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NOTE

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I. INTRODUCTION

The American legal system has a long-standing ban against using character evidence to show a party's propensity to act in conformity with that character. This rule has been especially stringent in the criminal system, where the notion is that when a criminal defendant is tried for a crime, that defendant should face trial only for the crimes charged. However, certain crimes, like sex crimes, can be incredibly difficult to prosecute and, accordingly, victim advocates have pushed for changes to these rules. The Federal Rules of Evidence ("FRE") and several states have enacted rules that allow evidence of prior bad acts to be used as propensity evidence in prosecutions of sex crimes.[1] In 2014, Missouri voters enacted a similar rule for prosecutions of child sex abuse cases by amending the Missouri Constitution.[2]

These changes to the total bar on propensity evidence have received immense push back. Critics argue that these rules violate the rights normally given to criminal defendants and stress the general unreliability of propensity evidence. Supporters of these rules, on the other hand, argue that because sex crimes are so difficult to prosecute – often due to a lack of eyewitnesses and physical evidence – this evidence is crucial in making sure guilty offenders are properly punished. Supporters and critics disagree about whether sex offenders

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1. *See* FED. R. EVID. 413; ALASKA R. EVID. 404(b)(2), (3) (allowing propensity evidence for prosecutions of crimes involving physical or sexual abuse of minors and sexual assault in any degree if the defendant relies on a defense of consent); ARIZ. R. EVID. 404(c) (allowing propensity evidence in civil and criminal cases involving sexual offenses and requiring the court to make specific findings that the "evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice); CAL. EVID. CODE § 1108; FLA. STAT. ANN. § 90.404(2)(b), (c) (West 2014); GA. CODE ANN. § 24-4-413 (West 2013); 725 ILL. COMP. STAT. ANN. 5/115–7.3 (West 2014); KAN. STAT. ANN. § 60-455(d) (West 2015); LA. CODE EVID. ANN. art. 412.2 (West 2019); NEB. REV. STAT. ANN. § 27-414 (2010); TEX. CODE CRIM. PROC. ANN. § 38.37 (West 2013); WIS. STAT. ANN. § 904.04(2)(b)(2) (West 2014).

2. MO. CONST. art. I, § 18(C).

differ from other criminal offenders in their likelihood to commit the same crime in the future. Now that the amendment has had a few years to affect cases and be heard by Missouri appellate courts and the Missouri Supreme Court, a critical look at the application of this rule in is ripe.

In Part I, this Note discusses the Missouri rule which allows the admission of propensity evidence in prosecutions of child sex abuse, as codified in Article I, Section 18(c) of the Missouri Constitution. Part II of this Note discusses the state of the law leading to the adoption of FRE 413, 414, and 415. Part II then analyzes how these rules laid the framework for the change reflected in the Missouri Constitution. Part III of this Note highlights case law decided after the Missouri amendment and details how the Missouri Supreme Court's analysis in child sex abuse prosecutions has changed in light of the admissibility of propensity evidence in these cases. Part III also discusses the discretion given to courts in admitting evidence of prior similar crimes. Part IV outlines the arguments for and against this type of evidence. This note concludes by suggesting Missouri courts employ a stronger balancing test to admit propensity evidence in child sex abuse cases as a way to navigate these difficult cases.

II. LEGAL BACKGROUND

The bar against the admission of character, or "propensity," evidence has a long tradition in common law.[3] In criminal trials, the main concern with allowing a jury to hear evidence of a defendant's prior crimes or other acts is that the introduction of such crimes or acts will be unfairly prejudicial to the defendant, in that a jury might convict a defendant based on those prior acts and not the charged crime.[4] The United States Supreme Court has explained the reasoning behind this rule is not "because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[5]

One of the earliest cases to articulate this justification was *People v. Zackowitz*,[6] where the Court of Appeals of New York vacated a conviction because character evidence was introduced at trial.[7] In that case, there was no question whether the defendant shot and killed the victim; the issue was instead

3. Michelson v. United States, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.").

4. *Id.* at 476.

5. *Id.* at 475–76 ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.").

6. 254 N.Y. 192 (Ct. App. N.Y. 1930).

7. *Id.* at 200.

what degree of murder fit the facts.[8] This hinged on whether the murder was premeditated.[9] At trial, the government presented evidence that Zackowitz kept at least three guns in his apartment, which, according to Chief Judge Benjamin Cardozo, the government used to show Zackowitz's "vicious and dangerous propensities."[10] On appeal, the court concluded that the government presented Zackowitz as a dangerous person – as seen by his gun collection – and because of this, he was more likely to have committed premeditated murder.[11] In fact, at trial the jury found Zackowitz guilty of first-degree murder.[12] The Court of Appeals of New York vacated Zackowitz's conviction because the evidence of Zackowitz's gun collection clearly violated the common law rule against propensity evidence.[13] Specifically, Cardozo explained that in allowing the evidence of Zackowitz's gun collection, he was put on trial for bad conduct that was "more general and sweeping" than the offense charged.[14]

The FRE were adopted in 1975, and Rule 404 codified the common law rule announced in *Zackowitz* barring propensity evidence.[15] Rule 404 states that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[16] At least forty states have since followed suit by codifying rules against propensity evidence.[17] While rules against propensity evidence had a strong common law foundation and were generally well-accepted, critics soon pointed to the roadblocks these rules presented in prosecutions of rape and sexual assault.

A. Adoption and Controversy of Federal Rules of Evidence 413, 414, and 415

In 1994, Congress created FRE 413, 414, and 415 with the passage of the Violent Crime Control and Law Enforcement Act.[18] These rules codified an explicit exception to the prohibition of character evidence in cases of sexual

8. *Id.* at 193.
9. *Id.* at 194–95.
10. *Id.* at 196.
11. *Id.*
12. *Id.* at 193.
13. *Id.* at 197 (citing WIGMORE ON EVIDENCE, Vol. 1 §§ 55, 192 (1915)).
14. People v. Zackowitz, 254 N.Y. 192, 199 (Ct. App. N.Y. 1930) ("[b]rought to answer a specific charge, and to defend himself against it, he was placed in a position where he had to defend himself against another, more general and sweeping").
15. FED. R. EVID. 404.
16. *Id.*
17. Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 801 (2013).
18. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796, 1918–19 (1994).

abuse by allowing courts to admit evidence of prior similar crimes or conduct against a defendant accused of rape, sexual assault, or child molestation. Specifically, Rule 413 states "[i]n a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other sexual assault."[19] Rule 413 further provides "[t]he evidence may be considered on any matter to which it is relevant."[20] Rule 413 sets out a notice condition as well, stating that a prosecutor must disclose the intent to offer this evidence to a criminal defendant at least 15 days before trial.[21] Rule 414 creates an exception to propensity evidence for criminal cases of child molestation, stating that in those cases "the court may admit evidence that the defendant committed any other child molestation."[22] Rule 414 similarly states that the "evidence may be considered on any matter which it is relevant" and contains the same notice requirement as Rule 413.[23] Rule 415 makes Rules 413 and 414 applicable in any "civil case involving a claim for relief based on a party's alleged sexual assault or child molestation."[24] After the adoption of Rules 413, 414, and 415 into the FRE, states across the country followed suit.[25]

B. Legislative History of Sex Crimes Exception to Character Evidence in Missouri

The Missouri Legislature responded to the addition of FRE 413, 414, and 415 with legislation that closely mirrored the federal statute.[26] The legislature decided, however, to limit the exception to the bar on propensity evidence to cases of child molestation.[27] In 1994, the Missouri Legislature enacted Section 566.025 of the Missouri Revised Statutes ("1994 Statute") which provided that, in prosecutions for sex crimes committed against victims under the age of four-

19. FED. R. EVID. 413.
20. *Id.*
21. *Id.*
22. FED. R. EVID. 414.
23. *Id.*
24. FED. R. EVID. 415.
25. Thirteen other states and the military have enacted rules allowing introduction of propensity evidence in sexual assault cases; Maryland and Nevada have case law that allows introduction of this evidence. BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE §§ 33:1, 34:1 (15th ed. 2018). Sixteen other states and the military have enacted rules allowing introduction of propensity evidence in child molestation cases; Maryland and Nevada again have case law that allows introduction of this evidence. *Id.*; *see, e.g.*, ARIZ. REV. STAT. § 13–1420 (allowing introduction of prior criminal acts that constitute a sexual offense if a defendant is charged with a sexual offense); COLO. REV. STAT. § 16–10–301; ILL. R. EVID. 413; *see also* CAL. EVID. CODE § 1108; TEX. CRIM. PROC. CODE ANN. § 38.37; VA. SUP. CT. R. 2:413.
26. *See* MO. REV. STAT. § 566.025 (1994), *invalidated by* State v. Burns, 978 S.W.2d 759, 760 (Mo. 1998) (en banc).
27. *Id.*

teen, "evidence of charged or uncharged crimes involving victims under fourteen years of age *shall be* admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged."[28] Under the 1994 Statute, such evidence was admissible as long as the prior acts occurred within ten years of the current claims.[29]

In *State v. Burns*,[30] the Missouri Supreme Court held that the 1994 Statute violated the Missouri Constitution because it violated criminal defendants' right to be tried "only on the offense charged."[31] Specifically, the court held the statute violated Article I, Section 17, which states "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information," and Article I, Section 18(a), which states that in "criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation."[32] A jury convicted defendant Burns of first-degree statutory sodomy and sentenced him to fifteen years in prison.[33] On appeal to the Missouri Supreme Court, Burns challenged the constitutionality of the 1994 Statute because, under the statute, the trial court allowed the government to admit testimony from two witnesses about uncharged prior sexual abuse committed by Burns.[34]

The Missouri Supreme Court reversed Burns' conviction and remanded for a new trial, holding that the evidence permitted at trial under the 1994 Statute violated Burns' rights under the Missouri Constitution.[35] Specifically, the court stated that admitting into evidence uncharged crimes of the defendant functioned as trying the defendant for crimes not indicted in the current action, which directly contradicted Article I, Section 17 of the Missouri Constitution.[36] The court discussed the longstanding rule against the admissibility of propensity evidence, citing its own precedent that "showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence, because such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.'"[37]

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28. State v. Burns, 978 S.W.2d 759, 760 (Mo. 1998) (en banc) (quoting MO. REV. STAT. § 566.025 (2018)) (emphasis added).

29. *Id.*

30. *Id.*

31. *Id.* at 760.

32. *Id.*; MO. CONST. art. I, § § 17, 18(a). While these two sections of the Missouri Constitution do not explicitly prohibit character evidence, Missouri courts have interpreted these sections to do just that. *See* State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993) (en banc); State v. Naylor, 510 S.W.3d 855, 862 (Mo. 2017) (en banc); State v. Matthews, 552 S.W.3d 674 (Mo. Ct. App. 2018).

33. *Burns*, 978 S.W.2d at 759.

34. *Id.* at 760.

35. *Id.* at 759–62.

36. *Id.* at 760–61.

37. *Id.* at 761 (quoting State v. Bernard, 849 S.W.2d 10, 16 (Mo. 1993) (en banc)).

After the court invalidated the 1994 Statute as unconstitutional, the Missouri Legislature passed an updated version of the statute that added a balancing test requirement in 2000 ("2000 Statute").[38] The 2000 Statute stated that admission of evidence of prior similar crimes "shall be admissible for the purpose of showing the propensity of the defendant to commit the crime . . . with which he or she is charged *unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.*"[39] While the 2000 Statute did not change the "shall be admissible" language, it did subject propensity evidence in these cases to a test balancing the probative value of the evidence and the likeliness of causing unfair prejudice.[40]

The Missouri Supreme Court again struck down the 2000 Statute in its 2007 holding in *State v. Ellison*.[41] In that case, a jury convicted defendant Ellison of raping a minor multiple times.[42] At trial, the government presented evidence, pursuant to the 2000 Statute, of Ellison's prior conviction for sexual abuse in the first-degree for inflicting sexual contact resulting in serious physical injury on a thirteen-year-old victim.[43] Over Ellison's objection, the trial court admitted this evidence, finding "the evidence of a prior conviction [was] more probative than prejudicial."[44] The jury was specifically instructed that it could use the evidence of Ellison's prior convictions to consider his propensity to commit the crime charged.[45]

On appeal to the Missouri Supreme Court, Ellison challenged the validity of the 2000 Statute under the Missouri Constitution.[46] The court again cited to Article I, Sections 17 and 18(a) of the Missouri Constitution in its holding that the 2000 Statute was unconstitutional.[47] The court reiterated the common law understanding that admission of character evidence to prove propensity of a criminal defendant to act in accordance with that character trait directly contradicts the rights afforded to criminal defendants under the Missouri Constitution.[48] While the court acknowledged that evidence of prior acts may be admissible on grounds other than propensity – proving motive, intent, absence of

38. State v. Ellison, 239 S.W.3d 603, 606 (Mo. 2017) (en banc).

39. MO. REV. STAT. § 566.025 (2000), *invalidated by* State v. Ellison, 239 S.W.3d 603 (Mo. 2007) (en banc) (emphasis added).

40. *Id.*

41. 239 S.W.3d at 607–08.

42. *Id.* at 604–05.

43. *Id.* at 605.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 606.

48. *Id.* ("Evidence of prior criminal acts is *never* admissible for the purpose of demonstrating the defendant's propensity to commit the crime with which he is presently charged . . . There are no exceptions to this rule.") (internal citations omitted).

mistake, lack of accident, or common scheme or plan – it held firm that character evidence can never be used to show the propensity of a criminal defendant to act in accordance with that character trait.[49]

III. RECENT DEVELOPMENTS

In the years after the Missouri Supreme Court decided *Ellison*, debate continued between those concerned with the constitutional rights of criminal defendants[50] and prosecutors who found it nearly impossible to get convictions for child sex abuse.[51] An anonymous Jefferson County mother got involved in this debate after discovering her six-year-old daughter's father had been sexually molesting the child.[52] After investigations by Children's Division, sheriff's detectives, and child therapists confirmed the likelihood of the molestation and revealed that the father had been previously accused of molesting another child, the mother again received unfortunate news: the prosecutor would not file charges against the father because of the lack of eye-witnesses and the disjointed nature of the child's retelling of the molestation.[53]

The mother petitioned local politicians and lawmakers, and her story inspired Missouri Representative John McCaherty of High Ridge to file legislation to change the Missouri Constitution in an effort to make cases like her daughter's easier to prosecute.[54] The proposed amendment would create a state constitutional exception to the bar on the admissibility of propensity evidence by allowing evidence of prior convictions and allegations of child sexual abuse by a criminal defendant.[55] The proposed amendment effectively circumvented the Missouri Supreme Court's numerous holdings that the admission of propensity evidence in child sex abuse prosecutions was unconstitutional.[56] The amendment passed easily through the Missouri General Assembly in the spring of 2014 and was added to the general election ballot.[57] The measure was presented to voters as a necessary step in prosecuting and convicting dangerous

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49. *Id.* at 607.

50. *See* Eli Yokley, *Amendment 2 Would Change Type of Evidence Allowed in Child Sex Crimes*, JOPLIN GLOBE (Oct. 25, 2014) https://www.joplinglobe.com/news/amendment-would-change-type-of-evidence-allowed-in-child-sex/article_ed4db77a-5cb9-11ef-b39d-fb415ff0c428.html [perma.cc/C5QC-E2XN].

51. *See* Nancy Cambria, *As Sex Abuse Case Goes Unprosecuted, Some Want Missouri Law Changed*, ST. LOUIS POST-DISPATCH (March 18, 2013) https://www.stltoday.com/news/local/crime-and-courts/as-sex-abuse-case-goesunprosecuted-some-want-missouri-law/article_c7314a3b-b383-5b95-9bbf-9f2a58b0ec8c.html [perma.cc/3WCB-EJ26].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

child sex offenders.[58] On November 4, 2014, Missouri voters approved the amendment ("2014 Amendment") and Article I, Section 18(c) was adopted into the Missouri Constitution.[59] The 2014 Amendment states:

> Notwithstanding the provisions of sections 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.[60]

In *State v. Prince*, one of the first cases heard by the Missouri Supreme Court after the 2014 Amendment passed, the court grappled with the balancing test set out in the amendment.[61] In that case, a jury convicted defendant Jordan Prince of first-degree murder, felony abuse of a child, and forcible sodomy after Prince sexually abused and strangled his girlfriend's infant daughter to death in 2012.[62] At trial, the government presented evidence of Prince's juvenile record, which included allegations of "lewd and lascivious conduct with a minor."[63]

Prince claimed that because his prior crime involved his six-year-old niece and the present crime involved an infant who was not biologically related to him, these crimes were too dissimilar for the prior crime to be logically relevant to the current action.[64] The court, noting the low standard for finding evidence logically relevant as opposed to legally relevant,[65] dismissed this argument, finding that the sexual nature of the crimes involving victims with a

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58. *See* Editorial, *More Harmful Initiatives Than Good Ones on Missouri's Nov. 4 Ballot*, K.C. STAR (Oct. 3, 2014), https://www.kansascity.com/opinion/editorials/article2500526.html ("Constitutional Amendment 2 is a reasonable and necessary measure to help sexually abused children and put dangerous offenders behind bars").

59. H. J. Res. 16, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013); MO. CONST. art. I, § 18(c).

60. MO. CONST. art. I, § 18(c).

61. 534 S.W.3d 813, 819 (Mo. 2017) (en banc); *see also*, MO. CONST. art. 1, § 18(c).

62. *Prince*, 534 S.W.3d at 816–17.

63. *Id.* at 817.

64. *Id.* at 819.

65. Evidence must be both logically and legally relevant to be admissible. To be logically relevant, evidence must "make the existence of a material fact more or less probable." State v. Taylor, 466 S.W.3d 521, 528 (Mo. 2015) (en banc). To be legally relevant, the "probative value" of the evidence must outweigh the risk of "unfair prej-

"close family-like" relationship to Prince was enough to make the prior crime logically relevant.[66] Prince finally argued that because he committed the prior crime when he was a juvenile, it did not fall within the definition of a "prior criminal act" because it was merely a "delinquent act."[67] The court rejected this argument as well, stating that to fall within the exception to the character evidence rule laid out in the 2014 Amendment, the court looks to "Prince's actual conduct, rather than the classification of his conduct," to determine admissibility.[68]

The court held that the trial court did not abuse its discretion in allowing this evidence in simply because it was classified as a "delinquent act."[69] The language of the 2014 Amendment states that relevant prior criminal acts, "whether charged or uncharged" are admissible as propensity evidence.[70] The mere fact that the evidence admitted resulted from a juvenile conviction did not change its admissibility under the 2014 Amendment, and consequently, the court found no error in the trial court admitting it.[71]

Prince further challenged the admission of his juvenile record not on propensity grounds but rather by arguing the record was not "logically relevant to [the] case."[72] Specifically, Prince argued the prior conduct was "too remote in time, based on a dissimilar act, and technically not a crime" because the charges had been brought in juvenile court.[73] The court rejected the argument that the juvenile record was too remote in time by explaining that this was an issue pertaining to the weight of the evidence rather than its admissibility.[74] Further, the court explained that the test for determining if the probative value of the evidence outweighs the risk of unfair prejudice was "relaxed/diminished" by the adoption of the 2014 Amendment because the Amendment stated that the court "*may* exclude" evidence in this case.[75] The court also noted that the argument was not necessarily appropriate because this balancing test exists to determine the legal relevance of evidence, while Prince argued here that the evidence was not *logically* relevant.[76]

In *State v. Rucker*, the Eastern District of Missouri also dealt with this balancing test.[77] In that case, a jury convicted defendant Tajeaon Rucker of

udice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.*; *see also* Johnson v. State, 406 S.W.3d 892, 902 (Mo. 2013) (en banc).

66. *Prince*, 534 S.W.3d at 819.
67. *Id.*
68. *Id.*
69. *Id.*
70. MO. CONST. art. I, § 18(c).
71. *Prince*, 534 S.W.3d at 819.
72. *Id.* at 818.
73. *Id.*
74. *Id.* at 819.
75. *Id.* (emphasis added).
76. *Id.*
77. State v. Rucker, 512 S.W.3d 63 (Mo. Ct. App. 2017).

first-degree child molestation and third-degree assault for molesting a ten-year-old victim.[78] At trial, the prosecution admitted evidence that the defendant had, years before, allegedly molested the same victim.[79] Additionally, the victim's sister, who was an eyewitness to both instances of abuse, testified and corroborated the victim's story.[80] On appeal to the Court of Appeals for the Eastern District of Missouri, defendant Rucker made three arguments as to why the court should not have admitted the prior instance of alleged abuse into evidence: (1) the alleged abuse occurred before the enactment of the 2014 Amendment, so it should not apply in this case; (2) at the time of the appeal, there were "no applicable case law exceptions to the prohibition of prior bad acts evidence," and (3) the prejudicial effect of the evidence of the alleged prior abuse substantially outweighed the probative value of the evidence.[81]

The court rejected all three of Rucker's arguments, first finding that Article I, Section 18(c) applied in this case because of the recent rule announced by the Missouri Supreme Court in *State ex rel. Tipler v. Gardner*, which held that Article I, Section 18(c) applied to all trials "occurring on or after" the date the amendment was enacted, regardless of when the alleged abuse occurred.[82] The court further found that the trial court did not "plainly err" in admitting the evidence of the alleged prior abuse.[83] Because the evidence was relevant in corroborating the victim's testimony, the "considerable amount of probative value" it had was not substantially outweighed by its prejudicial effect.[84] However, after looking to the language of the amendment, specifically that "the court *may* exclude relevant evidence of prior criminal acts if the probative value of the evidence is *substantially* outweighed by the danger of unfair prejudice," the court determined that "the General Assembly's use of the word 'may' indicates that the court has the discretion to exclude such evidence in these circumstances, but it is not obligated to do so."[85] Because of this, the court determined that even if the probative value of the evidence of the prior abuse was "substantially outweighed by the danger of unfair prejudice," the

78. *Id.* at 69.

79. *Id.* at 65.

80. *Id.*

81. *Id.* at 67. Because defendant Rucker's counsel at trial failed to make a timely objection to the evidence of the alleged prior abuse, the issue was not preserved on appeal, so the standard of review was for plain error. *Id.* at 65–66. The court used a two-prong test to determine if there was plain error: (1) whether the error was "evident, obvious, and clear," and (2) whether the error "resulted in a manifest injustice or miscarriage of justice." *Id.* at 66 (quoting State v. Ray, 407 S.W.3d 162, 170 (Mo. Ct. App. 2013)).

82. *Id.* at 68 (citing State ex rel. Tipler v. Gardner, 506 S.W.3d 922, 924 (Mo. 2017) (en banc)).

83. *Id.* at 70.

84. *Id.*

85. *Id.* at 69 (quoting MO. CONST. art. I, § 18(c)).

trial court still had the discretion to admit the evidence.[86] Accordingly, the court upheld defendant Rucker's conviction.[87]

A little over a year later, in *State v. Williams*,[88] the Missouri Supreme Court abrogated the Eastern District's decision in *Rucker*, holding that propensity evidence must be excluded when its probative value outweighs the risk of unfair prejudice.[89] In *Williams*, a jury convicted defendant Travis Williams of three counts of first-degree statutory sodomy for repeated sexual abuse committed against the daughter of Williams' girlfriend over a period of about four years.[90] At trial, the circuit court allowed the government to read a stipulation to the jury that Williams had pleaded guilty to a charge of first-degree statutory sodomy in 1996.[91] Williams agreed to allow the stipulation to be read to the jury but preserved his objection for appeal.[92] The jury convicted Williams and sentenced him to three life sentences without the possibility of parole.[93]

On appeal, Williams argued that on its face, the 2014 Amendment violated his due process rights.[94] Williams also challenged the circuit court's decision to admit the evidence of his prior conviction without first expressly subjecting the evidence to a balancing test to determine if its probative value outweighed the risk of unfair prejudice, and further argued that the risk of unfair prejudice did, in fact, outweigh the probative value of the prior conviction.[95]

Williams specifically claimed that the 2014 Amendment violated his due process rights by allowing propensity evidence in criminal prosecutions.[96] The court noted that Williams faced a high burden in order to prevail on this claim; he would have had to show that the 2014 Amendment "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[97] The court agreed that the prohibition on propensity evidence in criminal prosecutions was "rooted" in tradition, but it also acknowledged that the 2014 Amendment presented a narrow exception to this tradition.[98] This type of exception to the propensity rule for admitting evidence of a defendant's prior sexual misconduct had almost become a tradition itself because a majority of jurisdictions either have statutes or rules that allow admission of this kind of evidence.[99] In rejecting the defendant's argument, the

86. *Id.*
87. *Id.* at 70.
88. 548 S.W.3d 275 (Mo. 2018) (en banc), *cert. denied*, 139 S. Ct. 606 (2018).
89. *Id.* at 285 n.11.
90. *Id.* at 279.
91. *Id.*
92. *Id.* at 279 n.4.
93. *Id.* at 279.
94. *Id.* at 280.
95. *Id.*
96. *Id.*
97. *Id.* at 280–81 (quoting Montana v. Egelhoff, 518 U.S. 37, 43 (1996)).
98. *Id.* at 281.
99. *Id.* at 282–83.

court also laid out the history of challenges to FRE 414, after which the 2014 Amendment was closely modeled, and a number of cases where no due process violations were found.[100]

The court rejected Williams' claims that the circuit court was required to make an express finding that the probative value of Williams' prior conviction outweighed the danger of unfair prejudice before admitting the evidence.[101] While the court agreed this balancing test was crucial when deciding whether to admit prior crimes, it held that the 2014 Amendment did not require an express finding by the court.[102] Further, the court found support in the record that the circuit court did carefully analyze whether the probative value of the conviction was outweighed by its risk of unfair prejudice.[103] However, the court rejected the holding in *Rucker* that the trial judge had the discretion to admit the evidence even if its probative value was outweighed by the danger of unfair prejudice.[104] Even though the 2014 Amendment states that a trial court "may" exclude evidence where its probative value is outweighed by the risk of unfair prejudice, the court here looked to the practice of federal courts under FRE 403, which similarly states that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."[105] Because federal courts have understood this rule to mean that evidence "must pass the legal relevance test" to be admitted, the Missouri Supreme Court adopted this rule as well. Specifically, if a trial court finds that the probative value of the propensity evidence – admissible under the 2014 Amendment – is substantially outweighed by the risk of unfair prejudice, the court is required to exclude this evidence.[106]

The court then rejected Williams' claim that the probative value of the evidence of his prior conviction was outweighed by the risk of unfair prejudice, finding that the state had an "appreciable need" to admit the evidence.[107] The only eye witness in Williams' case was the victim, a nine-year-old child, and because of the difficulty that naturally arises with child witnesses – especially those who have experienced trauma[108] – the court found that the government

100. *Id.* at 284–85 (citing United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001); United States v. Schaffer, 851 F.3d 166, 180 (2d Cir. 2017); United States v. Mound, 149 F.3d 799, 285 (8th Cir. 1998)).

101. *Id.* at 286.

102. *Id.* at 287.

103. *Id.*

104. *Id.* at 285 n.11.

105. *Id.* (citing FED. R. EVID. 403).

106. *Id.*

107. *Id.* at 290.

108. Claudia L. Marchese, Note, *Child Victims of Sexual Abuse: Balancing a Child's Trauma Against the Defendant's Confrontation Rights – Coy v. Iowa*, 6 J. CONTEMP. HEALTH L. & POL'Y 411, 411–12 (1990).

faced "unique evidentiary challenges."[109] Because of the lack of other eyewitnesses, the probative value of Williams' prior conviction was very high.[110] The court again clarified that the probative value still must not be substantially outweighed by the danger of unfair prejudice to be admissible.[111]

Accordingly, the court analyzed whether the evidence of Williams' prior conviction presented a risk of unfair prejudice that outweighed its probative value.[112] It laid out the typical reasons why propensity evidence is usually kept out, specifically fear that the jury will punish the defendant for the past crime instead of the one currently charged or that the jury will punish the defendant just for being a bad person.[113] The court, however, found that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice in Williams' case for a number of reasons.[114] First, the prosecution presented the evidence to the jury in the form of a "dispassionate" stipulation as opposed to allowing the previous victim to testify, which would have been much more "jarring" for the jury to hear.[115] Second, the facts and evidence of the prior conviction were not nearly as disturbing as all the evidence the jury heard in Williams' current case, so the risk of unfair prejudice was not very high.[116] Finally, when compared to the time spent explaining the evidence for the current charge, the prosecution spent very little time discussing the prior conviction.[117] For these reasons, the court held that the circuit court did not abuse its discretion in admitting the evidence of Williams' prior conviction.[118]

In light of these judgments from the Missouri Supreme Court, appellate courts across the state have continued to hear challenges to Article I, Section 18(c), and in virtually almost every case, appellate courts have upheld the use of propensity evidence.[119]

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109. *Williams*, 548 S.W.3d at 290.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 292.
115. *Id.* at 291.
116. *Id.* at 290.
117. *Id.* at 291.
118. *Id.* at 292.
119. State v. Lutes, 557 S.W.3d 384, 391 (Mo. Ct. App. 2018); State v. Tucker, 564 S.W.3d 376, 379 (Mo. Ct. App. 2018); *Williams*, 548 S.W.3d at 275; State v. Peirano, 540 S.W.3d 523, 527–28 (Mo. Ct. App. 2018); State v. Prince, 534 S.W.3d 813, 815 (Mo. 2017) (en banc); State v. Edwards, 537 S.W.3d 848, 855 (Mo. Ct. App. 2017); State v. Jones, 546 S.W.3d 1, 6 (Mo. Ct. App. 2017); State v. Matson, 526 S.W.3d 156, 158 (Mo. Ct. App. 2017); State v. Hood, 521 S.W.3d 680, 685 (Mo. Ct. App. 2017); State v. Rucker, 512 S.W.3d 63, 64 (Mo. Ct. App. 2017); *but see* State v. Salmon, 563 S.W.3d 725, 733 n. 1 (Mo. Ct. App. 2018) (excluding evidence of prior child abuse because it was not sexual in nature, and therefore did not fall within Article I, Section 18(c) of the Missouri Constitution); State v. McWilliams, 564 S.W.3d 618, 623 (Mo. Ct. App. 2018) (prosecution consented to exclude prior evidence of child sexual abuse because the State failed to give proper notice to the defendant).

IV. DISCUSSION

On the surface, the debate over propensity evidence in sex crime prosecutions pits the interests of victims and criminal defendants against each other, and today's debate echoes the discussion surrounding the introduction of FRE 413, 414, and 415 in the 1990s. This distinction is not so much a dichotomy – since it is entirely possible to advocate for victims and support criminal defendants' rights – but both sides of these trials face massive hurdles depending on the admission or exclusion of this evidence.

This Part will first discuss the unique difficulties of prosecuting sex crimes against children and the use of "me too" evidence as a remedy. This Part then analyzes defendant's rights and disagreement about whether there is value to propensity evidence. Finally, this Part suggests that Missouri courts should use a stronger balancing test when dealing with these difficult cases.

A. He Said, She Said: The Challenges of Prosecuting Sex Crimes

Rape and sexual assault are some of the hardest crimes to prosecute, not only because victims are hesitant to come forward, but, when they do, because of the problems that arise at trial: the intimate settings in which these crimes typically occur leave no eyewitnesses, lack of physical evidence causes "he said, she said" testimony, and a deeply rooted culture of victim-blaming manifests in juror bias against victims.[120] While the general public tends to view child sexual abuse as one of the most heinous crimes, child sex offenders are especially difficult to prosecute because of the complexities that arise when a traumatized child is the only witness to the abuse other than the perpetrator.[121] Because of this, proponents of propensity evidence argue that rules like FRE 413, 414, 415, and Article I, Section 18(c) of the Missouri Constitution are necessary to bring repeat sex offenders to justice. These rules essentially allow "me too" evidence, which can significantly bolster a victim's claims and alleviate some of the challenges associated with rape and sexual assault proceedings.[122]

120. Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 672–73 (1998); Alletta Brenner, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J. L. & GENDER 503, 508 (2013).

121. *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHICAGO-KENT L. REV. 15, 20 (1994).

122. Yixuan Zhang, *Using the Power of "Me Too" Evidence in Criminal Sexual Assault Trials*, 56 AM. CRIM. L. REV. ONLINE 31, 34 (2019).

1. Difficulty with Child Witnesses and "Me Too" Evidence as a Remedy

While "me too" evidence got its name long before the #MeToo movement began in 2017, the basic concept is the same.[123] "Me too" evidence is testimony or other evidence that a particular defendant has committed a similar wrong or crime against another person, even though that victim is not a party to the case.[124] Plaintiffs use this as circumstantial evidence to bolster their claims that the alleged wrong or crime at issue was committed by the defendant.[125] "Me too" evidence is invoked today mostly in the context of employment discrimination claims,[126] and the usefulness of "me too" evidence has been cited in support of allowing propensity evidence of sex abusers to be admissible in criminal prosecutions.[127]

Since the 1980s, courtrooms have adjusted traditional rules of criminal proceedings to create better accommodations to support child witnesses.[128] These changes were made in response to studies that showed the psychological consequences of child abuse as well as the added stress for children being present in court and facing their abusers.[129] If a child is too frightened to testify accurately or even at all – which correlates both with the age of the child and the severity of the abuse experienced – it may mean that a sex abuser could walk free.[130] One way courts have tried to mitigate this stress on children is to allow the child to testify in another room, away from the defendant, or to provide a screen so that the child cannot see the defendant while testifying.[131] These types of accommodations have been challenged as Confrontation Clause violations, but the United States Supreme Court has permitted these accommodations when judges find appropriate facts justifying their use.[132]

Congress has passed legislation allowing live testimony by children via television in proceedings involving allegations of child abuse, depending on

123. *Id.* at 31; *see also* Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1286 (11th Cir. 2008).

124. *See* Cox v. Kan. City Chiefs Football Club, Inc., 473 S.W.3d 107, 118 (Mo. 2015) (en banc).

125. *Id.*

126. *See, e.g.*, *id.;* Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008), *as corrected* (Jan. 21, 2009); *Goldsmith*, 513 F.3d at 1286.

127. Zhang, *supra* note 122, at 34.

128. Robert H. Pantell, *The Child Witness in the Courtroom*, 139 AM. ACAD. OF PEDIATRICS 3 (2017), https://pediatrics.aappublications.org/content/139/3/e20164008 [perma.cc/U7eJ-HZ5J].

129. *Id.*

130. *Id.* at 4.

131. *Id.* at 2.

132. Maryland v. Craig, 497 U.S. 836, 851 (1990) (holding that allowing a child witness to testify via closed circuit television to allow the child to be in a separate room from defendant did not violate defendant's Sixth Amendment right to confront witnesses).

why the child is unable to testify.[133] While this legislation signified a big step in the right direction for mitigating child witnesses' stress and trauma, most child abuse cases are heard in state courts, which are inconsistent in the accommodations they are willing to provide to child victim witnesses.[134]

In light of these difficulties, "me too" evidence could be particularly useful in prosecutions of child abuse. For this reason, adoption of rules like Article I, Section 18(c) of the Missouri Constitution are beneficial for victims and prosecutors because they help supplement or bolster the testimony of victims. Nonetheless, rules like these continue to face scrutiny for violating long-standing rules against propensity evidence and the constitutional right of defendants to be tried only for the charged crimes.

B. The (Un)Reliability of Propensity Evidence and Unfair Prejudice

The long-standing rules against propensity evidence have a lengthy history in our criminal law jurisprudence.[135] For this reason, rules allowing propensity evidence of child sex offenders face sharp criticism. Debate over this issue evokes another question: is sex abuse – or specifically, child sex abuse – a different kind of crime such that propensity evidence is actually reliable? General lay opinion might tend to answer this in the affirmative, and this could explain why Missouri voters enacted Article I, Section 18(c) in 2014.[136] However, this consensus is not as pronounced in the legal and medical communities.[137] As the understanding and study of pedophilia has developed over time, while a majority still consider it a disorder, a small minority of mental health professionals have gone as far as to categorize pedophilia as a sexual orientation.[138] However, this remains a point of strong contention among physicians.

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133. 18 U.S.C. § 3509(1) (2018).

134. Joëlle Anne Moreno, *Einstein on the Bench?: Exposing What Judges Do Not Know About Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence*, 64 OHIO ST. L.J. 531, 537 (2003).

135. *See supra* Part II.

136. See Hal Arkowitz & Scott O. Lilienfeld, *Once A Sex Offender, Always A Sex Offender? Maybe Not*, SCIENTIFIC AMERICAN (April 1, 2008) https://www.scientificamerican.com/article/misunderstood-crimes/ [perma.cc/F8RF-Y4TW].

137. *Id.*

138. A 2018 TEDx talk in which a German medical student asserted that pedophilia was a sexual orientation no different from heterosexuality received major backlash and was removed from the TEDx YouTube channel. *TEDx Talk Under Review*, TEDBLOG (June 19, 2018, 6:19 PM), https://blog.ted.com/tedx-talk-under-review/ [perma.cc/Y2MG-RQBS]; *see also* Margo Kaplan, *Pedophilia: A Disorder, Not a Crime*, N.Y. Times (Oct. 5, 2014) https://www.nytimes.com/2014/10/06/opinion/pedophilia-a-disorder-not-a-crime.html [perma.cc/GW4P-2ZFY]; *Pessimism About Pedophilia*, HARVARD HEALTH PUBLISHING (July, 2010) https://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia [perma.cc/3M8D-DC2Z].

1. The Propensity of Sex Offenders to be Repeat Offenders

David Karp, one of the main proponents of FRE 413, 414, and 415, raised these issues as arguments in favor of adopting the rules at the time Congress enacted them.[139] Specifically for prosecutions of child sex abuse, Karp explained that for a defendant with a history of child sex abuse, this history is evidence of that defendant's "combination of aggressive and sexual impulses that motivates the commission of such crimes."[140] Karp further argued that defendants with these histories likely "lack[] the effective inhibitions against acting on these impulses, and that the risks involved do not deter [them]."[141] Karp essentially argued that evidence of a defendant's propensity to commit sex crimes against children is much different than evidence of a defendant's prior arrest record for unrelated offenses.[142]

Others counter these arguments by positing that sex offenders actually have lower rates of recidivism than persons who commit other crimes.[143] In a study conducted by the Department of Justice ("DOJ") of prisoners released in 1994,[144] sex offenders not only had lower recidivism rates for committing new sex offenses but also lower recidivism rates for committing other crimes as compared to other offenders.[145] In that report, DOJ tracked prisoners in fifteen different states for three years and differentiated between offenders categorized as rapists, sexual assaulters, child molesters, and statutory rapists.[146]

However, drawing firm conclusions from these types of studies is risky because these studies typically fail to consider how many sex crimes go unreported.[147] Victims – especially child victims – have a very difficult time reporting abuse for various reasons.[148] Most victims are abused by someone

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139. Karp, *supra* note 121, at 20.

140. *Id.*

141. *Id.*

142. *Id.* ("A person with a history of rape or child molestation stands on a different footing.").

143. *See* Lave & Orenstein, *supra* note 17, at 817.

144. This is the most recent version of this kind of study conducted by the DOJ. More recent recidivism studies do not differentiate among violent offenders.

145. Lave & Orenstein, *supra* note 17, at 818.

146. Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. (2003) https://www.bjs.gov/content/pub/pdf/rsorp94.pdf [perma.cc/KZ7P-43YH].

147. 73% of child victims do not report abuse for at least a year; 45% do not report for at least 5 years. Jayneen Sanders, *12 Confronting Child Sexual Abuse Statistics All Parents Need to Know*, HUFFPOST (Jan. 25, 2017 8:29 PM) https://www.huffpost.com/entry/12-confronting-statistics-on-child-sexual-abuse_n_587dab01e4b0740488c3de49 [perma.cc/Z995-G5QW].

148. *Why Don't They Tell? Teens & Sexual Assault Disclosure*, NAT'L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/sites/default/files/resources/fact-sheet/why_dont_they_tell_teens_and_sexual_assault_disclosure.pdf [perma.cc/KCJ6-MW4N].

close to them,[149] and the manipulative tactics of abusers, especially those who abuse children, make it very difficult for victims to come forward and be believed. While the recidivism statistics seem to suggest that sex offenders are not repeat offenders, they fail to consider the amount of sex abuse that goes unreported and unpunished. On the other hand, crimes that do have very high recidivism rates, like drug possession and sale, do not have comparable rules which would allow propensity evidence.[150]

Critics of these rules have argued that they make incorrect assumptions about the psychology of sex offenders and its relation to propensity.[151] In their article, "Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes," Professors Tamara Rice and Aviva Orenstein were particularly critical of common cultural myths about sexual predators, which they argued were the motivating factors in Congress' decision to pass FRE 413, 414, and 415.[152] They explained that the "central assumption about perpetrators of sex crimes – that they are a deviant discrete group of outsiders and psychopaths – justifies the sex propensity rules and encapsulates their faulty psychological, statistical, and sociological presumptions."[153] Professors Rice and Orenstein argued that this "faulty" understanding of sex offenders contributes to incorrect assumptions about their likelihood of recidivism.[154] Proponents of the rule, they contended, incorrectly assume that sex offenders are more likely to commit future sex offenses than other types of criminals because of the deviant nature of their crimes, which is not based upon any real statistics or studies.[155]

2. Unfair Prejudice Where Prejudice is Already High

When FRE 413, 414, and 415 were proposed, they faced harsh scrutiny from attorneys and policymakers across the country. In fact, the American Bar Association ("ABA") wrote a report to the House of Delegates stating its disapproval of the rules after President Clinton signed them into law in 1994.[156] In this report, the ABA explained its fear that these rules would allow evidence that substantially prejudices jurors against certain defendants to the point that jurors would "not care if sufficient evidence of guilt exists" in convicting a criminal defendant.[157] The report also cited the unreliability of propensity evidence in general, and the ABA explained its concern that because recidivism

149. Sanders, *supra* note 147.
150. Lave & Orenstein, *supra* note 17, at 817.
151. *Id.* at 796.
152. *Id.* at 807–08.
153. *Id.* at 808.
154. *Id.* at 816.
155. *Id.* at 811.
156. *ABA Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L. J. 343, 344 (1995).
157. *Id.* at 349.

rates for all crimes are high, the same justifications could soon create similar rules for all offenses.[158]

The prejudice created by admitting evidence of prior abuse is also coupled with other prejudice that a criminal defendant faces, and this is especially true for black male defendants.[159] The increasingly high arrest and incarceration rates of black men suggest disparate treatment and biases.[160] Recent psychological studies have shown that participants were more likely to associate black defendants with "guilt" than with white defendants.[161] When coupled with racial bias, it is difficult to envision a scenario in which the bias that results from admission of evidence of prior sex crimes – charged or uncharged – does not create a risk of unfair prejudice.

While most sex crimes perpetrators are close to their victims, especially in cases of child abuse, allowing propensity evidence could worsen the racial bias problems inherent in our criminal justice system. Considering these problems, as well as the fact that charges of child abuse alone are highly prejudicial, it is difficult to see where this type of propensity evidence would ever *not* be unfairly prejudicial against a defendant.

Another concern with these rules is the "usual suspects" problem, which is often cited as an issue with utilizing DNA testing to identify perpetrators of crimes.[162] This problem reflects the fear that law enforcement tends to only "round up the usual suspects" – people who have been arrested or previously charged with crimes in the past – to pin unsolved crimes on them.[163] This problem could arise for sex crimes with unknown perpetrators if law enforcement is more likely to "round up" those with prior records of sex offenses who will then be faced with the likely admission of those very records.

The arguments both for and against propensity rules like Article I, Section 18(c) raise valid claims and pit very closely held rights and values against one another. This debate is so difficult because it seeks to answer impossible questions: whether propensity can ever be reliable in predicting behavior or if our criminal system, as it stands with total bars on propensity evidence, will ever be truly effective at prosecuting sex crimes.

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158. *Id.* at 350.

159. Demetria Frank, *The Proof is in The Prejudice: Implicit Racial Bias, Uncharged Act Evidence & The Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 2–3 (2016).

160. *Id.* at 1–3.

161. *Id.* at 20.

162. *See* David H. Kaye, *Rounding up the Usual Suspects: A Legal and Logical Analysis of DNA Trawling Cases*, 87 N.C. L. REV. 425 (2009).

163. Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1272 (2001).

C. In Missouri: Balancing Test as a Check for Admissibility of Prior Sex Crimes

Regardless of whether the proponents or critics of these rules have the stronger argument, these rules are the law in many states and in federal courts. In Missouri, it is even codified in the state constitution.[164] One way Missouri courts can balance the interests of bolstering child victim testimony while ensuring the constitutional rights of criminal defendants is to more strictly enforce the balancing test set out in Article I, Section 18(c) of the Missouri Constitution. That is, "The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."[165]

In *State v. Williams*, the Missouri Supreme Court stated that trial courts are not required to make an "express finding" that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice it presents before allowing the admission of evidence of prior sex crimes.[166] This seems problematic. The only safeguard afforded to criminal defendants in child sex crime prosecutions under the 2014 Amendment is this balancing test. Without requiring some kind of finding by trial courts that the danger of unfair prejudice does not outweigh the probative value of the prior crime, trial judges are afforded a great amount of discretion in their determinations of whether to allow this evidence. One way for Missouri courts to protect the rights of criminal defendants is to require trial judges to be more transparent in their decisions to admit this evidence and create a list of factors that assist judges in determining what might constitute unfair prejudice in these prosecutions. Professors Lave and Orenstein laid out such factors as length of time since the prior crime, type of the prior crime, similarity of the prior crime to present crime, and age and gender of the offender.[167]

The way Arizona has dealt with this issue provides a good example Missouri could follow. Rule 404(c) of the Arizona Rules of Evidence creates an exception to the bar on propensity evidence for criminal and civil cases involving sexual offenses.[168] This rule sets out that the court may admit evidence of "other crimes, wrongs, or acts . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged."[169] In order to admit this evidence, the court must make specific findings that (1) the "evidence is sufficient to permit the trier of fact to find that the defendant committed the other act"; (2) the trier of fact has a "reasonable basis to infer that the defendant had a character trait giving rise to an aberrant

164. MO. CONST. art. I, § 18(c).
165. *Id.*
166. State v. Williams, 548 S.W.3d 275, 286 (Mo. 2018) (en banc).
167. Lave & Orenstein, *supra* note 17, at 833–35.
168. ARIZ. R. EVID. 404(c).
169. *Id.*

sexual propensity"; and (3) the "evidentiary value of proof" of the evidence is not substantially outweighed by the danger of unfair prejudice.[170] Under the third prong, the court may look to multiple factors: the "remoteness of the other act"; the "similarity or dissimilarity of the other act"; "the strength of the evidence that defendant committed the other act"; "frequency of the other acts"; and any other surrounding circumstances or relevant factors.[171]

The specificity of the Arizona evidence rule helps find a middle ground between providing an avenue to bolster victim testimony while safeguarding the rights of criminal defendants. Because trial courts must make specific findings as to why the evidence is allowed, trial judges have less discretion in making these decisions – or at least the decision making is more transparent. Missouri would benefit from a similarly specific balancing test in determining whether to admit propensity evidence.

V. CONCLUSION

Missouri voters have spoken on the issue: they believe propensity evidence can and should be used against perpetrators of sexual crimes against children. While this rule stands in stark opposition to traditional rules of character evidence, it may still prove beneficial for victims of sex crimes. Sex offenses are some of the most underreported crimes and among the most difficult crimes to prosecute. This stems from various factors such as a general culture of victim-blaming, manipulative abusers, and the lack of resources available to prove guilt in these cases. Evidence rules allowing propensity evidence could be beneficial in encouraging more victims to come forward but may come at a cost of denying one of the most basic constitutional rights afforded to all criminal defendants – to be tried only for the crime charged. As Missouri attempts to manage these competing yet very significant interests, state courts should focus more effort on transparency in decision-making as a way to balance the scale.

170. *Id.*
171. *Id.*