

---

---

## ARTICLES

---

---

# ON A COLLISION COURSE: PURE PROPENSITY EVIDENCE AND DUE PROCESS IN ALASKA

DREW D. DROPKIN\*  
JAMES H. MCCOMAS\*\*

*This Article examines the four propensity evidence provisions embodied in Alaska Rule of Evidence 404 and the threat they pose to the constitutional due process rights of defendants. Rule 404 permits the state, in certain criminal cases, to introduce evidence of a defendant's criminal propensity to show that the defendant acted in accordance with this propensity. The authors argue that this contravenes a deeply rooted principle of American criminal justice disallowing such propensity evidence, and they are critical of Alaska Court of Appeals decisions upholding the constitutionality of three of the propensity evidence exceptions. The Article analyzes the court's reliance on judicial balancing as a safeguard against due process threats and discusses why this approach to propensity evidence is flawed.*

### I. INTRODUCTION

The Alaska legislature is treading on thin ice, and the Alaska Court of Appeals has joined its legislators in the middle of a perilous constitutional pond. Seven years ago, the Alaska legislature

---

Copyright © 2001 by Drew D. Dropkin and James H. McComas. This Article is also available on the Internet at <http://www.law.duke.edu/journals/18ALRDropkin>.

\* J.D. Candidate, Duke University School of Law, 2002; B.A., Duke University, 1999.

\*\* J.D., Harvard Law School, 1978; B.A., the College of Wooster, 1974. Mr. McComas has practiced criminal law for twenty-three years in state and federal courts in Alaska, Wisconsin, and Washington, D.C.

initiated a concerted attack upon the well-accepted principle that “other-misconduct” evidence,<sup>1</sup> which is offered to prove an accused’s bad character or criminal propensity,<sup>2</sup> is inadmissible in a criminal trial. By enacting the propensity provisions<sup>3</sup> embodied in Alaska Rule of Evidence (“ARE”) 404,<sup>4</sup> the legislature has repudiated this deeply-rooted principle of American criminal justice and permitted the state to introduce evidence of a defendant’s criminal propensity in many criminal cases.<sup>5</sup> Three of the four “pure” propensity provisions have survived due process challenges in the Alaska Court of Appeals since 1997,<sup>6</sup> and the court of appeals has yet to provide a precedential opinion evaluating the constitutionality of the fourth.<sup>7</sup> The Alaska Supreme Court has not yet ruled on the constitutionality of the propensity provisions.<sup>8</sup> However, the court made clear that it incorporated the provisions into ARE 404 *solely* because legislation required it.<sup>9</sup>

---

1. “Other-misconduct” evidence refers to evidence of an accused’s other crimes, wrongful acts, and/or bad character.

2. “Criminal propensity” refers to use of evidence of the defendant’s character or prior acts to persuade the jury that the defendant acted in conformity with his character or disposition during the alleged incident. James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754 (1995).

3. These “propensity provisions” include four different categories of evidence deemed admissible by the Alaska legislature. The legislature has specifically approved the use of such evidence to persuade the jury that the defendant acted in conformity with this propensity during the alleged event. *See infra* Part II. By contrast, evidence of prior acts has routinely been admitted for “non-propensity purposes”—establishing intent, motive, opportunity, knowledge and plan. *See infra* note 36 and accompanying text.

4. *See* ALASKA R. EVID. 404(a)(2), 404(b)(2), 404(b)(3), and 404(b)(4).

5. Namely, this propensity evidence is used in cases of aggressive behavior, *see* ALASKA R. EVID. 404(a)(2), child abuse, *see id.* 404(b)(2), sexual assault, *see id.* 404(b)(3), and domestic violence, *see id.* 404(b)(4). For a detailed discussion of each exception, *see infra* Part II.

6. *See infra* notes 152-168 and accompanying text. Federal circuit courts have similarly upheld the sexual assault exceptions established in Federal Rules of Evidence 413-415 on the same basis. The United States Supreme Court has not addressed the pure propensity issue.

7. The court of appeals has issued non-binding memorandum opinions upholding the constitutionality of the fourth exception on substantially the same grounds as the prior three. *See infra* note 151.

8. In *Hess v. State*, the Alaska Supreme Court reversed the accused’s conviction because of improper application of ARE 404(b)(3). The court did not address the constitutionality of the propensity exception. 20 P.3d 1121 (Alaska 2001).

9. *See infra* note 53.

Alaska's propensity provisions vest prosecutors with virtually unfettered power to impugn the character of a criminal defendant in cases of alleged aggressive behavior, child abuse, sexual assault, and domestic violence. Subject only to minimal limitations,<sup>10</sup> these exceptions openly invite the state to tread on the constitutional due process rights of defendants in contravention of several bedrock principles of Anglo-American jurisprudence. The Alaska Court of Appeals' inability to appreciate the threat that pure propensity evidence poses to due process bestows upon the Alaska Supreme Court the responsibility to declare the ARE 404 exceptions unconstitutional. This Article suggests that the supreme court will not hesitate to do so.

The Article proceeds in six parts. Part II introduces Alaska's four pure propensity exceptions—the first aggressor exception, the child abuse exception, the sexual assault exception, and the domestic violence exception—and places these exceptions in the context of the evidence rules of other states and the federal courts. Part III traces the historical treatment of propensity evidence and identifies three fundamental principles of federal due process—the presumption of innocence, the “beyond a reasonable doubt” standard of proof, and the prohibition against status crimes—that are endangered by the admission of propensity evidence. Relying on the United States Supreme Court's decision in *Dowling v. United States*,<sup>11</sup> this section also identifies three procedural safeguards that protect a defendant's federal due process rights when other-misconduct evidence is admitted for non-propensity purposes. Part IV analyzes the Alaska Court of Appeals' approach to Alaska's pure propensity provisions and highlights the court's heavy reliance upon one procedural safeguard, judicial balancing under ARE 403, to protect the defendant's due process rights. Part V isolates the major flaw in the intermediate court's reasoning. Although the court relies entirely on the “protection” afforded by judicial balancing under ARE 403, this safeguard is meaningless where other-misconduct evidence is employed *for a pure propensity purpose*. The propensity provisions disable meaningful ARE 403 balancing by redefining unfair prejudice as legitimate “probative” value. By putting both interests on the same side of the scale, nothing is left to balance. Recognizing that propensity provisions pose a clear

---

10. These limitations may establish the court's procedure for considering the admission of such evidence, *see* ALASKA R. EVID. 404(a)(2), the similarity requirements for such evidence, *see id.* 404(b)(2), or the fact that the admission of the evidence is contingent on the nature of the accused's defense, *see id.* 404(b)(3). *See infra* notes 26, 41-42, 49-50 and accompanying text.

11. 493 U.S. 342 (1990).

threat to federal due process, Part VI suggests that the admission of such evidence for a propensity purpose independently violates the requirements of due process in Alaska.

In finding Alaska's propensity provisions unconstitutional, this Article does not suggest that the traditional use of other-misconduct evidence for *non*-propensity purposes is unconstitutional. Furthermore, as Part VII suggests, the unconstitutionality of these exceptions will not necessarily bar much of the evidence from being introduced at trial. On the contrary, some such evidence will be admitted under ARE 404(b)(1) for *non*-propensity purposes. In admitting this evidence for non-propensity purposes, Alaska courts will furnish defendants with the benefits of traditional procedural safeguards and will strike the appropriate balance between the permissible introduction of the evidence and the constitutional requirements of due process.

## II. ALASKA RULE OF EVIDENCE 404 AND THE FOUR PROPENSITY EXCEPTIONS

ARE 404<sup>12</sup> addresses the admissibility of evidence of a person's character or a trait of character.<sup>13</sup> The Alaska Evidence Rules generally track the structure of the Federal Rules of Evidence ("FRE").<sup>14</sup> ARE 404, like its federal counterpart, dedicates a section to "Character Evidence Generally"<sup>15</sup> and a section to "Other Crimes, Wrongs, or Acts."<sup>16</sup> Alaska's propensity exceptions are enconced in these two sections of ARE 404.

ARE 404(a) generally prohibits the admission of evidence of an individual's character or a trait of that individual's character for the purpose of proving that the individual acted in conformity with

---

12. ALASKA R. EVID. 404.

13. In ARE 404, the treatment of character evidence is not limited solely to the character of the criminally accused; the scope of ARE 404 also includes the admission of character evidence with respect to the victim and witnesses. ALASKA R. EVID. 404(a). Although the character evidence rule is more often invoked in criminal trials, ARE 404 also applies to civil cases. *See Coulson v. Marsh & McLennan, Inc.*, 973 P.2d 1142, 1145, 1150 (Alaska 1999) (in a civil case alleging invasion of privacy, conversion, negligence, and negligent infliction of emotional distress, affirming a lower court's decision to exclude evidence of a defendant's prior act of copying confidential client lists on the grounds that it was propensity evidence prohibited under ARE 404). For the purposes of this examination, we discuss the implications of ARE 404 only in criminal cases because of the significant due process rights extended to the criminally accused.

14. *See* FED. R. EVID. 404.

15. *Compare* FED. R. EVID. 404(a) *with* ALASKA R. EVID. 404(a).

16. *Compare* FED. R. EVID. 404(b) *with* ALASKA R. EVID. 404(b).

such character during the alleged crime.<sup>17</sup> However, the rule embodies three exceptions<sup>18</sup> that have been widely accepted in other jurisdictions<sup>19</sup>: (1) evidence of the defendant's character may be admitted, by the defendant and the prosecution, if the evidence is initially offered by the defendant<sup>20</sup>; (2) evidence of the victim's character may be admitted, by the defendant and the prosecution, if the evidence is initially offered by the defendant<sup>21</sup>; and (3) evidence of the character of a witness may be admitted as governed by Alaska Rules of Evidence 607-609.<sup>22</sup>

At common law, the defendant in an assault or homicide case was entitled to introduce evidence of the victim's violent character, which served as circumstantial evidence that the victim may have been the initial aggressor during the incident.<sup>23</sup> The government was subsequently entitled to rebut the defendant's evidence by introducing contrary evidence evincing the peacefulness of the victim.<sup>24</sup> If the defendant introduced evidence of the victim's violent character, the prosecution was *not* permitted to introduce evidence of the defendant's violent character. Conceptually, the character of

---

17. ALASKA R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . .").

18. *Id.* 404(a)(1)-(a)(3).

19. The Official Commentary to ARE 404 notes that:

[i]n most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce relevant evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce relevant evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that [the] deceased was the first aggressor, and (3) the character of a witness may be gone into as bearing on his credibility.

ALASKA R. EVID. 404 cmt. a.

20. *Id.* 404(a)(1) ("*Character of Accused.* Evidence of a relevant trait of character offered by an accused, or by the prosecution to rebut the same . . .").

21. *Id.* 404(a)(2) ("*Character of Victim.* Evidence of a relevant trait of character of a victim of a crime offered by an accused, or by the prosecution to rebut the same . . .").

22. *Id.* 404(a)(3) ("*Character of a Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609."); *cf.* FED. R. EVID. 404(a)(1)-(a)(3).

23. *Allen v. State*, 945 P.2d 1233, 1235 (Alaska Ct. App. 1997).

24. *Id.* (citing JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 193, at 820-21 & n.1 (4th ed. 1992)).

the victim and the character of the defendant were not interrelated.<sup>25</sup>

Alaska, however, has broadened the common law admission of character evidence in its ARE 404(a)(2) *first aggressor* exception.<sup>26</sup> In 1980, the Alaska Supreme Court concluded in *Keith v. State*,<sup>27</sup> in accordance with the common law rule, that the character of the victim and the character of the defendant were not interrelated, and therefore the prosecution could not introduce evidence of the defendant's character after the defendant offers evidence of the aggressive propensity of the victim.<sup>28</sup> The legislature purported to vitiate the *Keith* holding by amending ARE 404(a)(2)<sup>29</sup> in 1994. Under the amended rule, when the defendant asserts that the victim was the first aggressor, for example by claiming self-defense, the state may introduce evidence of the defendant's violent disposition in addition to evidence of the victim's peacefulness.<sup>30</sup>

25. See *Allen*, 945 P.2d at 1235-36.

26. The first aggressor exception authorizes the introduction of the following evidence:

*Character of Victim.* . . . evidence of a relevant character trait of an accused or of a character trait for peacefulness of the victim offered by the prosecution in a case to rebut evidence that the victim was the first aggressor, subject to the following procedure:

(i) When a party seeks to admit the evidence for any purpose, the party must apply for an order of the court at any time before or during the trial or preliminary hearing.

(ii) The court shall conduct a hearing outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

(iii) The court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

(iv) In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

ALASKA R. EVID. 404(a)(2).

27. 612 P.2d 977 (Alaska 1980).

28. See *id.* at 984 (rejecting the notion that "proof of the character of the victim and the accused [were] interrelated").

29. See Act of June 17, 1994, ch. 116, sec. 2, 1994 Alaska Sess. Laws.

30. The amended ARE 404(a)(2) deems the following evidence admissible, with the added language in italics:

*Character of Victim.* Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, or *evidence of a relevant character trait of an accused* or of a character trait for peacefulness of the victim *offered by the prosecution in a case to*

Alaska's first aggressor exception deviates from the first aggressor exception in the Federal Rules of Evidence in one critical respect. Under FRE 404(a)(2), if the accused asserts that the victim was the first aggressor (i.e., the accused claims self-defense), the prosecution may offer evidence of the victim's peacefulness even if the accused did not offer evidence of the victim's character when the self-defense claim was made.<sup>31</sup> This FRE first aggressor exception is limited to homicide cases only.<sup>32</sup> More importantly, FRE 404(a)(2) does not authorize the prosecution to present evidence of *the accused's* character when a self-defense claim is asserted. FRE 404(a)(1) governs the introduction of character evidence of the accused, and under that rule, the prosecution may introduce evidence of a pertinent character trait of the accused if *the accused* offers evidence of the same character trait in the victim.<sup>33</sup> Because FRE 404(a)(2)'s first aggressor exception authorizes *the prosecution* to offer evidence of the victim's character in a self-defense homicide case, FRE 404(a)(1) does not consequently permit the prosecution to present character evidence of the accused in a self-defense case as well. The admissibility of character evidence of the accused remains within the control of the accused—the accused must offer character evidence of the victim pursuant to FRE 404(a)(2) before the prosecution will be permitted to offer evidence of the same character trait of the accused. Therefore, the accused can assert self-defense without presenting character evidence of the victim, and in this situation, the prosecution would be permitted to introduce evidence of the victim's character under the

---

*rebut evidence that the victim was the first aggressor, subject to the following procedure . . .*

ALASKA R. EVID. 404(a)(2).

31. FRE 404(a)(2) states:

Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.

FED. R. EVID. 404(a)(2).

32. *See id.*

33. FRE 404(a)(1) states:

Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

FED. R. EVID. 404(a)(1).

first aggressor exception but would not be authorized to offer evidence of the character of the accused.

The Alaska first aggressor exception undermines the sensible framework adopted by the Federal Rules. Under ARE 404(a)(2), the prosecution may present evidence of a character trait of the accused *in any case where the accused claims self-defense* subject to the procedure prescribed in the rule.<sup>34</sup> In essence, the Alaska rule eviscerates the prohibition against character evidence in all cases where self-defense (one of the most prevalent criminal defenses) is asserted by the accused. Although the accused can preclude the admission of character evidence about himself by refusing to claim self-defense, this decision is substantially different from the decision made by the accused in federal courts. In federal courts, the accused must forego the presentation of character evidence of the victim to avoid the introduction of character evidence about himself; in Alaska courts, the accused must forego one of the most frequently invoked defenses in criminal proceedings to avoid the introduction of character evidence about himself. Alaska's first aggressor exception expands tremendously the circumstances under which the prosecution may present character evidence of the accused. Furthermore, the troubling dilemma that the accused face under ARE 404(a)(2)—which requires them to authorize the introduction of character evidence as the penalty for invoking self-defense—may present additional significant due process concerns that are beyond the scope of this Article.

ARE 404(a) is augmented by ARE 404(b), which generally prohibits the introduction of evidence of a defendant's prior crimes, wrongs, or acts to demonstrate that the defendant acted in conformity with his prior acts at the time of the alleged crime.<sup>35</sup> The "other crimes" prohibition is not absolute. Pursuant to ARE 404(b)(1), the prosecution is permitted to introduce evidence of a defendant's other crimes, wrongs, or acts if the evidence is employed for a *non-propensity* purpose.<sup>36</sup> Non-propensity purposes

---

34. See *supra* note 26 and accompanying text.

35. *Id.* 404(b)(1) ("Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith.").

36. *Id.* 404(b)(1) ("[Evidence of other crimes, wrongs, or acts] is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."); see *supra* note 3 (discussing the distinction between "propensity evidence" and evidence used for "non-propensity" purposes). For a discussion of the admission of "other crimes" evidence for "non-propensity" purposes, including a constitutional evaluation, see *infra* Part III.



expressly include proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>37</sup> Furthermore, this list of “non-propensity purposes” is not intended to be exclusive<sup>38</sup>—the express language of ARE 404(b)(1) also permits the introduction of such evidence “for other purposes,” so long as the evidence is not presented for a “propensity” purpose.<sup>39</sup> By and large, courts and commentators agree that such an admission of other-misconduct evidence for a non-propensity purpose does not automatically violate due process.<sup>40</sup>

While the “non-propensity purpose” doctrine has been widely accepted by other jurisdictions, the Alaska legislature has blazed a new evidentiary trail by approving three additional other-misconduct provisions. Specifically, the legislature has established a *child abuse* exception,<sup>41</sup> a *sexual assault* exception,<sup>42</sup> and a *domestic violence* exception.<sup>43</sup> Each exception, by its terms, permits the

---

37. *Id.*

38. *See, e.g.*, *Petersen v. State*, 930 P.2d 414, 432 (Alaska Ct. App. 1996) (permitting admission of propensity evidence to demonstrate the relationship between the victim and the accused, even though this purpose is not expressly authorized by ARE 404(b)(1)).

39. *See supra* note 36 (text of ALASKA R. EVID. 404(b)(1)).

40. *See, e.g.*, *Dowling v. United States*, 493 U.S. 342 (1990); *Allen v. State*, 945 P.2d 1233 (Alaska Ct. App. 1997).

41. Contrary to the general prohibition against evidence of the defendant’s other crimes, wrongs, or acts, ARE 404(b)(2) states:

In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses

(i) occurred within the 10 years preceding the date of the offense charged;

(ii) are similar to the offense charged; and

(iii) were committed upon persons similar to the prosecuting witness.

ALASKA R. EVID. 404(b)(2).

42. ARE 404(b)(3) states:

In a prosecution for a crime of sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible if the defendant relies on a defense of consent. In a prosecution for a crime of attempt to commit sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible.

ALASKA R. EVID. 404(b)(3).

43. ARE 404(b)(4) states:

In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or

prosecution to admit evidence of other crimes, wrongs, or acts for the express purpose of persuading jurors that the defendant acted in accordance with his prior acts during the alleged incident.<sup>44</sup>

In 1994, the Alaska legislature amended ARE 404(b) to include exceptions in cases of child abuse and sexual assault.<sup>45</sup> Six years earlier, in *Velez v. State*,<sup>46</sup> the Alaska Court of Appeals concluded that the limitations embodied in ARE 404(b)(1) precluded the state from offering such evidence in sexual assault cases for the sole purpose of establishing the defendant's propensity to commit sexual assault.<sup>47</sup> In response to *Velez* and other cases construing ARE 404(b)(1) to preclude the admission of pure propensity evidence, the legislature added the child abuse and sexual assault exceptions to ARE 404(b).<sup>48</sup>

These two exceptions were incorporated into the Alaska Rules of Evidence at the same time. Practically speaking, however, their similarity ends there. The child abuse exception in ARE 404(b)(2) sets forth three standards that evidence of prior child abuse must satisfy to be admissible: the act must have occurred within ten years of the offense charged, it must be similar to the offense charged, and it must have been committed upon a person who is similar to the prosecuting witness.<sup>49</sup> In contrast, sexual assault evidence under 404(b)(3) need not meet any standards of similarity under the text of the rule. If the defendant is charged with attempted sexual assault, all evidence of prior sexual assaults or attempted sexual assaults is admissible. If the defendant is charged with sexual assault (as opposed to *attempted* sexual assault), evidence of prior sexual assaults is admissible only if the defendant relies on a defense of consent.<sup>50</sup>

Three years later, in 1997, the legislature amended the Alaska Rules of Evidence to include a fourth exception in cases of domes-

---

another person or of interfering with a report of a crime of domestic abuse is admissible.

ALASKA R. EVID. 404(b)(4).

44. ALASKA R. EVID. 404(b)(2)-(4).

45. Act of June 17, 1994, ch. 116, sec. 1, 1994 Alaska Sess. Laws. *See supra* notes 41-42 for the text of these exceptions. ARE 404(b)(3) was further amended in Act of June 12, 1998, ch. 86, sec. 18, 1998 Alaska Sess. Laws (making the presentation of evidence of other sexual assaults admissible only if the defendant relies on a defense of consent).

46. 762 P.2d 1297 (Alaska Ct. App. 1988).

47. *Id.* at 1304.

48. *Wardlow v. State*, 2 P.3d 1238, 1246 (Alaska Ct. App. 2000).

49. *See supra* note 41 (text of ARE 404(b)(2)).

50. *See supra* note 42 (text of ARE 404(b)(3)).

tic violence.<sup>51</sup> Pursuant to ARE 404(b)(4), domestic violence propensity evidence may be admitted in any prosecution of a domestic violence crime or any prosecution for interfering with a domestic violence report.<sup>52</sup> The use of such evidence is not proscribed by similarity standards (unlike the child abuse exception), and its use is not contingent upon the defenses presented by the accused at trial (unlike the sexual assault exception in non-attempt cases).

Although the four propensity exceptions were validly enacted by the Alaska state legislature, their enactment does not endow these provisions with the imprimatur of constitutionality. When the Alaska Supreme Court was presented with the child abuse, sexual assault, and domestic violence exceptions, the court gave special notice that the “sole reason” that the rules were adopted was that the “legislature [had] mandated the amendment.”<sup>53</sup> Because these exceptions authorize state prosecutors to employ pure propensity evidence in a manner inconsistent with centuries of criminal law tradition and the consistent rulings of the Alaska Supreme Court, the suspect constitutionality of these exceptions is worthy of extended consideration.

If these propensity provisions violate the constitutional guarantee of due process, they cannot govern the admissibility of evidence in criminal trials. Practically speaking, the admission of pure propensity evidence pursuant to Alaska’s propensity exceptions could violate due process on two levels. First, the admission of pure propensity evidence might be unconstitutional as a violation of a defendant’s federal due process rights.<sup>54</sup> Second, even if the admission of pure propensity evidence is not a violation of federal due process, it may nonetheless violate the fundamental due process guarantee of the Alaska Constitution.<sup>55</sup> Each of these due process issues will be examined in turn.

---

51. Act of June 3, 1997, ch. 63, sec. 22, 1997 Alaska Sess. Laws (amending ARE 404(b)).

52. *See supra* note 43 (text of ARE 404(b)(4)).

53. ALASKA R. EVID. 404, Notes to Supreme Court Orders 1293, 1339.

54. “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V; “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .” *id.* amend. XIV, § 1.

55. “No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.” ALASKA CONST. art. I, § 7.

### III. PURE PROPENSITY EVIDENCE THREATENS FEDERAL DUE PROCESS

#### A. The Historical Aversion to Pure Propensity Evidence

The prohibition against the introduction of other crimes/bad acts/bad character evidence for the purpose of establishing conformity with the charged conduct can be traced back to the era before the independence of the nation.<sup>56</sup> In England, courts prohibited the introduction of such evidence nearly a century before the American revolution.<sup>57</sup> In 1692, for instance, an English court rejected the admission of pure propensity evidence in *Harrison's Trial*.<sup>58</sup> The prosecution intended to present other-misconduct evidence during the murder case. Lord Chief Justice Holt excluded the evidence, proclaiming, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter."<sup>59</sup> American jurists have commonly traced the exclusion of pure propensity evidence to *Harrison's Trial* and England's Glorious Revolution of the late seventeenth century.<sup>60</sup> Moreover, the prohibition against the admission of pure propensity evidence antedates the "beyond a reasonable doubt" standard by more than a century.

The criminal propensity prohibition made the transatlantic voyage to the New World and has long since been a principle of the

---

56. *Marshall v. Lonberger*, 459 U.S. 422, 448 n.1 (1983) (Stevens, J., dissenting) ("The common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime.").

57. In *Hampden's Trial*, for instance, the English court observed that "a person was indicted of forgery, [but] we would not let them give evidence of any other forgeries, but that for which he was indicted." 9 How. St. Tr. 1053, 1103 (K.B. 1684); see also *United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998) ("The ban on propensity evidence dates back to English cases of the seventeenth century.").

58. 12 How. St. Tr. 834 (Old Bailey 1692).

59. *Id.* at 864.

60. See *Anderson v. State*, 549 So. 2d 807, 813 n.8 (Fla. Ct. App. 1989) (Coward, J., dissenting) (referencing *Harrison's Trial* and Lord Chief Justice Holt's remarks to illustrate that the exclusion of propensity evidence is a principle at common law); *State v. Spreigl*, 139 N.W.2d 167, 169 n.1 (Minn. 1965) (noting that the exclusion of propensity evidence was first applied in England after 1680 and offering *Harrison's Trial* as an example of its emergence).

American criminal system.<sup>61</sup> Before the American Revolution, the exclusion of pure propensity evidence was embraced by colonial courts. In *Rex v. Doaks*,<sup>62</sup> for example, the state attempted to offer evidence of the defendant's prior acts of lasciviousness to bolster its allegations that the defendant was operating a bawdy house.<sup>63</sup> This evidence was excluded by Massachusetts' highest court.<sup>64</sup> Such colonial courts ushered the common law prohibition of pure propensity evidence into American jurisprudence, and the influence of this principle became apparent in the late nineteenth century when the United States Supreme Court first prohibited the admission of prior crimes evidence in *Boyd v. United States*.<sup>65</sup>

By the beginning of the twentieth century, the prohibition against the use of pure propensity evidence to establish guilt was a settled principle of Anglo-American jurisprudence.<sup>66</sup> The United States Supreme Court has condemned the use of such evidence in criminal proceedings for decades. In *Michelson v. United States*, for example, the Court wrote:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends

---

61. See 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, 13 (1996).

62. Quincy's Mass. 90 (Mass. Super. Ct. 1763).

63. *Id.* at 90-91.

64. *Id.* at 91.

65. 142 U.S. 450, 458 (1892) ("Proof of [prior robberies admitted at trial] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law.")

66. *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901) ("This [no propensity evidence] 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.")

to prevent confusion of issues, unfair surprise and undue prejudice.<sup>67</sup>

Almost fifty years later, the Supreme Court reaffirmed its condemnation of proving “a defendant’s . . . bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, calling for preventive conviction even if he should happen to be innocent momentarily),”<sup>68</sup> calling the use of such tactics an “‘improper’ basis for conviction.”<sup>69</sup>

#### B. The Threat to Federal Due Process

Federal due process is intended to safeguard those “fundamental conceptions of justice which lie at the base of our civil and political institutions.”<sup>70</sup> Accordingly, federal due process requires states to respect and comply with the community’s sense of fair play and decency,<sup>71</sup> and it is violated when a state offends a principle of justice that is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>72</sup> This focus on history, which was first announced by the United States Supreme Court in 1856<sup>73</sup> and was further articulated by the Court in 1884,<sup>74</sup> still governs the due process inquiry today. The Court has reaffirmed this historical approach on numerous occasions,<sup>75</sup> emphasizing that courts should primarily rely upon historical practice to evaluate whether a principle has enjoyed “uniform and continuing acceptance.”<sup>76</sup>

The historical evidence supporting exclusion of pure propensity evidence is compelling. From the days of England’s Glorious Revolution until the present day, courts have demonstrated a steadfast commitment to the principle that pure propensity evidence should not be admitted, fearing that juries will infer present guilt from previous conduct. Beginning in the late 1600s, courts in

---

67. 335 U.S. 469, 475-76 (1948).

68. *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997).

69. *Id.* at 182.

70. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

71. *Rochin v. California*, 342 U.S. 165, 173 (1952).

72. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

73. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856).

74. *Hurtado v. California*, 110 U.S. 516, 528 (1884).

75. *See, e.g.*, *Dowling v. United States*, 493 U.S. 342, 353 (1990); *Montana v. Egelhoff*, 518 U.S. 37, 43, 48 (1996).

76. *Egelhoff*, 518 U.S. at 43, 48.

England—and eventually pre-colonial America as well—recognized the threat to fairness created by pure propensity evidence and sought to exclude it from criminal trials. The principle has enjoyed longstanding status as a fundamental principle of American criminal justice.

More importantly, as the United States Supreme Court has recognized, the admission of pure propensity evidence directly undermines three specific principles of federal due process: (1) the presumption of innocence; (2) the “beyond a reasonable doubt” standard of proof; and (3) the principle that cases, not people, are placed on trial. Chief Justice Warren, in his memorable dissent in *Spencer v. Texas*,<sup>77</sup> provided the blueprint for this contemporary understanding of the interplay between due process and the admission of pure propensity evidence.

In *Spencer*, the United States Supreme Court was called upon to assess the constitutionality of a Texas procedure for enforcing its habitual criminal statutes.<sup>78</sup> Under these statutes, the state could allege prior offenses in indictments and could introduce proof of past convictions so long as the court charged the jury that such information should not be taken into account while determining the guilt or innocence of the defendant.<sup>79</sup> In a 5-4 decision, the Court concluded that due process did not require the state to bifurcate its trial in a manner that would allow the jury to determine guilt as an initial matter and subsequently determine the punishment in light of the defendant’s prior convictions and the standards of Texas’s recidivism statute.<sup>80</sup> Notably, the majority clearly grounded its ruling in the Court’s extremely deferential approach to a state’s criminal procedure.<sup>81</sup> Although the Court announced that Texas’s admission of prior convictions at trial did not violate the Constitution,<sup>82</sup> the majority emphasized that the evidence probably would have been admissible for a non-propensity purpose under another

---

77. 385 U.S. 554, 569 (1967) (Warren, C.J., concurring in part and dissenting in part).

78. *Id.* at 555-56.

79. *Id.*

80. *Id.* at 567-69.

81. *Id.* at 564 (“But it has never been thought that such [due process] cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.”).

82. *Id.* at 568-69 (“It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not.”).

universally-recognized propensity exception<sup>83</sup> and observed that the admission of the evidence was required to prove allegations under Texas's recidivism statutory framework.<sup>84</sup>

Chief Justice Warren's partial dissent challenged the majority's due process conclusions, contending that the introduction of evidence purely for propensity purposes violates federal due process.<sup>85</sup> Chief Justice Warren stated:

While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes *introduced for no purpose other than to show criminal disposition* would violate the Due Process Clause.<sup>86</sup>

Although this sentiment is expressed in dissent, the Chief Justice observed that the majority opinion did not conflict with this interpretation of the Due Process Clause.<sup>87</sup>

Chief Justice Warren's approach to propensity evidence recognizes that the admission of other-misconduct evidence is not absolutely barred by federal due process.<sup>88</sup> Some such evidence has been traditionally admitted to impeach a defendant's testimony,<sup>89</sup> to counter defense evidence of a defendant's good character,<sup>90</sup> and for other non-propensity purposes, including those identified in FRE 404(b)(1).<sup>91</sup> When evidence is admitted in these cases for a *non-propensity* purpose, Chief Justice Warren observed that the defendant's due process rights can be protected by judicial balancing of probative value against the risk of unfair prejudice.<sup>92</sup> On this

---

83. *Id.* at 560-61.

84. *Id.* at 565-66.

85. *Id.* at 569-87.

86. *Id.* at 572-74 (Warren, C.J., concurring in part and dissenting in part) (emphasis added) (footnotes omitted).

87. *Id.* at 575-76 ("I do not understand the opinion to assert that this Court would find consistent with due process the admission of prior-crimes evidence for no purpose other than what probative value it has bearing on an accused's disposition to commit a crime currently charged. It ignores this issue. . . .").

88. *Id.* at 576.

89. *Id.*

90. *Id.*

91. *Id.* at 577.

92. *Id.* at 578 ("The problem thus becomes the delicate one of balancing probative value against the possibility of prejudice, and the result for most state and federal courts . . . has been that the trial judge is given discretion to draw the balance in the context of the trial.").



basis, “it is apparent that prior-convictions evidence introduced for certain specific purposes relating to the determination of guilt or innocence, other than to show a general criminal disposition, would not violate the Due Process Clause.”<sup>93</sup> Thus, Chief Justice Warren followed the historical admission of such evidence for non-propensity purposes to its logical conclusion—when admitted for non-propensity purposes, such evidence is “not so *inherently* prejudicial” that due process requires its categorical exclusion.<sup>94</sup>

By contrast, when such evidence is introduced for pure propensity purposes, Chief Justice Warren concluded that its admission *would* necessarily violate the Due Process Clause and require categorical exclusion. This conclusion is derived from the threat that the use of pure propensity evidence poses to three bedrock due process principles, which are discussed below.

1. *The Presumption of Innocence.* It is beyond dispute that the presumption of innocence is a component of due process.<sup>95</sup> “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>96</sup> The use of pure propensity evidence, however, undermines the jury’s conceptual ability meaningfully to presume the innocence of the accused, and this consequence threatens the principle of the presumption of innocence that is a foundation of due process.

Recognition of the potential for pure propensity evidence to undercut the presumption of innocence is not new. In *Spencer*, Chief Justice Warren observed that “[e]vidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged.”<sup>97</sup> In 1977, the Court of Appeals for the Fifth Circuit clearly contemplated this unmistakable threat to due process in holding that prior acts evidence can-

---

93. *Id.*

94. *Id.* (emphasis added).

95. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

96. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

97. *Spencer*, 385 U.S. at 575.

not be employed for pure propensity purposes.<sup>98</sup> Beginning as early as 1901, American courts have so held for over a century.<sup>99</sup>

2. *Proof Beyond a Reasonable Doubt.* In criminal cases, it is well-settled that due process requires that the accused be acquitted unless the state can prove the defendant's factual and legal guilt "beyond a reasonable doubt."<sup>100</sup> Even if one assumes that the admission of other-misconduct evidence for propensity purposes does not shift the entire burden of proof from the state to the defendant by undermining the presumption of innocence, the admission of such evidence invariably lowers the state's burden of persuasion. Every trial lawyer knows from personal experience what a sea change may occur in a jury's attitude toward the accused's case even when other-misconduct evidence is legitimately admitted for a *non-propensity* purpose.

In his prescient opinion in *Spencer*, Chief Justice Warren also recognized that the admission of propensity evidence for propensity purposes threatened to lighten the state's burden of persuasion, noting that "[r]ecognition of the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act."<sup>101</sup> Almost 25 years later, Justice O'Connor echoed Chief Justice Warren's concerns about the jury's misuse of propensity evidence. In response to a jury instruction that encompassed propensity language, Justice O'Connor observed that this language may "relieve[] the State of its burden of proving the identity of [the] murderer beyond a reasonable doubt."<sup>102</sup>

The voices of Chief Justice Warren and Justice O'Connor, descending from the nation's highest court, are not alone in their condemnation of propensity evidence used for propensity purposes based on its threat to the "beyond a reasonable doubt" standard. Federal courts and state courts have prohibited the introduction of propensity evidence based on the "beyond a reasonable doubt" ra-

---

98. *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) ("A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes.").

99. *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901).

100. *In re Winship*, 397 U.S. 358, 361 (1970).

101. *Spencer*, 385 U.S. at 575.

102. *Estelle v. McGuire*, 502 U.S. 62, 76 (1991) (O'Connor, J., concurring in part and dissenting in part).

tionale,<sup>103</sup> and the warning has been voiced by commentators as well.<sup>104</sup>

3. *Prohibition Against Status Crimes.* The tendency to convict a defendant because of his purported bad character endangers yet another fundamental guarantee of due process—the accused cannot be found guilty on the basis of his criminal “status.”<sup>105</sup> Chief Justice Warren summarized this concern: “A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a ‘bad man,’ without regard to his guilt of the crime currently charged.”<sup>106</sup>

Pure propensity evidence affirmatively encourages jurors to convict the defendant because of his anti-social character, instead of on the basis of sufficient evidence that the defendant committed the charged offense. A leading commentator summarized this concern:

As a nation, we are committed to the proposition that the state may not punish a person for his or her character; the state may criminalize only antisocial acts. Many continental countries routinely admit evidence of the defendant’s past misconduct; but under our system, it is axiomatic that the defendant need answer only for the crime he or she is currently charged with.<sup>107</sup>

The Michigan Supreme Court conveyed this sentiment most appropriately: “[I]n our system of jurisprudence, we try cases, rather than persons.”<sup>108</sup>

Courts recognize the serious threat to due process posed by the use of pure propensity evidence to convict an individual because of his status. The Court of Appeals for the Ninth Circuit in *McKinney v. Rees*<sup>109</sup> acknowledged that when the use of other-

103. See, e.g., *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993); *People v. Garceau*, 862 P.2d 664, 692 (Cal. 1993).

104. See, e.g., *Natali & Stigall*, *supra* note 61, at 32-34. The Alaska Supreme Court has placed great currency in this aspect of due process, noting in *Oksoktaruk v. State*, 611 P.2d 521 (Alaska 1980), that pure propensity evidence “dilut[es] the requirement that present guilt be proved beyond a reasonable doubt.” *Oksoktaruk*, 611 P.2d at 524.

105. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (concluding that states may not criminalize the status of drug addiction).

106. *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part); *accord Old Chief v. United States*, 519 U.S. 172, 180-81 (1997).

107. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03, at 9 (1996) (citations omitted).

108. *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988).

109. 993 F.2d 1378 (9th Cir. 1993).

misconduct evidence, even for a legitimate, non-propensity purpose, makes it reasonably likely that the jury will convict the accused on the basis of his bad character and prior acts, its admission violates the community's basic standards of fair play.<sup>110</sup>

C. A Valuable Comparison: *Dowling v. United States*, Non-Propensity Purpose, and Three Due Process Safeguards

In *Dowling v. United States*,<sup>111</sup> the United States Supreme Court held that other-misconduct evidence can properly be admitted as long as the defendant's right *not* to be convicted by improper propensity inferences can effectively be insured. Thus, *Dowling* implicitly recognizes that admission of such evidence purely for propensity purposes would violate due process.

1. *Dowling v. United States: The Legitimate Admission of Other-Misconduct Evidence for Non-Propensity Purposes.* In *Dowling*, the Court was called upon to assess the constitutionality of FRE 404(b),<sup>112</sup> which, as noted above, allows the state to introduce evidence of prior crimes, acts, or wrongs for "non-propensity" purposes, such as proving the defendant's intent, motive, opportunity, identity, plan, or preparation.<sup>113</sup> Consistent with historical practice, the Court ultimately concluded that the admission of such evidence for non-propensity purposes is not absolutely barred by federal due process.<sup>114</sup>

In July of 1985, \$12,000 was stolen during a bank robbery on the island of St. Croix in the United States Virgin Islands.<sup>115</sup> After stealing the money, the robber exited the bank, darted about the

---

110. *Id.* at 1385. The Ninth Circuit observed that:

[h]is was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are.

*Id.* at 1386.

The Alaska Supreme Court has endorsed this fear that a defendant will not be capable of defending against the particular crime charged if propensity evidence is presented at trial. *See Adkinson v. State*, 611 P.2d 528, 531 (Alaska 1980) (stating that when bad character is inferred, "the defendant has been effectively denied his right to defend against the particular crime . . . charged.").

111. 493 U.S. 342 (1990).

112. *Id.* at 343.

113. *See* FED. R. EVID. 404(b).

114. *Dowling*, 493 U.S. at 354.

115. *Id.* at 344.

street briefly, and commandeered a taxi van to make his getaway.<sup>116</sup> The culprit removed his mask as he exited the scene of the crime, and an eyewitness identified the robber as Reuben Dowling.<sup>117</sup> Other witnesses saw Dowling driving the stolen van outside of town shortly after the robbery.<sup>118</sup> Dowling subsequently was charged with bank robbery, armed robbery, and several other crimes.<sup>119</sup>

Two weeks after the bank robbery, two men entered the home of a woman in the same city where the bank robbery had occurred.<sup>120</sup> One intruder was wearing a ski mask and brandishing a handgun, and a struggle ensued between this man and the woman.<sup>121</sup> During the struggle, the woman unmasked the intruder, whom she later identified as Dowling.<sup>122</sup> Based on this incident, Dowling was charged with burglary, attempted robbery, assault, and weapons offenses.<sup>123</sup> Before Dowling's bank robbery trial, he was tried for this burglary and acquitted.<sup>124</sup>

During Dowling's bank robbery trial, the prosecution presented evidence about the burglary for which Dowling was acquitted. Specifically, the state called the burglary victim as a witness.<sup>125</sup> The woman testified that an armed man wearing a ski mask entered her house, and that the armed man was Dowling.<sup>126</sup> The prosecution sought to introduce this evidence for two purposes. First, because the bank robber had worn a ski mask and carried a handgun similar to the gun carried by the woman's assailant, the prosecution contended that the woman's testimony strengthened the prosecution's identification of Dowling as the culprit.<sup>127</sup> Second, the government sought to link Dowling to Delroy Christian, the other man who entered the woman's house.<sup>128</sup> During the bank robbery trial, a police officer testified that Christian had parked a

---

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 344-45.

122. *Id.* at 345.

123. *Id.*

124. *Id.* This summary, to a degree, is an oversimplification: Dowling's first bank robbery trial ended in a hung jury, and after he was convicted at his second trial, the Court of Appeals for the Third Circuit reversed his conviction. *Id.* at 344.

125. *Id.* at 345.

126. *Id.* at 344-45.

127. *Id.* at 345.

128. *Id.*

car at the front of the bank shortly before the bank robbery occurred.<sup>129</sup> One of the car doors was open and the officer had instructed Christian to close it.<sup>130</sup> Christian drove away shortly thereafter, before the robber emerged from the bank.<sup>131</sup> The prosecution contended that Christian was designated to drive the getaway car, and the prosecution asserted that the robber's distress upon exiting the bank and the robber's impulsive attempt to steal a getaway vehicle corroborated this theory.<sup>132</sup>

Dowling appealed his conviction,<sup>133</sup> alleging that the admission of the woman's testimony was an unconstitutional violation of the prohibition against Double Jeopardy and a violation of federal due process.<sup>134</sup> The Court of Appeals for the Third Circuit affirmed the district court verdict, concluding that the admission of the evidence was harmless error.<sup>135</sup> The Supreme Court affirmed, concluding that the admission of the other-misconduct evidence, for non-propensity purposes under FRE 404(b), did not violate the Double Jeopardy Clause or the Due Process Clause.<sup>136</sup> For present purposes, discussion is limited to the Court's due process reasoning.<sup>137</sup>

The Court rejected Dowling's contention that admission of the other-misconduct evidence violated due process because of the inherent risk that the jury might convict him based on a propensity inference arising from his other-misconduct. In rejecting this claim, the *Dowling* court relied upon the trial judge's ability to exclude unfairly prejudicial evidence under the judicial balancing required

---

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. After his third trial, see *supra* note 124, Dowling was convicted and sentenced to 70 years' imprisonment. *Id.* at 344.

134. *Id.* at 347.

135. *United States v. Dowling*, 855 F.2d 114, 122-24 (3d Cir. 1988).

136. *Dowling*, 493 U.S. at 352-53.

137. Dowling presented four independent grounds upon which the admission of the woman's testimony was fundamentally unfair and therefore violated due process. Specifically, Dowling argued that the admission of prior conduct evidence for non-propensity purposes violates due process because (1) evidence of acquitted conduct is inherently unreliable, (2) the jury may convict the defendant based on inferences from his past conduct, (3) evidence of acquitted conduct leads to inconsistent jury verdicts, and (4) introducing evidence of acquitted conduct forces the defendant to answer the same accusation in a later proceeding. Because the first, third and fourth of Dowling's contentions challenge the constitutionality of admitting evidence of *acquitted* prior conduct, only Dowling's second contention bears upon whether the admission of propensity evidence under any circumstance is prohibited by federal due process.

by FRE 403.<sup>138</sup> The court thus concluded that in cases where the risk of a propensity inference was *not* outweighed by the probative value on a *non*-propensity issue, the judge would exclude the evidence under FRE 403, and the due process issue would never arise.<sup>139</sup>

The *Dowling* Court also emphasized that the trial court instructed the jury, both when the woman testifying about Dowling left the stand and again during the court's final charge, that the evidence of Dowling's prior conduct, for which he was acquitted, was introduced only for the limited purposes of establishing his identity and connecting him with Delroy Christian.<sup>140</sup> The Court concluded that "[e]specially in light of the limiting [jury] instructions provided by the trial judge, we cannot hold that the introduction of [the woman's] testimony merits . . . condemnation."<sup>141</sup>

*Dowling* simply recognizes the traditional view: due process does not prohibit other-misconduct evidence offered for a legitimate, *non*-propensity purpose *in those cases* where its probative value is not substantially outweighed by the risk of unfair prejudice *and* where the jury's consideration of the evidence is effectively limited by judicial instruction. In other words, when other-misconduct evidence is offered for a non-propensity purpose, admission or exclusion depends on the facts, circumstances, and trial dynamics of the particular case. Based on these procedural safeguards (the judge's ability to exclude prejudicial evidence pursuant to FRE 403 balancing and the issuance of a jury instruction), the Supreme Court held that the admission of other-misconduct evidence for non-propensity purposes does not violate a defendant's due process rights.<sup>142</sup>

2. *The Three Procedural Safeguards.* Consistent with *Dowling*, trial judges are obliged to protect the accused's due process rights at three different stages: at the pre-admission stage, during the trial when the evidence is introduced, and in the final charge to the jury. Because these three procedural safeguards form the basis for the Supreme Court's decision that the admission of other-misconduct evidence for *non*-propensity purposes may be able to

---

138. See FED. R. EVID. 403 ("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.").

139. *Dowling*, 493 U.S. at 353.

140. *Id.* at 345-46.

141. *Id.* at 353.

142. See *id.* at 354.

survive a due process challenge, each safeguard will be addressed briefly.

First, other-misconduct evidence may be admitted for non-propensity purposes only if it satisfies the judicial balancing required by FRE 403, which is almost identical to Alaska's counterpart, ARE 403. According to ARE 403, "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>143</sup> Under this balancing, the court must weigh two very real, but conceptually distinct, concepts. On one hand, the trial judge must consider the probative value of the evidence with regard to the specific, limited non-propensity purpose for which it is offered. On the other hand, the trial judge must protect the defendant's due process rights by ensuring that the defendant will not be found guilty because of the "unfair prejudice" caused by propensity or bad character inferences.

Assume, for example, the following course of events.<sup>144</sup> In 2000, Joe Fairbanks is charged with physically assaulting a young boy, A.B. The prosecution alleges that Fairbanks, a local youth baseball coach, had repeatedly told A.B., who was one of the players, that he needed to improve his batting skills. After three weeks of such criticism, Fairbanks asked A.B. to stay late one day for extra batting practice. During the batting exercise, Fairbanks intentionally hurled the baseball at the child, hitting A.B. in the back, the ribcage, and the side of his head. A.B. subsequently informed his parents of Fairbanks' conduct, and A.B.'s parents reported the incident to the police.

During the course of criminal discovery, the prosecution learned that the defendant was involved in a similar assault the previous year. As a youth soccer coach, Fairbanks continually told

---

143. ALASKA R. EVID. 403. ARE 403 deviates from FRE 403 in one important respect: under the federal rule, relevant evidence may be excluded if the danger of unfair prejudice, confusion, etc., *substantially outweighs* the probative value of the evidence. Under the Alaska rule, these dangers need only *outweigh* the probative value of the evidence to justify exclusion. Because of this difference, the Alaska rule would provide greater protection to the objector under the 403 balancing test. Unfortunately, as this Article demonstrates in Part V, Alaska's propensity exceptions disable ARE 403 balancing and undermine the protection afforded by the Alaska rule.

144. This course of events is entirely fictional and is intended solely as a basis for evaluation. Any similarity between these events and any actual events is coincidental.



his goalie, L.M., that his skills needed to improve. After three weeks of such criticism, Fairbanks told the goalie to stay late after practice. During this extra practice time, Fairbanks positioned himself less than ten yards from the goal and directed powerful shots directly at L.M. Although the shots repeatedly hit L.M. in the head and the midsection, Fairbanks continued the exercise until L.M. was unable to continue. L.M. informed his parents, but L.M.'s parents did not inform the police until they heard about Fairbanks' alleged abuse of A.B. one year later. The prosecution seeks to admit the evidence of Fairbanks' abuse of L.M. for two non-propensity purposes: first, to demonstrate that Fairbanks had a well-conceived plan (namely, continual criticism of the athlete followed by a required post-practice one-on-one exercise); and second, to demonstrate that the abuse of A.B. was neither an accident nor a legitimate coaching technique.

If the trial judge decides that the evidence of Fairbanks' prior abuse of L.M. is relevant to these non-propensity purposes, the evidence must also satisfy FRE 403 balancing to be admissible. On one hand, the judge will consider the probative value of the evidence of Fairbanks' prior treatment of L.M. to prove Fairbanks' plan or to prove that Fairbanks' infliction of injury was not accidental or justified. Commonly, this will involve evaluation of the recency, similarity, extent, and nexus of the prior misconduct to the non-propensity issues. On the other hand, the judge will evaluate the extent to which the evidence of Fairbanks' treatment of L.M. will unfairly prejudice the jury, promote bad character inferences, and/or lead the jury to convict Fairbanks because of his propensity to commit crimes. In doing so, the court will assess the ease or difficulty lay jurors will have in separating permissible from impermissible purposes, the centrality of the non-propensity purposes to the real, legitimate issues in the case, and the degree of confidence the judge has in *this* jury to follow the jury instructions.

In this manner, FRE 403 balancing provides a substantial procedural safeguard that protects against the improper use of evidence in the precise manner feared by courts since the seventeenth century. The judge is called upon to identify and isolate the unfair prejudice implicated by the evidence, and, if the risk of unfair prejudice outweighs the probative value of the evidence, the judge must exclude the evidence.

The second procedural safeguard is integral to the proper use of other-misconduct evidence that is admitted at trial. Because this evidence is introduced for a *non*-propensity purpose, its relevance at trial is limited to the non-propensity purpose, or purposes for which its introduction has been authorized. If the prosecution strays from the non-propensity purpose in its presentation of

and/or argument on the evidence, defense counsel is empowered to object to the questions, testimony, or arguments for lack of relevancy and for violation of the court's order. Moreover, the prosecution's improper use of the evidence for pure propensity purposes could easily cause a mistrial or justify a retrial on appeal. When such evidence is presented for a *non*-propensity purpose, its use must actually conform to this limited purpose.

This procedural safeguard is essential, and it significantly limits the conduct of the prosecutor at trial. Restricted by this safeguard, the prosecution is powerless to employ charged rhetoric to impugn the defendant's character or to provoke the jury to convict the defendant based on his criminal propensity. Explicitly or implicitly, consciously or subconsciously, the prosecution cannot summon broad generalizations and fevered advocacy to "arraign [the defendant's] whole life."<sup>145</sup>

The final safeguard for the defendant—jury instructions—serves as a final reminder to the jury that the other-misconduct evidence admitted at trial must not be considered as proof that the defendant acted in conformance with his general propensity during the alleged crime. Typically, the court instructs the jury both when the evidence is admitted, and again in the court's final charge, that the evidence has been admitted "for a limited purpose," and that to convict the defendant to any degree on the basis of speculation about his character or criminal propensity would be improper and "unfair." While some commentators and courts have questioned the degree of protection provided by jury instructions of this nature,<sup>146</sup> Alaska courts presume that the jury can meaningfully adhere to these instructions.<sup>147</sup> Where the judge's instructions are given in emphatic language and clearly identify the *non*-propensity purpose, the impermissible uses, and the reasons why consideration

---

145. Harrison's Trial, 12 How. St. Tr. 834, 864 (Old Bailey 1692).

146. Parish v. State, 477 P.2d 1005, 1011 (Alaska 1970) (Boney, C.J., dissenting). For instance, Justice Jackson observed in *Krulewitch v. United States* that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury [is something that] all practicing lawyers know to be unmitigated fiction." 336 U.S. 440, 453 (1949) (internal citations omitted); see also HARRY KALVAN & HANS ZEISEL, *THE AMERICAN JURY* 127-30, 177-80 (1966) (providing empirical studies showing that Justice Jackson's view is likely correct); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 *YALE L.J.* 763, 778 (1961) (contending that the jury instructions are illogical and cannot be followed).

147. See *State v. McDonald*, 872 P.2d 627, 654-55 (Alaska Ct. App. 1994); *Whiteaker v. State*, 808 P.2d 270, 277 (Alaska Ct. App. 1991).

is so limited, the likelihood of jury compliance is greatly increased.<sup>148</sup>

Viewed collectively, these three procedural safeguards adequately protect a criminal defendant's federal due process rights when other-misconduct evidence is admitted for a *non*-propensity purpose.<sup>149</sup> Of course, these procedural safeguards do not compel a trial court to exclude such evidence whenever it might prejudice the jury.<sup>150</sup> In fact, because it is commonly accepted that the introduction of other-misconduct evidence will always entail some risk of prejudice, these safeguards do not necessarily protect the defendant from all inappropriate use of the evidence by the jury. The *Dowling* decision articulates that such evidence is admissible provided both that the judge has found valid *non*-propensity relevance in the evidence and that he or she uses means which ensure that the risk of unfair prejudice is minimized. This observation, which proved critical to upholding the constitutionality of introducing other-misconduct evidence for *non*-propensity purposes, also provides the foundation for understanding the fundamental flaw in the Alaska Court of Appeals' recent decisions upholding Alaska's propensity provisions.

#### IV. THREE CASES, BUT ONE DEFECTIVE RATIONALE: THE ALLEN-WARDLOW-FUZZARD TRILOGY

Over the last five years, the Alaska Court of Appeals has upheld the constitutionality of three propensity exceptions to ARE 404(b)(1)—the first aggressor exception, the sexual assault exception, and the domestic violence exception. Though the intermediate court has not passed upon the constitutionality of the child abuse exception in a published opinion, it has routinely imported its rationale from other propensity exception cases into memorandum opinions declaring the child abuse exception constitutional as well.<sup>151</sup>

---

148. Use Note to Alaska Criminal Pattern Jury Instruction No. 1.25 (1999), available at <http://www.state.ak.us/courts/crimins.htm#1>.

149. See *Dowling v. United States*, 493 U.S. 342, 353 (1990).

150. “[N]ot all admissions of [prejudicial] evidence are errors of constitutional dimension. The introduction of improper evidence against a defendant does not amount to a violation of due process unless the evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice.’” Brooks Holland, *Section 60.41 of the New York Criminal Procedure Law: The Sexual Assault Reform Act of 1999 Challenges Molineux and Due Process*, 27 *FORDHAM URB. L.J.* 435, 438-39 (1999) (quoting *Dunnigan v. Kean*, 137 F.3d 117, 125 (2d Cir. 1998)).

151. In a 1999 memorandum opinion that did not create legal precedent, the Alaska Court of Appeals relied on the reasoning in *Allen* to uphold the constitu-

In *Allen v. State*,<sup>152</sup> the intermediate court upheld the constitutionality of ARE 404(a)(2)'s broad "first aggressor" exception.<sup>153</sup> *Allen* contains the most extensive articulation of the court's rationale for rejecting due process challenges to pure propensity evidence. Allen was charged with second-degree murder arising out of an altercation with another man.<sup>154</sup> When Allen claimed self-defense, the state offered evidence of Allen's past violent acts to enable the jury to infer that Allen's violent character made him likely to act as the first aggressor.<sup>155</sup> Although the intermediate court reversed Allen's conviction,<sup>156</sup> it concluded that the first aggressor exception was constitutional.<sup>157</sup>

Initially, the court conceded that the use of character evidence under the first aggressor exception amounts to propensity evidence

---

tionality of ARE 404(b)(2)'s child abuse exception. In *Geerhart v. State*, the defendant appealed his conviction on seven counts of first-degree sexual assault and seven counts of incest. No. 4073, 1999 Alaska App. LEXIS 51, at \*1 (Alaska Ct. App. July 7, 1999). Geerhart claimed that the trial judge's admission of Geerhart's prior sexual activity with his niece, pursuant to ARE 404(b)(2), unconstitutionally diluted the state's burden of proof. *Id.* at \*15. After briefly observing that the trial judge instructed the jury regarding the state's burden of proof, the court invoked the reasoning in *Allen*, without any further discussion, to uphold the constitutionality of the child abuse exception, noting that:

Geerhart claims that the admission of evidence of his prior sexual misconduct under Rule 404(b)(2) violates due process. We rejected a similar attack on Rule 404(a)(2) in *Allen v. State*. Geerhart has not offered a convincing argument why we should analyze his due process claim any differently than the claim in *Allen*. We conclude that Rule 404(b)(2) does not violate Geerhart's constitutional rights.

*Id.* at \*16 (internal citations omitted).

152. 945 P.2d 1233 (Alaska Ct. App. 1997).

153. *Id.* at 1239.

154. *Id.* at 1234.

155. *Id.*

156. *Id.* at 1235. The court of appeals upheld the constitutionality of ARE 404(a)(2), but reversed the conviction on other grounds. The court concluded that the state was not required to establish the defendant's violent character in order to disprove the defendant's self-defense theory—violent people may act in self-defense, and non-violent people may act aggressively. Therefore, although evidence of the defendant's character was admissible pursuant to ARE 404(a)(2), proof of the defendant's character was not an "essential" element of the crime or of the defendant's claim of self-defense. Under these circumstances, the court of appeals concluded that ARE 405 prohibits the introduction of the defendant's specific prior violent acts; instead, the state was limited to providing reputation or opinion evidence of the defendant's violent character. *Id.* at 1240.

157. *Id.* at 1239-40.

that is normally excluded at trial.<sup>158</sup> First aggressor character evidence “is introduced for the very purpose normally barred by the evidence rules: to prove that [a person] acted in conformity with his or her [character trait].”<sup>159</sup> Moreover, the court acknowledged that the bar on the use of pure propensity evidence was based on the concern that the jury would not hold the state to the traditional burden of proof in a criminal trial.<sup>160</sup>

Nonetheless, the intermediate court upheld the constitutionality of the first aggressor exception on two grounds. First, the court noted that the admission of other-misconduct evidence was not absolutely barred, because such evidence was not excluded at common law when the defendant placed his character at issue.<sup>161</sup> Second, the court claimed that the procedural safeguard provided by the balancing test of ARE 403 satisfied due process demands. According to the court, “Evidence Rule 404(a)(2) does not eliminate the weighing of relevance versus potential prejudice.”<sup>162</sup> In fact, the rule itself explicitly provides for such balancing.<sup>163</sup> Judicial balancing under FRE 403 played a critical role in the United States Supreme Court’s *Dowling* decision—permitting the use of other-misconduct evidence for *non*-propensity purposes—and the intermediate court asserted that ARE 403 balancing “similarly” saved the provision from violating the state and federal due process clauses.

Four years after *Allen*, the court of appeals employed *Allen*’s due process analysis and upheld the validity of the ARE 404(b)(3) sexual assault exception. In *Wardlow v. State*,<sup>164</sup> the defendant ap-

---

158. *Id.* at 1238 (“[The defendant] objects that this use of character evidence—as circumstantial proof of a defendant’s likely conduct during a particular episode—amounts to “propensity” evidence, a type of evidence normally prohibited. This is true, but it is not a valid objection to admission of the evidence.”).

159. *Id.* (quoting *McCracken v. State*, 914 P.2d 893, 898 (Alaska Ct. App. 1996)).

160. *Allen*, 945 P.2d at 1238 (“[A] jury might be tempted to relax the government’s normal burden of proof if they were convinced that the defendant was a bad person.”).

161. *Id.*

162. *Id.*

163. ALASKA R. EVID. 404(a)(2)(ii):

The court shall conduct a hearing outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

164. 2 P.3d 1238 (Alaska Ct. App. 2000).

pealed his conviction for assault, sexual assault, and kidnapping,<sup>165</sup> arguing that evidence of a prior attempted sexual assault should have been excluded at trial.<sup>166</sup> The court simply cited *Allen* and rejected the argument:

Wardlow's basic contention is that the legislature is constitutionally prohibited from authorizing the admission of other crimes evidence to prove "propensity"—*i.e.*, to prove a person's character when character is being offered as circumstantial evidence that the person acted true to character during the episode being litigated. We rejected this argument in *Allen v. State*, and we reaffirm that decision here.<sup>167</sup>

Although *Wardlow* invoked the underlying rationale in *Allen* to uphold the constitutionality of a propensity exception, *Wardlow* was not the court of appeals' final statement on the constitutionality of these exceptions.

In *Fuzzard v. State*,<sup>168</sup> the intermediate court again relied upon *Allen*, without any further analysis, to validate the domestic violence exception embodied in ARE 404(b)(4). Fuzzard was convicted of third-degree assault after the state introduced evidence of a prior incident in which Fuzzard broke into the victim's apartment and pulled the victim's phone from the wall as she attempted to call the police.<sup>169</sup> The court reasoned as follows:

Fuzzard argues that Evidence Rule 404(b)(4) violates the due process clause of the constitution because it authorizes a court to admit evidence of prior domestic violence for "propensity" purposes—that is, as circumstantial proof that the defendant was likely to engage in the domestic violence charged in the current case . . . .

*Allen* involved a due process challenge to another subsection of Evidence Rule 404—subsection (a)(2), which authorizes a court to admit evidence of the defendant's character for violence to rebut a claim that the victim was the first aggressor. We held that, because trial judges retain the authority under Evidence

---

165. *Id.* at 1241.

166. *Id.* at 1248.

167. *Id.* (internal footnotes omitted); *see also* McGill v. State, 18 P.3d 77, 81 (Alaska Ct. App. 2001) (reaffirming the holdings in *Allen* and *Wardlow*).

168. 13 P.3d 1163 (Alaska Ct. App. 2000).

169. *Id.* at 1163-64. The state contended that the evidence was admissible under ARE 404(b)(1) to establish the reasonableness of the victim's fear and the nature of the victim's relationship with Fuzzard. Although the court concluded that the evidence was admissible under Rule 404(b)(1)—to establish the victim's fear, to indicate that the incident was not an accident, and to show the nature of their relationship, *see id.* at 1165, the trial court also found that the domestic violence exception was constitutional and provided an alternative basis for the admission of the evidence, *id.* at 1164-65.

Rule 403 to exclude evidence that is more prejudicial than probative, Evidence Rule 404(a)(2) did not violate the guarantee of due process. We reach the same conclusion regarding Evidence Rule 404(b)(4).<sup>170</sup>

In *Wardlow* and *Fuzzard*, the court of appeals mechanically applied the *Allen* rationale to uphold the constitutionality of Alaska's propensity exceptions. In *Allen* and its progeny, the intermediate court simply waves the judicial wand of Rule 403 balancing, then announces that the significant threats to due process have magically disappeared. This judicial sleight-of-hand evinces the court's complete failure to perceive and comprehend the conceptual and practical impossibility of meaningfully applying the Rule 403 balancing test to other-misconduct evidence admitted specifically for propensity purposes.

#### V. THE INSUFFICIENCY OF ARE 403 BALANCING OF PURE PROPENSITY EVIDENCE

The Alaska Court of Appeals, following the lead of some federal circuit courts, has upheld Alaska's pure propensity provisions explicitly because of the purported ability of ARE 403 balancing to insure due process. The intermediate court also asserts that, but for the applicability of ARE 403, the pure propensity provisions would violate due process. Because meaningful balancing under ARE 403 is analytically and practically impossible when evidence is offered under Alaska's propensity provisions, these provisions violate the due process rights of the accused.<sup>171</sup>

When other-misconduct evidence is offered for a *non*-propensity purpose, ARE 403 requires the trial judge to balance the probative value of the evidence for a legitimate, limited pur-

---

170. *Id.* at 1166 (internal citations omitted).

171. In *Dowling*, three procedural safeguards were relied on to satisfy due process: balancing under Federal Rule 403, limiting prosecution evidence and argument to non-propensity purposes, and the issuance of a limiting jury instruction. In addition to neutering Rule 403 balancing, Alaska's propensity provisions totally disable the second and third due process safeguards as well. Under these provisions, other-misconduct evidence is admitted for its propensity purpose—consequently, the prosecution will not be limited in the inferences which it asks the jury to draw from the accused's prior conduct. Similarly, the trial judge cannot give a limiting instruction, because the evidence *has* been admitted for the previously impermissible propensity purpose. Simply put, there is nothing left to limit. The court of appeals predictably rested its due process finding in *Allen* on the availability of 403 balancing because the other two procedural safeguards—limiting the use of the evidence at trial and issuing a jury instruction—were conclusively foreclosed by the legislature's approval of the use of the evidence for propensity purposes.

pose against the risk that the evidence will be misused by the jury to infer guilt from propensity. This judicial task is analytically and practically sound because the legitimate probative value of the evidence is conceptually distinct from its potential prejudicial impact. The judge can adequately assess these two competing considerations, as well as the likely efficacy or inadequacy of limiting instructions, in determining whether to admit the evidence.

By contrast, meaningful balancing is impossible when the evidence is admitted for a *propensity* purpose because the judge no longer has distinct, conflicting interests to weigh. By legislative fiat, the unfairly prejudicial impact of this evidence—recognized as such for centuries—*becomes* its probative value. By redefining the previously impermissible and unfairly prejudicial propensity inference as “probative,” the Alaska legislature has thus disabled ARE 403 balancing because all of the weight has been placed on the same side of the scales.

The court of appeals is firm in its conviction that the Alaska legislature has foreclosed trial judges from treating the prejudice that arises from propensity evidence as “unfair prejudice” in the framework of ARE 403 balancing. In *Fuzzard*, the court of appeals observed that the prior acts of domestic violence “were admitted for the very purpose advanced by the legislature . . . . Although evidence of other acts of domestic violence does show propensity in a domestic violence prosecution, under Rule 404(b)(4) the evidence’s tendency in this regard *can no longer be deemed unfair prejudice*.”<sup>172</sup> Similarly, the court of appeals concluded in *Wardlow*:

When evidence of other sexual assaults and attempted sexual assaults is admissible under Rule 404(b)(3), and when the probative value of this evidence is weighed against its potential for unfair prejudice, the trial judge’s assessment of “unfair prejudice” *no longer includes the fact that the evidence tends to prove the defendant’s propensity to engage in sexual assault*.<sup>173</sup>

What the intermediate court has failed to do, however, is to explain how the empty gesture of one-side-only balancing can possibly save the legislature’s excess from condemnation under the Due Process Clause.

If trial judges are foreclosed from considering the prejudicial impact of the admission of other-misconduct evidence because the legislature declares that such evidence is no longer “unfair,” then

---

172. *Fuzzard v. State*, 13 P.3d 1163, 1167 (Alaska Ct. App. 2000) (emphasis added).

173. *Wardlow v. State*, 2 P.3d 1238, 1247 (Alaska Ct. App. 2000) (emphasis added).



the legislature has completely eviscerated the lone remaining safeguard that protects the defendant's due process rights.<sup>174</sup> For five years, the court of appeals has resolved this constitutional dilemma by speaking out of both sides of its institutional mouth—proclaiming in one breath that a trial judge is not permitted to consider the dangerous inferences that flow from propensity evidence while assessing “unfair prejudice” under ARE 403, but declaring in the next breath that ARE 403 provides sufficient procedural safeguards to protect the defendant's due process rights.

In contrast to the intermediate court's legerdemain, the Alaska Supreme Court has been clear and unequivocal in rejecting propensity inferences. In *Fields v. State*,<sup>175</sup> the court articulated a two-step framework for evaluating the admissibility of other-misconduct evidence.<sup>176</sup> The trial court must initially determine if the evidence is admissible for a permissible, *non*-propensity purpose. If, and only if, it is admissible for a *non*-propensity purpose, the evidence must then be subjected to ARE 403 balancing. The judge must exclude the evidence if its prejudicial impact substantially outweighs its probative value.<sup>177</sup>

In *Oksoktaruk v. State*,<sup>178</sup> the Alaska Supreme Court specifically addressed the admissibility of other-misconduct evidence for pure propensity purposes. The court observed that “it is a presumption in our law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist with regard to propensity. No case-by-case balancing is permitted; a prior crime may not be admitted to show propensity.”<sup>179</sup> Thus, if such evidence does not serve a permissible, *non*-propensity purpose, there is an irrebuttable presumption that the evidence is inadmissible—regardless of and because of the potential probative value of

---

174. *See supra* note 171.

175. 629 P.2d 46 (Alaska 1981).

176. The Alaska Supreme Court wrote:

It is by now firmly rooted in Alaska that evidence of other crimes or prior misconduct is not admissible to show bad character or propensity to commit crime. Such evidence may be admissible, however, where relevant to a material fact in issue, such as motive, intent, knowledge, plan or scheme, and when its probative value outweighs its prejudicial impact. Hence, we must initially determine whether [the propensity evidence] was relevant to any material issue . . . other than [the defendant's] general character or propensity to commit crimes.

*Id.* at 49 (citations omitted).

177. *Id.*

178. 611 P.2d 521 (Alaska 1980).

179. *Id.* at 524.

the evidence—in establishing the accused’s criminal propensity and/or bad character.<sup>180</sup>

The irrebuttable presumption holding in *Oksoktaruk* appears to be constitutionally derived, and if the holding in *Oksoktaruk* was of constitutional status—as its context implies—the Alaska propensity exceptions are patently unconstitutional. Immediately before the Alaska Supreme Court announced that no case-by-case balancing of pure propensity evidence is permitted, the court stated:

The danger inherent in informing a jury that a defendant has committed a prior criminal act is self-evident: it is all too likely that a determinative inference of present guilt will be drawn from the fact of the prior act, thus diluting the requirement that present guilt be proved beyond a reasonable doubt.<sup>181</sup>

#### VI. THE ALASKA DUE PROCESS CLAUSE PROHIBITS ADMISSION OF PURE PROPENSITY EVIDENCE

Alaska’s propensity provisions pose a serious threat to the federal due process rights of the criminally accused. The Alaska Supreme Court may, at its discretion, conclude that the introduction of propensity evidence pursuant to these exceptions constitutes a violation of federal due process, even though the United States Supreme Court has yet to decide this timely and important issue.

Additionally, and independently, the Alaska Supreme Court, in interpreting Article I, Section 7 of the Alaska Constitution,<sup>182</sup> is empowered to construe the protective ambit of the Alaska Due Process Clause more broadly than its federal counterpart.<sup>183</sup> Unlike the due process jurisprudence of the federal courts, whose rulings

---

180. In *State v. Lerchenstein*, Justices Rabinowitz and Burke drew upon the reasoning employed six years earlier in *Oksoktaruk* and concluded that if evidence does not satisfy the first step in the two-part analysis (identifying a non-propensity purpose), the evidence is absolutely inadmissible. 726 P.2d 546, 549 (Alaska 1986) (Rabinowitz, C.J., dissenting). Justice Rabinowitz wrote, “In my view, *Oksoktaruk* stands for the proposition that there is an irrebuttable presumption that the prejudicial effect outweighs the probative value of evidence offered to show propensity.” *Id.* Justice Rabinowitz’s conclusion derives from the clear, unqualified statement of the Alaska Supreme Court in *Oksoktaruk*, and no other member of the *Lerchenstein* Court expressed a contrary view.

181. *Oksoktaruk*, 611 P.2d at 524.

182. “No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.” ALASKA CONST. art. I, § 7.

183. *Burnor v. State*, 829 P.2d 837, 839 (Alaska Ct. App. 1992); *Maeckle v. State*, 792 P.2d 686, 688 (Alaska Ct. App. 1990).

limit governmental authority in 50 sovereign states, the due process holdings of Alaska courts are unfettered by federalism considerations.

For decades, Alaska appellate courts have consistently provided greater due process protection to the accused under the Alaska Constitution than is available under the United States Constitution, particularly when the constitutional validity of evidence or the reliability of fact-finding in court is at issue. In *Lauderdale v. State*,<sup>184</sup> the Alaska Supreme Court held that due process requires the preservation of an alleged drunken driver's breath sample for the accused's independent testing.<sup>185</sup> The court did not articulate whether this finding was compelled by federal due process or by the due process requirement of the Alaska Constitution.<sup>186</sup> Eight years after the Alaska Supreme Court's decision in *Lauderdale*, the United States Supreme Court addressed a similar issue.<sup>187</sup> In *California v. Trombetta*,<sup>188</sup> the Court appeared to repudiate the conclusion reached by the Alaska Supreme Court in *Lauderdale*, concluding that "the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial."<sup>189</sup> Six years after the decision in *Trombetta*, however, the Alaska Supreme Court reaffirmed its *Lauderdale* holding in *Gundersen v. Anchorage*<sup>190</sup> on the independent ground that Alaska's constitutional guarantee of due process mandates the

---

184. 548 P.2d 376 (Alaska 1976).

185. *Id.* at 381. The court concluded:

A denial of the right to make such analysis, that is to say, to "cross-examine" the results of the test, would be reversible error without any need for a showing of prejudice. It would be a denial of a right to a fair trial, and a fair trial is essential to affording an accused due process of law.

*Id.* (footnotes omitted).

186. Notably, the Alaska Supreme Court cited three United States Supreme Court cases for the proposition that a "fair trial" is essential to due process. *Id.* at 381 n.10 (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); and *Massey v. Moore*, 348 U.S. 105 (1954)).

187. *California v. Trombetta*, 467 U.S. 479, 481 (1984) ("[T]he question presented is whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions.").

188. *Id.* at 479.

189. *Id.* at 491.

190. 792 P.2d 673 (Alaska 1990).

preservation of breath samples, even if federal due process does not.<sup>191</sup>

The Alaska Supreme Court's invocation of state due process rights, notwithstanding contrary federal due process rulings, is not limited to the *Lauderdale-Trombetta-Gundersen* line of cases. In *Thorne v. Department of Public Safety*,<sup>192</sup> the state's highest court found that the state's failure to preserve a videotape of the defendant performing field sobriety tests violated the defendant's due process rights.<sup>193</sup> Notably, the court ruled that the state's good or bad faith in destroying potentially useful evidence is not necessarily dispositive of whether the defendant's due process rights were violated.<sup>194</sup> In reaching this conclusion, the court rejected the reasoning adopted by the United States Supreme Court in *Arizona v. Youngblood*,<sup>195</sup> which requires a showing of bad faith destruction by the state to establish a federal due process violation.<sup>196</sup>

The decisions in *Gundersen* and *Thorne* are certainly not anomalies in Alaska's due process jurisprudence; on the contrary, the Alaska Supreme Court regularly and unabashedly acknowledges its authority to interpret the Alaska due process clause more broadly than federal due process. In *Stephan v. State*,<sup>197</sup> the court offered the following observation in holding that the Alaska Due Process Clause mandates that the state tape-record all custodial interrogations in their entirety:

It must be emphasized that *our holding is based entirely upon the requirements of article I, section 7, of the Alaska Constitution*, as interpreted by this court. We accept the state's argument that custodial interrogations need not be recorded to satisfy the due process requirements of the United States Constitution, because a recording does not meet the standard of constitutional materiality recently enunciated by the United States Supreme Court in *California v. Trombetta*. In interpreting the due process clause of the Alaska Constitution, however, we "remain free to adopt more rigorous safeguards governing the admissibility of . . . evidence than those imposed by the Federal Constitution." Thus, as we have done on previous occasions, we construe Alaska's

---

191. *Id.* at 675-76.

192. 774 P.2d 1326 (Alaska 1989).

193. *Id.* at 1330.

194. *Id.*

195. 488 U.S. 51 (1988).

196. *Thorne*, 774 P.2d at 1330 n.9.

197. 711 P.2d 1156 (Alaska 1985).

constitutional provision, in this instance, as affording rights beyond those guaranteed by the United States Constitution.<sup>198</sup>

As discussed in Part V, *supra*, Alaska's highest court has repeatedly and emphatically articulated an irrebuttable presumption against the admission of pure propensity evidence. The *Oksoktaruk* court explicitly presented the prohibition as necessary to meet the requirements of due process. Additionally, in *Adkinson v. State*,<sup>199</sup> the Court recognized the fundamental nature of the prohibition against pure propensity evidence, writing:

It is beyond dispute that where evidence of other crimes or acts is relevant only to prove one's character, to show that on the occasion in question he acted in conformity with that character, *it is not admissible*. This is because of the unfair impact such evidence tends to have. It may give rise to a persuasive inference that the defendant is guilty of the crime charged because he is a bad person.<sup>200</sup>

Six years after the decision in *Adkinson*, the Alaska Supreme Court justices once again voiced their misgivings about the use of prior crimes evidence in *State v. Lerchenstein*.<sup>201</sup> In *Lerchenstein*, the state offered evidence of the defendant's prior bad acts to establish the defendant's motive (a 404(b)(1) non-propensity purpose), prompting two justices to observe:

Admission of evidence of prior bad acts is by its nature highly prejudicial and the outcome must be subject to careful scrutiny. . . . Prior bad acts evidence is always prejudicial. The risk of prejudice increases where the previous offense is similar to the offense for which the accused is presently on trial.<sup>202</sup>

Although the Alaska Supreme Court has not yet had occasion explicitly to hold that the use of pure propensity evidence is absolutely barred by Alaska's Due Process Clause, the court has given every indication that it will do so when the issue reaches it. In addition to *Adkinson*, *Fields*, *Oksoktaruk*, and *Lerchenstein*, the court expressed its views against the use of pure propensity evidence in *Keith v. State*<sup>203</sup> observing that:

---

198. *Id.* at 1160 (citations and footnotes omitted); *see also* *Atchak v. State*, 640 P.2d 135, 150-51 (Alaska 1981) (expanding the protection of the accused against vindictive prosecution pursuant to the Alaska Due Process Clause far beyond the protection provided by the federal guarantee of due process); *Shagloak v. State*, 597 P.2d 142, 144 (Alaska 1979) (same).

199. 611 P.2d 528 (Alaska 1980).

200. *Id.* at 531 (Alaska 1980) (emphasis added) (footnotes omitted).

201. 726 P.2d 546 (Alaska 1986).

202. *Id.* at 549, 551-52.

203. 612 P.2d 977 (Alaska 1980).

The general rationale of the rule against allowing character evidence to be introduced by the prosecutor is that it prevents the jury from convicting someone because he has a propensity to commit a crime or has a past history of criminal activity and not whether he has done the act of which he is accused. It has been more fully expressed as follows:

“The rule is justified primarily on the ground that the probative value of propensity evidence is outweighed by its prejudicial effect on a jury. The introduction of such evidence is said to create a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt because it is convinced that the defendant is a bad man deserving of punishment. In addition, it is argued that the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor. At the least, it is said that such evidence would be given greater probative weight than it deserves, and so lead to convictions on insufficient evidence. Furthermore, saddling a person forever with his record might tend to discourage reformation.”<sup>204</sup>

In *Keith*, the court concluded that the exclusion of pure propensity evidence had “substantial validity.”<sup>205</sup> The historical commitment of Alaska courts to prohibit the introduction of pure propensity evidence supports a construction of the Alaska Due Process Clause that condemns the admission of such evidence as a *per se* due process violation of article I, Section 7 of the Alaska Constitution.

Moreover, both of the interests that have persuaded the Alaska Supreme Court to interpret the Alaska Due Process Clause to more broadly protect the accused — constitutional validity and reliability of factfinding — support the *per se* exclusion of propensity evidence. First, the foregoing discussion shows the constitutional infirmity of pure propensity provisions, because they mandate admission of the *most* unfairly prejudicial “bad man” evidence while simultaneously disabling the procedural safeguards necessary to afford due process. Second, because of the ease with which juries will overvalue pure propensity evidence and be inflamed into deciding cases on emotion instead of the sufficiency of the evidence of the offense charged, pure propensity evidence will greatly impair accurate factfinding. Following *Lauderdale*, *Gunderson*, *Thorne*, and *Stephan*, and in light of *Fields*, *Oksotaruk*, *Keith*, and *Lerchenstein*, the Alaska Supreme Court should, and likely will, resolve the conflict between ARE 404’s propensity provisions and

---

204. *Id.* at 985 (quoting Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 436 (1964)) (footnotes omitted).

205. *Id.*

the Alaska Due Process Clause against the admission of pure propensity evidence and in favor of fundamentally fair, accurate fact-finding.

## VII. CONCLUSION

Over thirty years ago, Chief Justice Warren emphasized the genuine due process risks that inhere in the admission of other-misconduct evidence for propensity purposes. Although the United States Supreme Court has yet to address this issue directly, the Court's ruling in *Dowling v. United States* certainly dovetails with Chief Justice Warren's understanding of the interaction between propensity evidence and due process. The *Dowling* Court concluded that the admission of propensity evidence for non-propensity purposes was permissible because procedural safeguards were available to protect the defendant's due process rights. The negative implication of *Dowling*—that propensity evidence should not be admissible if procedural safeguards are unable to ensure fairness to the accused—should resonate through chambers and courtrooms.

However, such evidence is presented for a propensity purpose pursuant to Alaska's recently enacted amendments to ARE 404, and the Alaska Court of Appeals has found that the trial judge's ability to exclude the evidence through the procedural safeguard of ARE 403 balancing is constitutionally dispositive. In theory and practice, however, this is an empty protection, an illusion created by simply renaming the unfairly prejudicial impact of pure propensity evidence as legitimate probative value. Trial courts cannot meaningfully balance the probative value and the prejudicial effect of pure propensity evidence, because both interests have now been placed on the same side of the balance, by legislative fiat. There is nothing left to balance. Given this simple reality, the court of appeals' reliance upon ARE 403 as a constitutional "safeguard" is alarming. The defendant's constitutional rights to due process, guaranteed by the United States Constitution and the Alaska Constitution, can be preserved only if Alaska's propensity provisions are deemed unconstitutional.

The Supreme Court of Alaska is not likely to hesitate in declaring that the pure propensity provisions of ARE 404 are unconstitutional. The practical effect of such a decision is easy to predict. Knowing that evidence of prior child abuse, sexual assault, violent character, and domestic violence will no longer be admissible for propensity purposes, prosecutors will petition courts to admit such evidence for limited, permissible *non*-propensity purposes, under ARE 404(b)(1). Some of this evidence will be admitted at trial,

and some will fail a *meaningful* ARE 403 balance, and be excluded. But even when the evidence is admitted at trial, it will be subject to two additional safeguards—the limited use of the evidence and the limiting jury instructions.

By resurrecting the three due process safeguards, which the legislature effectively disabled when it enacted the propensity provisions, the Alaska Supreme Court can restore the constitutional balance that has controlled the use of other-misconduct evidence throughout our nation's history, a balance originating in the English common law. It is a balance vital in a pluralistic society, in which the case, not the character of the accused, is tried.