VERMONT RULE OF EVIDENCE 404(b) ADMISSIBILITY OF PRIOR BAD ACTS IN THE "CONTEXT" OF CHILD MOLESTATION CASES

INTRODUCTION

On November 16, 2001, the Vermont Supreme Court filed its opinion in the case of *State v. Hendricks*, in which the court affirmed a jury conviction for second-degree domestic assault.[1] One of the issues on appeal was the admission of two prior instances of abuse involving the same victim.[2] The majority opinion, written by Chief Justice Amestoy, agreed with the trial court that these incidents were admissible under the reasoning developed in *State v. Sanders*, where the supreme court held that prior domestic assaults may be properly admitted to give "context" to a domestic violence charge.[3] The decision to affirm the conviction was unanimous; however, the majority opinion and the concurring opinions by Justice Dooley and Justice Skoglund evince substantial differences within the court regarding the interpretation and intended breadth of the precedent set in *Sanders*, as well as the future development of the notion of context.

The purpose of this Note is to review the application of Vermont Rule of Evidence 404(b) in child molestation cases, with particular attention to the development of the theory of context. Although this theory or rationale was first enunciated in *State v. Forbes*, a child molestation case,[4] it has been developed in the two domestic violence cases mentioned above, *Hendricks* and *Sanders*.[5] Therefore, those cases are examined as well. The reliance on these domestic violence cases, for the purposes of this Note, is entirely justified because the Vermont Supreme Court uses a similar context rationale in child molestation and in domestic violence cases. The context rationale serves to address some specific evidentiary problems, particularly with regard to victim credibility, that both types of cases have in common.

The Vermont Supreme Court has been consistent in keeping the boundaries of Rule 404(b) firmly set.[6] While in other jurisdictions the exceptions of Rule 404(b) have been stretched to fit otherwise inadmissible uncharged misconduct evidence,[7] the Vermont Supreme Court has opened

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1. State v. Hendricks, 12 Vt. L. Wk. 337, 787 A.2d 1270 (2001).
2. *Id.* at 337, 787 A.2d at 1272.
3. *See id.* at 339, 787 A.2d at 1276 (citing State v. Sanders, 168 Vt. 60, 62, 716 A.2d 11, 13 (1998)).
4. State v. Forbes, 161 Vt. 327, 329, 640 A.2d 13,14 (1993).
5. *See Hendricks*, 12 Vt. L. Wk. 337, 787 A.2d 1270; *Sanders*, 168 Vt. 60, 716 A.2d 11.
6. *See infra* notes 97–100 and accompanying text.
7. *See generally* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (2001). (using the term "uncharged misconduct" to refer to the crimes or wrongs committed by the defendant

only a very narrow door. The application of the context theory in domestic violence cases, and certain flexibility in some child molestation cases, have been the court's only concessions to the difficult evidentiary issues that often arise in those cases.[8] However, as the diversity of opinions in *Hendricks* evinces, the court has not clearly defined the limits of these possible exceptions. Currently, the trial courts are provided little guidance, and it is difficult to predict how the context theory will develop. In addition, there is substantial danger of misapplication of the context rationale to other crimes.

This Note proposes the creation of a separate exception in Rule 404(b) to deal with the admissibility of prior bad acts in some child molestation cases. This Note argues that, if proper boundaries are set, the scope of admissibility of uncharged misconduct evidence in those cases can and should be broadened. This rule would take into consideration the contributions of behavioral science to the issues of relevance of character evidence. Although the rule would make more evidence admissible, it would do so under a very specific set of circumstances, thus offering guidance to the trial courts and increasing predictability. Additionally, adoption of a rule that specifically deals with the admission of evidence in child molestation cases would avoid warping the existing rules, thus fending off the dangers of misapplication of the "warped" rule to other crimes.

Part I of this Note reviews some of the issues regarding the probative value of character evidence that should be considered when determining its admissibility. Part II briefly discusses the general problems in applying Rule 404(b). Part III focuses on the application of the rule in Vermont, with particular attention to its use in domestic violence and child molestation cases. Part IV proposes a modification of Rule 404 of the Vermont Rules of Evidence to include a new exception specific to those cases.

I. CHARACTER EVIDENCE

In the last decade, there has been considerable controversy regarding the longstanding principle of exclusion of character evidence to show conduct.[9] One of the reasons for the rekindling of the controversy was the

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that are not the subject of the *current* criminal charge for which the defendant is on trial). The past conduct may or may not have been the subject of another criminal case. *Id.* at §2:01. Professor Leonard notes that the term, although "a bit awkward," has caught on. David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 440 n.5 (2001) [hereinafter Leonard, *Character and Motive*].

8. *See infra* Part III.A–C.

9. For a comprehensive collection of articles on character evidence, see generally Symposium, *Truth & Its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 HASTINGS L.J.

enactment of Federal Rules of Evidence 413, 414, and 415. These rules allow for the introduction of evidence of similar crimes in sexual assault and child molestation cases, thus "blowing away" the character ban in a particular class of cases, and bringing into question whether the prohibition should be abolished entirely.[10]

The traditional argument in support of the ban on character evidence is that the probative value of the evidence is low in comparison with its enormously prejudicial effect.[11] First, the jury may give the evidence more weight than it deserves,[12] and second, "inflammatory" character evidence may lead jurors to decide cases on the basis of their animosity against the defendant rather than the law's mandates.[13] In addition, supporters have offered a variety of arguments based on historical, legal, philosophical, psychological, and ethical grounds.[14] Critics of the ban find many of the traditional justifications for the rule unconvincing.[15] Some of the arguments, pro and con, are very relevant in child molestation cases. For example, it would be difficult to downplay the impact on the jury of a defendant's previous acts of child molestation. However, a review of such an extensive debate is outside the scope of this Note. Thus, I will touch only briefly on the issue of the probative value of character evidence, since some of the arguments have bearing on the new rule proposed in this Note.

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289 (1998).

10. David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 835 (1998) [hereinafter Leonard, *The Perilous Task*].

11. MCCORMICK ON EVIDENCE § 190 (John William Strong ed., 4th ed. 1992).

12. *Id.* § 185.

13. *Id. But see* Peter Tillers, *What's Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 782–793 (1998) (finding unconvincing some of the traditional arguments against character evidence).

14. *See e.g.*, David Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1164 (1998) (examining the legal, historical, and philosophical origins of the rule); David Leonard, *The Perilous Task*, *supra* note 10, at 840 (stating that the Jewish Talmudic traditions of *lashon hora* and *Shmiras HaLashon* support the exclusion of character evidence, particularly in criminal cases); Miguel Angel Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1005 (1984) [hereinafter Méndez, *California's New Law*] (arguing that from a psychological perspective, character evidence not only is unduly prejudicial but also possesses little or no probative value); Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 226 (1996) [hereinafter Méndez, *Stable Personality*] (applying personality theory to character evidence).

15. *See e.g.*, Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 523–25 (1991) (arguing that all probative evidence is damaging and that current literature supports the view that people act according to their characters); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 720–54 (1998) (noting that recidivism data supports the common sense view of the difference between "ordinary people" and those that commit "outrageous crimes"); Peter Tillers, *supra* note 13, at 782 (theorizing that character is the "internal operating system" of humans).

For character evidence to be probative, it must have some value in predicting behavior.[16] This predictive value depends on whether an individual's previous conduct shows a predisposition to engage in similar conduct.[17] Professor Méndez has underscored the need for a scientific assessment of the probative value of character evidence, and has examined the different personality theories proposed by experimental psychologists as possible methods for that assessment.[18] The early theory of personality was that personality was a bundle of traits or predispositions that caused individuals to behave consistently in accordance with those traits, even in widely divergent situations.[19] If this theory were still deemed valid, it would obviously support the probative value of character evidence. Empirical research, however, failed to validate this theory, so it was eventually rejected.[20]

Dr. Mischel, among others, found that behavior strongly depended on stimulus situations, and that even trivial differences in the stimulus may evoke different behaviors.[21] For Professor Méndez, these findings undermine the law's assumption about the probative value of character evidence: "If, as a scientific matter, even trivial situational differences can render behavioral predictions invalid, then character evidence should not serve as the basis for in-court predictions by experts or jurors about whether an individual engaged in specified behavior on a given occasion or was truthful as a witness."[22]

Mischel's theories have evolved, however, and they do not support Méndez's position as strongly as before. Mischel and Shoda have proposed a new theory in which personality is "a stable system" of "mediating processes, conscious and unconscious, whose interactions are manifested in predictable patterns of situation-behavior relations."[23] According to this theory, an individual's response to a situation depends on the presence or absence of "psychological features" to which the individual is particularly sensitive.[24] Thus, when an individual perceives certain situations as similar

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16. Méndez, *Stable Personality*, *supra* note 14, at 225–26.

17. *Id.* at 225.

18. *Id.* at 226.

19. WALTER MISCHEL, PERSONALITY AND ASSESSMENT 6 (1968), *quoted in* Méndez, *Stable Personality*, *supra* note 14, at 227.

20. Méndez, *Stable Personality*, *supra* note 14, at 227.

21. MISCHEL, *supra* note 19, at 177, *quoted in* Méndez, *Stable Personality*, *supra* note 14, at 228.

22. Méndez, *Stable Personality*, *supra* note 14, at 228.

23. Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REV. 246, 246–47 (1995) [hereinafter Mischel & Shoda, *Cognitive-Affective System Theory*].

24. Mendez, *Stable Personality*, *supra* note 14, at 229.

because of the presence of specific features, he or she will react similarly.[25] The way an individual focuses on certain features, encodes them cognitively and emotionally, and responds to them, is part of a distinctive, basic structure of personality that is unique to each individual, and remains invariant.[26]

As Méndez has noted, if there is specific invariance in an individual's behavior and certain predictions are possible, then prior acts of the individual may have some probative value.[27] Méndez argues, however, that the application of this personality theory to the law of evidence would be difficult.[28] When comparing prior conduct to the charged crime, it would be necessary to inquire deeply into the defendant's specific cognitions, affects, and potential behaviors in order to construct a personality profile.[29] This would require introduction of expert testimony, the defendant's co-operation in submitting to psychological tests—unlikely unless she believes it would help her—and an inquiry into whether the theory can pass the admissibility tests for expert testimony.[30]

For other authors, personality-based predictions have much more probative value than Méndez seems to grant. Susan M. Davies, for example, maintains that current psychological literature strongly supports the probative value of character evidence.[31] Davies argues "trait theorists '*can* predict many things about people at levels of confidence that are reasonable for various goals and purposes.'"[32] Davies addresses the doubts of some scholars who have pointed out that, since trait theorists are unable to make accurate predictions from a single instance of a person's behavior, the legal relevance of the evidence is questionable.[33] Davies argues that this objection incorrectly elevates the standard of logical relevance to a requirement of sufficiency of evidence: "logical relevance requires only that the existence of the [character] evidence . . . makes the existence of certain conduct on a particular occasion more or less probable, to any degree, than

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25. Mischel & Shoda, *Cognitive-Affective System Theory*, *supra* note 23, at 248.
26. Méndez, *Stable Personality*, *supra* note 14, at 235.
27. *Id.* at 233–34.
28. *Id.* at 235
29. *Id.*
30. *Id.* at 236.
31. Davies, *supra* note 15, at 506.
32. *Id.* at 516–17 (quoting Walter Mischel, *Alternatives in the Pursuit of the Predictability and Consistency of Persons: Stable Data that Yield Unstable Interpretations*, 51 J. PERSONALITY & SOC. PSYCHOL. 578, 581 (1985)).
33. *Id.* at 517; *contra* David Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV 1, 30 (1986–87); Méndez, *California's New Law*, *supra* note 14, at 1049.

it would be in the absence of the evidence."[34] Moreover, Davies argues that this criticism misconstrues the significance of the psychologist's conclusion that a generalized trait cannot be inferred from one or two instances of a person's behavior:

> This proposition simply means that a generalization of cross-situational consistency in behavior cannot be made on the basis of one or two observations of behavior in particular situations. This is because any single instance of a person's behavior will largely be determined by the situation in which it occurred, and different situations impose different levels of psychological stress and behavioral constraint on the individual . . . . But where situations are similar, past behavior is an excellent indicator of a person's likely future behavior.[35]

Professor Park, another supporter of the probative value of character evidence, urges caution in the application of psychology scholarship to issues of evidence law because much of this literature refers to studies of nonviolent, noncriminal behavior.[36] There are reasons to think that criminal violence, and aggression in general, are more consistent and stable types of behavior than the behaviors generally studied in the studies of personality.[37] Thus, Park points to the need to heed *Daubert's* warning about "fit" when applying behavioral science to the law of evidence.[38] At the same time, Park appeals to our common sense: "most of us believe that there are personality differences between those who commit outrageous crimes and other people, and that ordinary people are more restrained by morality and by fear of consequences than are criminals."[39] According to Park, scholarship about crime supports this common-sense perception.[40] Recidivism data, for example, shows that a person who has been convicted of a criminal

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34. Davies, *supra* note 15, at 518.

35. *Id.* at 519–20.

36. Park, *supra* note 15, at 733.

37. *Id.* at 735–36. Park supports his assertion with several studies: MICHAEL R. GOTTFREDSON & TRAVIS HIRSHI, A GENERAL THEORY OF CRIME *passim* (1990); JOHN MONAHAN, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 71–72 (1981); MARK H. MOORE ET AL., DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE 23–62 (1984). Park, *supra* note 15 at 736, n.61. Behavioral studies, such as Mischel's, also support this finding. *Id.* at 735, n.60.

38. *Id.* at 736. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993) (warning that scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes).

39. Park, *supra* note 15, at 721.

40. *Id.*

offense is "many times more likely to commit a similar offense than a person chosen at random."[41]

Ironically, some of the current rules on the admissibility of character evidence in legal proceedings seem entirely at odds with the observations of behavioral science. One of Park's most interesting points is that previous bad acts are used in sentencing and civil commitment proceedings for the purpose of predicting future conduct, even though it would be prohibited in the guilt stage of the trial:

> Yet propensity evidence often throws more light on the past than on the future. . . . When evidence shows a person's high comparative propensity to engage in low base rate behavior, there is a great difference between predicting what might happen and finding out what did happen. When determining what did happen, evidence about a person's propensity can link up with incident-specific evidence in a way that makes it highly probable that the person committed an unusual act. That can be the case even if the same propensity evidence, by itself, would not justify a prediction that in the future the person would commit that unusual act. For example . . . [w]hile it may be true that only one in a thousand men who physically abuse their wives go on to kill them, if a wife is found murdered and the husband is a suspect, the evidence of abuse is certainly worth considering.[42]

That is, predictions based only on past conduct are not as reliable, particularly because the conduct is in itself so rare that nobody engages in it that often. Park finds past conduct significant when an individual has previously engaged in unusual conduct, and specific evidence makes him or her a suspect of a new instance of that conduct.[43] Similarly, Davies has pointed out the incongruity of banning character evidence to prove conduct but admitting it for impeachment purposes.[44] While behavioral science supports the theory that an actor would behave similarly when reacting to a similar stimulus, it does not support the proposition that past conduct in dissimilar contexts can be used to predict an individual's lack of veracity.[45]

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41. *Id.* at 721–22. See also his review of recidivism rates. *Id.* at 761–62. However, Park also points out that there are some dangers with the use of recidivism statistics to draw conclusions about the probative value of character evidence. *Id.* at 768.

42. *Id.* at 722–23.

43. *Id.* at 724.

44. Davies, *supra* note 15, at 520.

45. *Id.*

It is remarkable that some of these apparently opposite opinions are not so distant from each other. There is an obvious common ground among these authors: a concern regarding the unsatisfactory outdated reasoning behind the rules of admission of character evidence. Their disagreement centers on the probative value of character evidence, as much as on the ability of social science methods to prove the accuracy of its findings with the necessary degree of certainty. Professor Méndez acknowledges that character evidence may have predictive value in some circumstances; however, he finds that the doubts raised about the value of the evidence and about possible inferential errors have not been dispelled.[46] Méndez charges the proponents of change with the burden of persuasion, thus arguing that while these doubts remain the ban on character evidence should not be lifted.[47] Critics of the rule express a similar uncertainty about the best solution for this problem. Park finds many of the proposed approaches unsatisfactory.[48] Even stronger proponents of the admission of character evidence, such as Davies, are sensitive to the dangers of such evidence, and envision "a careful, guided balancing . . . on a case-by-case basis."[49]

This Note follows a middle ground. From the previous discussion, it is apparent that the predictive accuracy of current methods of behavioral science is not sufficient to justify entirely lifting the general ban on character evidence. It is also insufficient to justify rules such as Federal Rules of Evidence 413–415, and the so called "lustful disposition" rules, which broadly admit any prior sexual misconduct any time a defendant is charged with a sexual crime, without regard to the similarity of the crime or the context in which the two crimes occurred.[50] However, new personality theories, Mischel's observations with regard to the predictability of patterns of stimulus-response, and innumerable studies on high recidivism may justify carving exceptions to the ban when certain crimes are at issue. One such crime is the sexual molestation of children in the domestic environment or in other environments, such as schools, churches, or youth organizations, where the abusers may take advantage of ongoing relationships with children in order to carry out acts of molestation. Admitting evidence of prior similar misconduct in such circumstances would be

46. Miguel Méndez, *Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters,"* 49 HASTINGS L. J. 871, 889 (1998).

47. *Id.*

48. Park, *supra* note 15, at 779; *see also* Tillers, *supra* note 13, at 831 ("[T]he standard justifications for a prohibition against circumstantial character evidence are unconvincing. Nonetheless, the use of character evidence may be dangerous or unwise for other reasons.").

49. Davies, *supra* note 15, at 534.

50. *See infra* Part II.

justified when it shows a consistent pattern of behavior that reoccurs in a similar context or environment.

II. RULE 404(b)

The Advisory Committee's Note to Amended Federal Rule 404(b) comments, "Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence."[51] It is not surprising, as this rule codifies both a long-standing principle of Anglo-American law and possible tools for its erosion.[52] Consistent with the common law "propensity rule," the first sentence forbids introducing evidence of "other crimes, wrongs or acts" to prove that the person acted in conformity with a character trait.[53] The second sentence, however, makes the uncharged misconduct admissible when used to prove something other than the character of the defendant, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[54] Thus, the rule requires the proponent to show that the evidence has probative value apart from the forbidden propensity reasoning. Although the concept is simple, its application raises so many issues that, as Professor Imwinkelried has noted, "[t]he admissibility of uncharged misconduct is the most frequently litigated evid–entiary issue on appeal."[55]

Even when misconduct evidence is used properly under one of the exceptions, there is a strong danger that the jury will also use it for the forbidden purpose, that is, to make impermissible assumptions about the character of the defendant and his propensity for wrongdoing.[56] In addition,

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51. FED. R. EVID. 404(b) advisory committee's note.

52. The rule in its entirety provides:

> 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(b).

53. *Id.*

54. *Id.*

55. IMWINKELRIED, *supra* note 7, at 19.

56. As Vivian Rodriguez has noted, "[i]t is doubtful that the Rule 402 relevancy requirement and the Rule 403 balancing test, coupled with a Rule 105 limiting instruction, sufficiently protect against the admission of unduly prejudicial extrinsic evidence as the United States Supreme Court has recently

the line between proper and forbidden inferences is not at all clear, leaving wide discretion in the hands of the trial court.[57] Moreover, some authors have suggested that even when the evidence is used for admissible purposes, character is often an essential link in the reasoning that supports its relevance.[58]

Precisely, one of the rule's most problematic aspects is delineating the limits of concepts such as motive, intent, or plan, and when the probative value for these purposes is sufficiently separated from the prohibited use. Their definitions can be—and often are—stretched by either the proponent or the court in order to fit in otherwise inadmissible evidence. Park has pointed out that the "horrifying" complexity of the character evidence rules is enhanced by the numerous evasions of the supposed ban on general propensity evidence.[59] Courts exercise ample discretion in admitting evidence under one of these exceptions. According to Park, "some judges act as if a 'plan' exists whenever a defendant has done bad things twice, or that bad intent on one occasion is always admissible to show bad intent on another, even if the bad intent is inferred from general propensity to commit a type of crime."[60] Almost every exception has been stretched, triggering considerable controversy among legal scholars.[61]

Although the courts' willingness to admit uncharged misconduct evidence is not unique to sex crime prosecutions, all the issues surrounding its

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asserted." Vivian Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451, 452 (1993) (citing Huddleston v. United States, 485 U.S. 681, 691–92 (1988)).

57. Leonard, *Character and Motive*, *supra* note 7, at 441; *see also* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 186 (1998) (noting the misconception that the choice between the Rule's categorical structure of choices—propensity and non-propensity evidence—is quite simple).

58. *See* Morris, *supra* note 57, at 208 ("The only plausible explanations for most uses of bad acts evidence necessarily depend on inferences about defendant propensity.").

59. Park, *supra* note 15, at 754.

60. Park, *supra* note 15, at 754–55 (citations omitted).

61. *See generally* Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 KAN. L. REV. 1005 (1995); Leonard, *Character and Motive*, *supra* note 7 (exploring the limits of the motive theory); Miguel A. Méndez & Edward J. Imwinkelried, People v. Ewoldt: *The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 478–79 (1995); Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 114 (1984) (analyzing the impact on federal jurisprudence of the adoption of Rules 403, 404, 405 and 608, and comparing the exceptions of the common law propensity rule to the 404(b) exceptions); Rodriguez, *supra* note 56, at 457 (proposing procedural safeguards to regulate the admissibility of highly prejudicial evidence under the theory of intent).

admission "are most sharply raised in sex offender cases."[62] Courts have been particularly flexible in the admission of uncharged misconduct evidence in this context.[63] As Professor Leonard has noted, the very occurrence of the crime is often at issue in these cases, and proving that it did happen is exceedingly difficult.[64] In explaining the admission of this evidence, courts have pointed to the evidentiary difficulties in the prosecution of these crimes.[65] These crimes generally take place in private, so there are no witnesses to corroborate the stories of the defendant or the alleged victim.[66] In addition, these crimes can be committed without leaving sufficient physical evidence.[67] Further, even if there was enough physical evidence when the crime occurred, "it often has been destroyed by the time the crime is reported and investigated."[68]

To address these issues, courts have developed interpretations of the 404(b) exceptions that are specific, or tailored, to sex crimes. For example, while conduct indicative of motive is usually admitted to establish identity or intent, in sex crimes cases it is often admitted to prove the actus reus.[69] Leonard exemplifies the theory with a Colorado decision where the court explained:

> [W]hile sexual gratification may be a motive in any sexual assault [case] . . . the concept of motive involves more.
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> In our view, the concept of motive in a sexual assault case may also address other relevant factors such as why a particular type of behavior is involved or why a particular victim is selected for the assault.70

Professor Reed, in his survey of the different theories of admission, offers examples of how other exceptions have been similarly adapted—or misused—to make evidence of prior sexual misconduct admissible.[71] For example, such evidence has been admitted to prove intent, although intent is not at issue because the defendant is not claiming mistake, or that the

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62. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 132 (1992) [hereinafter Reed, *Reading Gaol*].

63. Leonard, *Character and Motive*, *supra* note 7, at 490.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 490–91.

70. *Id.* at 491 (quoting People v. Leonard, 872 P.2d 1325, 1328 (Colo. Ct. App. 1993)).

71. Reed, *Reading Gaol*, *supra* note 62, at 200–08.

touching was innocent, but is flatly denying the event took place.[72] Similarly, the evidence has been admitted to prove identity even though the defendant was not denying that the event took place but asserting that the sexual conduct was consensual.[73] The misuse of the plan or design exception is illustrated with a case in which the evidence showed simply that the defendant had committed other assaults in a similar manner.[74]

Reed uses these and other examples to show that the common law *Molineux* rule,[75] codified now in the 404(b) exceptions, "fails to explain judicial behavior on admission of uncharged sexual misconduct."[76] According to Reed, "it is a dishonest rule to use in sex offenses."[77] Reed then compares it with another rule developed at common law, the lustful disposition rule, which he finds more rational.[78]

The lustful disposition rule, developed in the mid-nineteenth century, is a common law exception to the character evidence ban.[79] Under this rule, evidence of the defendant's sexual misconduct was admissible to show the defendant's lustful disposition to commit sex crimes.[80] The rule could be interpreted quite broadly, making admissible evidence of misconduct with the same or a different victim, and misconduct prior or subsequent to the charged crimes.[81] In addition, the evidence could be introduced during the prosecution's case in chief, so whether the defendant had made an issue of his or her moral character was irrelevant.[82]

In his survey of jurisdictions where the lustful disposition rule is applied,[83] Reed specially praises the approach taken by Arizona.[84] Under common law, Arizona allows for the introduction of previous sexual misconduct that is relevant to show the defendant's "emotional propensity"

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72. *Id.* at 200.

73. *Id.* at 204–05.

74. *Id.* at 203–04.

75. In *People v. Molineux*, the court laid out the exceptions to the character evidence rule, making prior bad acts admissible during the prosecution case-in-chief, if there was a substantial issue in the case regarding the defendant's intent, guilty knowledge, motive, criminal plan or design, or identity of the perpetrator, or if the defendant's criminal activity charged in the indictment was so bound up with uncharged misconduct as to be inextricably intertwined. People v Molineux, 61 N.E. 286, 294–302 (N.Y. 1901).

76. Reed, *Reading Gaol*, *supra* note 62, at 209.

77. *Id.*

78. *Id.* at 218–20.

79. *Id.* at 168.

80. *Id.*

81. *Id.* at 168–69.

82. *Id.*

83. *Id.* at 190 n.340. Vermont is cited as a jurisdiction where the lustful disposition rule still applies. *Id.* *But see infra* Part III for the Vermont Supreme Court's rejection of this argument.

84. Reed, *Reading Gaol*, *supra* note 62 at 193–96.

to commit sex offenses, if psychiatric foundation evidence is presented to prove that propensity.[85] Thus, as Reed notes, "[t]he defendant's whole sex life is on trial during the State's case in chief," if an expert witness can lay the foundation required.[86] The jury's verdict, therefore, is based on the general predisposition of the defendant to commit those acts.[87]

One of the reasons that Reed gives in support of the lustful disposition approach is that the co-existence of the lustful disposition rule and the *Molineux* rule—either in its common law version or as Rule 404—has led to "confusion over the appropriate rationale for admitting" evidence of sexual misconduct.[88] The courts at times have mixed both rationales,[89] which leads to the distortion of the traditional *Molineux* exceptions.[90]

III. THE VERMONT SUPREME COURT'S INTERPRETATION OF RULE 404(b)

Vermont Rule of Evidence 404(b) parallels the federal rule.[91] It excludes "bad act" evidence "introduced for the purpose of showing a general propensity to commit the acts in question."[92] The evidence is admitted, however, when relevant to some other issue in the case.[93] Even if the evidence survives the Rule 404(b) test, it still must pass the balancing test of Rule 403.[94] Vermont's common law was "generally in accord with these provisions,"[95] thus the enactment of the rule has not significantly changed the Vermont Supreme Court's treatment of character evidence.[96]

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85. *Id.* at 195.
86. *Id.* at 195–96.
87. *Id.* at 196.
88. *Id.* at 174–75.
89. *Id.* at 169.
90. *See supra* notes 69–74 and accompanying text.
91. The rule states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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.

VT. R. EVID. 404(b).
92. State v. Bruyette, 158 Vt. 21, 27, 604 A.2d 1270, 1272 (1992).
93. *Id.*
94. State v. Ashley, 160 Vt. 125, 126, 623 A.2d 984, 985 (1993).
95. VT. R. EVID. 404 reporter's notes.
96. For common law treatment of the exceptions of the propensity rule, see generally State v. Ryan, 135 Vt. 491, 494, 380 A.2d 525, 527 (1977) (prior conviction of manslaughter admissible in a first-degree murder trial); State v. Batchelor, 135 Vt. 366, 369, 376 A.2d 737, 740 (1977) (evidence of prior alcohol abuse not admissible in a DWI trial); State v. McMann, 133 Vt. 288, 291, 336 A.2d 190, 192 (1975) (prior evidence of attempted burglary not admissible to show intent of burglary); State v. Bogart, 132 Vt. 8, 12, 312 A.2d 733, 735–36 (1973) (evidence of prior acts admissible to show motive); State v. Levine, 117 Vt. 320, 327–28, 91 A.2d 678, 682 (1952) (evidence of prior involvement in purchase of stolen goods admissible to show motive and purpose to commit larceny); State v. Howard,

As the court noted in *State v. Winter*, Vermont Rule of Evidence 404(b) is most often invoked in cases in which the defendant is charged with a sexual misconduct crime.[97] Unlike other jurisdictions, the controversial expansive use of the "motive" and "intent" exceptions in drug related and other crimes has not taken place in Vermont.

In *Winter*, the court noted that neither before the adoption of the Vermont Rules of Evidence, nor since, has there been in Vermont a lustful disposition exception to the propensity rule.[98] Even if such an exception has ever existed, it would now be considered inconsistent with Rule 404(b).[99] The court specifically rejected Professor Reed's argument, which used two Vermont cases to support the contention that Vermont followed a lustful disposition rule at common law in statutory rape cases and had adopted a similar exception since the enactment of Rule 404(b).[100] The first common law case Reed cited was *State v. Willett*, where the court stated that evidence of acts of adultery should be applicable in a prosecution for statutory rape.[101] The court in *Winter* dismissed this statement as dictum.[102] Reed's argument with respect to jurisprudence post Rule 404(b) was based on *State v. Cardinal*.[103] There, the defendant was charged with sexually assaulting his seventeen-year-old daughter.[104] The court upheld the admission of evidence of the defendant's violent actions against his daughter's fiancé because it showed that the defendant had a "proprietary sexual interest in the victim, his actions being consistent with those of a jealous lover."[105] The court in *Winter* noted that the "defendant's jealous actions corroborated the victim's story without relying on defendant's character," thus they were not offered as propensity evidence.[106]

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108 Vt. 137, 154, 183 A. 497, 505 (1936) (evidence of prior carelessness with fire around defendant's house inadmissible in an arson case); State v. Donaluzzi, 94 Vt. 142, 144–47, 109 A. 57, 58–60 (1920) (evidence of prior acts which legitimately supports current charge should not be excluded); State v. Kelley, 65 Vt. 531, 533–36, 27 A. 203, 204–05 (1892) (evidence tending to show defendant has been guilty of other like offenses has been received when it is necessary to prove character knowledge, establish felonious use of certain destructive agencies, or when crimes are linked together temporally, in identity, proximity, motive, purpose, preparation or concealment).

97. State v. Winter, 162 Vt. 388, 392, 648 A.2d 624, 626 (1994).

98. *Id.* at 392, 648 A.2d at 626.

99. *Id.* at 392, 628 A.2d at 626–27.

100. *Id.* at 392 n.1, 648 A.2d at 626 n.1; Reed, *Reading Gaol*, *supra* note 62, at 170 n.238, 190 n.340.

101. State v. Willett, 78 Vt. 157, 159, 62 A. 48, 49 (1905); Reed, *Reading Gaol*, *supra* note 62, at 170.

102. *Winter*, 162 Vt. at 392 n.1, 648 A.2d at 626 n.1.

103. Reed, *Reading Gaol*, *supra* note 62, at 190 n.340.

104. State v. Cardinal, 155 Vt. 411, 412, 584 A.2d 1152, 1153 (1990).

105. *Id.* at 415, 584 A.2d at 1155.

106. *Winter*, 162 Vt. at 392 n.1, 648 A.2d at 626 n.1.

The Vermont Supreme Court has not only rejected the notion of a special rule for sexual misconduct cases but has also been very reluctant to follow other jurisdictions in allowing for a more liberal interpretation of Rule 404(b) in those cases.[107] Thus, the court has set standards of admissibility for each of the non-prohibited purposes mentioned in the rule, and applied them consistently.[108] At the same time, the court has acknowledged the difficult evidentiary issues in child molestation and domestic violence cases. That concern is reflected in the development of the current standards: the *Catsam* test and the *Forbes* notion of context for child molestation cases, and the development of the context theory for domestic violence cases in *Sanders* and *Hendricks*.[109]

A. The Plan or Common Scheme Exception: State v. Catsam

In *Catsam*, the defendant appealed his conviction of sexual assault of a ten-year-old child.[110] One of the issues on appeal was the admission of evidence of the "defendant's prior sexual relations with the complainant."[111] The victim testified, "on approximately six occasions within two years of when the charged offense took place, the defendant had sexually molested her."[112] She further testified that after these incidents, the defendant told

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107. *See* State v. Hurley, 150 Vt. 165, 168, 552 A.2d 382, 384 (1988) (explaining special admission rules in other states for child sexual abuse cases).

108. *See, e.g.*, State v. Lawton, 164 Vt. 179, 183, 667 A.2d 50, 55 (1995) (finding that defendant's specific method of performing anal sex with his wife is not sufficiently distinctive to be admissible under the identity exception); State v. Perrillo, 162 Vt. 566, 568–69, 649 A.2d 1031, 1033 (1994) (holding that evidence that defendant had fondled another child was inadmissible under the identity exception because it was not an act so distinctive and unique as to constitute the defendant's "signature"); *Winter*, 162 Vt. at 394–95, 648 A.2d at 628 (stating that it is impermissible propensity analysis to invite the jury to infer that because defendant was motivated by a desire for sexual gratification in a previous assault, he was similarly motivated in the case at issue). *But see* State v. Jones, 160 Vt. 440, 445, 631 A.2d 840, 844 (1993) (approving the admission of evidence such as poem with sexual connotations, gifts, and songs that defendant gave to child victim over a year and a half period to prove motive because they fairly indicated the defendant's continuing sexual interest in the child); State v. Bruyette, 158 Vt. 21, 29, 604 A.2d 1270, 1273 (1992) (affirming trial court's decision to admit evidence of defendant's prior consensual sexual conduct with his girlfriend because it was highly probative on the issue of identity, since the conduct was strikingly similar to the conduct perpetrated on the victim of a sexual assault, and it was unlikely that the points of similarity, at least eleven in number, occurred by chance); *Cardinal*, 155 Vt. at 414, 584 A.2d at 1154–55 (explaining that evidence of a continuous practice of sexual abuse accompanied by threats to the victim's life was indispensable in establishing defendant's modus operandi of overcoming the victim's will by putting her in fear of harm).

109. *See* State v. Hendricks, 12 Vt. L. Wk. 337, 787 A.2d 1270 (2001); State v. Sanders, 168 Vt. 60; 716 A.2d 11 (1998); State v. Forbes, 161 Vt. 327, 640 A.2d 13 (1993); State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987).

110. *Catsam*, 148 Vt. at 367, 534 A.2d at 186.

111. *Id.* at 379, 534 A.2d at 193.

112. *Id.*

her not to tell anyone about them "or else."[113] The trial court, relying on *Huddleston v. State*, admitted the evidence on the theory that it "exhibits a common scheme or transaction that's continuous in nature of ongoing behavior."[114] The Vermont Supreme Court upheld the admissibility of the evidence, characterizing the defendant's efforts to secure the silence of his victim as part of his "plan" to keep the victim available for future acts of molestation.[115] The court reasoned:

> In a child molestation case such as this, the major issue is whether the alleged criminal act took place; there is no issue of identity and no issues associated with the defense of consent. Evidence that the defendant previously molested the victim, and threatened her with harm if she were to reveal the incident, gives rise to the legitimate inference that because of the manner in which the prior sexual acts were perpetrated, the prior acts and the charged crime were part of a concerted scheme or plan of molestation. If the evidence of prior acts establishes the existence of such a plan, the necessary connection between the prior acts and the crime charged is present, bringing the evidence within the scope of Rule 404(b).[116]

The court recognized that this approach comes *perilously close* to the prohibited practice of admitting character evidence to prove the defendant "acted in conformity therewith in committing the crime charged."[117] Thus, the court instructed the trial courts to "be careful not to apply this exemption in a manner that swallows the rule,"[118] and established the applicable standard:

> In order to ensure the principled application of the rule, trial courts must find, at a minimum, a clear inference of the existence of a plan from the prior acts. At least *two factors* are crucial considerations in making this determination: *similarity between the prior acts and the crime charged and proximity in time.* . . . Other factors may also be considered, but the controlling consideration is whether the evidence tends to establish a scheme or plan of sexual molestation.[119]

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113. *Id.*

114. *Catsam*, 148 Vt. at 380, 534 A.2d at 193 (citing Huddleston v. State, 695 P.2d 8 (Okla. Crim. App. (1985)).

115. *Id.* at 381–82, 534 A.2d at 194.

116. *Id.* at 381, 534 A.2d at 194.

117. *Id.*

118. *Id.*

119. *Id.* at 382, 534 A.2d at 194 (emphasis added)(citation omitted).

As the court in *Winter* noted, insistence on a clear inference of the existence of a plan is intended to avoid "stretching" the concept beyond traditional logical constraints.[120] Subsequent applications of the *Catsam* test have refined it, especially with respect to the meaning of proximity in time. This proximity is not determined by the amount of elapsed time between assaults; rather, it is determined by whether there is continuity between the previous acts and the charged crime.[121]

B. The Starting Point of the Context Theory: State v. Forbes

In *State v. Forbes*, the Vermont Supreme Court developed an alternative exception and a most interesting approach to child molestation cases.[122] First, the court introduced an exception not explicitly mentioned in the rule. Second, and more importantly, it confronted the need of understanding child molestation as a pattern of behavior and not as a specific instance of conduct.

In *Forbes*, the defendant was accused of lewd and lascivious conduct with a child and sexual assault.[123] The victim was his eleven-year-old daughter.[124] The victim testified that the abuse had started about two years prior to the charged act.[125] She further testified that she had told her mother what happened after the first incident, but her mother did not believe her.[126] Her older sister persuaded her not to report the abuse to a school counselor.[127]

The charged assault took place on November 14, 1989.[128] The daughter testified that her father had sexually abused her in her room.[129] Although her mother and older sister were at home that night, they testified that they were unaware of what had occurred.[130] The defendant denied on the stand that any assault had occurred.[131] The defense suggested that the

120. State v. Winter, 162 Vt. 388, 396, 648 A.2d 624, 629 (1994).

121. *See* State v. Ashley, 160 Vt. 125, 126–27, 623 A.2d 984, 985 (1993) (finding that a continuous series of similar acts right up to the time of the charged crime provided a "significant nexus" between uncharged and charged misconduct); *cf.* State v. Hurley, 150 Vt. 165, 169, 552 A.2d 382, 385 (1988) (concluding that two previous instances of abuse ten and twelve years earlier were too remote).

122. State v. Forbes, 161 Vt. 327, 640 A.2d 13 (1993).

123. *Id.* at 329, 640 A.2d at 14.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

daughter had fabricated the allegations because her father had threatened two weeks earlier to send her away to reform school.[132]

The defendant was convicted of the charges.[133] On appeal, the defendant contended that the evidence about the prior sexual misconduct was inadmissible under Vermont Rule of Evidence 404(b).[134] The State argued that the uncharged misconduct was admissible under the theories of intent, motive, and plan.[135] The court rejected those arguments because the defendant had not put any of those factors at issue.[136] However, the court held the evidence admissible on different grounds:

> The history of defendant's incestuous relationship with his daughter was particularly relevant because it supplied the *context* within which the charged incidents of sexual contact occurred. The point of establishing the existence of an incestuous relationship was not to make an issue of defendant's general character for sexually abusing females of minor age. Rather, the point was to establish specifically defendant's propensity to engage in sexual contact with his daughter as an object of his desire.[137]

The court emphasized the importance of the evidence of a pattern of abuse to solve issues of credibility, given the issues of dependency and secretiveness that surrounds child sexual abuse, particularly incest.[138] Further, the court referred to studies that show that despite the relative frequency of child sexual abuse, "many people, including juries and judges, find it difficult to believe that it happens."[139] It is even more difficult to believe that an "ordinary" parent would sexually abuse his or her child.[140] Under those circumstances, "allegations of a single act of sexual contact between parent and child, taken out of its situational context of secrecy, oppression, and recurrence, are likely to seem incongruous and incred–

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132. *Id.*

133. *Id.*

134. *Id.* at 330, 640 A.2d at 14–15.

135. *Id.* at 330–31, 640 A.2d at 15.

136. *Id.* at 331, 640 A.2d at 15.

137. *Id.* (emphasis added).

138. *Id.* "Child sexual abuse is 'the involvement of dependent, developmentally immature children in sexual activities that they do not fully comprehend,' and incest is one form of sexual abuse usually 'carried out under actual or threatened violence, or it may be nonviolent, even tender, insidious, collusive, and secretive.'" *Id.* (quoting Richard Krugman & David P.H. Jones, *Incest and Other Forms of Sexual Abuse*, *in* THE BATTERED CHILD 286 (Ray E. Helfer & Ruth S. Kempe, eds., 4th ed. 1987)).

139. *Id.* at 331–32, 640 A.2d at 151 (quoting Susan B. Apel, *Custodial Parents, Child Sexual Abuse and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 499 (1989).

140. *Id.* at 332, 640 A.2d at 15–16 (quoting Apel, *supra* note 139, at 499).

ible."[141] The court then concluded that the daughter's allegations of a single instance of sexual contact would have seemed incredible absent the context of a continuous sexual relationship with her father; thus, the pattern of behavior or context was necessary for the jurors to appreciate the truthfulness of the victim.[142]

It is difficult to understand why the court in *Forbes* rejected the State's argument of admissibility under a traditional 404(b) exception. The State sought to justify admission of the evidence to prove opportunity, intent, motive, and plan.[143] The court rejected these grounds because the defendant did not put any of these factors in issue.[144] The court explained: "[Defendant] did not argue that opportunity to abuse his daughter was lacking, for example, because he did not reside with her. Nor did defendant concede that some contact had occurred, but his intent was innocent. . . . Instead, defendant categorically denied that any sexual abuse had ever occurred."[145] This explanation, however, does not clarify why the evidence was not admissible under the "plan" exception. The basic facts were essentially the same as in several other cases of child molestation in which the court found the evidence admissible under the *Catsam* rationale: an ongoing pattern of molestation, secrecy, and threatened or actual violence.[146]

One possible explanation for this anomaly is the court's intent to develop a specific analysis for child molestation cases instead of stretching the logical meaning of the "plan" exception to contain what is better described as a "pattern." This could signify that the Vermont Supreme Court, without adopting a more liberal interpretation of Rule 404, is nevertheless ready to adopt some specific evidentiary standards in child molestation cases with regard to character evidence.

C. Development of the Context Theory: State v. Sanders

After *Forbes,* the development of the context theory has taken place in two domestic violence cases.[147] As stated at the beginning of this Note, the court has specifically noted some evidentiary difficulties that are common

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141. *Id.* at 331, 640 A.2d at 15.

142. *See id.* at 332–34, 640 A.2d at 16–17.

143. *Id.* at 330–31, 640 A.2d at 15.

144. *Id.* at 331, 640 A.2d at 15.

145. *Id.* at 331, 640 A.2d at 15.

146. *See, e.g.*, State v. Ashley, 160 Vt. 125, 126–27, 623 A.2d 984, 985 (1993); State v. Johnson, 158 Vt. 344, 352, 612 A.2d 1114, 1118–19 (1992); State v. Parker, 149 Vt. 393, 399, 545 A.2d 512, 516 (1988).

147. *See* State v. Sanders, 168 Vt. 60, 716 A.2d 11 (1998); State v. Hendricks, 12 Vt. L. Wk. 337, 787 A. 2d 1270 (2001).

in both child molestation and domestic violence cases, particularly with regard to the victim's credibility.[148] The problems are so similar that the court's arguments in support of evidence of context are identical in both series of cases.

In *State v. Sanders*, the defendant was convicted of aggravated domestic assault.[149] The defendant threatened his live-in girlfriend and a friend with a knife, saying, "someone is going to die."[150] At trial, the State introduced evidence of two prior acts of violence against the victim.[151] However, when the victim took the stand she recanted most of the substantive facts of her prior statements.[152]

On appeal, the defendant claimed that the trial court erred in admitting the prior bad acts because they constituted propensity evidence.[153] The court disagreed, applying exactly the same rationale as in *Forbes*, and explaining, "the evidence was relevant also to portray the history surrounding the abusive relationship, providing the needed context for the behavior in issue."[154] The court relied on the precedent established in *Forbes*, stating, "allegations of a single act of domestic violence, taken out of its situational context, are likely to seem 'incongruous and incredible' to a jury."[155]

The court further explained the special evidentiary difficulties in domestic violence cases, pointing to some of the same characteristics that were noted in the child molestation cases—specifically, the difficulty in crediting an isolated instance of violence without evidence of recurrent behavior.[156] An additional factor is the relevancy of the prior acts to put the victim's recantation into context for the jury:

> Victims of domestic abuse are likely to change their stories out of fear of retribution, or even out of misguided affection. This prior history of abuse gives the jury an understanding of why the victim is less than candid in her testimony and allows them to decide more accurately which of the victim's statements more reliably reflect reality.[157]

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148. *Hendricks*, 12 Vt. L.Wk. at 342, 787 A.2d at 1282 (Skoglund, J., concurring).
149. *Sanders*, 168 Vt. at 60, 716 A.2d at 12.
150. *Id.* at 61, 716 A.2d at 12.
151. *Id.*
152. *Id.*
153. *Id.* at 62, 716 A.2d at 13.
154. *Id.*
155. *Id.* (quoting State v. Forbes, 161 Vt. 327, 331, 640 A.2d 13, 15 (1994)).
156. *Id.*
157. *Id.* at 63 (citing State v. West, 164 Vt. 192, 197, 667 A.2d 540, 543 (1995) (citing Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of*

D. Setting the Boundaries: State v. Hendricks

State v. Hendricks[158] is the latest development in the context jurisprudence of *Forbes* and *Sanders*. The differences between the majority opinion and the concurrences reveal the disagreement within the court regarding the limits of the context theory.

In *Hendricks*, the defendant was accused of assaulting his former girlfriend of fourteen years.[159] She claimed that the defendant grabbed her by the throat and banged her head against a wall, and that later that day he knocked her down to the ground and choked her.[160] The defendant, however, claimed that she had attacked him and that he had merely pushed her away in self-defense.[161] The defendant was convicted of second-degree domestic assault.[162] On appeal, the defendant claimed that the court erred in admitting two prior acts of violence against the same victim because they should have been proscribed under 404(b) and 403.[163] The court agreed with the trial court that the two prior incidents were admissible for context purposes under *Sanders*.[164] It is important to note the breadth of the applicability of *Sanders* in the majority opinion:

> This case presents exactly the circumstances to which the reasoning of *Sanders* applies. The jury was presented with a single act of domestic violence. Defendant asserted that his actions during the incident were in self-defense, and that injuries to the victim occurred either in defending himself or as a result of the victim's . . . accidental fall.[165]

There were two concurring opinions. The concurring opinion of Justice Skoglund, to which this discussion will return, criticized the application of the *Sanders* analysis to this case and prompted Justice Dooley's additional concurrence.[166] Justice Dooley offered an interpretation of the scope of *Sanders* that is significantly narrower than the standard set in the majority opinion:

State Statutes and Case Law, 21 HOFSTRA L. REV. 801, 1187 (1993))).

158. State v. Hendricks, 12 Vt. L. Wk. 337, 787 A.2d 1270 (2001).
159. *Id.* at 337, 787 A.2d at 1272.
160. *Id.*
161. *Id.* at 337, 787 A.2d at 1272–73.
162. *Id.* at 338, 787 A.2d at 1274.
163. *Id.* at 338–39, 787 A.2d at 1275.
164. *Id.* at 339, 787 A.2d at 1276.
165. *Id.*
166. *Hendricks*, 12 Vt. L. Wk. at 340, 787 A.2d at 1278 (Dooley, J., concurring).

> Although I am concerned that the prohibition on the misuse of character evidence as expressed in V.R.E. 404(a) should not be undermined by the use of specious alternative rationales for admission, I do not believe that concern should govern in the narrow circumstances of the admission of prior incidents of domestic violence with the same victim as testified to by that victim.[167]

Further, Justice Dooley pointed to three important factors that sustain the context rationale and its applicability to the case. First, the evidence is "character evidence" only in the broadest sense, as it is used to show that the defendant has a violent relationship with the victim, not that he is violent generally, or in his relations with women.[168] Second, *Sanders* is limited to domestic violence cases, where a context is often essential to lend credibility to the accusation of violence in a particular instance.[169] Third, because admission of the evidence does not seriously raise the risk of abuses underlying Rule 404(a):

> It is logically possible, but highly unlikely, that the jury would believe the victim about the prior violence, disbelieve her about the violence involved in the charge before it, but convict defendant anyway because he is a bad actor. . . . If the jury is unlikely to misuse the evidence in this way, it makes no sense to exclude it.[170]

In any case, it is clear throughout Justice Dooley's analysis that he limited the *Sanders* opinion to the admission of prior bad acts of domestic violence against the same victim. He further limited it to those acts *as testified to by the victim*, since they may be necessary for an adequate determination of credibility. If an additional witness is necessary to prove the prior conduct, the admissibility of the testimony should be addressed by applying Vermont Rule of Evidence 403.[171]

Justice Skoglund, in her concurring opinion, expressed her disagreement with regard to the applicability of the *Sanders* rationale: "I believe that the prior assaults were admissible to refute defendant's claims of self-defense and accidental injury to the victim. However, I do not

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167. *Id.* at 340, 787 A.2d at 1278–79 (emphasis added).
168. *Id.* at 340, 787 A.2d at 1279.
169. *Id.* at 341, 787 A.2d at 1279–80.
170. *Id.* at 341, 787 A.2d at 1280.
171. *Id.*

believe that they were admissible in this case to provide 'context' for the charged offense."[172]

Justice Skoglund recognized the existence of a trend towards leniency in the admission of prior bad acts in domestic violence cases because of a "greater understanding of the pathology of abusive relationships."[173] However, Justice Skoglund reiterated the principle of *Winter* that the court has not adopted special, more liberal interpretations of Rule 404(b) for those cases, adding:

> The closest we have come to a special rule is allowing the State to show that the act charged in a child sexual abuse prosecution "is only one of a continuous series of acts" with the same victim. In such cases, we "allow the victim to tell enough of the story to preserve its integrity as a credible one." But that is only appropriate where the "context" of historical events is "so interwoven with the crime [that] it cannot be separated without skewing the event made the subject of the charge."[174]

Thus, Justice Skoglund argued that the context theory was not applicable in the *Hendricks* case.[175] She noted that it was not a case in which context evidence was admitted because the victim was dead and thus unavailable to testify.[176] Additionally, it was inappropriate because the victim had not behaved in a way that could diminish her credibility, such as by recanting or refusing to testify.[177] Skoglund went on to offer examples of cases where the context theory was so used: where evidence of a violent relationship was probative of identity when defendant was on trial for murder of his wife;[178] where prior assaults could explain the dynamics of the relationship and why the victim permitted contact with the abuser after the assault, thus helping the jury to evaluate her credibility;[179] where prior violence explained why the victim did not try to escape or retaliate, because the victim knew, based on nine years of abuse, that defendant would react more violently;[180] and where repeated acts of violence were admitted to explain the recantation of the victim.[181]

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172. *Hendricks*, 12 Vt. L. Wk. at 341, 787 A.2d at 1281 (Skoglund, J., concurring).
173. *Id.* at 342, 787 A.2d at 1282.
174. *Id.* at 342, 787 A.2d at 1283 (citations omitted).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* (quoting State v. Green, 652 P.2d 697, 701 (Kan. 1982)).
179. *Id.* (quoting State v. Grant, 920 P.2d 609, 613–14 (Wash. Ct. App. 1996)).
180. *Id.* (quoting State v. Kelly, 624 N.E.2d 733, 735 (Ohio Ct. App. 1993)).
181. *Id.* (quoting State v. Clark, 926 P.2d 194, 206 (Haw. 1996)).

Justice Skoglund precisely distinguished *Sanders* because in that case there were two facts that were not present in *Hendricks*: 1) the history of violence "went to prove that the defendant meant to intimidate and threaten the victim," and 2) the history of violence helped "to put the victim's recantation . . . into context for the jury."[182] In *Hendricks*, the victim testified fully in support of the State's case.[183] There was no ambiguity for which context was needed: "This was a credibility contest between the two witnesses to the event. There was no need to paint a picture of the relationship between defendant and his wife in order for the jury to make its assessment of who was more credible."[184]

Justice Skoglund very accurately and concisely described the problem with the context rationale, and pointed to the possible solution:

> I believe that the "context" rationale is an appropriate approach in certain cases, such as in *Sanders*. Applied in this case, however, the rationale has no purpose and simply becomes an excuse to admit all evidence of prior assaults against victims of domestic violence. If that is the path we are to take—and I am not convinced that it is the right path in all cases—it should be done through the rule amendment process rather than by dubious or incomplete analysis that warps the existing rules for other crimes.[185]

The Vermont Supreme Court transposed the context rationale from child molestation to domestic violence. Now, there is a strong possibility that the disagreement with regard to the boundaries of context seen in *Hendricks* will be transplanted to the child molestation jurisprudence. Justice Skoglund's proposed path, the rule amendment process, seems the wisest way to set those boundaries. The last part of this Note proposes, precisely, an amendment of the rule to codify this notion of context.

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182. *Id.* at 342, 787 A.2d at 1283–84 (quoting *Sanders*, 168 Vt. at 62–63, 716 A.2d at 13).
183. *Id.* at 343, 787 A.2d at 1284.
184. *Id.*
185. *Id.*

IV. PROPOSED AMENDMENT TO RULE 404: 404(c) EVIDENCE OF PRIOR CHILD MOLESTATION OFFENSES IN CHILD ABUSE CASES

Proposed Vermont Rule of Evidence 404(c)

* * *

> **(c) Evidence of prior child molestation offenses in child abuse cases.** In addition to possible admissibility under the exceptions of 404(b), evidence of defendant's prior acts of child sexual abuse may be admissible in child sexual abuse cases when:
>
> (1) the alleged abuse has taken place in the domestic environment or in another environment, such as a school, church or youth organization, where the defendant had a position of authority, leadership or trust over the victim;
>
> (2) the identity of the perpetrator is not at issue; and
>
> (3) the prior sexual misconduct took place in an environment similar to the one in which the alleged abuse occurred.
>
> (4) in weighing the probative value of such evidence, the court, as part of its Rule 403 determinations, shall consider, at a minimum:
>
> (A) the proximity in time to the charged or predicate misconduct, or its continuity;
>
> (B) the degree of similarity between the previous acts and the charged conduct; and
>
> (C) the existence or absence of physical or other evidence corroborating the victim's testimony.

The purpose of the Proposed Rule is to codify the Vermont Supreme Court rulings with regard to the admission of uncharged misconduct in a very specific set of child abuse cases: sexual molestation of children in a domestic environment, where the identity of the perpetrator is not at issue, and the credibility of the child victim is crucial to the case. In approving the use of this evidence, the court intended to allow jurors to learn about the context in which the alleged attack took place and the previous interactions between the victim and the abuser. The proposed rule adopts these purposes, and therefore is not applicable in cases of random or single acts of abuse where there is little or no connection between the child and the defendant. However, the rule should apply in cases involving environments such as schools, churches or youth organizations, where the abusers—very much like relatives and friends in the domestic environment—may take advantage of their positions as trusted, loved, or feared figures to carry out

acts of molestation. The rule codified in subsection (1) is confined to this specific set of cases.

The first limit necessarily implies a second one: the perpetrator's identity must not be at issue. The rule codifies this requirement in subsection (2). In all the Vermont cases examined in this Note, the victim alleged that the defendant had molested him or her; thus, the main issue was whether the allegations were true, not whether the child had misidentified the defendant. The courts admitted the evidence mainly to help the juries evaluate the credibility of the parties. This kind of character evidence would not be adequate or reliable when the perpetrator of the attack has not been identified. Certainly, 404(b) may be used to seek the admission of evidence of prior bad acts to prove identity, but only when the previous offenses are so similar to the charged misconduct and involve such distinctive acts that they fit the modus operandi exception.[186]

The third limit that the court has imposed when applying the context rationale is the confinement of the admissible prior bad acts to acts with the same victim. The proposed rule would not be so limited. The reason for this departure is to make the rule available in cases like *State v. Parker*, so that the evidence may be admitted without stretching the traditional 404(b) exceptions for other crimes.[187] In *State v. Parker*, evidence of the defendant's alleged sexual assaults on the victim's older brother was admitted to show the defendant's motive, intent and plan to assault the victim.[188] The children lived in the defendant's home.[189] There was evidence that the defendant molested the older brother for a one-year period, until the boy indicated his unwillingness to continue.[190] The defendant then started molesting the younger brother.[191] The court concluded that the facts fit the motive, opportunity, plan and intention exceptions.[192] The facts indicated the defendant's motive for assaulting the victim: "his desires continued unabated, and his prior source of gratification

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186. *Compare* State v. Bruyette, 158 Vt. 21, 29, 604 A.2d 1270, 1273 (1992) (affirming admission of defendant's prior consensual sexual conduct because it was highly probative on the issue of identity, since the conduct was strikingly similar on at least eleven points which was unlikely to occur by chance), *with* State v. Lawton, 164 Vt. 179, 183, 667 A.2d 50, 55 (1995) (finding that defendant's specific method of performing anal sex with his wife is not sufficiently distinctive to be admissible under the identity exception); State v. Perrillo, 162 Vt. 566, 569, 649 A.2d 1031, 1033 (1994) (holding that evidence that defendant had fondled another child was inadmissible under the identity exception because it was not an act so distinctive and unique as to constitute the defendant's "signature").

187. State v. Parker, 149 Vt. 393, 545 A.2d 512 (1988).

188. *Id.* at 399, 545 A.2d. at 516.

189. *Id.* at 399, 545 A.2d. at 514.

190. *Id.* at 396, 545 A.2d. at 514.

191. *Id.*

192. *Id.*

had come to an end."[193] Similarly, the facts were evidence of his intent and his plan "to continue his course of conduct; the victim was immaterial, as such."[194] Finally, "the common domicile of defendant and the boys provided a more accessible and safer opportunity that could not be duplicated outside of the home."[195]

It seems that, in order to fit the facts within the exception, the Vermont Supreme Court considerably stretched the concepts of motive and plan. The rationale to admit the evidence under the motive exception is particularly broad: the defendant assaulted the victim because his previous victim was no longer available.[196] That may be the motive of an enormous number of pedophiles, in or out of the domestic environment. At the same time, ironically, evidence of the abuse of the older brother would not have been admissible if the defendant in *Parker* had been abusing the two children at the same time, instead of consecutively. Further, this broad interpretation of motive could be easily applied in cases involving many other crimes. The concept of plan has been similarly broadened, since the defendant's plan is described as his intention to continue obtaining sexual satisfaction from a child, the identity of the victim being "immaterial."[197] It could be said that that is the "plan" of quite a few child molesters. Thus, *Parker* is an example of the dangerous warping of the rules discussed earlier.[198]

While the court's application of the facts to each of the exceptions seems a bit awkward, the court's reasoning explains how the sum of all the facts and circumstances is extraordinarily relevant in understanding how and why the abuse occurred:

> [W]hile it is true that the mere fact of defendant's prior conduct with another male juvenile, standing alone, would not be sufficient . . . the situation here is not the same. . . . [T]here is a clear connection, a nexus, between the two series of sexually inspired actions. . . . Defendant took advantage of their common domicile . . . to carry out a clandestine and furtive course of conduct with the older boy. This he did for a substantial period of time, until the maturing youth himself indicated his

193. *Id.* at 399, 544 A.2d at 516.

194. *Id.*

195. *Id.*

196. Compare *Parker*, 149 Vt. at 399, 545 A.2d at 5–6, with the more restrained definition of motive in *State v. Winter*, 162 Vt. 388, 648 A.2d 624 (1994). "The clearest example of using a prior crime to establish motive is when the victim knows that the defendant committed the prior crime and the defendant kills the victim to prevent disclosure." *Winter*, 162 Vt. at 394, 648 A.2d at 628.

197. *Parker*, 149 Vt. at 399, 545 A.2d at 516.

198. *See supra* Part II.

> unwillingness to continue. Thereupon, defendant turned to the younger boy, J.P., seeking and finding . . . another source for the same gratification of his illicit appetite, under the same domiciliary circumstances; circumstances offering the same opportunities with at least a minimal risk which could not be assured had he gone more widely into the community at large.[199]

This reasoning is more in accord with the context rationale than with the application of the traditional exceptions. The court took notice of the defendant's recurrent behavior under a very specific set of circumstances. Thus, the court's reasoning in *Forbes* should be applicable in cases like *Parker*:

> The point of establishing the existence of an incestuous relationship was not to make an issue of defendant's general character for sexually abusing females of minor age. Rather, the point was to establish specifically defendant's propensity to engage in sexual contact with his daughter as an object of his desire.[200]

The *Forbes* court allows character evidence, but only to establish a specific propensity. Similarly, as the *Parker* court noted, evidence of the abuse of the older sibling would not be indicative of the defendant's general propensity to engage in sexual contact with minors.[201] Rather, the evidence shows a very specific pattern of behavior: the misuse of the defendant's position as a loved, trusted, or feared figure to abuse the children in his household. In such a case, the evidence of a pattern of abuse to solve issues of credibility is important, as the *Forbes* court found.[202] The purpose of introducing evidence of prior acts is to show that what the victim alleges the defendant did is consistent with a specific pattern of behavior that the defendant has exhibited in the past.

Following this reasoning, subsection (3) of the proposed rule would allow evidence of prior sex offenses with a different victim provided that they took place in a very similar context. For example, previous abuse of the defendant's children could be admissible where the defendant is accused of abusing his step-child, but not if he is charged with a random assault on a child. The proposed rule, therefore, takes into consideration Professor Park's observations with regard to the relevancy of prior bad acts when an

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199. *Parker*, 149 Vt. at 398–99, 545 A.2d at 516.
200. *Forbes*, 161 Vt. at 331, 640 A.2d at 15.
201. *Parker*, 149 Vt. at 399, 545 A.2d at 516.
202. *Forbes*, 161 Vt. at 331–33, 640 A.2d at 15–16.

individual has once engaged in unusual conduct, and specific evidence makes him or her a suspect of a new instance of that conduct.[203] It also reflects the importance, for many commentators, of taking into account the similarity between past and present conduct.[204] In this regard, there is symmetry between the behavioral and legal analyses, since similarity of conduct is also one of the two essential factors required by the court under the *Catsam* test.[205] The rule, however, further limits the admission of character evidence by requiring similarity of contexts.

Determining what constitutes a similar context is a difficult issue, and one with which behavior experts can help more. A close examination of the contexts in which a defendant acted may offer important clues as to the stimuli that caused his or her response and may reveal significant similarities or disparities. In any event, the context (or stimulus) should be defined as narrowly as possible. Such a narrow conception will minimize the risk of overly broad generalizations from a specific act; at the same time, it will recognize the legal significance of an unusual response to that stimulus. For example, if a defendant had previously been charged with assaulting a seven-year-old boy, characterizing the stimulus as "seven-year-old boys" would be overly broad, and could be enormously unfair for the defendant. It could also be entirely useless if the triggers for the behavior are unrelated to the age or even the gender of the victim—for example, when the abuse is the defendant's way to exercise control over his own children, or a way of "getting back" at a wife or girlfriend.

Finally, the proposed rule is expressly subject to Rule 403 balancing, following the model of the amendment to Federal Rule 404 proposed by the Advisory Committee.[206] As in that proposal, the rule proposed here provides courts with a list of factors that they may consider, thus minimizing the need for extensive and time-consuming judicial interpretation.[207] With regard to subsections (A) and (B), the importance of proximity in time and similarity has already been discussed.[208] Subsection (C) explicitly

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203. Park, *supra* note 15, at 724.

204. *See, e.g.*, Davies, *supra* note 15, at 519–20.

205. *Catsam*, 148 Vt. at 382, 534 A.2d at 194.

206. Proposed FED. R. EVID. 404(a)(4)(A). The Standing Committee on Federal Rules of Practice and Procedure and the Judicial Conference of the United States recommended this rule as an alternative to the enactment of FED. R. EVID. 413–415, which both the Committee and the Conference opposed. Congress rejected the recommendation, and rules 413–415 became effective on July 9, 1995. C. Arlen Beam, *The Uniform Rules of Evidence (1999): Introduction, Background, and Overview*, 54 OKLA. L. REV. 443, 445 (2001).

207. These factors are simply an addition to the traditional factors considered under Rule 403, and should not be used in substitution of the more thorough balancing test needed under that rule. Proposed FED. R. EVID. 404(a)(4) advisory committee's note.

208. For a discussion of temporal proximity, see *supra* Part III.A. Similarity has been discussed

directs the court to consider with particular attention the need for the evidence. As discussed throughout this Note, the purpose of the admission of the evidence is not to inform the jury about the bad character of the defendant. Rather, the purpose is to bolster the credibility of the victim because of the specific credibility issues in this type of case. Thus, when no other evidence is available, the probative value of the prior offenses outweighs its prejudicial effect. But, when other evidence *is* available to corroborate the victim's testimony, the prejudicial effect of the character evidence substantially outweighs its probative value, and therefore it should be excluded.

As these limits show, the rule proposed here is not an opening to all kinds of prior sexual misconduct evidence under all circumstances. Its breadth is not even comparable with Federal Rule 414,[209] and the enormous controversy surrounding Federal Rules 413–415 makes clear that such a broad scope should be entirely out of the question.[210] Neither is Rule 404(c) as proposed here an adoption of a modified lustful disposition rule. Reed has described the possible consequences of a lustful disposition rule, citing the rule enacted in Arizona as an example.[211] Such a rule would "permit [the] admission of [any] uncharged misconduct evidence to prove habitual criminal sexual activity."[212] The evidence would then serve as a basis for expert opinion on the defendant's habitual sexual behavior patterns: "The jury, aided by an expert, will use evidence of the defendant's sexual behavior in general to convict or acquit the defendant."[213] Reed, while proposing this approach, notes that "conservative courts" would be uncomfortable with this approach because it turns the sex crime prosecution into an inquisition into the sexual behavior of the defendant.[214]

There are additional and maybe more significant reasons to reject the lustful disposition approach. It is practically impossible to distinguish it

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throughout this Note.

209. In relevant part, the rule states: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 414(a).

210. For a glimpse of the controversy, see generally James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994) (arguing that the proposed new rules are unnecessary and unjustified) and Paul G. Cassell & Eran S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145 (favoring the rule).

211. Reed, *Reading Gaol*, *supra* note 62, at 220. See *supra* Part II. for comments on the lustful disposition rule and other approaches of several jurisdictions.

212. Reed, *Reading Gaol*, *supra* note 62, at 220.

213. *Id.*

214. *Id.*

from other forbidden uses of character evidence because there is no limit to its scope. Even if it could be so distinguished, the courts should proceed with caution in allowing expert testimony with regard to the behavior of the defendant. As reviewed in Part I of this Note, the new personality theories may eventually permit more accurate use of the prior behavior of an individual.[215] However, as Méndez noted, the application of these theories to the law of evidence would be difficult, and in their current stage of development, it is uncertain whether the methods and theories can pass the admissibility tests for expert testimony.[216] If there is disagreement even about less controversial uses of expert testimony on behavior, the approach Reed described—an "inquisition," in his own words[217]—requires a degree of accuracy in predictions about a single individual from his or her general behavior that the methods and theories of behavioral science cannot, and hopefully will not, guarantee.

CONCLUSION

Child molestation cases pose specific evidentiary issues that make their prosecution difficult: the acts are often committed in secrecy, and therefore there are no witnesses to corroborate the victim's story.[218] In addition, the social stigma surrounding the abuse, and the contradictory feelings that many of these victims experience towards their abusers often make the victims reluctant or insecure witnesses.[219] Since often there is no physical evidence left or it has been destroyed by the time the crime is reported, many of the cases end up being a credibility competition between the defendant and the victim.[220] Although there have been substantial advances in raising the public awareness about child molestation, juries and judges still have difficulties believing stories of child abuse and incest, which, without context, may appear untruthful or incongruous.[221]

The development of the context theory reflects the Vermont Supreme Court's awareness of these evidentiary obstacles in child molestation crimes. It also shows the court's understanding of the significance of patterns and recurrence of behavior in domestic violence and child molestation situations and their relevance in assessing the credibility of a victim. However, without delineation of fixed boundaries, there is little

215. *See supra* Part I.
216. Méndez, *Stable Personality*, *supra* note 14, at 236.
217. Reed, *Reading Gaol*, *supra* note 62, at 220.
218. *See supra* notes 62–68 and accompanying text.
219. *See supra* notes 138–42 and accompanying text.
220. *See supra* notes 62–68 and accompanying text.
221. *See supra* notes 138–42 and accompanying text.

guidance to the trial courts, unpredictability of outcomes, and an uneven application of the rationale.

Behavioral science can offer important contributions in this exploration of the boundaries of the relevance of character evidence.[222] Nonetheless, it is clear that this discipline should not be used to make broad predictions about the conduct of a defendant or to assess the likelihood that a certain defendant committed a specific crime.[223] A lustful disposition rationale is equally unhelpful. Behavioral science can and should be used, however, to help us better understand the specific triggers or causes that make a defendant commit an act of molestation, thus helping to narrow the notions of context and similarity.

This very narrow conception of similarity and context will help establish the limits of the rules of admission. The codification of the theory into a rule of evidence will further limit the risks of misuse of the theory. A rule, such as proposed in this Note, that is specific to child abuse in the domestic environment will minimize the risk of expanding the notion of context to other crimes. Otherwise, the context rationale may start creeping into the prosecution of crimes that present neither the same policy considerations nor the specific evidentiary difficulties that support its use in child molestation cases.

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222. *See supra* Part I.

223. *Id.*

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