

OREGON'S NEW CHARACTER EVIDENCE RULES

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On June 12, 1997, the Oregon Legislature enacted Senate Bill 936 (SB 936) as part of the Victims' Rights Initiative. [FN1] Among other things, SB 936 amended Rules 404 and 405 of the Oregon Evidence Code to proscribe judicial balancing of evidence of a criminal defendant's prior crimes, wrongs, or acts if otherwise relevant. Critics charge that the amended rules violate criminal defendants' rights to fundamental fairness at trial because they may permit the introduction of unfairly prejudicial prior act and propensity evidence.

Senate Bill 936 was enacted, in part, to implement aspects of Ballot Measure 40. Passed in the November 1996 general election, Measure 40 sought to amend Article I of the Oregon Constitution by detailing special rights for crime victims. [FN2] In particular, Measure 40 gave crime victims the right to have "all relevant evidence" admissible against criminal defendants. In *Armatta v. Kitzhaber*, Measure 40 was invalidated by the Oregon Supreme Court because the measure failed to comply with the appropriate procedural requirements for adopting constitutional amendments. [FN3] Senate Bill 936 (SB 936) was enacted prior to the ruling in *Armatta*, but the amendments to Rules 404 and 405 appear to be valid.

This Comment will examine the controversial amendments to Rules 404 and 405. Part I outlines the history of the Oregon Evidence Code and the debate surrounding the recent amendments. Part II describes the justifications for the traditional exclusion of propensity and unfairly prejudicial prior act evidence. Part III describes the evolution of Measure 40 and SB 936. Part IV examines *316 various interpretations of the amended rules and their implications for due process analysis. This Comment concludes that the amended rules are not likely to change substantially the rights of criminal defendants with respect to the introduction of prior act evidence.

I

Overview: The Oregon Evidence Code, Measure 40, and Senate Bill 936

The Oregon Evidence Code was enacted in 1981, and is modeled largely upon the Federal Rules of Evidence, although a number of the Federal Rules were modified to conform with Oregon law. [FN4] The purpose of the code is to "facilitate the ascertainment of truth and the just determination of proceedings." [FN5] Accordingly, the code contains several provisions designed to ensure fundamental fairness to defendants in criminal proceedings. [FN6]

Two provisions, Rules 404 and 405, govern the admissibility of character evidence. Rule 404 [FN7] restates the common law rule in *317 most jurisdictions, including Oregon, [FN8] that evidence of a person's character is not admissible to prove that the person acted in conformity with his or her character. Though such circumstantial use of character evidence is generally inadmissible, evidence of other crimes or wrongs may be offered for purposes other than to demonstrate conformity with propensity. [FN9] Where character evidence is admissible, Rule 405 governs the method of proof. [FN10] Rules 404 and 405, as originally enacted, remained unchanged until the passage of Measure 40 in 1996 and the subsequent 1997 amendments.

Measure 40 sought to give crime victims the right to have all relevant evidence admissible against criminal defendants. Measure 40 defined "relevant evidence" in such a way that many categories *318 of previously prohibited evidence became admissible, such as propensity evidence, results of lie detector tests, and evidence seized in violation of statutory provisions. [FN11] Senate Bill 936 implemented Measure 40 by amending Rules 404 and 405 of the Oregon Evidence Code to permit evidence of a criminal defendant's prior crimes, wrongs or acts if otherwise relevant. Because the amended rules appear to substantially alter the scope of evidence admissible against criminal defendants, critics charge that the amended rules undermine fundamental fairness under the United States and Oregon Constitutions.

II

Background: Character, Propensity, and Prior Act Evidence

By governing the process of proof at trial, the rules of evidence play a central role in promoting and preserving due process of law. The admission of unfairly prejudicial evidence violates the Due Process Clause of the U.S. Constitution if it results in a denial of fundamental fairness at trial. [FN12] "Fundamental fairness" requires that findings of guilt be logically grounded upon relevant evidence; fairness is jeopardized when the evidence tends to suggest a decision on an improper basis, such as emotion. [FN13]

A. Character and Propensity Evidence

One of the greatest threats to fundamental fairness is the circumstantial use of character evidence. In the evidentiary context, "character" is defined as a propensity to commit certain acts. [FN14] Such propensity evidence often has significant probative *319 value, [FN15] but because it often results in prejudice and distraction, it is generally inadmissible to prove conformity therewith on a particular occasion. [FN16] In criminal cases, the rule against propensity evidence is applied even more strictly. [FN17]

The Supreme Court has yet to address whether laws permitting the use of prior act evidence to show propensity violate the Due Process Clause. [FN18] However, there is evidence that the Court would oppose a rule that unconditionally permits the use of such evidence. For example, in *Brinegar v. United States*, the Court noted that guilt in a criminal case must be proved beyond a reasonable doubt and in accordance with rules of evidence designed to safeguard individuals from dubious and unjust convictions. [FN19] In his partially dissenting opinion in *Spencer v. Texas*, Justice Warren noted that the Court's decisions "suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." [FN20] Finally, the Court recently stated in *Old Chief v. United States* that there is no question that propensity evidence is an improper basis for conviction and that, in U.S. cases, evidence of prior convictions is subject to balancing of the relative probative value and prejudicial risk of misuse as propensity evidence. [FN21]

This is not to suggest, however, that the introduction of propensity evidence constitutes a per se violation of fundamental fairness. First, the Supreme Court has very narrowly defined the categories of infractions that violate fundamental fairness: "[b]eyond the specific guarantees enumerated in the Bill of *320 Rights, the Due Process Clause has limited operation." [FN22] As the Court discussed in *Michelson v. United States*, the traditional exclusion of propensity evidence is not based on the text of the Constitution, rather it is based upon the practical experience that its exclusion helps to prevent confusion of issues, surprise, and unfair prejudice. [FN23] As the Ninth Circuit Court of Appeals remarked in *Jammal v. Van de Kamp*, propensity evidence violates due process only if there are no permissible inferences the jury may draw from the evidence. [FN24] Even then, however, the introduction of such evidence must not prevent a fair trial. [FN25] The same court later held that, although "[c]haracter evidence is the type of evidence from which no permissible inference may be drawn . . . in determining whether the admission of such evidence necessarily prevented a fair trial, the probative and prejudicial force of inadmissible evidence must be compared with that of the admissible evidence supporting the verdict." [FN26] These arguments suggest that the introduction of propensity evidence does not constitute a violation of the Due Process Clause unless the defendant can show actual prejudice.

Regardless of the constitutional arguments for and against propensity evidence, the Oregon Evidence Code generally prohibits such evidence in Rule 404(2). [FN27] There are several well-known exceptions to the general prohibition. Under Rule 404(1), such evidence is admissible if character itself is an element of the crime or defense. [FN28] Rule 404(2)(a) permits a criminal defendant to introduce evidence of a pertinent trait of his or her own character. [FN29] Under Rule 404(2)(b), the accused may introduce evidence *321 of a pertinent trait of character of the victim. [FN30] Rule 404(2)(c) allows evidence of a witness' character for truthfulness where probative of credibility. [FN31] Finally, Rule 404(2)(d) permits evidence of the character for violence of either party in civil assault or battery cases when the identity of the aggressor is at issue. [FN32]

B. Evidence of Prior Acts

One of the most effective methods of proving character is by offering evidence of prior crimes, wrongs, or acts. [FN33] Such prior act evidence may be relevant to a material fact, or it may be relevant as a form of propensity

evidence. [FN34] However, where character evidence is admissible under Rule 404(2)(a)-(d), Rule 405(1) does not permit proof by evidence of prior acts. [FN35] Moreover, Rule 404(3) expressly forbids the use of prior act evidence to prove propensity. [FN36] Rule 404(3) does allow prior act evidence if it is offered for a relevant non-propensity purpose, such as to demonstrate "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." [FN37] Prior act evidence is subject to balancing under Rule 403 [FN38] and may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence." [FN39] Rule 405(2) permits proof of prior act evidence offered under Rule 404(3) by specific *322 instances of conduct. [FN40]

Though the circumstantial use of character evidence does not constitute a per se violation of the Due Process Clause, nearly 300 years of common law jurisprudence cautions against the use of propensity evidence. [FN41] The Oregon Evidence Code favors the traditional rule by expressly prohibiting such evidence except in limited circumstances. This prohibition extends to prior act evidence when offered to prove conformity with character. Evidence of prior acts may be admissible if relevant to a fact in issue, so long as the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice. These rules help ensure fundamental fairness by minimizing the risk that the trier of fact will render its decision on an improper basis.

III

Recent Developments: Measure 40 and Senate Bill 936

Measure 40 sought to amend the Oregon Constitution by adding section 42, entitled Crime Victims' Rights, to the Oregon Bill of Rights. [FN42] In particular, Measure 40 granted fourteen specific rights to crime victims to ensure they have a meaningful role in the criminal justice system. [FN43] Significantly, section 1(f) would have granted victims the right to have "all relevant evidence" admissible against criminal defendants. [FN44] Section 6 defined relevant evidence as "evidence having any tendency to prove the charge against the criminal defendant or establish the proper sentence for the criminal defendant." [FN45] The only restriction on the use of such evidence was in section 3, which stated that Measure *323 40 does not reduce the rights of criminal defendants under the U.S. Constitution or change any existing rules relating to privilege or hearsay. [FN46]

Measure 40 was designed as a constitutional amendment to prevent legislative tampering with Oregon's popular initiative process. [FN47] With respect to section 1(f), supporters of Measure 40 stated that the amendment:

guarantees that the jury will hear all relevant evidence that pertains to the guilt of the defendant as long as the evidence is permissible under the United States Constitution. . . . Moreover, evidence of other crimes, if probative of guilt, will be admitted. [Section 1(f)] will not admit evidence that is confusing, repetitive, or unclear, because the judge must still make a determination that the evidence pertains to the defendant's guilt and therefore is relevant. [FN48]

Prior to the vote on Measure 40, opponents argued that most of Measure 40's provisions relate to criminal procedure, rather than to substantive rights, and that they therefore belong in statutes, not in the Oregon Constitution. [FN49] Even incumbent State Attorney General Hardy Myers and his opponent in the 1996 election, Victor Hoffer, joined forces to argue that there was no need to amend the Oregon Constitution because the Measure 40 provisions designed to help victims were rights that Oregon's *324 crime victims already enjoy. [FN50] More substantive criticisms focused on provisions, such as the "all relevant evidence" requirement and mandatory restrictions on pretrial release, that effectively strip criminal defendants of their rights under the Oregon Constitution and the Oregon Evidence Code. [FN51]

Although Measure 40 ultimately passed in the November 1996 election, the Oregon Supreme Court struck it down as an unconstitutional amendment in *Armatta v. Kitzhaber*. [FN52] The issue before the court was whether Measure 40 was validly adopted; the court did not address the merits of the victims' rights policies represented by the measure. The court concluded that, although Measure 40 purported to be a single amendment to the state constitution, it contained two or more constitutional amendments that must be voted upon separately under Article XVII, section 1, of the Oregon Constitution. [FN53] Because Measure 40 was presented to voters as a single amendment, it was found invalid in its entirety.

Prior to the ruling in *Armatta*, Senate Bill 936 was enacted by the Oregon Legislative Assembly. Introduced by

Senator Stull [FN54] and Representative Minnis, [FN55] the bill contains thirty-nine sections relating to the implementation of the Victims' Rights Initiative. [FN56] Pertinent to this discussion are sections 29 and 34, which broaden the scope of evidence admissible against criminal defendants. Section 29, which is based directly upon Measure 40's "all relevant evidence" provision, amends Rule 404 by adding subsection 4. The new subsection states:

In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:

(a) [Rules 406-412] and, to the extent required by the *325 United States Constitution or the Oregon Constitution, [Rule 403];

(b) The rules of evidence relating to privilege and hearsay;

(c) The Oregon Constitution; and

(d) The United States Constitution. [FN57]

Section 34 of SB 936 complements section 29 by permitting proof of the defendant's prior acts through evidence of specific instances of conduct. [FN58]

The validity of SB 936 apparently was not affected by the ruling in *Armatta*. [FN59] Prior to the supreme court's ruling in *Armatta*, the court of appeals upheld the constitutionality of SB 936 in *State v. Fugate*. [FN60] In *Fugate*, the trial court suppressed evidence of alcohol-related impairment because it was obtained in violation of relevant statutory provisions. The state appealed, contending that SB 936, although enacted after the trial court's decision in the case, applied and compelled a reversal. In particular, section 1 of SB 936 states that "[a] court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required" by the federal or state constitution. The defendant argued that SB 936 should not apply for various reasons, including a claim that SB 936 violates the one-subject rule of Article IV, section 20, of the Oregon Constitution. [FN61] The court rejected the constitutional challenge, finding the body of the act contains a unifying principle logically connecting all provisions in the act, such that it can be said that the act embraces only one subject. [FN62] Upon reconsideration after the supreme court's ruling in *Armatta*, the court of appeals affirmed its earlier ruling on the constitutionality of SB *326 936. [FN63] Several subsequent challenges to SB 936, section 1, also have failed. [FN64]

IV

Implications: Interpreting the Amended Rules

The amendments to Rules 404 and 405 may significantly impact criminal trials. Critics claim the amendments open the door to forbidden propensity evidence as well as to other unfairly prejudicial evidence because balancing under Rule 403 is expressly limited. There is also concern that the amended rules create substantive and procedural imbalances which threaten criminal defendants' rights to fundamental fairness at trial. This section addresses each of these concerns and their implications for the Oregon Evidence Code.

A. Rule 404(4) and the Circumstantial Use of Character Evidence

The first criticism of Rule 404(4) is that it permits the introduction of prior act evidence for any purpose, including propensity. As the following discussion suggests, however, the statute does not necessarily support such an interpretation. Further, the requirement of fundamental fairness also suggests that courts will exclude prior act evidence offered purely to prove conformity with propensity.

1. Statutory Analysis and Analogies

As discussed above, the Rule 404(2) exclusion of propensity evidence is an exception to the general rule that all relevant evidence is admissible. [FN65] Though such evidence often has strong probative value, as a matter of both law and policy its probative *327 value is determined to outweigh the dangers listed in Rule 403. [FN66] The issue here is whether Rule 404(4) represents an exception to the exception; that is, whether Rule 404(4) permits the

use of prior act evidence to prove character in order to show conformity therewith. Although the text is ambiguous on this issue, the following discussion suggests that courts are not likely to read Rule 404(4) as a broad sanction on the use of prior act evidence for propensity purposes.

The language of Rule 404(4) is similar to Rule 404(3) insofar as both address evidence of prior crimes, wrongs, or acts. [FN67] However, Rule 404(3) states that such evidence is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith." [FN68] Rule 404(3) specifically addresses "character" and it essentially restates Rule 404(2)'s general exclusion of propensity evidence. Thus, subsections (2) and (3) of Rule 404 directly relate to the purposes for which character evidence is, or is not admissible; i.e., to prove conformity with propensity.

Subsections (2) and (3) of Rule 404 also detail the circumstances under which character and prior act evidence are admissible. For example, subsection (2) permits propensity evidence in limited situations when offered by the accused, and subsection (3) permits prior act evidence for non- propensity purposes so long as its probative value is not substantially outweighed by the danger of unfair prejudice. [FN69]

In contrast, Rule 404(4) does not address "character" at all and it is silent regarding the purposes for which prior act evidence is admissible. By curtailing judicial balancing under Rule 403 in the context of criminal trials, Rule 404(4) relates only to the circumstances under which prior act evidence is admissible; it does not represent an express exception to the exclusion of propensity evidence. Because the new subsection is silent as to purpose, and in light of the common law tradition against the use of prior act evidence for propensity purposes, Rule 404(4) should be read narrowly. [FN70] Accordingly, it should be limited to the purposes *328 detailed elsewhere in the rules, in particular, the purposes detailed in Rules 403 and 404(3). [FN71]

Nevertheless, Rule 404(4) may be interpreted to permit the use of prior act evidence to prove propensity. The rule states that evidence of other acts by the defendant is admissible if relevant. Since propensity evidence is relevant, [FN72] it is admissible under the rule unless the Constitutions of the United States or Oregon require exclusion under Rule 403. [FN73]

Under this interpretation, Rule 404(4) operates much like Federal Rules of Evidence (FRE) 413 and 414. [FN74] FRE 413 and 414 permit prosecutors in sexual assault or child molestation cases to introduce evidence of the defendant's prior commission of similar crimes. [FN75] Also, the evidence of prior sexual misconduct may be used for any relevant purpose. [FN76] These rules have been interpreted to supersede FRE 404(b)'s restriction on character evidence, thereby permitting proof of a defendant's prior acts to demonstrate the defendant's propensity to commit the charged offense. [FN77] Though these rules raise issues of due process and fundamental fairness, broad constitutional challenges have been rejected by the courts that have considered them. [FN78] Although *329 Oregon did not adopt FRE 413, it is possible that Rule 404(4) is intended to go further because it applies to all prior acts, not just to prior sexual misconduct. [FN79] Thus, interpretations of FRE 413 provide persuasive authority for the proposition that Rule 404(4) permits the introduction of propensity evidence. However, there are several key distinctions between FRE 413 and Oregon Rule 404(4) that substantially undermine this argument. First, FRE 413 expressly states that evidence of prior sexual misconduct may be used for any purpose. As discussed above, Rule 404(4) is silent as to purpose. Second, the federal rules offer some protection by including a fifteen day notice requirement. [FN80] Rule 404(4) contains no such provision. Third, whereas courts interpreting FRE 413 have held that balancing under FRE 403 is required, Rule 404(4) expressly proscribes such balancing. [FN81] Finally, FRE 413 creates only a narrow exception to FRE 404 for a specific form of conduct for which propensity evidence has a unique probative value--sex crimes. [FN82] In contrast, Rule 404(4) creates a broad exception to Rule 404(2) and (3), based not upon specific categories of conduct but upon the defendant's status; i.e., the rule targets the defendant qua defendant.

Though federal interpretations of FRE 413 suggest that the use of prior sexual misconduct for propensity purposes does not violate the U.S. Constitution, these arguments lend little support to the claim that Rule 404(4) permits the use of generic prior act evidence to prove propensity. Similarly, the text of Rule 404(4) does not warrant such a broad use of prior act evidence. The rule does not expressly permit the use of propensity evidence, and in light of the common law tradition against such evidence, any ambiguity must be resolved in favor of permitting the courts to exercise *330 their traditional power to exclude propensity evidence. [FN83] For these reasons, it is unlikely courts will interpret Rule 404(4) as an open-ended sanction on the use of prior act evidence to prove conformity with propensity.

2. Rule 404(4) and Propensity Evidence: Recent Cases

Two recent orders by Oregon circuit courts shed light on the limits of prior act evidence offered for propensity purposes. In each case, the court held that the Due Process Clause requires exclusion of prior act evidence offered against criminal defendants solely to prove conformity with propensity. [FN84] In *State v. Gadbois*, the Multnomah County Circuit Court considered the admissibility of prior act evidence in light of recently passed Measure 40, but before the amendment to Rule 404. [FN85] The defendant was charged with oral sodomy against his nine-year old adopted granddaughter and he moved at pretrial to exclude, and the state moved at pretrial to admit, evidence that he had also committed oral sodomy against his three-year old granddaughter in the state of Washington. [FN86] The state argued that such evidence was admissible under Measure 40's "all relevant evidence" provision. The court disagreed, noting that the due process jurisprudence on the admissibility of prior act evidence follows the common law prohibition on propensity evidence. [FN87] Accordingly, the court held that evidence that is relevant only to show propensity is inadmissible where it necessarily prevents a fair trial. [FN88] The court then applied Rule 404(3) and excluded the proffered evidence because it did not serve a valid non-propensity purpose. [FN89]

Because Rule 404 was amended to implement Measure 40, the order in *Gadbois* suggests that propensity evidence is not permitted *331 under Rule 404(4). However, the court in *Gadbois* did not have Rule 404(4) before it, so it is not surprising that it applied Rule 404(3) to the evidence of prior acts. The court's conclusion is predictable under Rule 404(3) because the rule expressly prohibits the use of prior act evidence for propensity purposes. In contrast, Rule 404(4) lacks any express prohibition on propensity evidence, so it is unclear whether the court would have reached the same conclusion under the new rule. Nevertheless, it is clear the *Gadbois* court viewed propensity evidence as a threat to fundamental fairness, suggesting that courts will continue to bar such evidence even under Rule 404(4). [FN90]

In *State v. Dunn*, the Lane County Circuit Court considered whether prior act evidence was admissible under Measure 40 and SB 936. [FN91] In *Dunn*, the defendant was charged with attempted robbery and the state sought to offer evidence of the defendant's involvement in a juvenile crime fifteen years prior. [FN92] As in *Gadbois*, the court held that character evidence is inadmissible unless offered for a relevant non-propensity purpose because "Rule 404(3) defines what is relevant as far as prior bad acts are concerned." [FN93] The court acknowledged that propensity evidence is remotely relevant in itself, but that something else must tie the defendant to the crime. According to the court, that "something" is the purposes identified in Rule 404(3): motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [FN94] After deciding that Rule 404(3) defines the relevance of prior act evidence, the court concluded that neither Measure 40 nor SB 936 changes the analysis. [FN95] Because the court found the proffered evidence lacked a valid non-propensity purpose, it was excluded. [FN96]

Consistent with the statutory analysis above, *Dunn* suggests *332 that Rule 404(4) broadens only the circumstances under which prior act evidence is admissible; it does not broaden the limited purposes detailed in Rule 404(3) for which such evidence may be introduced. In light of the long tradition against the use of prior act evidence to prove propensity, *Dunn* suggests that absent an express rejection of the common law rule, the courts are unlikely to permit prior acts to prove conformity with propensity under Rule 404(4).

B. Rule 404(4) and Balancing Under Rule 403

Rule 404(4)(a) specifically rejects balancing under Rule 403 except to the extent required under the United States or Oregon Constitutions. Thus, the constitutional limits of prior act evidence must be analyzed each time the state offers such evidence against criminal defendants. [FN97] This begs the question of whether fundamental fairness alone demands balancing along the lines of Rule 403.

1. Prior Acts and the Requirements of Fundamental Fairness

Rule 404(3) permits evidence of prior acts offered for non-propensity purposes, so long as it survives scrutiny under Rule 403. [FN98] The danger is that it is not always easy to determine when such evidence is being offered for the prohibited purpose of proving conformity with propensity and when it is being offered for a permissible purpose. [FN99] Consequently, the admissibility of prior act evidence under Rule 404(3) has generated more appellate decisions than almost any other rule of evidence. [FN100] In cases where such evidence is admitted erroneously, appellate courts often find the error to be grounds for reversal. [FN101] Rule 404(4) seeks to avoid

this problem by preventing judges from weighing the prejudicial impact of prior act evidence when offered against criminal defendants. However, when the prejudicial effect of prior act evidence substantially outweighs its probative value, "then the use of such evidence by a state may rise to the posture of the denial of fundamental fairness and due process of law." [FN102] Thus, trial *333 courts really are not free from considering the prejudicial impact of prior act evidence; rather, they have the more difficult job of assessing whether the danger of unfair prejudice threatens a fundamental constitutional right. For this reason, there is support for the argument that under Rule 404(4), both the United States and Oregon Constitutions require balancing the probative value of prior act evidence against the danger of unfair prejudice.

First, faced with the possibility that unfairly prejudicial evidence could deprive a criminal defendant of fundamental fairness, trial courts may be inclined to err on the side of caution and exclude unfairly prejudicial prior act evidence. [FN103] This is why courts excluded unfairly prejudicial evidence at common law and why the common law rule was codified in Rule 403. [FN104] In a sense, then, Rule 403 already represents the threshold at which the introduction of prejudicial evidence threatens fundamental fairness. [FN105] Rule 403 represents a flexible threshold, as the balance of probative value and prejudicial effect will vary according to the nature of both the evidence and the case. The standard also aims directly at concerns about fairness, while the requirement that the danger of unfair prejudice substantially outweigh probative value maintains the policy "favoring the admissibility of evidence in close cases." [FN106]

For example, consider an appellate court reviewing a trial court decision to exclude prior act evidence under Rule 403; i.e., because the danger of unfair prejudice substantially outweighs the probative value of the evidence. Because Rule 404(4)(a) creates a presumption that such evidence is admissible, the trial court would be permitted to exclude evidence only if it threatened the defendant's constitutional rights. The appellate court would review the decision to determine whether the trial *334 court abused its discretion in excluding the prior act evidence. [FN107] If the appellate court concludes the trial court did not abuse its discretion because the introduction of prior act evidence would threaten fundamental fairness, the appellate court necessarily concludes that the evidence is unfairly prejudicial. On the other hand, if the reviewing court finds that the trial court abused its discretion because the admission of the evidence would not threaten fundamental fairness, the reviewing court necessarily concludes that the evidence is not unfairly prejudicial to the defendant. In either case, the "unfairly prejudicial" standard of Rule 403 provides an effective threshold for determining whether the introduction of prior act evidence threatens due process and fundamental fairness.

Further, a constitutional requirement for such balancing would not render Rule 404(4)(a) moot because the "danger of unfair prejudice" is only one of five factors listed in Rule 403. [FN108] The other factors include: (1) confusion of the issues; (2) misleading the jury; (3) undue delay; and (4) needless presentation of cumulative evidence. [FN109] Of the five factors, it is the danger of unfair prejudice which represents the greatest threat to fundamental fairness because it connotes unjust and irreparable harm to the defendant's case. [FN110] In contrast, the harm resulting from confusion of the issues and misleading the jury may be mitigated by remedial arguments, clarification, and express limiting instructions from the judge. [FN111] The risks of undue delay and the needless presentation of cumulative evidence affect all parties equally and relate more to the desire for judicial efficiency than to the *335 protection of fundamental fairness. [FN112] Thus, it is possible that Rule 404(4)(a) remains viable insofar as a judge may not exclude prior act evidence when its probative value is substantially outweighed by the danger of confusion of the issues, misleading the jury, undue delay, and the needless presentation of cumulative evidence. [FN113]

2. Rule 403 Balancing Requirements: Analogies and Precedent

Once again, a review of the Federal Rules of Evidence is instructive. As noted above, most federal courts that have interpreted FRE 413 acknowledge that the rule permits the use of evidence of a defendant's prior sexual misconduct for any purpose, including propensity. [FN114] However, the same courts have held that evidence offered under FRE 413 is subject to balancing under FRE 403. [FN115] An examination of these federal rulings suggests similar balancing is warranted under Oregon Rule 404(4).

Because Rule 413 states that evidence of a defendant's prior sexual misconduct "is admissible" and may be considered for any relevant purpose, some commentators suggest the text of FRE 413 creates its own exception to balancing under FRE 403. [FN116] This conclusion is based on a comparison of FRE 413 with FRE 412, which allows evidence of the prior sexual history of an alleged victim in limited circumstances. Rule 413 states that evidence of prior sexual misconduct "is admissible," whereas Rule 412 states that such evidence "is admissible, if

otherwise admissible ***336** under these rules." [FN117] The omission from FRE 413 of the qualification in FRE 412 suggests that Congress intended to make the introduction of prior sexual misconduct evidence mandatory, rather than subject to judicial discretion under FRE 403. [FN118]

The federal courts that have considered the constitutionality of FRE 413 have rejected this interpretation. For example, the Tenth Circuit Court of Appeals in *United States v. Guardia* found the textual differences between FRE 412 and 413 to be insignificant. [FN119] The court noted that "[FRE] 402, the rule allowing admission of all relevant evidence and a rule to which the [FRE] 403 balancing test undoubtedly applies, contains language no more explicit than that in [FRE] 413." [FN120] The court also noted that where the drafters of the Federal Rules intended to modify the application of FRE 403, they used much more explicit language than that found in FRE 413. [FN121] In addition to these textual arguments, other federal courts cite legislative history as support for FRE 403 balancing of FRE 413 evidence. [FN122] More importantly, these courts hint that FRE 413 would not pass constitutional muster absent balancing under FRE 403. [FN123]

Because Oregon Rule 404(4) permits all relevant prior act evidence, the analysis of FRE 413 suggests that courts will be even more likely to require Rule 403 balancing of Rule 404(4) evidence. Unlike FRE 413, however, Rule 404(4)(a) expressly limits balancing under Rule 403 to the extent required by the United States or Oregon Constitutions. Thus, the drafters of Rule 404(4) left little room to argue that traditional balancing under ***337** Rule 403 is permitted. [FN124] As noted above, however, it is doubtful that the federal courts would have upheld FRE 413 if FRE 403 balancing were prohibited. [FN125]

Thus the analysis returns to an examination of the extent to which the state or federal constitutions require judicial balancing. On this issue, the circuit court orders in *Gadbois* and *Dunn* are again instructive. In *Gadbois*, the Multnomah County Circuit Court concluded that prior act evidence is not admissible under Measure 40 to prove propensity. [FN126] Similarly, in *Dunn* the Lane County Circuit Court held that prior acts are not admissible to prove propensity because Rule 404(3) controls the determination of "relevance" under both Measure 40(1) and SB 936. [FN127] Important to this discussion is that both courts also stated that where prior act evidence is admissible, due process requires some balancing consistent with Rule 403. [FN128]

In *Gadbois*, the court referred to recent federal opinions regarding the requirement for balancing under FRE 413. The court concluded that "some assessment of the prejudicial effect of other crimes evidence is required by the Due Process Clause, even where the evidence is marginally relevant to some issue in the case." [FN129] It is important to note, however, that unlike Rule 404(4), FRE 413 does not expressly limit balancing. Nevertheless, *Gadbois* illustrates one scenario (evidence of a prior act of sodomy in a sodomy trial) where, despite Rule 404(4), Rule 403 balancing may be required by the United States or Oregon Constitutions.

In *Dunn*, the court noted that even if prior act evidence serves a valid non-propensity purpose, it may be excluded under Rule 403. The court recognized that Rule 404(4)(a) does not eliminate Rule 403 balancing because it makes exceptions for evidence covered by constitutional considerations. The court remarked that, "[w]hile it is unclear whether the balancing process is more stringent under a due process analysis than under OEC 403, it is clear that, even under [SB 936], it must come into play." [FN130]

***338** Though *Gadbois* and *Dunn* provide useful examples of how Rule 404(4) evidence may be excluded under Rule 403, they do not represent precedent. If anything, these cases demonstrate the fact specific, case-by-case nature of Rule 404(4) evidence. Though it is clear that Rule 404(4) does not expressly prohibit balancing under Rule 403, there is little guidance as to the extent such balancing is constitutionally required. Absent such guidance, *Gadbois* and *Dunn* suggest that courts will continue to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice.

C. Determining Relevance Under Rule 404(4)

Rule 404(4) permits evidence of prior acts only "if relevant." [FN131] Yet, SB 936 does not define "relevant evidence." Further, we cannot assume that the term is to be given its plain meaning as there are at least three standards of evidentiary relevance to consider: (1) the relevance definition found in Measure 40; (2) the "logical" relevance standard in Rule 401; and (3) the policy-based "legal relevance" standard encompassed by Rules 403, 404(2) and (3), and by Oregon common law. The results of a ruling under 404(4) are likely to vary widely depending on which interpretation of "relevant evidence" a court uses. The following discussion suggests that only the "legal relevance" standard meets the requirements of due process and fundamental fairness.

1. Rule 404(4) Relevance Under Measure 40

The definition of "relevant evidence" found in Measure 40 is a logical starting point because SB 936 was designed to implement the measure. [FN132] Under Measure 40, "relevant evidence" is defined as "evidence having any tendency to prove the charge against the criminal defendant or establish the proper sentence for the criminal defendant." [FN133] Under this definition, Rule 404(4) would read as follows: In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if it tends to prove the charge against the defendant except as otherwise required by the United States or Oregon Constitutions.

***339** This interpretation limits balancing under Rule 403 and it addresses only inculpatory evidence. In contrast, exculpatory "prior act" evidence offered by an accused under Rule 404(2) remains subject to the character and balancing restrictions of Rules 404(3) and 403. This interpretation would also permit propensity evidence and other unfairly prejudicial evidence so long as it tends to prove the charge against the defendant. As discussed above, however, such evidence may jeopardize due process and fundamental fairness.

The shortcomings of this definition become more apparent by recognizing that Measure 40 defined "relevant evidence" only in the context of victims' rights. In criminal trials, the rights of the accused are generally greater than those of the victim because it is the accused's liberty that is at stake. [FN134] Accordingly, where the victim's interest in having all relevant evidence admissible against a criminal defendant is outweighed by the defendant's right to due process and fundamental fairness, propensity evidence and other unfairly prejudicial evidence should be excluded even under the Measure 40 standard. [FN135] Strict application of this definition is also inappropriate because it broadens the admissibility of inculpatory prior act evidence while retaining the traditional restrictions on exculpatory evidence of prior acts. This undermines due process by reducing the defendant's ability to present a defense. Clearly the drafters did not intend such a result, as section 3 of Measure 40 stated that it "shall not reduce a criminal defendant's rights under the United States Constitution." [FN136]

2. Interpreting Rule 404(4) under Rule 401

The second standard of relevance is the statutory definition found in Rule 401. Here, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable ***340** or less probable than it would be without the evidence." [FN137] This rule represents a logical standard of relevance; that is, evidence is relevant if it logically tends to prove a material fact. [FN138] As the material fact in any criminal trial is guilt or innocence, the Rule 401 definition encompasses both inculpatory and exculpatory evidence. Thus, Rule 401 provides a broader and more balanced definition of "relevant evidence" than does Measure 40.

Applying the Rule 401 definition, Rule 404(4) would read as follows: In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if it tends to make any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Under this interpretation, balancing under Rule 403 is still not permitted except as required by the state or federal constitutions. This suggests that prior act evidence is admissible by either the prosecution or the defense even if the factfinder is likely to use it as propensity evidence.

However, if the prior act evidence is offered by the prosecution, the same concerns about the defendant's right to due process and fundamental fairness suggest that judicial balancing is still required. If the prior act evidence is offered by the accused, however, a different problem emerges. Rule 404(2)(a) already permits evidence of a pertinent trait of character when offered by an accused or by the prosecution to rebut the same. However, under Rule 405(1), character evidence offered under Rule 404(2)(a) is limited to proof by reputation or opinion evidence. [FN139] In contrast, prior act evidence offered under Rule 404(4) is controlled by Rule 405(2)(b), which permits extrinsic proof of specific instances of conduct. [FN140] Such proof is permitted without any balancing under Rule 403. Consequently, strict adherence to Rule 401's definition of "relevant evidence" renders Rules 404(2)(a) and 405(1) meaningless; that is, a defendant may subvert Rule 404(2)(a) and offer extrinsic proof of propensity by simply introducing exculpatory prior act evidence under Rule 404(4). These concerns highlight the fact that, although Rule 401 defines "relevant evidence" under the code, it does not represent the standard for admissibility. Accordingly, Rule 401 is not an ***341** appropriate stopping point in the analysis of whether prior act evidence satisfies the relevance requirement of Rule 404(4). [FN141]

3. Legal Relevance: Limitations on Otherwise Relevant "Prior Act" Evidence

The final standard of "legal relevance" is classified more appropriately as a standard for admissibility. Rather than defining relevance, this standard balances logically relevant evidence against the competing dangers of unfair prejudice, confusion of the issues, and waste of time. [FN142] This standard is manifest in Rule 403 and the succeeding rules in Article IV of the Oregon Evidence Code, as well as in many of the rules relating to privilege and hearsay. [FN143] A "legal relevance" standard is consistent with the requirements of due process and fundamental fairness, and it conforms with traditional limitations on the admissibility of relevant but unfairly prejudicial evidence. A criticism of this approach, however, is that it is not the interpretation envisioned by the drafters of SB 936 because it effectively renders Rule 404(4) meaningless in light of Rules 403 and 404(3). [FN144]

Under this interpretation, "relevant evidence" in the Rule 404(4) context is to be determined according to the standards of legal relevance established in the Oregon Evidence Code, by the United States and Oregon Constitutions, or in Oregon statutes and common law. [FN145] As discussed above, both the United States and Oregon Constitutions probably require some balancing of unfairly prejudicial prior act evidence offered under Rule 404(4). [FN146] Accordingly, prior act evidence that poses a substantial risk of unfair prejudice is legally irrelevant, and is inadmissible.

The drafters of Rule 404 subsections (2) and (3) also determined as a matter of law that the value of propensity evidence is ***342** substantially outweighed by the danger of unfair prejudice and confusion of the issues. [FN147] Thus, under a "legal relevance" interpretation of Rule 404(4), prior act evidence that is likely to be used as propensity evidence is legally irrelevant. This was the approach adopted by the circuit court in *Dunn*, which concluded that "Rule 404(3) defines what is relevant as far as prior bad acts are concerned." [FN148]

This "legal relevance" interpretation is also consistent with statutory construction. As the discussion in Section IV(A) points out, subsection (4) only modifies Rule 404 by expanding the circumstances under which prior act evidence is admissible; it allows such evidence without Rule 403 balancing when it is offered against a criminal defendant. Rule 404(4) says nothing about the purposes for which such prior act evidence may be used. Likewise, Rule 404(4) does not create its own standard of relevance; it only says that prior act evidence is admissible "if relevant." Thus, Rule 404(4) is presumed to be subject to the same legal relevance standards established in Rule 403 and Rule 404 subsections (2) and (3). [FN149] Nor does this interpretation necessarily render Rule 404(4) moot because it may still prohibit the trial court from excluding prior act evidence simply because it is confusing, misleading, cumulative, or a waste of time. [FN150]

The court of appeals appeared to adopt this "legal relevance" standard for evidence offered under Rule 404(4) in *State v. Pyle*, the only reported case addressing the admissibility of evidence offered under the amended rule. [FN151] In *Pyle*, the defendant was charged with murdering his wife. Though he admitted shooting his wife, defendant claimed he was under the influence of an extreme emotional disturbance when he shot her and that he was not able to form the requisite intent to sustain a murder conviction. [FN152] Before trial, the state indicated its desire to introduce evidence of the defendant's prior acts of violence against his deceased wife and a former spouse. The trial court excluded four of the six prior acts of violence proffered by the state.

***343** On appeal, the state first argued that such evidence was admissible under Rule 404(3) as evidence of defendant's intent or motive. The state agreed that under Rule 404(3) the defendant's prior violent acts were not admissible to prove the defendant acted in conformity with his violent disposition. [FN153] Because the only issue was whether the defendant intended to murder his wife, the court turned to *State v. Johns*, [FN154] which established the criteria for determining whether proffered evidence of prior acts is relevant to the issue of intent. [FN155] The court concluded that the dissimilarities between the shooting and the incidents of assault were sufficient to render the evidence irrelevant to the issue of the defendant's intent. [FN156]

Important to this discussion, the state also argued that Rule 404(4) required admission of the evidence even if the prior assaults failed to meet the Johns criteria. [FN157] The court of appeals disagreed. The court noted that Rule 404(4) permits evidence of prior acts only if relevant, and that the trial court's application of the Johns criteria was a determination of relevancy. According to the court, "evidence of prior crimes, wrongs or acts cannot be admitted unless relevant to some material issue in the charged crime. . . . In this case, the evidence of four prior incidents was excluded because they are not relevant under the Johns criteria to the issue of defendant's intent or motive in the shooting death of his wife." [FN158]

The Pyle opinion is significant for several reasons. First, by applying the Johns criteria, the court adopted a common law legal relevance standard to assess the admissibility of the prior act evidence. Second, though the Johns inquiry is primarily a factual one, it inherently involves judicial balancing despite Rule 404(4)'s balancing restrictions. Third, the court also adhered to *344 the requirements of Rule 401 that, to be relevant, prior act evidence must relate to a fact that is of consequence. This implies that prior act evidence offered solely to prove propensity may never be relevant because propensity is normally not a fact of consequence. [FN159] Finally, the opinion is consistent with the reasoning of the circuit courts in Gadbois and Dunn and thereby affirms the broad discretion of trial courts in assessing the admissibility of Rule 404(4) evidence.

D. Rule 404(4) Implications for Due Process

Critics charge that on its face, Rule 404(4) violates fundamental fairness because it provides prosecutors with two weapons unavailable to criminal defendants. First, the rule permits prosecutors to introduce prior act evidence against criminal defendants without balancing under Rule 403, yet prior act evidence offered by defendants under Rule 404(3) presumably remains subject to balancing. The effect is a substantive imbalance in the type of evidence admissible by each party. Second, SB 936 also amends Rule 405 to permit proof of prior acts by extrinsic evidence. Because such extrinsic proof is not subject to balancing, the trier of fact may misuse the evidence as propensity evidence. Critics claim that the net effect is to sanction the proof of propensity evidence by extrinsic evidence. Yet Rule 405(a) still limits criminal defendants to proof of propensity only by reputation and opinion testimony. [FN160] This, critics argue, creates a procedural imbalance that threatens fundamental fairness at trial.

Neither argument survives close scrutiny, however. First, the argument that Rule 404(4) creates substantive and procedural imbalances assumes that prior act evidence offered against the accused will never be subject to Rule 403 balancing. As discussed in Section IV(B), however, this is a tenable assumption; due process probably requires some balancing along the lines of Rule 403. [FN161] For similar reasons, it is unlikely that prosecutors will be permitted to use Rule 404(4) as a "back door" for the extrinsic proof of propensity. Even if prosecutors are permitted to introduce prior act evidence without balancing, the principle of fundamental fairness will likely require courts to give criminal *345 defendants wide latitude in rebutting such evidence. [FN162] Such a scenario is analogous to permitting prosecutors to impeach a defendant's character when the defendant "opens the door" under Rule 404(2)(a). Of course, Rule 404(2)(a) expressly permits prosecutors to rebut such evidence, whereas Rule 404(4) is silent as to rebuttal testimony. Nevertheless, fundamental fairness mandates that substantive and procedural rights be applied uniformly between the accused and the state. [FN163]

Conclusion

The preceding examination of Oregon's new character evidence rules suggests that Rule 404(4) will not significantly broaden the use of prior act evidence in Oregon. Opponents claim that because Rule 404(4) operates only against criminal defendants, it necessarily violates the right to due process. However, it is possible to interpret Rule 404(4) consistent with the requirements of fundamental fairness. For example, Rule 404(4) does not expressly sanction the use of prior act evidence to prove propensity. Also, courts are likely to apply a standard of legal relevance to Rule 404(4) evidence, suggesting that they will continue to exclude propensity evidence under Rules 404(2) and (3). Similarly, Rule 404(4)(a) permits trial courts to exclude unfairly prejudicial prior act evidence to the extent required by the United States and Oregon Constitutions. As the exclusion of such evidence will be reviewed only for an abuse of discretion, trial courts are likely to continue balancing the probative value of prior act evidence against its prejudicial effect. Finally, the overriding requirements of due process and fundamental fairness imply *346 that Rule 404(4) will not lead to the substantive and procedural imbalances that critics suggest.

[FN1]. S.B. 936, 69th Or. Legis. Ass'y (1997) (enacted) [hereinafter SB 936].

[FN2]. State of Oregon Official 1996 General Election Voters' Pamphlet-- Statewide Measures 40 (1996) [hereinafter Measure 40].

[FN3]. *Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (1998).

[FN4]. Laird C. Kirkpatrick, *Oregon Evidence* xxix (3d ed. 1996). Where necessary, the Oregon rules were modified to conform with current Oregon law. See, e.g., Or. Rev. Stat. §§ 40.225-.295 (1997) (Rules 503-514) (relating to privileges); 40.170(2)(d) (Rule 404(2)(d)) (permitting evidence of character for violence in some civil cases); 40.350 (Rule 608) (prohibiting inquiry into specific instances of conduct, even if probative of truthfulness or

untruthfulness, during cross-examination of a witness).

[FN5]. Kirkpatrick, *supra* note 4, at 11.

[FN6]. See, e.g., Or. Rev. Stat. §§ 40.160 (Rule 403) (permitting the exclusion of relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury); 40.170 (Rule 404) (prohibiting character evidence to prove propensity); 40.350 (Rule 608) (limiting attacks on credibility, provable by opinion or reputation, to evidence of character for truthfulness or untruthfulness); 40.355 (Rule 609) (proscribing conditions on the admissibility of prior convictions to attack the credibility of a witness).

[FN7]. Or. Rev. Stat. § 40.170, as amended by SB 936 (Jun. 12, 1997), (Rule 404).

CHARACTER EVIDENCE; Evidence of Other Crimes, Wrongs or Acts.

(1) Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.

(2) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(c) Evidence of the character of a witness, as provided in [Rule 607 to 609] ORS 40.345 to 40.355; or

(d) Evidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

(3) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted 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.

(4) In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:

(a) [Rules 406 to 412] and, to the extent required by the United States Constitution or the Oregon Constitution, [Rule 403];

(b) The rules of evidence relating to privilege and hearsay;

(c) The Oregon Constitution; and

(d) The United States Constitution.

[FN8]. Legislative Commentary, Or. Evid. Code Rule 404 (codified at Or. Rev. Stat. § 40.170 (1995) (citing *Rich v. Cooper*, 234 Or. 300, 380 P.2d 613 (1963)) [hereinafter Rule 404 Legislative Commentary].

[FN9]. Or. Rev. Stat. § 40.170(3) (Rule 404(3)).

[FN10]. Or. Rev. Stat. § 40.175, as amended by SB 936 (Jun. 12, 1997) (Rule 405).

METHODS OF PROVING CHARACTER

(1) [Reputation or opinion.] In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) [Specific instances of conduct.]

(a) In cases in which character or a trait of character of a person is admissible under ORS 40.170(1) [Rule 404(1)], proof may also be made of specific instances of the conduct of the person.

(b) When evidence is admissible under ORS 40.170(3) or (4) [Rule 404(3) or (4)], proof may be made of specific instances of conduct of the person.

[FN11]. See Scott Hewitt, *Criminal Justice Gets Tougher: Police, Prosecutors Appear Big Winners While Youth Lose Out*, *Portland Skanner*, May 28, 1997, at 1; Wayne Westling, *The New Character Evidence Rules in Oregon 2* (unpublished talking paper) (Nov. 14, 1997).

[FN12]. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence As applied to a criminal trial, denial of due process is the failure

to observe that fundamental fairness [is] essential to the very concept of justice." See *Jammal v. Van De Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) (evidentiary rules violate due process where they do not comport with fundamental fairness); *Hatch v. Oklahoma*, 58 F.3d 1447, 1468 (10th Cir. 1995) (evidentiary ruling that rendered a defendant's trial fundamentally unfair violated due process).

[FN13]. Rule 404 Legislative Commentary, *supra* note 8.

[FN14]. See *State v. Johns*, 301 Or. 535, 548, 725 P.2d 312, 320 (1986).

[FN15]. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 180 (1997); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (propensity evidence is not rejected because character is irrelevant; on the contrary, it weighs too much with the jury and overpersuades them as to prejudge one and deny a fair opportunity to defend against a particular charge).

[FN16]. See *McCormick on Evidence, Practitioner Treatise Series* § 188 (John William Strong ed., 4th ed. 1992).

[FN17]. *Id.* at § 190.

[FN18]. See *id.* at § 190, n.1 (the courts have had no occasion to decide whether the exclusion of propensity evidence is constitutionally compelled); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 *Am. Crim. L. Rev.* 57, 77 (1995) (the Court has never squarely held that the exclusion of propensity evidence is a constitutional imperative). Cf. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) (expressly avoiding the issue of whether a law would violate the Due Process Clause if it permitted the use of prior act evidence to show propensity to commit a charged crime).

[FN19]. 338 U.S. 160, 174 (1949).

[FN20]. 385 U.S. 554, 574 (1967).

[FN21]. 519 U.S. 172, 182 (1997).

[FN22]. *Dowling v. United States*, 493 U.S. 342, 352 (1990). See also *Estelle*, 502 U.S. at 72.

[FN23]. 335 U.S. 469, 475-76 (1948) (footnotes omitted). Character evidence is rarely reviewed as a constitutional claim. "Michelson ... is not constitutional in basis and the constitutional permissibility of such evidence is very broad." *United States v. Detella*, No. 96C0914, 1997 WL 11013, at *2 (N.D. Ill. Jan. 7, 1997) (citing *Spencer v. Texas*, 385 U.S. 554 (1967)).

[FN24]. 926 F.2d 918, 920 (9th Cir. 1991) (citing *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986)).

[FN25]. *Id.*

[FN26]. *Sadeghy v. Kernan*, 107 F.3d 878 (Table), No. 96-16073, 1997 WL 85332, at *4 (9th Cir. Feb. 27, 1997) (unpublished disposition) (citing *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993), and *United States v. Johnson*, 618 F.2d 60, 62 (9th Cir. 1980)).

[FN27]. Or. Rev. Stat. § 40.170(2) (Rule 404(2)).

[FN28]. Or. Rev. Stat. § 40.170(1) (Rule 404(1)).

[FN29]. Or. Rev. Stat. § 40.170(2)(a) (Rule 404(2)(a)).

[FN30]. Or. Rev. Stat. § 40.170(2)(b) (Rule 404(2)(b)).

[FN31]. Or. Rev. Stat. § 40.170(2)(c) (Rule 404(2)(c)). See also Or. Rev. Stat. §§ 40.345-.355 (Rules 607-609).

[FN32]. Or. Rev. Stat. § 40.170(2)(d) (Rule 404(2)(d)). It should be noted that this exception does not appear in

Federal Rule of Evidence 404, "but was added to codify present Oregon law regarding character evidence of the pugnaciousness of parties to a civil action." Rule 404 Legislative Commentary, *supra* note 8.

[FN33]. Legislative Commentary, Or. Rev. Stat. § 40.175 (Rule 405) [[hereinafter Rule 405 Legislative Commentary].

[FN34]. *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993).

[FN35]. Or. Rev. Stat. § 40.175(1) (Rule 405(1)). Note that Rule 405(1) does permit inquiry into relevant specific instances of conduct on cross-examination.

[FN36]. Or. Rev. Stat. § 40.170(3) (Rule 404(3)). The justification for these limitations is that, although evidence of specific instances of conduct is the most convincing method of proof, it also possesses the greatest capacity to create prejudice and confusion. Rule 404 Legislative Commentary, *supra* note 8.

[FN37]. Or. Rev. Stat. § 40.170(3) (Rule 404(3)).

[FN38]. Rule 404 Legislative Commentary, *supra* note 8.

[FN39]. Or. Rev. Stat. § 40.160 (Rule 403).

[FN40]. Or. Rev. Stat. § 40.175(2), as amended by SB 936, (June 12, 1997) (Rule 405(2)).

[FN41]. See *McKinney v. Rees*, 993 F.2d 1378, 1381 (9th Cir. 1993).

[FN42]. Or. Const. art. I, § 42 (amended 1996).

[FN43]. Measure 40, *supra* note 2, at 140. Among the more significant victims' rights detailed in section 1 are: subsection (a)--the right that any person arrested for a crime carrying a mandatory minimum sentence shall not be released prior to trial unless a court determines by clear and convincing evidence that the person will not commit new criminal offenses upon release; subsection (f)--the right to have all relevant evidence admissible against a criminal defendant; subsection (g)--the right to trial by a jury selected from registered voters and composed of persons who have not been convicted of a felony within the last fifteen years; and subsection (h)--the right to have eleven members of a twelve-member jury render a verdict of guilty of aggravated murder or murder. *Id.*

[FN44]. *Id.*

[FN45]. *Id.*

[FN46]. *Id.* Article V of the Oregon Evidence Code details Oregon's rules of privileges which include: lawyer-client, psychotherapist-patient, physician-patient, nurse-patient, school employee-student, clinical social worker-client, husband-wife, clergy-penitent, counselor-client, stenographer-employer, public officer, disabled person-sign language interpreter, and non-english speaking person-interpreter privileges. Or. Rev. Stat. §§ 40.225-.273 (Rules 503- 509).

[FN47]. The chief petitioners of the Victims' Rights Initiative, Rep. Kevin Mannix (D-Salem) and Bob and DeeDee Kouns of Crime Victims United, stated that the purpose of a constitutional amendment was to make it impossible to change the law without a vote of the people.

The same people who opposed the statutory Crime Victims' Measure in 1986 oppose [Measure 40] too ... When they were not successful in destroying the 1986 measure, they set about eliminating parts of it by ... making other law changes, additional administrative rules, changing policies and practices. We now realize we should have made the 1986 measure a Constitutional Amendment. This would have made it impossible to change without a vote of the people.

Argument in Favor, Official 1996 General Election Voters' Pamphlet--Statewide Measures 142 (1996) [hereinafter Official Voters' Pamphlet].

[FN48]. *Id.* at 143.

[FN49]. Former Deans Committee, Argument in Opposition, Official Voters' Pamphlet, supra note 47, at 151.

[FN50]. Hardy Myers & Victor Hoffer, Argument in Opposition, Official Voters' Pamphlet, supra note 47, at 144.

[FN51]. Cf. Greg Veralud, Argument in Opposition, Official Voters' Pamphlet, supra note 47, at 150; ACLU of Oregon, Measure 40 & 26 Victim's Rights and Vindictive Justice Measures: Threats to Privacy, Due Process and Fairness 2 (1996) (unpublished information sheet).

[FN52]. 327 Or. 250, 959 P.2d 49 (1998).

[FN53]. Id.

[FN54]. Senator Shirley Stull (R-Keizer), Chair of the Senate Crime and Corrections Committee.

[FN55]. Representative John Minnis (R-Wood Village), Chair of the House Judiciary Committee.

[FN56]. SB 936.

[FN57]. Id. at § 29.

[FN58]. Id. at § 34. Section 34 makes the proof of prior acts under Rule 404(4) consistent with the proof of prior acts under Rule 404(3).

[FN59]. State v. Fugate, 154 Or. App. 643, 963 P.2d 686 (1998).

[FN60]. Id.

[FN61]. Article IV, section 20, of the Oregon Constitution provides, in part:

Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.

[FN62]. Fulgate, at 653, 963 P.2d at 692 (citing McIntire v. Forbes, 322 Or. 426, 909 P.2d 846 (1996)).

[FN63]. State v. Fugate, 154 Or. App. 643, 963 P.2d 686 (1998), adhered to as modified on recon., 156 Or. App. 609, 969 P.2d 395 (1998).

[FN64]. See, e.g., State v. Jaehnig, 158 Or. App. 348, 978 P.2d 1011 (1999); State v. Riley, 158 Or. App. 649, 976 P.2d 79 (1999); State v. Dolan, 158 Or. App. 139, 973 P.2d 370 (1999). In each case, the court of appeals upheld the admissibility of evidence obtained in violation of statutory provisions.

[FN65]. Rule 404(2) is an exception to Rule 402, which states: "All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible." Or. Rev. Stat. § 40.155 (Rule 402).

[FN66]. Christopher B. Mueller and Laird C. Kirkpatrick, Modern Evidence § 4.11 (1995).

[FN67]. Comparing Or. Rev. Stat. § 40.170(3) and (4), amended by SB 936, Jun. 1997 (Rule 404(3) and (4)).

[FN68]. Or. Rev. Stat. § 40.170(3) (Rule 404(3)) (emphasis added).

[FN69]. Id.

[FN70]. The United States Supreme Court has declared that statutes shall not be construed as altering the common law unless such an intention is fairly expressed. 3 Sutherland Statutes and Statutory Construction § 61.01 (Norman J. Singer, ed., Sands 4th ed. 1986) (citing Shaw v. North Pa. R.R. Co., 105 U.S. 557, 565 (1879)).

[FN71]. See *State v. Dunn*, No. 10-97-02208, at 2 (Cir. Ct. Lane County, Or. 1997) (order granting defendant's motion to exclude prior bad acts offered to prove propensity because Rule 404(3) determines the relevance of prior act evidence).

[FN72]. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 181 (1997); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

[FN73]. Or. Rev. Stat. § 40.170(4)(a), amended by SB 936, Jun. 1997 (Rule 404(4)(a)).

[FN74]. As the portions of FRE 413 and 414 relevant to this discussion are identical, subsequent references to these rules will refer to FRE 413 only.

[FN75]. FRE 413(a) and 414(a) state:

In a criminal case in which the defendant is accused of an offense of [sexual assault or child molestation], evidence of the defendant's commission of another offense or offenses of [sexual assault or child molestation] is admissible, and may be considered for its bearing on any matter to which it is relevant.
Fed. R. Evid. 413, 414.

[FN76]. *Id.*

[FN77]. *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998). See also *United States v. Larson*, 112 F.3d 600, 604 (2d Cir. 1997) (Rule 414 permits evidence of other child molestation as proof of propensity).

[FN78]. *Westling*, supra note 11, at 5 (citing *United States v. Sumner*, 119 F.3d 658, 661-62 (8th Cir. 1997); and *Larson*, 112 F.3d 600, 604 (2d Cir. 1997)). See also *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998).

[FN79]. See Wayne T. *Westling et al.*, *Oregon Evidence Code with Objections* 19 (2d ed. 1997).

[FN80]. FRE 413(b).

[FN81]. Courts addressing the constitutionality of FRE 413-414 hint that the rules would not pass constitutional muster absent balancing under FRE 403. See, e.g., *Enjady*, 134 F.3d at 1433 (FRE 413 does not violate the Due Process Clause considering the safeguards of FRE 403); *Sumner*, 119 F.3d at 661; *Guardia*, 135 F.3d at 1330; *Larson*, 112 F.3d at 604-05.

[FN82]. In *Enjady*, the court noted that in passing FRE 413, Congress believed it was necessary to lower the threshold to admission of propensity evidence in sexual assault cases because of the unique difficulty in determining credibility in such cases. When the defendant in such cases claims consent, and there are no witnesses other than the defendant and the alleged victim, the evidence of prior sexual assault has undeniable value in bolstering the credibility of the victim. *Enjady*, 134 F.3d at 1431. See also *Sheft*, supra note 18 at 69-70.

[FN83]. *Sutherland*, supra note 70, at § 61.01 (citing *Johnson v. Mathews*, 539 F.2d 1111 (8th Cir. 1976)). See also *Willson v. Hessong*, 38 Or. App. 269, 273, 589 P.2d 1194, 1195 (1979) (statutes in derogation of the common law should be given a narrow rather than a broad construction).

[FN84]. *State v. Gadbois*, No. 96-05-34015 (Cir. Ct. Multnomah County, Or. 1996) (order and opinion regarding application of Ballot Measure 40(1)(f) to "other acts" evidence); *State v. Dunn*, No. 10-97-02208 (Cir. Ct. Lane County, Or. 1997) (order granting defendant's motion to exclude prior bad acts).

[FN85]. *Gadbois*, No. 96-05-34015, at 1.

[FN86]. *Id.*

[FN87]. *Id.* at 2.

[FN88]. *Id.* at 2 (citing *McKinney v. Rees*, 993 F.2d 1378, 1384 (1993)).

[FN89]. *Id.*

[FN90]. The court noted that the Due Process Clause is violated when the evidence violates "'fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.'" ... The character rule is based on those same fundamental conceptions of justice and community sense of fair play and decency." *Id.* at 2 (quoting *Dowling v. United States*, 493 U.S. 342, 353 (1990)).

[FN91]. *State v. Dunn*, No. 10-97-02208 (Cir. Ct. Lane County, Or. 1997) (order granting defendant's motion to exclude prior bad acts).

[FN92]. *Id.* at 1.

[FN93]. *Id.* See also discussion *infra* in Part IV.C.1 regarding various interpretations of "relevance" in the Rule 404(4) context.

[FN94]. *State v. Gadbois*, No. 96-05-34015 at 2 (Cir. Ct. Multnomah County, Or. 1996).

[FN95]. *Id.*

[FN96]. *Id.*

[FN97]. *Westling*, *supra* note 11, at 4.

[FN98]. Rule 404 Legislative Commentary, *supra* note 8.

[FN99]. *Kirkpatrick*, *supra* note 4, at 138.

[FN100]. *Id.* at 139.

[FN101]. *Id.*

[FN102]. *United States v. Pate*, 426 F.2d 1083, 1086 (7th Cir. 1970), cert. denied, 400 U.S. 995 (1971).

[FN103]. *Cf. United States ex rel. Palmer v. DeRoberts*, 738 F.2d 168 (7th Cir. 1984) (in a due process analysis of questionable evidence, the issue is whether the probative value of the evidence outweighs the prejudice to the criminal defendant).

[FN104]. See Legislative Commentary, Or. Rev. Stat. § 40.160 (1995) (Rule 403) (citing *State v. Rook*, 10 Or. App. 367, 499 P.2d 830 (1972); *State v. Freeman*, 232 Or. 267, 374 P.2d 453 (1962); *State v. Flett*, 234 Or. 124, 380 P.2d 634 (1963)) [*hereinafter* Rule 403 Legislative Commentary].

[FN105]. *Cf. McKinney v. Rees*, 993 F.2d 1378, 1386 (1993) (fundamental fairness violated where it is highly probable that prior act evidence had substantial and injurious effect or influence in determining the jury's verdict); *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998); *DeRoberts*, 738 F.2d 168 (7th Cir. 1984); *State v. Gadbois*, No. 96-05- 34015 (Cir. Ct. Multnomah County, Or. 1996); *State v. Dunn*, No. 10-97-02208 (Cir. Ct. Lane County, Or. 1997).

[FN106]. *Kirkpatrick*, *supra* note 4, at 121.

[FN107]. The standard of review for the erroneous admission of prejudicial evidence is abuse of discretion. *Kirkpatrick*, *supra* note 4, at 122 (citing *Carlson v. Piper Aircraft Corp.*, 57 Or. App. 695, 701, 646 P.2d 43, 47 (1982)), review denied, 293 Or. 801, 653 P.2d 999 (1982). Accord *State v. Sullivan*, 152 Or. App. 75, 78, 952 P.2d 100, 102 (1998).

[FN108]. *Cf. Guardia*, 135 F.3d at 1330 (indicating that the rules of evidence should be interpreted in a way that does not render them superfluous).

[FN109]. Or. Rev. Stat. § 40.160 (Rule 403).

[FN110]. The concept of undue prejudice [appears] to encompass two analytically distinct forms of prejudice. The first is the injection of emotionalism into the proceeding, resulting in undue hostility, sympathy, or anger on the part of the jury. The second aspect of unfair prejudice is the likelihood that the jury will misuse the evidence in some way or place undue emphasis upon it, even though the evidence does not necessarily appeal to the emotions. Kirkpatrick, *supra* note 4, at 122.

[FN111]. Cf. Rule 403 Legislative Commentary, *supra* note 104 (when deciding whether to exclude evidence on the grounds of unfair prejudice, courts should consider the probable effectiveness of a limiting instruction).

[FN112]. The rationale for excluding evidence because of undue delay and the needless presentation of cumulative evidence "can be viewed as a 'concession to the shortness of life' as well as an acknowledgement of the limited resources of the judicial system." Mueller & Kirkpatrick, *Modern Evidence* § 4.5 (1995) (quoting *Reeve v. Dennett*, 145 Mass. 23, 28 (1887) (Holmes, J.)).

[FN113]. There is one bit of anecdotal support for the proposition that Rule 403 applies in its entirety when evidence is offered under Rule 404(4). Rule 404(4) codifies in part Measure 40's "all relevant evidence" requirement and in the official voters' pamphlet, the chief petitioners of Measure 40 made the following statement: "evidence of other crimes, if probative of guilt, will be admitted. [Measure 40] will not admit evidence that is confusing, repetitive, or unclear, because the judge must still make a determination that the evidence pertains to the defendant's guilt and therefore is relevant." *Argument in Favor, Official Voters' Pamphlet*, *supra* note 47, at 143. This statement suggests that the drafters of Measure 40 intended balancing along the lines of Rule 403 of evidence offered under the Oregon Constitution's new "all relevant evidence" provision.

[FN114]. *Westling*, *supra* note 11 at 5; *United States v. Enjay*, 134 F.3d 1427, 1431 (10th Cir. 1998).

[FN115]. *Westling*, *supra* note 11, at 6.

[FN116]. *United States v. Guardia*, 135 F.3d, 1326, 1329 (10th Cir. 1998).

[FN117]. Compare Fed. R. Evid. 413(a) with Fed. R. Evid. 412(b).

[FN118]. *Guardia*, 135 F.3d at 1329.

[FN119]. *Id.*

[FN120]. *Id.*

[FN121]. *Id.* As support for this conclusion, the court cited the following examples: FRE 609(a)(2) (stating that convictions involving dishonesty "shall be admitted" for impeachment purposes); and FRE 609(a)(1) (requiring the court to find that the probative value of a prior conviction outweighs its prejudicial effect on the accused).

[FN122]. See, e.g., *United States v. Sumner*, 119 F.3d 658, 662 (8th Cir. 1997); *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998), cert. denied, 119 S. Ct. 202 (1998). In each of these cases, the court noted that the principal sponsors of FRE 413-415 made identical statements regarding the rules: "In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." (quoting 140 Cong. Rec. H8991 (1994) (statement of Rep. Molinari); and 140 Cong. Rec. S12990 (1994) (statement of Sen. Dole)).

[FN123]. *Supra*, note 81.

[FN124]. But see discussion, *supra* note 47 (suggesting that the drafters of Measure 40 did not intend to prohibit balancing under Rule 403).

[FN125]. *Supra*, note 81.

[FN126]. *State v. Gadbois*, No. 96-05-34015 (Cir. Ct. Multnomah County, Or., 1996).

[FN127]. *State v. Dunn*, No. 10-97-02208, at 3 (Cir. Ct. Lane County, Or., 1997).

[FN128]. *Gadbois*, No. 96-05-34015, at 3; *Dunn*, No. 10-97-02208, at 3.

[FN129]. *Gadbois*, No. 96-05-34015, at 3.

[FN130]. *Dunn*, No. 10-97-02208, at 3.

[FN131]. Or. Rev. Stat. § 40.170(4), amended by SB 936, June 1997 (Rule 404(4)).

[FN132]. Though Measure 40 was found to be an invalid constitutional amendment, it represents part of the legislative history of SB 936 from which the intent of the drafters of Rule 404(4) may be inferred.

[FN133]. Measure 40, *supra* note 2, at 140.

[FN134]. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 *Stan. L. Rev.* 937 (1985) (noting that victims' rights are generally outweighed by the rights of the accused because the victim suffers no deprivation at the hands of the government).

[FN135]. See generally Henderson, *supra* note 134; Christopher Johns, *The Costs of Victims' Rights*, *Arizona Attorney*, Oct. 1992, at 27 (tension between victims' rights and the rights of the accused are difficult to balance but weigh in favor of the accused).

[FN136]. Measure 40, *supra* note 2 at 140.

[FN137]. Or. Rev. Stat. § 40.150 (Rule 401).

[FN138]. Legislative Commentary, Or. Rev. Stat. § 40.150 (Rule 401) (citing *Tanner v. Farmer*, 243 Or. 431, 414 P.2d 340 (1966)).

[FN139]. Or. Rev. Stat. § 40.175, amended by SB 936, June 1997 (Rule 405).

[FN140]. *Id.*

[FN141]. *Cf. State v. Dunn*, No. 10-97-02208, at 2 (Cir. Ct. Lane County, Or., 1997).

[FN142]. Mueller & Kirkpatrick, *supra* note 66, at § 4.11. See also Legislative Commentary, Or. Rev. Stat. § 40.155 (Rule 402) (particular policies require the exclusion of relevant evidence) [hereinafter Rule 402 Legislative Commentary]; McCormick on Evidence, *supra* note 16, at § 185 (addressing the concept of "legal relevance"); Sheft, *supra* note 18, at 59.

[FN143]. Rule 402 Legislative Commentary, *supra* note 142.

[FN144]. See Westling, *supra* note 11, at 3. Nevertheless, there is evidence that even the drafters contemplated a legal relevance standard under Rule 404(4). See *supra* text accompanying note 113.

[FN145]. Or. Rev. Stat. § 40.144 (Rule 402).

[FN146]. *Supra* note 81, and the discussion in Part IV.B.

[FN147]. See Mueller & Kirkpatrick, *supra* note 66, at § 4.11.

[FN148]. *State v. Dunn*, No. 10-97-02208 at 1 (Cir. Ct. Lane County, Or., 1997) (order granting defendant's motion to exclude prior bad acts). See also discussion *supra* Part IV.A.1.

[FN149]. See *Dunn*, No. 10-97-02208, at 2.

[FN150]. See discussion *supra* Part IV.A.1.

[FN151]. 155 Or. App. 74, 963 P.2d 721 (1998).

[FN152]. *Id.* at 77, 963 P.2d at 722.

[FN153]. *Id.*

[FN154]. 301 Or. 535, 725 P.2d 312 (1986).

[FN155]. The Johns criteria are:

- (1) Does the present charged act require proof of intent?
- (2) Did the prior act require intent?
- (3) Was the victim in the prior act the same victim or in the same class as the victim in the present case?
- (4) Was the type of prior act the same or similar to the acts involved in the charged crime?
- (5) Were the physical elements of the prior act and the present act similar?

Johns, 301 Or. at 555-56, 725 P.2d at 324-25.

[FN156]. Pyle, 155 Or. App. at 82, 963 P.2d at 725.

[FN157]. *Id.*

[FN158]. *Id.*

[FN159]. See also discussion *supra* Part IV.A.

[FN160]. Or. Rev. Stat. § 40.175 (Rule 405(a)).

[FN161]. See discussion *supra* Part IV.B.

[FN162]. See *State v. Day*, 236 Or. 458, 389 P.2d 30 (1964) (criminal defendants should be given a great deal of latitude in rebutting evidence offered by the state); *State v. Hubbard*, 297 Or. 789, 688 P.2d 1311 (1984) (it is the essence of a fair trial that reasonable latitude be given to a cross-examiner, and prejudice ensues from a denial of an opportunity to challenge the weight of a witness' testimony and credibility).

[FN163]. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (the justice system suffers when an accused is treated unfairly); *Wardius v. Oregon*, 412 U.S. 470, 475 n.6 (1973) (the Court is suspicious of state trial rules that provide nonreciprocal benefits to the state when the lack of reciprocity interferes with the defendant's ability to secure a fair trial).

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