RECONSIDERING PENNSYLVANIA'S LUSTFUL DISPOSITION EXCEPTION: WHY THE COMMONWEALTH SHOULD FOLLOW ITS NEIGHBOR IN *GETZ V. DELAWARE*

ZACHARY STIRPARO*

"The oldest and strongest emotion of mankind is fear . . . ."[1]

I. INTRODUCTION: CHARACTER VERSUS ACTIONS

The sexual allegations against Bill Cosby have continued to cause a frenzy in the media.[2] Although, some comics were not surprised.[3] One of the major issues in Cosby's Montgomery County trial is the admissibility of testimony by other women who have stated that Cosby sexually assaulted them.[4] The reason Cosby has not been charged with these other sexual assaults is because the statute of limitations has lapsed for those charges.[5] Commentators assume that Pennsylvania Evidence Rule 404(b), which allows prior crimes in as evidence under various exceptions,[6] will be the prosecution's main argument to allow Cosby's other assaults to be admissible at trial.[7] However, the "lustful disposition exception" in Pennsylvania takes a more liberal approach in allowing evidence of other sexual crimes.[8] The question is which

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[1] H.P Lovecraft, *Supernatural Horror in Literature*, THE H.P. LOVECRAFT ARCHIVE, http://www.hplovecraft.com/writings/texts/essays/shil.aspx.

[2] *See* TV Guide News, *Why No One Should Be Surprised by the Bill Cosby Rape Allegations: A Timeline of His Bad Behavior*, TV GUIDE (Nov. 22, 2014, 6:01 PM), http://www.tvguide.com/news/bill-cosby-rape-allegations-timeline-1089629/ ("There are many who are expressing shock that the imagined family man was capable of sexual assault . . . .").

[3] Michele Barard, *'No One is Surprised,' Comedians Comment on Cosby Rape Allegations*, INQUISITR, http://www.inquisitr.com/1803911/no-one-is-surprised-comedians-comment-on-cosby-rape-allegations/ (last visited Dec. 22, 2016) (noting comedians such as Rosanne Barr, Hannibal Buress, and Patton Oswalt were aware from third parties of "Cosby's issues with women . . . .").

[4] Jeffrey Toobin, *The Central Question in the Bill Cosby Criminal Case*, THE NEW YORKER (Jan. 5, 2016), http://www.newyorker.com/news/daily-comment/the-central-question-in-the-bill-cosby-criminal-case (noting the other crimes are "broadly consistent" with the charged 2004 crime).

[5] Katie Reilly, *Here's What Makes This Accusation Against Bill Cosby Different from Others*, TIME (May 24, 2016), http://time.com/4346387/bill-cosby-andrea-constand-sex-assault-accusation/ (noting that the statute of limitations in Pennsylvania is twelve years).

[6] PA. R. EVID. 404(a)(2)(A), (b).

[7] *See* Toobin, *supra* note 4.

[8] Hon. Jack A. Panella, PENNSYLVANIA CRIMES OF SEXUAL VIOLENCE BENCHBOOK ch. 6, 38-39 (3d. ed. 2015), http://www.pacourts.us/assets/files/setting-3008/file-

exception should be applied to this trial. This question is important because Pennsylvania's lustful disposition exception has become extremely liberal in its allowance of past crimes or acts testimony at trial.[9] According to the law, Cosby is presumed innocent until proven guilty, yet with approximately 50 other women accusing him of sexual assault,[10] it seems unfair to keep this testimony from the jury.

It is this struggle between justice for the victim and fairness to the defendant that underlies the conflicting evidentiary precedents in sexual criminal cases. In the middle of this debate is the liberal standard of Pennsylvania's lustful disposition exception and the original Rule 404(b) exceptions. Because Cosby allegedly followed a specific procedure when he drugged his victims,[11] the testimony of the prior assaults could likely come in under the more stringent Rule 404(b) standard.[12] Nevertheless, even in Cosby's case where the past acts are nearly identical to the present alleged crime, some commentators have discussed their discomfort with allowing the jury to be influenced by past crimes.[13] This discomfort is not unfounded, as juries are extremely susceptible to deciding that a defendant is guilty based on his character.[14] Likewise, neither are appellate court judges immune from the human desire to empathize with the victims of sexual crimes.[15]

723.pdf?cb=01a225. Even Oscar Wilde was confronted with a type of "lustful disposition exception" when, in a criminal libel prosecution involving his lover's father, Wilde was forced to admit his proclivities for men under oath. *See* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 128-29 (1993). Wilde was forced to withdraw his case and was subsequently convicted of sodomy due to his previous testimony. *Id.* at 129.

[9] Wesley M. Oliver, *Bill Cosby, the Lustful Disposition Exception, and the Doctrine of Chances*, 93 WASH. UNIV. L. REV. 1131, 1131 (2016).

[10] *See id.*

[11] Michael McLaughlin, *Here Are the Complete and Creepy Accusations Against Bill Cosby*, THE HUFFINGTON POST (Dec. 30, 2015 8:50 PM), http://www.huffingtonpost.com/entry/complete-accusations-against-billcosby_us_5684423ae4b06fa68881d8d7.

[12] Sherry F. Colb, *Bill Cosby and the Rule Against Character Evidence*, VERDICT (Jan. 15, 2016), https://verdict.justia.com/2016/01/15/bill-cosby-and-the-rule-against-character-evidence.

[13] *Id.*

[14] Jurors are prone to convict a defendant on his or her bad character. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (internal footnotes omitted)).

[15] *See, e.g.*, Wheeler v. State, 135 A.3d 282, 307 (Del. 2016) ("The subject of this prosecution is an unsympathetic figure. And the sexual exploitation of children is a dreadful scourge in our society.").

This issue of whether the prosecution can attempt to place a defendant's character on trial is easier to ignore in trials of sex offenders because they are viewed as having an inherent criminal character.[16] The assumption is that sex offender-defendants must be guilty if they committed any sexual crimes in the past.[17] This belief dates back to ancient times where character evidence was used to "persuade the jury that deciding in [the prosecution's] favor would actually produce a just result."[18] However, the "bedrock principle of American jurisprudence" is that the prosecution must prove the elements of the charged crime beyond a reasonable doubt.[19] That is, the defendant's actions are on trial, not his person. Pennsylvania reinforced these principles when it drafted Pennsylvania Evidence Rule 404, which condemns sentencing a defendant for being a "bad man," unless specific circumstances demand permitting propensity evidence.[20] Nevertheless, Pennsylvania's lustful disposition exception seeks to undermine this separation of a defendant's actions and character.

This article argues that Pennsylvania judges who oversee sexual cases, such as Bill Cosby's case, should evaluate the admissibility of the other sexual acts under Pennsylvania Rule of Evidence 404 and not the overbroad lustful disposition exception that undermines the fairness of the criminal trial by allowing other—often tangential—"bad acts" to be admissible in court.[21] Section II begins by discussing how Pennsylvania's lustful disposition exception evolved from common law, as well as defining the various exceptions to character evidence under Rule 404(b). The section concludes by chronicling the admissibility of prior sexual acts in Pennsylvania from 1895 to 1995. Section III describes the current state of the lustful disposition exception in Pennsylvania by analyzing a Pennsylvania Supreme Court opinion that implicitly applies the exception yet uses Rule 404(b)'s language. Section IV describes the approach that Delaware and Indiana have taken to Rule 404(b) as applied to sexual crime evidence, and offers those states as models for Pennsylvania. Section V provides a brief conclusion.

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[16] *See* Mark Davis, *A Violent Sex Offender Is Released into the Public Spotlight*, SEVEN DAYS (Apr. 22, 2015), http://www.sevendaysvt.com/vermont/a-violent-sex-offender-is-released-into-the-public-spotlight/Content?oid=2557402 (noting how sex offenders are "hate[d]").

[17] Jeffrey Omar Usman, *Ancient and Modern Character Evidence: How Character Evidence Was Used in Ancient Athenian Trials, Its Uses in the United States, and What This Means for How These Democratic Societies Understand the Role of Jurors*, 33 OKLA. CITY U. L. REV. 1, 14 (2008). This belief is based in the "consistency of behavior," which dates back to ancient Athenian society. *Id*.

[18] *Id.* at 28.

[19] *See id.* at 29; *see also id*. at 30 ("By its nature, character evidence almost invites the jury to make assessments of a party's worth as a person, rather than focusing on the particular circumstances of a given case.").

[20] PA. R. EVID. 404(b)(2).

[21] *See infra* Parts III, IV.

II. BACKGROUND: THE EVOLUTION OF THE LUSTFUL DISPOSITION EXCEPTION

A. The Exception's Common-Law Roots

The lustful disposition exception dates back to the beginning of American courts.[22] These "[e]arly American courts" allowed the exception because of their roots in "English ecclesiastical law . . . ."[23] There was no prohibition against allowing propensity evidence in ecclesiastical courts.[24] These courts did not always align with English criminal common law, as the former was concerned with "morality of duty."[25] This morality was based on biblical morals and "Puritan values."[26]

The United States Supreme Court has reiterated again and again that religion cannot influence the law.[27] And religious morals should certainly not influence the law on evidence, unless there is a reason for society to validate such intrusion.[28] Furthermore, these "church courts" were stated to have "faulty [procedures] as to evidence and judgment . . . ."[29] Additionally, these courts allowed evidence that the victim had a history of consenting to sexual encounters with other men.[30]

Conversely, current rape shield laws do not allow a victim to be shamed into remaining silent and failing to report a crime.[31] Phrased differently, disrupting the logical cohesion of the evidence rules should be defeated only in the narrowest circumstances. The exceptions set out in Pennsylvania Rules of Evidence 404(b)[32] are sufficient to ensure justice while

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[22] Michael Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 AM. CRIM. L. REV. 321, 338-39 (2015).

[23] *Id.* at 339.

[24] *Id.*

[25] Morgan Stevenson Bragg, Note, *Victimless Sex Crimes: To the Devil, Not the Dungeon*, 25 U. FLA. L. REV. 139, 142 (1972) (internal quotation marks omitted).

[26] *Id.*

[27] *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (importing Jefferson's words to the Danbury Baptist Association that there must be "a wall of separation between church and State").

[28] Bragg, *supra* note 25, at 143-44 (discussing the influence of morals on criminalizing certain sexual acts between consenting adults).

[29] Joseph Fletcher, *Sex Offenses: An Ethical View*, 25 LAW & CONTEMP. PROBS. 244, 247 (1960).

[30] Smith, *supra* note 22, at 341.

[31] *Id.* at 341-42.

[32] PA. R. EVID. 404(a)(2)(A)-(C) ("(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; (B) subject to limitations imposed by statute a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant's same trait; and (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.").

counteracting the substantial similarity of former crimes that may be confronted in a sex crime case. Comparatively, a laissez faire approach that allows defendants to be prejudiced by remote past crimes or acts is not fairness.

Pennsylvania has not codified its lustful disposition exception,[33] but neither did Pennsylvania adopt the federal codification, Federal Rules of Evidence 413 and 414, which expanded the exception to all prior or subsequent sexual crimes.[34] However, Pennsylvania courts have accepted their own lustful disposition exception "de facto."[35] The definition of lustful is obvious, as it means "feeling or showing strong sexual desire."[36] And "disposition" is defined as "a tendency to act or think in a particular way."[37] *Black's Law Dictionary* defines a person's disposition as "[t]emperament or character; personal makeup."[38] Pennsylvania's lustful disposition exception has been framed as follows:

> In general, evidence of other wrongful conduct not charged in the information on which the defendant is being tried is inadmissible at trial except in certain limited circumstances. One such exception arises in the prosecution of sexual offenses. *Evidence of prior sexual relations between defendant and his or her victim is admissible to show a passion or propensity for illicit sexual relations with the victim.* This exception is limited, however. *The evidence is admissible only when the prior act involves the same victim*

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[33] *See* Commonwealth v. Wattley, 880 A.2d 682, 688-89 (Pa. Super. Ct. 2005) (McEwen, J., dissenting) ("As did the trial court, the Majority relies upon the decision of this Court in *Commonwealth v. Knowles*, 431 Pa.Super. 574, 637 A.2d 331 (1994), wherein a panel of this Court held that '[e]vidence of prior sexual relations between defendant and his or her victim is admissible to show a passion or propensity for illicit sexual relations with the victim.' This exception to the general rule of exclusion of 'bad acts' evidence has been designated as the 'lustful disposition exception.' It merits mention, however, that the *Knowles* decision of this Court has not been cited as authority in Pennsylvania during the eleven years since its 1994 publication. One possible explanation for that lack of echo is the intervening adoption in 1998 by the Pennsylvania Supreme Court of comprehensive Rules of Evidence, in which the Supreme Court, contrary to the approach taken in the Federal Rules of Evidence and by this Court in *Knowles*, chose not to incorporate the lustful disposition exception into the body of law of Pennsylvania evidence. *The result of the ruling of the Majority, however, effectively accomplishes that incorporation*, and, as purposeful and as wise such a holding may be, it is my view that it remains for the Supreme Court to formally amend the Rules or to create a judicial exception to the Rules." (emphasis added) (citations omitted)).

[34] Panella, *supra* note 8, at ch. 6, 39.

[35] Oliver, *supra* note 9, at 1141.

[36] MERRIAM-WEBSTER, *Lustful*, http://www.merriam-webster.com/dictionary/lustful (last visited Mar. 23, 2016).

[37] MERRIAM-WEBSTER, *Disposition*, http://www.merriam-webster.com/dictionary/disposition (last visited Mar. 23, 2016).

[38] *Disposition*, BLACK'S LAW DICTIONARY 539 (9th ed. 2009).

> *and the two acts are sufficiently connected to suggest a continuing course of conduct.* The admissibility of the evidence is not affected by the fact that the prior incidents occurred outside of the statute of limitations.[39]

The exception has been expanded to include subsequent offenses, even though the Pennsylvania Superior Court has noted that offenses which occurred later are "less probative of intent than evidence of a prior offense . . . ."[40]

Scholar Ohlbaum, in his study of the Pennsylvania Rules of Evidence, has stated that categorizing the cases on sexual crimes is "difficult."[41] Categorization is difficult because courts often do not offer the rationale for why they are allowing other sexual crime evidence.[42] And the courts often allow other evidence under the "'common plan, scheme, or design'" exception of Pennsylvania Rule of Evidence 404(b), despite the evidence not fitting that exception's tenets.[43] The courts are thus only paying lip service to the idea that a defendant should not be sentenced to jail for his propensity.[44] The following sections are an attempt at historical categorization.

B. Pennsylvania Evidence Rule 404

1. Common Law & Rule 404(b)'s Adoption

In 1981, before any rules of evidence were adopted in Pennsylvania, the Pennsylvania Supreme Court stated:

> It is a principle of long standing in this Commonwealth that evidence of a distinct crime, except under special circumstances, is inadmissible against a defendant who is being tried for another crime because the commission of one

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[39] Commonwealth v. Knowles, 637 A.2d 331, 333 (Pa. Super. Ct. 1994) (emphasis added) (citations omitted).

[40] Commonwealth v. Wattley, 880 A.2d 682, 687 (Pa. Super. Ct. 2005) (quoting Commonwealth v. Collins, 703 A.2d 418, 423 (Pa. 1997)).

[41] EDWARD D. OHLBAUM, OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE § 404.22 (2016).

[42] *See id.* For example, the Superior Court in *Wattley* noted that res gestae, "or complete history," was important where the defendant pled guilty in an earlier Texas case to indecency with a child (charged in 1996 with sexual abuse of his minor daughter), as the Superior Court allowed it as evidence of the defendant's subsequent sexual acts from 1989 to 1995. *Wattley*, 880 A.2d at 687 (quoting Commonwealth v. Dillon, 863 A.2d 597, 601 (Pa. Super. Ct. 2004)); *but see* Chris Blair, *Let's Say Good-Bye to Res Gestae*, 33 TULSA L. J. 349, 349 (1997) (arguing that res gestae has "outlived any usefulness it ever had").

[43] *See* OHLBAUM, *supra* note 41, at § 404.22.

[44] *See id.*

> crime is not proof of the commission of another, and the effect of such evidence is to create prejudice against the defendant in the jury's mind.[45]

The Pennsylvania Supreme Court noted the "special circumstances" and summarized the allowable uses of character evidence:

> The general rule, however, allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. Thus, although the law does not allow use of evidence which tends solely to prove that the accused has a "criminal disposition," evidence of other crimes is admissible for certain purposes if the probative worth of this evidence outweighs the tendency to prejudice the jury.[46]

In reiterating the precedent in 1989, the Pennsylvania Supreme Court added the following exceptions:

> (6) to impeach the credibility of a defendant who testifies in his trial; (7) situations where defendant's prior criminal history had been used by him to threaten or intimidate the victim; (8) situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called "res gestae" exception).[47]

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[45] Commonwealth v. Morris, 425 A.2d 715, 720 (Pa. 1981).

[46] *Id.* (internal citations omitted). The five exceptions date back before 1955. Commonwealth v. Wable, 114 A.2d 334, 336-37 (Pa. 1955) ("But it is also true that sometimes there exist the 'special circumstances' which operate as exceptions to the general rule, and bring the case within the equally well established principle that evidence of other crimes *is* admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the crime on trial,—in other words where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.").

[47] Commonwealth v. Billa, 555 A.2d 835, 840 (Pa. 1989) (citations omitted).

The court noted in summation that a trial court was vested with the "sound discretion" to determine evidence admissibility, and that the court should "balance the relevancy and evidentiary need for the evidence of distinct crimes against the potential for undue prejudice."[48]

In 1998, the Pennsylvania Supreme Court adopted the Pennsylvania Rules of Evidence.[49] The court specifically did not incorporate the federal lustful disposition exception, which is recognized in Federal Rules of Evidence 413 and 414.[50] Pennsylvania Rule of Evidence 404(a) states, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[51] Pennsylvania Evidence Rule 404(b)(1)-(2) states,

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.[52]

Admissibility is determined by Rules 401 and 402. These rules are the minimum threshold for determining admissibility and state that "[a]ll relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible."[53] Additionally, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[54]

Pennsylvania also adopted a check for Rule 404 in Rule 403. Pennsylvania Rule of Evidence 403 states, "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[55] Vitally, the Pennsylvania legislature stated in the comment to Rule 403 that the rule "differs from [Federal Rule of Evidence] 403. The Federal Rule

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[48] *Billa*, 555 A.2d at 840 (citations omitted).
[49] Panella, *supra* note 8, at ch. 6, 39.
[50] *Id.* at 39-41.
[51] PA. R. EVID. 404(a)(1).
[52] PA. R. EVID. 404(b)(1)-(2).
[53] PA. R. EVID. 402.
[54] PA. R. EVID. 401(a)-(b).
[55] PA. R. EVID. 403.

provides that relevant evidence may be excluded if its probative value is 'substantially outweighed.' [Pennsylvania Rule of Evidence] 403 eliminates the word 'substantially' to conform the text of the rule more closely to Pennsylvania law."[56]

2. Rule 404(b) Exceptions

The Rule 404(b) exception to prove identity is limited to proving that another crime was executed "nearly identical in method as to earmark [the crimes] as the handiwork of the accused."[57] This exception is not proven when the first crime is the same type of crime, as in two sexual assaults.[58] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature."[59] The two crimes must show "such a high correlation in the details of the crimes that . . . makes it very unlikely that anyone else committed [the crimes]."[60] The courts are required to evaluate the similarity in "time," "geographic distance," and "resemblance . . . [in] the methodologies of the two crimes."[61]

For example, the Pennsylvania Supreme Court held that a victim's testimony describing how she survived the defendant's attacks was admissible when the defendant's "signature" was to break into women's homes, rape them, and then murder them.[62] Over a year, the defendant attacked four women and was caught when he returned to kill his third victim.[63] Another example was where:

> In both cases the intruder gained non-forcible entry, ostensibly by ringing the doorbell. Both victims were neighbors of the appellant and had only recently been introduced to him. Both were attacked while alone in their third floor bedrooms in apartment buildings where appellant resided on the first floor. The victims, both of whom were black, female, and relatively young, had their underclothing or nightclothes pulled from them. Both were then physically restrained and attacked with knives obtained from their own apartments. The assailant repeatedly stabbed both victims until death (or, in the 1979 attack, apparent death) occurred. Mrs. Hands was stabbed more than fifty times, and the

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[56] PA. R.EVID. 403 cmt. (quoting Commonwealth v. Boyle, 447 A.2d 250 (Pa. 1982)).
[57] 27 STANDARD PA. PRACTICE 2d § 135:234 (2016).
[58] *Id.*
[59] *Id*.
[60] *Id.*
[61] *Id.*
[62] Commonwealth v. Robinson, 864 A.2d 460, 497 (Pa. 2004).
[63] *Id.* at 471-75.

> victim of the previous attack was stabbed eight times. In each case the apartment was ransacked, yet the only valuables taken were small items from the bedroom, i.e., coins, watches, etc. In each case the perpetrator cleaned the borrowed knife and left it at the scene of the crime.[64]

The court distinguished the situation from one where the elements of the crime were the only similarities.[65]

The common scheme, plan, or design exception is also implicated when "the commission of two or more crimes [is] so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the crime on trial . . . ."[66] Like identity, the common scheme exception does not allow the same crime to prove a common scheme, but there must be "something unusual or distinctive, like a signature" linking both crimes.[67] This exception is very specific, such as "coded language" used in drug transactions (and in prison phone calls).[68] Another example is a defendant who physically attacked his girlfriends when they tried to leave him or talk with other men; the defendant attacked his girlfriends' faces if they were with or looked at other men, stalked his girlfriends, and threatened to hurt their families or male friends.[69]

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[64] Commonwealth v. Rush, 646 A.2d 557, 561 (Pa. 1994).

[65] *Id.*

[66] 27 STANDARD PA. PRACTICE 2d § 135:235 (2016).

[67] *Id.*

[68] Commonwealth v. Kinard, 95 A.3d 279, 281-83, 285 (Pa. Super. Ct. 2014) (defendant convicted for possession with the intent to deliver and conspiracy); *cf.* Commonwealth v. Semenza, 127 A.3d 1, 8, 11 (Pa. Super. Ct. 2015) (holding that the defendant's subsequent sexual relationship with a subordinate did not fit within the common scheme exception because the only similarities were that the defendant was older than both victims, hired both victims, and was their boss in two different job descriptions). The Superior Court notes that these similarities are "commonplace in many, and perhaps most, sexual harassment cases . . . ." *Semenza*, 127 A.3d at 11. Confusingly, what the court deems necessary to make the incidents a common scheme are elements in the corruption of a minor charge that the defendant was charged with, such as: if both had been minors, if the sexual contact had been more similar, if the relationships had been more similar, and the retaliation had been more similar. *Id.* at 3, 11-12 (also rejecting the Commonwealth's counterargument that both were "young Caucasian females," at work more than they needed to be, and the activity was based on "workplace or work-related activities").

[69] Commonwealth v. Arrington, 86 A.3d 831, 842-44 (Pa. 2014); *cf.* Commonwealth v. Tyson, 119 A.3d 353, 356, 360 (Pa. Super. Ct. 2015) (finding a common scheme or plan based on a prior rape in Delaware where the defendant knew the victim and was invited as a guest to help take care of the victim, and the victim awoke to find the defendant having vaginal intercourse with her). Although the Superior Court noted in *Tyson* that its facts were not "common to many sexual assault cases," this was not the question. *Tyson*, 119 A.3d at 360. The court seems to imply that each crime has a stereotypical procedure and outcome such that the "same crime" cannot be indicated by similar facts. *Id.* However, this is not true. If two rapes occur in the victims' houses, the victims knew the defendant, and the victims were more susceptible, those are similar sexual assaults, but no scheme or plan is established. If the facts

Under the motive or intent exception, "the evidence must give sufficient grounds for the belief that the crime currently being considered grew out of or was in some way caused by the prior set of facts and circumstances . . . ."[70] "[T]here must be a logical connection between the prior incident and the crime for which the accused is being tried."[71] Similar to the other exceptions, motive or intent evidence must be more probative than prejudicial.[72] This exception, however, is not implicated when a defendant simply denies doing the act; the defendant must assert a "defense of accident, mistake, or lack of required intent" for this exception to be applicable.[73] For example, a defendant's own admission, "I'm giving Samantha something she'll remember," was properly admissible to show motive where the defendant brutally attacked and viciously killed the victim's two brothers and her son's father who was visiting the victim's home, where the defendant also lived.[74] The evidence of the defendant's brutal attacks were not introduced to show that he committed prior crimes.[75]

Additionally, the *res gestae* exception[76] is not a type of lustful disposition equivalent, but was intended to elucidate the "natural development of the events" that lead to the offense and defendant being charged.[77] The exception is supposed to "'tell the complete story'" of the case, but only in reference to "when the bad acts are part of the same transaction involving the charged crime . . . ."[78] Thus, it is an exception that is focused on the facts of the specific case so the jury can understand its progression.[79] For example, the

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were slightly altered to show a defendant who knew the victims from class, they invited him or her over to work on a school project, the defendant slipped them a drug, and they woke up to him having sexual intercourse, there would be a better argument for a scheme. But a common scheme cannot be argued when the crimes are similar of their own accord but the defendant did not have a hand in furthering the events, as shown in the scenario above.

[70] 27 STANDARD PA. PRACTICE 2d § 135:236 (2016).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Commonwealth v. Rushing, 71 A.3d 939, 945-46, 971 (Pa. Super. Ct. 2013) (internal quotation marks omitted), *rev'd on other grounds*, 99 A.3d 416 (Pa. 2014); *see also* Commonwealth v. Ferguson, 107 A.3d 206, 211 (Pa. Super. Ct. 2015) (allowing a defendant's statement of intent, "I told you I was going to effing kill you").

[75] *Rushing*, 71 A.3d at 971.

[76] There is also the mistake exception, which can be admitted to negate the defendant's argument that the events happened accidentally, but the prosecutor "must show that the previous incidents are similar to the incident in question and that a similar result was obtained in both cases." 27 STANDARD PA. PRACTICE 2d § 135:237 (2016); *see also* Commonwealth v. Smith, 675 A.2d 1221, 1229 (Pa. 1996) (finding that testimony describing a defendant who was physically abusive in the past to an infant was relevant to show that severe injuries to a five-month-old child were not accidental). Yet, this exception does not appear to arise in sexual trials often.

[77] Panella, *supra* note 8, at ch. 7, 41.

[78] 27 STANDARD PA. PRACTICE 2d § 135:241 (2016).

[79] *See id.*

Pennsylvania Supreme Court allowed testimony of a rape victim who the defendant threatened to kill in a fashion similar to the murder victim he was charged with killing in the present case.[80] Yet, the Superior Court did not allow the exception to be used to bring in prior bad acts that were based on charges that had been dropped, as the bad acts did not add any insight into the current case's history.[81]

C. The History of Admissible Prior Sexual Incident Evidence in Pennsylvania: 1895-1995

The following is an overview of Pennsylvania common law and its allowance of additional sexual acts in criminal trials. Focus is given to Pennsylvania Supreme Court cases. However, Pennsylvania Superior Court cases were included where necessary. This overview is not intended to be an exhaustive examination, but rather a broad view of Pennsylvania courts' interpretation of prior bad acts in sexual crime cases.

In the late 1800s, the Pennsylvania Supreme Court held that a defendant's prior acts of sexual intercourse with his daughter were admissible in a case involving incest.[82] The court also allowed evidence that the defendant prevented his daughter from going to church or meeting with friends because it demonstrated that he was keeping his daughter close "in furtherance of his incestuous purpose."[83] The court adopted the analysis of the Indiana Supreme Court, which allowed strong evidence showing past sexual conduct.[84]

In 1925, the Superior Court refused to allow the prosecution to introduce as propensity evidence testimony from two children that the defendant tried to entice them into his car, which supported the victims' testimony that the defendant sexually assaulted them.[85] In 1927, the Pennsylvania Supreme Court had the chance to formulate through dicta the beginning tenets of the

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[80] Commonwealth v. Simmons, 662 A.2d 621, 635 (Pa. 1995).

[81] Commonwealth v. Brown, 52 A.3d 320, 332-33 (Pa. Super. Ct. 2012) (noting a time gap from 1984 to 2002 was damning to a claim of *res gestae*, as the exception is based on the "natural part of the history, chain, or sequence of events" of the present case).

[82] Commonwealth v. Bell, 31 A. 123, 123-24 (Pa. 1895).

[83] *Id.* at 124.

[84] *Id.* at 123 (quoting State v. Markins, 95 Ind. 464, 465 (Ind. 1884), *abrogated by* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992)). Interestingly, the Indiana Supreme Court later reversed itself and held that Federal Rule of Evidence 404 should be applied to all crimes, and that the "depraved sexual instinct exception" should be extinguished because it was too liberally applied in sex crime cases. *Lannan*, 600 N.E.2d at 1337-38. Ironically, Congress, "believing, in effect, that it was Indiana that had the better rule, reformed its own law, leaving Indiana once again at odds with the Federal Rules of Evidence." Ellen H. Meilaender, Note, *Revisiting Indiana's Rule of Evidence 404(b) and the* Lannan *Decision in Light of Federal Rules of Evidence*, 75 IND. L.J. 1103, 1103-04 (2000) (noting the irony in Indiana changing its rules to follow the Federal Rules of Evidence).

[85] Commonwealth v. Lipschutz, 89 Pa. Super. 142, 144-46 (Pa. Super. Ct. 1925).

lustful disposition exception in Pennsylvania: "[w]e think it can not logically be contended that it would not be relevant where the charge was rape to show that just prior to the commission of that crime the prisoner had attempted to ravish another woman."[86] The court accepted the prosecution's argument that the defendant's murders of the two victims were related to his "unsuccessfully solicit[ing]" two of the victims' older brothers to have sex with him.[87]

In 1949 and with blatant circularity, the court rationalized that a defendant who committed sexual offenses was "likely" to have had a "plan or design" to do so, and thus his other acts would fall under the exception because the law was more "liberal" in allowing such evidence for sexual crimes.[88] Disturbing, but unsurprisingly, the court stated:

> The fact that A, who is being tried for the murder of Y, was one time convicted of murdering X, has no probative value to prove A guilty of murdering Y, if the two murders were in no way related. On the other hand, if A is being tried for the rape or attempted rape of Y the fact that recently he raped or attempted to rape X is admissible in evidence because it tends to prove that he possessed such an abnormal mental or moral nature as would likely lead him to commit the offence charged.[89]

The court held that testimony that the defendant was naked when he stood in front of a neighboring home's back porch was relevant to support his daughter's testimony that he had raped her when she was fifteen.[90] The court stated, "[w]ithout this testimony of [the defendant's] aberrant conduct at the time fixed the jury might be reluctant to believe that he committed the

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[86] Commonwealth v. Winter, 137 A. 261, 264 (Pa. 1927).

[87] *Id.* at 262, 263-64.

[88] Commonwealth v. Kline, 65 A.2d 348, 351-52 (Pa. 1949), *overruled by* Commonwealth v. Shively, 424 A.2d 1257 (Pa. 1981).

[89] *Id.* at 352 ("'Human nature constitutes a part of the evidence in every case. We more easily believe that a person has done what we would have expected under the circumstances, and we require a greater degree of evidence to satisfy us that a person has done something which would be unnatural or improbable.'" (quoting Greene v. Harris, 11 R.I. 5, 17 (R.I. 1877))). The Superior Court did follow by example. *See, e.g.*, Commonwealth v. Ransom, 82 A.2d 547, 550 (Pa. Super. Ct. 1951) (noting the "authority" of *Kline* and stating that "[w]here the charge is rape, the committing of a single previous rape or rape attempt upon another woman may, with other circumstances, give strong indication of a design (not a disposition) to rape"). The court did not use the term "disposition," but its analysis was anything but, stating, "[a]lthough such evidence may not be admissible to show a lustful disposition generally, it is admissible to show a design—a plan formed in the mind—upon the part of a defendant to commit rape . . . ." *Id.*

[90] *Kline*, 65 A.2d at 348-49 (noting that the neighboring homes were fifty feet from each other's back porches).

unnatural act with which he is charged."[91] The tenet of innocent until proven guilty was non-existent—Justices Stern and Stearne dissented.[92]

In 1955, in *Commonwealth v. Boulden*, the Superior Court revisited *Commonwealth v. Kline* and its 1949 ideologies, noted various inconsistencies in its reasoning, and limited *Kline* to its facts.[93] In *Boulden*, two seven-year-old girls claimed that they were molested by the fifty-three-year-old defendant in his automobile mechanic garage when they went in to get a drink of water.[94] He had molested them in the garage's "wheel alignment pit" after sitting them on a cart in his garage and then on his lap while he sat on the cart.[95] The Commonwealth then called a twelve-year-old witness at the end of its case, who testified that the defendant had "suggested she take a ride on the cart" when she went into the defendant's garage to get a drink of water.[96] After she got off the cart, the defendant then sat down on the cart and asked her to join him, but she declined and left.[97]

The *Boulden* court refused to allow the second witness's testimony to show that the defendant was "the type of individual" who would commit these sexual acts on children.[98] While noting that the courts were very liberal in their allowance of previous sexual acts evidence, the court decried the separation of crimes into sexual and non-sexual crimes for evidence purposes.[99] The court quipped, "there is a grave question whether the distinction as frequently applied is not the result of an emotional rather than a logical approach . . . ."[100] The court questioned the reliance on recidivism as a justifiable reason, as it may prejudice jurors against the defendants.[101]

The Pennsylvania Supreme Court "explicitly overrule[d]" *Kline* in 1981 and held that "sexual and non-sexual crimes must be treated alike in deciding whether evidence of prior criminal activity should be admitted."[102]

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[91] *Kline*, 65 A.2d at 352.

[92] *See id.* at 353.

[93] 116 A.2d 867, 875-76 (Pa. Super. Ct. 1955) (noting that *Kline*'s rationale for exception was "not clear" and limiting the case to incidents occurring on the same day or within a week).

[94] *Id.* at 868.

[95] *Id.*

[96] *Id.*

[97] *Id*.

[98] *Id.* at 872 (internal quotation marks omitted). The court did not believe that the testimony fell under any other exception, as even "state of mind" was excluded because there was a gap of a year between the two incidents. *Id.* at 873 (internal quotation marks omitted).

[99] *Boulden*, 116 A.2d at 872-876 ("The one principal that stands above the 'hopeless confusion'—the one which the courts have almost without exception accepted, approved and applied both in this jurisdiction and in others, —is that evidence that accused committed other crimes, even if they were of like nature to that charged, is not admissible to show his depravity or criminal propensities or the resultant likelihood of his committing the offense charged." (citation omitted)).

[100] *Id.* at 873.

[101] *Id.* at 873-74. The court even denounced the "classification" of "sex offenders." *Id.* at 874-75.

[102] Commonwealth v. Shivley, 424 A.2d 1257, 1259-60 (Pa. 1981).

Commonwealth v. Shivley involved a defendant who, while driving, followed the twenty-year-old victim in her car, made her pull over, kidnapped her, and then drove her to a location to sexually assault her.[103] At trial, the prosecutor introduced evidence that the defendant had pled guilty to sodomy for forcing a twenty-year-old girl into his car and assaulting her at a separate location.[104] The court held that even if the amount of time the defendant spent in prison was subtracted from the three-and-one-half year time difference between the two crimes, resulting in a seven-month gap, the span of time was still too attenuated.[105] The court did not accept an argument under the identity exception because of dissimilarity between the two crimes, and thus dismissed the Commonwealth's reliance on *Kline*.[106]

Because the *Shivley* opinion was a plurality, with two judges joining the opinion's result and two dissenting, the Pennsylvania Superior Court deemed the overruling of *Kline* dicta.[107] *Commonwealth v. Powers* involved a victim whom the defendant sexually abused over the course of approximately three years.[108] Evidence that the defendant showed one of his grandchildren an "x-rated video," which occurred two years later, was found relevant as "part of a pattern of sexual abuse . . . ."[109] Judge Del Sole dissented and noted that other cases, beyond *Shivley*, limited *Kline*.[110] Judge Del Sole lamented the hazy relevance; the two-year time gap made the evidence more prejudicial than probative.[111]

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[103] *Shivley*, 424 A.2d at 1258.

[104] *Id.* (noting that the defendant had an alibi witness for the present case, his mother, who said that he was at home the entire day).

[105] *Id.* at 1259 (noting that it would not address whether prison time should always be subtracted).

[106] *Id.* at 1259-60. Justices Larsen and Kauffman dissented, arguing that the crimes were "sufficiently similar" and the time gap "sufficiently small." *Id.* at 1260 (Larsen, J., dissenting) ("Six day[s] after appellee's release from prison where he was serving a three year term for forcible sodomy, he is again accused of forcibly raping and sodomizing another young girl. Both victims were approximately 20 years of age; both victims were in or entering their automobiles at the time they were approached by the perpetrator; both victims were forced with deadly weapons to accompany the assailant to a secluded country area; and both victims were ordered to assume crouching positions (one kneeling on all fours and one leaning over the front seat of an automobile) which exposed their gen[i]talia from the rear for the assailant.").

[107] Commonwealth. v. Powers, 577 A.2d 194, 197 n.1 (Pa. Super. Ct. 1990).

[108] *Id.* at 195.

[109] *Id.* at 196-97 (noting that the defendant "opened the door" when he testified that he had not shown any x-rated videos to his grandchildren). The court then compared the rebuttal evidence that involved the same conduct as testified to by the defendant. *Id.* at 197.

[110] *Id.* at 199 (Del Sole, J., dissenting) (citing Commonwealth v. Bradley, 364 A.2d 944, 947 (Pa. Super. Ct. 1976)).

[111] *Id.* at 199-200. In 1985, the court relied on McCormick to expound on Pennsylvania's lustful disposition exception. Commonwealth v. Claypool, 495 A.2d 176, 179 n.2 (Pa. 1985) (citing MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 449, 451 (E. Cleary 2d ed. 1972)). The legal issue diverges slightly from the scope of this article, as the court was contemplating whether the victim could counter the defendant's argument that the sex was

In 1992, three cases shifted the framework of admissibility and propensity evidence of sexual acts. In January, the Pennsylvania Supreme Court decided *Commonwealth v. Dunkle* and developed Pennsylvania's lustful disposition exception by allowing prior sexual acts to show the defendant's "continuing and escalating nature."[112] The court did not hold that the defendant "had to engage in the same, exact sexual misconduct for which he was charged in order for the testimony to be admissible."[113] In June, the court vacated a judgment of sentence again, noting the trial court's disregard for its previous ruling.[114] The court held that while both crimes do not have to "be identical," the exception of common scheme required defendant's "signature," which was not present in the distinct case of burglary and sexual assault.[115]

In September, the court reversed the Superior Court when it allowed the defendant's convictions two years earlier for indecent assault and endangering the welfare of children into trial to prove his present convictions of rape, involuntary deviate sexual intercourse, corruption of a minor, indecent assault, and endangering the welfare of children.[116] The Superior Court believed that the older convictions were relevant to satisfy the motive exception, which showed that he "intended to sexually assault the instant victim."[117] The Supreme Court pointed out that this was not the proper use of the motive exception, as every defendant who sexually assaults the victim intends to "sexually assault" the victim.[118] Furthermore, the court noted that the "motive of receiving sexual gratification from young girls in the six and

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consensual, and whether the victim could testify about statements that the defendant made to her during the rape that he would kill anyone she alerted because he would not go back to jail. *Id.* at 177-79. The victim testified that the defendant told her that he had been in jail for a rape in which he "and another fellow were at his cousin's house and they had been drinking and they tied up his cousin and then they took the cousin's wife upstairs." *Id.* at 177. The trial court specifically addressed the jury and told them that this testimony was only to be considered as to the element of consent and not for propensity. *Claypool*, 495 A.2d at 178 n.1. The court expanded the exceptions in Rule 404(b):

> We hold, therefore, that when there is evidence that a statement about prior criminal activity was made by the defendant in order to threaten and intimidate his victim, and when force or threat of harm is an element of the crime for which the defendant is being tried, such evidence is admissible.

Id. at 179 (noting a "cautionary instruction" was needed to prevent "potential for misunderstanding on the part of the jury when this type of evidence is admitted").

[112] Commonwealth v. Dunkle, 602 A.2d 830, 831, 839 (Pa. 1992) (citing MCCORMICK, EVIDENCE § 190, at 449) (escalating from peeping in on the victim showering to "fondl[ing]" the victim's chest while she feigned sleep).

[113] *Id.* at 839.

[114] Commonwealth v. Bryant, 611 A.2d 703, 704 (Pa. 1992).

[115] *Id.* at 706.

[116] Commonwealth v. Seiders, 614 A.2d 689, 690-92 (Pa. 1992).

[117] *Id.* at 691 (internal quotation marks omitted).

[118] *Id.* (pointing out that the defendant never claimed that the touching was accidental).

seven year age range" was a "common motive," but was not specific enough.[119]

In 1995, the court allowed evidence in a 1990 murder trial that the defendant had previously been convicted in 1982 for the rape and attempted murder of two women in the same "remote wooded area" as the murder victim, Kathy Fair.[120] Both incidents involved the use of a "short" knife.[121] While the court attempted to bolster the connection by comparing the two crimes, no connection was readily apparent:

> Kathy Fair was twenty-two (22) years old when she disappeared, and the two victims of the 1982 rape-assault were fifteen (15) and nineteen (19) years old. Kathy Fair was a Caucasian woman, and the two victims of the 1982 rape-assaults are Caucasian women. Kathy Fair was slim and attractive, and the two victims of the 1982 rape-assaults are slim and attractive. Kathy Fair died of stab wounds inflicted with a small knife. Defendant used a small knife to inflict wounds on the victims of the 1982 rape-assault. Kathy Fair's remains showed stab wounds were inflicted on the upper body. The two victims of the 1982 rape-assaults were stabbed in the upper body. Kathy Fair disappeared in early September of 1982. The two victims of the 1982 rape-assaults were attacked in mid-December of 1982. Kathy Fair was stabbed and possibly molested. Both victims of the 1982 rape-assaults were stabbed, and one was raped. Kathy Fair was stabbed at least five (5) times. The two victims of the 1982 rape-assaults were stabbed fifteen (15) and twenty-nine (29) times. Kathy Fair's remains were left in a remote wooded area. The two victims of the 1982 rape-assaults were left approximately two hundred (200) feet from the place where Kathy Fair's remains were found. Kathy Fair, when last seen, had brownish shoulder-length hair. The two victims of the 1982 rape-assaults had brownish shoulder-length hair.[122]

It seems that the court followed the trial court's lead in being persuaded by the knife length and location, which was "not accessible except by unimproved roads . . . ."[123] Additionally, the court relied on the fact that only "local residents" were known to use the location and "no other crimes had

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[119] *Seiders*, 614 A.2d at 692.
[120] Commonwealth v. May, 656 A.2d 1335, 1338, 1340-41 (Pa. 1995).
[121] *Id.* at 1341.
[122] *Id*.
[123] *Id.*

been reported in the general location of the 1982 rape-assaults either before or after the incident . . . ."[124] One is left wondering why the court felt murderers would be dissuaded by unpaved roads or an area with few travelers to report crimes. Most likely, these weakened analytics are present because the defendant had confessed to his brother that he had stabbed all three girls.[125] Regardless of the court's justifications, courts must be careful not to weaken analyses when establishing precedent, as such precedent will be expanded beyond its limiting factual context.

III. ANALYSIS: A CURRENT CASE STUDY OF THE LUSTFUL DISPOSITION EXCEPTION

Pennsylvania courts have dismissed the notion that they are using the lustful disposition exception as an automatic acceptance of prior sexual misconduct.[126] Yet, the courts' comparisons often focus on the most innocuous of details, such as the victim's age or race, without more sufficient commonalities.[127] Granted, there are cases where the lustful disposition has mirrored Rule 404(b); however, these instances are rare since Rule 404 requires a more exacting standard.[128] More commonly, Pennsylvania courts are finding that the lustful disposition exception applies, such as in *Commonwealth v. Talbert*, where the Superior Court used the exception to admit past evidence of an attempted sexual assault of a victim when she was twelve, even though the defendant was not arrested or charged.[129] Pennsylvania courts allow deviant propensity to alter the analysis, but do not

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[124] *May*, 656 A.2d at 1339.

[125] *Id*.

[126] Commonwealth v. Aikens, 990 A.2d 1181, 1186 (Pa. Super. Ct. 2010) ("[W]e reject [a]ppellant's position that we are pigeonholing sexual abuse cases to such an extent that any prior instance of child abuse would be admissible in a subsequent child abuse prosecution.").

[127] *See* Commonwealth v. Carrington, 2015 WL 6870714, at *5 (Pa. Super. Ct. Nov. 6, 2015) (non-precedential) (citing Commonwealth v. Carrington, No. CP-51-CR-0006608-2012, slip op. at 23 (Pa. Com. Pl. 2015)) (comparing two crimes that were unrelated other than being sex crimes perpetrated against African-American females of the same age by the defendant).

[128] *E.g.*, *Aikens*, 990 A.2d at 1185-86 ("[T]he victims were of like ages: T.S. was fourteen years old, and V.B. was fifteen years old. Both victims were Appellant's biological daughters. Appellant initiated the contact during an overnight visit in his apartment. He began the sexual abuse by showing the girls pornographic movies. The assaults occurred in bed at night. While Appellant raped V.B. and indecently assaulted T.S., T.S. stopped Appellant from disrobing her and committing the more serious sexual assault. In addition, Appellant mimicked the grinding movements of sexual intercourse on T.S. in order to sexually gratify himself. These matching characteristics elevate the incidents into a unique pattern that distinguishes them from a typical or routine child-abuse factual pattern.").

[129] 2015 WL 6738840, at *1, *3 (Pa. Super. Ct. 2015) (non-precedential) (drawing no specific comparison to crimes charged or the facts involved in the later crime other than to say that the two were similar).

admit that they are relying on the lustful disposition exception, thus framing the issue under a Rule 404(b) exception.[130]

Commonwealth v. Hacker is a prime example of Pennsylvania courts' willingness to allow other sexual crimes in under a less stringent application of Rule 404(b). In *Hacker*, the Pennsylvania Superior Court would not sever the crimes of solicitation with the intent of promoting or facilitating the rape of a child under thirteen with disseminating sexually explicit materials to minors and corrupting the morals of minors.[131] The defendant showed an underage boy and girl sexual pictures of the defendant having sex with a man and woman.[132] The minors were later encouraged to play "truth or dare" with other children, but during the game the defendant dared the girl to perform oral sex on the boy.[133] The girl was pressured into the act by the defendant who brought the two minors into a bedroom, threatened to tell the girl's mother that she misbehaved if she did not perform oral sex, and moved the two minors closer together.[134] The defendant also showed a third minor the images, who was present for some of the truth and dare game.[135] The defendant claimed that the solicitation and dissemination criminal counts should have been severed because had there been separate trials, the evidence required to prove one would be inadmissible at the other's trial.[136]

Despite dealing with the severance issue, the court still relied on Rule 404(b) as its foundation.[137] The court found that disseminating the images to

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[130] *See Carrington*, 2015 WL 6870714, at *3; *see also* Commonwealth v. Smith, 2015 WL 4898112, at *5 (Pa. Super. Ct. 2015) (non-precedential) (reversing the lower court because the Superior Court found that the two acts (two years apart) to be similar and satisfied a common scheme where the "age of the victims was extremely close: C.H. was twenty-three years of age and J.K. was twenty-one years old. The attempted assault on C.H. occurred in Appellee's basement as did the assault on J.K"); Commonwealth. v. Trifiro, 2014 WL 10790081, at *5-6 (Pa. Super. Ct. 2014) (non-precedential) (finding a common plan where the similarities were that both victims were children, neither were spouses, and the "sexual contact involved Appellant's exertion of power . . ."), *appeal denied*, 113 A.3d 280 (Pa. 2015). In *Smith*, Judge Donohue pointed out that the three similarities were all that the crimes shared. *Smith*, 125 A.3d at *6 n.1 ("[T]he manner in which each incident occurred bears little to no relation to one another.") (Donohue, J., concurring and dissenting in part); *see also* LEONARD PACKEL & ANNE BOWEN POULIN, PA. EVIDENCE § 404-9 (4th ed. 2013) ("Since *Shively*, the Superior Court has evaluated evidence of sexual acts with someone other than the victim of the charged offense under the same rules that apply to other acts evidence in general.").

[131] Commonwealth v. Hacker, 959 A.2d 380, 385, 391 (Pa. Super. Ct. 2008), *rev'd on other grounds*, 15 A.3d 333, 336 (Pa. 2011).

[132] *Id.* at 385-86.

[133] *Id.* at 386.

[134] *Id.*

[135] *Id.* at 386 n.1.

[136] *Id.* at 385, 391. The Superior Court relied on Pennsylvania Criminal Procedure Rule 56, which states that multiple offenses can be charged based on the same information "if: (1) the evidence of each of the offenses would be admissible in a separate trial for the other and (2) . . . each is capable of separation by the jury so that there is no danger of confusion." *Id.* at 391 (citing PA. R. CRIM. P. 563(a)(1)).

[137] *Hacker*, 959 A.2d at 391-92.

the minors was "part of the natural development and history of the solicitation."[138] The court also held that the images proved "plan and preparation for [the defendant's] eventual solicitation of sex between the minors."[139] Additionally, the court noted that the solicitation proved the defendant's motive.[140]

First, while the *res gestae* exception is the most tenable in *Hacker*, the defendant showed the images to a third minor who was not forced to engage in sexual relations with the other two minors.[141] The *res gestae* exception is meant only to help the jury understand the full picture and fill gaps in the story.[142] No gaps were present in *Hacker* because the jurors were informed that the defendant suggested the minors have sexual relations, led them to the room, threatened one, and physically pushed them closer while the defendant waited.[143] Because the jurors could have found the defendant guilty on those events alone, the photos were not probative to understanding the progression of the crime.

Second, the court's reliance on "plan" is misguided, as the exception requires a specific signature to link the two crimes,[144] and showing the images had no such signature. An example of a signature is found in *Commonwealth v. Keaton*, where the defendant approached drug-addicted victims that he knew and who had turned him down before, threatened them verbally with sexual references, held a gun to their backs, took them to abandoned houses in the same area, placed them in rooms full of trash, raped them, became suspicious of them, physically assaulted them, raped them again with progressing signs of violence, and then let them escape.[145] A signature cannot be based on one incident as in *Hacker*, regardless of how many victims were present. There must be multiple individual incidents with near identical procedures taken by the defendant in facilitating the crime.

Finally, the court relied on the motive exception despite its requirement that the defendant claim a defense of accident, mistake, or lack of intent, which the defendant did not do, beyond questioning the minors' recollection

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[138] *Hacker*, 959 A.2d at 392.

[139] *Id*.

[140] *Id.* at 392-93.

[141] *Id.* at 386. This article does not seek to argue for the exclusion of the *res gestae* exception when used to explain why a victim fails to report his or her sexual assault for a significant period of time, as the jury should likewise not be allowed to presume that silence by the victim indicates a lack of crime. *See* Commonwealth v. Dillon, 925 A.2d 131, 133, 138-40 (Pa. 2007) (allowing evidence that the defendant viciously harmed the victim's mother and brother, which made the victim afraid and wait years after being sexually assaulted by the defendant to report it).

[142] *See supra* notes 76-79 and accompanying text.

[143] *Hacker*, 959 A.2d at 386.

[144] *See, e.g.*, Commonwealth v. Judd, 897 A.2d 1224, 1231-32 (Pa. Super. Ct. 2006); Commonwealth v. Frank, 577 A.2d 609, 614 (Pa. Super. Ct. 1990).

[145] 729 A.2d 529, 532-34 (Pa. 1999), *aff'd in part*, 45 A.3d 1050, 1066 (Pa. 2012) (finding a common scheme or plan), *aff'd in part on other grounds*, 82 A.3d 419 (Pa. 2013).

of the events and ability to access the images on their own.[146] The Superior Court stated that the "prejudice was slight" because the "proof did not tend to show [that the defendant] was a bad person in any way other than with respect to the specific conduct at issue."[147] Contrary to the court's understanding, showing that the defendant was "a bad person" based on the crimes charged is the exact definition of propensity evidence.

IV. TAKING A STEP BACK: SOLUTIONS IN DELAWARE & INDIANA

At its pinnacle, the lustful disposition exception has created uncertainty in the law with regards to prosecuting defendants who commit sexual crimes. At its worst, the exception has become more liberally applied than the Federal Rules of Evidence, which explicitly allow other sexual crimes to be admissible despite the prejudicial impact on certain defendants.[148] While the exception has followed Federal Rules of Evidence 413-415 and allowed "prior accusations . . . that did not result in a finding or plea of guilty," the exception has become broader, allowing more attenuated past or subsequent acts into evidence.[149] This article proposes that prior bad act evidence should

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[146] *Hacker*, 959 A.2d at 393.

[147] *Id.* at 394.

[148] *E.g.*, Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 427 (2014) ("States that employ the 'lustful disposition' exception may in fact allow substantially more evidence to be admitted against a defendant than a court applying Rule 414. While Rule 414 allows specifically for the admission of past convictions, the 'lustful disposition' exception through Rule 404(b) allows for additional character evidence, which may not have escalated into a conviction, but is nonetheless seen as applicable to the current case. Thus, through the use of Rule 404(b), coupled with the Rule 403 balancing analysis, most states have not deemed a separate rule, such as Rule 414, a necessity.").

[149] Lindsey Webb, *The Immortal Accusation*, 90 WASH. L. REV. 1853, 1876-77 (2015). Pennsylvania's approach is to essentially adopt Federal Rules of Evidence 413 and 414. *See* United States v. Reynolds, 720 F.3d 665, 671 (8th Cir. 2013) ("Because propensity evidence is admissible under Rule 414, the admission of J.S.'s testimony did not result in any unfair prejudice to [the defendant]."); United States v. Rogers, 587 F.3d 816, 822 (7th Cir. 2009) (finding that Rule 413 overrides the fear of unfair prejudice under Rule 403, but not applying the same logic to Rule 404(b) and its relation with Rule 403). The federal courts have latched onto Congress' intent, as "courts are to liberally admit evidence of prior uncharged sex offenses." United States v. Benally, 500 F.3d 1085, 1090-92 (10th Cir. 2007) (internal quotation marks omitted) (quoting United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997)) (allowing Rule 413 to trump Rule 403, while noting that Rule 403 could exclude relevant evidence under Rule 413). Even certain circuit courts that consider Rule 413 or Rule 414 and Rule 403 in tandem often find that Rule 403 does not exclude evidence of prior sexual assaults. *E.g.*, United States v. O'Connor, 650 F.3d 839, 853 (2d Cir. 2011) (finding that the forty-eight-year-old defendant's autobiography, which described the defendant's sexual conduct and thoughts about his sister's friends when he was a teenager, was not unfairly prejudicial to a charge of molestation thirty years later because he wrote the autobiography seven years before the present crime); United States v. Carino, 368 Fed. App'x. 929, 929 (11th Cir. 2010) (a forty-eight-year-old defendant argued that the district court did not consider Rule 403 when allowing testimony by his sister that he molested her when he was sixteen years old and she was eleven years old).

be analyzed under Rule 404(b) and that courts should strictly consider the prejudice that will result under Rule 403.[150] The court must ignore the repugnant nature of the crime in order to make certain that the defendant is not being sentenced for his repugnant character. Only when the prior or subsequent crime is a near mirror image of the charged crime, and fits under one of the 404(b) exceptions, should the prior or subsequent act be admissible.[151]

An example of a case that did not meet the 404(b) standard is *Commonwealth v. Evans*.[152] In *Evans*, the defendant raped a ten-year-old victim while "threatening her with a knife," stating that he would kill her family if she said anything.[153] In 2009, because the victim had not told anyone about the rape out of fear, the defendant was able to attempt to rape the victim again in the same bathroom with a knife.[154] The Superior Court allowed—through the common plan, scheme, or design exception—testimony from the victim's sister that the defendant had sexually assaulted her in 2009 when she was twelve while "play fighting" in the same house.[155] What the defendant did was horrid, but the testimony of the victim's sister does not satisfy a "signature" analysis.

It is unclear why the court allowed the sister's testimony. The prosecution did not need the testimony to prove its case. The defendant was faced with the rape and attempted rape of the victim and there was strong testimony from the victim as to those crimes. The only implicit explanation is that the court did not wish to silence evidence that was potentially damning. Yet if the jury relied on the testimony from the victim's sister, then the defendant's guilt was not based on the actual evidence of his rape and attempted rape but an insinuation that the defendant was of bad moral character. This type of courtroom proceeding is antithetical to the American justice system.

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[150] Note that prior to Congress codifying Rules 413-415, *Huddleston v. United States* did not allow propensity evidence, especially in sexual crime cases. 485 U.S. 681, 685 (1988). Because the Federal Rules of Evidence did not expound on how Rules 413-415 coincide with Rule 404 and Rule 403's concerted effort to exclude propensity evidence, district court judges must arbitrarily determine the criminal defendant's fate. *See* Jeffrey A. Palumbo, *Ensuring Fairness and Justice Through Consistency: Application of the Rule 403 Balancing Test to Determine Admissibility of Evidence of a Criminal Defendant's Prior Sexual Misconduct Under the Federal Rules*, 9 SETON HALL CIR. REV. 1, 7-8 (2012). In fact, the Third, Sixth, and Eighth Circuit Courts have held that Federal Rule of Evidence 403 should be applied "less stringently" to sexual crimes because the intent to allow such sexual propensity evidence was clear from their adoption of evidence rules 413-415, and the Third, Fourth, Seventh, Ninth, and Tenth Circuit Courts have adopted factors for their district courts to use when balancing Rules 413-415 with Rule 403. *Id.* at 5. For example, the Third Circuit in *Johnson v. Elk Lake School District* discussed the uncertainty of whether Congress intended Rule 403 to apply to Rules 413-415. 283 F.3d 138, 155-56 (3d Cir. 2002).

[151] *See* PA. R. EVID. 404(b)(2).

[152] 2016 WL 783913 (Pa. Super. Ct. Feb. 29, 2016) (non-precedential).

[153] *Id.* at *1.

[154] *Id.*

[155] *Id.* at *4.

In contrast, the Delaware Supreme Court offered an analysis in *Getz v. State* that comprehends the dangers of allowing a sexual offender exception beyond Rule 404(b)'s exceptions.[156] Not only is Delaware Rule of Evidence 404 equivalent to Pennsylvania's, but the Delaware Rules of Evidence also rejected Federal Rules of Evidence 413-415, as the rejection stemmed from *Getz*.[157] In *Getz*, Delaware argued that the defendant's prior molestation of his daughter should be admissible against the defendant in the case of rape.[158] The rape charge was based on testimony from the defendant's daughter that he entered her bedroom at night, took off her clothes, and "achieved partial penetration."[159] The victim's stepmother also testified that she saw the defendant "leaving his daughter's bedroom wearing a housecoat."[160] The stepmother then entered the victim's room after confronting the defendant as he was leaving, but the child "appeared to be asleep and did not respond to questioning."[161]

At trial, the prosecution was allowed to let the examining physician read the victim's case history in which she previously complained of "prior episodes of sexual molestation by her father."[162] The prosecution was also able to ask the victim about prior sexual incidents through leading

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[156] 538 A.2d 726 (Del. 1988).

[157] *See* DEL. R. EVID. 404(a)-(b) ("(a) **Character evidence generally**. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . . **(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."); DEL. R. EVID. 413 cmt. ("F.R.E. 413, 414, and 415 were adopted by Congress in 1994 (P.L. 103-322, Title XXXII, Subtitle I, § 320935(a), 108 Stat. 2136) over the objection of the Judicial Conference Advisory Committee on Evidence Rules, the Standing Committee on Rules of Practice and Procedure, and the Federal Judicial Conference. The Permanent Advisory Committee on the Delaware Uniform Rules of Evidence recommended in 2001 that the Delaware Supreme Court not adopt provisions similar to F.R.E. 413, 414, and 415 for several reasons: (1) such propensity evidence is too prejudicial; (2) if such propensity evidence is permitted, the potential for a trial within a trial becomes likely; (3) the empirical data on the relevance of such evidence is conflicting; (4) F.R.E. 413, 414, and 415 were enacted over the objection of the relevant federal rule-making committees; (5) the Delaware Supreme Court's decision in *Getz v. State*, Del. Supr., 538 A.2d 726 (1988), held that such propensity evidence may conflict with the defendant's right to a presumption of innocence; and (6) the consensus of the Committee was that F.R.E. 413, 414, and 415 were unnecessary in Delaware because the prosecution of accused persons under the existing D.R.E. and relevant statutes, such as 11 DEL. C. §§ 3507, and 3513, generally produces fair results.").

[158] *Getz*, 538 A.2d at 729.

[159] *Id.*

[160] *Id.* at 728.

[161] *Id.* Also testifying were the investigator and physician who examined the victim after the police reported. *Id.* at 729.

[162] *Id*.

questions.[163] The defendant testified that he had not inappropriately touched his daughter, and that his wife was simply trying to protect her immigrant status by creating a "misconduct ground for divorce."[164]

The Delaware Supreme Court engaged in an in-depth analysis of Delaware Rule of Evidence 404(b), calling the rule's foundation the "corollary of the presumption of innocence."[165] The court found the rule to not be "exclusive," but also noted that most courts "favor the inclusionary approach."[166] The court held that the defendant's "presumption of innocence" overrode any propensity argument.[167] Specifically, the court confronted the "lustful disposition or sexual propensity exception."[168] The court defined the exception as limited to the same victim and cited the Arizona Supreme Court's rationale for the rule:

> Certain crimes today are recognized as stemming from a specific emotional propensity for sexual aberration. The fact that in the near past one has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in the case being tried [the defendant] is guilty of a particular unnatural act of passion. . . . This propensity tended directly to establish the offense for which the defendant herein was being tried, much as symptoms of a known disease suffered in the past tend to establish the presence of the same today. Of course, this exception would be subject to the limitation of relevant nearness in time, and would not apply to mere criminal tendencies in general as distinguished from specific sexual inclinations.[169]

The Delaware Supreme Court rejected this rationale as contrary to Rule 404(b).[170] Certainly, Rule 404(b) allows exceptions based on an evidentiary need; however, when the victim is able to give testimony on the charged crime and the offender, there is no need to point to other sexual incidents or crimes.[171]

Similarly, the court rejected the evidence under a theory of a common plan because the evidence was not "so unusual and distinctive" and the prior acts did not "form part of the background of the alleged act . . . ."[172]

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[163] *See Getz*, 538 A.2d at 729.
[164] *Id*.
[165] *Id.* at 730
[166] *Id.* at 730-31.
[167] *Id.* at 731.
[168] *Id.* at 732.
[169] *Getz*, 538 A.2d at 732-33 (citing State v. McDaniel, 298 P.2d 798, 802-03 (Ariz. 1956)).
[170] *Id.* at 733 (citing Commonwealth v. Shivley, 424 A.2d 1257 (Pa. 1981)).
[171] *Id*.
[172] *Id.*

Pointedly, the court stated, "[r]epetition is not, in itself, evidence of a plan . . . ."[173] The court further denied the demonization of a "classification of criminal offenses" because a "sexual gratification exception" to Rule 404 "proceeds upon the assumption that a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt."[174] The court refused to allow an evidentiary exception to "equate[] character disposition with evidence of guilt . . . ."[175]

Most importantly, the court noted that the needs of children in sexual abuse cases were "best addressed on a case by case basis, through accommodating the needs of youthful witnesses and by explanation of the dynamics which affect their testimony, . . . rather than through the creation of a class of criminal offenses to which the usual rules of evidence do not apply."[176] In an act of clairvoyance, the court stated:

> The unfairness inherent in the indiscriminate use of evidence of prior criminal acts is aptly illustrated by this case. Although the State had evidence of three separate acts of sexual contact, it charged the defendant with only one. Of the two prior acts one apparently could also have formed the basis for a separate charge of rape or attempted rape. In arguing for the admissibility of these prior acts the State was unable to provide specific dates for either incident. *At trial, the State presented no direct specific evidence of the prior criminal acts but was able to place before the jury the inference that the defendant was guilty of other acts of sexual misconduct involving his daughter. Although the defendant denied the indicted offense he was never directly confronted with the evidence of the other crimes.* Moreover, the jury received the evidence without any guidance concerning the limited purpose for its admissibility and thus was permitted to consider its cumulative effect in assessing the defendant's guilt.[177]

In concluding, the court set out guidelines for future sexual abuse cases:

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must

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[173] *Getz*, 538 A.2d at 733.
[174] *Id.* at 733-34.
[175] *Id.* at 734.
[176] *Id.* (internal citations omitted).
[177] *Id.* (emphasis added) (footnote omitted).

> demonstrate the existence, or reasonable anticipation, of such a material issue.
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive."
> (4) The other crimes must not be too remote in time from the charged offense.
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by [Delaware Rule of Evidence] 403.
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by [Delaware Rule of Evidence] 105.[178]

This Delaware case appropriately demonstrates the simple but important foundation of the Rules of Evidence: the defendant's presumption of innocence. This foundation alone is critical to the justice system. In fact, the system's checks and balances pale in comparison to the presumption of innocence. A defendant who commits a sex crime should not be held to a lesser standard. By applying 404(b)'s exceptions, the victims of sexual crimes are still protected when the prior bad acts are directly connected to the present crime. Likewise, by following 404(b), no criminal is placed on a different pedestal at trial.

A few years later, in 1992 the Indiana Supreme Court implicitly agreed with the Delaware Supreme Court and did not allow testimony from a second victim about other sexual incidents with the defendant.[179] The court expressly rejected the more common arguments for the "depraved sexual instinct exception": recidivism, and reinforcement of victim testimony.[180] The court noted the important reason to support such an exception—"protection of children"—especially during the testifying process.[181] Yet, the court quickly dismantled the rationales for supporting the unique exception.[182] The court assumed that the recidivism rate was high for

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[178] *Getz*, 538 A.2d at 734 (footnote omitted) (citation omitted).
[179] Lannan v. State, 600 N.E.2d 1334, 1334-35, 1338 (Ind. 1992).
[180] *Id.* at 1336-38.
[181] *Id.* at 1336.
[182] *Id.* at 1336-38.

defendants who commit sexual crimes, but the court noted that recidivism rates are not used for other criminal categories, such as drug use.[183]

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[183] Lannan, 600 N.E.2d at 1336-37, 1337 n.6 ("If a high rate of recidivism cannot justify a departure from the propensity rule for drug defendants, logic dictates it does not provide justification for departure in sex offense cases."). The court disagreed with an amicus curiae, the Indiana Association of Criminal Defense Lawyers, who believed that the recidivism rate was quite low, because the court thought that the defense lawyers relied upon studies that were "of questionable value, since often they utilize arrest and conviction rates, which are inadequate measures of recidivism due to the low number of cases which actually make it that far into the system." *Id.* at 1337 n.6 (citation omitted); *cf.* Tamara Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 795 (2013) (discussing the lack of empirical evidence on recidivist tendencies or deviance that would support Federal Rules of Evidence 413-414).

Congress was similarly concerned with: (1) statistics showing a rise in sexual assaults; (2) the private occurrence of sexual assaults; and (3) sexual offenders' recidivism. Lave & Orenstein, *supra* note 183, at 810-11. These reasons were quickly dispensed with by scholars. First, the statistics relied on were rising at the same rate as statistics on murder and drug trafficking; therefore, sexual assaults are not increasing above the normal rate of incline. *Id.* at 817-18 (also noting that Congress' belief that it needed to respond quickly to prevent more sexual assault from occurring was fictitious, as the statistics indicated that the reporting of sexual assaults was increasing, not that there was a surge in sexual assaults). Second, many crimes occur in private and have no witness—murder, for example—which would mean that murder would need its own "special" legislation. Lave & Orenstein, *supra* note 183, at 805-07. Third, even if recidivism is occurring with perpetrators of sexual crimes, it is occurring no more than the recidivism found in other crimes, like homicide or drug distribution. *Id.* at 817-18.

The idea that defendants who commit sexual crimes are more prone to recidivism is constantly questioned. *See, e.g.*, EDWARD J. IMWINKELRIED, 1 UNCHARGED MISCONDUCT EVIDENCE § 2:26 (2015) ("There is a widespread public perception that recidivism rates are quite high among both sexual offenders and child molesters. If that were true, it might be justifiable to carve out special exceptions from the general character prohibition for evidence of prior sex offenses and child molestations. The problem is that that perception is erroneous."). The problem possibly originated when lawmakers attempted to rely on "scientific methods and theory" of mental diagnoses to craft law. *See* Joelle Moreno, *"Whoever Fights Monsters Should See to It That in the Process She Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets-Federal Rules of Evidence 413-415-and a Stake Through the Heart*-Kansas v. Hendricks, 49 FLA. L. REV. 505, 549-52 (1997). Furthermore, there is no evidence that a criminal who engages in a sexual crime is forever limited to sexual crimes, as the term "sex offender" was coined to garner political support rather than protect victims. *Id.* at 558. A scientific study conducted in 1997 by Dr. Leonore M.J. Simon found "no empirical support for the assumption of sex offense specialization." *Id.* at 559. Sex offences were equivalent to "'nonviolent crimes such as theft, burglary, and drug offenses'" in terms of committing other crimes. *Id.* (quoting Leonore M.J. Simon, *The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387, 395 (1997)).

In 2003, the United States Department of Justice found that of nine thousand sex offenders who were out of prison for three years, only a 5.3% recidivism rate was present. Jill Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOCIAL ISSUES & PUB. POL'Y 1, 6 (2007), https://www.innovations.harvard.edu/sites/default/files/105361.pdf. In Pennsylvania, the Department of Corrections broke down three-year recidivism rates by "crime types" and found statutory rape to have a 50.0% recidivism rate and other sexual offenses to have a 60.2%

The second rationale, "Bolstering," was defended as necessary since the nature of sexual crimes is different from other crimes.[184] The court lamented the violation of children by criminals, but the court would not "abandon a basic tenet of criminal evidence law older than the republic itself, however desirable the social end may be."[185] The court was adamant that "[t]he notion that the State may not punish a person for his character is one of the foundations of our system of jurisprudence."[186]

The court did not wish its opinion to be read as ignoring the "merit" of these rationales; the court simply saw the exception as too broad in its admissibility of unrelated sexual crimes.[187] Importantly, the court was quick to point out that the invalidation of the exception did not "mean evidence of prior sexual misconduct" could not be admissible.[188] The justices specifically pointed to Federal Rule of Evidence 404(b), which they "adopt[ed] in its entirety . . . ."[189] The court allowed propensity to be an indirect result of admissible evidence under the 404(b) exception, pointing to the common scheme or plan exception.[190] The court noted that uncharged sex offenses still fell under the 404(b) exception.[191]

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recidivism rate, based on inmates who were released in 2008. PA. DEP'T OF CORRECTIONS, RECIDIVISM REPORT 2013 20-21 (2013), https://www.prisonlegalnews.org/news/publications/pa-doc-recidivism-report-2013. Pennsylvania defines a "recidivist" as an "inmate who, after release from prison, commits a new offense or violates parole, resulting in an arrest, an incarceration, or both." *Id.* at 37. Ignoring the problems with how the other categories' computation ("rearrests" and "incarcerations") can lead to malleable recidivism statistics, the department states that "sexual offenses" was one category of nine (out of eleven) with the "higher 3-year overall recidivism rates." *Id.* at 20. These other categories were "Other Assault, Fraud, Stolen Property, Forgery, . . . Weapons, Prison Breach, and Kidnapping." *Id.* And if one considers lumping these categories together as non-characteristic of department procedure, John Wetzel, the Corrections Secretary, was happy to state that the overall recidivism rates in Pennsylvania are "the lowest rates the department has ever recorded." Christian Alexandersen, *Pennsylvania Prison Recidivism Rates Drop to Historic Lows*, PENNLIVE (May 07, 2015, 3:24 PM), http://www.pennlive.com/midstate/index.ssf/2015/05/pennsylvania_prison_recidivism.html.

[184] *Lannan*, 600 N.E.2d at 1337-38.

[185] *Id.* (footnote omitted) (noting the "'rationale behind the rationale,' the desire to make easier the prosecution of child molesters . . .").

[186] *Id.* at 1338 (citing Penley v. State, 506 N.E. 2d 806, 808 (Ind. 1987)).

[187] *Id.*

[188] *Id.* at 1339.

[189] *Id.* (footnote omitted).

[190] *Lannan*, 600 N.E.2d at 1339.

[191] *Id*. The court also allowed "*res gestae*" to survive under 404(b)'s adoption, even though that exception is not implicit in a rule 404(b) analysis, yet this exception is beyond this article's purview. *Id.* at 1340 n.12 (noting that there is a debate as to where *res gestae* fits under a "[common] plan"). Ultimately, the court did not reverse or remand the case because the impact on the jury was mitigated by direct testimony of the defendant's statements about violating the victims for a second time. *Id.* at 1341.

Getz and *Lannan* provide a solid framework for how the admissibility of prior sexual crime evidence should be balanced. The prior bad acts need to meet the 404(b) exception requirements to be admissible. That is, if a sex offender's actions show a common scheme or plan, and the acts are more probative than prejudicial, the prior acts should be admissible. Courts must always keep in mind, however, that sexual crimes carry an especially heavy assumption of guilt. The veil over the jury that is the presumption of innocence should only be pierced when necessary. While Pennsylvania Rule of Evidence 404(b) is not exclusive, it should be expanded only in limited circumstances and when the desired exception applies equally to all defendants. The lustful disposition exception has become untenable and should be abrogated by Pennsylvania courts.

V. CONCLUSION

This article should not be interpreted as supporting leniency for defendants who commit sexual violence. Any violence perpetrated under the belief that one can rip away another's freedom violates the very essence of humanness and what it means to have personal autonomy. However, the men and women who stand trial accused of a crime are not criminals until they are found guilty by a jury of their peers. That guilt should be based on the prosecution proving beyond a reasonable doubt the elements of the charged crime. The defendants' guilt cannot be based on past acts or crimes unless the original exceptions of Rule 404(b) allow such evidence. In this regard, Rule 404(b) is an appropriate check on a fact finder's prejudices, and correctly balances justice for the victim and fairness for the defendant.

The public, legislatures, and judges cannot allow the corrosive nature of sexual crimes to cloud the just and logical underpinnings of the Pennsylvania Rules of Evidence. Pennsylvania's liberal approach under the lustful disposition exception that allows tangential past crimes into trial undermines Pennsylvania's criminal justice system. It is admittedly difficult to stand up for the rights of those accused of sexual crimes; however, the law requires that every man and woman receive a fair and unbiased trial. Thus, rules of evidence should apply equally to all criminal defendants. Because the lustful disposition exception does not apply equally, it should be rescinded.