PRIOR SEXUAL MISCONDUCT EVIDENCE IN STATE COURTS: CONSTITUTIONAL AND COMMON LAW CHALLENGES

Michael L. Smith*

ABSTRACT

Prosecuting sex crimes is a sensitive, challenging process, and many who commit these crimes end up going unpunished. While a defendant may have a history of prior sexual misconduct, the rules of evidence in most states and at the federal level generally prohibit the introduction of prior misconduct to show a defendant's propensity to commit a present crime. In response, the federal government and numerous state legislatures have adopted rules of evidence that permit the introduction of prior sexual misconduct in cases where a defendant is charged with a sexual crime.

While commentators have written in great detail about federal rules regarding sexual misconduct propensity evidence, comparatively little attention has been paid to analogous rules at the state level. And while much of the commentary on rules of evidence permitting the introduction of prior sexual misconduct focuses on whether these rules are good or bad policy, questions of whether the rules violate due process rights or separation-of-powers requirements often fall by the wayside.

This article fills these gaps in the literature. In this article, I offer the first systematic review of challenges to state rules of evidence that permit the introduction of evidence of a defendant's prior sexual misconduct. These challenges include claims that these rules violate due process, that they violate constitutionally-mandated separation of powers, and that they contradict the common law. This article examines both the successful and unsuccessful challenges to state rules, evaluates the merits of the arguments, and emphasizes procedures and considerations that states must address if they seek to change their rules to permit evidence of prior sexual misconduct.

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INTRODUCTION

Prosecuting sex crimes is a sensitive and challenging process, and most people who perpetrate these crimes go unpunished.[1] In the 1990s, concern over the difficulty of prosecuting sexual assault and rape cases led Congress to reform the Federal Rules of Evidence in order to allow the introduction of evidence that defendants charged with sexual assault and child molestation had been accused or

1. Karen M. Fingar, *And Justice For All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 501–04 (1996) (noting that most victims of sex crimes "never see their attacker apprehended, tried, or imprisoned" and attributing this phenomenon to tendencies to blame victims for these crimes and on rules that prohibit the introduction of prior crimes and uncharged misconduct).

convicted of similar crimes in the past.[2] While evidence of prior misconduct is generally prohibited, Federal Rules of Evidence 413 and 414 provide an exception to this general rule in cases where a defendant is charged with sexual assault or child molestation. When a defendant is charged with sexual assault or child molestation, Rules 413 and 414 permit evidence that the defendant committed a previous sexual assault or molestation offense.[3] The defendant need not have been convicted of the prior offense.

Federal Rules of Evidence 413 and 414 prompted a great deal of critical scholarship upon their adoption in 1994. While the volume of criticism has since tapered, the Rules continue to attract attention, and a steady stream of legal scholarship has both criticized and defended the rules. But while Rules 413 and 414 have attracted a great deal of scholarly attention, very little attention has been paid to similar rules of evidence at the state level. A focus on state rules of evidence is warranted, since most prosecutions for sex crimes take place at the state level.[4]

Before the 1994 enactment of Federal Rules of Evidence 413 and 414, Indiana was the only state with a statute permitting the admission of evidence of prior sexual misconduct.[5] In the wake of the 1994 enactment of Rules 413 and 414, several states have passed legislation permitting the introduction of prior sexual assault or child molestation. States that have passed legislation permitting evidence of prior sexual assault or child molestation are Alaska,[6] Arizona,[7] California,[8] Connecticut,[9]

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2. *See* 140 Cong. Rec. 12,990 (1994) (statement of Sen. Robert Dole) (citing the centrality of credibility determinations in sex crime cases as a critical reason for admitting prior sexual misconduct of the defendant); *see also* United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (citing the need to resolve credibility disputes between victims and perpetrators as one of the reasons for rules of evidence permitting evidence of prior sexual misconduct); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 568 (1997) (stating that rules permitting evidence of prior misconduct were enacted so that prosecutors could show defendants' "propensity" to engage in sexual misconduct and so that prosecutors could overcome credibility difficulties in sex crime prosecutions).

3. FED. R. EVID. 413–14.

4. Bryan C. Hathorn, Note, *Federal Rules of Evidence 413, 414, and 415: Fifteen Years of Hindsight and Where the Law Should Go From Here*, 7 TENN. J. L. & POL'Y. 22, 67 (2010).

5. *See* IND. CODE § 35-37-4-15(a) (2014) (effective 1994). The Indiana Court of Appeals has held that this rule is a "nullity," however, because it is directly contrary to precedent set by the Indiana Supreme Court. *See Brim v. State*, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) (holding that the rule is a nullity because it is contrary to the Indiana Supreme Court's decision in *Lannan v. State*, 600 N.E.2d 1334 (1992)); *see also* Day v. State, 643 N.E.2d 1, 2–3 (Ind. Ct. App. 1994).

6. ALASKA R. EVID. 404(b)(2)–(3) (2014) (effective 1998 & 2013). Alaska is one of two states that has also passed legislation permitting the admission of prior actions of domestic violence in domestic violence prosecutions. *See id.* at 404(b)(4).

7. ARIZ. R. EVID. 404(c) (2014) (effective 1997).

8. CAL. EVID. § 1108 (2014) (effective 2003). California is one of two states that has passed legislation permitting the admission of prior actions of domestic violence in domestic violence prosecutions. *See* CAL. EVID. CODE § 1109 (2014) (effective 2006).

9. CONN. CODE EVID. § 4-5(b) (2014) (effective 2012).

Florida,[10] Georgia,[11] Iowa,[12] Kansas,[13] Louisiana,[14] Michigan,[15] Missouri,[16] Nebraska,[17] Oklahoma,[18] Tennessee,[19] Utah,[20] and Washington.[21] Several states that passed legislation permitting evidence of prior sex crimes already had common law rules that permitted the admission of prior sexual misconduct to show the defendant's propensity to commit sexual offenses.[22] Other states that have not passed legislation permitting evidence of prior sex crimes have common law rules permitting the admission of this evidence or at least have case law indicating that courts are willing to be flexible when considering whether to admit that evidence.[23] Colorado passed a law in 1996 relating to evidence of prior sexual misconduct in cases where a defendant is charged with a sexual offense.[24] While that law acknowledges that evidence of prior sexual misconduct cannot be introduced to prove a defendant's propensity to commit sexual crimes, the statute emphasizes that evidence of sexual misconduct will often be highly probative and can be introduced for "any purpose other than propensity."[25]

In this article, I present the first systematic review of challenges against state rules that permit the introduction of evidence of prior sexual misconduct in cases where the defendant is charged with a sex crime. This article pays particular attention to challenges that have succeeded and whether similar challenges to other

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10. FLA. STAT. § 90.404(2)(b)–(c) (2014) (effective 2001).
11. GA. CODE ANN. §§ 24-4-413 to -415 (2014) (effective 2013).
12. IOWA CODE § 701.11 (2014) (effective 2003), *invalidated by* State v. Cox, 781 N.W.2d 757 (Iowa 2010).
13. KAN. STAT. ANN. 60-455(d) (2014) (effective 2011).
14. LA. CODE EVID. ANN. art. 412.2 (2014) (effective 2001).
15. MICH. COMP. LAWS § 768.27a (2014) (effective 2006).
16. MO. REV. STAT. § 566.025 (2014) effective 1995), *invalidated by* State v. Ellison, 239 S.W.3d 603 (Mo. 2007) (en banc).
17. NEB. REV. STAT. §§ 27-413 to -415 (2014) (effective 2010).
18. OKLA. STAT. tit. 12, §§ 2413–14 (2014) (effective 2007).
19. TENN. CODE ANN. § 40-17-124 (2014) (effective 2004).
20. UTAH R. EVID. 404(c) (2014) (effective 2008).
21. WASH. REV. CODE § 10.58.090 (2014) (effective 2008).
22. *See, e.g.*, Lawrence v. State, 464 N.E.2d 923, 924 (Ind. 1984) (noting that while evidence of prior crimes is generally inadmissible to show propensity, there is an "exception for the admissibility of prior criminal acts which show the defendant had a depraved sexual instinct, when the charges upon which he is being tried involve that same instinct").
23. *See*, *e.g.*, State v. Graham, 541 S.E.2d 341, 347–48 (W. Va. 2000) (holding that evidence of defendant's prior conviction of child molestation was admissible in the present child molestation case to show that defendant had a "lustful disposition toward children"); State v. Davidson, 613 N.W.2d 606, 615, 619–24 (Wis. 2000) (noting that Wisconsin has a "greater latitude" rule, which gives courts greater latitude to choose to admit prior acts evidence in child molestation cases, and holding that evidence of defendant's prior child molestation conviction was admissible in light of the greater latitude rule). Courts also tend to be flexible with other exceptions to the rule against character evidence when it comes to prior sexual offense evidence. *See, e.g.*, State v. McCombs, 762 S.E.2d 744, 748–50 (S.C. Ct. App. 2014) (holding that evidence of a defendant's prior sexual misconduct was admissible as "common scheme or plan" evidence because despite several differences between the past and present offenses, the prior offenses had several similarities to the present offense).
24. *See* 1996 Colo. Legis. Serv. 96-1181 (West) (codified at COLO. REV. STAT. § 16-10-301).
25. COLO. REV. STAT. § 16-10-301(1), (3) (2014).

states' rules would be meritorious. Several states with rules permitting the admission of evidence of prior sexual misconduct have yet to consider these challenges to their propensity exceptions. And states considering adopting similar rules should consider the potential for legal challenges or procedural obstacles when deciding whether and how to enact these rules.

I would like to emphasize that I am not seeking to approach propensity restrictions and exceptions from a policy perspective. Plenty has been written on whether character evidence restrictions are good restrictions to have and on whether propensity exceptions for prior sex crimes are desirable, and I do not want to retread ground that has already been covered.[26] This article's focus is on due process, common law, and other procedural challenges and obstacles to state rules of evidence, since this subject has been largely neglected by legal commentators.

Section I lays out the legal landscape. I describe the general rule against propensity evidence and some of its nuances. I then describe the federal exceptions to this rule: Rules 413 and 414.[27] In Section II, I discuss due process challenges to Rules 413 and 414, and, more importantly, due process challenges to state rules permitting the admission of evidence of prior sexual misconduct. The Iowa Supreme Court addressed whether a rule permitting evidence of prior sexual crimes violated due process in *State v. Cox*,[28] and the Missouri Supreme Court addressed this question in *State v. Ellison*.[29] I discuss these cases and how the courts reached their conclusions and then explore the merits of due process challenges to rules that permit the introduction of prior sexual misconduct. I pay particularly close to the historical background of these rules and the history of the prohibition on character evidence in general. Section III introduces another potential basis for challenges to state rules permitting the admission of evidence of prior sexual misconduct that arise from separation-of-powers concerns. I explore how separation-of-powers challenges have proceeded in Washington, Indiana, and Michigan, and discuss how similar challenges may arise in other states. In Section IV, I explore the potential for challenges to rules permitting evidence of prior sexual misconduct on the ground that the rules are contrary to well-established common law. This article concludes that there are many ways that propensity exceptions for prior sexual misconduct may be challenged. States must be prepared to overcome potential challenges and obstacles if they seek to enact this

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26. *See generally, e.g.*, Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013) (criticizing rules permitting the admission of evidence that defendants have committed prior sexual misconduct).

27. Federal Rules of Evidence 413 through 415 all have to do with permitting evidence of prior sexual misconduct. In this paper, I will focus on Rules 413 and 414, which permit this evidence in criminal cases. Rule 415 permits prior sexual misconduct evidence in civil cases. While certainly worthy of attention, Rule 415 does not raise the deeper due process questions of Rules 413 and 414 and the state rules that permit the introduction of prior sexual misconduct evidence in criminal trials. *See* FED. R. EVID. 415.

28. 781 N.W.2d 757 (Iowa 2010).

29. 239 S.W.3d 603 (Mo. 2007) (en banc).

type of propensity exception, and this article shows what obstacles exist and how states may overcome them.

I. THE LEGAL LANDSCAPE

Before addressing challenges to rules that permit evidence of prior sexual misconduct in cases where defendants are charged with sex crimes, a brief background on the basics of character evidence is helpful to set the stage for the issues discussed in the rest of this paper. In this Section, I describe the general rule against propensity evidence that bars the use of prior acts of a defendant to prove that the defendant acted in a similar manner in the present case. I then describe the development of the exception to this rule in cases where a defendant is charged with a sex crime.

A. The General Rule Against Propensity Evidence

Rules of evidence, at both the federal and state levels, restrict the introduction of prior-act evidence to show that a party or witness has acted in conformity with the character demonstrated by the prior acts.[30] This sort of prior-act evidence is also known as "propensity" evidence. For example, if a defendant, Greg, is charged with assault stemming from a bar fight, the prosecution cannot introduce evidence that Greg had several prior bar fights in order to prove that Greg was more likely to get in a bar fight in the present case.

This ban on propensity evidence has a number of justifications. One justification for the restriction is that propensity evidence only bears on prior, unrelated conduct that is not relevant to whether the defendant committed the currently-charged crime.[31] After all, a defendant is on trial for a current crime, not a past crime. Even if evidence of a prior wrong is relevant to a current trial, courts worry that juries may give disproportionate weight to evidence of prior crimes.[32] Proponents of the character evidence ban also justify the prohibition by warning that juries may seek to punish defendants based on prior misconduct or that too much evidence concerning prior crimes would waste the court's time.[33]

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30. *See* FED. R. EVID. 404(a), (b)(1); *see also* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1547 & n.1.

31. *See, e.g.*, Fed. R. Evid. 404 advisory committee's note (quoting CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964)) ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion.").

32. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948).

33. *See, e.g.*, People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (warning of the danger that evidence of prior crimes will be given "excessive" weight when used to show a propensity to commit a crime); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4.22 (4th ed. 2013) (stating three reasons to exclude evidence of other crimes: (1) "such evidence might persuade the jury to convict in order to penalize the accused for past misdeeds or for being a bad person"; (2) "the jury may overvalue prior crimes in assessing guilt"; and (3)

But prior-act evidence may still be admitted against a person if the evidence is relevant to prove something other than a person's propensity to carry out similar actions. For example, Federal Rule of Evidence 404(b)(2) permits the introduction of prior-act evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[34] Returning to Greg, the bar fight defendant: while the state may not be able to introduce evidence of a prior bar fight to prove that Greg got in a bar fight in the current case, the prior bar fight may be relevant to prove Greg's motive. For instance, the state may argue that in the present case Greg got in a fight with his longtime rival, Andy. To prove that Greg and Andy are rivals, and that Greg had a motive to attack Andy, the state may seek to introduce evidence of conflict between Greg and Andy, including evidence of previous bar fights between the two of them. This evidence would likely be admissible under Rule 404(b)(2) because the evidence could be admitted to show Greg's motive to attack Andy, rather than Greg's propensity to get in bar fights.

B. Exceptions to the General Rule: Prior Sexual Misconduct Evidence in Sex-Crime Cases

While evidence of prior crimes or bad acts is generally impermissible to prove that a person has acted in conformity with the character those prior acts demonstrate, Federal Rules of Evidence 413 and 414 are exceptions to this general rule. Rule 413 permits the introduction of prior convictions or accusations of sexual assault crimes against a defendant who is currently charged with a sexual assault.[35] Rule 414 permits the introduction of evidence that the defendant committed prior acts of child molestation in cases where the defendant is being tried for the crime of child molestation.[36]

Rules 413 and 414 were enacted through the Violent Crime Control and Law Enforcement Act of 1994.[37] The proposed rule changes were submitted to the Judicial Conference, the policymaking branch of the judiciary that drafts rules of evidence and submits them to Congress.[38] Typically, the Judicial Conference selects a committee to recommend new rules, which the Supreme Court then

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"it seems unfair to require the defendant to be prepared not only to defend against the immediate charges but to answer for other alleged misdeeds").

34. FED R. EVID. 404(b)(2).

35. FED. R. EVID. 413(a). The Rule defines "sexual assault" broadly so that crimes of rape, sexual abuse, unwanted sexual contact, and pain, injury, or death inflicted for purposes of sexual gratification are all instances of "sexual assault." FED. R. EVID. 413(d).

36. FED. R. EVID. 414(a). Like Rule 413, "child molestation" is defined broadly so that it encompasses a wide range of inappropriate sexual conduct carried out with a child under the age of 14. FED. R. EVID. 414(d).

37. Pub. L. No. 103-322, 108 Stat. 1796.

38. Rosanna Cavallaro, *Federal Rules of Evidence 413–415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 52 (2007).

transmits to Congress.[39] The Rules Enabling Act provides that these rules will take effect unless Congress enacts contrary legislation.[40]

Because of their origin in The Violent Crime Control and Law Enforcement Act of 1994, Rules 413 and 414 were adopted in a nontraditional manner. The Rules originated in the legislature, rather than in the committee selected by the Judicial Conference. Congress sent the text of the proposed rules to the Judicial Conference for review and recommendations and gave the Conference 150 days to review the proposed rules.[41] The Judicial Conference returned a recommendation that Congress "reconsider its policy determinations" and recommended that the rules not be enacted.[42] In the event that Congress refused to reconsider the policy behind its rule proposals, the Conference recommended that Congress adopt an alternate form of the rules.[43] Congress did not follow either of the Conference's recommendations, and the original versions of the proposed rules became law.[44]

In the wake of Congress's passage of Rules 413 and 414, a number of states passed similar legislation permitting the admission of propensity evidence in sexual assault or child-molestation cases.[45] Several of these laws have been challenged on a number of grounds by defendants with mixed success. It is to these challenges that I now turn.

II. DUE PROCESS CHALLENGES TO RULES PERMITTING PRIOR SEXUAL MISCONDUCT EVIDENCE

In the wake of Congress's enactment of Rules 413 and 414, a number of commentators argued that these new rules violated the Due Process Clause of the Constitution.[46] There have been several federal due process challenges to these Rules; however, they have been unsuccessful.[47] While the Supreme Court has not ruled on the due process issue, it is unlikely that it would overturn Rules 413 and 414 on due process grounds.[48] In light of due process arguments' lack of success in

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39. *See id.* at 51 (describing the recommendation and transmission process).

40. 28 U.S.C. § 2074 (2012).

41. Cavallaro, *supra* note 38, at 52.

42. Judicial Conference of the United States, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1995)*, *reprinted in* 159 F.R.D. 51, 54 (1995).

43. *Id.*

44. Cavallaro, *supra* note 38, at 54.

45. *See* sources cited *supra* notes 6–21.

46. *See, e.g.*, Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1 (1996); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57 (1995).

47. *See, e.g.*, United States v. Coutentos, 651 F.3d 809, 819 (8th Cir. 2011) (holding that Rule 414 did not violate the defendant's due process rights); United States v. LeMay, 260 F.3d 1018, 1031 (9th Cir. 2001) (noting that propensity evidence is still subject to restrictions under Rule 403 prohibition on unduly prejudicial evidence); United States v. Charley, 189 F.3d 1251, 1259–60 (10th Cir. 1999) (same).

48. *See* Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 744–46 (concluding that due process arguments to rules permitting propensity evidence of prior sex crimes are unlikely to succeed because the argument rests on "shaky" historical grounds and because due

federal courts, critics do not focus very much on due process arguments against rules that allow propensity evidence and focus instead on criticizing the policy rationales for the rules.[49]

While this shift in attention is sensible in light of federal courts' decisions, due process should not be counted out when it comes to state-level challenges to rules of evidence that permit evidence of prior sexual misconduct in sex-crime cases. Admittedly, the success of due process challenges at the state level is not guaranteed. Alaska and Illinois have held that rules permitting evidence of prior sexual misconduct do not raise issues of constitutional magnitude and therefore do not raise due process concerns.[50] And even when states consider due process arguments, the arguments may be rejected.[51]

Nevertheless, two states have held that rules permitting the admission of prior sexual misconduct in sex-crime cases are unconstitutional violations of due process. And the existence of similar due process language in other states' case law suggests that due process challenges may arise in many states should they choose to adopt rules permitting evidence of prior sexual misconduct.[52] Significant

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process challenges to the law are too abstract for lower courts to apply in practice); *see also* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 112–13 (2008) (noting that the "limited scope of application" of the federal exceptions to the bar against propensity evidence would make it "politically imprudent for the Court to clash with Congress over the rules' constitutionality").

49. *See, e.g.*, Lave & Orenstein, *supra* note 26 (criticizing the rules' psychological assumptions as well as assumptions that sexual offenders are more likely to repeat their crimes).

50. *See* McGill v. State, 18 P.3d 77, 81–82 (Alaska Ct. App. 2001) (rejecting a due process argument against a law permitting prior child molestation evidence on the ground that the rule against propensity evidence is "not rooted in the constitution"); People v. Dabbs, 940 N.E.2d 1088, 1098–99 (Ill. 2010) (holding that even though bans on propensity evidence have a long history, the rule is not one of "constitutional magnitude" and therefore rules permitting propensity evidence do not implicate "a fundamental constitutional right").

51. *See* People v. Falsetta, 986 P.2d 182, 189–90 (Cal. 1999); Horn v. State, 204 P.3d 777, 783–84 (Okla. Crim. App. 2009) (rejecting a due process argument against a rule permitting propensity evidence after noting that any propensity evidence admitted under this rule would still be subject to a balancing test of the evidence's undue prejudicial effects against its probative value).

52. The due process challenges this section primarily addresses have been drawn from Supreme Court cases and are therefore employed in numerous states. *See, e.g.*, Chambliss v. State, 373 So.2d 1185, 1203 (Al. Crim. App. 1979) (defining due process as covering "fundamental conceptions of justice which lie at the base of our civil and political institutions," and which define "the community sense of fair play and decency" (internal quotation marks omitted) (citing United States v. Lovasco, 431 U.S. 783 (1977))); State *ex rel.* White v. Hilgemann, 34 N.E.2d 129, 130 (Ind. 1941) ("[D]ue process guaranteed by the Federal Constitution requires a trial in a state court, conforming to the fundamental conceptions of justice which lie at the base of our civil and political institutions."); State v. Taylor, 960 P.2d 773, 776 (Mont. 1998) ("[A] pre-indictment delay will lead to a violation of a defendant's due process rights if it can be said that requiring the defendant to stand trial 'violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.'" (citations omitted)); State v. Aguirre, 670 A.2d 583, 585 (N.J. Super. Ct. App. Div. 1996) ("The due process inquiry focuses on whether the delay violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." (citations omitted) (internal quotation marks omitted)); State v. Thompson, 567 P.2d 132, 134 (Or. Ct. App. 1977) ("[S]uch actions violate those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and define the community's sense of fair play and decency and violate the Due Process Clause of the Fourteenth Amendment." (citations omitted)); State v. Lee,

questions remain over the merits of due process challenges to these rules, particularly when it comes to courts' and commentators' discussion of the history of restrictions on the use of character evidence.

A. Successful Due Process Challenges: Iowa and Missouri

Two state supreme courts have overturned laws permitting the admission of prior-act evidence in sexual-assault cases. The Iowa Supreme Court addressed whether a rule permitting evidence of prior sexual crimes violated due process in *State v. Cox*,[53] and the Missouri Supreme Court addressed this question in *State v. Ellison*.[54]

1. Iowa's Section 701.11 and State v. Cox

Iowa passed a law permitting the admission of propensity evidence in 2003.[55] Iowa's law, codified at section 701.11 of the Iowa Code, was broad, permitting evidence of "sexual abuse," which it defined as anything in Chapter 709 of the Iowa Code.[56] Prior-act evidence covered by the Iowa rule overlapped, in part, with Federal Rules of Evidence 413 and 414, since Chapter 709 sexual abuse includes rape[57] and child molestation.[58] But Chapter 709 sexual abuse also includes indecent exposure[59] and invading another's privacy by watching, photographing, or filming another person who is in a state of full or partial nudity, and who has a reasonable expectation of privacy.[60] By including crimes like indecent exposure and invasion of privacy within the scope of the propensity-evidence exception, the Iowa law affected more crimes than Federal Rules of Evidence 413 and 414.

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653 S.E.2d 259, 262 (S.C. 2007) ("[T]he second part of the due process inquiry requires the court to consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant. . . . [T]he basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" (citations omitted)); State v. Charles, 263 P.3d 469, 475 (Utah Ct. App. 2011) ("[P]reaccusation delay violates due process only when it offends 'those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.'" (citations omitted)); State v. Oppelt, 257 P.3d 653, 656 (Wash. 2011) (same test); State *ex rel*. Knotts v. Facemire, 678 S.E.2d 847, 855 (W.Va. 2009) (same test).

53. 781 N.W.2d 757 (Iowa 2010).

54. 239 S.W.3d 603 (Mo. 2007) (en banc).

55. *See* 2003 IOWA ACTS 132.

56. IOWA CODE § 701.11(3) (2014) *invalidated by* State v. Cox, 781 N.W.2d 757 (Iowa 2010).

57. *See* IOWA CODE § 709.1 (2014).

58. § 709.12.

59. § 709.9.

60. § 709.21.

In *State v. Cox*, the Iowa Supreme Court evaluated a challenge to the constitutionality of section 701.11.[61] In *Cox*, the defendant was convicted with molesting his younger cousin.[62] At trial, the prosecution introduced evidence that the defendant had molested two of his other cousins on past occasions, and the court admitted this evidence.[63] The defendant argued that admission of prior molestation evidence involving persons other than the victim under section 701.11 violated the due process of the Iowa Constitution.[64]

The court, in considering the due process challenge, pointed out that it would "invalidate an evidentiary rule only if it violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, which define the community's sense of fair play and decency."[65] The court then noted that a ban on propensity evidence was a longstanding feature of Iowa common law.[66] The court admitted that a "lewd disposition" exception had been discussed in prior Iowa cases, and under this exception, courts had admitted prior sexual abuse evidence to establish that the defendant had a lewd disposition to commit sexual abuse crimes.[67] But the court pointed out that evidence of prior sexual abuse had only been admitted under this exception when it involved the same victim the defendant was presently charged of abusing.[68] After considering other cases involving propensity evidence in sexual abuse cases, the court concluded that section 701.11 was an unconstitutional violation of due process because it permitted evidence of prior sexual abuse involving people other than the victim in the present case.[69]

2. Missouri's Section 566.025 and State v. Ellison

In 1994, Missouri enacted Missouri Revised Statutes section 566.025, which permitted the admission of evidence that the defendant had committed crimes of a sexual nature against children under the age of fourteen.[70] Unlike Iowa's rule that was overturned in *Cox*, Missouri's statute was limited to cases involving sexual crimes against children under fourteen.[71] But like the statute in *Cox*, the statute permitted the introduction of evidence of sexual crimes against children other than the victim in the case where the defendant is charged.[72]

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61. 781 N.W.2d 757 (Iowa 2010).
62. *Id.* at 759.
63. *Id.*
64. *Id.* at 761.
65. *Id.* at 764 (citations omitted) (internal quotation marks omitted).
66. *Id.* (citing State v. Vance, 94 N.W. 204, 204 (Iowa 1903)).
67. Id. at 765.
68. *Id.*
69. *Id.* at 768.
70. MO. REV. STAT. § 566.025 (2014) *invalidated by* State v. Ellison, 239 S.W.3d 603 (Mo. 2007) (en banc).
71. *Id.*
72. *Id.*

In *State v. Ellison*, the Missouri Supreme Court held that section 566.025 violated the Missouri Constitution.[73] In *Ellison*, the defendant had been charged with first-degree child molestation after raping the child of a longtime friend.[74] At trial, the prosecution introduced evidence that the defendant had previously been convicted of first degree child molestation.[75]

In evaluating the defendant's claim that the introduction of his prior conviction violated his constitutional rights, the court noted that longstanding Missouri case law established a "general prohibition against the admission of evidence of prior crimes out of concern that '[e]vidence of uncharged crimes, when not properly related to the cause of trial, violates a defendant's right to be tried for the offense for which he is indicted.'"[76] The court, citing *State v. Gilyard*,[77] held that section 566.025 violated the Missouri constitution.[78] In *Gilyard*, the court stated that "[e]vidence of prior uncharged misconduct is inadmissible for the sole purpose of showing the propensity of the defendant to commit such acts."[79]

The Missouri Supreme Court's conclusion in *Ellison* was based on Article I, sections 17 and 18(a) of the Missouri Constitution.[80] Article I, section 17 of the Missouri Constitution requires those prosecuted of a crime to be formally charged by indictment.[81] And Article I, section 18(a) guarantees due process for the criminal defendant.[82]

The *Ellison* court noted that admitting prior-act evidence for the sole purpose of proving propensity "violates defendant's right to be tried for the offense for which he is indicted."[83]

Cox and *Ellison* show that state constitutional guarantees of due process may be an obstacle for states that wish to enact rules that permit propensity evidence in cases of sexual assault or child molestation. The lesson from *Ellison* is that state legislatures should pay attention to sections of the state constitution that may specifically conflict with these exceptions to the general ban on character evidence.

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73. 239 S.W.3d 603, 607–08 (Mo. 2007).

74. *Id.* at 605.

75. *Id.*

76. *Id.* at 606 (quoting State v. Burns, 978 S.W.2d 759, 760 (Mo. 1998) (en banc)).

77. 979 S.W.2d 138 (Mo. 1998) (en banc).

78. *Ellison*, 239 S.W.3d at 607–08.

79. *Gilyard*, 979 S.W.2d at 140.

80. See *Ellison*, 239 S.W.3d at 605–06.

81. MO. CONST. art. 1, § 17 ("That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case.").

82. MO. CONST. art 1, § 18(a) ("That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.").

83. *Ellison*, 239 S.W.3d at 607 (quoting State v. Sladek, 835 S.W.2d 308, 311 (Mo. 1992) (en banc)) (internal quotation marks omitted).

The lesson from *Cox* is that even if no specific section of the state constitution seems to apply directly to propensity evidence, courts may still permit challenges to these rules on the grounds that the rules violate fundamental notions of fair play and decency.

B. An Unsuccessful Due Process Challenge: People v. Falsetta

Soon after the enactment of Federal Rules of Evidence 413 and 414 California passed section 1108 of its evidence code, which permits the introduction of a defendant's prior commission of a wide range of sexual offenses in cases where the defendant is charged with a sexual offense.[84] The legislature passed this law in an effort to facilitate the prosecution of defendants charged with sexual crimes, since these crimes are usually secret and boil down to a credibility contest between the defendant and the victim.[85]

In *People v. Falsetta*, the California Supreme Court considered the argument that section 1108 violated the defendant's due process rights.[86] In *Falsetta*, the defendant had been charged and convicted of forcible oral copulation, assault with the intent to rape, assault with force likely to cause great bodily injury, and kidnapping.[87] At trial, the prosecution introduced evidence that defendant had previously pled guilty to rape on two occasions.[88]

The California Supreme Court noted that defendants who seek to challenge a law on due process grounds face a high burden. The court stated that "[i]n the due process context, defendant must show that section 1108 offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[89] The court then cited several cases and historical sources in support of the defendant's claim that there was a longstanding prohibition on propensity evidence.[90] But the court emphasized that in addition to the longstanding prohibition, there are several longstanding exceptions to restrictions on prior-act evidence, noting that courts had treated prior evidence of sex crimes "liberally" and that there was a historical trend of prior sex-crime evidence being admitted to show a defendant's "lustful disposition."[91] In light of this other historical evidence, the court found that the historical evidence was "unclear" as to whether admission of propensity evidence in sex-crime cases violated a fundamental principle of justice.[92]

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84. CAL. EVID. CODE § 1108 (2014).
85. *See* People v. Fitch, 63 Cal. Rptr. 2d 753, 759 (Cal. Ct. App. 1997).
86. 986 P.2d 182, 184 (Cal. 1999).
87. *Id.*
88. *Id.* at 185.
89. *Id.* at 187.
90. *Id.* at 187–88.
91. *Id.* at 188.
92. *Id.*

After exploring the historical background of the character evidence restriction and its exceptions, the court moved on to the policy reasons against admitting propensity evidence. The court found that section 1108 would not put an undue burden on the defendant or on the court because the rule required the prosecution to provide notice of its intention to introduce evidence under the rule and also required the court to introduce 1108 evidence in a manner that accounted for considerations of judicial efficiency and the need to avoid unduly prejudicial evidence against the defendant.[93] The court concluded that the law was saved from the defendant's due process challenge because evidence allowed under section 1108 would still be limited by California Evidence Code section 352, which prohibits the introduction of unduly prejudicial evidence.[94]

C. The Significance and Complexities of the Historical Perspective

Commentators who criticize rules that permit the admission of evidence of prior sexual misconduct often emphasize that these rules are contrary to a long-established prohibition on the admission of prior-act evidence.[95] This critique is sometimes used for persuasive purposes—by presenting the ban on prior-act evidence as a longstanding, fundamental characteristic of the legal system, rules that depart from this tradition stand in "stark" contrast to longstanding rules.[96] This contrast facilitates policy arguments against these rules by requiring supporters of the rules to bear the burden of justifying them, given their sharp departure from tradition.

Establishing that a ban on prior-act evidence is a longstanding restriction has impacts beyond policy arguments over exceptions to this ban. Critics who argue against the constitutionality of rules permitting the admission of evidence of prior sexual misconduct point out that the right to due process prohibits rules that violate "fundamental conceptions of justice" that define a community's notion of "fair play and decency."[97] A substantial part of the due process inquiry requires that courts evaluate evidentiary rules to determine whether these rules have a strong foundation in history.[98] Those who claim that defendants' due process rights are violated by the exceptions to a ban on propensity evidence must show that the ban

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93. *Id.* at 189–90.

94. *Id.* at 190; *see* CAL. EVID. CODE § 352 (2014).

95. *See, e.g.*, Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 WIS. L. REV. 1221, 1225–26.

96. *See, e.g.*, *id.* at 1227–28 (noting that Federal Rule of Evidence 415 is "a stark departure" from traditional evidentiary principles, and quoting Senator Joe Biden's criticism of Rules 413–415 as going against "800 years of experience" of what evidence is relevant (quoting 139 Cong. Rec. S15020-01, S15072 (1993))).

97. State v. Cox, 781 N.W.2d 757, 764 (Iowa 2010); *see also* Natali & Stigall, *supra* note 46, at 3.

98. *See* Montana v. Egelhoff, 518 U.S. 37, 43–44 (1996).

on propensity evidence is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[99]

The historical background of the prohibition on propensity evidence is far more complicated than most commentators tend to admit. Differing accounts of the history of evidence law reach different conclusions on what precisely was prohibited by rules of evidence, when rules of evidence developed, and how strongly the courts enforced these rules.

John Henry Wigmore, one of the most renowned scholars of evidence, set forth a history of how rules of evidence developed from 700 A.D. until 1860.[100] Wigmore noted that up until 1200 A.D., there were no rules of evidence in England, as preferred manners of conducting trial were by ordeal and battle rather than by anything resembling the modern tribunal.[101] Beginning in the 1200s, the jury system took hold, and procedures for swearing in witnesses under oath developed, though specific rules of evidence did not begin to form until the 1500s.[102] The rule against character evidence developed in the 1600s.[103]

Wigmore did not elaborate any further on the details of the character evidence rule, or how strictly it was enforced after its development in the 1600s, but notes that in the United States, rules of evidence were propounded by the courts of various jurisdictions in detailed, reasoned opinions.[104] In his treatise on the law of evidence, Wigmore emphasized that there is "a general and absolute rule of exclusion" that forbids "showing that the defendant has not the good character which he affirms" by referring "to particular acts of misconduct by him."[105] Wigmore noted that this rule of exclusion has existed since the late 1600s.[106]

Wigmore referenced several cases in support of this claim. He cited *Hampden's Trial*, where Judge Withins noted that, in a case where the defendant was charged with forgery, the court would not examine prior forgery cases of which the defendant had been indicted observing that the defendant would not be prepared to answer to these accusations.[107] Wigmore also cited *Harrison's Trial*, where Lord Chief Justice Holt refused to hear evidence of a defendant's prior "felonious conduct," emphasizing that the defendant would not be able to defend against these accusations without notice and that the evidence would "perplex" the court

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99. *Id.* at 43; *see also* People v. Falsetta, 986 P.2d 182, 187 (Cal. 1999) (applying the "fundamental" due process test from *Egelhoff*); sources cited *supra* note 52 (applying similar "fundamental" due process test language).

100. John Henry Wigmore, *A General Survey of the History of the Rules of Evidence*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691 (1908).

101. *Id.* at 691–92.

102. *Id.* at 692.

103. *Id.* at 693–94.

104. *Id.* at 699.

105. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 193 (1st ed. 1904).

106. *Id.* § 194 n.1.

107. *Id.* § 194 (citing Hampden's Trial, 9 How. St. Tr. 1053, 1103 (1684)).

and the jury.[108] The remaining cases Wigmore cited are from English and American cases that took place beginning in the mid-1800s.[109]

Courts that have considered due process challenges to state rules of evidence that permit the admission of evidence of prior sexual misconduct have drawn much of their historical evidence and discussion from Wigmore.[110] Commentators who criticize these rules also rely on Wigmore, or the cases he cites to support claims that the rule against propensity evidence is longstanding and fundamental.[111]

Initially, it is worth pointing out that the two cases Wigmore cited from the 1600s focused on the importance of *notice* in their decisions to prohibit evidence of prior criminal activity. Both courts, in reaching their rulings, noted that the defendant would not be able to defend against the accusations of the prior crimes without notice.[112] While notice is an important consideration, laws permitting the admission of prior sexual misconduct typically require prosecutors to provide notice that they intend to introduce this evidence.[113] If the main reason for the exclusion of prior-act evidence in the 1600s was the worry that defendants would not be able to defend against accusations without notice, this concern is of limited application when it comes to modern rules permitting the admission of evidence of prior sexual misconduct. As long as states include a notice provision in their rules permitting this evidence, the rules would seem to avoid the rationale for prohibiting propensity evidence that the courts applied in *Hampden's Trial* and *Harrison's Trial*.

Furthermore, while proponents of the ban on propensity evidence often assume that this ban is a longstanding tradition, this assumption has come under fire, both in the past and present. Julius Stone criticized the claim that a strong ban on propensity evidence has existed for hundreds of years, arguing that a bar on propensity evidence was not well known in England.[114] Stone maintained that early cases cited for this proposition were actually based on considerations of

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108. *Id.* (citing Harrison's Trial, 12 How. St. Tr. 833, 864, 874 (1692).

109. *Id.*

110. *See, e.g.*, People v. Falsetta, 986 P.2d 182, 187–88 (Cal. 1999) (citing Wigmore to support the proposition that there has been a general ban on propensity evidence for 300 years, and to support the claim that evidence of prior sexual misconduct had been historically admitted through a "lustful disposition" exception to the general ban on propensity evidence).

111. *See* Natali & Stigall, *supra* note 46, at 13–14 (citing Wigmore, *Hampden's Trial*, and *Harrison's Trial*, to support the claim that the "ban on propensity has been firmly and historically established since at least the seventeenth century in England").

112. *See supra* notes 107–08.

113. *See* FED. R. EVID. 413(b), 414(b) (requiring the prosecution to provide notice of its intent to introduce prior sexual misconduct evidence at least fifteen days before trial); *see also* CAL. EVID. CODE § 1008(b) (2014) (requiring evidence of prior sexual misconduct to be introduced in compliance with CAL. PENAL CODE § 1054.7 (2014), which in turn requires the prosecution to give thirty days notice of its intent to use this evidence absent good cause not to give this notice).

114. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 959, 967–69 (1933).

relevance alone.[115] Stone concluded that any bans on propensity evidence that may have existed in England were "narrow" and that judges still had substantial discretion to admit similar-act evidence.[116] In another (more strongly worded) article,[117] Stone applied his same criticism to American courts' assumptions that there is a general rule against the admission of propensity evidence, noting that American courts' support for the rule is based on the English cases he had already refuted in his previous article.[118] Modern critics of the ban on propensity evidence have adopted Stone's criticism.[119]

John Langbein cast further doubt on the strength of evidence rules in general, claiming that "the law of evidence as we understand the term was largely nonexistent as late as the middle decades of the eighteenth century."[120] Langbein examined the "judge's notes of Sir Dudley Ryder, Chief Justice of King's Bench during the years 1754–1756" and found that these notes provided a "detailed narrative" of the trials over which Ryder presided.[121] Based on these notes, Langbein concluded that the judge did not tend to exclude evidence based on systematic rules; rather, the judge relied heavily on "comment and instruction" of the jury to tell them what evidence to regard and what evidence to disregard.[122] Thomas Reed also suggests that strict rules of evidence are a modern phenomenon, and notes that judges in the "courts in these early English cases stated neither a general rule of exclusion nor a rule of conditional admissibility. Rather, the courts limited their opinions to the narrow issues before them."[123]

Stone's and Langbein's works cast doubt on the claim that rules barring propensity evidence are a fundamental, traditional aspect of systems governing the admission of evidence. Admittedly, the evidence seems mixed: different cases point in different directions; the scope of English holdings is unclear; and the Ryder sources point to the actions of one judge and focus on the treatment of hearsay evidence rather than character evidence. But this mixed evidence may yet be enough to overcome a due process challenge to a rule of evidence, since courts

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115. *Id.*

116. *Id.* at 985.

117. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938). In this article, Stone labels the general rule against propensity evidence as the "spurious rule." The term "spurious" appears approximately ninety times in the article.

118. *Id.* at 990–91.

119. *See* Melilli, *supra* note 30, at 1558–59.

120. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172 (1996).

121. *Id.*

122. *Id.* at 1195.

123. Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Trials*, 50 U. CIN. L. REV. 713, 718–19 (1981).

tend to presume the constitutionality of challenged laws.[124]

The fundamental ban on character evidence is only one step of the analysis where the constitutional claims can be defeated. Courts upholding the constitutionality of state rules permitting the admission of evidence of prior sexual misconduct emphasize that even if there is a longstanding prohibition on the admission of propensity evidence, this longstanding prohibition can be neutralized if there is a corresponding exception to the prohibition that also exists.[125] Challengers to rules that permit evidence of defendants' prior sexual misconduct face a daunting obstacle in the "lustful disposition" exception.

D. Due Process and the "Lustful Disposition" Exception

While all states restrict the admissibility of propensity evidence, many states take a less-restrictive view when considering the admissibility of evidence that defendants have engaged in prior sexual misconduct. In cases where a defendant is charged with a sex crime, courts are more likely to admit evidence of prior sexual misconduct—and this lenient treatment is often recognized as a "lustful disposition" exception to the general prohibition on propensity evidence.[126] This exception permits the introduction of propensity evidence even in the absence of rules of evidence permitting this evidence.[127] Twenty-one states and the District of Columbia permit evidence of prior sexual conduct under a "lustful disposition" exception.[128]

States have a long history of permitting prior-act evidence to show a "lustful disposition."[129] This exception has its roots in earlier American and English cases, which permitted evidence of prior sexual misconduct in cases where the defen-

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124. *See, e.g.*, People v. Falsetta, 986 P.2d 182, 187 (Cal. 1999) ("The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.").

125. *See*, *id.* at 188 (noting historical evidence that there is a "lustful disposition" exception to the prohibition on character evidence, and concluding that it is "unclear" that the rule against propensity evidence in sexual assault cases is "a fundamental historical principle of justice"); *see also* State v. Scherner, 225 P.3d 248, 264 (Wash. Ct. App. 2009) (striking down a due process argument against a rule permitting the introduction of prior sexual assault evidence and noting that rules that existed prior to that rule had liberally allowed prior sexual assault evidence under alternate theories of relevance).

126. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 62.2 (4th ed. 1983).

127. *See* Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 338–39 & n.51 (2012).

128. *Id.* at 339 & n.1. According to Tchivdjian, "lustful disposition" states are Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Georgia, Kansas, Idaho, Massachusetts, Mississippi, Missouri, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 339 n.51, 342–43 n.63.

129. *Id.* at 337–38 (noting that Indiana permitted propensity evidence under a "lustful disposition" exception in a 1918 decision).

dants were currently accused of sexual misconduct.[130] Early American courts generally allowed the introduction of prior-act evidence to prove a lustful disposition because many sexual crimes had their roots in English ecclesiastical law, where prior-act evidence was traditionally permitted to prove defendants' lustful dispositions.[131]

Courts considering due process challenges to rules of evidence that permit propensity evidence in cases where the defendant is charged with sexual crimes should take note of the "lustful disposition" exception. In *Falsetta*, the California Supreme Court noted that the "lustful disposition" exception casted doubt on the defendant's claim that restrictions on prior-act evidence in sex-crime cases were a "fundamental" historical principle.[132] Even if courts are convinced that restrictions on propensity evidence are a fundamental principle of the legal system, this conclusion may be limited to non-sexual propensity evidence, given courts' longstanding, permissive treatment of propensity evidence in sex-crime cases.

E. The Significance of Rules Prohibiting Unduly Prejudicial Evidence

The history of the rule prohibiting propensity evidence and the longstanding existence of the lustful disposition exception to this rule are only one part of the due process inquiry. Courts may be unwilling to strike down rules permitting propensity evidence in light of the complicated history of the rules of evidence involved. In light of this complex history, courts can turn to rules that prohibit unduly prejudicial evidence in order to provide a solid, simpler answer to due process challenges.

The federal government, and at least forty states, prohibit the introduction of evidence that is unduly prejudicial.[133] While all relevant evidence tends to be prejudicial in that it supports one side's case or undermines the arguments of the other side, evidence that tends to inflame the passions of the jury or sway jurors based on their emotions is prohibited if this prejudicial effect substantially outweighs the evidence's probative value.[134]

Evidence of a defendant's prior sexual misconduct will naturally tend to prejudice the jury against that defendant. Prosecutors may argue that evidence of

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130. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 166–67 (1993).

131. *Id.* at 165–66.

132. People v. Falsetta, 986 P.2d 182, 188 (Cal. 1999).

133. At the federal level, this rule is Federal Rule of Evidence 403. At the state level, see *Johnson v. United States*, 683 A.2d 1087, 1099–1100, n.14 (D.C. 1996) (listing citations to states that have adopted rules similar to Federal Rule of Evidence 403).

134. *See, e.g.*, People v. Yu, 191 Cal.Rptr. 859, 870 (Cal. Ct. App. 1983) ("[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'").

prior sexual misconduct reveals that the defendant has a propensity to engage in sex crimes and therefore is more likely to have committed the crime with which the defendant is charged. But defendants may argue that evidence of prior sexual misconduct is so inflammatory that it would do little more than cause the jury to dislike the defendant.[135]

Defendants' ability to challenge prior sexual-misconduct evidence as being unduly prejudicial gives courts an alternate argument against due process challenges. Courts can point out that defendants' due process rights are not violated by the introduction of evidence of prior sexual misconduct because there are still rules that prohibit the introduction of prior misconduct that is unduly prejudicial. Prohibitions on unduly prejudicial evidence can reduce harm to a defendant's right to a fair trial that prior-act evidence may cause, since prior-act evidence that is particularly inflammatory may still be barred by other rules of evidence.

Indeed, this seems to be the crux of many state and federal decisions that reject due process challenges to rules permitting evidence of prior sexual misconduct. *People v. Falsetta* acknowledged that the history of the rule against propensity evidence in sexual cases was "unclear" but ultimately concluded that the rule permitting evidence of prior sexual misconduct did not violate due process because it was subject to the balancing test of California Evidence Code section 352, which prohibits unduly prejudicial evidence.[136] Likewise, the Alaska Court of Appeals emphasized the ability of courts to balance the prejudicial effect of evidence of prior sexual misconduct against that evidence's probative value in upholding Alaska's rule permitting prior sex-crime evidence in *Allen v. State*.[137] And the Oklahoma Court of Criminal Appeals applied the same reasoning in *Horn v. State*, where it upheld Oklahoma's rule permitting evidence of prior sexual misconduct.[138] Several federal courts have applied this reasoning as well in rejecting due process attacks on federal rules of evidence that permit the introduction of evidence of prior sexual misconduct.[139]

Courts that are unwilling to rest their due process arguments entirely on the complicated history of propensity-evidence prohibitions will likely turn to rules that prohibit the introduction of unduly prejudicial evidence at trial. While defendants may argue that they are prejudiced by evidence of their prior sexual misconduct, these defendants may have a difficult time showing that this prejudice

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135. See MUELLER & KIRKPATRICK, *supra* note 33, § 4.22 (noting that one reason to prohibit propensity evidence is that the jury may end up convicting the defendant for being a "bad person").

136. *Falsetta*, 986 P.2d at 190.

137. 945 P.2d 1233, 1238–39 (Alaska Ct. App. 1997).

138. Horn v. State, 204 P.3d 777, 784 (Okla. Crim. App. 2009).

139. *E.g.*, United States v. LeMay, 260 F.3d 1018, 1031 (9th Cir. 2001) (rejecting a due process challenge to Federal Rule of Evidence 414 after noting that propensity evidence is still subject to restrictions under Rule 403 prohibition on unduly prejudicial evidence); United States v. Charley, 189 F.3d 1251, 1259–60 (10th Cir. 1999) (citing United States v. Castillo, 140 F.3d 874, 883–84 (10th Cir. 1998)) (same holding as *LeMay*).

rises to the level of a due process violation in light of continuing safeguards against unduly prejudicial evidence.

F. Reciprocity and Rape Shield Laws

While historical evidence and the "lustful disposition" exception to propensity bans undermine due process arguments against state rules that permit the introduction of evidence of prior sexual misconduct, the relatively recent development of rape shield laws may cut in the other direction. Historically, rape defendants have been allowed to enter evidence of their victims' sexual history at trial.[140] The practice of introducing evidence of victims' sexual history originates in laws that were closely related to biblical-era practices, which outlawed the rape of a virgin but did not mandate punishments for other instances of rape.[141] By proving that their victims had a sexual history, rape defendants could avoid punishment.[142]

American criminal statutes never explicitly required the victim to be a virgin, but women have historically been expected to avoid sexual behavior, while men have historically been afforded a "broad sexual license."[143] Evidence that a rape victim has a history of sexual activity was helpful for rape defendants because juries would be less likely to believe that the victim did not consent to sexual activity.[144] The courts permitted defendants to introduce evidence of victims' sexual history evidence to cast doubt on the victims' credibility and on whether the victims had consented to sexual activity.[145] As a result, between 1900 and 1975, evidence of a rape victim's prior sexual behavior was "routinely" admitted in criminal trials.[146] This trend continued until widespread criticism of this evidence led to the adoption of Federal Rule of Evidence 412, which banned the admission of evidence of the victim's prior sexual activity.[147] By 1985, "the federal government and almost all of the states" adopted laws that limited "the admissibility of evidence of the victim's past sexual conduct."[148] These rules are known as "rape shield" laws.

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140. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 835–36 (2013).

141. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 61–64 (2002).

142. *Id.*

143. *Id.* at 65–66.

144. *Id.* at 67.

145. For an infamous example of such a case, see *People v. Abbot*, 19 Wend. 192, 196 (N.Y. Sup. Ct. 1838) ("[T]here is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of *another*, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity?").

146. Anderson, *supra* note 141, at 69.

147. Capers, *supra* note 140, at 843–47.

148. Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 127 (1999).

While the government may have historically been able to admit evidence that the defendant had a propensity to commit sex crimes, this ability coexisted with the defendant's ability to admit evidence of the victim's prior sexual behavior. With the introduction of both rape shield laws and rules that permit introduction of a defendant's propensity to commit sex crimes, the defendant is at a notable disadvantage.

The defendant's inability to introduce sexual history evidence in conjunction with the government's ability to introduce the defendant's propensity evidence may violate the defendant's due process rights by violating reciprocity. Defendants have a due process right to have a similar level of power at trial as the prosecution has.[149] Some critics note that by restricting the defendant's ability to introduce evidence of the victim's prior sexual activities while the government has the ability to introduce evidence about the defendant's past crimes, the defendant's due process right to reciprocity is violated.[150] The government could address this due process concern by limiting or eliminating either rape shield laws or the use of propensity evidence of a defendant's prior sex crimes.[151] Given the history of perpetrators of rape being able to get away with their crimes by casting harassing aspersions on their victims, the preferable approach would be to limit or eliminate rules that allow propensity evidence of the defendant's prior sex crimes.

While reciprocity may be an important due process consideration, the argument that defendants have a due process right to introduce prior sexual activities of victims is not likely to prevail.[152] Those states that have struck down rules permitting the admission of evidence of prior sexual misconduct have not mentioned the rise of rape shield statutes in their reasoning. And states that have upheld these rules against due process challenges have not addressed how rape shield laws may strengthen due process claims. Despite this lack of attention thus far, the reciprocity consideration is worth noting, since almost all states have rape shield laws, and those states that permit propensity evidence in sex-crime scenarios may need to address how these rape shield laws influence broader due process considerations.

III. SEPARATION-OF-POWERS CHALLENGES TO RULES PERMITTING PRIOR SEXUAL MISCONDUCT EVIDENCE

Due process challenges are not the only challenges defendants may make against state rules permitting the admission of evidence of prior sexual miscon-

149. *See* Wardius v. Oregon, 412 U.S. 470, 471–72 (1973).

150. *See* Celia McGuinness, *Sliding Backwards: The Impact of California Evidence Code Section 1108 on Character Evidence, Rape Shield Laws and the Presumption of Innocence*, 9 HASTINGS WOMEN'S L.J. 97, 118–19 (1998).

151. *Id.* at 119.

152. *See* Thomas v. State, 483 A.2d 6, 18–19 (Md. 1984) (rejecting defendant's argument that rule prohibiting evidence of victim's sexual activity violated due process).

duct. Defendants may argue that legislation permitting propensity evidence in sex-crime cases violates state constitutions by infringing on the separation of power between the legislature and the judiciary. Several states' constitutions require the judiciary to develop rules of procedure for trials, and laws that purport to change the rules over what evidence is admissible may infringe on the rulemaking province of the judicial branch.

Some states with rules permitting the introduction of evidence of prior sexual misconduct have constitutional or statutory provisions that give the judiciary the role of developing procedural rules. These states include Michigan[153] and Washington.[154] Many states without rules permitting the admission of evidence of prior sexual misconduct have constitutional or statutory provisions that give the judiciary the role of developing rules of procedure. These states include Alabama,[155] Arkansas,[156] Delaware,[157] Florida,[158] Idaho,[159] Indiana,[160] Kentucky,[161]

153. MICH. CONST. art. VI, § 5. While the legislature's enactment of a rule permitting the introduction of prior sexual misconduct would appear to violate this separation of powers provision, the Michigan Supreme Court found no such violation due to the substantive nature of such a rule. *See infra* Part III.C.

154. WASH. CONST. art. IV, § 1. While Washington still has a law permitting the evidence of prior sexual misconduct on the books, this law has been overruled for violating this separation of powers provision. *See infra* Part III.A.

155. ALA. CONST. art. VI, § 150.

156. ARK. CONST. amend. 80, § 3; *see also* Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 140–41 (Ark. 2009) (striking down a statute that imposed a procedural rule on parties and noting that "so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional").

157. DEL. CODE ANN. tit. 11, § 5121 (2014). Subsection (c) of this law provides that upon the enactment of any procedural rule by the Delaware Supreme Court, any conflicting laws will be rendered void. *Id.* § 5121(c). This indicates that while procedural laws may not necessarily be void when they are initially passed, they may at any time be rendered void if the Delaware Supreme Court finds that they are inconsistent with existing rules, or wishes to impose an alternate rule.

158. FLA. CONST. art. V, § 2. The legislature maintains some limited power to impose procedural rules, but these rules are subject to the approval of the Supreme Court. *See* Mortimer v. State, 100 So. 3d 99, 104 (Fl. Dist. Ct. App. 2012) ("[T]he Supreme Court's unwritten policy is 'to allow trial courts to utilize a rule of evidence during the period between its legislative enactment and its adoption by the supreme court if the trial court determines that the new rule of evidence is procedural and does not violate the prohibition against *ex post facto* application.' '[S]tatutes are presumed constitutional and given effect until they are declared unconstitutional.'" (citations omitted)).

159. IDAHO CODE ANN. § 1-212 (2014); *see also* State v. Badger, 525 P.2d 363, 365 (Idaho 1974).

160. IND. CODE 34-8-1-3 (2014). While the Indiana legislature tried to enact legislation permitting the introduction of prior sexual misconduct evidence, this statute was held to be a nullity due to its infringement on the role of the judiciary. *See infra* Part III.B.

161. KY. CONST. § 116; *see also* Gaines v. Commonwealth, 728 S.W.2d 525, 527–28 (Ky. 1987) (striking down a legislatively-enacted procedural rule as "an unconstitutional infringement on the inherent powers of the judiciary").

Maine,[162] Maryland,[163] Minnesota,[164] Mississippi,[165] Montana,[166] New Hampshire,[167] New Jersey,[168] New Mexico,[169] Ohio,[170] Pennsylvania,[171] South Dakota,[172] Vermont,[173] Wisconsin,[174] and Wyoming.[175]

A. Violating the Separation of Powers: Washington and State v. Gresham

In 2008, Washington enacted a statute that permitted the introduction of prior sex-offense evidence in cases where the defendant was charged with a sex offense.[176] The statute had a relatively broad scope and would permit evidence of crimes ranging from rape, to sexual assault, to child molestation.[177] The statute also required courts to consider a variety of factors when deciding to admit prior evidence of sexual misconduct, including the length of time elapsed since the prior

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162. ME. REV. STAT. tit. 4, § 9 (2014).

163. MD. CONST. art. IV, § 18(a); *see also* MD. CODE ANN. CTS. & JUD. PROC. § 1-201 (West 2014) (establishing that the power to set procedural rules extends to rules of evidence).

164. MINN. STAT. § 480.051 (2014); *see also* MINN. STAT. § 480.0591(6) (2014) ("Present statutes relating to evidence shall be effective until modified or superseded by court rule. If a rule of evidence is promulgated which is in conflict with a statute, the statute shall thereafter be of no force and effect.").

165. *See* Trull v. State, 811 So. 2d 243, 247–48 (Miss. Ct. App. 2000) (holding a statutory rule of procedure to be void because it conflicted with a judicially-enacted rule of procedure).

166. MONT. CONST. art. VII, § 2. The legislature retains the power to veto, but not replace, judicially-enacted rules of procedure. *In re* Formation of East Bench Irrigation Dist., 186 P.3d 1266, 1268 (Mont. 2008) ("Without question, Art. VII, § 2(3) vests in the Supreme Court the authority to adopt rules for appellate procedure and trial and appellate procedures 'for all other courts.' Just as clearly, the legislature is empowered to veto any such rules promulgated by this Court. However, once a legislative veto is exercised, the legislature is not empowered to fill the vacuum by enacting its own legislation governing appellate procedure or lower court procedure." (citations omitted)).

167. N.H. REV. STAT. ANN. § 491:10 (2014); *see also* Nassif Realty Corp. v. Nat'l Fire Ins. Co., 220 A.2d 748, 749–50 (N.H. 1966) (noting that the New Hampshire Supreme Court's power to make rules is "broad and comprehensive").

168. N.J. CONST. art. VI, § 2, ¶ 3; *see also* George Siegler Co. v. Norton, 86 A.2d 8, 12 (N.J. 1952) ("[W]here a statute, wholly procedural in its operation, is in conflict, either directly or by necessary implication, with a rule of procedure promulgated by this court pursuant to the authority delegated to it under the Constitution, the latter must prevail.").

169. N.M. STAT. ANN. §§ 38-1-1, 38-1-2 (2014); *see also* Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1359 (N.M. 1976) (holding that legislatively-created rules of procedure are "constitutionally invalid and cannot be relied upon or enforced in judicial proceedings").

170. OHIO CONST. art. IV, § 5(B).

171. PA. CONST. art. V, § 10(c); *see also* LJS v. State Ethics Comm'n, 744 A.2d 798, 801–02 (Pa. Commw. Ct. 2000) (emphasizing that the Pennsylvania Constitution grants the power of making procedural rules to the judiciary alone).

172. S.D. CODIFIED LAWS § 16-3-5.1 (2014).

173. *See* VT. CONST. ch. II. § 37 (granting the power to establish procedural rules to the judiciary, but noting that these rules could still be revised by the legislature); *see also* VT. STAT. ANN. tit. 12, § 1 (2014) (extending the rulemaking power of the Vermont Supreme Court to rules of evidence).

174. WIS. STAT. § 751.12 (2014).

175. WYO. STAT. ANN. §§ 5-2-114, 5-2-115 (2014); *see also* White v. Fisher, 689 P.2d 102, 106–07 (Wyo. 1984) (emphasizing that the Supreme Court has the power to make rules and that statutes conflicting with the procedural rules are unconstitutional violations of separation of powers).

176. WASH. REV. CODE ANN. § 10.58.090 (2014), *invalidated by* State v. Gresham, 269 P.3d 207 (Wash. 2012).

177. *Id.*

act, the similarity of the prior act to the current act, and whether the defendant had been convicted in the past or simply accused.[178]

In *State v. Gresham*, the Washington Supreme Court held that this statute violated the Washington Constitution.[179] The defendant, Gresham,[180] was charged with four counts of first-degree child molestation following a pattern of abuse of a single victim.[181] At trial, the prosecution admitted evidence that Gresham had previously been convicted of raping and molesting another minor.[182] Gresham was ultimately convicted for three counts of first-degree child molestation and one count of attempted first-degree child molestation.[183] Gresham appealed, arguing that section 10.58.090 of the Washington Code, which permitted the admission of his prior convictions, was an unconstitutional violation of the separation of powers between the state legislature and judiciary.[184]

The court pointed out that the separation of powers was a crucial aspect of the Washington Constitution and that Article IV, section 1 of the constitution gave courts the "inherent power" to "'prescribe rules for procedure and practice.'"[185] The court then noted that Washington's evidence law, as set forth by the state supreme court, prohibited the admission of propensity evidence and that there were no exceptions to this prohibition.[186] Section 10.58.090 presented an "irreconcilable" conflict with this prohibition.[187]

The court then confronted the question of whether section 10.58.090 was a substantive or procedural rule. Acknowledging that the line between substantive and procedural rules was not always clear, the court noted that rules governing the admissibility of evidence are generally procedural rules and that section 10.58.090 was a procedural, rather than substantive, rule.[188] The court held that section 10.58.090 was therefore an unconstitutional violation of the separation of powers because the legislature had infringed on the judiciary's power to prescribe rules of procedure.[189]

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178. *Id.*
179. 269 P.3d 207, 220 (Wash. 2012).
180. Gresham was one of two defendants whose cases the Washington Supreme Court reviewed, and the court reached its holding on the constitutionality of section 10.58.090 based on its review of Gresham's conviction. *Id.* at 212.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 217 (quoting State v. Smith, 527 P.2d 674, 676 (Wash. 1974)).
186. *Id.*
187. *Id.*
188. *Id.* at 218–19.
189. *Id.* at 219.

B. Separation of Powers and Shifts in the Common Law: Indiana and Brim v. State

As in Washington, the Indiana legislature's attempt to pass legislation to permit the introduction of propensity evidence ran aground because it conflicted with a recent holding of the Indiana Supreme Court. In 1993, the Indiana legislature passed a law that would permit courts to introduce evidence that the defendant had committed prior acts of child molestation in cases where the defendant is currently charged with child molestation.[190] Up until 1992, Indiana common law permitted the admission of evidence of prior sexual misconduct for purposes of showing that defendants charged with sex crimes had a disposition to commit sexual misconduct in child-molestation cases.[191] In 1992, however, the Indiana Supreme Court abandoned this exception.[192] The court noted that the exception that permitted prior sex-crime evidence had been employed to permit evidence of prior crimes from many years before in prior cases "under the theory that remoteness [of the past crime] goes to weight and not admissibility."[193] The court also noted that the exception allowed the admission of evidence concerning a prior sex crime without notice to the defendant or a showing that the prior crime was similar to the charged crime.[194] In light of these concerns, the court abandoned the exception to the ban on prior crimes evidence in child-molestation cases and overruled the prior cases that had applied this exception.[195]

In Indiana, the state supreme court has the power to adopt and amend procedural rules for trials.[196] Any laws that conflict with the procedural rules the Indiana Supreme Court adopts have "no further force or effect."[197] When the Indiana Supreme Court finds that a statute purports to modify or reverse a rule of procedure adopted by the Indiana Supreme Court, the court concludes that the statute is a "nullity."[198]

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190. IND. CODE § 35-37-4-15 (2014).

191. *See, e.g.*, Lawrence v. State, 464 N.E.2d 923, 924 (Ind. 1984) (noting that while evidence of prior crimes is generally inadmissible to show propensity, there is an "exception for the admissibility of prior criminal acts which show the defendant had a depraved sexual instinct, when the charges upon which he is being tried involve that same instinct").

192. Lannan v. State, 600 N.E.2d 1334, 1338–39 (Ind. 1992).

193. *Id.* at 1338.

194. *Id.*

195. *Id.* at 1339 (holding that a dissenter in one of the prior cases had "carried the day" and that prior-crime evidence could not be used to simply show a predisposition to commit crimes).

196. IND. CODE § 34-8-1-3 (2014).

197. *Id.*

198. *See, e.g.*, Hawkins v. Auto-Owners' Ins. Co., 608 N.E.2d 1358, 1359 (Ind. 1993) ("[W]hen a statute is in conflict with the rules of procedure established by the [Indiana] Supreme Court, the Supreme Court rules prevail and the statute is a nullity."), *overruled on other grounds by* Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994); *see also* Humbert v. Smith, 655 N.E.2d 602, 604–05 (Ind. Ct. App. 1995) (holding that a rule permitting the admission of blood or genetic test evidence was a "nullity" because it conflicted with prior rules of evidence set forth by the Indiana Supreme Court).

In *Brim v. State*, the Indiana Court of Appeals noted that the statute permitting evidence of prior child molestation was contrary to the Indiana Supreme Court's holding in *Lannan*.[199] Accordingly, that statute was a nullity.[200] Even though the court was not addressing a case involving evidence of a prior child molestation, the court concluded that it was best to make that point in dicta rather than overturning a future child-molestation conviction on that ground.[201] It is safe to conclude that the Indiana law permitting evidence of prior child molestation will not be accepted by the courts in light of the law's inconsistency with the holding of the Indiana Supreme Court.

C. Lessons From Gresham

Gresham and *Brim* illustrate how legislative changes to evidence rules may infringe on the judiciary's domain. In states like Washington and Indiana where state constitutions give the choice of procedural rules to the judiciary, legislatures will most likely be unable to change any rules of evidence, including rules relating to propensity evidence. In other states, the legislature may be able to change procedural rules adopted by the judiciary so long as the legislature meets certain requirements, such as a supermajority vote on the rule.[202]

States that do not have specific rules of evidence permitting the admission of sex crimes may be unable to enact these rules through legislation if procedural reforms are in the sole domain of the judiciary. For example, Tennessee does not have any rules of evidence analogous to Federal Rules of Evidence 413 and 414. But if Tennessee's legislature seeks to adopt state rules of evidence that would permit propensity evidence in sex-crime cases, the rules would likely be rejected by the Tennessee Supreme Court, which has previously held that "[o]nly the [Tennessee] Supreme Court has the inherent power to promulgate rules governing the practice and procedure" of Tennessee state courts.[203]

State legislatures seeking to adopt rules that permit the introduction of evidence relating to prior sexual misconduct must look to the state constitution before enacting any legislative reforms. If the constitution grants procedural rulemaking powers to the judiciary, proposed legislative reforms to the rules of evidence will be constrained by whatever rules the judiciary has adopted. This may not leave the legislature entirely powerless, however, since laws consistent with the procedures the judiciary has already adopted would not infringe on the judiciary's power to prescribe procedural rules.

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199. 624 N.E.2d 27, 33 & n.2 (Ind. Ct. App. 1994).

200. *Id.*

201. *Id.* at n.2.

202. *See, e.g.*, ALASKA CONST. art. IV, § 15 (delegating procedural rulemaking powers to the state supreme court and granting the legislature power to change these rules by means of a two-thirds vote from members of each house in the legislature); UTAH CONST. art. VIII, § 4 (same rule).

203. State v. Mallard, 40 S.W.3d 473, 480–81 (Tenn. 2001).

Returning to the Tennessee example, while the Tennessee legislature may not be able to enact rules of evidence identical to Federal Rules of Evidence 413 and 414, the legislature may enact rules affecting propensity evidence that are consistent with existing precedent. While Tennessee's supreme court does not recognize a general "sex crimes" exception to the prohibition against prior-act evidence, the court has recognized a limited exception for evidence of prior, uncharged sex crimes committed during the time at issue in a current sex-crime indictment.[204] As a result, even if the Tennessee rules of evidence contain a general prohibition on prior-act evidence, the Tennessee legislature may be able to enact a limited exception to the prohibition so long as the exception does not exceed the scope of the exception outlined in prior Tennessee Supreme Court cases.

Gresham and *Brim* show that state legislatures that enact rules permitting the introduction of prior sexual misconduct run the risk that state courts will overturn these rules if the state's constitution or laws give the judiciary the power to enact procedural rules. While this risk is worth noting, it may not necessarily be fatal to legislation, since one argument remains for proponents of these rules of evidence: that rules permitting evidence of prior sexual misconduct are substantive, not procedural.

D. Are Prior Sexual Misconduct Rules Substantive or Procedural? An Alternate Take in Michigan's People v. Watkins

While *Gresham* and *Brim* illustrate how laws that change rules of evidence may implicate separation-of-powers concerns, these concerns may not be fatal to legislatively-enacted rules of evidence. Numerous states contain constitutional or statutory provisions that give the judiciary the role of enacting procedural rules.[205] Legislative efforts to pass laws that permit the introduction of evidence of prior sexual misconduct at trial may be overturned if found to encroach on this role of the judiciary. But proponents of this legislation may argue that rules permitting evidence of prior sexual misconduct do not encroach on the judicial role of enacting procedural rules because these rules of evidence are substantive, rather than procedural.

This argument succeeded in the Michigan case of *People v. Watkins*.[206] There, two defendants challenged a Michigan law that permitted the introduction of prior sexual misconduct with a minor in cases where the defendant is charged with sexual misconduct with a minor.[207] The Michigan Supreme Court found that the

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204. *See* State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994); *see also* State v. Osborne, 251 S.W.3d 1, 19 (Tenn. 2007) (recognizing that *Rickman* establishes a "limited exception" to the general rule prohibiting the admission of prior crimes evidence).

205. *See* sources cited *supra* notes 153–75.

206. 818 N.W.2d 296 (Mich. 2012).

207. *Id.* at 298–99; MICH. COMP. LAWS § 768.27a (2014).

law was inconsistent with Rule 404(b) of the Michigan Rules of Evidence.[208] The next question to confront, therefore, was whether the prior sexual misconduct law was a procedural rule that encroached on the role of the judiciary.

The Michigan Supreme Court held that the law permitting evidence of prior sexual misconduct did not encroach on the constitutional role of the judiciary because it was a substantive, rather than a procedural, rule.[209] The court emphasized prior case law in which it had "rejected the mechanical approach of characterizing all rules of evidence as procedural."[210] Rules of evidence that reflect "policy considerations limited to the orderly dispatch of judicial business" would implicate procedural concerns.[211] But rules that involve "policy considerations over and beyond matters involving the orderly dispatch of judicial business are substantive" and would therefore take precedence over judicially-enacted rules.[212]

The court held that the law permitting evidence of prior sexual misconduct against minors was substantive because it was based in policy reasons beyond the "orderly dispatch of judicial business."[213] The court noted that these policy concerns included the worry that sexual offenders would be more likely than other criminals to reoffend and the difficulty of proving sex-crime cases.[214] Accordingly, the law was not an unconstitutional separation of powers, and the court held that the law permitting evidence of prior sexual misconduct would supersede Michigan Rule of Evidence 404(b) when the two rules conflicted.[215]

Watkins shows that even when a state's constitution or statutes give the judiciary the role of drafting and enacting procedural rules, the legislature may still be able to enact rules of evidence that permit evidence of prior sexual misconduct. But *Gresham* and *Brim* show that the success of this legislation is far from certain. The *Gresham* court also considered the argument that laws permitting prior sexual misconduct are substantive, rather than procedural, and rejected this argument.[216]

State legislatures seeking to change rules of evidence governing the admission of propensity evidence should pay close attention to their state's constitution to see if the legislature has the authority to change rules of procedure. If that power rests with the judiciary, the legislature may need to tailor any statutes it enacts to be consistent with existing state precedent. While *Watkins* illustrates that there may still be a chance for laws that are inconsistent with judicially-enacted rules of evidence, the survival of these laws is far from guaranteed.

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208. 818 N.W.2d at 307–08.
209. *Id.* at 309.
210. *Id.* (citing McDougall v. Schanz, 597 N.W.2d 148 (Mich. 1999)).
211. *Id.* (internal quotation marks omitted).
212. *Id.* (internal quotation marks omitted).
213. *Id.* at 309–10.
214. *Id.*
215. *Id.* at 310.
216. State v. Gresham, 269 P.3d 207, 217–19 (Wash. 2012).

IV. COMMON LAW CHALLENGES TO RULES PERMITTING PRIOR SEXUAL MISCONDUCT EVIDENCE

While defendants may appeal to constitutional arguments when challenging state rules permitting the introduction of evidence of prior sexual misconduct, defendants may also argue that these rules are contrary to established common law principles. While common law may not be as powerful as the constitution when it comes to challenging statutes, courts generally presume that statutes are consistent with the common law unless they contain a clear statement otherwise.[217] Defendants may argue that directly contrary common law warrants the abandonment or a limited application of a state law.

A. Common Law Support for Propensity Exceptions: Connecticut and State v. DeJesus

Connecticut presents an interesting example of the interaction between state common law and state rules of evidence that are contrary to the common law. Currently, Connecticut Code of Evidence ("CCE") section 4-5(b) permits the introduction of propensity evidence in the form of prior acts of sexual misconduct when the defendant is currently charged with sexual misconduct.[218] But in 2008, CCE section 4-5 did not contain this exception and prohibited the admission of prior-act evidence to show that the defendant had a propensity to act in conformity with the character demonstrated by those acts.[219]

In *State v. DeJesus*, the defendant was convicted of two counts of sexual abuse in the first degree after he sexually assaulted one of his employees on two occasions.[220] At trial, the prosecution introduced evidence that the defendant had sexually assaulted another one of his employees on a prior occasion.[221] The defendant appealed from this conviction, arguing that the evidence of his prior sexual misconduct should not have been admitted because the CCE prohibited propensity evidence.[222]

The Connecticut Supreme Court began its evaluation of the defendant's case by analyzing the common law treatment of propensity evidence. It noted that there was a general rule that "evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused."[223] The court recognized, however, that there was an exception to this general rule

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217. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318–19 (2012); *see also, e.g.*, Viera v. Cohen, 927 A.2d 843, 853–54 (Conn. 2007).

218. CONN. CODE EVID. § 4-5(b) (2014).

219. *See* State v. DeJesus, 953 A.2d 45, 61–62 (Conn. 2008).

220. *Id.* at 50–51.

221. *Id.*

222. *Id.* at 59–60.

223. *Id.* at 60 (quoting State v. Randolph, 933 A.2d 1158, 1169 (Conn. 2007)) (internal quotation marks omitted).

when it came to prior evidence of sexual misconduct, noting that previous cases permitted the introduction of propensity evidence in sexual cases if the prior crimes resemble and were close in time to the current case.[224]

The court then moved on to analyze CCE section 4-5. While the language of section 4-5 seemed to exclude propensity evidence generally, the court noted that other portions of the CCE stated the legislature's intent that the CCE conform to Connecticut common law and concluded that section 4-5 was enacted to codify Connecticut's common law jurisprudence, rather than to change the common law rule.[225] The court bolstered this interpretation by referring to the history of the evidentiary code, which had been enacted only eight years before.[226] The court concluded from this analysis that it retained the authority to change and develop the rules of evidence on a case-by-case basis.[227] After reviewing previous cases that had permitted the introduction of propensity evidence in sexual misconduct cases and the policies behind the rule, the court concluded that a limited exception to section 4-5's ban on character evidence existed to show that the defendant had a propensity to engage in "aberrant and compulsive criminal sexual behavior."[228]

State v. DeJesus involved a number of distinctive facts that help explain its outcome. The code of evidence had been adopted only eight years before, and there were multiple communications between the legislature and Connecticut Supreme Court indicating that the CCE was adopted with the intent to codify then-existing common law rules of evidence.[229] Moreover, the text of the code itself indicated a general intent that the CCE reflect state common law.[230]

B. The Importance of Common Law: Lessons from Connecticut

Although *State v. DeJesus* was decided in a legal environment that gave notable strength to the common law, the case reveals how legislatures seeking to enact rules relating to propensity need to consider prior decisions by their state supreme courts. *DeJesus* shows that states seeking to enact rules restricting propensity evidence in cases of sexual assault may run into trouble if there are cases to the contrary and there is precedent, legislative history, or text in the rules that indicate that rules of evidence are to be based on the common law established by state courts. State legislatures hoping to overcome the presumption that new statutes do not depart from existing common law must explicitly indicate that evidence of

224. *Id.* at 60.
225. *Id.* at 61–62.
226. *Id.* at 64–68.
227. *Id.* at 67–68.
228. *Id.* at 77.
229. *Id.* at 64–68.
230. *See* CONN. CODE EVID. § 1-2(a) (2014) ("The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.").

prior sexual misconduct is to be admitted at trial even if there is existing case law to the contrary.

Maryland is a state where a situation similar to that in *DeJesus* may arise. Maryland has no rules of evidence that permit the admission of prior sexual-misconduct evidence. Maryland, like most states, has a rule of evidence that prohibits the use of prior-act evidence to show that the defendant acted in conformity with the character demonstrated by the evidence.[231] Maryland's rule governing the scope of its rules of evidence does not explicitly mention the common law.[232] But Maryland case law establishes that rules of evidence are to be construed in a manner consistent with existing common law unless there is a "clear indication to the contrary."[233]

Maryland common law explicitly recognizes that there is an exception to the prohibition on propensity evidence in certain sex-crime prosecutions.[234] This exception is limited to cases where the prior-act evidence is committed against the victim in the present case and is similar to the charged sex crime.[235]

The text of Maryland's rules of evidence does not contain any mention of the exception to the general prohibition on propensity evidence. But given Maryland's common law tradition of permitting propensity evidence in certain sex-crime cases, any argument that the general ban on propensity evidence applies to evidence of prior sexual misconduct against the victim in the present case is likely to fail since Maryland's propensity ban does not explicitly exclude this particular type of prior-act evidence.

On the other hand, legislatures in states with common law that is restrictive toward propensity evidence in sex-crime cases may need to be more explicit when describing what propensity evidence should be admissible. Nevada common law, for example, has recently gone in a restrictive direction when it comes to attempts to admit evidence of prior sexual misconduct.[236] If the Nevada legislature wants to enact a statute that permits the admission of a broad range of prior sexual misconduct to show propensity, the rule the legislature enacts will need to be clearly stated in order to overcome the common law prohibition on prior-act evidence in sex-crime cases.

A state seeking to pass laws that permit or prohibit propensity evidence in sex-crime cases must pay careful attention to whether the state's rules of evidence

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231. MD. CODE ANN. EVID. § 5-404(b) (West 2014).

232. MD. CODE ANN. EVID. § 5-102 (West 2014).

233. Holmes v. State, 712 A.2d 554, 559 (Md. 1998).

234. State v. Westpoint, 947 A.2d 519, 540–42 (Md. 2008) (describing the exception and various cases that establish the exception).

235. *Id.*

236. *See* Braunstein v. State, 40 P.3d 413, 417–18 (Nev. 2002) (noting prior Nevada cases favoring the admission of prior sexual misconduct and rejecting this trend, specifically rejecting the rule "that evidence of other acts offered to prove a specific emotional propensity for sexual aberration is admissible and that, when offered, it outweighs prejudice").

purport to reflect common law. States must also expect courts to construe rules in a manner that is consistent with existing common law and frame their laws accordingly.

CONCLUSION

There are many considerations that state legislators must take into account before passing laws that permit propensity evidence in sexual assault cases. Legislators must consider whether a rule permitting propensity evidence would survive due process challenges and may need to temper the scope of any propensity reform accordingly. Legislators must also determine whether any separation-of-powers problems would arise and whether proposed propensity evidence reforms are consistent with the state's common law. This process of careful consideration may not always be easy, since laws that permit propensity evidence in sexual assault cases may be precipitated by high-profile cases and resulting public outcry.[237]

But while constitutional and common law considerations may not have center stage in political and policy debates over propensity evidence, legislatures should pay attention to the lessons learned from Iowa, Missouri, Washington, and Indiana. Although propensity reforms may be popular, and although there may be strong policy reasons for their enactment, these laws may face challenges in the courts. Rules of evidence that are enacted with these challenges in mind are the rules that are most likely to survive.

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237. *See* Michael S. Ellis, Note, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 974–75 (1998) (highlighting widespread concern about sex crimes in the years leading up to the adoption of Federal Rules of Evidence 413 and 414).