification.”¹⁶⁸ This will be the term and definition used when identifying Rule 403 factors to be considered when evaluating the admissibility of prior sexual misconduct.¹⁶⁹

In the past thirty years, a considerable increase in the study and research has occurred relating to the myriad of issues related to those who sexually victimize children.¹⁷⁰ Although the personalities and characteristics of child molesters can be significantly different, “their sexual behavior is often repetitive and highly predictable. Knowledge of these sexual-behavioral patterns is extremely valuable”¹⁷¹ The result of this behavioral research has been admissible in court to assist the fact finder in attempting to understand the methods and techniques of child molesters.¹⁷² In fact, at least one state supreme court held that the clinical symptoms of pedophilia are relevant to establish the defendant’s propensity to sexually victimize a child.¹⁷³

is a commonly accepted term that defines individuals who sexually victimize children between the ages of 14 and 16. *See* Hall & Hall, *supra* note 163, at 458.

¹⁶⁸ ABEL & HARLOW, *supra* note 5.

¹⁶⁹ In this section, the terms “molester” and “offender” will be used interchangeably.

¹⁷⁰ Volumes could not contain the plethora of knowledge that has been gained through extensive research on this issue by a significant number of respected scholars and practitioners. To identify the most relevant factors when determining the admissibility of prior act evidence, the focus of this article is limited to the methods used by child molesters to abuse children. However, for a good sampling overview of this research, *see generally* Gene Abel, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE no.1, 3 (1987); David Finkelhor, Gerald Hotelling, I.A. Lewis, & Christine Smith, *Sexual Abuse in A National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT no.1, 19 (1990); DAVID FINKELHOR, SOURCEBOOK ON CHILD SEXUAL ABUSE (1986); Kristen A. Danni & Gary D. Hampe, *An Analysis of Predictors of Child Sex Offender Types Using Presentence Investigation Reports*, 44 INT’L J. OFFENDER THERAPY COMP. CRIMINOLOGY no.4, 490 (2000); LANNING, *supra* note 167; ANNA C. SALTER, PREDATORS, PEDOPHILES RAPISTS, AND OTHER SEX OFFENDERS: WHO THEY ARE, HOW THEY OPERATE, AND HOW WE CAN PROTECT OURSELVES AND OUR CHILDREN (2003).

¹⁷¹ LANNING, *supra* note 167, at 51. *See also* United States v. Romero, 189 F.3d 576, 582-83 (7th Cir. 1999).

¹⁷² Romero, 189 F.3d at 582-83 (admitting testimony of FBI expert on child sexual abuse to explain the methods and techniques used by certain child molesters).

¹⁷³ *See, e.g.,* State v. Prine, 200 P.3d 1, 15-16 (Kan. 2009) (reversed by statute). The court commented saying that modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness.

Id. In *State v. Prine*, the Kansas Supreme Court followed the rules of evidence and refused to admit the defendant’s prior bad acts to prove intent, plan, and absence of mistake or accident. *Id.* In that case, the

Hence, there is precedent for the admissibility of information relating to the common characteristics and behaviors of child molesters. Similar data is relevant to establish propensity and should be available for consideration during a FRE 403 analysis when determining the admissibility of prior sexual misconduct evidence.

Two necessary components for any child molester when sexually victimizing a child are access¹⁷⁴ and control.¹⁷⁵ The offender must have access to the child in order to perpetrate the abuse. Similarly, without some degree of control, the child molester is unable to victimize the child or insure his/her silence. Three common methods used by child molesters in securing access and control of children are: 1) authority, 2) trust, and 3) instrumental physical force/threats. These methods are a relevant determiner of one's propensity to sexually victimize children, and should be the factors considered by the courts when engaging in a Rule 403 analysis in child sexual abuse prosecutions.

Scholars and researchers have developed various methods in which to type or categorize child molesters.¹⁷⁶ A description of the offender as defined by his/her relationship with the child, however, is the most helpful way to demonstrate the application of these three methods.¹⁷⁷

Court discussed the probative value of propensity evidence in child sexual abuse cases but recognized that it was the legislature's responsibility to adopt changes to the rules of evidence. *Id.* After *State v. Prine* was decided, the Kansas legislature amended its rules of evidence to admit propensity evidence of a defendant's commission of sexual misconduct. KAN. STAT. ANN. § 60-455(d) (2011). Thus, *State v. Prine* was reversed by statute to allow such propensity evidence.

¹⁷⁴ LANNING, *supra* note 167, at 57 (“The pedophile will almost always have a method of gaining access to children.”).

¹⁷⁵ *Id.* at 58 (“[A] pedophile must know how to manipulate and control children.”); *Id.* at 68 (“Child molesters control their victims in a variety of ways.”).

¹⁷⁶ See, e.g., Bhagwan A. Bahroo, *Pedophilia Psychiatric Insights*, 41 FAM. CT. REV. 497, 500-501 (2003) (description of the incest-assault continuum typology); Kenneth V. Lanning, *Sex Offender Continuum*, in PROSECUTING ONLINE CHILD EXPLOITATION CASES (James S. Peters ed. 2002) (description of the situational-preferential continuum typology); SALTER, *supra* note 170, at xi (explaining the power-predator and the “persuasion-predator” typology).

¹⁷⁷ In applying the factors for each type of child molester below, the factor with the most significance for that particular child molester type will be applied first.

Using relationship as the identifying standard, the three primary categories of child offenders are, the stranger molester, the acquaintance molester, and the intra-familial molester.¹⁷⁸

A. Stranger Molester

A stranger molester can range from being someone whom the child has never seen, to someone that the child has only had minimal prior interactions.¹⁷⁹ This type of offender is the typical “stranger at the playground” whom children are often warned about through popular slogans such as “stranger danger.”¹⁸⁰ Stranger molesters are by far the smallest category of child molesters. A study concluded in 2001 by Gene Abel and Nora Harlow discovered that only 10% of molesters reported that they sexually assaulted a child who was a stranger.¹⁸¹ Similarly, in a study of child sexual abuse survivors that ended in 1986, Robert Dubé and Martine Hébert reported that only 22% disclosed being molested by a stranger.¹⁸² The three common methods of securing access and control over a child are often prevalent in the behavior of a stranger molester.

1. Instrumental Physical Force/Threats:

Due to the fact that there is no relationship between the offender and the child, the primary method a stranger molester uses to gain access and control of a child is by instrumental

¹⁷⁸ LANNING, *supra* note 167, at 9; *see also id.* at 10 (“The offender gradually moves from being a stranger using force to an acquaintance using seduction to a father-like or domestic figure using a family-like bond.”); Though these categories are distinctively defined, it is important to note that they should be considered on a continuum rather than independent from one another. For example, an acquaintance molester may end up marrying the child’s parent and becoming an intra-familial molester. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Press Release, Nancy A. McBride, Nat’l Ctr. for Missing and Exploited Child., Child Safety is More Than a Slogan: “Stranger-Danger” Warnings Not Effective at Keeping Kids Safer, (2005), *available at* <http://www.missingkids.com/missingkids/servlet/NewsEventServlet?>

¹⁸¹ ABEL & HARLOW, *supra* note 168, at 8.

¹⁸² Robert Dubé & Martine Hébert, *Sexual Abuse of Children Under 12 Years of Age: A Review of 511 Cases*, 12 CHILD ABUSE & NEGLECT no.3, 321, 326 (1988).

physical force or threatened physical force.¹⁸³ Instrumental physical force is the force applied by the child molester in order to accomplish the act.¹⁸⁴ It usually involves the physical force that is necessary to gain a victim's compliance, such as holding the child, physically removing the child to a specific location, or confining the child.¹⁸⁵

2. Authority

The authority method is also utilized when the stranger molester has actual, or perceived authority.¹⁸⁶ Most children are raised to submit to those in authority—police officers, parents, teachers, religious leaders, and baby-sitters.¹⁸⁷ The stranger molester possesses a unique opportunity to access and control a child when the molester is an authoritative figure or deceives the child into believing that he/she has authority.¹⁸⁸

3. Trust

It is common knowledge that most children are taught not to trust strangers. Thus, an objective of the stranger molester is to convince the child that he/she is not a stranger and can be trusted. This is accomplished by disarming the child of any preconceptions he/she may have about the meaning of a stranger. This is usually accomplished without much difficulty due to the fact that children can be easily influenced by adults. Dr. David Warden, a psychologist at the University of Strathclyde in the United Kingdom, writes:

No matter how intelligent the child, he or she does not see the world through skeptical adult eyes . . . Children live very much in the present. They can't foresee someone's actions or judge their intentions, certainly not at primary school age.

¹⁸³ See, e.g., *Marshall v. State*, 832 N.E.2d 615, 619 (Ind. Ct. App. 2005) (reciting the facts that a child was sexually abused by a stranger who forced himself in through bedroom window).

¹⁸⁴ ROBERT PRENTKY, U.S. DOJ, *RISK MANAGEMENT IN SEXUALLY ABUSIVE YOUTH IN MASSACHUSETTS*, 1998-2004, at 173 (2004).

¹⁸⁵ Landa Stermac, Kathryn Hall, & Marianne Henskens, *Violence Among Child Molesters*, 26 J. SEX RES. no.4, 450, 453 (1989).

¹⁸⁶ The effectiveness of this method often coincides with the child's developmental age and maturity.

¹⁸⁷ AM. PROSECUTORS RES. INST., *INVESTIGATION AND PROSECUTION OF CHILD ABUSE 2* (3d. ed. 2004).

¹⁸⁸ See, e.g., *Hennagan v. Dep't of Highway Safety and Motor Vehicles*, 467 So. 2d 748, 749 (Fla. Dist. Ct. App. 1985) (using his position of authority, a police officer gained access to and molested a child).

They have a very weak understanding of motives, they simply take someone at face value. The concept of stranger danger is difficult, because it clashes with the social constraints on children to be polite to adults. Research suggests that children don't really know what a stranger is. They feel that once someone tells his name, he ceases to be a stranger.¹⁸⁹

The younger the child, the easier it is for the stranger molester to lure the child into believing that he/she is not a stranger.¹⁹⁰ Once that belief has been set aside, the offender is a significant step closer to obtaining the necessary trust needed to molest.

B. Acquaintance Molester

An acquaintance molester is a non-family member—such as a family friend, clergy member, next door neighbor, law enforcement officer, pediatrician, teacher, coach, or volunteer—who is acquainted with the child or the child's parents.¹⁹¹ The acquaintance molester will often work at positioning themselves, “[w]here they can meet children and have the opportunity to interact with children in an unsupervised way.”¹⁹² As best defined by Kenneth Lanning: “[t]he acquaintance molester, by definition, is one of us. He is not simply an anonymous external threat. He cannot be identified by physical description and, often not even by “bad” character traits. Without specialized training or experience and an objective perspective, he cannot easily be distinguished from others.”¹⁹³

The acquaintance molesters is a larger category of offender than stranger molesters. The same study concluded in 2001 by Gene Abel and Nora Harlow found that forty percent of the subject child molesters reported molesting a non-family member who was known by the

¹⁸⁹ Ernest Allen, *Keeping Children Safe: Rhetoric and Reality*, 5 JUV. JUST. J. no.1 (1998), available at <http://www.ojdp.gov/jjjournal/jjjournal598/safe.html>.

¹⁹⁰ See, e.g., Mikell v. State, 637 S.E.2d 142, 145-46 (Ga. Ct. App. 2006) (reciting the fact that a six year old child agreed to follow stranger molester to second floor of her home where she was molested).

¹⁹¹ LANNING, *supra* note 167, at 8.

¹⁹² HALL & HALL, *supra* note 163, at 461.

¹⁹³ LANNING, *supra* note 167, at 8.

offender.¹⁹⁴ Acquaintance molesters utilize all three methods of obtaining access and control over children, with an emphasis on trust.

1. Trust

The acquaintance molester attains access and control of the child by engaging in a process that is designed to secure the trust of the child and/or parent.¹⁹⁵ One scholar has described trust as the “chosen battleground” for acquaintance molesters.¹⁹⁶ This gaining of trust is commonly referred as the “grooming process.”¹⁹⁷ The acquaintance molester has the unique ability to identify with children. In describing this ability, Kenneth Lanning writes, “[h]e knows how to talk to children, but more importantly, he knows how to listen to them.”¹⁹⁸ A convicted pedophile defined the process as follows:

“There’s a process of obtaining the child’s friendship and, in my case, also obtaining the family’s friendship and trust. When you get their trust, that’s when the child becomes vulnerable, and you can molest the child. . . .”¹⁹⁹

He goes on to say:

As far as the children goes, they’re kind of easy. You befriend them. You take them places. You buy them gifts. . . . Now in the process of grooming the child, you win his trust and I mean, the child has a look in his eyes—it’s hard to explain—you just have to kind of know the look. You *know* when you’ve got that kid. You know when that kid trusts you.²⁰⁰

To secure this trust, the acquaintance molester grooms child victims by providing a variety of services and gifts, including but not limited to attention, affection, kindness, privileges,

¹⁹⁴ ABEL & HARLOW, *supra* note 5, at 8; *see also* Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177, 182 (1983) (“[A] child is three times more likely to be molested by a recognized, trusted adult than by a stranger.”).

¹⁹⁵ HALL & HALL, *supra* note 163, at 461.

¹⁹⁶ SALTER, *supra* note 170, at 45.

¹⁹⁷ *See, e.g.*, State v. Jacobson, 930 A.2d 628, 635-36 (Conn. 2006) (describing the grooming stages).

¹⁹⁸ LANNING, *supra* note 167, at 38.

¹⁹⁹ SALTER, *supra* note 170, at 42.

²⁰⁰ *Id.*

recognition, alcohol, drugs, money, and pornography.²⁰¹ Sometimes, the acquaintance molester will encourage his own children to befriend the target child in order to provide the opportunity to facilitate the grooming process.²⁰² The trust that develops as a result of the grooming process will often reduce the child's inhibitions and increase the offender's control over the child.²⁰³ This toxic trust eventually renders the child virtually helpless, creating an environment for ongoing abuse, while increasing the likelihood that the victim will remain silent.²⁰⁴ When asked how he kept his victims from reporting, a child molester who admitted to raping over 100 victims, reported:

Well, first of all I've won all their trust. They think I'm the greatest living thing that ever lived. Their families think I'm the greatest thing that ever lived. Because I'm so nice to them and I'm so kind and so—there's just nobody better to that person than me. If it came down to, you know, it came down to, "I have a little secret, this is our little secret," then it would come down to that, but it didn't have to usually come down to that. It is almost an unspoken understanding.²⁰⁵

Not only does the acquaintance molester seek the trust of the child, but oftentimes he/she first grooms the child's guardian/s.²⁰⁶ The rationale behind this objective is that the offender will have greater access to the child if the trust of the guardian/s are secured.²⁰⁷ In recounting the effects of this family grooming process, the above-referenced molester stated,

²⁰¹ See, e.g., *Oliver v. State*, 977 So. 2d 673, 676 (Fla. Dist. Ct. App. 2008). In this case, the Defendant was "[a]lmost like a father figure" because of the attention he showered upon the victim. *Id.* As a result, defendant gained child's trust and confidence.

²⁰² See, e.g., *State v. DeVincentis*, 74 P.3d 119, 125 (Wash. 2003) (en banc) (discussing the defendant's developed "scheme" to befriend children through his own daughter which brought children into his home which provided him the opportunity to abuse).

²⁰³ LANNING, *supra* note 167, at 27.

²⁰⁴ Freyd, *supra* note 161, at 16. ("Non-disclosure, delayed disclosure, and retraction are particularly likely in cases in which the perpetrator is close to the victim."); see also Summit, *supra* 194, at 182-83 ("The fact that the perpetrator is often in a trusted and apparently loving position only increases the imbalance of power and underscores the helplessness of the child.").

²⁰⁵ SALTER, *supra* note 170, at 43.

²⁰⁶ See, e.g., *People v. Waples*, 95 Cal. Rptr. 2d 45, 46-47 (Ct. App. 2000) (stating that the defendant used his trade skills as a horse trainer to "insinuate himself into families with young girls"); *Commonwealth v. Ardinger*, 839 A.2d 1143, 1144 (Pa. Super. Ct. 2003) (explaining that prior to molestation, defendant became "good friends" with child's mother who allowed him to become a "substitute father").

²⁰⁷ LANNING, *supra* note 167, at 72. See also *Adrian v. People*, 770 P.2d 1243 (Colo. 1989) (stating that the defendant was a trusted friend of victim's family for 15 years before assaulting the victim).

[y]ou just trick the family into believing that you are the most trustworthy person in the world. Every one of my victims, their families just totally thought that there was nobody better to their kids than me, and they trusted me wholeheartedly with their children. . . .²⁰⁸

The trust developed between an acquaintance molester and the child and/or family is often made possible by the position of the offender. For example, a child may develop a trusting relationship with the next door neighbor who has spent years fostering a “friendship” with the child and his parents. On the other hand, a child may get into a vehicle alone with a youth pastor whom he barely knows, simply because of the trust he or his family may have for pastors. Oftentimes, the acquaintance molester will exploit his/her position in order to open the door to a successful grooming process.²⁰⁹

2. Authority

Though children may be taught to avoid the attention of strangers, they are generally instructed to “be obedient and affectionate with any adult entrusted with their care.”²¹⁰ As a result, the acquaintance child molester is often in a position to exploit their position of authority in order to access and silence children. This is most common in positions of authority that have substantive exposure with children, such as family friends, teachers, camp counselors, babysitters, coaches, clergy members, pediatricians, law-enforcement officers, and any type of youth worker.²¹¹ A classic example of this dynamic is the abuse perpetrated upon a young Christa Brown by her church youth pastor. In her book, *This Little Light*, Ms. Brown recounts how the

²⁰⁸ SALTER, *supra* note 170, at 42.

²⁰⁹ See *State v. Jacobson*, 930 A.2d 628, 632 (Conn. 2006) (explaining that a youth ice hockey coach ingratiated himself into the victim’s family prior to molestation).

²¹⁰ Summit, *supra* note 194, at 182.

²¹¹ LANNING, *supra* note 167, at 77.

acquaintance molester used his authority as a pastor to manipulate her into submission.²¹² She writes,

Eddie [pastor] always said that God had chosen me for something special. I guess I really wanted to believe that. Doesn't every kid want to think they're special? Besides, who was I to question a man of God? It wasn't my place. My role was to be submissive.²¹³

Not only does authority provide the acquaintance molester with access to the child, but it often can be exploited to maintain the child's silence. In general, direct requests from those in authority have been proven to significantly impact compliance of both adults and children.²¹⁴ More specifically, children often delay or even fail to report sexual abuse, "[b]ecause they are loathe to disobey an authority figure who has ordered silence."²¹⁵ In addition to simply instructing the child to remain silent, acquaintance molesters also employ threats, fear, blackmail, embarrassment, and confusion.²¹⁶

3. Instrumental Physical Force/Threats

The Abel Harlow study found that only 22% of child molesters admitted to any degree of physical restraint or aggression.²¹⁷ There is no doubt that certain acquaintance offenders use physical force to exert sufficient control over the child in order to facilitate the abuse.²¹⁸ However, due to their ability to successfully manipulate issues of trust and authority, physical force is the least used method of acquaintance molesters to establish access and control over

²¹² See generally CHRISTA BROWN, THIS LITTLE LIGHT (2009).

²¹³ *Id.* at 14. See also *People v. Taylor*, 890 N.E.2d 1108 (Ill. App. Ct. 2008) (finding that the defendant exploited his authority as school board chairman to isolate and abuse victim); *State v. Rucker*, 752 N.W.2d 538, 543 (Minn. Ct. App. 2008) (relating that after school co-facilitator was a position of authority was used to molest children).

²¹⁴ Bette L. Bottoms, Gail S. Goodman, Beth M. Schwartz-Kenney & Sherilyn N. Thomas, *Understanding Children's Use of Secrecy in the Context of Eyewitness Reports*, 26 LAW & HUM. BEHAV. no.3, 285, 306 (2002).

²¹⁵ *Id.* at 287.

²¹⁶ LANNING, *supra* note 167, at 58.

²¹⁷ ABEL & HARLOW, *supra* note 5, at 12-13 (since this study did not separate out the three types of molesters, the percentage for acquaintance molesters is likely lower).

²¹⁸ Classic examples of the use of physical force by an acquaintance molester can be found in *People v. Watson*, 281 A.D.2d 691 (N.Y. App. Div. 2001) (finding that the defendant's physical abuse of family members provided created sufficient control to sexually molest 14 or 15 year old) and *Sands v. State*, 662 S.E.2d 374 (Ga. Ct. App. 2008) (reciting the facts that the defendant placed child's hands on his penis and also inserted his penis in her vagina).

victims.²¹⁹ An acquaintance offender who uses physical force to control the child is more likely to be reported to law enforcement and identified by the child who has been victimized.²²⁰ Use or the threat of physical force is most common with acquaintance molesters when the child resists the sexual demands of the offender or expresses intent to disclose the abuse.²²¹

C. Intra-Familial Molester

An intra-familial molester is related to the victim and is someone who usually, but not always, lives in the same house as the victim.²²² Some scholars consider a live-in boyfriend/girlfriend of the child's parent to be classified as an intra-familial molester.²²³ The intra-familial molester is generally considered the largest of the three child molester categories, with one study finding that 68% of the admitted offenders sexually victimized a child within their family.²²⁴ By the nature of the relationship, most intra-familial offenders have fairly trouble-free access to the target child.²²⁵ Because of greater accessibility, intra-familial victims tend to be overall younger than non-familial victims.²²⁶

²¹⁹ LANNING, *supra* note 167, at 9 (noting the exception of acquaintance molestation related to child prostitution). Another exception is that physical force is more commonly used by juvenile sexual offenders. Over one-third of juvenile sex offenses involve some form of physical force. Victor Vieth, *When the Child Abuser is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 HAMLINE L. REV. 47, 51 (2001). Adolescent offenders are also more likely to employ force or threats as a means of keeping the victim silent after the abuse is completed. *Id.* This is often because the “immaturity, lower cognitive ability, and closeness in age to the victim may make it more difficult for the juvenile offender to entice the victim with gifts and desensitization efforts.” *Id.*

²²⁰ *Id.* at 10.

²²¹ See, e.g., *People v. West*, 2008 Cal. App. Unpub. LEXIS 2865, at *4 (Cal. Ct. App. April 7, 2008) (“When J. [child] did not comply with defendant's sexual requests, defendant would yell at J. [child] and get physically violent); *Murphy v. Merzbacher*, 697 A.2d 861 (Md. 1997) (reciting the fact that acquaintance molester threatened each victim with physical violence if they reported the abuse).

²²² Donald G. Fischer & Wendy L. McDonald, *Characteristics of Intrafamilial and Extrafamilial Child Sexual Abuse*, 22 CHILD ABUSE & NEGLECT no.9, 915, 915 (1998).

²²³ LANNING, *supra* note 167, at 9. One court has broadly defined a familial relationship to be one in which there is a “recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian.” *State v. Rawls*, 649 So.2d 1350, 1353 (Fla. 1994).

²²⁴ ABEL & HARLOW, *supra* note 5, at 8. See also David Finkelhor, Gerald Hotaling, I.A. Lewis, & Christine Smith, *supra* note 169, at 21 (Survey found that family members were responsible for perpetrating sexual abuse upon 29% of all minor females who have been sexually victimized. Of those victims, 6% were abused by a father or stepfather).

²²⁵ Biological and step parents usually reside within the same home as the victim, while more distant relatives are often granted access simply because they are a relative. See *State v. Merida*, 960 A.2d 228,

The primary challenge for the intra-familial molester is not access, but the ability to exert sufficient control in order to both perpetrate and silence the abuse. A seemingly greater correlation and interplay exists between the use of trust, authority, and physical force utilized by the intra-familial molester than with the other two categories of molesters. However, for the sake of maintaining consistency, each method will be reviewed separately.

1. Authority

Authority is the primary manner in which many intra-familial molesters maintain long term control over their victims.²²⁷ This control derives from their parental type authority, coupled with the fact that they are often the primary provider for the family's basic mental and physical necessities.²²⁸ For example, the intra-familial molester will often exercise authority over the child through exploiting the fact that he is the family provider, and that disclosing the molestation will have devastating consequences upon the family.²²⁹ This exploitation of authority to perpetrate abuse and silence is often augmented in some degree by the trust a child has in the abuser's role as a caretaker.²³⁰ Furthermore, the intra-familial molester often exercises his authority with older children through the use of physical force and threats.²³¹ The use of the authority by intra-familial molesters is not limited to just caregivers. Any family member is capable of using or attempting to use authority as a mechanism to control the child for the purpose of facilitating abuse. However, when the abuser is not a caregiver, the effectiveness of

231 (R.I. 2008) (being molested repeatedly by her grandfather while she routinely spent weekends with her grandparents).

²²⁶ Fischer & McDonald, *supra* note 222, at 925.

²²⁷ *Id.*

²²⁸ Such basic necessities include food, clothing, shelter, and attention. *See* LANNING, *supra* note 167, at 10.

²²⁹ *See, e.g.*, Ledbetter v. State, 129 P.3d 671, 675 (Nev. 2006) (reciting the facts that the stepfather warned the child victim that if she disclosed the abuse that he would go to prison and that she would be acting selfish and would break up the family).

²³⁰ DIANE MANDT LANGBERG, ON THE THRESHOLD OF HOPE 113 (1999).

²³¹ John B. Murray, *Psychological Profile of Pedophiles and Child Molesters*, 134 J. PSYCHOL. no.2, 211, 214 (2000).

this method will largely depend upon whether the child perceives the intra-familial abuser to have such authority.²³²

2. Trust

The trust a parent or family member has with a child often provides the necessary control to perpetuate long-term abuse.²³³ Intra-familial molesters often subject the child victim to abuse through a distorted combination of authority and trust. When a child is young, his/her knowledge of sexual matters is limited, and he/she often does not appreciate the wrongfulness of the molester's behavior.²³⁴ However, as the child grows older and begins to comprehend the wrongfulness of the abuse, the intra-familial molester often responds by promoting a "trusting" familial relationship hoping to produce confusion and acquiescence by the child. Consequently, the intra-familial molester manipulates and distorts the familial position to secure acceptance and sexual intimacy with the child. This is tragically illustrated by the defendant who took his thirteen year old daughter on a camping trip and told her that "having sexual intercourse with him was the only way she could prove her love for him."²³⁵

Trust is also utilized by intra-familial molesters to keep child victims silent. The survival of children is largely dependent upon a successful attachment between the child and the caregiver.²³⁶ As a result, the child often makes every effort to block out the abuse in order to

²³² See, e.g., *State v. J.M.*, 941 So. 2d. 686, 691 (La. Ct. App. 2006) (during her visit her grandparents, ten year old victim's grandfather "made" her play "Doctor" in the greenhouse and "made" her watch a "dirty movie"); *People v. Wardlaw*, 794 N.Y.S.2d 524, 526 (N.Y. App. Div. 2005) (stating that victim "did as she was told" when molested by her half-uncle).

²³³ Fischer & McDonald, *supra* note 222, at 917 ("Duration of abuse has generally been found to be greater for intrafamilial than extrafamilial sexual abuse. This has been attributed to the greater accessibility of victims in interfamilial cases . . . and the lower likelihood of reporting, or reporting early, sexual abuse in intrafamilial cases.").

²³⁴ Tina B. Goodman-Brown et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT, 525, 526 (2003).

²³⁵ *Soper v. State*, 731 P.2d 587, 588 (Alaska Ct. App. 1987).

²³⁶ Jennifer J. Freyd, *Violations of Power, Adaptive Blindness and Betrayal Trauma Theory*, 7 FEMINISM & PSYCHOL. no.1, 22, 26 (1997).

facilitate a “trusting” attachment to the abusive caregiver.²³⁷ Not only will a child unilaterally maintain silence as a mode of self protection, but he/she will also remain silent if instructed to do so by the intra-familial molester.²³⁸ A relationship based upon loyalty, devotion, and trust will foster “an overwhelming incentive for a child to abide by a parental request to conceal information.”²³⁹

3. Instrumental Physical Force/Threats

Intra-familial offenders use some degree of physical force in approximately 17.9% of molestations against a family member.²⁴⁰ The degree of physical force used by intra-familial molesters is generally minimal with victims up to the age of eleven.²⁴¹ Oftentimes, this is “instrumental force” associated with the offender grabbing, carrying, or confining the child for the purpose of accomplishing the sexual act.²⁴² As the child gets older, the amount of physical force used to perpetrate abuse often increases.²⁴³ This increased force is associated with the offenders need to prevent or discourage any resistance by the child.²⁴⁴ Additionally, as with stranger molesters and acquaintance molesters, intra-familial molesters often use threats to discourage the reporting of abuse.²⁴⁵

²³⁷ Dr. Freyd has also found that the closeness of victim and perpetrator is related to the probability that the child will have some degree of amnesia regarding the childhood sexual abuse. *Id.* at 28.

²³⁸ A 1998 study found intra-familial abusers instruct their victims more often than acquaintance molesters to remain silent about the abuse. See Fischer & McDonald, *supra* note 222, at 928.

²³⁹ Bottoms et al., *supra* 214, at 291.

²⁴⁰ Dubé & Hébert, *supra* 182, at 327.

²⁴¹ Fischer & McDonald, *supra* note 222, at 927.

²⁴² Stermac, Hall & Henskens, *supra* note 185, at 453. For an example of instrumental force, see *State v. Merida*, 960 A.2d 228, 231 (R.I. 2008) (reciting the fact that the defendant “grabbed and held onto” nine year old’s breasts while also touching the inside of her private with his fingers); *Ledbetter v. State*, 129 P.3d 671, 675 (Nev. 2006) (reciting the fact that a six year old woke in pain to find her step-father inserting his fingers inside of her vagina).

²⁴³ Fischer & McDonald, *supra* note 222, at 927.

²⁴⁴ See, e.g., *United States v. Hawpetoss*, 478 F.3d 820, 822 (7th Cir. 2007) (finding that defendant sexually assaulted 14 year old step-daughter at knife-point).

²⁴⁵ In 2004, children were only the direct source of their own referral in 0.5% of all substantiated abuse cases. See Benjamin P. Matthews & Donald C. Bross, *Mandated Reporting is Still a Policy with Reason: Empirical Evidence and Philosophical Grounds*, 32 CHILD ABUSE & NEGLECT no.5, 511, 512 (2008); see, e.g., *Payne v. State*, 674 S.E.2d 298, 299 (Ga. 2009) (reciting the fact that the defendant held down his 11 year old step-daughter and

Trust, authority, and instrumental physical force/threats are common methods used by the three primary categories of child molesters in order to gain access and control of children for the purpose of perpetrating sexual abuse. These methods clearly establish relevant and useful evidence to assist the court in determining whether the defendant's propensity to sexually abuse children is substantially outweighed by unfair prejudice.

V. THE SOLUTION

A. The 403 Propensity Proposal

As has already been articulated, the current manner in which prior sexual misconduct evidence is evaluated under Rule 403²⁴⁶ when offered for propensity purposes, lacks consistency in factors, consistency in application, and consistency in purpose. Common sense dictates that factors be selected based upon their studied ability to demonstrate one's propensity to sexually victimize children. As discussed above, decades of study, research, and court decisions have clearly revealed that trust, authority, and instrumental physical force/threats are common threads of behavior that are utilized by child molesters in gaining access and/or control over children. Therefore, the application of these specific three behavioral methods to a Rule 403 analysis will provide the necessary uniformity of factors, application, and purpose that is currently lacking. I propose that the current method of evaluating prior sexual misconduct propensity evidence under Rule 403 in child sexual abuse cases be replaced by the following approach:²⁴⁷

“threatened her with physical harm”); *State v. Weatherbee*, 762 P.2d 590, 591 (Ariz. Ct. App. 1988) (stating that the defendant threatened to hurt 16 year old daughter with his pistol if she “told anyone about the sexual abuse”).

²⁴⁶ In this section, Rule 403 refers to the balancing test in FRE 403 and the state equivalents. To make sure that this proposal is not limited in any way to application in only federal courts, it is referred to as simply Rule 403.

²⁴⁷ Jurisdictions that have either adopted the lustful disposition exception through judicial precedent or have codified it by statute but have not codified factors to be considered under Rule 403, can simply adopt this proposal by judicial decree.

When evaluating whether the probative value of the defendant's commission of a prior child sexual offense is substantially outweighed by unfair prejudice pursuant to Evidence Rule 403, the trial judge shall consider the following propensity factors:

*A. Whether the prior sexual offense was established by a preponderance of the evidence;
and*

B. Whether the prosecution was able to establish by a preponderance of the evidence one of the following factors:

a. Defendant made use of child's trust or the trust of child's guardian to access or control the child for the purpose of perpetrating the sexual offense; or

b. Defendant made use of authority or perceived authority to access or control the child for the purpose of perpetrating the sexual offense; or

c. Defendant made use of instrumental physical force or threats to access or control the child for the purpose of perpetrating the sexual offense. "Instrumental physical force" is defined as force used to obtain access or control, including but not limited to holding a child down, carrying a child to a specific location, or confining a child. "Instrumental force" is not gratuitous and excessive force used during or immediately preceding the sexual contact.

In addition to establishing the prior bad act by a preponderance of the evidence, this proposal requires the prosecution to introduce additional evidence that demonstrates the defendant's use of one of three "propensity factors" in carrying out the prior bad act.²⁴⁸ Last,

²⁴⁸ The proposal no longer requires a similarity analysis between the prior bad act and the charged offense. The focus of the analysis is the defendant's propensity to sexually victimize children, not the similarity of both offenses.

this proposal does not apply to evidence that is being introduced for reasons other than propensity under Rule 404(b).²⁴⁹

B. Application of The Rule 403 Propensity Proposal

The Rule 403 Propensity Proposal is best explained through its application to the Christopher Smith hypothetical.²⁵⁰ Mr. Smith has been criminally charged with sexually victimizing Kelly Peters when she was between twelve and fourteen years of age. While preparing the case for trial, the prosecution has discovered three witnesses who allege that they were also sexually victimized by Mr. Smith when they were children. The prosecutor wishes to introduce the testimony of these three witnesses to establish Mr. Smith's propensity to sexually victimize children.²⁵¹

The first step in evaluating the admissibility of such prior bad act evidence is the determination whether it is relevant. As mentioned earlier, evidence is deemed relevant if it merely marginally increases the probability of a "consequential fact".²⁵² Since this evidence is being offered for propensity purposes, the "consequential fact" in this case is the propensity for Mr. Smith to sexually victimize a child. Similar to Ms. Peters, all three witnesses allege being sexually victimized by Mr. Smith when they were children. Though the ages, genders, and circumstances of their abuse differ in some degree, the relevancy standard simply requires that the evidence "marginally" increase the purpose for which it is being offered. There is little doubt

²⁴⁹ If there is no evidence to establish that the defendant used one of the three propensity factors, the prosecution remains free to attempt to introduce the prior bad act evidence under Rule 404(b) and its well established Rule 403 analysis framework.

²⁵⁰ In an actual case, many additional facts and circumstances would be known and examined by both parties and the court when evaluating the admissibility of prior bad act propensity evidence. This hypothetical has been kept intentionally simple and short for the sake of application.

²⁵¹ For the purpose of this application, it will be assumed this case is being prosecuted in a jurisdiction that has adopted the "lustful disposition" exception or its statutory equivalent similar to FRE Rule 414.

²⁵² See *supra* notes 70 and 71.

that all three witnesses who allege some form of child sexual abuse at least marginally establish Mr. Smith's propensity to sexually abuse Kelly Peters. Having satisfied the relevancy test for all three witnesses, the central focus of the admissibility analysis becomes Rule 403 and the application of the propensity proposal.

The heart of the Rule 403 analysis is the determination of whether the probative value of the prior bad act propensity evidence is not substantially outweighed by unfair prejudice. Thus, a key factor to keep in mind under the propensity proposal is that there is no need to compare the similarities between the underlying offense and the prior bad act offenses.

1. Testimony of Brian Smith:

Since Brian Smith's testimony related to his abuse is uncontroverted, there is little doubt that subsection (A) would be satisfied and by the court finding that the prior sexual offense was established by a preponderance of the evidence.²⁵³ The court then moves to consider the three propensity factors of the propensity proposal under subsection (B). As Brian's uncle, Christopher Smith could be categorized as an alleged intra-familial molester. The evidence is compelling that the defendant "made use" of Brian Smith's trust and the trust of his parents to gain access and control to perpetrate the sexual abuse. The defendant was a family member who lived next door and was often asked by Brian's parents to watch him when they travelled out of town. This evidence clearly demonstrates that Brian's parents trusted the defendant to watch over and care for their little boy for significant periods of time. Furthermore, it was during those times when the defendant was entrusted with Brian's care that he perpetrated the abuse. Not only did the defendant exploit the trust of Brian's parents, but he also undoubtedly made use of his authority over Brian to facilitate the continued abuse. Brian testified that during the times

²⁵³ There is always the possibility that the witness' testimony could be impeached or severely questioned through cross-examination and/or the testimony of the defendant. At this point there is nothing to suggest that this witness' allegations do not satisfy the relatively low threshold of the preponderance standard.

when he was entrusted into the care of his uncle, the defendant used his position of authority as his temporary guardian to “order” him into the spare bedroom where he was sexually victimized. Last, Brian’s testimony clearly demonstrates that the defendant used threats about never seeing his parents again to control Brian’s silence regarding the abuse. Since the court can easily find that Brian Smith’s testimony satisfies all three factors under the propensity proposal, it is reasonable to conclude that the probative value of such testimony is not substantially outweighed by unfair prejudice and should be admitted.

2. Testimony of Tommy Rickles:

Since Tommy Rickles’ testimony related to his abuse is uncontroverted, there is little doubt that subsection (A) would be satisfied and that the court would find that the prior sexual offense was established by a preponderance of the evidence.²⁵⁴ However, there is little, if any, testimony to satisfy any of the three subsection (B) factors under the propensity proposal. The defendant was merely a stranger who happened to be employed at the same camp that Tommy was attending. As an alleged stranger molester, there is no evidence that the defendant used the trust of Tommy and/or his parents to provide the opportunity to perpetrate the abuse.²⁵⁵ Similarly, as a camp cook, there is no evidence that the defendant had any authority or perceived authority over Tommy or any of the other camp attendees. Furthermore, it is clear that the defendant didn’t even attempt to use authority in order to facilitate the abuse since it was perpetrated during the darkness of night while Tommy was asleep. Last, at no time did the defendant make any threats to Tommy. His testimony is that as soon as he noticed what was happening, he screamed and the defendant immediately escaped through a dorm window without

²⁵⁴ See *supra* note 253.

²⁵⁵ The prosecutor could argue that the defendant consciously chose to work at a camp where parents entrust their children to others for long periods of time. However, this argument is tenuous at best since the defendant was employed as a cook and not a camp counselor. The court would most likely conclude that parents don’t voluntarily place their children into the trust and care of the camp cook.

saying a word. Additionally, there is no evidence that any form of force was used by the defendant to carry out the abuse. He simply woke up in his own bed to discover the defendant touching his penis. Because none of the three propensity factors under the proposal can be established by a preponderance of the evidence, the court will likely exclude the evidence because its probative value is substantially outweighed by its prejudicial effect.²⁵⁶

3. Testimony of Susanna Phillips:

Susanna Phillip's testimony concerning her abuse is uncontroverted. Thus, there is little doubt that subsection (A) will be satisfied and the court will find that the prior sexual offense was established by a preponderance of the evidence.²⁵⁷ Her testimony provides persuasive evidence to satisfy two of the three subsection (B) propensity proposal factors. The defendant was an acquaintance of Susanna's mother and was allowed to move into their apartment where he gained the access and opportunity to sexually victimize Susanna. Susanna's mother undoubtedly trusted the defendant as evidenced by her allowing him to move into the apartment.²⁵⁸ As an acquaintance molester, the defendant used this trust to gain access to Susanna when her mother was asleep in the adjoining room. Susanna's testimony does not indicate that the defendant had any actual or perceived authority over her during the time when he was living at their apartment. The fact that this was a quasi-professional living arrangement demonstrates that the defendant was more like a tenant than a family member. If so, this further demonstrates that the defendant lacked authority over Susanna during his two week stay. Though there is no testimony that the defendant threatened Susanna, she testified that the defendant moved her from the living room couch to her own bed (where he was sleeping) to carry out the abuse. Moving the child in order

²⁵⁶ The prosecution may attempt to introduce this prior bad act testimony under Rule 404(b) and its well established Rule 403 analysis framework.

²⁵⁷ See *supra* note 253.

²⁵⁸ Even though this was a quasi-business arrangement in that the defendant paid rent and furnished his own food, it can be convincingly argued that a certain level of trust is normally required before one allows another to move into one's home.

to perpetrate the sexual abuse clearly constitutes instrumental force as defined under subsection (B)(3) of the propensity proposal. Since two of the three factors under the propensity proposal have been established by a preponderance of the evidence, it is reasonable to conclude that the court will find that the probative value of Susanna Phillip's testimony is not substantially outweighed by unfair prejudice.

Application of the Rule 403 Propensity Proposal to the Christopher Smith case study demonstrates the importance of applying factors that actually relate to one's propensity to sexually victimize children. For example, the testimony of Tommy Rickles would most likely not be admissible under the propensity proposal because it lacked all three factors. This does not mean that Christopher Smith did not abuse Tommy Rickles, it simply indicates that the unfair prejudice of admitting such testimony would outweigh any probative value it has to establish one's propensity to abuse children. On the other hand, the testimonies of both Brian Smith and Susanna Phillips clearly demonstrate the probative value of the propensity evidence because they are based upon factors that are supported by the research and data of known sexual offenders.

VI. CONCLUSION

The admissibility of prior bad act evidence in child sexual abuse prosecutions oftentimes makes the difference between a guilty and not guilty verdict. As jurisdictions have embraced the admission of this evidence for the sole purpose of establishing propensity, it is critical that such evidence be carefully scrutinized under FRE 403. If such game-changing propensity evidence is to be admissible, then courts must insure that it be directly probative of known behavioral patterns of those who sexually victimize children. The Rule 403 Propensity Proposal establishes a relatively simple and consistent method for evaluating the admissibility of such propensity

evidence. More importantly, this proposal applies a fundamental fairness steeped in the knowledge of experts who have spent lifetimes studying the behavioral patterns of those who sexually victimize children. A uniform application of the Rule 403 Propensity Proposal will better insure that prosecutions for these types of crimes will be based upon relevant and probative evidence that directly relates to one's propensity to sexually victimize children. Both defendants and complainants are entitled to nothing less.