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Protecting the Predator or the Prey - The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence

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Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence

State v. Ellison[1]

I. INTRODUCTION

Americans consider child molestation and sexual assault among the most heinous crimes that one can commit.[2] In response to the public's opinion regarding these crimes, Congress created exceptions to the long-standing rule barring character propensity evidence.[3] Over the protests of prominent legal figures,[4] Congress enacted Federal Rules of Evidence 413-415 in 1994.[5] Though these rules have been sustained by several appellate court decisions,[6] the constitutionality of Rules 413-415 has not been conclusively decided by the United States Supreme Court.

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1. 239 S.W.3d 603 (Mo. 2007) (en banc).

2. *See* Charles H. Rose III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1, 2 n.5 (2006) (arguing that no other crimes except sex crimes require such stringent measures to track past offenders).

3. *See* FED. R. EVID. 414. *See generally* Erik D. Ojala, Note, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947, 954-56 (1999) (setting forth the American common law rules regarding propensity evidence and its general ban in American courts).

4. The Advisory Committee on Evidence Rules opposed an exception allowing propensity evidence in the case of sex crimes, due to the lack of empirical evidence to support such an exception, concerns over efficiency, reliability issues with such evidence, constitutional due process concerns, and long-standing rules in American jurisprudence that have recognized the "danger of convicting a criminal defendant for past . . . behavior or for being a bad person." JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (2005), *available at* 159 F.R.D. 51, 52-53 (1995).

5. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (establishing FED. R. EVID. 413-415).

6. *See, e.g.*, United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (FED. R. EVID. 413 is not invalid under Fifth Amendment due process protections); United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (no constitutional due process violation in applying FED. R. EVID. 414); United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997) (FED. R. EVID. 414 is subject to FED. R. EVID. 403 balancing); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997) (same as *Summer*); United States v. Meacham, 115 F.3d 1488, 1491-92, 1495 (10th Cir. 1997) (FED. R. EVID.

Missouri's legislature has twice attempted to pass a statute regarding child molestation similar to Federal Rule of Evidence 414, and twice the Missouri Supreme Court has struck down these attempts as unconstitutional.[7] Although the Missouri Supreme Court relied entirely on state constitutional grounds in refusing to uphold statutes permitting propensity evidence in child molestation prosecutions, one must ask whether the Missouri Supreme Court should instead follow in the footsteps of the of the federal judiciary, which has allowed similar long-standing rules of evidence to be rejected in favor of the will of the legislature. The essence of this query lies in the answer to the question of whether the prejudicial effect of such propensity evidence and the threat to an individual's right to be tried only for the crime for which one stands accused outweighs the potential dangers posed to victims and society.

II. FACTS AND HOLDING

In the case of *State v. Ellison*, the victim was a pre-pubescent child, barely at the age of rational cognition, when the abuse by Donald Ellison began.[8] Donald Ellison's wife, Tena, and the child victim's mother worked together at Dairy Queen.[9] On days that the victim's mother was working, Tena would watch the victim.[10] However, on the days that both Tena and the victim's mother would work, the child and her sibling were left in the care of Donald Ellison.[11] In the summer of 2003, Donald watched the children while Tena and the victim's mother were at work.[12] On this occasion, Donald asked the victim to go to the bedroom with him, "where he engaged in sexual intercourse with the child, despite her repeated requests that he stop."[13]

After this initial incident, Donald continued to make "inappropriate sexual advances" when the children were left in his care, showing the victim

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414 overrides FED. R. EVID. 404(b)'s general ban on propensity evidence in the case of child molestation cases and is subject to FED. R. EVID. 403 balancing).

7. *See* State v. Ellison, 239 S.W.3d 603 (Mo. 2007) (en banc); State v. Burns, 978 S.W.2d 759 (Mo. 1998) (en banc) (both cases rely on state constitutional grounds).

8. *Ellison*, 239 S.W.3d at 605. The child victim described the abuse that began when she was six or seven. *Id.* Jean Piaget in his groundbreaking and highly influential theory of cognitive development, described a child of six or seven years of age to either be in the late stages of "preoperational" thought, where a child would not be able to think logically, or at the beginnings of the "operational" stage where a child begins to form rational strings of thought, i.e., 2 + 2 = 4. *See* PATRICIA C. BRODERICK & PAMELA BLEWITT, THE LIFE SPAN: HUMAN DEVELOPMENT FOR HELPING PROFESSIONALS 11-12 (2003).

9. *Ellison*, 239 S.W.3d at 605.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

pornography and masturbating in front of her.[14] According to the record, Donald "ejaculated in the child's presence and asked her to drink his ejaculate" and he had "vaginal intercourse with the child a number of times in various rooms in Ellison's house."[15] Finally on August 19, 2004, the child could not bear the burden of the abuse any longer and broke down in the midst of a slumber party, revealing that Donald Ellison molested her.[16] After being taken home and later to the local police, the victim told her mother and police of the ongoing rape committed by Donald Ellison.[17] The child described to local deputies "various instances of sexual abuse that had taken place after her sixth or seventh birthday and continued until her ninth birthday."[18] The child later testified that she had not spoken of the abuse to anyone until the summer of 2004 because Donald Ellison threatened to kill her if she told.[19]

Following the victim's interview with local deputies, police arrested Donald Ellison and charged him with child molestation in the first degree.[20] At trial, pursuant to section 566.025 of the Missouri Revised Statutes,[21] the State entered into evidence a certified copy of Ellison's prior conviction "for the class C felony of sexual abuse in the first degree for subjecting a 13-year

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* The language of the child molestation statute reads:

> 1. A person commits the crime of child molestation in the first degree if he or she subjects another person who is less than fourteen years of age to sexual contact.
> 2. Child molestation in the first degree is a class B felony unless:
> (1) The actor has previously been convicted of an offense under this chapter or in the course thereof the actor inflicts serious physical injury, displays a deadly weapon or deadly instrument in a threatening manner, or the offense is committed as part of a ritual or ceremony, in which case the crime is a class A felony . . . .

MO. REV. STAT. § 566.067 (Supp. 2007).

21. The statute reads:

> In prosecutions pursuant to this chapter or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age *shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged* unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.

MO. REV. STAT. § 566.025 (2000) (emphasis added), *invalidated by Ellison*, 239 S.W.3d 603.

old girl 'to sexual contact without her consent by the use of forcible compulsion and in the course of such offense Ellison inflicted serious physical injury' to the girl."[22] In a pretrial motion in limine, Ellison requested that the trial court "enter an order . . . prohibiting the state or any witness from referring to or offering evidence of" the prior conviction for sexual abuse in the first degree, which the trial court denied.[23] At trial, Ellison also objected "to the admission of the prior conviction as more prejudicial than probative," to which the trial court overruled Ellison's objection and admitted the evidence "finding that 'the evidence of a prior conviction is more probative than prejudicial.'"[24]

At trial, Ellison also objected to an instruction given to the jury allowing them to consider prior acts of sexual abuse as probative of his propensity to commit the crimes for which he was charged.[25] Ellison argued that the jury instruction "violated his constitutional right to a fair trial;" however, the trial court overruled Ellison's objection and read the instruction to the jury.[26] The jury returned a guilty verdict on the charge of child molestation in the first degree and sentenced Ellison to twenty years imprisonment.[27]

Ellison appealed his conviction to the Missouri Court of Appeals for the Western District of Missouri, challenging the sufficiency of the evidence supporting his conviction. The court of appeals summarily denied Ellison's sufficiency of evidence claim as having no merit.[28] However, because Ellison also challenged the constitutionality of section 566.025 of the Missouri Revised Statutes, the court of appeals held that it did not have jurisdiction over the case "pursuant to Article III [sic], Section 3 of the Missouri Constitution"[29] and transferred the case to the Missouri Supreme Court.[30]

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22. *Ellison*, 239 S.W.3d at 605.

23. *Id.*

24. *Id.*

25. *Id.* The instruction read in part, "'if you find and believe from the evidence that the defendant pled guilty to sexual abuse, an offense other than the one for which he is now on trial, you may consider that evidence on the issue of the propensity of the defendant to commit the crime with which he is charged.'" *Id.*

26. *Id.*

27. *Id.*

28. State v. Ellison, No. WD 66013, 2007 WL 1118394, at *1 (Mo. App. W.D. 2007).

29. Appellate jurisdiction in Missouri is governed by article V, section 3 of the Missouri Constitution, which reads:

> The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the constitution of this state . . . . The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

MO. CONST. art. V, § 3.

30. *Ellison*, No. WD 66013, 2007 WL 1118394, at *1.

On appeal to the Missouri Supreme Court, Ellison continued to attack the constitutionality of section 566.025, which allowed for the use of prior sexual misconduct with a person fourteen years of age or younger "for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he . . . is charged."[31] The court agreed with Ellison and held that the statute violated article I, sections 17-18 of the Missouri Constitution.[32] In justifying its decision, the court stated that "[e]vidence of a defendant's prior criminal acts, when admitted purely to demonstrate the defendant's criminal propensity, violates one of the constitutional protections vital to the integrity of our criminal justice system."[33] Following a long line of precedent and rejecting arguments similar to those justifying the constitutionality of Federal Rules of Evidence 413-415, the court reversed the judgment of the trial court and remanded the case for a new trial.[34]

III. LEGAL BACKGROUND

A. Prior Criminal Acts as Propensity Evidence in Missouri

Under the Missouri Constitution, "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information"[35] and "in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation."[36] Through a series of cases, the Missouri Supreme Court has interpreted these provisions to always exclude evidence of prior crimes or misconduct for the purpose of demonstrating the accused's propensity to commit such acts. Although this evidence is never admissible in Missouri when used to prove the propensity of the accused, evidence of past crimes or misconduct may be admitted into evidence in a criminal trial when used for purposes other than for demonstrating propensity.[37]

In *State v. Spray,* the Missouri Supreme Court extensively reviewed its rule regarding the use of prior crimes and misconduct for the purpose of demonstrating the defendant's propensity to commit similar acts.[38] In *Spray*, the defendant was convicted of robbery after a witness testified that he saw the defendant in the area where the crime was committed and that the

31. *Ellison*, 239 S.W.3d at 605-06 (quoting MO. REV. STAT. § 566.025 (2000), *invalidated by Ellison*, 239 S.W.3d 603).

32. *Id.* at 606.

33. *Id.* at 608.

34. *Id.*

35. MO. CONST. art. I, § 17.

36. MO. CONST. art. I, § 18(a).

37. *See Ellison*, 239 S.W.3d at 607 (citing State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993) (en banc)). For examples of purposes for which character evidence of past misconduct is admissible, see *infra* note 42.

38. 74 S.W. 846 (Mo. 1903).

defendant not only robbed the victim, but also robbed the witness.[39] In its decision to reverse the defendant's conviction and remand for a new trial, the court held that admission into evidence of the witness's testimony about the other robbery was error on the part of the trial court.[40] The court found that the admission of "the commission of offenses other than the one charged" was generally inadmissible.[41] However, the court noted that past cases determined that there were limited exceptions to the general rule forbidding evidence of prior crimes and misconduct and that most of these exceptions were admissible for the purpose of demonstrating intent, not propensity (with the exception of forgery).[42] Further, the Missouri Supreme Court pointed out that, at least with regards to larceny, other courts held the use of prior misconduct was inadmissible because the prosecution was "'not driven to the necessity of proving intent by proving other felonies committed about the same time.'"[43]

The court found that the common link between the exceptions to the general ban on the use of prior acts in a criminal trial was that evidence was "admissible only on the ground that it has some logical connection with the

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39. *Id.* at 846.

40. *Id.* at 851.

41. *Id.* at 848. The court adopted the view proposed by the New York Supreme Court that:

> "This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

Id. (quoting People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901)).

42. *Id.* at 848-49. Quoting extensively from *State v. Goetz*, the Court noted that there were exceptions, "'rendered necessary by the difficulty which the prosecution labors under to establish the intent with which the act is done.'" *Id.* at 848 (quoting State v. Goetz, 34 Mo. 85 (1863)). These exceptions included: admission of evidence of prior forged notes in an "'indictment for uttering a forged bank note'"; "'on an indictment against a receiver for receiving several stolen articles . . . for the purpose of proving guilty knowledge'" evidence of past receipts may be given; on an indictment for forgery evidence of "'other forged bills upon the same house'" are admissible; "'[o]n an indictment for an assault with an intent to commit a rape, evidence of previous assaults on the prosecutrix are admissible to to show intent'"; "'on an indictment for administering sulphuric [sic] acid to horses with intent to kill them, administering at different times was permitted to be shown in order to demonstrate intent'"; on an indictment for maliciously shooting another, evidence for the purpose of demonstrating intent is admissible. *Id.* at 848-49 (quoting *Goetz*, 34 Mo. 85).

43. *Id.* at 849 (quoting *Goetz*, 34 Mo. 85).

offense proposed to be proven."[44] Thus, the court held that evidence of prior crimes or misconduct "is clearly not admissible on the theory that, if a person will commit one offense, he will commit another."[45] Therefore, there was no reason to invade "well-settled rules of evidence" by admitting into evidence testimony regarding a "separate and distinct offense."[46]

The Missouri Supreme Court reiterated this general rule banning the admission of prior crimes and misconduct in *State v. Reese*.[47] In *Reese*, Samuel Reese was convicted of first degree murder after testimony was admitted into evidence, over Reese's objection, by a witness identifying Reese as a participant in a robbery that occurred two hours after the alleged murder.[48] The court reversed Reese's conviction, holding that the trial court erred in admitting evidence of a separate and distinct crime and that "the introduction of those details [the later robbery] . . . could have had no other effect than to seriously prejudice the accused, and constituted reversible error."[49] In restating the rule against the admission of evidence regarding "the commission of separate and distinct crimes," the court recognized the exceptions to the rule stated in *Spray*[50] and provided a test for "whether evidence of other distinct crimes falls within any of these exceptions."[51] This test relied on the logical relevance of the evidence submitted "'to the particular excepted purpose or purposes for which it is sought to be introduced'" and balanced the probative value of the evidence with the unfair prejudice that may result.[52]

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44. *Id.* at 851.

45. *Id.* The court reached this conclusion of banning propensity evidence outright through a thorough review of prior Missouri cases. *See id.* at 849-50. The only time that evidence of

> "other crimes is competent to prove the specific crime [is] when it tends to establish, first, motive; second, intent; third, the absence of mistake or accident; fourth, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; fifth, the identity of the person charged with the commission of the crime on trial."

Id. at 850 (quoting *Molineux*, 61 N.E. at 293).

46. *Id.* at 851.

47. 274 S.W.2d 304 (Mo. 1954) (en banc).

48. *Id.* at 305-06.

49. *Id.* at 307.

50. *Id.* (citing *Molineux*, 61 N.E. at 294).

51. *Id.*

52. *Id.* (quoting State v. Lyle, 118 S.E. 803, 807 (S.C. 1923)).

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by

The standards reiterated and set forth in *Reese* were subsequently upheld as the law in Missouri in *State v. Holbert*.[53] Here, the Missouri Supreme Court applied the *Reese* test to the admission of propensity evidence and reversed the defendant's conviction for carrying a concealed weapon.[54] The defendant was arrested for having a concealed weapon in his left rear trouser pocket.[55] Evidence of a gun that was in plain sight near the defendant and of a pistol found under the defendant's car seat cushion was admitted into evidence and repeatedly referenced during the trial, despite the defendant's objections.[56] The State argued that the evidence of the other weapons seized was admissible for the purpose of demonstrating intent; however, the court held "[t]he other two pistols were in no way connected with the present offense" and were therefore inadmissible.[57] The court found that "[t]hese exhibits had no legitimate probative value in establishing defendant's guilt of the offense on trial. And it seems perfectly obvious that their use throughout the trial was prejudicial to the defendant."[58]

Although the Missouri Supreme Court, in *State v. Bernard*, adopted an additional exception to the general ban on character evidence by accepting a signature modus operandi exception, the court nonetheless maintained the absolute ban on character evidence used for the purposes of demonstrating propensity.[59] The defendant in *Bernard* was a pastor who was charged with sexual assault and attempted forcible sodomy.[60] Over the defendant's objection, the trial court allowed four witnesses to testify about prior, uncharged sexual abuse by the defendant.[61] The court, in holding that some but not all of the testimony from the four witnesses was admissible,[62] reiterated the general ban on character evidence and also explicitly rejected a "depraved sexual instinct" exception that had been adopted by other

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the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.

Lyle, 118 S.E. at 807.

53. 416 S.W.2d 129 (Mo. 1967).
54. *Id.* at 133.
55. *Id.* at 130.
56. *Id.* at 130-31.
57. *Id.* at 132-33.
58. *Id.* at 133 (citations omitted).
59. 849 S.W.2d 10, 13, 17 (Mo. 1993) (en banc).
60. *Id.* at 12.
61. *Id.*
62. *Id.* at 20.

jurisdictions.[63] However, the court adopted a signature modus operandi exception to the general ban on character evidence wherein prior "uncharged sexual acts that are sufficiently similar to the crime charged in time, place and method" would be admissible to prove identity.[64] Thus, under the signature modus operandi exception, evidence was admissible to prove the identity of the defendant for the crime charged and not for the purpose of proving propensity to commit such acts.[65]

In 1998, the Missouri Supreme Court, in *State v. Burns*, followed its line of cases barring propensity evidence when it struck down section 566.025 of the Missouri Revised Statutes.[66] In passing section 566.025, the Missouri legislature authorized the admission of character evidence for the purpose of proving the defendant's propensity to commit certain acts of sexual misconduct involving persons under fourteen years of age.[67] The court found that section 566.025's explicit declaration that "evidence of other charged and uncharged crimes 'shall be admissible for the purpose of showing the propensity of the defendant to commit the crime . . . charged,'" violated the Missouri Constitution.[68] The court, applying the reasoning in *Bernard*, found

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63. *Id.* at 16. In rejecting the "depraved sexual instinct" exception adopted in other jurisdictions, the court explained that admission of prior sexual misconduct of the defendant with persons other than the victim under the common scheme or plan exception is a distortion of that exception as traditionally interpreted . . . . The common scheme or plan exception has become instead "a series of crimes theory," and the evidence of prior misconduct is admitted more to prove that the defendant had a propensity to engage in deviant sexual behavior than to prove a common scheme or plan that connects the misconduct with the present crime. The exception, in effect, engulfs the rule. *Id.* (citation omitted).

64. *Id.* at 17.

> For the prior conduct to fall within the identity exception, there must be more than mere similarity between the crime charged and the uncharged crime. The charged and uncharged crimes must be nearly "identical" and their methodology "so unusual and distinctive" that they resemble a "signature" of the defendant's involvement in both crimes.

Id. (quoting State v. McDaniels, 668 S.W.2d 230, 232-33 (Mo. App. E.D. 1984); State v. Young, 661 S.W.2d 637, 639 (Mo. App. E.D. 1983)).

65. *Id.*

66. 978 S.W.2d 759 (Mo. 1998) (en banc).

67. *Id.* at 762.

68. *Id.* at 760. Section 566.025 originally read:

> In prosecutions under chapter 566 or 568 involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged, provided that such evidence involves acts that occurred within ten years before or after the act or acts for which the defendant is being tried.

MO. REV. STAT. § 566.025 (1994), *invalidated by Burns*, 978 S.W.2d 759.

that by allowing evidence of uncharged conduct to prove the defendant's propensity to commit such crimes, the defendant would be forced to defend against such uncharged conduct as well as the charged crime.[69] This conclusion was based on the court's belief that juries have a tendency to convict based on the defendant's propensity to commit such acts, rather than on the crime charged.[70] The State argued that the court in *State v. Spray* tied the prohibition against propensity evidence to a New York decision;[71] therefore, the ban on propensity evidence in Missouri over the past century did not rely on the Missouri Constitution.[72] This argument, however, was unavailing to the *Burns* Court, which found that the general ban on propensity evidence was a part of the Missouri Constitution at the time of its decision in *Spray*.[73]

In an attempt to salvage section 566.025 after *Burns*, the Missouri legislature amended the statute to include a balancing test.[74] This test required the trial court to ensure the probative value of evidence of prior charged and uncharged sexual misconduct with a victim under fourteen years of age was not outweighed by its prejudicial effect against the defendant.[75] Though the amended statute was similar to Federal Rules of Evidence 413-415, at least as applied by federal appellate courts in providing these rules a saving construction,[76] the Missouri Supreme Court in the instant decision of *State v. Ellison* struck the Missouri statute down once again for violating the state's constitutional requirement that an accused only be tried for the crime for which he was indicted.[77]

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69. *Burns*, 978 S.W.2d at 761-62 (citing *Bernard*, 849 S.W.2d at 16).

70. *Id.* at 761.

71. People v. Molineux, 61 N.E. 286 (N.Y. 1901).

72. *Burns*, 978 S.W.2d at 762.

73. *Id.*

74. State v. Ellison, 239 S.W.3d 603, 606 (Mo. 2007) (en banc).

75. *Id.*

76. Compare the language of the statute to the construction the Eighth Circuit gave to FED. R. EVID. 413 in *United States v. Mound*, 149 F.3d 799, 801 (1998), and the Tenth Circuit gave FED. R. EVID. 414 in *United States v. Castillo*, 140 F.3d 874, 883 (1998), wherein both rules of evidence were held not to violate the defendants' Fifth Amendment due process rights because the rules did not violate "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."

77. 239 S.W.3d at 607-08.

B. Prior Criminal Acts as Propensity Evidence in Federal Courts

For many years federal courts barred attempts by the government to enter evidence of a defendant's past acts for the purpose of demonstrating the defendant's bad character or propensity to commit such bad acts.[78] One of the United States Supreme Court's most thorough discussions of propensity evidence was in *Michelson v. United States*,[79] a pre-Federal Rules of Evidence decision. In *Michelson,* the Court affirmed the conviction of the defendant for bribing a federal official despite the prosecution giving evidence of past crimes and misconduct.[80] The Court held that because the evidence was not being offered as propensity evidence, but instead for the purposes of attacking the testimony of four character witnesses who offered an opinion of good character of the defendant, the evidence of past arrests and crimes was admissible.[81] Key to the Court's decision not to overturn Michelson's conviction was the fact that the trial judge gave a limiting instruction to the jury.[82] The limiting instruction required that the evidence of prior acts was to be used only for the purpose of rebutting the defendant's character evidence of good reputation as testified to by the four defense witnesses and the prosecution's questioning of these witnesses on cross-examination regarding past bad acts was not to be used as propensity evidence.[83] The Court did not believe that evidence of past acts for the purpose of demonstrating a propensity to commit the crime charged was necessarily irrelevant, rather, the Court found such evidence "to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[84]

Beginning in 1965, the Supreme Court and Congress endeavored to codify the federal courts' rules of evidence.[85] After ten years of revising the proposed rules, the Federal Rules of Evidence were finally adopted and

78. *See* GEORGE FISHER, FEDERAL RULES OF EVIDENCE 2007-2008 STATUTORY AND CASE SUPPLEMENT 47-55a (Frederic Bloom & Binyamin Blum eds., 2007).

79. 335 U.S. 469 (1948).

80. *Id.* at 471-72.

81. *Id.* at 479.

82. *Id.* at 484-85.

83. *Id.* at 472 & n.3 ("I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested.").

84. *Id.* at 475-76.

85. *See* FISHER, *supra* note 78, at i.

enacted into law.[86] The rules adopted a general ban on propensity evidence in Rule 404(b).[87] At the same time that Rule 404's general ban on character evidence was passed into law, Congress also adopted Federal Rule of Evidence 403.[88] Rule 403 instructed federal courts to balance the probative value of submitted evidence against its prejudicial effect and to bar admission of the evidence if the evidence's probative value was "substantially outweighed" by its unfair prejudice.[89]

The Supreme Court addressed the issue of Rule 403 and the balancing of unfair prejudice of past crimes against their probative value in *Old Chief v. United States*.[90] *Old Chief* dealt primarily with the issue of a stipulation of past crimes offered by the defendant and the prosecution's refusal to accept the stipulation.[91] However, the Court also spoke of the prejudicial effect of past misconduct and how, when offered for the purpose of demonstrating propensity, such evidence is per se unfairly prejudicial, thus, outweighing its probative value.[92] Though the Court discussed the issue of propensity evidence within the confines of Rules 404(b) and 403, the Court expressly noted that, "[t]here is . . . no question that propensity would be an 'improper basis' for conviction," and evidence of prior crimes and misconduct must be weighed under Rule 403.[93]

Contrary to the aforementioned case law banning evidence of prior acts for the purpose of demonstrating the defendant's propensity to commit such

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86. *Id.*

87. FED. R. EVID. 404(b) provides:

> Other Crimes, Wrongs, or Acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

88. *See* FISHER, *supra* note 78, at 46-55a. FED. R. EVID. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

89. FED. R. EVID. 403.

90. 519 U.S. 172 (1997).

91. *Id.* at 174.

92. *Id.* at 181 ("'Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance.'" (omission in original) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir.1982))).

93. *Id.* at 182.

acts and over strong objections from the Judicial Conference, in 1994 the United States Congress proposed and adopted Federal Rules of Evidence 413-415, allowing propensity evidence of past sexual misconduct to be used in the case of certain criminal and civil proceedings.[94] Soon after their adoption, challenges to Rules 413 and 414 quickly arose.[95] One of the first challenges to the new rules' constitutionality was in *United States v. Castillo*, where the Tenth Circuit rejected the defendant's Fifth Amendment due process challenge to Rule 414.[96] In *Castillo*, the defendant was convicted of four counts of sexual abuse of a minor.[97] At trial, the Government introduced into evidence three prior uncharged acts of sexual abuse by the defendant against the victims.[98] The Tenth Circuit determined that the Supreme Court had not

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94. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (establishing FED. R. EVID. 413-415). The rules allowing for the admissibility of propensity evidence in the case certain defined sex crimes are:

FED R. EVID. 413, which provides:

> (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. . . .
>
> (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

FED R. EVID. 414, which provides:

> (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. . . .
>
> (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

FED R. EVID. 415, which provides:

> (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules. . . .
>
> (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

95. *See* FED. R. EVID. 414, 28 U.S.C.A. (listing cases challenging Rule 414).

96. 140 F.3d 874, 883 (10th Cir. 1998). Defendant Castillo also raised constitutional challenges to FED. R. EVID. 414 regarding its constitutionality under the Fifth Amendment guarantees of equal protection and the Eighth Amendment bar to cruel and unusual punishment. *Id.* at 878, 883-84. However, the discussion of these challenges is beyond the scope of this case note.

97. *Id.* at 878.

98. *Id.* at 878-79.

yet spoken on the constitutionality of admitting propensity evidence, though it had hinted at a possible bar to propensity evidence in prior decisions.[99]

The Tenth Circuit, relying on *Dowling v. United States*,[100] found that an evidentiary rule would violate the Due Process Clause "only if the rule '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.'"[101] In determining whether admitting evidence of prior acts of sexual abuse of a minor violated "fundamental conceptions of justice," the court looked to historical practices and found that the states were split on the issue with twenty-three states allowing for evidence demonstrating a "lustful disposition."[102]

The court also looked to other decisions involving the constitutionality of other Federal Rules of Evidence when evidence presenting a risk of prejudice similar to that of Rule 414 was nonetheless admitted into evidence.[103] The court determined that because the Supreme Court held Federal Rule of Evidence 404(b) constitutional by implication[104] and that no due process violation exists when a state allows prior convictions into evidence (relevant only to sentencing) at the guilt-determination stage, the weight of authority was for finding no violation of the defendant's Due

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99. *Id.* at 880 ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and *deny him a fair opportunity to defend against a particular charge.*" (quoting Michelson v. United States, 335 U.S. 469, 475-76 (1948))). The *Castillo* court also cited *Brinegar v. United States*, 338 U.S. 160, 173-74 (1949) (noting that rules of evidence are "to some extent embodied in the Constitution"), and *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (reserving the question of "whether a state law would violate the Due process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime" because the question need not have been reached), for this proposition.

100. 493 U.S. 342, 352 (1990) (discussing the applicability of the Fifth Amendment Due Process Clause to a narrowly defined class of infractions that violate "fundamental fairness").

101. *Castillo*, 140 F.3d at 881 (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977)).

102. *Id.*

103. *Id.* at 882. In reaching their holding, the Tenth Circuit relied on the Supreme Court's finding that despite the risk that "the jury may choose to punish the defendant for the similar rather than the charged act, or [that] the jury may infer that the defendant is an evil person inclined to violate the law" a defendant's due process is not violated when prejudicial evidence similar to that allowed by Rule 414 is allowed before the jury. *Id.* at 882. (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)).

104. *Id.* (citing Lisenba v. California, 314 U.S. 219, 227-28 (1941); *Huddleston*, 485 U.S. 681).

Process rights when evidence of past sexual misconduct is introduced under Rule 414 as propensity evidence.[105]

The court lastly determined that Federal Rules of Evidence 402 and 403 applied to Rule 414, so that propensity evidence under the circumstances of Rule 414 is allowed so long as such evidence was relevant and its probative value was not be outweighed by its unduly prejudicial effect against the defendant.[106] The Tenth Circuit also reasoned that because there was no historical record that precluded use of propensity evidence, the Supreme Court would have allowed prejudicial evidence of past conduct despite the risk of improper use by jurors to convict for that past conduct.[107] Additionally, the Tenth Circuit found that because Rule 403 balancing was required to be conducted by the trial court when evidence of prior acts was submitted into evidence under Rules 413 and 414, Rule 414 did not facially violate the protections guaranteed by the Fifth Amendment's Due Process Clause.[108]

Construing Rules 413 and 414 in a similar manner as the Tenth Circuit, the Eighth Circuit affirmed the conviction of Alvin Mound for aggravated sexual abuse of a minor in *United States v. Mound*.[109] During trial, the prosecution sought to enter into evidence facts relating to the defendant's sexual abuse of two girls ten years prior to the crime for which the defendant stood accused.[110] Mound had pled guilty to prior acts with one of the girls and the government had dropped the other earlier charge.[111] Though the evidence was offered under Rule 413, the Eighth Circuit implied that the same standard applied to Rules 414 and 415 and held that Rule 403 balancing was to be applied to evidence offered under any of the propensity evidence exceptions.[112] The Eighth Circuit, like the Tenth Circuit, also applied the *Dowling* standard[113] for determining a violation of the Due Process Clause.[114]

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105. *Id.* (citing Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983); Spencer v. Texas, 385 U.S. 554, 564 (1967)).

106. *Id.* (citing United States v. Guardia, 135 F.3d 1326, 1328 (10th Cir. 1998); United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997)).

107. *Id.*

108. *Id.* at 882-83.

109. 149 F.3d 799 (1999).

110. *Id.* at 800.

111. *Id.*

112. *Id.* (citing United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (finding that evidence submitted under Rule 414 was still subject to Rule 403 balancing between probative value and prejudicial effect); United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997) (finding same as *LeCompte* regarding application of Rule 403 to propensity evidence of prior sexual misconduct)).

113. *See* Dowling v. United States, 493 U.S. 342, 352 (1990) ("[To violate the Due Process Clause] the introduction . . . of evidence [must be] so extremely unfair that its admission violates 'fundamental conceptions of justice.'" (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977))).

114. *Mound*, 149 F.3d at 801.

Looking to the Supreme Court's holding in *Spencer v. Texas*,[115] the Eighth Circuit found the Supreme Court's reasoning convincing in upholding Spencer's sentence that "'it has never been thought that [the Court's fundamental fairness] cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.'"[116] From this statement, the Eighth Circuit extrapolated that "Congress has the ultimate power over the enactment of rules."[117] Thus, the Eighth Circuit considered Rule 413 to be a mere procedural rule which the court believed "was within Congress's power to create exceptions to the longstanding practice of excluding prior-bad-acts evidence."[118] As a result of this finding, the Eighth Circuit held that Rules 413 and 414,[119] subject to the constraints of Rule 403, did not facially violate the Fifth Amendment's Due Process Clause.[120]

The Eighth Circuit, in *United States v. LeCompte,*[121] demonstrated the trend among the federal circuit courts' application of Rule 403 balancing of unfair prejudice and probative value when dealing with evidence of prior sexual offenses or child molestation.[122] *LeCompte* did not address the issue of Rule 414's constitutionality, but instead only determined whether the district court erred in excluding evidence offered under Rule 414 of past sexual abuse when it applied Rule 403 to balance the probative value of the evidence of a child molestation crime committed eight to ten years prior to the crime charged.[123] The Eighth Circuit held that although Rule 403 balancing still applied to evidence of past sexual misconduct offered under Rule 414 for the purpose of demonstrating the defendant's propensity to commit such acts, "Rule 403 must be applied to allow Rule 414 its intended effect."[124] According to the Eighth Circuit, the legislative judgment used in creating Rules 413 and 414 indicated that "evidence of prior sexual offenses should ordinarily be admissible."[125] This holding did away with the

115. 385 U.S. 554 (1967). The Supreme Court found no violation of the Due Process Clause when a state used prior convictions during the guilt-phase of the trial for the limited purpose of determining sentence and not guilt. *Id.* at 565-66.

116. *Mound*, 149 F.3d at 801 (quoting *Spencer*, 385 U.S. at 564).

117. *Id.*

118. *Id.*

119. The Eighth Circuit did not specifically state that Rule 414 was constitutional on the same grounds as Rule 413; however, in *United States v. Withorn*, 204 F.3d 790, 796 (8th Cir. 2000), the court maintained that such an assertion had been made in *Mound*.

120. *Mound*, 149 F.3d at 800-01.

121. 131 F.3d 767 (8th Cir. 1997).

122. *See generally* United States v. Guardia, 135 F.3d 1326, 1330-31 (10th Cir. 1998); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) ("[C]learly under Rule 414 the courts are to 'liberally' admit evidence of prior uncharged sex offenses.").

123. *LeCompte*, 131 F.3d at 768-69.

124. *Id.* at 769.

125. *Id.*

traditional bar to propensity evidence and created a standard that has been referred to as "403-lite."[126]

Both *Castillo* and *Mound* set forth the arguments that have been followed in other appellate courts regarding Due Process challenges to Rules 413 and 414.[127] Different courts rely to varying degrees on the factors set forth in *Castillo* that establish the legal determination that Rule 413 and 414 do not violate the Due Process Clause.[128] However, all federal appellate courts that have considered the question of Due Process relating to Rules 413 and 414 have held that there is no violation of fundamental fairness and thereby no violation of the United States Constitution's due process guarantees.[129] Despite the federal courts' failure to recognize the paramount unfairness in trying an individual for past crimes or acts, no matter how socially condemnable that act may be, the Missouri Supreme Court has continued to maintain its long line of cases barring the admissibility of propensity evidence even in the case of sexual predators.

IV. INSTANT DECISION

The Missouri Supreme Court reversed Donald Ellison's conviction for first degree child molestation. In doing so, the court held that Ellison's constitutionally guaranteed "'right to be tried only on the offense charged'"[130] was violated when the circuit court admitted into evidence Ellison's past conviction for felony sexual abuse of a 13-year-old girl for the purpose of demonstrating Ellison's propensity to commit similar acts.[131] As well as reversing Ellison's conviction and remanding his case for a new trial, the court struck down section 566.025 of the *Missouri Revised Statutes* as violating the Missouri Constitution and its prohibition against "admission of previous criminal acts as evidence of a defendant's propensity."[132]

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126. *See* Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1519-27 (2005).

127. *See, e.g.*, United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001); United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000).

128. As stated in *Castillo*, the federal courts rely on the historical application of rules of evidence regarding propensity evidence, the admissibility of evidence of prior acts despite the possibility of prejudicial effect similar to 414, and the application of Rule 403 to ensure that evidence whose probative value is substantially outweighed by its unfair prejudice is not allowed into evidence in order to justify the constitutionality of Rules 413 and 414 when challenged under a Due Process claim. United States v. Castillo, 140 F.3d 874, 879-83 (10th Cir. 1998). *Compare Castillo*, 140 F.3d at 882, *with LeMay*, 260 F.3d at 1025.

129. *See LeMay*, 260 F.3d 1018; *Wright*, 53 M.J. 476; United States v. Mound, 149 F.3d 790 (8th Cir. 1998); *Castillo*, 140 F.3d 874.

130. State v. Ellison, 239 S.W.3d 603, 605-06 (Mo. 2007) (en banc) (quoting State v. Burns, 978 S.W.2d 759, 760 (Mo. 1998) (en banc)).

131. *Id.* at 607-08.

132. *Id.*

The court began its analysis by setting forth the constitutional guarantees of sections 17 and 18 of the Missouri Constitution that "'no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information'" and that "'in criminal prosecutions that the accused shall have the right . . . to demand the nature and cause of this accusation.'"[133] Expounding on these constitutional provisions, the court laid down the historical development of the law in Missouri that supported the general rule that "the law shields defendants from the perception that a person who has acted criminally once will do so again."[134]

Turning to section 566.025, the statute relied upon by the State to enter evidence of Ellison's prior convictions, the court explained how the admission of evidence for the purpose of demonstrating the defendant's propensity contravenes long-standing precedent.[135] The court pointed out how the state legislature attempted to re-write the statute after the court initially struck it down as unconstitutional in *State v. Burns*.[136] The legislature did this by adding a clause that removed the compulsory nature of the original act. However, this too, even with "'any reasonable reading of the statute that [would] allow its validity'" could not save the statute.[137] The court reiterated that "[e]vidence of prior criminal acts is *never* admissible for the purpose of demonstrating the defendant's propensity to commit the crime with which he is presently charged. There are no exceptions to this rule."[138]

Attempting to understand the legislature's action in re-writing section 566.025, the court thought it was likely due to the legislature's misreading of a passage in *Burns*.[139] The court clarified this point, stating "[e]vidence of

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133. *Id.* at 606 (quoting MO. CONST. art I, §§ 17 & 18(a)).

134. *Id.* The court traces this history of not allowing the admission into evidence of propensity evidence back to as far as the Magna Carta and its modern statement of the law as understood in Missouri. *Id.* at 606 & n.2 (citing State v. Holbert, 416 S.W.2d 129, 132 (Mo. 1967); State v. Bernard, 849 S.W.2d 10, 16 (Mo. 1993) (en banc); State v. Spray, 74 S.W. 846, 848, 851 (Mo. 1903)).

135. *Id.* at 606.

136. *Id.*

137. *Id.* (quoting State v. Burns, 978 S.W.2d 759, 760 (Mo. 1998) (en banc)). The additional clause added after *Burns* was "unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect." MO. REV. STAT. § 566.025 (2000).

138. *Ellison*, 239 S.W.3d at 606 (citation omitted) (citing *Bernard*, 849 S.W.2d at 13).

139. *Id.* at 607. The contemplated misreading was based on the following passage:

> "Evidence of prior misconduct of the defendant, *although not admissible to show propensity*, is admissible if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of charges for which he is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect."

Id. (quoting *Burns*, 978 S.W.2d at 761).

prior criminal acts *may* be admissible for purposes other than demonstrating the defendant's propensity if the evidence is logically and legally relevant."[140] Thus, the court indicated that evidence of a past act could be admissible for another purpose other than for demonstrating the propensity of the defendant to commit such acts as long as this alternate purpose was:

> "[L]ogically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, . . . and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect."[141]

The court explained that "logical and legal relevance are not intended as a loophole for evading the general ban on propensity evidence."[142] Further, the court made clear that while a prior criminal act may be both logically and legally relevant, it cannot be used for the purpose of demonstrating a defendant's propensity.[143] Though the alternative evidentiary purposes for which prior criminal acts may be admitted into evidence are called exceptions, "[t]hese purposes are not exceptions to the ban on propensity evidence."[144] The exceptions referred to by the court are merely exceptions to "the broader general rule prohibiting the admission of evidence of prior criminal acts for *any* purpose."[145]

By finding section 566.025 unconstitutional due to the Missouri Constitution's ban on "the admission of previous criminal acts as evidence of a defendant's propensity," the court maintained its line of reasoning stemming from over one hundred years of precedent.[146] As a result of striking down the statute, the court held that evidence of Ellison's prior criminal acts, "admitted purely to demonstrate [Ellison's] criminal propensity, violate[d] constitutional protections vital to the integrity of our criminal justice system," reversing and remanding for a new trial.[147]

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140. *Ellison*, 239 S.W.3d at 607.

141. *Id.* (omission in original) (quoting *Burns*, 978 S.W.2d at 761).

142. *Id.*

143. *Id.*

144. *Id.* These alternative evidentiary purposes include:

> [E]stablishing "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; [or] (5) the identity of the person charged with the commission of the crime on trial."

Id. (quoting State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993) (en banc)). "This list of alternative purposes 'is not exhaustive.'" *Id.* at 607 n.3 (quoting State v. Barriner, 34 S.W.3d 139, 145 (Mo. 2000) (en banc)).

145. *Id.* at 607.

146. *Id.* at 607-08.

147. *Id.* at 608.

V. COMMENT

The Missouri Supreme Court's holding in *Ellison* maintains the long-standing precedent barring evidence of prior crimes or misconduct for the purpose of demonstrating the defendant's propensity to act in conformity with those prior acts.[148] In maintaining its absolute ban on the admission of propensity character evidence, the Missouri Supreme Court declared that to do otherwise would violate certain protections that have safeguarded the integrity of the criminal justice system.[149] Relying purely on Missouri precedent and law, but also pointing to the fact that the ban on the use of prior acts to demonstrate the propensity to commit similar acts stemmed from a tradition dating to the Magna Carta and that was essential to the Anglo-American idea of justice, the Missouri Supreme Court recognized the fundamental right to only be tried for the present crime for which the accused was indicted.[150] Despite the threat of recidivism of sex offenders and child molesters which surely must have been known to the Missouri Supreme Court,[151] the court found it contrary to law and the rights of Missouri citizens to allow such prejudicial evidence due to the risk that the jury would convict for a past crime or act. As heinous a crime as child molestation is to the general public,[152] the Missouri Supreme Court refused to bend the law of evidence and fundamental ideas of liberty to public opinion. The same cannot be said of the federal judiciary which has followed the lead of the Eighth and Tenth Circuits and allowed the admission of prior bad acts into evidence for the sole purpose of demonstrating the defendant's propensity to commit such acts in cases involving sexual misconduct.

In determining that Rules 413-415 did not violate a defendant's constitutionally protected due process rights, the federal appellate courts relied on *Dowling*'s standard that for a rule of evidence to violate the Fifth Amendment's Due Process Clause "'fundamental conceptions of justice' . . . 'which define the community's sense of fair play and decency'"[153] must be

148. *Id.* at 607-08.

149. *Id.* at 608.

150. *Id.* at 606 & n.2 (citing State v. Spray, 74 S.W. 846, 848, 851 (Mo. 1903)).

151. Though no legislative history regarding the floor debates in passing MO. REV. STAT. § 566.025 in 1994 and its amended passage in 2001 are available, the statute's uncanny timing to that of the passage into law of FED. R. EVID. 413-415 in 1994 indicates that the threat posed by sex offenders and the Federal floor debates were likely known to the Missouri Supreme Court when they decided both *Burns* and *Ellison*.

152. *See* Charles H. Rose III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1, 2 n.5 (2006).

153. Dowling v. United States, 493 U.S. 342, 353 (1990) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935); Rochin v. California, 342 U.S. 165, 173 (1952)).

violated.[154] The federal judiciary reached this conclusion despite the fact that there was a long-standing tradition demonstrating society's "sense of fair play and decency" to be against propensity evidence in any circumstance.[155] By allowing evidence of prior acts for the purpose of demonstrating propensity to commit similar acts, the federal appellate courts appear to rely heavily on recent developments in state courts that permit a "lustful disposition" or other similar exception.[156] Such reasoning seems flawed. The logic of the courts appears to rely on the fact that because some states permit such practices then such practices do not violate fundamental conceptions of fair play and decency. However, in other situations, the federal judiciary has broken with an approach espoused by even a majority of states, grounding their decisions in Due Process arguments, and thereby overturning common practices among the states.[157]

The Tenth Circuit correctly observed that though "the practice is ancient does not mean it is embodied in the Constitution."[158] This also does not mean that careful consideration should not be given to overturning centuries of precedent, as was noted by Judge Arnold when he dissented from the Eighth Circuit's denial of rehearing for Alvin Mound's conviction.[159] Judge Arnold noted the Judicial Conference's unanimous rejection of Rules 413-415 and the Conference's concerns regarding the rules' fundamental fairness, or rather the lack thereof.[160] Judge Arnold also pointed to evidence that empirical evidence did not support the idea that sex offenders and child molesters had higher rates of recidivism than other criminals.[161] In fact, studies indicated that rape recidivism rates tended to be lower than other crimes.[162] Though

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154. *See, e.g.*, United States v. Mound, 149 F. 3d 799, 801 (8th Cir. 1998) (FED. R. EVID. 413 is not invalid under Fifth Amendment due process protections); United States v. Castillo, 140 F.3d 874, 883 (10th Cir. 1998) (no constitutional due process violation in applying FED. R. EVID. 414); United States v. Meacham, 115 F.3d 1488, 1491-92, 1495 (10th Cir. 1997) (FED. R. EVID. 414 overrides FED. R. EVID. 404(b)'s general ban on propensity evidence in the case of child molestation cases and is subject to FED. R. EVID. 403 balancing).

155. *See, e.g.*, People v. Molineux, 61 N.E. 286, 294 (N.Y. 1901); Michelson v. United States, 335 U.S. 469 (1948).

156. *Castillo*, 140 F.3d at 881.

157. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970) (finding that, for criminal trials, guilt must be proven beyond a reasonable doubt).

158. *Enjady*, 134 F.3d at 1432. *Enjady* held that FED. R. EVID. 413 was subject to Rule 403 balancing and as a result was not contrary to fundamental fairness necessary under the Due Process clause. *Id.* at 1433.

159. *Mound*, 157 F.3d at 1153-54 (Arnold, J., dissenting).

160. *Id.* at 1153.

161. *Id.* at 1154.

162. *Id.* (citing Joelle Anne Moreno, *"Whoever Fights Monsters Should See to It That in the Process She Does Not Become a Monster": Hunting the Sexual Predator With Silver Bullets – Federal Rules of Evidence 413 – 415 – and a Stake Through the Heart* – Kansas v. Hendricks, 49 FLA. L. REV. 505, 552 (1997)).

Congress had likely weighed these arguments in making their final decision when it passed Federal Rules of Evidence 413-415 into law and even though, as the Tenth Circuit noted, Congress "has the ultimate power over the enactment of rules,"[163] when such rules raise questions of fundamental fairness, as understood under the rubric of the Due Process Clause, the courts must examine the rationality of such a decision. Without evidence to support the bold claims made by the proponents of the rules,[164] it cannot be said that such rules are rational or fair.

Even if evidence of past sexual offenses for the purpose of demonstrating a propensity to commit the crime for which the defendant is charged is not considered contrary to fundamental fairness, the application by the federal appellate courts of Rule 403's balancing test between probative value and prejudicial effect to Rules 413-415 should raise serious questions of due process violations. The Federal Courts of Appeals' attempts to salvage Rules 413-415 through the application of Rule 403 balancing cannot be said to meet the necessary guarantees of fundamental fairness, because the current application, as demonstrated in *LeCompte* and similar cases, is that it acts as no bar to allowing propensity evidence.[165] Despite the United States Supreme Court's indication in *Old Chief* that evidence of past crimes for the purpose of demonstrating propensity per se violates Rule 403,[166] the federal judiciary has bent this rule in order to allow in such evidence. To rely on Rule 403 as understood by the United States Supreme Court, but then to warp it into little or no protection of the defendant's due process rights, is to violate constitutional guarantees of the Fifth and Fourteenth Amendments.

The Missouri Supreme Court has continued to protect the fundamental right to only be found guilty for the crime for which one is indicted. The judges on the Missouri Supreme Court realize that by failing to secure the liberties and rights guaranteed to all people through our state constitution, even to those accused of some of the most reprehensible of crimes, those rights are more easily encroached upon by the government. Due to the federal appellate courts' fast and loose application of Rule 403 and their misconceptions of fundamental fairness, it is time for the United States Supreme Court to take up the issue of propensity evidence and to follow the reasoning of Missouri and re-secure those rights protected by not only the Missouri Constitution, but also by the United States Constitution.

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163. United States v. Enjady, 134 F.3d 1427, 1432 10th Cir. (1998).

164. *See* 140 CONG. REC. 8991 (1994) (statement of Representative Molinari).

165. 131 F.3d 768-70 (8th Cir. 1997); *see, e.g.*, United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) ("[C]learly under Rule 414 the courts are to 'liberally' admit evidence of prior uncharged sex offenses."); United States v. Guardia, 135 F.3d 1326, 1330-32 (10th Cir. 1998).

166. 519 U.S. 172, 182 (1997).

VI. CONCLUSION

The Missouri Supreme Court's rejection of the legislature's bid to allow evidence of past crimes or acts for the sole purpose of demonstrating propensity is not only in line with Missouri precedent, but also with the fundamental conceptions of ordered liberty to which all United States courts should be bound. To hold otherwise, as have the federal appellate courts in maintaining Rules 413-415, does not protect society as a whole against the sexual predator, but instead invades those rights guaranteed to every citizen to be tried only for the crime for which they have been charged. The decision by the federal appellate courts to waive these basic guarantees of fundamental fairness in the name of political will, as expressed through Congress, only is the beginning of the chipping away of the traditional bar to propensity evidence as originally codified in Rule 404(b). By maintaining the fundamental liberties owed even to the wolf, the Missouri Supreme Court has protected the flock.

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