THE ADMISSIBILITY OF PRIOR BAD ACTS IN SEXUAL ASSAULT CASES UNDER ALASKA RULE OF EVIDENCE 404(b) — AN EMERGING DOUBLE STANDARD

I. INTRODUCTION

Evidence of prior bad acts, when intended by the prosecution to establish a general disposition or propensity for criminal activity, is ordinarily inadmissible under Alaska Rule of Evidence 404(b).[1] The underlying rationale for the exclusion of such evidence is that prior bad acts are considered irrelevant in proving present conduct because any probative value is outweighed by the possibility of prejudice and confusion.[2] Rule 404(b) continues the general rule developed at common law excluding the circumstantial use of character evidence.[3] Character is used circumstantially when it is suggested that a person is likely to act consistently with an established character or certain character traits. Under the "propensity rule," therefore, evidence of other crimes, wrongs, or acts is not admissible to prove character in order to suggest that conduct on a particular occasion was in conformity with

---

1. Alaska Rule of Evidence 404(b) provides as follows:

> 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.

ALASKA R. EVID. 404(b). The Alaska rule is substantially similar to Federal Rule of Evidence 404(b), which states:

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

FED. R. EVID. 404(b).

2. *See* C. MCCORMICK, EVIDENCE § 190, at 557 (3d ed. 1984); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5239, at 436 (1978).

3. *See* FED. R. EVID. 404(b) advisory committee's note; ALASKA R. EVID. 404(b) commentary; C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 439. Circumstantial character evidence is also referred to as "extrinsic offense evidence." *See* C. MCCORMICK, *supra* note 2, § 190, at 557 n.7.

such character.[4] In *Soper v. State,*[5] however, the Alaska Court of Appeals ruled that, under certain limited circumstances, evidence showing a general pattern or history of sexual abuse by the defendant was admissible to prove culpability for a particular sexual assault.[6] Thus, the *Soper* decision reverses the previously enunciated position of the court of appeals with respect to the admission of prior bad acts in sex crimes cases.[7]

In *Soper,* the court of appeals affirmed a jury conviction of sexual assault in the first degree by the defendant, John P. Soper, on his youngest daughter, M.S. The conviction resulted from charges that Soper had sexual intercourse with M.S., a minor child, virtually every weekend between December 1979 and September 1980, at the family's lakeside cabin.[8] As part of its case-in-chief, the prosecution intended to introduce evidence establishing that Soper had sexually abused four of his older daughters regularly from 1963 until 1979.[9] Although Soper was not charged with any of these prior sexual assaults, two of these daughters were allowed to testify with respect to these earlier occurrences. Soper argued that the trial court erred in admitting any evidence of uncharged illegal sexual involvement with his other daughters.[10]

Finding no abuse of discretion,[11] the court of appeals upheld the lower court's evidentiary ruling. In an expansive opinion, the court concluded that evidence of prior sexual assaults upon other similarly situated victims falls within the scope of the judicially-recognized "lewd disposition" exception to exclusionary Rule 404(b).[12] The court further held that the probative relevance of the admitted evidence sufficiently outweighed its prejudicial impact under the associated balancing test of Rule 403.[13]

---

4. C. MCCORMICK, *supra* note 2, § 190, at 558.

5. 731 P.2d 587 (Alaska Ct. App. 1987), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

6. *Id.* at 590-91.

7. *See, e.g.,* Bolden v. State, 720 P.2d 957 (Alaska Ct. App. 1986); Pletnikoff v. State, 719 P.2d 1039 (Alaska Ct. App. 1986); Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985) (all three cases holding that sexual conduct with someone other than the victim is inadmissible under Alaska Rule of Evidence 404(b) because it was being used for propensity).

8. *Soper,* 731 P.2d at 588.

9. *Id.* at 589.

10. *Id.*

11. *Id.* at 591.

12. *Id.* at 590. *See* Burke v. State, 624 P.2d 1240, 1248-49 (Alaska 1980) (explaining the "lewd disposition" exception).

13. *Soper,* 731 P.2d at 591. Alaska Rule of Evidence 403 provides as follows: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

The *Soper* decision extends the "lewd disposition" exception, which was first enunciated by the Alaska Supreme Court in *Burke v. State.*[14] As originally formulated, the exception pertained only to evidence of prior sexual acts involving the accused and the same victim.[15] Indeed, the exception is sometimes referred to as the "same victim" exception.[16] Following *Soper,* however, the exception now applies to any evidence of earlier sexual misconduct occurring under "substantially similar circumstances" and with parties having "highly relevant common characteristics."[17] Such unique circumstances and characteristics were found by the *Soper* court to exist among sexually abused siblings, particularly dependent daughters.[18]

In addition to broadening the "lewd disposition" exception to Rule 404(b), the *Soper* decision also blurs the distinction between evidence of character, which is inadmissible under Rule 404 to show conformity of conduct on a particular occasion,[19] and evidence of habit, which is admissible under Rule 406 to prove such conformity.[20] In describing what appears to be a new evidentiary standard, the *Soper* opinion states that "the common experiences of each of these young women [siblings in sexual assault cases] establishes a striking pattern of behavior that seems to occupy the middle ground between evidence of character, [Alaska Rule of Evidence] 404(b), and habit, [Alaska Rule of Evidence] 406."[21]

In recent years, the Alaska Court of Appeals has been faced with an increasing number of sexual assault and child molestation cases.[22]

---

evidence." ALASKA R. EVID. 403. The Alaska standard is somewhat different from the federal standard, which requires that the probative value of the evidence "substantially" outweigh the prejudice. FED. R. EVID. 403.

14. 624 P.2d 1240 (Alaska 1980).

15. *Id.* at 1248-49; *see also* 2 J. WIGMORE, EVIDENCE § 402(2)(a) (Chadbourn rev. ed. 1979).

16. *See, e.g.,* Johnson v. State, 727 P.2d 1062, 1063 (Alaska Ct. App. 1986).

17. *Soper,* 731 P.2d at 590.

18. *Id.* at 591.

19. Alaska Rule of Evidence 404(a) provides, in relevant part, as follows: "Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . ." ALASKA R. EVID. 404(a).

20. Alaska Rule of Evidence 406 reads as follows: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." ALASKA R. EVID. 406. The Alaska version is identical to Federal Rule of Evidence 406.

21. Soper v. State, 731 P.2d 587, 590 (Alaska Ct. App. 1987), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

22. *See* Note, Nitz v. State: *Skewing the Evidentiary Rules to Prosecute Child Molesters,* 4 ALASKA L. REV. 333, 336 (1987) ("Alaska has a higher rate of child

In its apparent haste to confront this highly visible and disturbing problem, the court increasingly seems inclined to sidestep well established and widely followed evidentiary rules.[23] In *Soper,* the court's decision represents an emerging double standard in determining the admissibility of prior bad acts in sexual abuse cases, especially those involving children. Rather than meaningfully balancing relevancy against prejudice under Rule 403, the *Soper* court appeared to be more influenced by the long and continuous pattern of the sexual assaults, by the tremendous control of parents over a child, by the reluctance of victims to testify, and by the evidentiary difficulties in proving sexual abuse.[24]

This note argues that the courts should strive to apply existing evidentiary rules more uniformly, despite the unusually difficult hurdles that prosecutors face in sexual abuse and child molestation cases. Otherwise, the rules may lose their intended effectiveness in other situations. The decision in *Soper* reintroduces the concept of propensity into the framework of Rule 404(b). *Soper* also represents the failure of the courts fully to consider the harmful effects inherent in evidence of prior bad acts.

Section II of this note summarizes the common law development of prior bad acts in order to provide an historical context for the *Soper* decision; it then introduces the concept of prior bad acts under the Federal Rules of Evidence. Section III canvasses the doctrine as it has evolved under the Alaska Rules of Evidence. Section IV addresses the application of the prior bad acts doctrine in sexual assault cases before *Soper.* Section V considers the position taken by the Alaska Court of Appeals in *Soper* that an accused's prior bad acts with other individuals may be admissible to show or demonstrate a "lewd disposition" or an affinity for sexual molestation toward members of a limited class. Finally, Section VI concludes with a suggestion that the "lewd disposition" exception to Rule 404(b) should be severely limited, and that a thorough rather than a perfunctory balancing should be applied under Rule 403.

---

abuse/neglect cases than any other state in the country.") (citing PARENTS UNITED, INC., HELP FOR SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (1986)).

23. Previously, the *Alaska Law Review* has noted a tendency by the Alaska Court of Appeals to bend the prompt complaint doctrine and the rule governing prior consistent statements in cases involving the sexual assault of children. *See* Note, *supra* note 22, at 335.

24. *Soper,* 731 P.2d at 590.

II. COMMON LAW HISTORY OF PRIOR BAD ACTS AND PRIOR BAD ACTS UNDER THE FEDERAL RULES OF EVIDENCE

The common law rule excluding evidence of other crimes, wrongs, and acts is generally considered to have originated in England with the Treason Act of 1695,[25] which stated that an overt act not alleged in the indictment could not be proved at trial.[26] This rule eventually was recognized as the standard of basic fairness in all criminal trials, not just trials for treason.[27] Originally, the rule was not recognized as one of general exclusion, and the English courts admitted evidence of other crimes, wrongs, or acts in certain cases.[28]

The English rule was accepted by the early American courts,[29] and it eventually developed into a general rule of exclusion accompanied by numerous debilitating exceptions. These exceptions reflected those situations in which evidence of prior bad acts was traditionally admitted by the English courts. The common law rule has been summarized in this fashion:

> The doing of another criminal act, not a part of the issue, is . . . not admissible as evidence of the doing of the criminal act charged, except when offered for the specific purpose of evidencing Design, Plan, Motive, Identity, Intent, or other relevant fact . . . distinct from Moral Character.[30]

The rule at common law thus precluded the admission of evidence of prior bad acts, unless such evidence was intended to establish certain facts — other than the accused's demonstrably defective character — relevant to the immediate prosecution.

Federal Rule of Evidence 404(b) essentially codifies and continues this basic doctrine. The following excerpt represents a more contemporaneous statement of the traditional principle:

> As a general rule the character of a party to a civil [or criminal] action is not a proper subject of inquiry, for, while it is recognized that ground for an inference of some logically probative force as to whether or not a person did a certain act may be furnished by the fact that his character is such as might reasonably be expected to predispose him toward or against such an act, this consideration is outweighed by the practical objections to opening the door to this

---

25. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials,* 50 U. CIN. L. REV. 713, 717 (1981).

26. *Id.*

27. *Id.*

28. *Id.* at 718-19 (evidence of other crimes may be admitted to show intent, absence of mistake, knowledge, identity, the continuing nature of a criminal operation, and to impeach a witness).

29. *See, e.g.,* Walker v. Commonwealth, 28 Va. (1 Leigh) 574, 576 (1829).

30. J. WIGMORE, CODE OF EVIDENCE 81 (3d ed. 1942), *cited in* C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 428-29.

> class of evidence. There are, however, exceptions to the general rule. . . .[31]

This particular restatement of the common law highlights an enduring concern that the undesirable qualities or effects of the offered evidence not exceed the evidence's probative value. Under most modern versions of this rule, the comparable balancing process is now governed by Rule 403.[32]

The rationale and history behind this long-standing rule, which circumscribes the use of other crimes evidence, is best explained by Professor Wigmore:

> It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge. . . .[33]

Wigmore concluded that this rule of exclusion was so firmly established in the common law that it often prevailed in jurisdictions in which there was no express adoption of the rule.[34] Despite the apparently widespread fidelity to this general rule, the plethora of exceptions tended to constrain the rule's application. Often, the scope and development of the exceptions were of greater practical importance than the controlling rule itself. At other times, the courts have been unable to distinguish the rule from the exceptions.[35] Nonetheless, the Federal Rules of Evidence assimilated this broad exclusionary principle along with most of its exceptions.

The Federal Rules of Evidence for United States Courts and Magistrates were approved on January 2, 1975, and became effective on July 1, 1975.[36] Federal Rule 404(b), which was amended in 1987,[37] largely embodies the common law exclusionary doctrine it was intended to supersede. Although the application and interpretation of

---

31. 32 C.J.S. *Evidence* § 423 (1964) (footnotes omitted).

32. *See supra* note 13 (quoting ALASKA R. EVID. 403).

33. IA J. WIGMORE, EVIDENCE § 58.2 (Tillers rev. ed. 1983) (citations omitted).

34. *Id.*

35. C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 431.

36. Act of January 2, 1974, Pub. L. No. 93-595, 88 Stat. 1926 (1975), 1974 U.S. CODE CONG. & ADMIN. NEWS 2215.

37. The largely technical amendment substituted, "[i]t may, however, be admissible," in place of, "[t]his subdivision does not exclude the evidence when offered," at the beginning of the second sentence. The change was adopted on March 2, 1987, and became effective on October 1, 1987. *See* FED. R. EVID. 404(b). The Alaska version of Rule 404(b) also was amended to reflect this change. *See* ALASKA R. EVID. 404(b).

Rule 404(b) by the federal courts is beyond the scope of this note, such developments have been elsewhere documented and discussed.[38] The Alaska courts apparently have not felt constrained by this burgeoning body of federal authority in construing the state's own version of Rule 404(b).[39]

III. PRIOR BAD ACTS UNDER THE ALASKA RULES OF EVIDENCE

Alaska Rule of Evidence 404(b) was adopted and amended by Order 364 of the Alaska Supreme Court, and has been effective since August 1, 1979.[40] In determining the evidentiary admissibility of prior bad acts under Rule 404(b), the Alaska courts have developed a two-part test. The party seeking to introduce such evidence must first show some relevance apart from propensity, thereby satisfying the "other purposes" clause of Rule 404(b).[41] The offering party must then show that the nonpropensity relevance outweighs the presumed

38. *See generally* Annotation, *Admissibility of Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b) of Federal Rules of Evidence, in Civil Cases,* 64 A.L.R. FED. 648 (1983) (collects and analyzes the federal cases that discuss the admissibility of evidence of prior bad acts under Rule 404(b) in civil cases); Annotation, *Admissibility of Evidence of Character or Reputation of Party in Civil Action for Sexual Assault on Issues other than Impeachment,* 100 A.L.R. 3D 569 (1980) (collects and discusses state civil cases dealing with admissibility of evidence of character or reputation of victim or defendant in sexual assault cases not involving impeachment of party as a witness); Annotation, *Admissibility, Under Rule 404(b) of the Federal Rules of Evidence, of Evidence of Other Crimes, Wrongs, or Acts Similar to Offense Charged to Show Preparation or Plan,* 47 A.L.R. FED. 781 (1980) (discusses federal criminal cases on point); Annotation, *Admissibility Under Rule 404(b) of Federal Rules of Evidence, of Evidence of Other Crimes, Wrongs, or Acts Not Similar to Offense Charged,* 41 A.L.R. FED. 497 (1979) (discusses federal criminal cases on point); Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses,* 77 A.L.R. 2D 841 (1961) (compiles state common law criminal cases on point).

39. For example, in Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980), the first case construing ALASKA R. EVID. 404(b), the Alaska Supreme Court cited some federal authority and related commentary on the prior acts doctrine as it existed before the adoption of FED. R. EVID. 404(b), but it cited no cases interpreting the federal rule. *Id.* at 524 n.3. Subsequent cases often use the *Oksoktaruk* decision as a starting point, and make no references to federal or other extra-territorial precedent interpreting Rule 404(b). *See, e.g.,* Lerchenstein v. State, 697 P.2d 312, 315 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986).

40. *See* ALASKA R. EVID. 404(b) commentary.

41. *See Oksoktaruk,* 611 P.2d at 524.

highly prejudicial impact of the evidence,[42] in order to satisfy the discretionary language of Rule 404(b)[43] and the implicit balancing considerations of Rule 403.[44]

Both components of this test were described in *Oksoktaruk v. State,*[45] the first case in which the Alaska Supreme Court considered the application and scope of Rule 404(b). Phillip Oksoktaruk was convicted of burglarizing a photography lab after the state had introduced evidence that the defendant had been convicted, two years previously, of a fur store burglary.[46] In reversing Oksoktaruk's conviction, the court found that the only possible purpose of the evidence was to show a propensity to steal.[47] The court also stated that even if the burglary conviction were relevant, the nexus between the two burglaries was not sufficiently close to allow admission of the evidence.[48]

In *Oksoktaruk,* the court concluded that Rule 404(b), like its common law counterpart, was a rule of exclusion.[49] Thus, evidence of prior bad acts would be excluded unless it tended to prove some material fact other than propensity. More specifically, the court held that evidence of prior misconduct could never be used in a state prosecution to establish guilt by means of criminal propensity.[50] Rule 404(b)[51] provides, however, that evidence of prior bad acts may be used to show motive,[52] opportunity,[53] intent,[54] preparation,[55] plan,[56]

---

42. *Id.*

43. FED. R. EVID. 404(b) advisory committee's note; ALASKA R. EVID. 404(b) commentary; SENATE COMM. ON JUDICIARY, FED. RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 24 (1974), *reprinted in,* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7071; C. MCCORMICK, *supra* note 2, § 190, at 565.

44. *See supra* note 13 (quoting ALASKA R. EVID. 403).

45. 611 P.2d 521 (Alaska 1980).

46. *Id.* at 523.

47. *Id.* at 525.

48. *Id.*

49. *Id.* at 524.

50. *Id.*

51. *See supra* note 1 (quoting ALASKA R. EVID. 404(b)).

52. *See* State v. Grogan, 628 P.2d 570, 572 (Alaska 1981); Gafford v. State, 440 P.2d 405, 407-08 (Alaska 1968), *cert. denied,* 393 U.S. 1120 (1969); Patterson v. State, 732 P.2d 1102, 1103-04 (Alaska Ct. App. 1987). *But see* Pletnikoff v. State, 719 P.2d 1039, 1043-44 (Alaska Ct. App. 1986); Oswald v. State, 715 P.2d 276, 279 (Alaska Ct. App. 1986).

53. *See* C. MCCORMICK, *supra* note 2, § 190(7), at 563. *But see* C. WRIGHT & K. GRAHAM, *supra* note 2, § 5241, at 484-86.

54. *See* Adkinson v. State, 611 P.2d 528, 531-32 (Alaska), *cert. denied,* 449 U.S. 876 (1980); Demmert v. State, 565 P.2d 155, 157 (Alaska 1977).

55. Preparation is often considered similar to plan.

56. *See* Fields v. State, 629 P.2d 46, 49-51 (Alaska 1981); Oswald v. State, 715 P.2d 276, 279-80 (Alaska Ct. App. 1986).

knowledge,[57] identity,[58] absence of mistake,[59] or absence of accident.[60] These enumerated examples were not intended to be exhaustive, however, and the *Oksoktaruk* court described several other situations in which prior acts would be admissible under the "other purposes" clause of Rule 404(b). These situations include cases in which the prior act involved the same victim or complainant,[61] the prior act is used to impeach the credibility of the defendant as a witness,[62] the prior act occurred contemporaneously with and set the stage for the present crime (the inseparable or interwoven crimes exception),[63] and the prior act was committed in a similar manner and under almost identical circumstances as the present crime (the *modus operandi* or handiwork exception).[64]

Once the nonpropensity relevance of the evidence is established, the court must then weigh its probative value against its prejudicial effects.[65] The *Oksoktaruk* court indicated that the appropriate balancing standard is whether the prior misconduct is so related to the present crime in point of time or circumstances as to be significantly useful in establishing the material fact sought to be proved by evidence of the

57. Rhodes v. State, 717 P.2d 422, 424-25, 428 (Alaska Ct. App. 1986).

58. *See* State v. Grogan, 628 P.2d 570, 572 (Alaska 1981); Coleman v. State, 621 P.2d 869, 874-75 (Alaska 1980), *cert. denied,* 454 U.S. 1090 (1981); Garner v. State, 711 P.2d 1191, 1192-93 (Alaska Ct. App. 1986); Nix v. State, 653 P.2d 1093, 1096, 1098-1100 (Alaska Ct. App. 1982).

59. *See* Adkinson v. State, 611 P.2d 528, 531-32, 536 n.3 (Alaska), *cert. denied,* 449 U.S. 876 (1980).

60. *See id.*

61. Oksoktaruk v. State, 611 P.2d 521, 525 (Alaska 1980). *See also* Frink v. State, 597 P.2d 154, 169 (Alaska 1979); Braham v. State, 571 P.2d 631, 640 (Alaska 1977), *cert. denied,* 436 U.S. 910 (1978); Ladd v. State, 568 P.2d 960, 968 (Alaska 1977), *cert. denied,* 435 U.S. 928 (1978); Nicholi v. State, 451 P.2d 351, 357 (Alaska 1969); Gafford v. State, 440 P.2d 405, 408 (Alaska 1968), *cert. denied,* 393 U.S. 1120 (1969); Watson v. State, 387 P.2d 289, 293 (Alaska 1963).

62. *Oksoktaruk,* 611 P.2d at 525. *See also* Buchanan v. State, 599 P.2d 749, 750 (Alaska 1979); Richardson v. State, 579 P.2d 1372, 1376-77 (Alaska 1978); Lowell v. State, 574 P.2d 1281, 1283-84 (Alaska 1978); Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985). *See also* FED. R. EVID. 404(a) advisory committee's note.

This interpretation of Rule 404(b) is really an extension of Alaska Rules of Evidence 608 and 609. Rule 608 governs the impeachment of a witness by evidence of character for truthfulness or conduct, while Rule 609 governs the impeachment of a witness by evidence of a prior criminal conviction.

63. *Oksoktaruk,* 611 P.2d at 525; *see also* Kugzruk v. State, 436 P.2d 962, 967 (Alaska 1968); C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 446 & n.97.

64. *Oksoktaruk,* 611 P.2d at 525; *see also* Coleman v. State, 621 P.2d 869, 874-75 (Alaska 1980), *cert. denied,* 454 U.S. 1090 (1981); Demmert v. State, 565 P.2d 155, 158 (Alaska 1977); Nix v. State, 653 P.2d 1093, 1096-99 (Alaska Ct. App. 1982).

65. This balancing test is contained in Alaska Rule of Evidence 403, quoted *supra* note 13.

misconduct.[66] Thus, the court was emphasizing two factors: proximity in time[67] and similarity of circumstances.[68] The two burglaries considered in *Oksoktaruk* occurred approximately two years apart, and were found by the court to be sufficiently distant in time to warrant exclusion of the offered evidence.[69] The court found that the methods employed in the two crimes were also somewhat different. In the fur store burglary, Oksoktaruk had cut a hole in the roof of the store, and had lifted the furs out without setting foot on the premises.[70] In the photography lab incident, nothing had been stolen from or disturbed in the store, and Oksoktaruk claimed that he broke and entered through a boarded-up window only to escape the cold early morning air.[71]

In a similar case, *Beekman v. State,*[72] the Alaska Court of Appeals reversed the defendant's conviction of burglary in the first degree.[73] Quinton Beekman successfully argued that the trial court erred in admitting evidence that he had committed three previous burglaries as a juvenile. In applying the *Oksoktaruk* test of remoteness and resemblance, the court of appeals was persuaded by the fact that the prior burglaries occurred four years earlier, when Beekman was only fourteen years old, and that the circumstances surrounding the burglaries were sufficiently diverse.[74]

There are a number of other basic factors, however, which are traditionally considered in the course of a thorough balancing under Rule 404(b).[75] These factors include the strength of the evidence,[76] the necessity for the evidence,[77] whether the fact sought to be proved is actually disputed,[78] whether the fact sought to be proved is of real

66. Oksoktaruk v. State, 611 P.2d 521, 525 (Alaska 1980).

67. *See also* Adkinson v. State, 611 P.2d 528, 532 (Alaska), *cert. denied,* 449 U.S. 876 (1980); Freeman v. State, 486 P.2d 967, 977 (Alaska 1971); Garner v. State, 711 P.2d 1191, 1193 (Alaska Ct. App. 1986); Beekman v. State, 706 P.2d 704, 706 (Alaska Ct. App. 1985); Lerchenstein v. State, 697 P.2d 312, 319 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986).

68. *See also Adkinson,* 611 P.2d at 532.

69. *Oksoktaruk,* 611 P.2d at 523-25.

70. *Id.*

71. *Id.*

72. 706 P.2d 704 (Alaska Ct. App. 1985).

73. *Id.* at 706.

74. *Id.*

75. *See generally* C. MCCORMICK, *supra* note 2, § 190, at 565 & n.57 (summarizing some of these balancing factors).

76. *See* Patterson v. State, 732 P.2d 1102, 1104 (Alaska Ct. App. 1987); Johnson v. State, 727 P.2d 1062, 1064 (Alaska Ct. App. 1986); Lerchenstein v. State, 697 P.2d 312, 318-19 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986).

77. *See Lerchenstein,* 697 P.2d at 317.

78. *See* Moor v. State, 709 P.2d 498, 506 (Alaska Ct. App. 1985). *See also* C. MCCORMICK, *supra* note 2, § 190 n.49 and accompanying text, at 564.

consequence to an ultimate issue in the litigation,[79] whether the fact may be established by other non-prejudicial or less prejudicial evidence,[80] the likelihood that present culpability will be inferred improperly from the prior act alone,[81] whether the evidence arises in the course of a criminal or civil trial,[82] whether in the case of a criminal trial there is a jury or a non-jury trial,[83] and the effectiveness of a Rule 105 limiting instruction.[84] The courts generally make only passing reference to the balancing requirement, and do not consistently apply all of these individual factors to the particular facts of a case.[85] At times,

79. If not, the evidence generally is not admissible, because it fails to satisfy the "other purposes" exception to exclusionary Rule 404(b).

80. *See* Lerchenstein v. State, 697 P.2d 312, 318 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986); FED. R. EVID. 404(b) advisory committee's note.

81. *See* Oksoktaruk v. State, 611 P.2d 521, 525 (Alaska 1980); Beekman v. State, 706 P.2d 704, 705 (Alaska Ct. App. 1985); Braaten v. State, 705 P.2d 1311, 1317 (Alaska Ct. App. 1985); Lerchenstein v. State, 697 P.2d 312, 318 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986).

82. *See* C. MCCORMICK, *supra* note 2, §§ 189-90, at 554, 557.

83. Theoretically, a trial court can be more permissive in admitting potentially prejudicial evidence when it is sitting without a jury because there is less of a danger that the judge will confuse the issues, give undue weight to the evidence, or misapply the standard of guilt. In practice, however, judges are sometimes also swayed by the preponderance and character of prior acts evidence, as is apparently manifested in the instant case.

84. *See* Garner v. State, 711 P.2d 1191, 1193 (Alaska Ct. App. 1986); Beekman v. State, 706 P.2d 704, 705 (Alaska Ct. App. 1985); Lerchenstein v. State, 697 P.2d 312, 318 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986); *see also* C. MCCORMICK, *supra* note 2, § 59, at 152 n.5.

Alaska Rule of Evidence 105 provides, in relevant part, as follows: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ALASKA R. EVID. 105.

85. *See, e.g.,* Patterson v. State, 732 P.2d 1102, 1104 (Alaska Ct. App. 1987) (court considers only the strength of the evidence); Johnson v. State, 727 P.2d 1062, 1064 (Alaska Ct. App. 1986) (court considers only the strength of the evidence); Bolden v. State, 720 P.2d 957, 960-61 (Alaska Ct. App. 1986) (court references but does not reach the balancing considerations); Garner v. State, 711 P.2d 1191, 1193 (Alaska Ct. App. 1986) (court satisfied that the trial judge issued a Rule 105 limiting instruction and deferred to his discretion); Moor v. State, 709 P.2d 498, 506 (Alaska Ct. App. 1985) (court considers only the necessity for the evidence and whether it supports a disputed fact); Braaten v. State, 705 P.2d 1311, 1317 (Alaska Ct. App. 1985) (court considers only the likelihood that an improper inference will be drawn from the evidence). *But see* Lerchenstein v. State, 697 P.2d 312, 318-19 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986) (court considers several balancing factors, including strength, remoteness, resemblance, use of a limiting instruction, likelihood of an improper inference of guilt being made, and sufficiency of other evidence used for the same purpose).

courts will weigh the probative value of the evidence against the prejudice stemming from its purported legitimate use, while failing to consider all of the potential drawbacks arising from its use.[86]

A frequently quoted statement[87] of the basic two-part analysis under Rule 404(b) is contained in *Lerchenstein v. State*,[88] a recent court of appeals decision. In *Lerchenstein,* the defendant was convicted by a jury of three counts of assault in the third degree and one count of murder in the first degree.[89] Adolf Lerchenstein had been charged with shooting and fatally wounding an automotive garage employee who was attempting to prevent the defendant from removing his truck from the business premises before the defendant had paid his thirty-five dollar bill.[90] In reversing the defendant's convictions, the court held that the evidence of certain prior bad acts,[91] which was admitted during the trial, was more prejudicial than probative.[92] In its decision, the court summarized the adjudicative steps now required under Rule 404(b):

> The trial court's inquiry, then, is two-fold. First, the court must determine that the evidence sought to be admitted has relevance apart from propensity. Second, the court must determine that the nonpropensity relevance outweighs the presumed highly prejudicial impact of the evidence. If there is no genuine nonpropensity relevance, the balancing step is never reached.[93]

Citing *Oksoktaruk,* the court feared that unless this two-part analysis was followed, "it is all too likely that a determinative inference of present guilt will be drawn from the fact of the prior act, thus diluting the requirement that present guilt be proved beyond a reasonable

86. *See* C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 436.

87. Several cases have relied upon the *Lerchenstein* formulation of the Rule 404(b) balancing test. *See, e.g.,* Patterson v. State, 732 P.2d 1102, 1103 (Alaska Ct. App. 1987); Johnson v. State, 727 P.2d 1062, 1063 (Alaska Ct. App. 1986); Bolden v. State, 720 P.2d 957, 960 (Alaska Ct. App. 1986); Garner v. State, 711 P.2d 1191, 1192-93 (Alaska Ct. App. 1986); Moor v. State, 709 P.2d 498, 504-05 (Alaska Ct. App. 1985); Braaten v. State, 705 P.2d 1311, 1317 (Alaska Ct. App. 1985).

88. 697 P.2d 312 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986).

89. *Id.* at 313.

90. *Id.* at 313-14.

91. The prosecution was allowed to introduce evidence that on the day prior to the shooting, Lerchenstein had broken into the apartment of one of his former employees and had damaged certain consumer electronic goods which Lerchenstein had apparently sold on credit from his retail business' inventory to the ex-employee. The state also provided evidence of the defendant's verbal threats to kill this former employee with a gun, threats that Lerchenstein had communicated in a telephone conversation with the employee's landlord on the day of the break-in. *See id.* at 314.

92. *Id.* at 318-19.

93. *Id.* at 315-16 (citations omitted).

doubt."[94] The *Oksoktaruk-Lerchenstein* analytical framework remains largely unchanged when applied to sexual assault cases. However, special doctrines and exceptions have transformed qualitatively the application of the two-part test in these types of cases.

IV. PRIOR BAD ACTS IN SEXUAL ABUSE CASES IN ALASKA BEFORE *SOPER V. STATE*

In *Burke v. State,*[95] the Alaska Supreme Court was presented with a case of first impression regarding the admissibility of evidence of prior sexual misconduct under Rule 404(b). Luther J. Burke, the defendant, appealed his conviction for statutory rape of his fifteen-year-old stepdaughter, arguing that evidence of prior sexual misconduct with the same victim was inadmissible under Rule 404(b).[96] The prosecution had provided evidence that Burke had had sexual intercourse with his stepdaughter on four or five occasions since the victim was nine years old.[97] In affirming Burke's conviction, the court adopted the so-called "lewd disposition" or "same victim" exception to Rule 404(b).[98] Under this exception, evidence of prior sexual assaults against the same victim is admissible in evidence as being highly probative of the defendant's lewd or lustful disposition toward the victim.[99]

There are several rationales supporting the "lewd disposition" exception. First, proponents assert that the prior sexual misconduct is not offered into evidence to show a general propensity for crime, but only to demonstrate a propensity toward criminal activity with the same person.[100] Second, they argue that the existence of similar crimes is probative of an ongoing relationship between the accused and the victim, which makes repetition of the crime particularly likely.[101] Finally, evidence of a lewd disposition is justified as providing necessary background information to explain and give credence to

94. *Id.* at 318 (citing Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980)).

95. 624 P.2d 1240 (Alaska 1980).

96. *Id.* at 1247.

97. *Id.* at 1246-47.

98. *Id.* at 1248. Many jurisdictions recognize the "lewd disposition" exception for prior sexual acts with the same victim. *See, e.g.,* People v. Kelley, 66 Cal. 2d 232, 240, 424 P.2d 947, 955, 57 Cal. Rptr. 363, 371 (1967); People v. Greeley, 14 Ill. 2d 428, 431-32, 152 N.E.2d 825, 827 (1958); State v. Jalette, 119 R.I. 614, 627, 382 A.2d 526, 533 (1978).

99. *Burke,* 624 P.2d at 1248-49. *See also* J. WIGMORE, *supra* note 15, § 402(2)(b) (such evidence may be used to show a desire for the victim, plan, design, or intent).

100. *Burke,* 624 P.2d at 1248.

101. *Id.* at 1249.

the victim's testimony.[102] In brief, evidence of prior sexual misconduct is considered to be admissible under the "lewd disposition" exception because the propensity which is inferred is well focused, the propensity stems from an ongoing relationship, and the propensity provides "harmless" contextual clarification.

The nonpropensity necessity for the "lewd disposition" exception is not apparent, and has never been clarified by the courts. Indeed, the exception is often used instead of, or in conjunction with, an attempt to show motive, plan, design, intent, identity, or handiwork. Not only do these exceptions overlap, but frequently they become functionally interchangeable. Most unusual is the fact that the "lewd disposition" exception is limited only to sexual abuse cases; there is no corresponding "violent disposition," "destructive disposition," "treacherous disposition," or similar exception. The only credible explanation is that all of these exceptions, including the "lewd disposition" exception, constitute cloaks for the introduction of propensity evidence. The Alaska courts are not alone in attempting to weaken Rule 404(b) in sex crime cases, and several commentators believe that the propensity rule has collapsed in this area.[103]

While potentially very broad in scope, the "lewd disposition" exception, like the other prior acts exceptions, is not completely without limits. There are subsequent, though isolated, court decisions in Alaska which indicate that certain sexual misconduct between the defendant and the same victim may not be admissible. Sometimes Rule 403 balancing considerations do operate to exclude otherwise relevant evidence. In *Johnson v. State,*[104] for example, the court of appeals held that evidence of a single prior uncharged incident of sexual abuse which allegedly occurred eighteen months previously was not sufficient to establish an ongoing relationship between the accused and the victim, and therefore was not admissible.[105] Allan Johnson, the defendant, was convicted of felonious sexual assault in the second degree for fondling and molesting a six-year-old girl.[106] The court reversed Johnson's conviction upon determining that the *Burke* exception did not apply to a solitary event somewhat remote in time.[107]

---

102. *Id.*

103. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 230 (2d ed. 1982). *See also* C. MCCORMICK, *supra* note 2, § 190(4), at 560-61 ("proof of other sex crimes always was confined to offenses involving the same parties, but a number of jurisdictions now admit other sex offenses with other persons, at least as to offenses involving sexual aberrations." (citations omitted)).

104. 727 P.2d 1062 (Alaska Ct. App. 1986).

105. *Id.* at 1064.

106. *Id.* at 1062.

107. *Id.* at 1064.

In *Burke v. State,*[108] the Alaska Supreme Court expressly declined to resolve the more difficult issue of whether evidence of prior sexual misconduct with *other* victims should be allowed under Rule 404(b).[109] To date, the supreme court has not ruled directly on this question.[110] In a pre-Rule 404(b) case, however, the court did decide that evidence of prior *physical* child abuse by the defendant against a child who was not the victim in the immediate case was inadmissible unless identity was at issue. In this case, *Harvey v. State,*[111] the court reasoned that evidence of past abusive conduct in child abuse cases is often relevant only to show a propensity of the past offender to continue a pattern of child abuse, and that past incidents of child abuse are generally held to be more prejudicial than probative.[112] Although the two situations are not identical, there appear to be no significant doctrinal differences between physical and sexual child abuse.

In contrast to the absence of supreme court decisions in the sexual assault area, the Alaska Court of Appeals has had several opportunities to consider the problem left unanswered in *Burke.* As recently as 1985 and 1986, the court of appeals refused to extend the "lewd disposition" exception to include evidence of sexual misconduct with persons other than the victim. In *Moor v. State,*[113] the court of appeals concluded that evidence of the defendant's sexual conduct with someone other than the victim was conceptually indistinguishable from evidence of propensity.[114] James Moor II, the defendant in this case, was charged with digitally penetrating a thirteen-year-old girl in a darkened movie house.[115] He was subsequently convicted by a jury of felonious sexual abuse.[116] The victim was a classmate and friend of the defendant's niece.[117]

Although the court ultimately affirmed Moor's felony conviction, it rejected the state's contention that incidents of sexual abuse are always admissible in sexual abuse cases to show a "lewd disposition."[118]

108. 624 P.2d 1240 (Alaska 1980).

109. *Id.* at 1249.

110. In *Burke,* the Alaska Supreme Court quoted authority indicating that the number of jurisdictions allowing evidence of sexual misconduct with persons other than the victim were a distinct minority. *Id.* at 1249 n.14 (citing R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 221 (1977)); *see also* R. LEMPERT & S. SALTZBURG, *supra* note 103, at 229.

111. 604 P.2d 586 (Alaska 1979).

112. *Id.* at 590.

113. 709 P.2d 498 (Alaska Ct. App. 1985).

114. *Id.* at 506.

115. *Id.* at 500.

116. *Id.*

117. *Id.* at 501.

118. *Id.* at 506.

The court specifically held that evidence indicating that Moor had sexually abused his niece was not admissible for non-impeachment purposes.[119] While declining to expand the "lewd disposition" exception, the court acknowledged that evidence of third-party sexual misconduct could be admissible if it fell within one of the other exceptions to Rule 404(b), and if it did not constitute disguised propensity evidence.[120] The court indicated, however, that in cases of sexual abuse the trial court must carefully scrutinize evidence of uncharged sexual misconduct.[121]

In *Bolden v. State*[122] and *Pletnikoff v. State,*[123] the court of appeals reaffirmed its decision in *Moor,* which was decided less than a year earlier. Robert Bolden was convicted of rape, and of lewd and lascivious acts toward children.[124] The named victims were his two adolescent daughters. Over Bolden's objections, the prosecution introduced evidence that, for a period of three years, the defendant had sexually abused his two daughters and a number of their friends, all of them minors.[125] In particular, the state alleged that Bolden either persuaded or coerced his daughters and some of their friends, by bribery and intoxication, to touch and stimulate his penis, to perform fellatio upon him, to allow him to fondle their breasts and vaginal area, to permit him to perform cunnilingus on them, and to have sexual intercourse with him.[126] In reversing Bolden's convictions, the court found that the trial court had erred in admitting evidence of numerous sexual acts that the defendant allegedly committed with victims other than those named in the present indictment.[127] Citing *Moor,* the court held that the evidence was irrelevant to any material fact besides propensity, and that its admission constituted reversible error.[128]

In *Pletnikoff,* Patrick Pletnikoff was convicted by a jury of felonious sexual assault in the first degree of an adult female acquaintance.[129] As part of its prima facie case, the prosecution introduced testimonial evidence that the defendant also had raped a woman who was the victim's roommate and co-worker.[130] In reversing Pletnikoff's

119. *Id.*
120. *Id.* at 506-07.
121. *Id.* at 506.
122. 720 P.2d 957 (Alaska Ct. App. 1986).
123. 719 P.2d 1039 (Alaska Ct. App. 1986).
124. *Bolden,* 720 P.2d at 958.
125. *Id.* at 958-59.
126. *Id.*
127. *Id.* at 960.
128. *Id.*
129. Pletnikoff v. State, 719 P.2d 1039, 1040 (Alaska Ct. App. 1986).
130. *Id.* at 1040-42.

conviction, the court noted that, under *Moor,* evidence of a lustful disposition is admissible only in those cases in which the defendant's earlier misconduct involved the same victim.[131] The court explained that even if the two episodes were identical, evidence of the first incident used to corroborate evidence of the latter is inadmissible, because such corroboration is simply a showing of propensity under another guise.[132] In *Pletnikoff,* the court also repudiated the "smorgasbord" approach to prior crimes evidence, wherein the offering party indiscriminately claims that the evidence is being admitted for all of the reasons listed in Rule 404(b).[133] The court warned that while overlap is often possible, it is unlikely that evidence would ever be admissible in any given case for all the purposes contained in Rule 404(b).[134] Consequently, the trial courts must indicate the precise basis upon which the evidence of other acts is being admitted.[135]

Finally, in *Oswald v. State,*[136] the court of appeals determined that evidence of a defendant's former sexual activities with third persons was not admissible under the motive exception to Rule 404(b) because such evidence is indistinguishable from evidence of a generally lustful character.[137] Although not decided under the "lewd disposition" exception of *Burke,* the court's reasoning parallels the "same victim" rationale contained in the *Moor* decision and those cases following *Moor.*

V. THE *SOPER* DECISION

In *Soper v. State,*[138] the Alaska Court of Appeals held that, when proving sexual abuse on a particular occasion, the prosecution may introduce evidence of prior sexual misconduct if the earlier misconduct occurred under substantially similar circumstances and with parties having highly relevant common characteristics and experiences.[139]

131. *Id.* at 1044.
132. *Id.* at 1044 n.3.
133. *Id.* at 1042 n.1.
134. *Id.*
135. *Id.*
136. 715 P.2d 276 (Alaska Ct. App. 1986).
137. *Id.* at 279.
138. 731 P.2d 587 (Alaska Ct. App. 1987), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).
139. *Id.* at 590. Alaska is not the first jurisdiction in which the "lewd disposition" exception has been extended to sexual acts with third parties. *See, e.g.,* State v. Parker, 106 Ariz. 54, 56, 470 P.2d 461, 463-64 (1970); Lamar v. State, 245 Ind. 104, 109, 195 N.E.2d 98, 101 (1964) (later criticized in Meeks v. State, 249 Ind. 659, 664, 234 N.E.2d 629, 632 (1968)); State v. Schlak, 253 Iowa 113, 116, 111 N.W.2d 289, 291 (1961) (later limited in State v. Maestas, 224 N.W.2d 248, 250-51 (Iowa 1974)); Commonwealth v. King, 387 Mass. 464, 471, 441 N.E.2d 248, 252 (1982) (later criticized in Commonwealth v. Sylvester, 388 Mass. 749, 763, 498 N.E.2d 1106, 1114 (1983)

Through this decision, the court has vitiated Alaska Rule of Evidence 404(b) by creating an expansive new exception for any lewd disposition towards members of a limited class. Moreover, the *Soper* decision contravenes the court's recent line of decisions prohibiting evidence with respect to sexual misconduct between the defendant and persons other than the victim in the immediate case.[140] The unsettling result of this decision is to permit evidence of criminal propensity to be admitted in sexual assault and abuse cases, thereby allowing the state to prove culpability for specific offenses through inferences of a general character for lustfulness.

John P. Soper was charged with sexually abusing his youngest daughter, M.S., over the course of several months between December 1979 and September 1980.[141] Most of these offenses were alleged to have occurred at the family's weekend cabin at Big Lake.[142] Soper's first trial ended in a mistrial resulting from a divided jury.[143] Upon retrial, Soper was convicted of sexual assault in the first degree.[144] He subsequently was sentenced to fourteen years of incarceration with four years suspended.[145] On appeal, both the conviction and the sentence were affirmed by the court of appeals.[146] Soper's petition for hearing was denied by the Alaska Supreme Court.[147]

Prior to his first trial, Soper moved for a protective order, pursuant to Alaska Rules of Evidence 403 and 404, seeking to exclude evidence of prior uncharged sexual activities with his four other daughters — M.W., C.H., N.W., and T.S.[148] The state sought to introduce evidence that Soper had had sexual intercourse with them in a successive pattern from 1963 until 1979.[149] The evidence was intended to establish Soper's motive to seduce each of his daughters as

---

(O'Connor, J., concurring)); State v. Pignolet, 465 A.2d 176, 181-82 & n.3 (R.I. 1983) (later limited in State v. Bernier, 491 A.2d 1000, 1004-05 (R.I. 1985)); Elliot v. State, 600 P.2d 1044, 1047-48 (Wyo. 1979).

140. *See supra* text accompanying notes 113-37.

141. Soper v. State, 731 P.2d 587, 588 (Alaska Ct. App. 1987), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

142. *Id.*

143. *Id.* at 588-89.

144. *Id.* at 588.

145. *Id.*

146. *Id.* at 592.

147. The court's vote was split 3-2 against granting the petition for hearing. Soper v. State, No. S-2019, *slip op.* at 1 (Alaska Apr. 2, 1987).

148. Petition for Hearing at 6, Soper v. State (Alaska Apr. 2, 1987) (No. S-2019) [hereinafter Petition for Hearing].

149. The state hoped to present evidence that Soper had had sexual intercourse with M.W. between 1963 and 1967, with C.H. between 1967 and 1969, with N.W. between 1970 and 1971 and again between 1973 and 1975, and with T.S. in 1979. Soper, of course, was charged with sexually abusing M.S. between 1979 and 1980. At trial, evidence revealed that Soper has six daughters. *Soper,* 731 P.2d at 589.

they approached puberty, and to show a common plan or scheme to have sexual relations with them. During the trial, the state also argued that the evidence was properly admissible to show *modus operandi* and possibly intent.[150] The trial court judge ruled that the evidence sought to be excluded was admissible under either the motive or the common plan exceptions to exclusionary Rule 404(b),[151] and that the probative value of the evidence outweighed its prejudicial impact.[152] In refusing the issuance of the protective order, Judge Buckalew was persuaded by the fact that the uncharged acts involved a limited class of victims living in the same family unit. Nonetheless, he issued a Rule 105 limiting instruction to the jury,[153] directing them to consider the evidence of prior misconduct only for the specific purpose of showing a characteristic method, plan, scheme, or motive.

Two of Soper's stepdaughters, N.W. and M.W., testified at both trials.[154] At the second trial, each testified that Soper had sexual intercourse with them on a number of occasions, that several of these incidents occurred at the home in Big Lake, and that Soper told them that their willingness to have sexual intercourse with him would demonstrate their love for him.[155] One of the girls, N.W., testified that Soper, in order to assuage her fears of pregnancy, had told her that he had had a vasectomy.[156] Soper reportedly had appeased M.S. with this same information. The other girl, M.W., described the similarities of her experiences to those of M.S., the youngest daughter.[157] Although both M.W. and M.S. had reported their sexual abuse, their claims were met with disbelief and family rejection.[158] Eventually, they both were driven to leave home. Two of Soper's other daughters — C.H. (a third stepdaughter) and T.S. (one of his natural daughters) — did not testify at either of the trials. At a grand jury hearing, however, both girls denied that Soper had ever abused them.[159] At his trial, Soper admitted that he had sexual intercourse with N.W. when she was seventeen years old, but denied ever having sexual contact with M.W.[160]

---

150. Petition for Hearing, *supra* note 148, at 7.

151. *See generally supra* note 1, and the discussion of the Rule 404(b) exceptions in Section III.

152. *See supra* note 13 (quoting ALASKA R. EVID. 403, which outlines this balancing test).

153. *See supra* note 84 (quoting ALASKA R. EVID. 105).

154. Soper v. State, 731 P.2d 587, 589 (Alaska Ct. App. 1987), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Petition for Hearing, *supra* note 148, at 7 n.4; *Soper,* 731 P.2d at 589 n.1.

160. *Soper,* 731 P.2d at 589.

In appealing his conviction, Soper contended that the trial court erred in allowing testimony from N.W. and M.W. regarding their sexual contacts with him. More specifically, Soper argued that this evidence was inadmissible to show motive, common scheme or plan, handiwork, or any other exceptions to Rule 404(b).[161] On appeal, the state conceded that the prior bad acts evidence was inadmissible to establish the defendant's motive, but continued to assert that the evidence was admissible to show an ongoing scheme to obtain sexual gratification from each of his daughters.[162] In his defense, Soper also argued that M.S. had always been a problem child, that she ran away from home because she did not get along with other family members, and that she was fabricating the charges of sexual abuse in order to obtain a financial interest in the family's recreational property at Big Lake.[163]

From the foregoing facts, the court of appeals was presented with the question of whether evidence of prior sexual misconduct with persons other than the victim was admissible under Alaska Rule of Evidence 404(b) in proving culpability for the charged offense. In resolving this issue, the *Soper* court purported to apply the two-tiered analysis first developed in *Oksoktaruk*[164] and later followed in *Lerchenstein.*[165] In so doing, the court substantially enlarged the boundaries of the "lewd disposition" exception originally defined by the Alaska Supreme Court in *Burke.*[166] The court of appeals also rejected its recent determinations in *Bolden,*[167] *Pletnikoff,*[168] and *Moor,*[169] in order to recognize an exception for evidence regarding sexual misconduct with persons other than the named victim. In attempting to distinguish rather than overrule these earlier decisions, the

161. Appellant's Brief at 22-26, Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1987) (No. A-583), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987); Appellee's Brief at 1-3, *Soper* (No. A-583) [hereinafter Appellee's Brief]; Petition for Hearing, *supra* note 148, at 7.

162. Appellee's Brief, *supra* note 161, at 12-16; Petition for Hearing, *supra* note 148, at 7.

163. *Soper,* 731 P.2d at 589.

164. Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980). *See supra* text accompanying notes 45-71.

165. Lerchenstein v. State, 697 P.2d 312 (Alaska Ct. App. 1985), *aff'd,* 726 P.2d 546 (Alaska 1986). *See supra* text accompanying notes 87-94.

166. Burke v. State, 624 P.2d 1240 (Alaska 1980). *See supra* text accompanying notes 95-107.

167. Bolden v. State, 720 P.2d 957 (Alaska Ct. App. 1986). *See supra* text accompanying notes 124-28.

168. Pletnikoff v. State, 719 P.2d 1039 (Alaska Ct. App. 1986). *See supra* text accompanying notes 129-35.

169. Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985). *See supra* text accompanying notes 113-21.

court stressed the high degree of similarity of the daughters' experiences, and the ongoing pattern of sexual abuse by the defendant over a substantial period of time.[170] Realistically, the *Soper* decision repudiates *Moor* and its progeny, tramples upon the natural limits of the "same victim" exception, and introduces an exception that effectively eclipses the exclusionary presumption of Rule 404(b). Most significantly, the decision in *Soper* permits the introduction of evidence of criminal propensity and of a character for lustfulness supposedly prohibited under even the most generous reading of Rule 404(b).

In reaching this new position, the court of appeals was apparently persuaded by the following five factors. First, the prior bad acts took place under substantially similar circumstances and conditions.[171] In other words, the girls' ages when abused, the location of the assaults, and the methods of persuasion were largely identical. Second, all of the alleged victims were members of a limited class of individuals possessing highly relevant common characteristics.[172] That is to say, the victims were all dependent daughters of the same parent. Third, the purported acts illuminated a pattern of sexual abuse occurring over a substantial period of time.[173] This third factor is arguably one of pure propensity, or possibly guilt by repetition.[174] Intriguingly, the court appears to divine a new category for evidence of criminal sexual propensity that "seems to occupy the middle ground between evidence of character, [Alaska Rule of Evidence] 404(b), and habit, [Alaska Rule of Evidence] 406."[175] In actuality, the court blurs the distinction between evidence of character, which under Rule 404 is generally not admissible to prove conformity therewith,[176] and evidence of habit, which is admissible under Rule 406 to prove such conformity.[177] The fourth factor cited by the court was the assumption that a sexually abusive parent has tremendous control over his or her dependent children, and thereby is able to minimize the risk of discovery and cajole the young victims into silence.[178] Finally, the court was concerned by

170. Soper v. State, 731 P.2d 587, 590 (Alaska Ct. App. 1987), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

171. *Id.*

172. *Id.*

173. *Id.*

174. In their treatise, Professors Wright and Graham state that "if the jury convicts because of the multiplicity of accusations rather than the strength of the evidence, the right to proof of guilt beyond a reasonable doubt may be impaired." C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 438.

175. *Soper,* 731 P.2d at 590.

176. *See supra* notes 1, 19 and accompanying text.

177. *See supra* note 20 and accompanying text.

178. *Soper,* 731 P.2d at 590.

the fact that corroborative evidence of child sexual abuse is very difficult to obtain.[179] The court believed that these cases normally comprise a swearing contest between the child who is reluctantly alleging sexual abuse and the parent who is denying it. Often, the credibility of the child is attacked, and no other direct evidence of the assault is available.

The court also found that the facts in *Soper* satisfied two of the three *Burke* justifications for the original "lewd disposition" exception.[180] The court first determined that the evidence tended to unify the various offenses, thus giving them strong relevance to the charged offense.[181] Apparently, the offenses in aggregate were functionally equivalent to the "ongoing relationship" emphasized in *Burke.*[182] The court next found that the evidence also provided background information helpful in explaining the relationship between the defendant-father and his dependent daughter.[183] Without this information, the court felt that M.S.'s story would appear unnatural, unbelievable, and, by probable implication, unconvincing.[184] What the court failed to discuss, however, was the primary rationale of the *Burke* court. In the *Burke* opinion, the Alaska Supreme Court agreed with two leading treatise writers that evidence of prior sexual abuse was admissible under the "lewd disposition" exception because such evidence was not intended to show a general propensity to crime, but rather to demonstrate a lustful attitude or a propensity toward criminal activity with the *same* person.[185] In contrast, the *Soper* decision must be interpreted as sanctioning the use of third-party evidence to prove a generally lustful disposition or a propensity for sexual misconduct with all similarly situated persons within a limited class.

The disturbing use of propensity evidence is manifested in the *Soper* opinion's concluding paragraph:

> Soper may be a model citizen and, but for his sexual abuse, a good father. However, given the extended period of abuse of the named victim, coupled with verified and substantial history of abusing his daughters, we are satisfied that the trial court was not clearly mistaken in imposing a sentence of fourteen years with four years suspended.[186]

---

179. *Id.*

180. *Id.* at 591; *Burke v. State,* 624 P.2d 1240, 1248-50 (Alaska 1980).

181. *Soper,* 731 P.2d at 591.

182. *See supra* note 101 and accompanying text.

183. *Soper,* 731 P.2d at 591. *See also supra* note 102 and accompanying text.

184. *Soper,* 731 P.2d at 591.

185. *Burke,* 624 P.2d at 1248 (citing R. LEMPERT & S. SALTZBURG, *supra* note 110, at 220-21).

186. *Soper,* 731 P.2d at 592.

Based on the record, however, the defendant's history of sexual abuse was never adequately verified. Only two of Soper's six daughters testified at trial.[187] Their allegations were no longer separately actionable because the statute of limitations for these offenses had expired by 1984, the year of Soper's indictment.[188] Three of Soper's daughters, including the named victim, all denied under oath that Soper had sexually abused them.[189] Thus, the primary evidence of Soper's guilt for the charged offense was the testimony of two of his six daughters regarding prior alleged acts which were themselves not subject to prosecution. Furthermore, no evidence sufficient to convict Soper of these earlier crimes was presented. Objectively, this testimony was not sufficient even to establish the similar circumstances or common characteristics of the group. The *Soper* decision also raises the related question of whether these so-called limited classes of individuals are self-defining or whether they must be defined on a case-by-case basis.

Finally, irrespective of whether the evidence of prior bad acts was properly admissible under the expanded "lewd disposition" exception of Rule 404(b), both the trial court and the court of appeals failed to balance thoroughly the probativity of the offered evidence against its presumed prejudicial impact under Rule 403.[190] Although both tribunals alluded to the required balancing step, neither court felt that it was necessary or appropriate to reveal its application, if there actually was one, in Soper's situation. For all of these reasons, the admission of the prior acts evidence constituted an abomination of the general rule excluding propensity evidence contained in Rule 404(b).

VI. CONCLUSION

The *Soper* decision represents an emerging double standard in determining the admissibility of prior bad acts in sexual abuse cases, especially those involving children. Ordinarily, the state may not use evidence of earlier misconduct to show conformity of action with peculiar character traits or identifiable criminal tendencies. Rule 404 embodies this general doctrine excluding evidence of one's propensity to commit misdeeds. Under the exceptions listed in subsection (b) of Rule 404, however, the state may use otherwise inadmissible character evidence to show one or several specific elements of the charged offense. Traditionally, the prosecution must expressly stipulate those elements that it intends to prove by means of the character evidence, and the trial court must base its evidentiary ruling on the relevance of the offered evidence in establishing those elements. If the court finds

187. *Id.* at 589.
188. ALASKA STAT. § 12.10.010 (1984).
189. Petition for Hearing, *supra* note 148, at 12.
190. *See supra* note 13 (quoting ALASKA R. EVID. 403).

that the proffered evidence is relevant, then it must balance the probative value of the evidence against its presumed highly prejudicial impact under Rule 403. Once again, the prosecution bears the burden of persuading the court that the probativity outweighs the prejudice. In addition, the trier of fact is obligated to ascertain present guilt from the facts directly related to the charged offense; the trier may not infer culpability from evidence of prior activities which are themselves often uncharged, unsubstantiated, and not actionable. This entire process is premised on the assumption that evidence of prior bad acts is potentially relevant in every prosecution, but that such evidence is nearly always inflammatory or confusing. Another drawback of this evidence is that culpability for the antecedent event is rarely established by evidence that convinces beyond a reasonable doubt, but rather by the mere presentment of evidence.[191] Rules 403 and 404 were intended to take these factors into consideration.

In *Soper,* the court concluded that the state's evidence of prior bad acts was admissible under a judicially created exception to Rule 404(b). This exception is available only in sexual abuse cases, and previously, its application was limited to earlier assaults upon the same victim. In order to invoke the exception, the Alaska Court of Appeals rejected its own recent precedents, and broadened the exception to include all earlier assaults upon victims within a limited class of individuals. These classes were only generally defined by the court. Despite references to the contrary, the *Soper* court failed to balance the probative qualities of the evidence against its inherent infirmities. The question of whether the court felt such balancing is rendered unnecessary by the expanded "lewd disposition" exception, or whether the court merely ignored the substantive balancing requirements is therefore unclear. In either case, the *Soper* decision stands for the proposition that evidence of prior sexual misdeeds, whether with the same or other similarly situated individuals, is almost always relevant to showing a lewd or lustful inclination toward members of that limited class, and that the prejudicial effects of the evidence are not worth considering in detail. The effect of the court's holding is to allow the introduction of character evidence to show propensity in sexual assault cases. Thus, in this particular area of the law, the courts have developed a double standard in applying Alaska Rule of Evidence 404(b).

There are several solutions to the problems presented by the *Soper* case. The first solution would be to accept the *Soper* extension of the *Burke* exception, but to apply consistently in all future cases a thorough balancing under Rule 403. Although more evidence becomes eligible for admission under the expanded exception, a rigorous

191. *See* C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 438 n.52 (proof of the other crime need not meet the reasonable doubt standard).

examination of the accompanying prejudice and confusion theoretically would exclude the most egregious evidence.

An intermediate but more difficult solution would be to eliminate the *Soper* extension to the *Burke* exception, while also applying a more comprehensive balancing process. The extension is the apparent product of a results-oriented decision, based on the unsettling facts of the *Soper* case. Nonetheless, the decision in *Soper* is untenable in light of the *Bolden*[192] case. In *Bolden,* the prosecution had introduced evidence that the defendant had sexually abused his two daughters and their friends in a wide variety of ways, for a period of three years, by coercing them through bribery and intoxication.[193] With the sole exception of the duration of abuse, the circumstances in *Bolden* tend to disturb one's sense of propriety much more than those in *Soper.* Yet, the court reached the opposite result in *Bolden.*[194] Besides duration, the only significant fact distinguishing *Bolden* from *Soper* is that the prior acts in the former case allegedly involved not only the defendant's own daughters, but additionally young girls unrelated to him. Perhaps in retrospect, *Bolden* establishes a fixed boundary to the limited class roughly defined in *Soper.* The Alaska Supreme Court declined to review the *Soper* decision by a narrowly split vote.[195] It remains possible, therefore, that soon a case similar to *Soper* may come before the supreme court with different results.

A final solution would be to repeal the *Burke* exception in its entirety, and require the state to specify alternative uses, such as those listed in Rule 404(b), for any character evidence of prior sexual abuse sought to be introduced. This last possibility, while requiring a retrenchment from the *Burke* position, is the one option most compatible with the history and intent of Rule 404(b). Of course, meaningful balancing should also be applied as a component of this last alternative.

Two leading commentators have written that "there is no question of evidence more frequently litigated in the appellate courts than the admissibility of evidence of other crimes, wrongs, or acts."[196] The frequent appearance of these cases in the Alaska court system alone confirms these characterizations. Indeed, it is more probable than not that the admissibility of prior bad acts will continue to taunt and challenge the judiciary and bar in Alaska for years to come. The present

192. Bolden v. State, 720 P.2d 957 (Alaska Ct. App. 1986). *See supra* text accompanying notes 105-09.

193. *Bolden,* 720 P.2d at 958-59.

194. *Id.* at 960.

195. Soper v. State, No. S-2019, *slip op.* at 1 (Alaska Apr. 2, 1987).

196. C. WRIGHT & K. GRAHAM, *supra* note 2, § 5239, at 427.

trend is toward liberalization of the exclusionary rule in order to facilitate the prosecution of sex offenders. The courts should strongly consider the natural implication of such a development, which surely would be the complete emasculation of Rule 404(b), certainly in the context of sexual offenses, and possibly in other contexts as well. Prudence commands that the courts should attempt to apply existing evidentiary rules more uniformly, despite the special difficulties that often arise in sexual abuse cases.

Brian E. Lam

Author's Postscript

While this note was at the printer, the Alaska House of Representatives voted on and unanimously passed House Bill No. 237,[197] which, if enacted into law, would modify several provisions of the Alaska Criminal Code and certain procedural and evidentiary rules of the Alaska courts.[198] These changes are apparently designed to facilitate the prosecution of cases involving "physical and sexual offenses against children."[199] Of particular relevance to this note, sections nine and ten of this bill are intended to amend Alaska Rule of Evidence 404(b). The proposed change to Rule 404(b) implicitly affirms the decision of the Alaska Court of Appeals in *Soper v. State,*[200] and expressly reverses that court's decision in *Bolden v. State.*[201] Thus, at least one chamber of the Alaska Legislature has adopted an approach opposite to the one suggested by this note, and has further diluted the sound evidentiary protections of Rule 404(b).

Section 9 of House Bill No. 237 consolidates the current text of Rule 404(b) into a single subsection, subsection (1), and adds a completely new subsection, subsection (2).[202] If successfully amended, Rule 404(b) would read as follows:

197. H.R. 237, 15th Leg., 2d Sess. (Alaska 1988).

198. House Bill No. 237 amends or adds ALASKA STAT. §§ 11.41.110(a)(2) (definition of second degree murder), 11.41.200(a)(3) (definition of first degree assault), 11.41.434(a)(3) (definition of first degree sexual abuse of a minor), 11.42.436(a)(5) (definition of second degree sexual abuse of a minor), 12.55.025(e) (consecutive sentencing for multiple convictions), 12.55.025(h) (consecutive sentencing for multiple convictions for abuse or assault of a minor) 12.55.155(c)(18)(B) (assault or abuse of a minor as an aggravating factor to be considered under presumptive sentencing), ALASKA R. CRIM. P. 8(a) (joinder of offenses), and ALASKA R. EVID. 404(b) (prior bad acts). H.R. 237, 15th Leg., 2d Sess. (Alaska 1988).

199. *Id.*

200. 731 P.2d 587 (Alaska Ct. App. 1986), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

201. 720 P.2d 957 (Alaska Ct. App. 1986).

202. H.R. 237, 15th Leg., 2nd Sess. § 9 (Alaska 1988).

> (1) 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.
> (2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if admission of the evidence is not precluded by another rule of evidence and if the prior offenses (i) are not too remote in time; (ii) are similar to the offense charged; and (iii) were committed upon persons similar to the prosecuting witness.[203]

The first two factors contained in the proposed subsection (2), remoteness and resemblance, reflect the balancing considerations originally applied by the Alaska Supreme Court in *Oksoktaruk v. State*.[204] The third factor, similarity of the victims, was rejected by the Alaska Court of Appeals in *Bolden v. State*,[205] *Moor v. State*,[206] and *Pletnikoff v. State*,[207] but was eventually applied in *Soper v. State*.[208]

The reason for the proposed change to Rule 404(b) is provided in the Draft Letter of Intent prepared by the Alaska House Judiciary Committee:

> [H]aving heard testimony about patterns of behavior of many of these [child sex] offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct, particularly as to non-family members, and that it is appropriate to re-draw the line. The Legislature therefore specifically intends to reverse the decision in *Bolden v. State*.[209]

The Draft Letter of Intent also quotes language from the *Soper* opinion in support of the proposed modification of Rule 404(b).[210] Although the proposed change to Rule 404(b) does not expressly

---

203. *Id.*

204. 611 P.2d 521, 525 (Alaska 1980); *see also supra* notes 66-68 and accompanying text.

205. 720 P.2d 957, 960 (Alaska Ct. App. 1986); *see also supra* notes 124-28 and accompanying text.

206. 709 P.2d 498, 506 (Alaska Ct. App. 1985); *see also supra* notes 113-21 and accompanying text.

207. 719 P.2d 1039, 1044 (Alaska Ct. App. 1986); *see also supra* notes 129-35 and accompanying text.

208. 731 P.2d 587, 590 (Alaska Ct. App. 1986), *petition for hearing denied,* No. S-2019 (Alaska Apr. 2, 1987).

209. House Judiciary Comm., Draft Letter of Intent Accompanying H.R. 237, 15th Leg., 2d Sess. (Alaska 1988).

210. *Id. (quoting Soper,* 731 P.2d at 590-91 (" 'A sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery.' " Thus, evidence of prior bad acts " 'may tend to make the alleged incident appear much more plausible and probable' " thereby offsetting the " 'swearing contest between the parent denying unlawful conduct and the child alleging it' ")).

adopt the "lewd disposition" exception, it is apparent from both the language of the new subsection and the Draft Letter of Intent that House Bill No. 237 incorporates the rationale of the *Soper* court that underlies the expanded "lewd disposition" exception.

The proposed Rule 404(b)(2) is substantially broader than the *Soper* court's interpretation of Rule 404(b) as it is currently constituted. First, the "limited class" of individuals referenced in *Soper* could include, under the proposed modification, any child, not merely the siblings of the named victim.[211] Second, the prior offenses need only be "similar to the offense charged" and "committed upon persons similar to the prosecuting witness" rather than "substantially similar" as the court of appeals required in *Soper.*[212] Third, Rule 404(b)(2) would apply "not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children."[213] Finally, the modified rule "is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements."[214]

Section ten of House Bill No. 237 makes all changes to Rule 404(b) retroactive.[215] Rule 404(b)(2) would therefore apply to evidence of acts committed before the effective date of the changes, and in trials involving offenses committed before that date.[216]

If House Bill No. 237 is subsequently adopted by the Alaska Senate and signed into law, state prosecutors could introduce a broad variety of propensity evidence in cases involving the sexual or physical abuse and assault of minor children. In this one area of the law, therefore, the rule prohibiting the circumstantial use of character evidence would be rendered a nullity.

---

211. H.R. 237, 15th Leg., 2d Sess. § 9 (Alaska 1988); *see also Soper,* 731 P.2d at 590.

212. *Id.*

213. House Judiciary Comm., Draft Letter of Intent Accompanying H.R. 237, 15th Leg., 2d Sess. (Alaska 1988).

214. *Id.*

215. H.R. 237, 15th Leg., 2d Sess. § 10 (Alaska 1988).

216. *Id.*