

COMMENT

WISCONSIN'S "GREATER LATITUDE" RULE: A BACKDOOR TO UNCONSTITUTIONAL PROPENSITY EVIDENCE

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Wisconsin's greater latitude rule is unconstitutional as a due process violation because it not only admits propensity evidence, but it also fails to exclude evidence when its undue prejudice substantially outweighs its probative value. First, the greater latitude rule is unconstitutional under a theory based on the reasoning of *Crawford v. Washington*, which struck down hearsay rules that conflicted with the original meaning of the Sixth Amendment. Using *Crawford's* originalist reasoning, the greater latitude rule conflicts with the original meaning of due process. Second, the rule also interferes with the modern conception of due process, which requires procedures that produce accurate, reliable means of adjudicating criminal cases. By analogy to persuasive authority, the rule should be unconstitutional under the reasoning of federal appeals courts that have dealt with similar issues. I advocate a return to Wisconsin's traditional approach to admitting propensity evidence, which would accord with the United States Constitution and other jurisdictions' rules. This approach would also provide a basis for effective appellate review.

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INTRODUCTION

In her book, Pulitzer Prize-winning reporter Dorothy Rabinowitz tells the story of Grant Snowden,¹ a highly decorated police officer whose wife ran a daycare facility in their home.² Seeing bruises on the face of a boy named Greg and suspecting that he might have been abused, Snowden went to Greg's home and warned Greg's parents that if he saw signs of abuse again, he would report them to the police.³ In what seemed like an attempt to deflect an investigation, Greg's father reported that Snowden had put his mouth on Greg's penis, even though Greg repeatedly failed to confirm that allegation.⁴

1. See DOROTHY RABINOWITZ, NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES 47-62 (2003).

2. *Id.* at 48-49.

3. *Id.* at 49-50.

4. *Id.* at 50-51.

There was not enough evidence to bring the case to a grand jury, but the prosecutor tried Snowden two more times for two different cases of sexual assault on different children by relying on what appears to have been faulty evidence.⁵ In the first trial, even though the prosecutor coached minor witnesses to provide incriminating testimony, the jury acquitted Snowden because he produced evidence that the alleged victim had not even been at his house when she was allegedly assaulted.⁶ In the second trial, now years after the encounter with Greg's father, the prosecutor brought Greg to testify. He testified to Snowden's so-called "prior bad acts" that were so questionable they did not originally warrant a prosecution.⁷ Presented with this testimony and other suspect evidence, the jury found Snowden guilty and the judge sentenced him to five life sentences.⁸

Snowden's story demonstrates why rules of evidence matter. When the rules of evidence do not protect the right to a fair trial, innocent people go to jail. Prior bad acts evidence can bias the jury against the defendant. Additionally, as Snowden's story shows, prior bad acts are often unproven allegations that can have stark consequences for defendants.

Generally speaking, in all jurisdictions in the United States, extrinsic evidence of other acts that the accused may have committed (also called "bad acts evidence") is not admissible at trial, unless it fits a specific purpose like showing a common scheme, a plan, or mode of operation.⁹ Closely related to this rule is the character rule, which seeks to exclude evidence of actions offered to prove that a person acted out of a propensity to act wrongfully.¹⁰ The rationale is that such evidence would bias jurors and lead them to infer improperly that because the

5. *Id.* at 51–54.

6. *Id.* at 53.

7. *Id.* at 57.

8. *Id.* at 59.

9. See DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS* § 1.3 (Richard D. Friedman, ed., 2009 & Supp. 2012). This rule is codified in FED. R. EVID. 404(b) and in WIS. STAT. § 904.04(2) (2009–10). In relevant part, § 904.04(2) reads:

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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

10. LEONARD, *supra* note 9, at § 1.2. This rule is codified in FED. R. EVID. 404(a) and in WIS. STAT. § 904.04(1) (2009–10). In relevant part, § 904.04(1) reads, "[e]vidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion."

defendant did a bad thing in the past, he did a bad thing this time. That type of inference would be one based on the perceived *propensity*¹¹ of the defendant to commit a crime and on inferences from the facts presented at trial.¹²

Wisconsin, like twenty-nine other states¹³ and the federal court system,¹⁴ allows admission at trial of prior bad acts evidence against accused sex offenders, especially those accused of sexual misconduct with a minor.¹⁵ Wisconsin Statutes section 904.04(2)(b) explicitly allows the use of evidence of a previous conviction for sexual assault.¹⁶ The Wisconsin Supreme Court has gone further and created a judge-made rule called the “greater latitude rule” (GLR).¹⁷ The GLR allows judges “greater latitude” to admit evidence that would normally be excluded because the potential for undue prejudice outweighs its probative value,¹⁸ the evidence is not relevant, or it does not fit an exception to the rule barring admission of prior conduct evidence.¹⁹

11. To put it another way, that the defendant acted in conformity with a perceived character trait.

12. For a more complete explanation of the character rule, see LEONARD, *supra* note 9, at §§ 1.2–.3.

13. Erik D. Ojala, Note, *Propensity Evidence under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947, 956 (1999) (citing Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1127 (1993)) (the cited study is almost twenty years old and the laws of some states may have changed); see also R.P. Davis, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 77 A.L.R.2d 841, § 42 (1961) (updated weekly) (citing cases from twenty-nine states holding that evidence relating to sexual acts with the complaining witness is admissible). *But see id.* § 44 (citing cases from twenty-two states holding that evidence relating to sexual acts with children other than the complaining witness to be admissible). Unfortunately, I was unable to find a more recent, authoritative study of state laws concerning admission of sexual propensity evidence.

14. See, e.g., FED. R. EVID. 413 (“In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.”); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (holding that prior acts evidence was admissible under Federal Rule of Evidence 413).

15. Professor Daniel Blinka explained that Wisconsin’s greater latitude rule is analogous to Rule 414, and that “[t]he best that can be said of the federal approach is that it expresses the doctrine in rule form and drops any pretense that the other crimes are anything other than propensity evidence.” 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES, WISCONSIN EVIDENCE § 404.7 (3d ed. 2008 & Supp. 2012).

16. WIS. STAT. § 904.04(2)(b) (2009–10).

17. *State v. Davidson*, 2000 WI 91, ¶¶ 34–37, 236 Wis. 2d 537, 613 N.W.2d 606.

18. “Probative value” refers to the degree to which a piece of evidence “[t]end[s] to prove or disprove” a fact at issue. BLACK’S LAW DICTIONARY 1240 (8th

This Comment argues that the GLR is unconstitutional as a deprivation of due process and a violation of the Fifth and Fourteenth Amendments of the United States Constitution.²⁰ Because the rule admits propensity evidence while simultaneously failing to exclude evidence because of a lack of relevance or because of unfair prejudice, the rule deprives accused sex offenders of a fair trial before an impartial jury. Furthermore, even if the greater latitude rule were constitutional, it is unworkable because it provides no limits on what sexual propensity evidence is or is not admissible. This lack of demonstrable limits has resulted in an arbitrary rule that gives prosecutors carte blanche to enter propensity evidence.

Judge-made evidentiary rules are subject to procedural due process analysis if they infringe on a fundamental right, such as the right to a fair trial.²¹ In spite of the GLR's long history and ties to the nineteenth century, the Wisconsin Supreme Court should strike it down, just as the United States Supreme Court in *Crawford v. Washington*²² struck down the longstanding rule admitting testimonial hearsay that fell within firmly rooted hearsay exceptions.²³ As in the case of the testimonial hearsay rule, the limits of the GLR are vague and "so unpredictable that [they] fail[] to provide meaningful protection."²⁴

Other jurisdictions have arrived at different conclusions as to whether admission of propensity evidence violates procedural due process. Federal courts interpreting the *Federal Rules of Evidence* have almost unanimously agreed that propensity evidence does not violate procedural due process when its unduly prejudicial effect does not substantially outweigh its probative value.²⁵ Additionally, over half of

ed. 2004); see also BLINKA, *supra* note 15, at § 403.1 ("Probative value, then, is the product of relevance and an assessment of what the evidence adds to the case.").

19. See *Davidson*, 2000 WI 91 ¶¶ 46–51.

20. U.S. CONST. amend. V, XIV.

21. "Evidentiary rules are also subject to due process analysis. While states may restrict evidence submitted by the defendant, the Supreme Court will invalidate evidentiary rules that are arbitrary, because truly arbitrary evidence rules will violate fundamental fairness guarantee [sic] of the due process clause." 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.9(a)(i) n.5 (5th ed. 2008) (citing *Holmes v. South Carolina*, 547 U.S. 319 (2006); *United States v. Scheffer*, 523 U.S. 303 (1998); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967)).

22. 541 U.S. 36 (2004).

23. See *id.* at 53–56.

24. *Id.* at 63.

25. E.g., *United States v. Rogers*, 587 F.3d 816, 821–22 (7th Cir. 2009) (confirming that propensity evidence relating to child molestation is admissible only when its probative value is not substantially outweighed by undue prejudice); *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (holding that admission of

states allow propensity evidence in cases of child sexual assault.²⁶ However, at least two state courts have found that propensity evidence regarding sexual assault of children violates their state constitutions.²⁷ While finding a rule unconstitutional under a *state* constitution is not dispositive as to whether there is a breach of the *federal* Constitution, it is persuasive.²⁸

Part I of this Comment first provides an overview of the GLR and examines key Wisconsin cases. The Wisconsin Supreme Court has held that the GLR does not absolve judges from determining whether evidence is admissible under the same framework it uses for other evidence.²⁹ In practice, however, the GLR is akin to a magical incantation—it permits judges to justify the inclusion of evidence that would otherwise be rightly excluded. This Comment then describes the United States Supreme Court’s precedents on the issue of propensity evidence. Next, Part I provides background on the federal circuits’ holdings on propensity evidence and the two states that have found propensity evidence unconstitutional under their state constitutions. Part II argues that the GLR is unconstitutional under an originalist theory analogous to the holding of *Crawford* and also under a theory that it does not comply with *In re Winship*’s requirement that the state prove its burden beyond a reasonable doubt. It also argues that, by analogy to other, nonbinding authorities, the GLR should be struck down. Finally, Part III offers a superior approach to the GLR that is more amenable to a fair trial: returning to a balancing test that gives judges a workable standard to exclude inappropriate character evidence.

propensity evidence “can amount to a constitutional violation only if its prejudicial effect far outweighs its probative value”); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (“[W]ithout the safeguards embodied in Rule 403 we would hold the rule unconstitutional.”).

26. Ojala, *supra* note 13, at 956 (citing Imwinkelried, *supra* note 13, at 1127); *see also supra* note 13.

27. *E.g.*, *State v. Cox*, 781 N.W.2d 757, 772 (Iowa 2010); *State v. Ellison*, 239 S.W.3d 603, 608 (Mo. 2007).

28. *See, e.g.*, *State v. Evans*, 2000 WI App 178, ¶ 8 n.2, 238 Wis. 2d 411, 617 N.W.2d 220 (“[W]here a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority.”).

29. *State v. Davidson*, 2000 WI 91, ¶¶ 51–52, 236 Wis. 2d 537, 613 N.W.2d 606.

I. THE EVOLUTION OF THE GREATER LATITUDE RULE AND OTHER JURISDICTIONS' APPROACH TO PROPENSITY EVIDENCE

Wisconsin, like most other states, has incorporated the *Federal Rules of Evidence* (FRE) into its own statutes, although there are significant differences between Wisconsin's version and the FRE.³⁰ As a result, Wisconsin and most other states' evidence codes contain analogue rules that are similar to the FRE.³¹ This Comment argues that both under Supreme Court precedent and by analogy to cases interpreting the FRE, Wisconsin's application of the rule concerning prior bad acts is unconstitutional.

A. The Greater Latitude Rule

The GLR arose as a limited deviation from the general approach to admitting prior bad acts evidence described by the Wisconsin Supreme Court in *Whitty v. State*.³² This Section first discusses two cases on admitting prior bad acts, *Whitty* and *State v. Sullivan*.³³ It then explains the creation of the GLR. Finally, it details how a majority on the Wisconsin Supreme Court broadened the GLR to create a large exception to the general bar on prior bad acts evidence.

1. WHITTY AND THE SULLIVAN TEST

Whitty concerns the admissibility of prior bad acts evidence, while *Sullivan* lays out the framework for Wisconsin courts to admit prior bad acts evidence. As this Comment explains, the modern GLR significantly deviates from the precedents set by these cases.

a. Whitty

The seminal Wisconsin case on admitting prior bad acts is *Whitty v. State*, which involved the trial of a man who was convicted of indecent behavior with a female under the age of sixteen.³⁴ The defendant lured a ten-year-old girl into a basement and "took indecent

30. For a discussion of Wisconsin's adoption of the FRE and how the FRE and Wisconsin's code vary, see BLINKA, *supra* note 15, at § 101.1.

31. Forty-two states have adopted the FRE. For a discussion of state adoption of the FRE, see 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5009 (2d ed. 2005 & Supp. 2012).

32. 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

33. 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

34. 34 Wis. 2d at 284; *Sullivan*, 216 Wis. 2d at 775 (describing *Whitty* as "this court's seminal decision regarding other acts evidence").

liberties” with her under the pretext that he needed her help in locating a black and white rabbit.³⁵ At trial, the prosecution introduced the testimony of another girl, whom Whitty also lured into a basement with the same rabbit ploy.³⁶

The Wisconsin Supreme Court held that the evidence of the prior occurrence regarding the black and white rabbit was admissible.³⁷ However, the court noted that trial courts must ensure defendants receive “a procedurally and evidentially fair trial without making it impossible for the state to prosecute.”³⁸ The court went on to warn that prior bad acts evidence should be used sparingly as a “calculated risk” that could violate a defendant’s right to a fair trial.³⁹ Thus the Wisconsin Supreme Court was aware of the danger that prior bad acts present at trial. The court specifically acknowledged the “universal ‘character rule’” against admission of prior bad acts that have no other purpose than to show that the defendant had a propensity to commit the crime charged.⁴⁰

b. The Sullivan test

The *Sullivan* court initially proposed a comprehensive test to exclude prior bad acts evidence and restore the eroded prohibition on character evidence.⁴¹ In that case, the Wisconsin Supreme Court created a three-step analytical framework for admitting prior bad acts under Wisconsin Statutes section 904.04(2).⁴² The trial court must first determine whether the evidence is offered under an appropriate exception to the general rule barring character evidence.⁴³ The evidence must be entered to prove a fact at issue in the trial and cannot be entered merely to prove propensity. The *Sullivan* court specifically cited the rationales of *Whitty* when explaining the first prong of the test.⁴⁴ Second, the trial court must determine whether the evidence is relevant under Wisconsin Statutes section 904.01.⁴⁵ Finally, it must apply Wisconsin Statutes section 904.03, which is the traditional

35. *Whitty*, 34 Wis. 2d at 284–85.

36. *Id.* at 290–91.

37. *Id.* at 295.

38. *Id.*

39. *Id.* at 297.

40. *Id.* at 293.

41. BLINKA, *supra* note 15, at § 404.6.

42. 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). WIS. STAT. § 904.04(2) (2009–10) is the analogue to FED. R. EVID. 404(b).

43. *Sullivan*, 216 Wis. 2d at 772.

44. *Id.* at 782–83.

45. *Id.* at 772. Section 904.01 is the analogue to FED. R. EVID. 401.

balancing test to determine whether the probative value is substantially outweighed by the danger of unfair prejudice.⁴⁶

2. THE GLR APPLIED TO *SULLIVAN* AND *WHITTY*

In *Hendrickson v. State*,⁴⁷ the Wisconsin Supreme Court announced what would become the GLR.⁴⁸ The court held that in an incest trial, testimony by the defendant's daughters regarding prior instances of intercourse between the defendant and his daughters was admissible as relevant to "(1) the general scheme or plan; and (2) the proof of motive or intent exceptions to the general rule against admitting testimony in a criminal prosecution concerning prior crimes."⁴⁹ Upon finding the testimony of the defendant's daughters admissible, the court explained the policy rationale supporting admissibility of prior bad acts in child sexual assault cases and what "greater latitude" meant in the context of exceptions to the general rule prohibiting admission of prior bad acts.⁵⁰

Greater latitude "is not so much a matter of relaxing the general rule" against prior bad acts; rather, "it is a matter of placing testimony concerning other acts or incidents within one of the well established exceptions to such rule."⁵¹ Thus, the rule, as the Wisconsin Supreme Court explained, gave greater latitude to courts to admit prior bad acts under an established exception to the general prohibition on prior bad acts evidence.⁵² It was never the court's intent to admit evidence for the purpose of showing propensity. The policy supporting such greater latitude is that in cases of sexual assault the offense usually occurs in private, where the only witnesses are the alleged victim and defendant. The admission of prior bad acts with the defendant or others, who are "so related to the offense for which the defendant is on trial that they

46. *Sullivan*, 216 Wis. 2d. at 772-73. Section 904.03 is analogous to FED. R. EVID. 403.

47. 61 Wis. 2d 275, 212 N.W.2d 481 (1973).

48. *See id.*

49. *Id.* at 282.

50. *See id.* at 279. Citing a decision from California, the court noted that the policy rationale for admitting prior acts evidence in this type of case was that "the offense [incest with daughter] almost always occurs in private. The only direct witnesses are the prosecuting witness and the defendant. Although circumstantial evidence supplies occasional corroboration, conviction usually hinges upon the credibility of the prosecuting witness." *Id.* at 280 n.13 (quoting *People v. Covert*, 249 Cal. App. 2d 81, 88 (1967)).

51. *Id.* at 279.

52. *Id.*

have a logical connection therewith” is allowed because of the need to corroborate the alleged victim’s testimony with similar acts.⁵³

The question in *Hendrickson* was about the greater latitude courts have in placing prior bad acts within an established exception to the general prohibition on the admissibility of prior bad acts under Wisconsin Statutes section 904.04(2). The court never intended that trial courts should have greater latitude when deciding issues of relevance under Wisconsin Statutes section 404.01 or undue prejudice under Wisconsin Statutes section 904.03. Even though the *Hendrickson* court did find that an exception was justified by the facts, it still maintained that courts must adhere to the cautionary use of prior bad acts evidence. Moreover, it never even held that a greater latitude applied to issues of relevance or undue prejudice.

a. The Wisconsin Supreme Court majority’s approach to the GLR

In the past decade, a majority of the justices on the Wisconsin Supreme Court have departed from the *Whitty* safeguards which ensure a fair trial for those accused of sexual assault of a child. In *State v. Davidson*,⁵⁴ the court held that the GLR applies to *all three prongs* of the *Sullivan* test.⁵⁵ Thus, in Wisconsin, trial courts have greater latitude to admit prior bad acts when considering whether the evidence is even relevant to an issue at trial or unfairly prejudicial. The result since *Davidson* has been a cavalcade of obvious propensity evidence that has marked a stark departure from the safeguards voiced in *Whitty* and echoed by *Hendrickson*.⁵⁶ In none of the cases since *Davidson* has the court stated any limits on the admissibility of sexual propensity evidence.

In *Davidson*, the court vastly expanded the GLR when it allowed evidence that a defendant pled guilty almost ten years earlier to sexually

53. *Id.* at 281 (quoting *State v. Jackson*, 82 Ohio App. 318, 322, 81 N.E.2d 546 (1948) (quoting *State v. Moore*, 149 Ohio St. 226, 229, 78 N.E.2d 365 (1948))).

54. 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

55. *Id.* ¶ 51 (“We conclude that in sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant’s other crimes evidence was properly admitted at trial. The effect of the rule is to permit the more liberal admission of other crimes in sex crime cases in which the victim is a child.”).

56. The cases in which the Wisconsin Supreme Court has dealt with the expanded GLR include *State v. Martinez*, 2011 WI 12, ¶ 15, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Hunt*, 2003 WI 81, ¶ 2, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Veach*, 2002 WI 110, ¶ 7, 255 Wis. 2d 390, 648 N.W.2d 447; *State v. Hammer*, 2000 WI 92, ¶ 23, 236 Wis. 2d 686, 613 N.W.2d 629; and *Davidson*, 2000 WI 91, ¶¶ 4–5.

assaulting a child at church while the child was drinking water.⁵⁷ At trial, the state alleged that the defendant had given his niece a large amount of wine.⁵⁸ While she was sleeping in the same camper as the defendant's wife and sons, the defendant allegedly assaulted the girl after giving her more wine.⁵⁹ The dissimilarity between the two events is obvious. The majority opinion struggled to explain the similarities, by claiming the girl in church was "vulnerable" and that both the church and the camper were "unlikely locations."⁶⁰ The prior bad act could not have fit in to any realistic exception to the character rule and it most likely biased the fact-finder against the defendant. As Justice Bradley wrote, the majority was trying to "fit the 'square peg' of prior acts evidence into the 'round hole' of an acceptable statutory purpose of motive, plan, or scheme."⁶¹

The court also reiterated its prior policy rationales to admit propensity evidence.⁶² In a prior case, the court held that prior bad acts are necessary because juries could not believe someone would be capable of assaulting a child, so the prosecutor must be allowed to expose the evidence to the jurors to show them the defendant is capable of that act, even though there was an "unavoidable potential to prove propensity."⁶³ The court also stated that propensity evidence is admissible to counter the fact that sexually abused children often find it difficult to testify at trial.⁶⁴

Since *Davidson*, the Wisconsin Supreme Court has consistently failed to provide any meaningful limit to the GLR or any significant protection for defendants' right to a fair trial. For instance, in *State v. Hammer*,⁶⁵ a trial for sexual assaulting of a minor, the court allowed evidence of apparently uncharged allegations that, as a minor, the defendant had fondled an adult male.⁶⁶ Most recently, the court allowed the admission of a videotaped interrogation of a sexual assault victim.⁶⁷ In it, she detailed how the defendant had previously burned her hands

57. *Davidson*, 2000 WI ¶¶ 10–11, 18.

58. *Id.* ¶¶ 6–8.

59. *Id.*

60. *Id.* ¶ 61.

61. *Id.* ¶ 91 (Bradley, J., dissenting).

62. *Id.* ¶¶ 42–43.

63. *Id.* ¶ 42 (citing *State v. Friedrich*, 135 Wis. 2d 1, 27–28, 398 N.W.2d 763 (1987)).

64. *Id.*

65. 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629.

66. *See id.* ¶¶ 1–15.

67. *State v. Martinez*, 2011 WI 12, ¶ 57, 331 Wis. 2d 568, 797 N.W.2d 399.

with scalding water.⁶⁸ The court used various theories, such as “context” and establishing “time and location” of the alleged assault.⁶⁹ The notable dissimilarities between the prior bad acts and the crimes for which the defendants were charged exemplify how the *Davidson* majority has created a rule that admits evidence that is not probative of an individual’s guilt for the crime charged but is probative of the defendant’s propensity to commit crimes.⁷⁰ That seems to be the most likely outcome of a rule that allows judges to admit evidence without the safeguards of an unmodified *Sullivan* test.

b. The dissenters’ approach

Ever since *Davidson*, Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley have consistently protested the expanded GLR.⁷¹ They both rightly view the current GLR as an improper expansion of the GLR as articulated in *Hendrickson*, a means to admit propensity evidence against the defendant, and an erosion of the *Whitty* safeguards and the plain meaning of Wisconsin Statutes section 904.04(2).⁷² As Justice Bradley stated, the post-*Davidson* approach to the GLR is “a thinly veiled endorsement of the unrestricted use of propensity evidence.”⁷³ Unfortunately, their dissents have gone unheeded and the majority has continued its “legal gymnastics.”⁷⁴

B. Supreme Court Precedent Regarding Due Process at Trial

The right to a fair trial before an impartial jury, during which the state must prove a defendant’s guilt beyond a reasonable doubt, is a hallmark of the American judicial system that the Constitution

68. *Id.* ¶ 1.

69. *Id.* ¶ 4.

70. It is outside the scope of this Comment to examine the effect of the GLR on trial court rulings, but the Wisconsin Supreme Court rulings illustrate how much leeway prosecutors have to introduce propensity evidence.

71. See, e.g., *State v. Davidson*, 2000 WI 91, ¶¶ 91–93, 236 Wis. 2d 537, 613 N.W.2d 606 (Bradley, J., dissenting); *infra* note 72.

72. See *Marinez*, 2011 WI 12, ¶¶ 79–80 (Abrahamson, C.J., dissenting) (quoting *Davidson*, 2000 WI 91, ¶¶ 108–10 (Bradley, J., dissenting)); *State v. Hunt*, 2003 WI 81, ¶¶ 94–111, 263 Wis. 2d 16, 666 N.W.2d 771 (Bradley, J., dissenting); *State v. Veach*, 2002 WI 110, ¶¶ 139–143, 255 Wis. 2d 390, 648 N.W.2d 447 (Abrahamson, C.J., dissenting); *State v. Hammer*, 2000 WI 92, ¶¶ 52–63, 236 Wis. 2d 686, 613 N.W.2d 629 (Bradley, J., dissenting).

73. *Davidson*, 2000 WI 91, ¶ 93 (Bradley, J., dissenting).

74. *Id.* ¶ 110 (Bradley, J., dissenting).

protects.⁷⁵ While the United States Supreme Court has tended to be hesitant to strike down state criminal procedure rules,⁷⁶ it has held state evidentiary rules unconstitutional when they contravene the right to a fair trial.⁷⁷ The Supreme Court has not ruled extensively on whether the admission of propensity evidence is unconstitutional,⁷⁸ but I contend that traditional notions of due process and Supreme Court precedents support the notion that Wisconsin's GLR is unconstitutional.

C. Other Jurisdictions' Approaches to Propensity Evidence

Notably, at least two states—Iowa and Missouri—have held that sexual propensity evidence violates their state constitutions.⁷⁹ In contrast, the federal appeals courts have routinely held that sexual propensity evidence does not violate the Due Process Clause. As I argue below, the federal cases suggest that the GLR is unconstitutional. That two states' supreme courts have held that the admission of propensity evidence is unconstitutional under their state constitutions reveals that there is not uniform agreement on the constitutionality of propensity evidence.

75. See *In re Winship*, 397 U.S. 358, 362 (1970) (“[I]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’” (quoting *Leland v. Oregon*, 343 U.S. 790, 802–03 (1952))).

76. See *Spencer v. Texas*, 385 U.S. 554, 564 (1967) (holding that prior acts evidence was admissible to increase sentencing under a habitual criminal statute).

77. E.g., *In re Winship*, 397 U.S. at 368 (holding that the beyond a reasonable doubt standard is constitutionally mandated); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding a state rule against cross-examining one's own witness unconstitutional); *Davis v. Alaska*, 415 U.S. 308, 320 (1973) (holding unconstitutional a state rule against cross-examining minors); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding testimonial hearsay inadmissible when the defendant had no chance to cross-examine the declarant); *Holmes v. South Carolina*, 547 U.S. 319, 330–31 (2006) (holding unconstitutional a state rule barring evidence of third party guilt).

78. In *Spencer*, 385 U.S. 554 (1967), the Court upheld a law allowing admission of prior convictions to the jury under a Texas habitual criminal statute, *id.* at 568–69. However, that statute's purpose was to *enhance sentencing*, and the court expressly informed the jury that it could not take prior acts into account when deciding the individual's guilt. *Id.* at 563. But, in *Michelson v. United States*, 335 U.S. 469 (1948), the Court said, “[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt,” *id.* at 475.

79. See *State v. Cox*, 781 N.W.2d 757, 772 (Iowa 2010); *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. 2007).

1. THE FEDERAL CIRCUITS APPLYING THE FRE

Federal Rule of Evidence 414 codifies the admissibility of sexual propensity evidence in child-molestation cases in federal courts.⁸⁰ Rule 403 mandates that judges must exclude evidence when undue prejudice substantially outweighs its probative value.⁸¹ The federal appeals courts have consistently held that the Rule 403 balancing test⁸² must stay intact,⁸³ and that Rule 403 is the primary reason that Rule 414, which allows the admission of sexual propensity evidence, is constitutional.⁸⁴ Without Rule 403's ability to exclude unduly prejudicial evidence, admitting sexual propensity evidence under Rule 414 would be an unconstitutional deprivation of due process.⁸⁵

2. IOWA AND MISSOURI

In *State v. Cox*,⁸⁶ the Iowa Supreme Court found that a state statute that allowed admission of sexual propensity evidence violated Iowa's due process clause,⁸⁷ which reads, "no person shall be deprived of life, liberty, or property without due process of law."⁸⁸ Further, it held that the safeguards of its state's Rule 403 analogue did not save the admission of propensity evidence from unconstitutionality.⁸⁹ The court

80. See FED. R. EVID. 414(a) ("In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.").

81. FED. R. EVID. 403.

82. *Id.* This is the federal analogue to WIS. STAT. § 904.03 (2009–10).

83. See, e.g., *United States v. Rogers*, 587 F.3d 816, 821 (7th Cir. 2009) ("[A]fter a Rule 413 analysis the court must next consider whether it should exclude the evidence under Rule 403."); *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998) ("The legislative history, however, indicates that the district court must apply Rule 403 balancing and may exclude such evidence in an appropriate case.").

84. See, e.g., *United States v. LeMay*, 260 F.3d 1018, 1022 (9th Cir. 2001) ("We agree with numerous other courts that Rule 403 remains applicable to evidence introduced under Rule 414, and, if conscientiously applied, will protect defendants from propensity evidence so inflammatory as to jeopardize their right to a fair trial."); *United States v. Mound*, 149 F.3d 799, 800 (8th Cir. 1998) ("In considering evidence offered under Rules 413, 414, and 415, a trial court must still apply Rule 403 . . .").

85. *Enjady*, 134 F.3d at 1433.

86. 781 N.W.2d 757 (Iowa 2010).

87. *Id.* at 769.

88. *Id.* at 761 (quoting IOWA CONST. art. I, § 9).

89. *Id.* at 768 ("Unlike the federal courts that have considered this issue, we do not believe evidence of prior bad acts can be admitted for the sole purpose of showing general propensity even if a trial judge considers the balancing test found in Iowa Code section 701.11.").

reasoned that applying a Rule 403 balancing test to pure propensity evidence is almost impossible because “that which makes the evidence more probative—the similarity of the prior act to the charged act—also makes it more prejudicial.”⁹⁰ The court did, however, maintain that prior bad acts evidence that involved the same victim may still be admissible, because “it shows the nature of the relationship between the alleged perpetrator and the victim.”⁹¹ This is a similar rationale to the one laid out in *Hendrickson*.⁹²

Like Iowa, the Missouri Supreme Court has held that admission of sexual propensity evidence violates its state constitution.⁹³ In contrast to Iowa’s constitutional provision, the Missouri provision states “no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information” and “[t]hat in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation.”⁹⁴ The court explained that propensity evidence would violate the defendant’s right to be tried for the offense for which he or she is on trial, because the jury might convict based on the defendant’s propensity to commit crimes, rather than because he or she committed the crime.⁹⁵

II. WHY THE GLR DEPRIVES DEFENDANTS OF DUE PROCESS

The GLR is unconstitutional because it admits propensity evidence while also eviscerating the protections of the Rule 403 balancing test. First, this Comment provides two constitutional arguments for finding the GLR unconstitutional under United States Supreme Court precedents. The first argument is analogous to the originalist reasoning of *Crawford v. Washington*.⁹⁶ The second argument is that the GLR violates the beyond a reasonable doubt standard. Finally, this Part compares the GLR to the analogous rule in the federal circuits and argues by analogy that the GLR is unconstitutional. All three of these arguments present lawyers, judges, and legislators with an opportunity to follow Iowa and Missouri and strengthen due process protections for defendants.

90. *Id.* at 769.

91. *Id.* (quoting *State v. Reyes*, 744 N.W.2d 95, 102 (Iowa 2008)).

92. *See Hendrickson v. State*, 61 Wis. 2d 275, 280–82, 212 N.W.2d 481, (1973).

93. *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. 2007).

94. *Id.* (quoting MO. CONST. art. I, §§ 17–18(a)).

95. *Id.*

96. 541 U.S. 36, 50–54 (2004).

A. Two Theories to Challenge the GLR Based on Supreme Court Precedent

United States Supreme Court precedent weighs heavily against the constitutionality of the GLR. There are at least two theories that suggest that the GLR is unconstitutional. First, an argument analogous to the reasoning of the *Crawford* line of cases suggests the analysis underpinning the GLR and the federal court's approval of sexual propensity evidence is invalid. Second, because the GLR allows the admission of propensity evidence, it conflicts with the state's burden to prove beyond a reasonable doubt every element of the charged crime.

1. THE GLR IS UNCONSTITUTIONAL UNDER THE REASONING OF
CRAWFORD

In *Crawford v. Washington*, the Supreme Court held that so-called "testimonial hearsay"⁹⁷ is not admissible at criminal trials when the defendant has not had a chance to cross-examine the witness.⁹⁸ In *Crawford*, the defendant was convicted of assaulting a man who allegedly tried to rape his wife.⁹⁹ The trial court admitted testimonial hearsay from the defendant's wife, who refused to testify at trial.¹⁰⁰ Her statements suggested that the defendant stabbed the man, who was not holding a weapon.¹⁰¹ On appeal, the Washington Supreme Court held that the hearsay was admissible because it bore guarantees of trustworthiness.¹⁰² The United States Supreme Court reversed and overruled *Ohio v. Roberts*,¹⁰³ which held that testimonial hearsay was admissible if it bore "adequate 'indicia of reliability'" or fell under a firmly rooted hearsay exception.¹⁰⁴

Justice Scalia, writing for the majority, justified this holding by relying on an originalist interpretation of the Sixth Amendment.¹⁰⁵ Relying on a number of pre-Constitution cases and historical events,

97. Probably the most succinct definition of "testimonial hearsay" is quoted in *Crawford* itself: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52 (quoting Brief of Amici Curiae the National Association of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36).

98. *Id.* at 53–56.

99. *Id.* at 38.

100. *Id.*

101. *See id.* at 39–40.

102. *Id.* at 41.

103. 448 U.S. 56 (1980), overruled by *Crawford*, 541 U.S. 36.

104. *Crawford*, 541 U.S. at 40, 68–69.

105. *Id.* at 50.

including Sir Walter Raleigh's trial and execution for treason, Justice Scalia reasoned that the original meaning of the Sixth Amendment entailed a ban on testimonial hearsay.¹⁰⁶ To support his contentions, Justice Scalia wrote in detail about the one-sided trials in England and the colonies prior to the right to cross-examine.¹⁰⁷ The majority also noted that the previous framework under *Roberts* was so unpredictable and prone to inconsistent application that "it fails to provide meaningful protection from even core confrontation violations."¹⁰⁸ In subsequent cases, the Court reaffirmed this prohibition against testimonial hearsay and even applied it to forensic evidence, such as blood tests¹⁰⁹ and lab results stating that a particular substance is an illegal narcotic.¹¹⁰

Wisconsin's GLR should be overruled for the same reasons that the *Crawford* majority overruled *Roberts*. First, the ban on propensity evidence has roots in a reaction to the same one-sided judicial process as the Confrontation Clause.¹¹¹ Further, the GLR conflicts with the historical admissibility of prior bad acts evidence and it is so vague that "it fails to provide meaningful protection" for the right to a fair trial.¹¹² For both of these reasons, the GLR is unconstitutional.

a. Originalist foundations of a ban on propensity evidence

For the same reasons that the *Crawford* Court overruled *Ohio v. Roberts*, the Wisconsin Supreme Court should overrule *Davidson* and its progeny and discard the modern GLR. *Crawford* reasoned that the Founders drafted the Sixth Amendment as a bulwark to protect criminal defendants from the abusive criminal procedures prior to the judicial reforms in England and the colonies.¹¹³ The Due Process Clause was a similar bulwark meant to protect defendants from unfair procedures at trial; it originated from the same judicial reforms that guaranteed the

106. *Id.* at 53–54.

107. *Id.* at 43–49.

108. *Id.* at 63–64, 66.

109. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

110. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2008).

111. *See infra* Part II.A.1.a.

112. *Crawford*, 541 U.S. at 63–64.

113. *Id.* at 48–49 ("At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: 'The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*.' . . . The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment." (internal citations omitted)).

right to cross-examination—the Magna Carta and the Treason Act of 1695.¹¹⁴

Before the English Parliament adopted the Treason Act of 1695, civil-law practices at criminal trials were the norm in England, which often resulted in extremely unjust procedures and outcomes.¹¹⁵ There was no right to cross-examine witnesses, there was no right to counsel,¹¹⁶ and there was no ban on propensity evidence.¹¹⁷ The Parliament reacted by passing the Treason Act of 1695.¹¹⁸ One of the Act's provisions stated that "overt act[s] not stated in the indictment could not be proven at trial," which became the prohibition on propensity evidence.¹¹⁹ By the end of the eighteenth century, legal treatises and cases acknowledged a general prohibition on admitting evidence of other crimes and acts not stated in the criminal indictment.¹²⁰

It is beyond the scope of this Comment to provide a detailed account of the cases and treatises from the period between the passage of the Treason Act and the passage of the Bill of Rights.¹²¹ For the purposes of this Comment, it suffices to state that around the time of the founding, there was a general prohibition on evidence admitted to prove that a defendant acted out of a general propensity to commit a crime, if it did not prove another fact at trial. As one commentator

114. See Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 717 (1981); Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 666–69.

115. Reed, *supra* note 114, at 717.

116. *Id.* at 716 ("The judge limited neither the witnesses' testimony nor use of exhibits, and the accused could only object to a witness' competency. The judge prohibited the accused from employing a lawyer to argue his case, and the crown's counsel did not supply the accused with a copy of the indictment or disclose its witnesses prior to trial.")

117. *Id.* ("The rule excluding evidence of other crimes, wrongs or acts emerged in England in its earliest form in the late seventeenth century as a reaction to the Star Chamber proceedings.")

118. *Id.* at 717.

119. *Id.*

120. *Id.*

121. For a discussion of the ban on propensity evidence before and after the founding, see LEONARD, *supra* note 9, at §§ 2.1–.2, 3.2–.3; IA JOHN HENRY WIGMORE, EVIDENCE § 58.2 (Tillers rev. 1983); Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 188–90 (2001); Louis M. Natali, Jr. & R. Stephen Stigall, "Are You Going to Arraign His Whole Life?": *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 12–15 (1996); Julius Stone, *The Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 991–1000 (1938).

stated, "it is important to make clear that the American courts plainly followed English practice in excluding such evidence when offered to prove guilt through an inference of bad character."¹²² "This rule," he continued, "was recognized by the commentators, and the case authority is also virtually unequivocal."¹²³ The exception to that rule was for evidence that proved a separate fact at trial.¹²⁴

Most important to a claim of original meaning is that there is significant evidence that the people and legal professionals at the time of the founding understood "due process" to encompass a ban on propensity evidence at trial. Around the time the Bill of Rights was enacted, due "process" meant "the whole course of proceedings, in a cause, real or personal, civil or criminal, from the original writ to the end of the suit."¹²⁵ The founders incorporated many of the provisions of the Treason Act into the Bill of Rights, and those provisions "became matters of fundamental law" for the colonists.¹²⁶ Finally, depictions of the infamous procedures the Bill of Rights meant to protect against, such as Sir Walter Raleigh's trial and execution, were published in inexpensive pamphlets and even a ten-volume set owned by many individuals and possibly used by the drafters of the Constitution.¹²⁷

b. The GLR fails to comply with the original meaning of due process

Considering the historical context and law at the time of the Fifth Amendment's drafting, under an originalist approach,¹²⁸ the GLR fails

122. LEONARD, *supra* note 9, § 3.3.

123. *Id.*

124. *See, e.g., id.* § 2.3. For instance, in a forgery case, the court admitted evidence the defendants had uttered forged notes three times previously in order to prove the defendants knew they were uttering forged notes on the occasion for which they were on trial. *Id.* Such an admission is analogous to the modern exception to prove "knowledge." *Id.*

125. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 444–45 (2010) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

126. Reed, *supra* note 114, at 721.

127. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 94 (1974).

128. "Originalism" is a broad term that can encompass several judicial philosophies. Justice Antonin Scalia, the author of *Crawford*, adheres to a version of originalism some scholars have called "original public meaning." *See, e.g.,* Ralph A. Rossum, *The Constitutional Jurisprudence of Justice Clarence Thomas*, LIBRARY OF LAW AND LIBERTY (Feb. 12, 2012), <http://libertylawsite.org/post/the-jurisprudence-of-justice-clarence-thomas/>. According to Justice Scalia, judges should "apply . . . the clear textual language of the Constitution;" if the text is ambiguous, judges should refer to "what [the text] meant to the society that adopted it." RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 27 (2006) (quoting Justice Antonin

because it allows courts to admit propensity evidence while simultaneously allowing a lesser showing for whether the evidence is relevant and whether it is *unfairly* prejudicial. Because it is so contrary to accepted practice—even in jurisdictions that explicitly admit propensity evidence, like the federal courts—the GLR contravenes the historical ban on such evidence.

As explained above, the traditional rule dating to the seventeenth century, firmly entrenched in the United States, was that no propensity evidence was admissible unless it also proved another fact at trial.¹²⁹ Wisconsin's GLR, however, allows the trial court "greater latitude" in placing a prior bad act into an acceptable exception to the prohibition on propensity evidence.¹³⁰ This alone is not dispositive as to whether the GLR is unconstitutional because the Supreme Court has recognized the need for the law to evolve;¹³¹ however it contradicts at least one general rule regarding a fair trial.

Most crucially, the GLR grants judges a "greater latitude" in applying the balancing test necessary under Wisconsin Statute section 904.03, because the test is supposed to ensure fair trials by excluding irrelevant and unfairly prejudicial evidence.¹³² The vast majority of state and federal courts continue to adhere to the balancing test.¹³³ Further, several federal courts have held that, but for the balancing test, the admission of propensity evidence would be unconstitutional.¹³⁴ These holdings flow straight from the Supreme Court's due process jurisprudence, since the Due Process Clause is meant to ensure procedures that do not contradict traditional notions of "fair play and

Scalia, Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer at American University Washington College of Law (Jan. 13, 2005), *available at* <http://epstein.law.northwestern.edu/research/supctLawScaliaBreyer.pdf>).

129. See, e.g., *People v. Rojas*, 760 N.E.2d 1265, 1267 n.2 (N.Y. 2001). For cases acknowledging the exception to the ban on propensity evidence, see LEONARD, *supra* note 9, § 2.3.

130. *Hendrickson v. State*, 61 Wis. 2d 275, 279, 212 N.W.2d 481 (1973) ("This is not so much a matter of relaxing the general rule that it is not competent in a prosecution for one crime to introduce evidence of other offenses as it is a matter of placing testimony concerning other acts or incidents within one of the well established exceptions to such rule, as noted in *Whitty*, and codified in the new Wisconsin Rules of Evidence.").

131. See, e.g., *Hurtado v. California*, 110 U.S. 516, 529 (1884).

132. *State v. Davidson*, 2000 WI 91, ¶ 51, 236 Wis. 2d 537, 613 N.W.2d 606 (2000) (holding that in sexual assault cases the greater latitude rule applies to all three prongs of the *Sullivan* test).

133. See *supra* Part I.C.

134. See *generally supra* Part I.C.1.

decency.”¹³⁵ The admission of propensity evidence if it is unfairly prejudicial surely contradicts “fair play.”

c. Arguments in favor of the GLR based on historical precedents

Defenders of sexual propensity evidence often rely on the so-called “lustful disposition” exception to refute claims that sexual propensity evidence is a violation of due process.¹³⁶ The common justification is that around the late nineteenth and early twentieth centuries, some state courts developed rules that deviated from the traditional ban on character evidence.¹³⁷ One rationale of the state courts was that direct evidence of the sexual assault is often difficult to obtain, thus prior bad acts evidence is helpful to prosecutors.¹³⁸ The other justification is that sexual assault cases often arise from a complicated history; therefore, prior conduct between the two individuals is necessary to prove the alleged conduct.¹³⁹ Overall, state courts were split on the issue as to whether to allow a looser standard for sexual misconduct.¹⁴⁰

Those justifications, however, do not excuse the fact that there is scant evidence that prior sexual misconduct was admissible at the time of the founding.¹⁴¹ There is an argument that longstanding laws, such as the lustful disposition rule, should survive. For instance, in *Burnham v. California*,¹⁴² the Court upheld a law allowing transient jurisdiction on the reasoning that it was a long-recognized rule, even though the holding did not comply with modern conceptions of due process.¹⁴³ But the majority opinion relied on an originalist interpretation of due

135. *Dowling v. United States*, 493 U.S. 342, 352–53 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

136. See, e.g., *United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998); *United States v. LeMay*, 260 F.3d 1018, 1025–26 (discussing “lustful disposition” exceptions in state laws). Wisconsin’s greater latitude rule is also based on an exception for cases of sexual misconduct. See *Hendrickson v. State*, 61 Wis. 2d 275, 277–79, 212 N.W.2d 481 (1973).

137. See LEONARD, *supra* note 9, § 3.3.

138. *Id.* § 3.3.6.

139. *Id.*

140. *Id.* (“Thus, the state of nineteenth century law on the admissibility of subsequent misconduct in sexual offense cases was quite mixed. Though some courts admitted such evidence, others excluded it on grounds of relevance and prejudice, and still other courts held that the admissibility decision must be made on a case-by-case basis.”).

141. All of the lustful disposition cases occurred after the mid-nineteenth century. See *Castillo*, 140 F.3d at 881; LEONARD, *supra* note 9, at § 3.3.6.

142. 495 U.S. 604 (1990).

143. See *id.* at 609–11, 619 (holding that transient jurisdiction complies with due process because American courts traditionally recognized it); Natali & Stigall, *supra* note 121, at 18.

process.¹⁴⁴ Transient jurisdiction, unlike propensity evidence that does not prove a fact at trial, existed at the time of the founding.¹⁴⁵ Under an originalist analysis, it does comply with due process. As *Crawford* suggests, a longstanding rule does not imply constitutionality.¹⁴⁶ If historical practice always justified a law's constitutionality, many longstanding and unconstitutional laws would never have been found unconstitutional at a later date.¹⁴⁷

2. THE GLR VIOLATES *WINSHIP*'S BEYOND A REASONABLE DOUBT STANDARD

Besides an originalist approach to due process, the modern United States Supreme Court's precedents since *In re Winship*¹⁴⁸ have repeatedly held that due process requires procedures that produce accurate and reliable results. In order to uphold the state's burden to prove a defendant guilty beyond a reasonable doubt, procedures must be reliable¹⁴⁹ and "require that the factfinder will rationally apply that standard to the facts in evidence."¹⁵⁰ Wisconsin's GLR fails in both respects. First, the inclusion of propensity evidence tends to deter fact-finders from rationally applying the law to the facts because of the effect psychologists call "negativity bias,"¹⁵¹ which I will explain below. Second, the lack of a meaningful balancing test grants judges carte blanche to admit irrelevant and unfairly prejudicial evidence.

a. *Winship and due process*

Winship not only held that the state must prove the defendant's guilt beyond a reasonable doubt, it also "provided a radical basis for evaluating the constitutionality of trial procedures in both criminal and

144. See *Burnham*, 495 U.S. at 619.

145. See *id.* at 610–11 ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

146. *Crawford v. Washington*, 541 U.S. 36 (2004) overruled the longstanding precedent of *Ohio v. Roberts*, 448 U.S. 56 (1980).

147. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

148. 397 U.S. 358 (1970).

149. See D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 296–301 (1989).

150. *Id.* at 300 (quoting *Jackson v. Virginia*, 443 U.S. 307, 316–317 (1979)).

151. See, e.g., Paul Rozin & Edward B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 PERSONALITY & SOC. PSYCHOL. REV. 296, 296–97 (2001); Roy F. Baumeister et al., *Bad Is Stronger than Good*, 5 REV. GEN. PSYCHOL. 323 (2001).

civil cases.”¹⁵² Concomitant with *Winship*’s holding, the majority’s opinion and Justice Harlan’s concurrence reasoned that due process requires a high level of precision, accuracy, and certainty when the state threatens to deprive an individual of his or her liberty.¹⁵³ Implicit in the notion of modern due process is “safeguard[ing] men from dubious and unjust convictions.”¹⁵⁴ To ensure this, due process allocates “the major portion of the ‘margin of error’ . . . to the prosecution.”¹⁵⁵ As Justice Harlan stated, “it is far worse to convict an innocent man than to let a guilty man go free.”¹⁵⁶ Justice Harlan expressed the opinion that this is a “fundamental value determination of our society.”¹⁵⁷

The Court continued to refine the doctrine and its emphasis on procedures that produce precise, accurate, and certain convictions.¹⁵⁸ In *County Court of Ulster County, New York v. Allen*,¹⁵⁹ the Court reasoned that “in criminal cases, the ultimate test of any device’s constitutional validity in a given case remains constant: the device must not undermine the fact-finder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.”¹⁶⁰ In *Jackson v. Virginia*,¹⁶¹ the Court stated that procedures must not interfere with the fact-finder’s duty to find every fact necessary to constitute guilt beyond a reasonable doubt.¹⁶² Finally, in *Francis v. Franklin*,¹⁶³ the Court found that a due process violation

152. Lewis, *supra* note 149, at 296.

153. *Id.* (quoting *Winship*, 397 U.S. at 362–64, 372); *see also Winship*, 397 U.S. at 361–62 (“It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.” Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does “reflect a profound judgment about the way in which law should be enforced and justice administered.”) (internal citations omitted).

154. Lewis, *supra* note 149, at 296 (quoting *Winship*, 397 U.S. at 362).

155. *Id.* (quoting *Winship*, 397 U.S. at 364).

156. *Id.* (quoting *Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

157. *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

158. *See* Lewis, *supra* note 149, at 296–97 (“*Winship* has produced a still-developing inquiry into the validity of a variety of procedural devices in criminal trials, as well as a new framework for determining the standard of proof due process requires in civil litigation.”).

159. 442 U.S. 140 (1979).

160. *Id.* at 156.

161. 443 U.S. 307 (1979).

162. Lewis, *supra* note 149, at 300 (quoting *Jackson*, 443 U.S. at 316–17).

163. 471 U.S. 307 (1985).

“occurs whenever there is a reasonable possibility of adverse impact on the application of the standard.”¹⁶⁴

The GLR fails the reasonable doubt standard because it gives judges no definable limits as to what evidence is too prejudicial or too irrelevant to admit. The rule fails to serve as a meaningful device to accurately, precisely, and reliably allow the fact-finder to find every fact necessary to constitute guilt beyond a reasonable doubt. Scholars have long acknowledged that propensity evidence is highly prejudicial.¹⁶⁵ It leads the jury to believe that the defendant is guilty because of an inherent character trait to commit the crime charged, instead of reasonable inferences derived from the facts presented at trial.¹⁶⁶ It also leads them to overgeneralize from negative facts.¹⁶⁷ Such overgeneralizations are the unreasonable inferences that the Supreme Court sought to deter in *Jackson* and *Francis*.

b. Psychological evidence that propensity evidence can lead to unreasonable inferences

Psychologists have confirmed that negative information distorts people’s interpretation of facts.¹⁶⁸ Individuals give more thought to negative information than to positive information.¹⁶⁹ Through experiments, scientists have found evidence that “people [pay] more attention to bad than good acts when forming impressions.”¹⁷⁰ The larger amount of attention bad information receives leads to negative impressions and stereotypes.¹⁷¹

That juries may give more weight to certain evidence is not necessarily unconstitutional. However, individuals rely on these negative impressions and stereotypes and “tend to assume that a single sample of behavior is representative of what the actor ordinarily does.”¹⁷² Thus, it appears that science has confirmed one of the policy

164. See Lewis, *supra* note 149, at 300.

165. See, e.g., LEONARD, *supra* note 9, § 1.3.

166. See *id.*

167. See *id.*

168. See, e.g., Baumeister et al., *supra* note 151, at 323.

169. *Id.* at 340.

170. *Id.* at 341.

171. *Id.* at 344–45.

172. Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1048 (1984) (quoting DAVID J. SCHNEIDER ET AL., PERSON PERCEPTION 239 (2d ed. 1979)); *id.* at 1047 (“Perhaps the factor that most induces jurors to overestimate the probative value of character evidence is what psychologists term the ‘halo effect.’ In the present context it might be more aptly called the ‘devil’s horns

reasons behind the ban on propensity evidence: namely, that propensity evidence causes the judge and jury to overvalue negative evidence in determining guilt.¹⁷³ Evidentiary rules will not change how humans process information, but they can “shield” jurors so that they are less prone to making erroneous conclusions, whether consciously or unconsciously. Because propensity evidence, by definition, does not fit into established exceptions to the exclusionary rule and can cause erroneous inferences, courts need a process to exclude it in order to comply with due process.

c. The GLR fails to comply with Winship

Propensity evidence alone may not be unconstitutional,¹⁷⁴ but in the federal courts, Rule 403 is supposed to shield such prejudicial evidence from the jury. By contrast, in Wisconsin, because the GLR grants judges a “greater latitude” to admit arguably irrelevant and prejudicial evidence,¹⁷⁵ it neuters whatever protection the balancing test might have provided defendants. At the same time, the Wisconsin Supreme Court states that judges have a “greater latitude” to apply the balancing test, but that judges are not absolved of admitting prejudicial evidence against the defendant.¹⁷⁶ That is either a muddled rule or an implicit suggestion that judges should be biased against defendants.

Either way, such a rule cannot “safeguard men from dubious and unjust convictions”¹⁷⁷ and therefore cannot comport with “‘the community’s sense of fair play and decency.’”¹⁷⁸ A judge legitimately cannot know what the outer bounds of the GLR are and what he or she

effect.’ The term refers to the propensity of people to judge others on the basis of one outstanding ‘good’ or ‘bad’ quality. This propensity may stem from a tendency to overestimate the unity of personality—to see others as consistent, simple beings whose behavior in a given situation is readily predictable.”) (quoting GORDON W. ALLPORT, *PERSONALITY: A PSYCHOLOGICAL INTERPRETATION* 521 (1937)).

173. WIGMORE, *supra* note 121, § 58.2 (“The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused’s guilt of the present charge.”).

174. Decisions in the federal courts demonstrate this. *See, e.g., United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001).

175. *See State v. Davidson*, 2000 WI 91, ¶ 52, 236 Wis. 2d 537, 613 N.W.2d 606.

176. *Id.*

177. *In re Winship*, 397 U.S. 358, 362 (1970) (quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949)).

178. *Dowling v. United States*, 493 U.S. 342, 353 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

should exclude. The rule admits highly prejudicial evidence that has the potential to seriously interfere with jurors' reasoning. Because the rule fails to serve as a reliable tool for determining guilt based on the facts at trial, the GLR is unconstitutional.

B. By Analogy to Other Jurisdictions, the GLR Should Be Unconstitutional

At a minimum, Wisconsin's GLR should be held unconstitutional because the Wisconsin Supreme Court does not obligate lower courts to adhere to the section 904.03 balancing tests in the way that other jurisdictions require.¹⁷⁹ In the federal cases that have held sexual propensity evidence constitutional, those courts did so only because the Rule 403 balancing test still applies as it would in non-sexual-propensity instances.¹⁸⁰ Were it not for the intact Rule 403 test, sexual propensity evidence would constitute a deprivation of due process.¹⁸¹

Federal courts that have ruled on the admissibility of sexual propensity evidence under the *Federal Rules of Evidence* have at least obligated lower courts to conduct a structured balancing test to determine the admissibility of propensity evidence.¹⁸² For instance, in the Ninth Circuit, lower courts must apply a five-factor test to determine whether the prejudicial effect of the evidence outweighs its probative value under Rule 403.¹⁸³ Trial courts in that Circuit must consider:

- (1) "the similarity of the prior acts to the acts charged," (2) the "closeness in time of the prior acts to the acts charged," (3) "the frequency of the prior acts," (4) the "presence or lack of intervening circumstances," and (5) "the necessity of the evidence beyond the testimonies already offered at trial."¹⁸⁴

179. See *Davidson*, 2000 WI 91, ¶ 51.

180. See, e.g., *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) ("We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414. As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.").

181. *Id.*

182. *Id.* at 1027-28.

183. *Id.*

184. *Id.* at 1028 (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)).

In contrast, the Wisconsin Supreme Court requires no similar analysis for trial courts to admit sexual propensity evidence under the GLR.¹⁸⁵ In the most recent GLR case, the majority allowed the trial court to admit evidence that the defendant burned a young girl's hand.¹⁸⁶ The trial judge admitted that there was a "legitimate" concern of "unfair prejudice" but did not explain why this was or how the standard jury instruction limiting the evidence's use would negate the unfair prejudice.¹⁸⁷ The judge simply stated that he "believe[d]" that a jury instruction would "significantly minimize the possibility that the jury will use the hand burning evidence for an improper purpose."¹⁸⁸ In fact, no structured approach to balancing the probative value against the prejudicial nature of potentially extremely prejudicial evidence is necessary in Wisconsin.¹⁸⁹

In Wisconsin, *Davidson's* expansion of the GLR has weakened protection against unfair prejudice. In effect, it "permits more liberal admission of other crimes evidence"¹⁹⁰ in applying the Wisconsin Statutes section 904.03 balancing test. The Wisconsin Supreme Court's majority consistently states that the GLR does not make evidence "automatically admissible,"¹⁹¹ and does not absolve lower courts of determining whether evidence is admissible under Wisconsin Statutes section 904.03.¹⁹² However, the record of what the Wisconsin Supreme Court has held admissible under the GLR suggests the opposite.

*State v. Veach*¹⁹³ illustrates how the GLR has weakened the protections of the balancing test. In *Veach*, the defendant was on trial for sexual assault of a young girl; the Wisconsin Supreme Court upheld the trial court's ruling to admit evidence of the defendant's eleven-year-old conviction for sexually assaulting his own daughter.¹⁹⁴ The court allowed the evidence for proof of lack of mistake by the defendant. However, it engaged in virtually no balancing test to determine whether the evidence was unfairly prejudicial—in the court's

185. See, e.g., *State v. Martinez*, 2011 WI 12, ¶¶ 37–38, 331 Wis. 2d 568, 797 N.W.2d 399.

186. *Id.* ¶ 46.

187. See *id.* ¶ 37.

188. *Id.*

189. See, for example, BLINKA, *supra* note 15, § 403.1 for a discussion of the balancing test. There is no similarly structured approach for Wisconsin trial courts to take. *Id.*

190. *State v. Davidson*, 2000 WI 91, ¶ 52, 236 Wis. 2d 537, 613 N.W.2d 606.

191. See, e.g., *id.*

192. *Id.* (quoting *State v. Plymesser*, 172 Wis. 2d 583, 598, 493 N.W.2d 367 (1992)).

193. 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

194. *Id.* ¶¶ 27, 91.

own words, whether the evidence “arouses [the jury’s] sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.”¹⁹⁵ In this case, evidence of a man sexually assaulting his own daughter has a significant chance of “caus[ing] a jury to base its decision on something other than the established propositions in the case,”¹⁹⁶ but the court did not examine this evidence’s prejudicial effect. The balancing test is meant to protect against unfair prejudice. However, the GLR has served to absolve judges of their duty to exclude unfairly prejudicial evidence.

III. A BETTER APPROACH: RETURN TO *WHITTY* AND A REAL BALANCING TEST

Modern due process dictates that procedures at trial must be reliable and must not interfere with the fact-finder’s responsibility. To ensure that goal is carried out, Wisconsin should return to an intact *Whitty* and *Sullivan* standard for other acts evidence because those cases provide judges with a workable, definite standard for excluding potentially devastating evidence. A rule conforming to *Whitty* and *Sullivan* would disallow “greater latitude” for the second and third prongs of the *Sullivan* test, which require judges to determine whether evidence is relevant and whether the evidence’s probative value substantially outweighs its undue prejudice.¹⁹⁷

A workable standard would help to produce results at trial that comport with the standards of due process in *Whitty*. The default rule of Wisconsin Statutes section 904.04(2) is that all character evidence is inadmissible unless it “has any tendency to prove the fact at issue through reasoning that does not require an inference of the person’s character.”¹⁹⁸ The rule will not deter all propensity inferences, but it will severely reduce the propensity evidence that the court admits now. Moreover, it will serve as a guide for judges to control how much evidence to present, and in what context.

The Wisconsin Supreme Court should also obligate lower courts to engage in a factored balancing test like the one the Ninth Circuit uses to determine whether the unfair prejudice outweighs the probative value.¹⁹⁹ First, this test would force judges to consider facts they might

195. *Id.* ¶ 87 (quoting *Davidson*, 2000 WI 91, ¶ 73).

196. *Id.*

197. *See supra* Part I.A.1.b.

198. LEONARD, *supra* note 9, at § 4.2.

199. *See United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000)).

not otherwise. Second, it would force judges to reason to conclusions when admitting potentially prejudicial evidence. Finally, it would give appellate courts a basis to determine if the lower courts abused their discretion. As the balancing test in Wisconsin stands now, there is no guide to either trial or appellate judges as to how to determine whether the unduly prejudicial effect of a piece of evidence substantially outweighs its probative value.²⁰⁰

A rule that would disallow the cavalier use of propensity evidence that is now allowable in Wisconsin would probably encounter opposition. The most common argument in support of admitting propensity evidence in sexual assault cases is that there is a high recidivism rate among sexual assault defendants.²⁰¹ This is, however, a misperception that the empirical data do not support.²⁰² A Department of Justice study concluded that at three years after release only 3.5% of released sex offenders were reconvicted for another sex offense.²⁰³ Only 3.3% of convicted and released child molesters were rearrested for another child sexual assault.²⁰⁴ By contrast, the rearrest rate for convicted burglars arrested for burglary was 23.4%.²⁰⁵ The rearrest rate for all violent criminals committing another violent crime was 27.5%.²⁰⁶ For drug offenders, it was 41.2%.²⁰⁷ Clearly, if one should draw an inference about sex offenders, the inference should be that sex offenders are less likely to reoffend for another sex offense. If the recidivism argument were valid, it would destroy the ban on propensity

For an example of a decision applying the *LeMay* factors and finding propensity evidence inadmissible by applying Rule 403, see *United States v. Price*, No. 09-30107, 2011 WL 3859700, at *2-4 (C.D. Ill. Sept. 1, 2011) ("Even though evidence related to [the] molestation . . . is admissible under Rule 414, application of the *LeMay* factors supports the evidence's exclusion pursuant to Rule 403.").

200. See *Veatch*, 2002 WI 110, ¶ 91.

201. See, e.g., *Ojala supra* note 13, at 961 n.78 (summarizing the support for Rule 413).

202. See also Stacey Katz-Schiavone et al., *Myths and Facts about Sexual Violence: Public Perceptions and Implications for Prevention*, 15 J. CRIM. JUST. & POPULAR CULTURE 291, 292 (2008), available at <http://www.albany.edu/scj/jcipc/vol15is3/KatzSchiavoneLevensonAckerman.pdf> ("Although it is a widely accepted belief that sex offenders are more repetitive and violent than other criminals, data show that they are among the least likely criminals to be rearrested for new crimes.").

203. PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 2 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

204. *Id.* at 1.

205. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 8-9 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

206. *Id.*

207. *Id.*

evidence for almost all crimes, since reoffenders are comparatively rare among sexual offenders.²⁰⁸

Another criticism is that trial judges already reason to conclusions, so no structured balancing test is necessary.²⁰⁹ Since there are no factors to guide a judge conducting a balancing test, and no factors for an appellate court to review, it is difficult to see how a judge reasoned to his conclusion instead of making a “gut decision.” Appeals courts may only reverse a discretionary decision “if discretion was erroneously exercised” due to “clearly irrelevant or improper factors.”²¹⁰ Judges are people too, so they are not immune from the effects of negativity bias.

A structured balancing test would help to combat the effects of negative bias and allow a basis for appellate review instead of the current haphazard approach. The Wisconsin Supreme Court already requires judges to engage in an explicit reasoning process with reference to specific “relevant facts and factors”²¹¹ when sentencing defendants.²¹² Its goal was the same as the one this Comment suggests: “[b]y stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion.”²¹³

Finally, two more common arguments for the GLR have been that (1) jurors must be shown that the defendant is capable of the crimes for which he is on trial;²¹⁴ and (2) prior bad acts are necessary to bolster the victim’s testimony, since young victims find it difficult to testify.²¹⁵ The first argument appears to advocate shocking the jury into believing that the defendant is capable of the crime for which he is on trial, regardless of whether it is even relevant to an issue at trial. It ignores the fact that such prior bad acts are extremely prejudicial and often irrelevant. In an era of twenty-four hour news cycles and “Amber alerts,” it is doubtful that jurors would not believe that an individual is capable of sexual assault. As to the second justification, it might be true that victims have a difficult time testifying, but it does not necessarily follow that prejudicing the jury and admitting evidence that tends to

208. *Id.* at 9.

209. As explained above, there is no detailed, explicit process to balance probative value and undue prejudice in Wisconsin. See, for example, the court’s reasoning in *State v. Martinez*, 2011 WI 12, ¶¶ 37–38, 331 Wis. 2d 568, 797 N.W.2d 399.

210. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

211. *Id.* ¶ 46.

212. *Id.*

213. *Id.*

214. See, e.g., *State v. Davidson*, 2000 WI 91, ¶ 42, 236 Wis. 2d 537, 613 N.W.2d 606 (quoting *State v. Friedrich*, 135 Wis. 2d 1, 27–28, 398 N.W.2d 763 (1987)).

215. *Id.*

conflict with the jury's reasoning is the proper solution. Wisconsin law already contains means to help a victim testify if a minor victim finds it difficult to testify in court. For instance, Wisconsin Statutes section 908.08 allows the prosecution to admit audiovisual recordings of children at trial.²¹⁶

CONCLUSION

Because the GLR admits propensity evidence without an effective exclusionary mechanism, it conflicts both with originalist and modern conceptions of due process and is therefore unconstitutional. Further, by analogy to the federal appellate circuits, the GLR should be unconstitutional. Wisconsin should discard it and respect the right to a fair trial.

216. See WIS. STAT. § 908.08 (2009–10).