Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference

Paul G. Cassell[*]
& Evan S. Strassberg[**]

On January 17, 1997, the Utah Supreme Court reversed Michael Doporto's conviction for sodomy on a child.[1] The court concluded that the prosecution had improperly introduced "other crimes" evidence—also known as prior crimes, prior bad acts, or pattern evidence[2]—to establish Doporto's guilt.[3] In this Article, we take the view that the court's ruling was unsound. The court should have instead held that such prior crimes evidence is generally admissible in sex offense cases, to show not only a defendant's motive or plan in committing the crime, but more generally his propensity to commit such crimes.

The issue is nicely framed by the facts of the *Doporto* case. We set them out at some length because they reveal the extraordinary effect on individuals that seemingly dry legal decisions can have. On a summer evening in 1988, then seven-year-old Azure Wakefield[4] went to the home of her best friend for a sleep over.[5] During that evening, her friend's father, Michael Doporto, approached Azure and rubbed lotion on the inside of her legs. Later in the evening, Doporto again entered the room and forcibly performed anal sex on Azure. After he left, Azure cried herself to sleep.

Azure could not tell her mother and father what happened, but she did tell them that she hated the color of her eyes and hair. She began to do poorly in school. Azure's teacher called her mother to ask if something dramatic had happened at home,

---

 Professor of Law, University of Utah College of Law (cassellp@law.utah.edu).

[**]Senior Staff Editor, *Utah Law Review*. We thank Tracy Wakefield for information about her family, Edward Kimball for helpful suggestions, Michael Schwalb for excellent research assistance, and the editors of the *Utah Law Review* for cheerfully allowing us to revise this article at the eleventh hour to reflect the recent amendments to the Utah Rules of Evidence. This Article was supported by the University of Utah College of Law Faculty Development Fund.

[1]*See* State v. Doporto, 935 P.2d 484, 495 (Utah 1997).

[2]For an exceedingly instructive overview of this and many other evidentiary issues, see EDWARD L. KIMBALL & RONALD N. BOYCE, UTAH EVIDENCE LAW 4-35 to 4-48 (1996). The term "prior" crimes evidence is frequently used but is somewhat misleading, because "subsequent" crimes are generally admissible as well. *See id.* at 4-44.

[3]*See Doporto*, 935 P.2d at 490–94.

[4]Ordinarily we would employ a pseudonym here, but Azure Wakefield and her family have asked that their story be told.

[5]All facts that follow are taken from a riveting article by Connie Coyne, entitled *Girl's Rape Condemned Price Family to Years of Depression and Despair*, SALT LAKE TRIB., Jan. 23, 1998, at A1, and from State v. Doporto, 935 P.2d 484, 486–87 (Utah 1997). *See also* Greg Burton, *Punch Sends Accused Abuser from Courtroom to Hospital*, SALT LAKE TRIB., Jan. 15, 1998, at B2; Telephone Interview with Tracy Wakefield (Mar. 20, 1998); Lynnda Johnson, *Attorney General Files Felony Sex Charges Against Doporto*, SUN ADVOC., Jan. 27, 1998, at 1A; Lynnda Johnson, *Courtroom Altercation Disrupts Sodomy Case*, SUN ADVOC., Jan. 20, 1998, at 1A.

because all Azure did at school was cry. Trying to find out what was wrong, Azure's mother went to school to join her for lunch, where she inadvertently discovered that Azure used a different name when she was away from home.

Some four years after the attack, Traci Wakefield and her husband first learned what had happened to their daughter and how she was attempting to distance herself from the girl who was raped. Azure was eleven when she told her cousin about the attack. Word got back to the Wakefields, who sat down with their daughter as the truth flooded out. "Looking back, I wish I knew then what I know now," Azure's mother later recounted.[6] "I could have helped her. She was so tiny and helpless . . . and she was all alone."[7]

Charges were filed against Doporto, but it took three more years to bring him to trial. The delays were caused by Doporto, who repeatedly delayed obtaining counsel, claiming indigency, a position that the district judge found frivolous. Doporto ultimately chose to represent himself.

At trial, the prosecution sought to present evidence that the assault on Azure was not an isolated incident. At least six other girls were willing to testify that they, too, had been sexually molested by Doporto in similar circumstances. The trial court ruled that testimony from two of the witnesses could not be admitted because the acts they described were too remote in time to be relevant. The court allowed the prosecution to call only two of the other girls, ruling that permitting all four girls to testify would create a danger of unfair prejudice.

Azure testified about the rape and, because Doporto was proceeding pro se, faced personal cross-examination by her attacker. Azure's testimony was supported by her mother's testimony about changes in Azure's behavior after the attack. Not only did Azure try to change her appearance, but she shied away from adults, particularly men. Azure's aunt also testified that, around the time of the attack, she noticed a dark stain in the crotch area of Azure's panties.

The two other victims approved by the trial court also testified. B.L. testified that at age eleven she was raped by Doporto. B.L. was, like the victim in the case, a friend of one of Doporto's daughters. The other witness was T.M., Doporto's niece, who testified that at age five she was also raped by Doporto. During that act of abuse Doporto rubbed baby oil on his victim, just as he had done to Azure. Doporto did not testify. The jury convicted him of the crime of sodomy on a child.

Doporto then obtained counsel and appealed to the Utah Supreme Court. The court overturned his conviction on the grounds that the testimony of the other two girls should not have been permitted.[8] The court stated that it is a "fundamental tenet of American jurisprudence" that evidence is not admissible simply to show a defendant's "bad character or propensity to commit criminal acts,"[9] citing John H. Wigmore's treatise on evidence. The court then set out the controlling rule of evidence, Utah Rule of Evidence 404(b):

---

[6]Coyne, *supra* note 5, at A1.

[7]*Id.*

[8]*See Doporto*, 935 P.2d at 494.

[9]*Id.* at 490 (citing, *inter alia*, 1A JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 58.2, at 1215 (Peter Tillers rev. 1983) [hereinafter 1A WIGMORE]).

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[10]

The court interpreted this rule as creating a presumption against admissibility of such evidence,[11] concluding that prior crimes evidence can be admitted only if the trial court finds that "(1) there is a necessity for the prior crime evidence, (2) it is highly probative of a material issue of the crime charged, and (3) its special probativeness and the necessity for it outweigh its prejudicial effect."[12] Under this new standard, the court concluded that evidence of Doporto's attacks on the other two girls should have been excluded.[13] While the trial court found a number of similarities between Doporto's various attacks, the supreme court concluded that these similarities were not "'peculiarly distinctive of [the] defendant's conduct.'"[14] The court accordingly reversed Doporto's conviction and remanded for a new trial at which the testimony of the other victims was to be excluded.[15]

The supreme court's reversal sent Azure's father into despair. A twenty-year veteran of Utah's coal mines, Jordan Wakefield spoke so quietly in a recent newspaper interview that he could barely be heard. "I have hit rock bottom," he said, explaining that he had no hope for the future.[16] He and Azure visit a therapist several times a week and he is on extensive anti-depressant medication. "The medical bills are building up and my family is falling apart," he said.[17] Jordon Wakefield has been in and out of a mental hospital three times since the decision, and nine times has been given electroshock therapy in an unsuccessful effort to bring him out of his depression. Azure, too, was adversely affected by the reversal. As her mother explained a year after the reversal, "The last year, it's like my daughter has not even attended school. She can't keep her mind on her studies" because the memories and fear are too much to overcome.[18]

On January 15, 1998, almost a year after the supreme court's decision reversing his conviction, Doporto agreed to enter a plea bargain, in which he would admit his crime and plead guilt to a reduced second-degree felony charge in exchange for a sentence of, essentially, time served. At the hearing to consummate the plea, Azure began testifying about the attack and broke down. This was too much for her father, who jumped up and punched Doporto. After the altercation was brought under

---

[10]UTAH R. EVID. 404(b), *quoted in Doporto*, 935 P.2d at 491.

[11]*See Doporto*, 935 P.2d at 490.

[12]*Id.*

[13]*See id.* at 494.

[14]*Id.* at 492 (quoting State v. Cox, 787 P.2d 4, 6 (Utah Ct. App. 1990)).

[15]*See id.* at 493–95. Justice Howe concurred in the result. *See id.* at 495 (Howe, J., concurring). Chief Justice Zimmerman concurred on the prior crimes issue and wrote to expound on the issue of the proper standard of appellate review. *See id.* at 495–96 (Zimmerman, J., concurring). Justice Russon dissented, concluding that the court had misconstrued the law on prior crimes evidence and that, in any event, any error on this point was harmless. *See id.* at 496–98 (Russon, J., dissenting).

[16]Coyne, *supra* note 5, at A1.

[17]*Id.*

[18]*Id.*

control, Wakefield was charged with battery. After the melée, Azure said, "I want people to know my name, I want them to know the rape has affected my life traumatically—mentally and physically—my family has been destroyed."[19]

As Azure made her courageous announcement, legislation was moving forward in the Utah Legislature that would have overruled *Doporto*'s new standards on the admissibility of other crimes evidence and also would have clearly established that evidence of defendant's propensity to commit sex offenses could be introduced.[20] With the proposed legislation seemingly posed on the brink of passage, the Utah Supreme Court took a dramatic step. On an emergency basis, it amended the Utah Rules of Evidence to effectively overrule its decision in *Doporto* and restore the law on other crimes evidence to where it stood before the decision.[21] The action thus averted immediate legislative action, but did not resolve fully the circumstances in which propensity evidence could be admitted in sex offense cases. That issue apparently is left to be resolved in the rulemaking process.

With these facts serving to frame the issue, we turn to the legal question of the soundness of the *Doporto* approach to other crimes evidence. Part I critiques the new legal doctrine that emerged from *Doporto*, explaining how it was inconsistent with prior Utah precedent and prevailing approaches in other states. Part II chronicles the unique story of how the Utah Supreme Court recently reversed its own decision in *Doporto* by an emergency amendment to the rules of evidence and discusses where Utah law on other crimes evidence stands today. Part III then explains that the court's amendment to the rules of evidence, while a positive step, does not go far enough toward guaranteeing that propensity evidence is admissible in Utah sex crime cases. The Utah Rules of Evidence should be further amended to allow prior crimes evidence to prove a defendant's propensity to commit such crimes in sexual assault cases.

I. A LEGAL CRITIQUE OF *Doporto*

Doporto's legal analysis was troubling on a number of levels. This Part will focus on three overarching doctrinal concerns. First, the opinion misapprehended and misapplied the principles of Rule 404(b) on the appropriate uses of other crimes evidence. Second, the opinion misconstrued the appropriate balancing test for weighing probative value against prejudicial effect. Finally, and most important, the opinion failed to recognize the extent to which prior crimes evidence is conventionally admitted in sexual assault cases.

---

[19]Burton, *supra* note 5, at B2.

[20]*See* Dawn House & Stephen Hunt, *Accused Molester, Freed on Appeal, Faces New Charges*, SALT LAKE TRIB., Jan. 23, 1998, at A1.

[21]*See* Order, *In re* Proposed Amendments to Rule 404, Utah Rules of Evidence (Utah Feb. 13, 1998) (No. 980077).

A. Misapprehending the Principles of Rule 404(b).

The *Doporto* court misunderstood how Utah Rule 404(b) operates, treating the rule as embodying exclusionary principles when in fact it rests on inclusionary principles. As the *Doporto* court interpreted the rule, other crimes evidence was presumed to be inadmissible and would gain admission only in narrow circumstances. This interpretation stood the rule on its head.

As the state's two leading evidence scholars have explained, Utah Rule 404(b) does not require affirmative justification for admissibility, but instead adopts an "inclusionary phrasing."[22] Historically, "Utah rules and cases have taken the position that evidence of other crimes or wrongs is *admissible* unless it is relevant *only* to show the disposition of a person."[23] For example, in 1947, in *State v. Scott*[24], the Utah Supreme Court specifically recognized the inclusionary nature of this evidentiary principle, noting that while "[i]n some jurisdictions . . . the rule is stated to be that evidence of other crimes than that charged against the accused is inadmissible with certain exceptions," the "better analysis is that such evidence is admissible [unless it proves merely bad character] . . . under the basic rule that all evidence having probative value is admissible."[25] In 1971, after Utah adopted rules based on the Uniform Rules of Evidence, the supreme court likewise interpreted these rules as taking an inclusionary approach to prior crimes evidence. For example, in *State v. Forsyth*,[26] the court quoted from *Scott* and "reaffirmed" the inclusionary rule described therein.[27] One year later, in *State v. Tanner*,[28] the court again explained that, at least since *Scott* in 1947, "[t]he substance of the rule is inclusionary."[29]

In 1983, when Utah Rule 404(b) was adopted along with the rest of the Utah rules, the Utah Advisory Committee indicated that the provision was comparable to previous law.[30] Accordingly, since 1983 Utah courts have continued to recognize this inclusionary approach to prior crimes evidence. As the Utah Court of Appeals explained in interpreting the provision in 1993, "prior bad act evidence is only excluded where the *sole* reason it is being offered [is] to prove bad character or to show that a person acted in conformity with that character."[31] This interpretation of Utah Rule 404(b) is consistent with the interpretation of the identical Federal Rule 404(b) which, the federal courts have explained, "allows admission of evidence of other acts relevant to an issue at trial except that which proves only criminal

---

[22]KIMBALL & BOYCE, *supra* note 2, at 4–36.

[23]*Id.* (first emphasis added).

[24]175 P.2d 1016 (Utah 1947).

[25]*Id.* at 1021–22.

[26]641 P.2d 1172 (Utah 1982).

[27]*See id.* at 1175–76.

[28]675 P.2d 539 (Utah 1983).

[29]*Id.* at 546.

[30]UTAH R. EVID. 404 Advisory Committee Note.

[31]State v. O'Neil, 848 P.2d 694, 700 (Utah Ct. App. 1993), *cert. denied*, 859 P.2d 585 (Utah 1993); *accord* State v. Olsen, 869 P.2d 1004, 1010 (Utah Ct. App. 1994) (allowing evidence of defendant's "other bad acts" under Rule 404(b), an "inclusionary rule"); State v. Jamison, 767 P.2d 134, 137 (Utah Ct. App. 1989) (holding that "prior bad act evidence is only excluded where the sole reason it is being offered is to prove bad character or to show that a person acted in conformity with that character").

disposition."[32] In treating Rule 404(b) as generally excluding evidence, *Doporto* thus reversed the conventional understanding of the rule.

Under the traditional, inclusionary formulation of the rule, there were good grounds for concluding that Doporto's attacks on the two other girls had probative value. Rule 404(b) allows other crimes evidence to be admitted if it establishes a "common scheme or plan."[33] The trial court concluded that the prior instances of molestation fit within this rule because the various acts were "'similar to each other in that they involve[d] fondling or intercourse and occurred while at a party at the grandmother's or at Defendant's home while they were visiting one of Defendant's children.'"[34] The *Doporto* opinion adopted a "divide and conquer" approach to this finding, concluding that, standing alone, each component was insufficient to show a common scheme.[35] But, of course, the commonality of the various offenses must be determined by examining the components collectively, rather than piecemeal.

An illustration of the court's peculiar approach is its comparison of the trial testimony from the victim of the charged offense with testimony about one of the prior offenses, in which both victims alleged that Doporto had rubbed baby oil on them,[36] apparently to facilitate intercourse. The court concluded that this did not show a "unique modus operandi,"[37] a demanding standard that would almost seem to require an offender to perform some specialized sex act known only to him before the courts would consider it to have probative value under Rule 404(b).[38]

The *Doporto* court mistakenly conflated the issue of a "common scheme" actually before it with the issue of using prior crimes evidence to establish the "identity" of a particular defendant as the perpetrator of a crime. When the prosecution seeks to establish that one particular defendant is identified by virtue of his having committed a "signature" crime, the courts commonly require that the modus operandi—the signature—be essentially unique.

Evidence of a common scheme, however, can have probative value without being so distinctive. The California Supreme Court has explained the prevailing view on this point, holding that "[u]nlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference

---

[32]United States v. Watford, 894 F.2d 665, 671 (4th Cir. 1990); *see also* Huddleston v. United States, 485 U.S. 681, 686 (1988) (holding evidence of similar acts must be probative of material issue other than character). *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 4.20, at 336 (1995) (concluding FED. R. EVID. 404(b) "adopts an inclusionary rather than exclusionary approach making evidence of prior crimes . . . potentially admissible . . . where offered for *any* relevant purpose that does not require an inference from character to conduct").

[33]*Doporto*, 935 P.2d at 491. For helpful discussion of this point, see David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 546–51 (1994).

[34]*Dopoerto*, 935 P.2d at 491 (quoting State v. Featherson, 781 P.2d 424, 428–29 (Utah 1989)).

[35]*See id.* at 491–92.

[36] *See id.* at 492.

[37]*Id.*

[38]*See id.* at 497 (Russon, J., dissenting) (asking related question: "how many friends would have to be molested while visiting [Doporto's] daughter before the majority would be convinced that evidence of such abuse may be relevant [under Rule 404(b)] to prove design or opportunity?").

that the defendant employed that plan in committing the charged offense."[39] Under this conventional approach, many other decisions have more readily discerned a common scheme of sex offenses than did the Utah Supreme Court in *Doporto*.[40]

B. Revising the Probative Value Versus Prejudicial Effect Balance

The *Doporto* opinion contained another curious aspect: its balancing of the probative effect of evidence against its prejudicial value.[41] Because of the importance of providing a full picture to the jury, Rule 403 of the Utah Rules of Evidence provides that relevant evidence "may" be excluded if its prejudicial value "is substantially outweighed" by danger of prejudice.[42] From this language, it is obvious that Rule 403 "strongly favors admissibility."[43] Indeed, the Utah Supreme Court has underscored this point by rejecting a challenge to the admission of prejudicial evidence and highlighting the language of Rule 403 as follows: probative evidence "'*may* be excluded if its probative value is *substantially* outweighed by the danger of

---

[39]People v. Ewoldt, 867 P.2d 757, 770 (Cal. 1994). *See generally* MUELLER & KIRKPATRICK, *supra* note 32, at 279 ("Quite rightly, most courts require a high degree of similarity before admitting evidence of prior crimes to establish modus operandi, even more than for intent ....").

[40]*See, e.g.*, State v. Madore, 696 A.2d 1293, 1297 (Conn. App. Ct. 1997) (admitting prior acts of sexual victimization against children other than victim committed over six- year period, noting that "[t]he courts of this state 'are more liberal in admitting evidence of other criminal acts to show a common scheme or pattern in sex related crimes than other crimes'" (quoting State v. Kulmac, 644 A.2d 887 (Conn. 1994))); Shapiro v. State, 696 So.2d 1321, 1324 (Fla. Dist. Ct. App. 1997) (finding evidence properly admitted against psychotherapists as proof of "common scheme, plan, or design to sexually exploit his patients while purporting to help them improve self-esteem and feel good about themselves" and noting that "[s]imilar fact evidence of collateral crimes may be admitted as relevant even if it is not uniquely similar"); State v. Moore, 819 P.2d 1143, 1145 (Idaho 1991) (finding common scheme based on "a continuing series of alleged similar sexual encounters directed at the young female children living within [the defendant's] household"); People v. Oliphant, 250 N.W.2d 443, 488 (Mich. 1976) (admitting evidence of three uncharged rapes because similarities "tend to show a plan and scheme to orchestrate the events surrounding the rape of complainant so that she could not show non-consent"); People v. Garland, 393 N.W.2d 896, 898–99 (Mich. Ct. App. 1986) (admitting evidence of uncharged sexual misconduct to show prior plan); State v. Crocker, 409 N.W.2d 840, 843 (Minn. 1987) (allowing evidence of other sexual abuse of child to show pattern of conduct); State v. Maurer, 488 N.W.2d 834, 836 (Minn. Ct. App. 1992) (allowing evidence of "a common scheme or plan of sexual aggressiveness toward women who were dependent on [the defendant] for a ride home"), *rev'd on other grounds*, 491 N.W.2d 661 (Minn. 1992); State v. Tecca, 714 P.2d 136, 139 (Mont. 1986) (allowing evidence of sexual acts with young girls over nine-year period to show common scheme); Salyers v. State, 755 P.2d 97, 101–02 (Okla. Crim. App. 1988) (allowing evidence of prior abuse to show evidence of common scheme); State v. Hopkins, 698 A.2d 183, 185 (R.I. 1997) (finding evidence "relevant to show that when given the opportunity, [defendant] had a motive . . . and a plan to abuse children of like age in a like manner to that in which he abused his stepson when they were under his control or influence"); State v. Bennett, 672 P.2d 772, 775 (Wash. Ct. App. 1983) (finding plan to harbor and abuse runaway girls); Scadden v. State, 732 P.2d 1036, 1043–44 (Wyo. 1987) (finding plan to gain confidence of athletes coached by defendant and then molest them); *see also* State v. Maylett, 701 P.2d 291, 293 (Idaho Ct. App. 1985) (allowing evidence of attacks on other victims to show common plan, but must be within one year of charged offense).

[41]*See Doporto*, 935 P.2d at 494.

[42]UTAH R. EVID. 403; *accord* FED. R. EVID. 403.

[43]KIMBALL & BOYCE, *supra* note 2, at 4–13.

unfair prejudice.'"[44] This language comes from Federal Rule 403,[45] and at least forty-three states have adopted rules of evidence that are, in essence, identical.[46] The clear majority of these states apply the rule as it is written and require that any danger of unfair prejudice substantially outweigh any probative value the evidence may have.[47]

---

[44]State v. Johnson, 784 P.2d 1135, 1141 (Utah 1989) (quoting FED. R. EVID. 403).

[45]*See* FED. R. EVID. 403.

[46]*See* 1 GREGORY P. JOSEPH ET AL., EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 13.2. Saltzburg cites 30 states with rules that are virtually identical to Federal Rule 403: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See id.* nn.1–4. An updating of Saltzburg's research shows that at least 13 other states have also adopted rules closely resembling 403: Alabama (ALA. R. EVID. 403), California (CAL. EVID. CODE § 352), Connecticut (CONN. R. OF CT. 403), Indiana (IND. R. EVID. 403), Kansas (KAN. STAT. ANN. § 60-445), Kentucky (KY. R. EVID. 403), Louisiana (LA. R. EVID. 403), Maryland (MD. R. EVID. 5-403), Nevada (NEV. REV. STAT. § 48.035), New Jersey (N.J. R. EVID. 403), Rhode Island (R.I. R. EVID. 403), South Carolina (S.C. R. EVID. 403), and Tennessee (TENN. R. EVID. 403). Although we are not familiar with all of the nuances of the law in the other 7 states, it appears that they follow approaches that generally set a more demanding standard. *See* Jordan v. State, 1998 WL 54771, *1 (Ga. Ct. App. Feb. 12, 1998) (requiring district court to find that "probativeness outweigh[s] any prejudice"); People v. Williams, 1998 WL 21709, *6 (Ill. Jan. 23, 1998) ("admissibility of evidence may also depend upon whether the probative value outweighs its prejudicial effect to the defendant"); Commonwealth v. Rodriguez, 682 N.E.2d 591, 598 (Mass. 1997) (stating that "if the probative value of the facts is substantially outweighed by the danger of prejudice, the evidence should be excluded"); State v. Rousan, 1998 WL 32524, *8 (Mo. Jan. 27, 1998) (stating that "if probative value of such evidence outweighs its prejudicial effect, then it is admissible"); People v. Blair, 688 N.E.2d 503, 504 (N.Y. 1997) (stating that prior uncharged crime evidence may be admissible if its "probative value outweighs its prejudicial impact"); Commonwealth v. Hawkins, 701 A.2d 492, 515 (Pa. 1997) (stating probative value of properly admitted evidence must outweigh its prejudicial value); Guill v. Commonwealth, 495 S.E.2d 489, 492 (Va. 1998) (stating that "legitimate probative value of the evidence must exceed the incidental prejudice caused the defendant").

[47]*See, e.g.*, State v. Mott, 931 P.2d 1046, 1055 (Ariz. 1997) ("[T]o admit evidence of prior bad acts, the trial court must find that the evidence is admitted for a proper purpose under Rule 404(b), is relevant under Rule 402, and that its probative value is not substantially outweighed by the potential for unfair prejudice under Rule 403."); People v. Hogan, 703 P.2d 634, 638 (Colo. Ct. App. 1985) ("Evidence of other crimes is excluded if offered to prove that the defendant is a person of criminal character; however, it may be admissible for other purposes . . . unless its probative value is substantially outweighed by the danger of unfair prejudice."); Santellan v. State, 1996 WL 743816, *3 (Tex. Ct. App. 1996) ("Rule 403 of the Texas Rules of Criminal Evidence requires the trial court to conduct a balancing test to determine whether otherwise admissible evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice . . . ." (internal quotes omitted)); State v. Ashley, 623 A.2d 984, 985 (Vt. 1993) ("The real issue is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."). One state that has clearly deviated from the norm in the text of its rules is Alaska, where the word "substantially" is omitted from the balancing test, with the result that danger of unfair prejudice need only outweigh the evidence's probative value to justify exclusion. *See* ALASKA R. EVID. 403. Despite the application of this tighter standard under Rule 403, Alaska follows a specific rule allowing evidence of a "common scheme or plan" in sex offense cases. *See* ALASKA R. EVID. 404(b)(2); *see, e.g.*, Smithart v. State, 946 P.2d 1264, 1270–73 (Alaska Ct. App. 1997) (admitting evidence of prior acts to establish pattern of behavior). New York has created a special rule, generally requiring that "evidence of a prior uncharged crime may not be admitted solely to demonstrate a defendant's bad character or criminal propensity, but may be admissible if linked to a specific material issue or fact relating to the crime charged, and if its probative value outweighs its prejudicial impact." People v. Blair, 90 N.Y.2d 1003, 1004 (N.Y. 1997). For further discussion of New York law, see *infra* note 118.

A singular passage in *Doporto* ignored these conventional and widely shared principles. The passage reversed the standard balancing test and concluded that, before prior crimes evidence in sexual assault cases can be admitted, "the trial court *must* find that . . . its special probativeness and the necessity for it *outweigh* its prejudicial effect."[48] In holding that a court "must" make findings to *admit* evidence, the opinion disregarded the discretionary language—"may be excluded"—in Rule 403. More dramatically, the opinion changed the traditional rule strongly favoring admissibility (that is, excluding evidence when prejudice "substantially outweighs probative value") into a rule generally rejecting admissibility (admitting evidence only when its probative value "outweighs" its prejudicial effect).

This statement was so at odds with orthodox principles and the plain language of Rule 403 that it is hard to understand what the *Doporto* court meant.[49] It is interesting that this passage appeared in a section of the opinion in which the court said it would "take this opportunity to *comment upon* the appropriate standards" governing admissibility of prior crimes evidence.[50] "Commenting upon" certain legal principles would seem to signal that the discussion was pure dicta, not binding in future cases in the teeth of the contrary language of Rule 403.

The characterization of this language as dicta was supported by the fact that it appears in a section of the opinion entirely devoid of discussion of the facts. Indeed, when the opinion turned to the case at hand, it failed to follow its own suggestion. A few pages after its "comments," the *Doporto* court specifically addressed "the trial court's ruling under Utah Rule of Evidence 403 that the prejudicial effect of the evidence did not substantially outweigh its probative value," concluding the trial court's ruling under 403 was "incorrect."[51] Of course, if the balancing test generally rejects admissibility—as the opinion suggests in "comment[ing] upon the appropriate standards"—then there was no reason to address Rule 403's requirement that prejudice substantially outweigh probative value. The power of the plain language of

---

[48]*Doporto*, 935 P.2d at 490 (emphasis added).

[49]It is also pertinent to note that this issue—along with many others discussed by *Doporto*—was not raised before the trial court. This failure is likely attributable to Doporto's decision to proceed pro se. It is hard to understand the court's willingness to excuse Doporto's failure to comply with procedural requirements, particularly where a reasonable inference from the facts is that Doporto chose to proceed on his own at trial so that he could cross-examine his young victims personally to intimidate and harass them. *Cf.* Faretta v. California, 422 U.S. 806, 834 n.46 (1975) ("Neither is . . . [the right of self-representation] a license not to comply with relevant rules of procedural and substantive law."). Nor was this issue presented in Doporto's brief to the supreme court. While the brief argued the other crimes evidence should have been excluded, it raised no suggestion that the Rule 403 balancing test was generally improper. *See generally* Brief for Appellee at 24–27, State v. Doporto, 935 P.2d 484 (Utah 1997) (No. 940014) (discussing defendant's failures to raise and brief issues in trial court and on appeal). Under conventional legal principles, this should have been sufficient reason to avoid addressing this important legal principle, if not to actually reject Doporto's appeal. *Doporto*, unfortunately, is not the only illustration of a disturbing tendency of the court to create novel rights for criminal defendants in disregard of normal appellate principles. *Cf.* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 780–83 (noting creation of state exclusionary rule in case in which it was neither briefed nor argued) [hereinafter Cassell, *Exclusionary Rules*].

[50]*Doporto*, 935 P.2d at 490 (emphasis added).

[51]*Id.* at 493.

Rule 403 was apparently too strong to be ignored, even after contrary "comments" in the same opinion.

As support for its dicta that the balance tipped against admitting prior crimes, the *Doporto* court referenced an earlier decision, *State v. Johnson*,[52] an opinion that (like *Doporto*) was written by Justice Stewart. *Johnson*, in turn, contains the statement that prior crimes evidence is admissible "when the probative value of the evidence as one of the elements of an offense and the need for the evidence to prove a specific issue outweigh the potential for prejudicing the fact finder's consideration of the merits of the crime charged."[53] The support for this statement was said to be an earlier decision, *State v. Forsyth*.[54] Here, however, the chain of precedent broke down, for *Forsyth* in the specific passage cited held that a judge "'may in his discretion'" exclude relevant evidence if "'its probative value is substantially outweighed by the risk'" of prejudice.[55] Thus, Utah precedent led to the same conclusion: the *Doporto* dicta was wrong in suggesting that the balance tips against admitting prior crimes evidence.[56]

One reason that this revision of the balancing test deserved more careful scrutiny is the structure of the rulemaking process in Utah. To amend the Utah Rules of Evidence, the Utah Supreme Court must follow a process that provides an opportunity for public comment on proposed changes before the court adopts them,[57] unless it finds that there is an "emergency" that requires immediate rulemaking.[58] Even after the court adopts changes, the Utah Constitution gives the public's elected representatives—the legislature—the opportunity to override rule changes.[59] This entire process for public involvement is thwarted when the court makes de facto changes to the rules of evidence through judicial interpretation rather than through the conventional process.

---

[52]748 P.2d 1069 (Utah 1987), *cited in Doporto*, 935 P.2d at 490.

[53]748 P.2d at 1074 (citing State v. Forsyth, 641 P.2d 1172, 1175 n.5 (Utah 1982).

[54]641 P.2d at 1175 n.5, *cited in Johnson*, 748 P.2d at 1074.

[55]*Forsyth*, 641 P.2d at 1175 n.5 (citing former UTAH R. EVID. 45). *Forsyth* was decided before the Utah Rules of Evidence were adopted, but the new rules made no change on this issue. *See* Amy S. Thomas, Note, *Utah Rule of Evidence 403 and Gruesome Photographs: Is a Picture Worth Anything in Utah?*, 1996 UTAH L. REV. 1131, 1134–36.

[56]For support, *Doporto* also cited State v. Dibello, 780 P.2d 1221, 1229–30 (Utah 1989), which created a special category of presumed inadmissible evidence for gruesome photographs. The support from *Dibello* is, at best, indirect, as the cases rest on special concerns tied directly to gruesome photographs. In any event, the *Dibello* "presumption" has been subjected to extensive criticism that it is at odds with the approach of most other states. *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1409 n.184 [hereinafter Cassell, *Victims' Rights Amendment*]. *Dibello* is also "inconsistent with the plain language of Rule 403 and undermines the basic purposes of evidentiary rules: accurate fact-finding and promotion of fairness." Thomas, *supra* note 55, at 1159. A *Shepard's* search performed on January 11, 1997, showed that no court outside Utah had cited–let alone followed–*Dibello*.

[57]*See* UTAH CODE JUD. ADMIN. 11-101(3) (1996).

[58]*See id.* at 11-101(3)(E).

[59]*See* UTAH CONST. art. VIII, § 4; UTAH CODE ANN. § 78-2-4 (1996) (recognizing power of legislature to amend rules of evidence). *See generally* Cassell, *Exclusionary Rules*, *supra* note 49, at 827–31 (discussing rulemaking power); Ken R. Hart, Note, *Court Rule Making in Utah Following the 1985 Revision of the Utah Constitution*, 1992 UTAH L. REV. 153 (same).

To be sure, in some cases it may be unclear whether a judicial decision is merely "interpreting" a rule rather than amending it; but *Doporto* fell well on the amendment side of this spectrum, since the decision for all practical purposes changed the operation of important rules of evidence. Indeed, when the occasional commentator has taken the view that the Rule 403 balancing test ought to be changed in the context of other crimes evidence, that recommendation has been couched in the form of an explicit *amendment* to the federal rules—not surreptitious judicial interpretation.[60]

This point about public involvement is not merely theoretical. The public has considerable interest in the rules governing the prosecution of sex offenders and might evaluate the policy concerns differently than the court.[61] In particular, in 1995, a broad-based coalition of concerned crime victims and other organizations made a presentation to the Utah Supreme Court Advisory Committee on the Rules of Evidence, recommending that the rules be changed to allow greater use of prior crimes evidence in sexual assault cases.[62] Specifically, the organizations proposed that Utah adopt Federal Rules of Evidence 413 and 414, which liberally allow prior crimes evidence in sexual assault cases.[63] While the great bulk of the Utah rules track the federal rules,[64] the Advisory Committee ultimately rejected the proposal to conform Utah rules on this point.[65] While the Advisory Committee's assessment is discussed below,[66] the critical point here is that *Doporto* made an end-run around this entire process. After the victims organizations had been unsuccessful in urging liberalization of the other crimes rules through the specified rulemaking process, the Utah Supreme Court turned around and effectively moved in the opposite direction by tightening the rules significantly without the public involvement prescribed in the rulemaking procedures.

C. Failing to Recognize the Frequent Use of Other Crimes Evidence in Sexual Assault Cases

The previous discussion argues that, even assuming that other crimes evidence is generally inadmissible to prove a defendant's bad character, the *Doporto* court erred in excluding the evidence before it. This sub-part now examines the basic

---

[60]*See* Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1497 (1985) (recommending amendment to 404(b)).

[61]*Cf.* Cassell, *Victims' Rights Amendment*, *supra* note 56, at 1396–1400, 1407–09, 1440–56 (discussing court decisions overruled when public approved Utah's Victims' Rights Amendment).

[62]*See* Utah Supreme Court Advisory Committee on the Rules of Evidence, *Minutes* at 3 (Feb. 15, 1995). One of the present authors (Cassell) made this presentation on behalf of the Utah Council on Victims, noting that the proposal was endorsed by, *inter alia*, Attorney General Jan Graham, the Statewide Association of Prosecutors (Legislative Advisory Committee), the Utah Chapter of the National Committee to Prevent Child Abuse, the Utah Chiefs of Police Association, Missing Children of Utah, the Utah County Children's Justice Center, and the Domestic Peace Task Force, Inc.

[63]*See infra* notes 104–13 and accompanying text (describing these federal rules).

[64]*See* State v. Gray, 717 P.2d 1313, 1317 (Utah 1986).

[65]*See* Utah Supreme Court Advisory Committee on the Rules of Evidence, *Report of Federal Rules 413–15* at 31 (Jan. 10, 1996) [hereinafter Advisory Comm. Rep.].

[66]*See infra* notes 129–30 and accompanying text.

premise that other crimes evidence is inadmissible in sexual assault cases to prove "bad character" or "propensity"—that is, to show a defendant's propensity to commit such crimes.

Doporto reported that this principle of excluding prior crimes evidence to prove propensity is "a fundamental tenet of American jurisprudence."[67] As a general matter, this claim is at least misleading. While there have been restrictions on the use of prior bad acts for a considerable time,

> the range, ingenuity, and breadth of the avenues that the system has devised for circumventing these restrictions is at least equally striking. The history is one of on-going tension between an early-established rule against admitting this type of evidence, and the desire to admit it anyway because of its obvious relevance and probative value in many circumstances.[68]

To provide one illustration,[69] in *Marshall v. Lonberger*,[70] the United States Supreme Court stated that "the common law . . . implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification."[71]

However strong the principle against propensity evidence might be in general, its application to sex crimes cases is a separate matter—one that the *Doporto* court entirely ignored. In fact, the *Doporto* court appeared to have taken such a crabbed view of the circumstances in which prior crimes evidence can be admitted in sex cases that Utah was placed in a virtually unique position among American jurisdictions.

The *Doporto* court contended that the exclusion of propensity evidence in sexual assault cases is a principle "recognized in this Court's opinions for over ninety years."[72] The "over ninety years" claim rested upon, among other things, bad arithmetic; the oldest supporting citation was the court's decision in *State v. Williams*[73] in 1909, some eighty-eight years earlier. This is no mere quantitative quibble, for if one travels back through the "over ninety years," as suggested by the court, one discovers that the exclusion of prior crimes evidence in *Williams* was in considerable tension with earlier Utah decisions, suggesting that this "fundamental" tenet is perhaps not so fundamental after all.

In 1900—ninety-seven years before *Doporto*—the supreme court addressed whether evidence of prior acts of sexual intercourse between the accused and the

---

[67]*Doporto*, 935 P.2d at 490.

[68]David Karp, *Evidence of Propensity and Probability in Sex Offense Cases and other Cases*, 70 CHI.-KENT L. REV. 15, 30 (1994). *See generally* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: THE ADMISSION OF CRIMINAL HISTORIES AT TRIAL (rep. 4) (Aug. 14, 1986) (discussing usage of prior crimes evidence at trials) [hereinafter "DOJ CRIMINAL HISTORIES REP."].

[69]*See* Karp, *supra* note 68, at 27–30 (citing many other examples of such holdings).

[70]459 U.S. 422 (1983).

[71]*Id.* at 438–39 n.6.

[72]*Doporto*, 935 P.2d at 490.

[73]103 P. 250 (Utah 1909).

victim were admissible in a prosecution for statutory rape.[74] In *State v. Hilberg*,[75] while the court noted the general prohibition against propensity evidence, it also discussed some important exceptions to that rule in sexual assault cases:

> [W]here the offense consists of illicit intercourse between the sexes, such as is charged here, or in case of incest, adultery, or seduction, courts have relaxed the rule, and hold that previous acts of improper familiarity between the parties, occurring prior to the alleged offense, were admissible as explaining the acts, and as having a tendency to render it more probable that the act charged . . . was committed, though such acts would be inadmissible as independent testimony.[76]

Applying this exception, the court ruled that prior acts of intercourse between the parties were admissible to show the accused committed the crime charged.[77] The court reached an identical conclusion the following year in *State v. Neel*.[78]

When *State v. Williams*[79] reached the court several years later, however, the court appeared to depart from the rationale of *Hilberg* and *Neel*.[80] In *Williams*, a seventy-year-old man had been convicted of sexual assault on a ten-year-old girl.[81] On appeal, he challenged the admission of evidence that he had committed similar acts against other girls in the neighborhood. In overturning the conviction, the court held that a general prohibition against propensity evidence controlled.[82] The court quoted *Hilberg*'s language about previous acts of "improper familiarity" making it "more probable" that the charged crime was committed, but narrowed the application of this language to prior sexual conduct between the defendant and the victim of the charged offense.[83] The *Williams* court reasoned that the authorities "uniformly" hold that crimes "wholly disconnected from the crime charged on some person other than the one mentioned in the information or indictment is never admissible."[84]

Apart from being a clear misstatement,[85] what is most curious about the court's opinion is that it offered no reason for distinguishing the defendant's prior sexual conduct with the victim of the charged offense from that with other persons. Nor did

---

[74]*See* State v. Hilberg, 61 P. 215, 216 (Utah 1900).

[75]*See id.*

[76]*Id.* at 216.

[77]*See id.* The court, however, reversed on grounds that evidence of other *subsequent* sexual acts between the parties was not admissible, reasoning that subsequent acts are not probative of prior conduct. *See id.* at 217. This aspect of the decision is criticized in II JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE, § 398, at 455 n.1 (James H. Chadbourn rev. 1979) [hereinafter II WIGMORE].

[78]65 P. 494, 495 (Utah 1901) (holding that evidence of prior sexual acts between parties is admissible to explain acts).

[79]103 P. 250 (Utah 1909).

[80]*See id.* at 252.

[81]*See id.* at 251.

[82]*See id.* at 252.

[83]*See id.*

[84]*Id.*

[85]*See, e.g.*, 3 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE § 970 at 1846 (2d ed. 1913); § 970 at 46 (1st ed. 1880) (explaining that in England such sexual predisposition evidence was not admissible, but "[t]he contrary to this, believed to be the better law, has been adjudged with us"); *see also* 1A WIGMORE, *infra* notes 93–98, and accompanying text (discussing Wigmore's views on subject).

the court attempt to reconcile its holding with *Hilberg*'s holding that prior sexual acts with the victim of a charged offense make subsequent sexual misconduct "more probable."[86] Shortly before *Williams*, the renowned John Henry Wigmore had examined this very point, and concluded that "a previous rape-assault of another woman has equal probative value for the purpose, for it is the general desire to satisfy lust that is involved in this crime, and no particular woman is essential for this."[87] Moreover, although the *Williams* court excluded evidence that the accused had committed previous sex crimes, the court upheld the offering of evidence of the accused's good character.[88] Specifically, the court stated that the accused "was a man of good character, and up to the time of this trouble his reputation for chastity and virtue was good."[89] The unanswered question, of course, is how the court could simultaneously hold that evidence of the accused's prior bad acts was inadmissible, while allowing general statements about his good character to be presented to the jury.[90]

The *Williams* decision seems so odd that perhaps its true rationale is reflected in its reference to the dictum from Lord Hale that rape "'is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent.'"[91] This thought has now been thoroughly discredited as reflecting sexist notions about the untruthfulness of women who have been raped.[92] The unfortunate effect of the poorly-reasoned *Williams* decision was to entirely overshadow the court's earlier holdings to the contrary, as the *Doporto* court's failure to recognize the existence of these decisions demonstrates.

Not only do the early Utah precedents provide mixed support for the *Doporto* court's claim that prior crimes evidence is generally excluded, but the leading evidence scholar cited in the opinion apparently supported the opposite conclusion. *Doporto* cited liberally from Wigmore's renowned treatise on evidence[93] without any acknowledgment that Wigmore himself viewed the appropriate rule in sexual assault cases differently than the court. "An exhaustive analysis of the cases," the treatise's latest edition explains, "shows there is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities."[94] These "decisions

---

[86]*See Hilberg*, 61 P. at 216.

[87]1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 357, at 432 (1904) [hereinafter 1 WIGMORE]; *see also* Bracey v. United States, 142 F.2d 85, 88–89 (D.C. Cir. 1944) (including dicta supporting this view).

[88]*See Williams*, 103 P. at 251.

[89]*Id.*

[90]Today under the Utah Rules of Evidence and the Federal Rules, if Williams had offered evidence of his good character and chastity, the door would almost assuredly be opened, under Rule 404(a)(1), for the prosecution to offer rebutting evidence. *See* UTAH R. EVID. 404(a)(1).

[91]*Williams*, 103 P. at 254 (quoting 3 Greenl. Ev. §212).

[92]*See generally* SUSAN ESTRICH, REAL RAPE 28–79 (1987) (describing distrust society experiences toward women who allege rape); LINDA A. FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 14–15 (1993) (noting "archaic requirements" that stemmed from Hale's admonition); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10–12 (1977) (noting that Hale's admonition singles out rape for unique treatment, and proposing to treat rape like other crimes).

[93]*See Doporto*, 935 P.2d at 488–91.

[94]1A WIGMORE, *supra* note 9, § 62.2, at 1334.

show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions."[95] The latest edition further observes that the rationale for such opinions includes the fact that "[w]here the charge is of *assault with intent* [to rape], the propriety of [evidence of other offenses] cannot be doubted. There should be some limitation of time, but merely to avoid the objection of unfair surprise . . . ."[96]

It is also important to recognize that Wigmore's latest edition was reporting the weight of authority. It notes that a number of states "forthrightly" admit propensity evidence in sexual assault cases under a "lustful disposition" or "sexual proclivity" exception to the general rule barring the use of character evidence against an accused.[97] Those states not expressly recognizing a lustful disposition exception "may effectively recognize such an exception by expansively interpreting . . . various well-established exceptions to the character rule."[98]

Other authorities have reached identical conclusions about the current state of the law, leaving little question that the *Doporto* court's hostility to admitting prior crimes evidence in sexual misconduct cases was highly unusual among the states. The Department of Justice concluded in 1986 that "free use of propensity evidence in prosecutions of sex crimes is widespread."[99] While exact quantification of case law in particular jurisdictions is always difficult, a fifty-state survey in 1993 found that twenty–nine states "admit sexual misconduct evidence via the common-law lustful disposition rule."[100] That rule, in short, stated that "the prosecution in its case in chief could prove the defendant's lustful disposition to commit sex crimes by proof of prior

---

[95]*Id.* at 1334–35. For a discussion of Wigmore's views on propensity evidence outside the context of sexual offense cases, see Karp, *supra* note 68, at 27–30.

[96]II WIGMORE, *supra* note 77, § 357, at 334. Interestingly, Wigmore appears to have been given somewhat schizophrenic views on the use of other crimes evidence in sexual offense cases in the 1983 Tillers revision, written well after Wigmore's death. *Compare* 1A WIGMORE, *supra* note 9, § 62.2, at 1334 (raising questions about propensity evidence in sex cases) *with* 1 WIGMORE, *supra* note 87, § 357, at 433 (expressing no such doubts about other crimes evidence in cases involving prior rape assaults).

[97]1A WIGMORE, *supra* note 9, § 62.2, at 1335 (collecting cases).

[98]*Id.* at 1336 (collecting cases).

[99]DOJ CRIMINAL HISTORIES REP., *supra* note 68, at 10.

[100]Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 188 & n.340 (1993) (collecting numerous cases). For more recent cases to the same effect, see, for example, Smithart v. State, 946 P.2d 1264, 1270 (Alaska Ct. App. 1997) (concluding that evidence of prior sexual offenses offered to show propensity is admissible under Alaska Rule of Evidence 404(b)(2)); State v. Crawford, 672 So.2d 197, 210 (La. Ct. App. 1996) (allowing as properly admitted evidence to "show a pattern and intent or 'lustful disposition' on defendant's part to force women, with either a knife or through strangulation and brute force, to engage in non-consensual sex"); State v. Miller, 1997 WL 805407, at *2 (La. Ct. App. 1997) (admitting evidence as establishing "predisposition to molest young girls"); State v. McArthur, 702 So.2d 1047, 1053 (La. Ct. App. 1997) (defendant's prior homosexual rape and attempted rape of woman "sufficiently similar to show a pattern and intent, or 'lustful disposition,'"); *Ex parte* Register, 680 So.2d 225, 227 (Ala. 1997) (holding that "evidence that a defendant has a passion or propensity for sexual misconduct is material and relevant as tending to establish the defendant's motive for perpetrating the crime for which he or she is being tried"); Campbell v. State, No. CR-94-2290 (Ala. App. Aug. 22, 1997) (similar); Gibbons v. State, 1997 WL 742244, at *4 (Ga. Ct. App. 1997) ("In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim's testimony.").

or later instances of sexual misconduct with the same victim or a different victim."[101] Even in states that did not follow a lustful disposition approach, but instead applied 404(b), the survey found that "the courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct" evidence even when the other purpose besides propensity "is not truly an issue in the case."[102] Another commentator concluded, after collecting the cases in 1996, that

> [m]any courts, while purporting to follow the general rule [against propensity evidence,] have resorted to manipulating recognized exceptions in order to admit uncharged misconduct evidence in cases of sexual assault and child molestation.... Other courts have gone beyond the general rule entirely and have created special exceptions in order to admit uncharged sexual misconduct evidence.[103]

These authorities indicate that the states generally—either directly or indirectly—admit other crimes evidence in sexual assault cases. But perhaps the capstone to the movement of the law in the direction of admitting propensity evidence was an important development unacknowledged by the *Doporto* court. In 1994, Congress added Rules 413 and 414 to the Federal Rules of Evidence to ensure the admission of evidence of prior acts of sexual misconduct in criminal prosecutions for sex offenses.[104] The rules were approved by overwhelming majorities in both houses of Congress.[105] While existing Rule 404(b) allows admission of such evidence where it is probative of a series of non-propensity issues (*e.g.*, motive, opportunity, absence of mistake, plan),[106] the new rules directly admit evidence of prior sex offenses to show that the accused has the propensity to commit the charged offense. For example, Rule 414 provides:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.[107]

---

[101]Reed, *supra* note 100, at 168.

[102]*Id.* at 200.

[103]Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 514 (1996).

[104]*See* 108 Stat. 1796 (1994).

[105]In the Senate the vote was 75–19 in favor of the new rules. *See* 139 CONG. REC. S15137-38 (daily ed., Nov. 5, 1993). The House approved the rules by a vote of 348–62. *See* 140 CONG. REC. H5437, 5440-41 (daily ed., June 29, 1994).

[106]*See supra* note 32 and accompanying text.

[107]FED. R. EVID. 414(a).

Rule 413 is a parallel provision allowing such evidence in "sexual assault" cases.[108] Both rules require that, if the government will introduce any such propensity evidence, it must disclose the evidence to the defendant no less than fifteen days before trial.[109] The rules are subject to the Rule 403 balancing test, requiring exclusion if the probative value is substantially outweighed by prejudice.[110]

The sponsors of Rules 413 and 414 recognized that the immediate effect of the new rules would be to "greatly facilitate the effective prosecution of violent sex offenders and child molesters in cases subject to federal jurisdiction."[111] In addition, Congress hoped that the new rules would serve "as a model for reform in state rules of evidence as well."[112] That hope has been fulfilled, as several states have moved in the direction suggested by the federal rules.[113] Most important, in 1995 California adopted a new evidence provision that made propensity evidence readily admissible in criminal actions in which the defendant is accused of a sexual offense.[114] In 1995, Missouri adopted a statute allowing evidence of other crimes involving victims under fourteen years of age to be admitted.[115] In 1997, Arizona likewise adopted a rule facilitating the admission of evidence of sexual misconduct to prove propensity.[116] These developments suggest that the future holds even greater use of propensity evidence in sexual assault cases around the country.

---

[108] FED. R. EVID. 413. Rule 415 similarly provides for the admissibility of prior sexual offenses or acts of child molestation in *civil* cases. *See* FED. R. EVID. 415. We will not discuss this rule in any detail, because the focus of this Article is on the criminal law. It is enough to say that if other crimes evidence should be admissible in presumptively more serious criminal cases, the same conclusion for civil cases would follow in train.

[109] *See* FED. R. EVID. 413(b) and 414(b). By providing a mandatory notice requirement, the new federal rules actually provide greater protection for criminal defendants than is guaranteed under most similar common law exceptions.

[110] *See* United States v. Guardia, 135 F.3d 1326, 1328, 1330 (10th Cir. 1998) (concluding that "Rule 403 applies to evidence introduced under Rule 413"); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (holding that Rule 403 may require the court to exclude evidence if its admission is fundamentally unfair); *Sumner*, 119 F.3d at 661 (finding that Rule 403 balancing test applies to evidence admitted pursuant to Rule 414); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (balancing under Rule 403 is applicable when determining when to admit evidence under rule 414); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997) (finding that Rule 403 analysis is appropriate in connection with evidence offered under Rule 414).

[111] Letter from Sen. Orrin G. Hatch, Rep. Susan Molinari, and Rep. John Kyl to Chief Justice William H. Rehnquist 2 (Oct. 11, 1994) (on file with Cassell) [hereinafter Hatch Letter].

[112] *Id.* If nothing else, the new federal rules also eliminated the problem created by the tendency of states to simply mirror Federal Rule of Evidence 404(b), a development that worked to "deprive the [state] courts of their former latitude to overtly adopt special rules of admission for similar crimes evidence in sex offense cases." 137 CONG. REC. S4925-03, S4927 (1994) (statement of Sen. Dole); *accord* Karp, *supra* note 68, at 23.

[113] Many states model their rules of evidence after the Federal Rules of Evidence.

[114] *See* CAL. EVID. CODE §1108 (1996) (enacted by A.B. 882, signed Sept. 5, 1995, eff. date Jan. 1, 1996). *See generally* Daniel E. Lungren, *Stopping Rapists and Child Molesters by Giving Juries All the Facts—Reforms in Federal and California Law*, 17 PROSECUTOR'S BR. 13 (No. 2, 1995) (calling California rule pending at time article was published "critically important to the protection of the public from crimes of sexual violence").

[115] MO. REV. STAT. § 566.025 (1995).

[116] *See* ARIZ. R. EVID. 404(c). This provision was added by the Supreme Court of Arizona in August of 1997. *See* Order Amending Rules 404 and 405, Arizona Rules of Evidence (Aug. 19, 1997).

D. Doporto*'s Unique Approach*

As shown in the preceding three sub-parts, *Doporto* represented a distinct minority approach on each of three separate issues. Part II.A established that most jurisdictions view Rule 404(b) as an "inclusionary" rule that more readily admits evidence of a "plan" of sex offenses than did *Doporto*. Part II.B established that most jurisdictions apply a more liberal standard in weighing probative value against prejudice under Rule 403 than *Doporto*. Part II.C established that many jurisdictions are inclined to admit evidence of a defendant's propensity to commit sex offenses, in contrast to *Doporto*'s blanket exclusion of such evidence. When these three restrictive holdings are combined, it is clear that *Doporto* placed Utah in a very distinct minority of American jurisdictions. Indeed, so far was we can determine on these issues,[117] *Doporto* made it more difficult, in general, to admit other crimes evidence in a sexual assault case in Utah than in any other jurisdiction in the country.[118] Supporting our reading of these out-of-state doctrines is the fact that *Doporto* cited scant case authority from any other jurisdiction to support its conclusion.[119] Far from being consistent with "a fundamental tenet of American jurisprudence,"[120] *Doporto* was an undeniable aberration.

---

[117]We have not explored issues other than those addressed in *Doporto*, such as whether other crimes must be proved by a "clear and convincing" standard. *Cf.* United States v. Huddleston, 485 U.S. 681, 685–89 (1988) (finding only a preponderance of evidence is required).

[118]Apparently the strongest candidate for a comparable jurisdiction is New York, where the balancing probative value versus prejudice is similar to *Doporto*. *See supra* note 47. New York, however, does not appear to require that there be "a necessity for the prior evidence" or that it be "highly probative" of a material issue. *Compare Doporto*, 935 P.2d at 490 (imposing these requirements), *with* People v. Hudy, 535 N.E.2d 250, 258 (N.Y. 1988) (requiring that to be admissible prosecutor must "identify some issue, other than *mere criminal propensity*, to which the evidence is relevant"). There are also New York cases that appear to admit prior crimes evidence more generously than *Doporto*. *See, e.g.*, People v. Gargano, 636 N.Y.S.2d 350, 351–52 (N.Y. App. Div. 1995) (allowing other crimes evidence to show "the circumstances under which the charged crimes were allowed to occur and the degree of control that the defendant exercised over his congregants"); People v. Weeks, 510 N.Y.S.2d 920, 923 (N.Y. App. Div. 1987) (permitting use of "uncharged incidents of sexual misconduct by defendant as reasonably [indicative of] a continuity of the lascivious disposition" (internal quotes omitted)); People v. Young, 472 N.Y.S.2d 802, 803 (N.Y. App. Div. 1984) (admitting evidence of uncharged sexual misconduct to establish defendant's "intent").

[119]*Doporto* quoted from State v. Featherson, 781 P.2d 424, 429 (Utah 1989), which in turn quoted State v. Harris, 677 P.2d 202, 205 (Wash. Ct. App. 1984). Washington, however, appears to frequently allow propensity evidence in sexual assault cases. *See, e.g.*, State v. Ray, 806 P.2d 1220, 1229–30 (Wash. 1991) (admitting collateral sexual misconduct evidence to establish defendant's lustful disposition toward victim); State v. Ferguson, 667 P.2d 68, 71 (Wash. 1983) (similar); State v. Carver, 678 P.2d 842, 844–45 (Wash. Ct. App. 1984) (similar). It is also interesting that *Featherson* relies heavily on a California precedent that excludes prior crimes evidence, People v. Tassell, 679 P.2d 1, 3–8 (Cal. 1984), *quoted in* 781 P.2d at 429. *Tassell*, however, was overruled after lengthy analysis in People v. Ewoldt, 867 P.2d 757, 759–71 (Cal. 1994), which concluded that *Tassell* stood in an "anomalous position in more than 50 years of California case law." *Id.* at 769.

[120]935 P.2d at 490.

II. THE "OVERRULING" OF *State v. Doporto*

Because of its weaknesses, the *Doporto* decision was exceedingly vulnerable to criticism. In the 1998 legislative session, Representative David Gladwell introduced legislation that would have overruled *Doporto* and, tracking Federal Rule 414, would have also guaranteed that propensity evidence was generally admissible in child molestation cases.[121] To overrule *Doporto*, the bill would have amended Rule 404(b) by adding a sentence that "[i]f evidence is otherwise admissible under this section, a party need not show that the evidence is necessary nor meet any greater standard of relevance than is required for admission of other evidence under these rules."[122] The bill would also have added a new subsection (c) in Rule 404[123] that essentially tracked Federal Rule of Evidence 414 in guaranteeing that propensity evidence be admissible in all cases involving a sexual offense against a child.[124]

Four days after Representative Gladwell's bill was introduced, Azure Wakefield came forward with her compelling story, which was featured in a front-page article in the state's largest newspaper.[125] On that same day, an article about a preliminary draft of our study also appeared, noting that we had found *Doporto* to place Utah in a uniquely restrictive position on the use of other crimes evidence.[126]

Within the next two weeks, the Utah Supreme Court met to consider a possible response to Representative Gladwell's bill. The court agreed that the higher standard for admitting other crimes evidence established by *Doporto* should be overruled.[127] The court referred the matter to the Advisory Committee on Rules of Evidence to develop a new rule and accompanying commentary that would make clear that *Doporto* was being overruled.[128]

---

[121]*See* H.J.R. 1, 52d Leg. (Utah 1998).

[122]*Id.*

[123]The bill may have created a new section 404(c) rather than a new Rule 414 because of concern about whether a new rule would fall within the legislature's power to "*amend* the rules of . . . evidence adopted by the Supreme Court." UTAH CONST. art. VIII, § 4 (emphasis added). This hyper-cautious approach was unnecessary. The legislature's power to "amend" the rules of evidence would conventionally be understood as including the power to adopt new rules. *See, e.g.*, BLACK'S LAW DICTIONARY 81 (6th ed. 1990) (defining "amendment" as including alteration by "modification, deletion, *or addition*") (emphasis added). Moreover, the legislature's power should not turn on the purely formalistic distinction of whether an amendment is "packaged" as a new rule or an alteration of an existing rule.

[124]*See* H.J.R. 1, 52d Leg. 2 (Utah 1998). In addition to defining a child as a person younger than 14 years of age and requiring 15 days advance notice from prosecutors to defendants, the provision read as follows:

> Notwithstanding any other provision of this rule, in a criminal case in which the defendant is accused of a sexual offense involving any child , evidence of the defendant's commission of other sexual offenses involving any child is admissible and may be considered for its bearing on any matter to which that evidence is relevant, including the defendant's propensity to commit sexual offenses involving children.

Id.

[125]*See* Coyne, *supra* note 5.

[126]*See* House & Hunt, *supra* note 20.

[127]*See* Utah Supreme Court Advisory Committee on the Rules of Evidence, *Minutes* at 1–2 (Feb. 4, 1998) (minutes currently in draft form).

[128]*Id.*; *see also* Stephen Hunt, *State's Rule of Evidence Are Altered; Court Says Prior Acts Can Be Used in Trials*, SALT LAKE TRIB., Feb. 13, 1998, at B3.

The result of the court's direction was that on February 10, 1998, the Advisory Committee recommended that Utah Rule of Evidence 404(b) be amended to read as follows:

> (b) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.[129]

The Committee included a note that the amendment was intended to

> abandon[ ] the additional requirements for admitting evidence under Rule 404(b) imposed by *State v. Doporto*, 935 P.2d 484 (Utah 1997). . . .
>
> . . . This amendment to the rule is not intended to depart from the meaning and interpretation given to the equivalent rule in other jurisdictions, but to return to the traditional application of Rule 404 prior to *Doporto*.[130]

Within a week, the Utah Supreme Court adopted the proposed rule on an emergency basis, with only Justice Stewart (the author of *Doporto*) dissenting.[131] Thus did the *Doporto* decision, sickly at birth, die all but unmourned a few weeks after its first birthday.

Because Utah courts will frequently be called upon to interpret the amendment to Rule 404(b), it may be useful to discuss briefly its effect. The amendment returns Utah law to where it stood prior to *Doporto*. In other words, 404(b) should be interpreted as adopting an "inclusionary formulation"[132] under which "prior bad act evidence is only excluded where the *sole* reason it is being offered is to prove bad character or to show that a person acted in conformity with that character."[133] Other crimes evidence can be excluded because of concerns about "unfair prejudice," but only where defendants meet the demanding standard of showing that the prejudicial effect "substantially outweighs" probative value.[134] In short, prosecutors will be permitted to introduce other crimes evidence in a wide range of circumstances, except where the evidence is being used solely for propensity purposes.

---

[129]Utah Supreme Court Advisory Committee on the Rules of Evidence, *Meeting Minutes* at 2 (Feb. 4, 1998); *see also* Order, *In re* Proposed Amendments to Rule 404, Utah Rules of Evidence, (Utah Feb. 13, 1998) (No. 980077) (adopting amendments to Rule 404 as proposed by Committee).

[130]*See* UTAH R. EVID. 404(b) Advisory Committee Note.

[131]*See* Order, *In re* Proposed Amendments to Rule 404, Utah Rules of Evidence (Utah Feb. 13, 1998) (No. 980077).

[132]*See supra* notes 26–32 and accompanying text.

[133]*See* State v. O'Neil, 848 P.2d 694, 700 (Utah Ct. App. 1993), *cert. denied*, 859 P.2d 585 (Utah 1993).

[134]*See* UTAH R. EVID. 403.

III. ALLOWING PROPENSITY EVIDENCE IN SEX CASES

The overruling of *Doporto* paves the way for admission of prior crimes evidence to prove any point except a defendant's propensity to commit crimes. As explained earlier, many jurisdictions allow other crimes evidence to be used for this purpose in sexual offense cases—either directly or indirectly. Utah should join them.

Compelling justifications support the more generous approach of other jurisdictions in admitting prior crimes evidence in sexual assault cases. This short Article is not the place to attempt a comprehensive review of the supporting justifications, which have been ably canvassed elsewhere.[135] But it is useful to set them out briefly because this issue will likely arise in Utah in the near future, as either the Advisory Committee or the legislature considers whether to adopt the federal rules allowing propensity evidence in sex cases. It is also important because *Doporto* articulated the general concerns against prior crimes evidence—for example, the possibility that an innocent defendant might be convicted of a charge simply because he has done something wrong in the past[136]—without acknowledging any of the competing rationales for admitting such evidence. In the final analysis, what is perhaps most curious about *Doporto* is not that it has reached a different assessment of these salient questions, but that it simply made no assessment at all. The opinion is remarkable for its utter lack of anxiety about the effect of excluding prior crimes evidence on the successful prosecution of sex offenders.

Perhaps the most important reason for admitting other crimes evidence is the undeniable fact that sex crimes are frequently committed in private, resulting in a lack of neutral witnesses in most instances.[137] This lack of observers frequently turns sex offense prosecutions into "unresolvable swearing matches"[138] between the victim and the accused. In a criminal system that requires proof beyond a reasonable doubt for a conviction, it is quite difficult for prosecutors to carry that burden without evidence

---

[135]*See especially* Karp, *supra* note 68, at 19–26. *Compare* Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. Rev. 37 (1994) (discussing Karp's views), *with* David J. Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49 (1994) (responding).

[136]*See Doporto*, 935 P.2d at 490–91. The extent to which this concern is anything other than hypothetical remains to be established in Utah (and perhaps elsewhere). The *Doporto* opinion does not claim that Doporto was innocent of the charged crime, and any such assertion would seem impossible in light of Doporto's willingness to plead guilty to the charge. *See supra* text accompanying notes 18–19. Moreover, the opinion cites no example of an innocent person having been convicted in Utah as the result of the introduction of other crimes evidence. Outside of Utah, where such evidence is frequently admitted, the lesson of experience seems to be that no noticeable risk of injustice is thereby created. Indeed, if excluding prior crimes evidence operates to the differential benefit of guilty offenders (as seems quite likely), innocent defendants will especially suffer. The innocent are harmed by legal rules that make it more difficult for the system to distinguish the blameless from the blameworthy. *See generally* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (forthcoming 1998); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 47 n.160 (1997); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1931 (1993).

[137]Karp, *supra* note 68, at 20.

[138]Hatch Letter, *supra* note 111, at 7.

supporting a victim's testimony. In many cases, the only available supporting evidence comes from the pattern of the defendant's attacks.

This problem of supporting evidence is acute in rape cases, where the defendants often claim that the victim "consented" to have sex. In such cases the accused will often admit having sexual contact with the victim, thus making physical evidence of sexual relations irrelevant. This distinguishes other crimes evidence in sex cases from other types of cases, because claims of consent are rarely offered. David Karp has put the point nicely, noting that

> the accused mugger does not claim that the victim freely handed over his wallet as a gift. In contrast, claims are regularly heard in rape cases that the victim engaged in consensual sex with the defendant and then falsely accused him. In such instances, knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these conflicting claims . . . .[139]

Similar problems arise in child molestation cases, which inevitably involve child victim witnesses, whose credibility can frequently be attacked simply because of their lack of maturity. At the same time, a history of prior molestations is "exceptionally probative because it shows an unusual disposition on [the defendant's] part—a sexual interest in children—that simply does not exist in ordinary people."[140] Indeed, one commentator has suggested that the fact that "the psychiatric profession recognizes pedophilia as a disorder . . . [makes it] difficult to argue that prior acts that might in turn demonstrate the trait of pedophilia are not relevant to the question whether a given individual has sexually abused a child."[141]

Given frequently conflicting testimony from victims and defendants, admitting other crimes evidence serves to arm the jury with more information from which to determine the truth and reach an accurate verdict. When the defendant claims to have been unjustly accused, allowing evidence of prior acts of misconduct often puts an entirely different light on the matter.[142] "It would be quite a coincidence if a person

---

[139]Karp, *supra* note 68, at 21.

[140]Hatch Letter, *supra* note 111, at 7.

[141]Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L. FORUM 307, 320 (1993) (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM III-R) 284 (3d rev. ed. 1987)).

[142]An additional justification for admitting propensity evidence in sex cases may be that the rate of recidivism for sex offenders is generally higher than for most other crimes. The studies contrary to this proposition may be

> of questionable value, since often they utilize arrest and conviction rates, which are inadequate measures of recidivism due to the low number of cases which actually make it that far into the system. . . . "The low recidivism rate generally attributed to such offenders can be understood due to the low visibility of such offenses."

Lannan v. State, 600 N.E.2d 1334, 1337 n.6 (Ind. 1992) (quoting A. Nicholas Groth, et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQUENCY 450, 457 (1982)). Supporting this suggestion is a recent methodological analysis that found that "there was a marked underestimation of recidivism when the criterion was based on conviction or imprisonment." Robert A. Prentky et al., *Recidivism Rates Among Child Molester and Rapists: A Methodological Analysis*, 21 LAW & HUMAN BEH. 635, 635 (1997).

who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type."[143] Combining direct evidence of guilt with evidence of the defendant's past crimes may thus eliminate reasonable doubt in a case that would otherwise be inconclusive. As Senator Orrin Hatch concluded in sponsoring the new federal rules, the public interest in admitting evidence "that will illuminate the credibility of the charge and any denial by the defense is truly compelling."[144]

A good illustration of the problem comes from a very recent case in Utah.[145] Prosecutors charged a man with various separate sexual assaults, against five female Utah State University students. In January 1998, a jury acquitted the man in the first assault, after he testified that the sexual encounter had been consensual. The jury, however, never learned that the four other female students had alleged nearly identical rapes by the same man following the same pattern,[146] as the district court judge excluded such evidence on authority of *Doporto*. As prosecutors prepared to go to trial on the second assault, the supreme court overruled *Doporto*. The district judge then reversed his earlier decision, agreeing to allow three of the four other students to testify at this new trial. At this trial, the jury heard from three of the students (the fourth choosing not to testify because of the emotional ordeal) about the attacks against them and convicted the defendant after deliberating less than four hours.[147]

Another justification for the new rules is the appalling fact that as many as "98% of the victims of sex crimes never see their attacker apprehended, tried or imprisoned."[148] That percentage is disturbingly low for a variety of reasons, including the fact that a majority of rape victims never report attacks to law enforcement.[149] The reluctance to report sexual crimes is, undoubtedly, enhanced by the perpetuation of a judicial system that both conceals the truth with respect to the defendant's history and simultaneously forces victims "to stand trial to 'prove' their innocence in the face of widespread belief that they caused their own rapes."[150] Admitting prior crimes

---

[143]Karp, *supra* note 68, at 20.

[144]Hatch Letter, *supra* note 111, at 7.

[145]*See* Brian Maffly, *Other Accusers Can Testify at Rape Trial*, SALT LAKE TRIB., Feb. 26, 1998, at D2 [hereinafter *Accusers*]; Brian Maffly, *Prosecutors: Don't Hide Victims in Rape Case*, SALT LAKE TRIB., Feb. 23, 1998 at D2 [hereinafter *Victims*].

[146]*See Accusers*, *supra* note 145. In each of the attacks, the defendant: (1) invited the victim to his dorm room; (2) locked the door; (3) turned up the volume of his radio or television; (4) wore loose shorts that he quickly whisked off; (5) told the victim to kiss his body; (6) pinned her to his bed with her feet pressed toward her head; (7) insisted she stop complaining because it was ruining something beautiful; (8) offered her money or gifts; and (9) insisted that nothing bad happened. *See Victims*, *supra* note 145.

[147]*Jury Convicts Ex-USU Student of Rape*, DESERET NEWS, Apr. 18, 1998, archive article at http://www.desnews.com/eqi-bin/libstory_state?dn98&980-4190320.

[148]Fingar, *supra* note 103, at 501 (citing 139 CONG. REC. S15,070 (daily ed. Nov. 4, 1993) (statement of Sen. Diane Feinstein)).

[149]*See id.* at 504 (citing Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989)); *see also* Lannan v. State, 600 N.E.2d 1334, 1337 n.6 (Ind. 1992) ("'[T]here is a wide variety of factors that serve to deter many victims of sexual assault from reporting their victimization. Even if the offense is reported, in the majority of cases, no suspect is apprehended; few of the cases in which a suspect is apprehended reach trial level, and still fewer result in conviction.'" (quoting Groth, *supra* note 142, at 458)).

[150]Fingar, *supra* note 103, at 502–03. Fingar demonstrates that the belief that women often invite rape is one commonly held by the public at large. *See id.* at nn.5–9.

evidence properly gives the jury full information about a defendant.[151] As the Tenth Circuit recently concluded, "'[C]orroboratory information about the defendant also limits the prejudice to the victim that often results from jurors' tendencies to blame victims in acquaintance rape cases. Thus, like rape shield statutes codified in the federal and state rules of evidence, Rule 413 encourages rape reporting and increased conviction rates by directing the jury's attention to the defendant.'"[152]

IV. CONCLUSION

Utah should follow the mainstream approach of admitting propensity evidence in sex offense cases. This could be done by interpreting Utah Rule of Evidence 404(b) broadly, stretching the scope of the non-propensity uses of such evidence to, in effect, cover propensity. Many states have employed this interpretation of their own rules.

A more straightforward approach, however, would be to simply recognize the fact that propensity evidence is properly admitted in sexual assault cases. Historically, the earliest Utah cases recognized the proper use of propensity evidence. Today, there are particularly strong reasons for Utah to move in that direction. The large number of young persons in Utah[153] make the state a "target rich" environment for predatory pedophiles. If anything, one would expect that Utah's laws would be particularly protective of its relatively large vulnerable population. Utah should thus adopt a rule similar to Federal Rule 414 to ensure that other acts of child molestation are generally admissible to prove propensity in sex offense prosecutions. Utah should also adopt Federal Rule 413 to allow evidence of prior sexual assaults against adult victims to be admitted for propensity purposes.

Adopting the federal rules in Utah would end an unfortunate disparity in protection of crime victims. Today in Utah, sexual assault victims attacked on federal

---

[151]This is an appropriate point to address the occasionally advanced claim that admitting prior sex crimes evidence against defendants is inconsistent with rape shield rules that exclude from evidence sexual activity of victims. *See, e.g.*, UTAH R. EVID. 412 (providing for protection against admissibility of sexual assault victims' prior sexual activities); FED. R. EVID. 412 (same). The two types of evidence cannot be compared. First, prior sexual misconduct by the defendant places the defendant in a unique and discrete class of people: those who commit sex crimes. Prior sexual behavior by the victim, on the other hand, places the victim amongst the overwhelming majority of adult human beings who, at one time or another, engage in normal sexual relations. Second, a victim's prior, consensual sexual acts are matters of supreme privacy. On the other hand, "sex offenses are clearly not private acts, but are crimes against the state." Fingar, *supra* note 103, at 545. Accordingly, the defendant's interest in keeping the prior offense private is not remotely of the same character as the victim's interest in avoiding disclosure of prior consensual sexual acts. Finally, the "[r]ape shield laws serve the important purpose of . . . encouraging victims to report rapes by saving them the embarrassment of having their sexual histories revealed in doing so." *Id.* Considering that less than half of all rapes are reported, society as a whole has an interest in encouraging victims to come forward. Rape shield laws provide such encouragement. *See* Debra Sherman Tedeschi, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient,"* 57 U. PITT. L. REV. 107, 117 (1995).

[152]United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) (quoting Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 69–70 (1995)).

[153]Utah ranks first among the states in the percentage of population under the age of five and ages five to fifteen. *See* Economic Report to the Governor, tbl.16, <http://www.gvnfo.state.ut.us/dea/publications/erg97/tables>.

territory within the state (such as on an Indian reservation, at a National Park, or on a military base) can be assured that their attackers' histories will likely be presented to the juries trying these defendants. On the other hand, for such victims attacked in state territory, it is likely that the defendants' histories will be concealed. Fundamental justice should not turn on the happenstance of whether a victim is attacked in Utah on a federal enclave or in state territory. Adopting the prevailing approach of Federal Rules 413 and 414 would also be consistent with the general approach of the Utah Rules of Evidence, which almost invariably track the Federal Rules of Evidence. This produces the obvious advantage of certainty and comprehension in the law.

Apparently the Utah Supreme Court, through its Advisory Committee on the Utah Rules of Evidence, will revisit the issue of propensity evidence in sex offense cases before the 1999 legislative session.[154] In a 1996 report, the Committee concluded that the new federal rules were undesirable and that "the proper course of action is to wait for this case experience [under the new federal rules] to develop before further considering changes in the propensity evidence rules."[155] Case experience is now available and it has been quite favorable. In endorsing Representative Gladwell's attempt to adopt Rule 414 in Utah, the United States Department of Justice reported that "[e]xperience has shown that this [federal] rule is of great value in achieving just results in federal child molestation cases and in protecting the public from the perpetrators of these crimes."[156]

In its 1996 report, the Committee also raised the possibility that the new federal rules might present federal and state constitutional issues.[157] The federal experience dispels this concern, as federal courts have applied the federal rules without constitutional problem.[158] This is consistent with the facts that the "text of the Constitution does not, on its face, purport to limit the use of prior offenses as evidenced in criminal cases," and "[j]udicial decisions in the United States have

---

[154]Stephen Hunt, *State's Rules of Evidence are Altered; Court Says Prior Acts Can Be Used in Trials*, SALT LAKE TRIB., Feb. 13, 1998, at B3.

[155]*Id.* In recommending against the new rules, the Committee claimed that they represented "a dramatic, wide ranging departure from long accepted rules on propensity evidence." *Id.* This assertion was unsupported by any citation and, as was shown earlier, was incorrect. *See supra* notes 97–103 and accompanying text (explaining how in sex cases many states directly admit propensity evidence and most states indirectly admit such evidence). The Committee also paid little attention to the need for the new rules to permit effective prosecution of sex offenders. *See supra* notes 104–112 and accompanying text (discussing rationales of Federal Rules 413 and 414).

[156]Letter from Bonnie Campell, Director, Violence Against Women Office, U.S. Dept. of Justice to Rep. David L. Gladwell (Jan. 30, 1998) (on file with Cassell). The Department's experience with the federal rules contrasts with the Committee's surprising assertion that the new rules might "reduce the incentive for law enforcement to investigate fully sex crimes." Advisory Comm. Rep., *supra* note 65, at 28.

[157]Advisory Comm. Rep., *supra* note 65, at 25.

[158]*See, e.g.*, United States v. Eagle, 137 F.3d 1011, 1015 (8th Cir. 1998) (admitting evidence of prior sexual offense involving minor); United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997) (admitting testimony of uncharged victim of molestation 16–20 years prior to trial); United States v. LeCompte, 131 F.3d 767, 769–70 (8th Cir. 1997) (admitting evidence of uncharged prior sexual abuse); U.S. v. Akram, 1997 WL 392220, *1–3 (N.D. Ill. 1997) (admitting evidence of other sexual acts under Federal Rule of Evidence 413).

generally rejected constitutional arguments against the use of such evidence."[159] In the rare case where admitting prior crimes evidence may raise peculiar constitutional concerns, the federal rules allow a judge to exclude this evidence if the defendant establishes that the prejudicial value of such evidence substantially outweighs its probative value.[160] This approach should be followed with new Utah rules, largely obviating any conceivable federal constitutional concerns.[161]

With respect to the Utah Constitution, the Utah courts directly admitted some propensity evidence in sexual assault cases shortly after the constitution's adoption in 1896,[162] consistent with the law accepted in many other states at the time.[163] If anything, since then the prevailing law in the country has moved even further in the direction of admissibility of propensity evidence in sex offense cases, confirming the constitutionality of such an approach.[164]

The Advisory Committee should heed the lessons of the successful implementation of the new federal rules and recommend that they be added to the Utah Rules of Evidence, a recommendation that the Utah Supreme Court should then adopt. But if the Committee or the court will not act, the remaining way to move forward is by legislative action. Under Utah's rulemaking system, the legislature—not Utah's courts—is given final authority over the rules of evidence in Utah.[165] If necessary, the legislature should exercise that authority to ensure that the protection of the new federal rules is extended to all Utahns as quickly as possible.

---

[159]DOJ CRIMINAL HISTORIES REP., *supra* note 68, at 29.

[160]*See supra* note 110 and accompanying text.

[161]*Cf.* United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (rejecting constitutional attack on new federal rules in light of Rule 403 balancing); United Stats v. Enjady, 134 F.3d 1427, 1432–33 (10th Cir. 1998) (same).

[162]*See supra* notes 74–78 and accompanying text (discussing State v. Hilberg, 61 P. 215, 216 (1900); State v. Neel, 65 P. 494, 495 (1901)). Given these venerable rulings, it is difficult to argue that the Utah Constitution was understood when drafted as generally prohibiting propensity evidence.

[163]*See supra* note 85 and accompanying text (noting review of case law around the time of ratification of Utah Constitution by commentators Bishop and Wigmore).

[164]There is no holding in Utah to the contrary, and the only discussions that might be drawn upon to build such an argument are distinguishable. The concurring opinion of Justice Zimmerman in *State v. Bishop*, joined only by Justice Durham, attacks the use of such of propensity evidence in the guilt phase of a capital trial, alluding to state constitutional issues. *See* State v. Bishop, 753 P.2d 439, 495–97 (Utah 1988) (Zimmerman, J., concurring). The opinion appears to have been discussing general predisposition evidence in that specialized context, rather than in the context of sex offenses. Moreover, the concurrence suggests that the federal and state constitutions are the same on this point. *See id.* at 497 (discussing possible "violation of the state and federal constitutions"). This means the heavy weight of federal and other state precedents supporting the use of such evidence inform any interpretation of the Utah Constitution.

Utah cases have also held that it is unfair to join together charges of unrelated criminal conduct where the charges involve evidence that is not "mutually admissible." *See, e.g.*, State v. McCumber, 622 P.2d 353, 356 (Utah 1980) (noting that value of prosecutor's use of an unproven and uncharged crime to prove defendant's guilt in another unrelated offense is outweighed by "prejudicial and inflammatory effect"). Such cases are easily distinguished because the proposed rules, by definition, make the evidence of other charges mutually admissible.

[165]*See* UTAH CONST. art. VIII, § 4; *see also supra* note 59 and accompanying text (defining role of judiciary in creating rules of evidence).

We would be remiss if we closed this Article without reflecting on the individual lives that have been—and will be—profoundly affected by the approach that Utah takes to this issue. When then seven-year-old Azure Wakefield went to sleep on a summer night a decade ago, she could not have imagined the depredations that Michael Doporto would force on her. While that is a tragedy in its own right, it is also tragic that the criminal justice system unnecessarily compounded her anguish. Azure could not have dreamed that the criminal justice system would fail to bring Michael Doporto to justice nearly a decade later—a failure caused in no small measure by the reluctance of the Utah courts to inform juries when defendants have a history of perpetrating similar attacks. This perverse approach directly benefits those least deserving of protection: criminals who commit repeated acts of sexual violence, including predatory pedophiles and serial rapists. Azure and all of Utah's residents are right to expect that the criminal justice system will be structured to consider not only the interests of law breakers, but also the legitimate interests of the law abiding. Amending Utah's rules to admit propensity evidence in sex offense cases would be a valuable step in that direction.