

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Kurtis T. Wilder, PJ, Mark J. Cavanagh and Michael J. Kelly, J.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

LINCOLN ANDERSON WATKINS
Defendant-Appellant.

No. 142031

L.C. No. 06-008116 FC
COA No. 291841

APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Statement of Question

I.

Is MCL § 768.27a unconstitutional in any respect?

The People answer: NO.

Statement of Facts

The People accept defendant's statement of facts, and would add that in its instruction on the MCL § 768.27a evidence the court said, "Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts." T, 3-9, 103-104, 67a.

Statement of Jurisdiction

The People accept defendant's statement of jurisdiction.

Summary of Argument

MCL § 768.27a provides that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” This allows admission of other acts of the accused to show it is more likely that he or she committed the charged act, something prohibited by MRE 404(b). The statute and court rule thus conflict.

This conflict should be resolved in favor of the statute. The history of the Michigan constitutional provisions on practice, now practice and procedure, counsel caution and restraint by the court in considering statutory rules of evidence; those that express policy concerns and thus reach beyond the dispatch of judicial business, see *McDougall v Schanz*, 461 Mich 15 (1999), are within the ambit of the legislature. MCL § 768.27a is such a rule.

MRE 403 remains applicable in this situation. The statute does not, in saying such evidence “is admissible,” purport to prohibit application of all other evidentiary principles, but rather to render admissible for all relevant purposes in the specified cases evidence that otherwise would be admissible for only specified non-character purposes under MCL § 768.27. Thus, as the statute says, “notwithstanding” the limitations of MCL § 768.27, the evidence “is admissible” for all relevant purposes; that is, no prohibition on use of the evidence for a relevant purpose exists. But the other rules of evidence, including MRE 403, hearsay rules, and the like, continue to operate with regard to the evidence. This is the uniform understanding in the federal system with regard to FRE 414, from which the statute here was drawn, many of the cases holding that such an understanding is necessary to uphold the statute as against a due-process challenge.

MRE 403 is, however, not self-executing. The opponent of otherwise admissible evidence must carry the burden of showing it should be excluded under Rule 403—but Rule 403 must be applied properly; that is, the “propensity inference” that may be derived from the evidence is not considered prejudicial but instead goes on the probative side of Rule 403 balancing (where probative value—which includes propensity—must not be simply outweighed, but outweighed substantially, by “unfair” prejudice).

Argument

I.

MCL § 768.27a, to which MRE 403 applies, is constitutional in all respects.

A. Introduction: Short Answers to The Questions Involved

In its order granting defendant's application for leave to appeal, this court directed that the parties address certain issues; the "short answers" to those questions are:

- Whether MCL § 768.27a conflicts with MRE 404(b);

Yes, the statute and the court rule conflict, as the statute permits that which the rule of evidence prohibits—the use of other acts to show the propensity of the defendant to commit the sort of crime charged.

- If it does, whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, § 1 and § 5;

Yes, the statute prevails over the court rule.

- Whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that propensity evidence "is admissible for any purpose for which it is relevant," violated defendant's due process right to a fair trial;

No, MRE 403 remains applicable to this evidence, as do all other evidentiary principles, such as hearsay and privilege. But the "propensity inference" prohibited by MRE 404(b) is, under 27a, permissible, and therefore goes on the "probative" rather than the "prejudicial" side of the MRE 403 balancing scale.

- Whether the Court should rule that propensity evidence described in MCL § 768.27a is admissible only if it is not otherwise excluded under MRE 403;

Rule 403 is applicable—though not self-executing, as the opponent of otherwise admissible evidence must carry the burden of showing it should be excluded under Rule 403—but must be applied properly;

that is, the “propensity inference” that may be derived from the evidence is not considered prejudicial but instead goes on the probative side of Rule 403 balancing (where probative value—which includes propensity—must not be simply outweighed, but outweighed substantially, by “unfair” prejudice).

- Whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1.

No; insuring a fair trial is not a power exclusively vested to the courts of the state, as both the legislative and executive branches of government may act to insure a fair trial.¹ The judicial power that is confided in the judiciary is the authority to hear and decide controversies, and to make binding orders and judgments respecting them in accordance with the law that has been declared by the People directly or their political representatives, some of which may have as a purpose the ensuring of a fair trial to all parties. But the People’s political representatives may not direct that the judiciary, in the determination of legal controversies, act in a manner inconsistent with the fundamental law governing the state—the State and Federal Constitutions. Whether MCL § 768.27a violates either document is a judicial question—and the answer is that it does not.

B. MCL 768.27a conflicts with MRE 404(b)

The statute conflicts with the rule of evidence; indeed, the *raison d’etre* of the statute is to permit evidence forbidden by the rule of evidence (or else the statute is nugatory as redundant).

¹ For example, it is the *duty* of the prosecuting attorney to see that an accused has a fair and impartial trial. *People v. Evans*, 72 Mich. 367 (1888). See also *State v. Holmes*, 315 N.W.2d 703, 710 (Wis., 1982)(“ The legislature, in obedience to its duty to promote the public interest, may enact laws to assure fair trial”); *Traynor v. Leclerc*, 561 N.W.2d 644, 648 (N.D.,1997).

MCL § 768.27 provides:

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

MCL § 768.27a states, in pertinent part:

*Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. (emphasis added).*²

MRE 404(b) allows admission of other crimes, wrongs, or acts, for certain purposes, but prohibits their admission to prove character to show conduct in conformity therewith:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

² Cf. FRE 414(a): “In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.” The Michigan statute is clearly drawn from the federal rule (and in the federal system Congress has authority over the rules of evidence). This point is important in the question of interpretation, for as Justice Frankfurter has said, where something is “obviously transported from another legal source, whether the common law or other legislation, it brings its soil with it.” Felix Frankfurter, “Some Reflections on the Reading of Statutes,” 47 Colum. L.Rev. 527, 537 (1947).

Given that the statute allows the admission of specified criminal acts for *any* relevant purpose when the defendant is charged with a listed offense against a minor, and that MRE 404(b) precludes a relevant purpose—use of the evidence to show conduct in conformity therewith, which is the purpose of the statute—there is a conflict between the statute and the rule of evidence.³ In the federal system, where Congress has enacted rule 413—allowing other sexual assaults in a sexual assault prosecution for their “bearing on any matter to which [they are] relevant”—and FRE 414, allowing, in a case of sexual molestation of a child, prior acts of sexual molestation for their “bearing on any matter to which [they are] relevant,” it is clearly understood that these provisions “supersede Rule 404's prohibition against character evidence.”⁴ These rules are understood to “create an exception to the general bar against propensity evidence...,” with the legislative history on the point being crystal clear. Co-sponsor representative Molinari described the purpose of the rule as to provide that the prior conduct described is admissible for any “matter to which it is relevant,” including “the defendant’s propensity to commit sexual assault or child molestation offenses....”⁵

As well stated by one federal circuit:

Rules 413 and 414 , enacted in 1995, were designed to ‘protect the public from crimes of sexual violence’ by permitting ‘in sexual assault and child molestation cases ... evidence that the defendant has committed offenses of the same type on other occasions.’ 140 Cong. Rec. H8968, H8991 (daily ed. Aug. 21, 1994) (statement of Rep.

³ See *United States v Charley*, 189 F.3d 1251 (CA 10, 1999) and *United States v Withorn*, 204 F.3d 790 (CA 8, 2000), concerning FRE 414, the federal analogue to MCL § 768.27a, finding it constitutional, *Withorn* observing that the rule makes it “easier for the government to prosecute sex offense cases. ...’[p]romoting the effective prosecution of sex offenses is a legitimate end.”

⁴ *United States v Crawford*, 413 F.3d 873, 875-76 (CA 8, 2005).

⁵ See 140 Cong Rec H2433 (April 19, 1994).

Molinari). As such, they create an exception to the general ban on propensity evidence contained in Rule 404(b)... (“The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b) ... [and] authorize admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant.”) (quotation marks omitted).⁶

The statute conflicts with the rule; it was *designed to*.⁷

C. MCL 768.27a prevails over MRE 404(b)

Given that the statute and court rule conflict, which prevails?⁸ The source of judicial authority derives in Michigan from two sources in the Michigan Constitution: the “judicial power” confided in this court, and the “practice and procedure” authority also bestowed on the court in our state constitution.

⁶ *United States v. Seymour*, 468 F.3d 378, 384 -385 (CA 6, 2006).

⁷ See also House Legislative Analysis of H.B. 4937:

In general, in a trial of a criminal case, references are not allowed to be made to the fact that the defendant has committed other offenses. However, there are a limited number of statutory and judicial exceptions to this rule. Under Michigan law, for example, evidence of a defendant's other bad acts may be admissible in a criminal trial if it shows the defendant's 1) motive; 2) intent; 3) the absence of a mistake or accident; or 4) a scheme, plan, or system in doing an act.

House Bill 4937 would add a new section to the Code of Criminal Procedure to add another exception. Notwithstanding the exception detailed above, the bill would allow evidence that an individual had previously been convicted of a listed offense (crimes which require registration as a sex offender) committed against a minor to be *admissible as evidence of the individual's character* in any other criminal proceeding in which the individual has been alleged to have committed a listed offense against a minor (emphasis added).

⁸ The Court of Appeals has held on three occasions that these statutes are not merely “practice and procedure” concerning simply the judicial dispatch of litigation: *People v Watkins*, 277 Mich App 358 (2007) (the present case); *People v Pattison*, 276 Mich App 613 (2007); *People v Wilcox*, 280 Mich App 53 (2008) (rev'd in part on other grounds, 486 Mich 60 (2010)).

(1) The Judicial Power and Rules of Evidence

The United States Constitution provides in Article III, § 1 that "The *Judicial Power* of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." Similarly, the Michigan Constitution of 1963 provides in Article 6, § 1 that "The *judicial power* of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house." From its first constitution Michigan has vested the judicial power in the supreme court and its inferior courts.⁹ Each constitution has also provided that one department of government shall not exercise the powers of another.¹⁰ The terminology of the Michigan Constitution and the United States Constitution are the same, and thus venerable precedent from the United States Supreme Court regarding the meaning of "judicial power" is persuasive in the absence of any principled indication that the drafters and ratifiers of the Michigan Constitution meant something different.¹¹ Guidance can be found in the very case establishing judicial review of statutes with regard to their constitutionality —*Marbury v Madison*.¹² Chief Justice Marshall observed that the "whole judicial power of the United States" is vested in the Supreme Court and in those inferior courts that Congress sees fit to establish. If, held

⁹ Const 1835, Article 7, § 1; Const 1850 Article 6, § 1; Const 1908, Article 7, § 1; Const 1963, Article 6, § 1. Const 1835, Article 3, § 1.

¹⁰ Const 1850, Article 3, § 2; Const 1908, Article 4, § 2; Const 1963, Article 3, § 2.

¹¹ See *People v Pickens*, 446 Mich 298 (1994); see also *People v Nash*, 418 Mich 196, (1983); *People v Collins*, 438 Mich 8 (1991).

¹² *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60 (1803).

the Court, an act of the legislature is repugnant to the constitution it is void, and if it is void, it cannot bind the courts and oblige them to give it effect, for "[i]t is emphatically the province and duty of the judicial department to say what the law *is*."¹³ The province of the judicial department, then, is to "say what the law *is*"; the "judicial power" does not encompass *lawmaking*. Put plainly, the *creation* of substantive law is not within the rightful authority of the judiciary. Michigan has always been very clear on the point that the powers of the departments of government are separate and that no department or branch shall exercise power granted to another. While separation of powers is a structural concept implicit in the federal constitution, it is *explicit* in the Michigan constitution.¹⁴

Michigan precedent also exists on the point, extending to the early days of Michigan law. In 1859 one of the greats of Michigan jurisprudence, Justice Campbell (the "Big Four" of Michigan jurisprudence consisting of Justices Campbell, Christiancy, Cooley, and Graves), stated that "[b]y the judicial power of courts is generally understood the power to *hear and determine controversies between adverse parties, and questions in litigation*."¹⁵ The court has also said that "the exercise of judicial power in its legal sense can be conferred only upon courts named in the Constitution. The judicial power referred to is the authority to hear and decide controversies, and to make binding

¹³ 2 L Ed at 73. See also *American Trucking Assns v Smith*, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (1990), separate concurring opinion of Justice Scalia, and dissenting opinion of Justice Stevens; and *James Beam Distilling Co v Georgia*, 501 US 529, 111 S Ct 2439, 115 L Ed 2d 481 (1991), separate concurring opinion of Justice Blackmun, joined by Justices Marshall and Scalia, and separate concurring opinion of Justice Scalia, joined by Justices Blackmun and Marshall.

¹⁴ 1963 Mich Const, Art. 3, § 2.

¹⁵ *Daniels v People*, 2 Mich 380, 388 (1859) (emphasis added), citing *Story on the Constitution*, sec. 1640. Justice Campbell said much the same thing several years later in *Underwood v McDuffee*, 15 Mich 361 (1867).

orders and judgments respecting them."¹⁶ Some seven decades later the court reiterated that "[t]he power given to a court is judicial power....'to declare what the law is and to determine the rights of parties conformably thereto'....'to hear and decide controversies, and to make binding orders and judgments respecting them.'"¹⁷

Justice Cooley made the same point. Quoting Chief Justice Marshall from *Wayman v Southard*,¹⁸ Justice Cooley observed that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law." Further, "to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to *construe and apply the laws*, is the peculiar province of the judicial department." Distinguishing the construction of positive law from its creation, Justice Cooley wrote that

...those inquiries, deliberations, orders, and decrees, which are peculiar to such a department (the judicial department), must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former *decide upon the legality of claims and conduct*, and the latter *make rules* upon which, in connection with the constitution, *those decisions should be found*. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore,—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in itself a legislative act....¹⁹

¹⁶ *Risser v Hoyt*, 53 Mich 185,193 (1884)

¹⁷*Johnson v Kramer Freight Lines*, 357 Mich 254, 258 (1959) (emphasis supplied).

¹⁸ *Wayman v Southard*, 10 Wheat 46 (1824).

¹⁹ Cooley, *Constitutional Limitations*, p 91-92 (emphasis added, final two instances of emphasis in the original). This court's constitutional authority over practice and procedure, which is independent from cases and controversies, is not pertinent to the discussion here.

What of rule-making, particularly the creation of rules of evidence? While this court has been careful to protect against legislative encroachments on its authority,²⁰ the court also stated early on—in 1889—that “It is within the power of a legislature to change the formalities of legal procedure....”²¹ And this at a time when the Michigan Constitution then in effect provided that this court had both the “judicial power”²² as well as the authority to “by general rules establish, modify, and amend the practice in such court [the Supreme Court] and in the circuit courts, and simplify the same,”²³ and with that Constitution further providing for a separation of powers among the branches of government—“The powers of government are divided into three departments: The Legislative, Executive and Judicial. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.”²⁴ And Justice Cooley in his treatise, writing after the ratification of the 1850 Michigan Constitution, and thus while these provisions were in effect, said that rules of evidence are “at all times subject to modification and control by the legislature....”²⁵

²⁰ See *In The Matter of Head Notes*, 43 Mich 641 (1881).

²¹ *Brown v Kalamazoo Circuit Judge*, 75 Mich 274, 277 (1889).

²² Const 1850 Article 6, § 1.

²³ Const 1850 Article 6, § 5. In the 1908 Constitution “all circuit courts” was changed to “all other courts of record,” Const 1908 Article 7, § 5, and the language was changed in the 1963 Constitution to read “The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.” Const 1963 Article 6, § 5.

²⁴ Const 1850 Article 3, §§ 1 and 2.

²⁵ Cooley, *Constitutional Limitations*, p. 367.

That an exclusive, or at least superior, right to create rules of evidence can be derived from the “judicial power” is doubtful. The construction of the judicial power vested by the United States Constitution—which has never been construed to include the power to promulgate rules of evidence superior to the power of Congress to do so—argues against it. Though Congress has granted authority to the United States Supreme Court to promulgate rules, under certain conditions, the final authority is reserved to Congress,²⁶ and the Supreme Court has flatly held that “[t]he Congress has power to prescribe what evidence is to be received in the courts of the United States.”²⁷ Indeed, federal Rules 413 and 414 were passed by Congress independent of the federal courts, Congress *rejecting* a recommendation from the federal Judicial Conference that the rules not be adopted.²⁸

State cases are instructive as well. The Maine Supreme Court, reviewing an act of the legislature claimed to run afoul of a separation of powers provision strikingly similar to that of Michigan²⁹ on the ground that the legislature had “purported to exercise a judicial power to establish rules of evidence,” held that “the Legislature has the power to prescribe rules of evidence provided they pass constitutional muster.”³⁰ Similarly, in Illinois a claim that a statute allowing substantive

²⁶ See Rules Enabling Act, 28 USC §§ 2071-2077. See 28 USC § 2071(a) regarding general authority of the Court under the Act with regard to rules: “The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.”

²⁷ *Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 1245 (1943).

²⁸ See fn 80, *infra*.

²⁹ “No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.” Maine Const. Article. 3, § 2.

³⁰ *State v. Shellhammer*, 540 A.2d 780, 782 (Me.,1988).

use of prior inconsistent statements violated principles of separation of powers³¹ was rejected, the court stating that “[t]his argument ignores the long-established principle that the legislature has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof.”³² Indeed, the Illinois Supreme Court³³ has said that as a general matter “the legislature of a State has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof,” citing examples of statutory evidentiary rules in Illinois.³⁴ And *Corpus Juris* puts it this way:

The legislature cannot determine the weight to be given [the evidence,] and the facts in a judicial proceeding cannot be determined by legislative fiat. The legislature cannot unduly circumscribe the power of courts to determine facts and apply the law to them, or determine the sufficiency of the evidence. In addition, the legislature has no constitutional authority to enact rules of evidence that strike at the very heart of a court's exercise of judicial power. However, the legislature, as a general rule, has authority to establish, modify, and control rules of evidence to the extent that such rules are not in conflict with the constitution or with rights guaranteed by it.³⁵

³¹ The Illinois Constitution provides that “The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.” Illinois Const Article II, § 1.

³² *People v. Brent*, 530 N.E.2d 43, 45 (Ill.App. 1 Dist.,1988).

³³ *People v. Rolfingsmeyer*, 461 N.E.2d 410, 411-412 (Ill.,1984).

³⁴ “Examples of this are section 115-5 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1981, ch. 38, par. 115-5 (business records)), section 115-5.1 of that code (Ill.Rev.Stat.1981, ch. 38, par. 115-5.1 (coroner's records)), section 115-7 of that code (Ill.Rev.Stat.1981, ch. 38, par. 115-7 (evidence of rape victims' prior sexual conduct)), and section 8-1901 of the Code of Civil Procedure (Ill.Rev.Stat.1981, ch. 110, par. 8-1901 (evidence of defendant's payment of plaintiff's medical expenses)). Section 11-501.2(c) of the Illinois Vehicle Code simply provides that an accused's refusal to submit to a breath test shall be admissible as evidence at his trial, and it is not violative of the separation-of-powers clause.” *People v. Rolfingsmeyer*, 461 N.E.2d at 411-412. And see *infra* for similar Michigan statutory evidence rules.

³⁵ *Corpus Juris Secundum*, Const law § 235.

But there is another source of authority in Michigan—and a number of other states—the constitutional authority over “practice and procedure in all courts of this state.” Does this authority confer exclusive power in the judiciary over rules of evidence, and, if so, what sorts of rules of evidence?

(2) Practice and Procedure

(a) The Purpose of Constitutional Interpretation

The object of judicial interpretation of a law, be it a statutory provision or a constitutional one, is to determine the intent—the “objectified” intent³⁶—of the lawgiver. In the case of a constitutional provision, the lawgiver is the People of the State who adopted the provision in question by ratifying the work of the drafters. This court has said many times that

“[i]t is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it.” . . . This is so because when interpreting the law “ *it is the intent of the lawgiver that is to be enforced.*” 1 Cooley, *Constitutional Limitations* (8th ed.), p. 125 (emphasis in original).³⁷

After all,

“A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. ‘For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the

³⁶ Scalia, *A Matter of Interpretation*, p. 17.

³⁷ *People v. Pickens*, 446 Mich. 298, 309-310 (1994).

common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.’ ”³⁸

And thus the goal of constitutional interpretation is “to discern the original meaning attributed to the words of a constitutional provision by its ratifiers.”³⁹ Aids in this regard include such materials as the debates at the constitutional convention, the address to the People, and contemporary construction.⁴⁰ But it is always the will of the People—taking the language in the sense most obvious to the common understanding—which is sought.

(b) The History of the “Practice and Procedure” Provision

As previously noted, all Michigan Constitutions save the 1835 Constitution have granted authority to the Michigan Supreme Court with regard to practice in the courts of Michigan. The 1850 and 1908 constitutions gave the court authority to “by general rules establish, modify, and amend the practice” in the courts of the state, and also to “simplify” the same. Though the origins of the “general rules” or “practice” provision in the 1850 constitution are unclear, no debate on the

³⁸ *American Axle & Mfg., Inc. v. City of Hamtramck*, 461 Mich. 352, 363 (2000)(quoting Cooley, *Constitutional Limitations* (8th ed.), p. 143.

³⁹ *People v. Nutt*, 469 Mich. 565, 573-574 (2004).

⁴⁰ “. . . although this Court has continually recognized that constitutional convention debates are relevant to determining the meaning of a particular provision . . . , we take this opportunity to clarify that, when necessary, the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision” *Studier v. Michigan Public School Employees' Retirement Bd.*, 472 Mich. 642, 656 (2005).

And see *Univ of Michigan Regents v. Michigan*, 395 Mich. 52, 59-60 (1975): “Constitutional Convention debates and the Address to the People are certainly *relevant as aids* in determining the intent of the ratifiers.”

provision being apparent in the convention record,⁴¹ it seems likely that the convention adapted then-existing statutory provisions that were much to the same effect.⁴² The 1908 convention modified the provision by replacing “and in the circuit courts” with “and in all other courts of record.” The “Full Text of the General Revision” containing “the explanations of proposed changes and the reasons therefor” that was before the People for ratification indicated that other than that alteration “[n]o other change is made in the section.”⁴³

The 1963 Constitution changed the phrasing slightly, stating that this court “shall by general rules establish, modify, amend and simplify the practice *and procedure* in all courts of this state.”⁴⁴ And so what would the lawgiver—the People voting to ratify—glean from the addition of the words “and procedure” to the previously existing provision? And what was said in the convention?

Before the Constitutional Convention of 1961 began, the Citizens Research Council of Michigan published “A Comparative Analysis of the Michigan Constitution.” The document

⁴¹ See Journal of the Constitutional Convention of the State of Michigan, 1850. It is interesting to note that a resolution was offered requesting that the convention’s judiciary committee be requested to “inquire into the expediency” of reporting a constitutional provision “dispensing with the present law on evidence which now governs in our courts of justice”—which would have included both common-law and statutory evidentiary principles—but the resolution was not agreed to. See Journal, p. 61.

⁴² See *Detroit, G.R. & W.R. Co. v Eaton Circuit Judge*, 128 Mich 495, 497 (1901) (“Before the adoption of the constitution, if not before the circuit courts were presided over by circuit judges, the statute required the supreme court to make rules of practice for the circuit courts...and such statute has remained, in substance, the same, since that time”).

And see Rev St. 1838, p. 358, § 5: “The [supreme court] shall, from time to time, make rules for regulating the practice and conducting the business of the court, and of the circuit courts....”

⁴³ 2 Proceedings and Debates of the Constitutional Convention of 1908, p.1427.

⁴⁴ Const 1963, Article 6, § 5 (emphasis added).

explained its purpose as “to trace the history of the present state constitutions and to compare its provisions with prior documents, with the constitutions of the other states, and with the Model State Constitution of the National Municipal League.” Though “[s]uggestions, alternatives and critical or editorial statements” were included, the Research Council disclaimed any intent to “take sides” on any particular issue.⁴⁵ The “comment” section to the 1850 and 1908 Constitutions placement of responsibility in the supreme court to “by general rules, establish modify, and amend the practice,” and simplify the same, in that court and the courts of the state, lauded the provision as “extremely good,” placing the “responsibility on the court for the smooth administration of justice by requiring it to make general rules to see that justice operates in an effective manner.”⁴⁶ The analysis noted that the ABA Model State Judiciary Article suggested as a model provision a constitutional provision entitled “Rule Making Power,” to provide that “The supreme court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, *and rules of evidence*, for the judicial system.”⁴⁷ Though scarcely determinative, as the language could have been deliberately redundant as a point of emphasis or clarity, that the Model Act included language separate from “practice” and “procedure” in order to grant authority in the state supreme court to promulgate rules of evidence in its suggested model provision, language that does not appear in 1963 Mich. Const. 1963, Article 6, § 5, is suggestive.⁴⁸

⁴⁵ 1 A Comparative Analysis of the Michigan Constitution (Introduction).

⁴⁶ 1 A Comparative Analysis of the Michigan Constitution, vii-10.

⁴⁷ 1 A Comparative Analysis of the Michigan Constitution, vii-11 (emphasis supplied).

⁴⁸ Note also the the Rules-Enabling Act, which *grants* to the United States Supreme Court rule-making authority under certain procedures—that authority never having been held to be a part of the “judicial power” in the federal system—refers to a grant of authority “to prescribe

There was a lively debate at the 1961 Convention on the proposed “practice and procedure” provision,⁴⁹ occasioned by the proffer of an amendment to add to the proposal a provision that “where there is a conflict between supreme court rule and a statute concerning evidence or substantive law the statute shall prevail.”⁵⁰ There were, at the time, a number of statutory evidentiary rules—as well as many common-law evidentiary rules—and the proposal seems to have been generated by this court’s placement of a rule in the rules of practice providing that in the case of a conflict between a rule and a statute, the rule would prevail.⁵¹ The sponsors of the amendment disclaimed any attempt to prevent rule making by the court on matters of practice, but argued that the constitution should be clear that where a statute “relates to evidence or substantive law,” the statute prevails over a court rule.⁵²

The principal opposition to the amendment was that it was unnecessary, as the provision as proposed—without amendment—changed nothing from the 1908 Constitution, Mr. Danhof rejoining to Mr. McAllister that what “we have here is a grant of power to establish and modify and amend the practice and procedure in all courts of this state....it has been in our constitution since 1908....”; this being the case, said Mr. Danhof, the proposed amendment “limiting the power of the supreme

general rules of practice and procedure *and rules of evidence* for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.” 28 USC § 2072(a).

⁴⁹ The “practice and procedure” provision of the proposed constitution was discussed as section d of Committee Proposal 91 on February 26, 1962.

⁵⁰ Constitutional Convention Record, 1961, p. 1289, offered by Miss Donnelly and Messrs Leibrand and McAllister.

⁵¹ Constitutional Convention Record, 1961, p. 1289, remarks of Mr. McAllister.

⁵² Constitutional Convention Record, 1961, p. 1289.

court as it pertains to substantive law is in fact, no limitation at all,” for “[t]he grant of the power deals with practice and procedure, and this is different than the substantive law.”⁵³ With respect to rules of evidence, Mr. Danhof expressed the view that rules of evidence “have historically been made by the courts over the years....”⁵⁴ Mr. Woolfender, also opposing the amendment, argued that though the proposal as submitted without amendment had slightly changed the language of the 1908 constitution, this was “only in the interest of clarity,” so that nothing was changed from the 1908 constitutional provision, which had “never been interpreted by the courts to *include* anything that would be the basis for the amendment proposed.”⁵⁵

Impliedly taking issue with Mr. Danhof, Mr. Wanger observed that “we have many statutes which clearly say what is admissible in evidence and what is not, and this determines the outcome of many, many cases. . . .do you desire that the supreme court, under this section of the committee proposal, shall, by a court rule, be able to override any statute regarding a rule of evidence? I thought you said yes, but I was quite surprised, and I just want to have it be clear.”⁵⁶ Mr. Wanger continued, following Mr. Danhof’s answers, that “that still doesn’t answer the question....if the legislature passes a statute setting up ... a rule of evidence in the statute, can the supreme court, under the committee proposal, pass a court rule which supersedes that statute?”⁵⁷ and Mr. Danhof again

⁵³ Constitutional Convention Record, 1961, p. 1289.

⁵⁴ Constitutional Convention Record, 1961, p. 1289.

⁵⁵ Constitutional Convention Record, 1961, p. 1289 (emphasis supplied).

⁵⁶ Constitutional Convention Record, 1961, p. 1290.

⁵⁷ Constitutional Convention Record, 1961, p. 1290.

skirted the matter: "...if it relates to substantive law, naturally the statute—and I am sure the court has in the past ruled—that it would prevail. *This in no way would change the present practice.*"⁵⁸

Mr. Wanger asked again, "Well, should the supreme court then, be able to pass a rule of evidence which would supersede a rule of evidence set forth in the statute?" to which Mr. Danhof answered, "Well if it relates to practice or procedure then this in the court rule would override it,"⁵⁹ insisting that "the present practice would continue."⁶⁰ Mr. Wanger persisted that the question was whether rules of evidence are within practice and procedure or not, and finally Mr. Nord responded:

Now, the question I was asked by Mr. Wanger is *a very tough question, that is to say, should evidence count as procedure or not. Normally it is. Possibly there are some rules that should not be. We know that it is a difficult line between procedure and substantive in some cases....*As far as I am concerned, if it is a rule of evidence of the ordinary type, let's say it is something about the hearsay rule, as to whether hearsay evidence should be admitted under some exceptions, there is no objection I know of to the court determining whether it should be admitted or not, because that has to do with the way the case will be conducted in the court.⁶¹

Mr. Wanger then directly asked:

...should, shall we say, the rule of the court establishing a provision regarding the admissibility of certain evidence as an exception to the hearsay rule under one of the traditional exceptions, do you believe, then, that if that should be put into the supreme court rule, mind you, that the legislature should not then be able to change it by statute?

⁵⁸ Constitutional Convention Record, 1961, p. 1290 (emphasis added).

⁵⁹ Constitutional Convention Record, 1961, p. 1290.

⁶⁰ Constitutional Convention Record, 1961, p. 1290.

⁶¹ Constitutional Convention Record, 1961, p.1292 (emphasis supplied).

Mr. Nord answered: "yes, the legislature should not be allowed to change it, for the reason that one or the other must control."⁶² Mr. Nord then turned to the text of the rule of this court that appears to have sparked the proposed amendment, noting that it said only that "Any statutory provision that is inconsistent with any provision in these rules shall be considered as superseded by these rules," the question being, then, "what is in these rules." There being "nothing of a substantive nature in them at all," said Mr. Nord, there was no "reason to be alarmed that the supreme court is taking off into orbit after Mr. Glenn."⁶³ Mr. McAllister noted that "We don't know what those rules [the court rules] will contain tomorrow" so that the amendment "is strictly a protective measure so that the evidence that is contained in our statutes, and has been there for years, cannot be destroyed by a rule of the supreme court where it relates to evidence or a substantive law."⁶⁴ The amendment was put to a vote, and defeated 75-32.⁶⁵

It can at least be said, then, that the "practice and procedure" provision in the 1963 Constitution was believed by the majority of those on the committee that proposed it to include the power to promulgate a rule of evidence that would trump a legislative rule of evidence where that rule is not "substantive," those who urged defeat of the proposed amendment by the minority repeatedly making the point that "nothing was being changed" from the provision of the 1908 Constitution, other than some language for the sake of "clarity." While the records of convention

⁶² Constitutional Convention Record, 1961, p. 1290.

⁶³ Constitutional Convention Record, 1961, p. 1292-1293.

⁶⁴ Constitutional Convention Record, 1961, p. 1293.

⁶⁵ Constitutional Convention Record, 1961, p. 1294.

debates are a source of aid in construction,⁶⁶ in the end the drafters are not the lawgivers, and as “the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.”⁶⁷ While it is unlikely that the ratifiers reviewed the convention debates before the vote on ratification—indeed, their availability is highly doubtful—the ratifiers did have before them the “Convention Comment to the People,” stating, somewhat inconsistently with the arguments of its proponents in the convention, that “This is a revision of Sec. 5, Article VII, of the present constitution. *In addition to* existing powers of the court, power is conferred to simplify both practice and procedure.”⁶⁸ What would the ratifiers glean from the text, particularly in light of the text of the 1908 Constitution, historical practice under that Constitution and its predecessor, and the “Convention Comment to the People”? Accepting that the ratifiers would not have “looked for any dark or abstruse meaning in the words employed, but [would have] accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed,” what was conveyed and thus ratified?

⁶⁶ *Burdick v Secretary of State*, 373 Mich 578, 584 (1964). (“Courts on numerous occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution”).

⁶⁷ *American Axle & Mfg., Inc. v. City of Hamtramck*, 461 Mich. 352, 363 (2000).

⁶⁸ Convention Comment to the People (emphasis added).

In addition to the text of the provision and the Address to the People, it is telling that statutory rules of evidence long co-existed not only with the court's authority to "establish, modify, and amend" the practice in the courts of the state, but with a specific constitutional separation of powers provision. Indeed, chapter 21 of the Revised Judicature Act is entitled "Evidence."⁶⁹ And the legislature continues to this day to enact evidentiary rules.⁷⁰ These evidentiary statutes have been employed in litigation, and both their application and construction have been the subject of appellate decisions.⁷¹ Nothing from past practice suggested to the ratifiers that long-existing statutory

⁶⁹ MCL § 600.2101 et seq. Included among the many, many statutory rules of evidence are Affidavit taken in other state or country, authentication, MCL § 600.2102 (dating back to revised statutes of 1846; and see also C.L. 1897, 10144); Judicial records of other states or countries, use as evidence, authentication, MCL § 600.2103 (dating back to revised statutes of 1846; and see also C.L. 1897, 10145); Public records; certified transcript as evidence, MCL § 600.2107 (dating back to revised statutes of 1846, and see C.L. 1897, 10169); Signature or handwriting; proof, MCL § 600.2144 (dating back to 1915; see CL 1915, 12539); Record made in regular course of business, MCL § 600.2146 (dating to 1867; and see CL 1897, 12541); Cross-examination of opposite party or agent, MCL § 600.2161 (dating to 1909, and see CL 1915, 12554). In addition to Chapter 21 of the Revised Judicature Act, there are evidentiary rules scattered throughout the Michigan statutes. See e.g. MCL § 257.625a(6)(a) ("The following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than preliminary chemical breath analysis: (a) The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.")

⁷⁰ See Statement, writing, or action expressing sympathy, compassion, commiseration, or benevolence; admissibility in action for malpractice, MCL § 600.2155 (2011 PA 21), providing in part that "A statement, writing, or action that expresses sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual and that is made to that individual or to the individual's family is inadmissible as evidence of an admission of liability in an action for medical malpractice." The legislature here plainly acted to exclude otherwise relevant evidence on policy grounds.

⁷¹ See e.g. *General Conference Ass'n of Seventh-Day Adventists v Michigan Sanitarium & Benevolent Ass'n*, 166 Mich 504 (1911)(concerning MCL § 600.2103; then CL 1897 § 10145); *Huntoon v O'Brien*, 79 Mich 227 (1890) (concerning MCL § 600.2107); *Charvat v Gildemeister*,

rules of evidence could be overturned by the court, or, indeed, that, given principles of separation of powers written expressly into each Michigan Constitution, all legislative rules of evidence were actually unconstitutional as without the authority of the legislature.

Given this history, and that substantive law is within the ambit of the legislature, this court should be cautious when considering legislative evidentiary rules and the practice and procedure provision. The approach taken in this difficult area by the court in *McDougall v Schanz*⁷² provides an appropriate template. There this court considered this question with regard to the conflict between MCL § 600.2169 and MRE 702, as the statute contains requirements for admission of expert testimony in some circumstances in tort actions that are not contained in MRE 702. This court recognized and took “into account the undeniable distinction ‘between procedural rules of evidence and evidentiary rules of substantive law . . .’”,⁷³ and concluded “that a statutory rule of evidence violates Const 1963, art 6 § 5 only when ‘no clear legislative policy reflecting considerations other than *judicial dispatch of litigation* can be identified.’”⁷⁴ If a court rule, such as MRE 404(a), then, is in conflict with a legislatively declared principle of public policy that has at its core something other than court administration, the court rule should yield to legislative policy considerations reflected in the enactment of the substantive law.

222 Mich 286 (1923) (concerning MCL § 600.2144); *People v Kirkdall*, 391 Mich 370 (1974), overruling *People v Lewis*, 294 Mich 684 (1940) (concerning MCL § 600.2146).

⁷² *McDougall v Schanz*, 461 Mich 15 (1999).

⁷³ *McDougall v Schanz*, *supra*, at 29.

⁷⁴ *Id.*, at 30 (emphasis supplied).

Here, the legislature has clearly expressed its intent to allow propensity evidence that a defendant committed another listed offense against a minor to be admitted where a defendant is accused of committing a listed offense against a minor⁷⁵ by stating that “evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” As indicated, this is the uniform understanding of the federal courts with regard to the parallel federal rules. Federal courts have recognized the policy choices made by Congress:

Promoting the effective prosecution of sex offenses is a legitimate end. The legislative history of Rule 413 indicates good reasons why Congress believed that the rule was “justified by the distinctive characteristics of the cases it will affect.” 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). These characteristics included the reliance of sex offense cases on difficult credibility determinations that “would otherwise become unresolvable swearing matches,” as well as, in the case of child sexual abuse, the “exceptionally probative” value of a defendant's sexual interest in children. *Id.* “Appellate courts should not and do not try ‘to determine whether [the statute] was the correct judgment or whether it best accomplishes Congressional objectives; rather, [courts] determine [only] whether Congress' judgment was rational.’”⁷⁶

The Michigan legislature has made the same choice. And, after all, it is the legislature that creates the cause of action—the criminal offense—in the first instance. So long as it does not run afoul of constitutional principles—and federal courts have uniformly found the provisions of FRE 413 and 414 mandating admission of evidence of prior acts to show propensity are not

⁷⁵A “listed offense” means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL § 28.722. MCL § 768.27a(2)(a). MCL § 768.27a(2)(b) defines “minor” as an individual less than 18 years of age.

⁷⁶ *United States v. Mound*, 149 F.3d 799, 801 (CA 8,1998).

unconstitutional, a matter to which the People will return—the legislature acts substantively and properly when it directs the admission of evidence to make out the cause of action it has created.

The statute, then, does not concern “the dispatch of judicial business,” but reflects a considered legislative policy choice regarding enforcement of a statutory prohibition (the commission of the “listed offenses”) it created. The statute should prevail over the court rule. Indeed, as a general rule, rules of evidence that preclude otherwise relevant evidence on policy grounds are subject to legislative revision or displacement, given the substantive nature of the policy choices involved. For example, subsequent remedial measures are, in most jurisdictions, kept out of evidence on the policy ground that admission of this evidence will inhibit repairs that might be made whether the condition of the premises subjects the owner to liability or not, when as a matter of public policy repairs or improvements ought to be encouraged in any event. This policy choice could be made differently, and if made differently by the legislature would overcome a contrary rule of evidence.⁷⁷

⁷⁷ See 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence*, at 407-18 (1993) (“Since an extrinsic policy is involved in Rule 407, state rules admitting evidence of subsequent remedial measures should be followed in cases resting on state substantive grounds.”); 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5291, at p.157 (1980) (“The commentators have all agreed that the *Erie* rule requires the application of state rules with respect to the use of subsequent remedial measures in cases in which the state substantive law applies.”)

D. The Statute, Application of Other Evidentiary Principles, and the Constitution: Rule 403 and All Other Evidentiary Prerequisites for Admissibility Remain Applicable

(1) The Origins of 27a and 27b and the Text of 27a Justify Application of All Evidentiary Principles Regarding Admission Save Rule 404's Character Prohibition

The textual argument that has been made by the Attorney General that Rule 403 does not apply to evidence sought to be admitted under MCL § 768.27a rests on two premises: 1) the text of the statute says that “*Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant,*”⁷⁸ the language “is admissible and may be considered for its bearing on any matter to which it is relevant” being unqualified anywhere in the statute—just as the identical language is unqualified anywhere in FRE 414—and 2) MCL § 768.27b, the similar statute concerning admission of other acts of domestic violence than that charged, specifically *includes* qualifying language referencing Rule 403: “Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, *if it is not otherwise excluded under Michigan rule of evidence 403.*”⁷⁹ In light of these texts, then, the argument is made that given the unqualified nature of the text of 27a (“is admissible for any purpose for which it is relevant”) *no* evidentiary restrictions on admissibility other than relevance apply, and that this is the legislative purpose is further revealed by the inclusion of

⁷⁸ Emphasis supplied.

⁷⁹ Emphasis supplied.

a Rule 403 qualification in 27b that is absent in 27a. This argument has an undeniable surface appeal, and, as the briefing when this case was previously before the court demonstrated, has led to differences of opinion even among prosecutors. The Attorney General takes the view once again that under the text of the statute MRE 403 *cannot* be applied by a trial judge to evidence offered under MCL § 768.27a. But the argument in the end both relies too much on what is only a happenstance in drafting, and proves too much.

MCL § 768.27a is quite clearly derived from FRE 414(a), which provides:

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

The textual similarities between FRE 414 and 27a are striking, and the federal rule was passed directly by Congress—rather than having come up through the Supreme Court after recommendation by the federal Judicial Conference, that Conference declining to recommend such a rule⁸⁰—over a decade before the Michigan legislature enacted 27a. On the other hand, there is no federal analogue to 27b, the domestic-violence statute which references Rule 403. That statute appears to have been derived from a California statute enacted a decade earlier in 1996. This statute *does* include Rule 403 (in California, section 352) as a specific qualifier on admissibility.⁸¹ That 27a was borrowed

⁸⁰ “The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415.” Report of the Judicial Conference, February 9, 1995.

⁸¹ “. . . in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” West's Ann.Cal.Evid.Code § 1109. Section 1101 is the California analogue to MRE 404(b), and section 352 parallels MRE 403.

from a statute that did not *specifically* include Rule 403 as a qualifier on admissibility, and 27b was borrowed from a statute which *did*, is a weak reed on which to conclude that 27a's language is *completely* mandatory, allowing *no* other evidentiary qualifiers, which is the logical ending place of the argument, and an argument that even the Congressional *sponsors* of FRE 413 and FRE 414 rejected.⁸²

The textual argument is strained in any event, and with regard to the Michigan statutory language, fails to take into account the introductory phrase to 27a—"Notwithstanding section 27." Section 27 (MCL § 768.27) permits the introduction of "like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act." The purpose of § 27 was to allow for uses of other "bad acts" of the defendant for reasons *other than* to prove character, the common-law evidentiary rule being that "the prosecution are not allowed to prove the commission of another and distinct offense, though of the same kind with that charged, for the purpose of rendering it more probable in the minds of the jury that he committed the offense for which he is on trial."⁸³ It was thus rendered clear that a non-character use of other acts was permissible—but there was no purpose in the statute to exempt proof of these acts for non-character purposes from the ordinary rules of evidence, including the then common-law rule that any relevant evidence was subject to exclusion

⁸² "... 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." 140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (Statement of Sen. Dole); 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) (Statement of Rep. Molinari).

⁸³ *People v. Schweitzer*, 23 Mich 301 (1871).

if substantially outweighed by the danger of unfair prejudice.⁸⁴ Section 27 has always been understood, then—at a time before the promulgation by this court of the Michigan Rules of Evidence—to carry forward the character prohibition on the use of other-acts evidence, allowing admission of other acts of the accused only for the specified purposes, where relevant to one or more of those purposes,⁸⁵ and then subject to the ordinary law of evidence (hearsay, privileges, exclusion if substantially outweighed by unfair prejudice).

When 27a says that “*Notwithstanding section 27*” where “the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant” it means no less—but no more—than that the character or propensity ban *continued* from the common law in § 27 with regard to the use of other acts of the defendant is *removed* in the named circumstances. A described act “may be considered for its bearing on any matter to which it is relevant” *notwithstanding* the limitations of such acts to non-character purposes generally as contained in § 27. But 27a does *not* begin “Notwithstanding any rule or principle of evidence” so as to evince a legislative intent to remove the character or propensity ban from the application of *every* rule of evidence in these circumstances. No intent to remove limitations with regard to

⁸⁴ See e.g. *People v. Bledsoe*, 46 Mich.App. 558, 560 (1973) (“Upon retrial, the court should be aware that, even when evidence of prior acts is admissible under this statute, an objection calls for an exercise of discretion to determine whether any probative value is outweighed by potential prejudice”).

⁸⁵ See e.g. *People v. Oliphant*, 52 Mich.App. 242, 250 (1974) (“After hearing this testimony in the absence of the jury, the trial court determined that it was admissible under the statute. Before the witnesses testified, the trial court instructed the jury on the *uses to which the evidence was limited under the statute*, and that the witnesses' testimony *could not be used to show guilt of other crimes, a criminal character or propensity to rape*” (emphasis supplied).

hearsay, privileges, and the like can be gleaned from this introductory phrase, nor to remove application of Rule 403—though with propensity now on the “probative” rather than the “unfairly prejudicial” side of the scale in the balancing process. In other words, in context, what the statute provides is that because the limitation in 27 of admission of other acts of the defendant for certain purposes is removed in the situations specified in 27a, another act “is admissible” for any relevant purpose rather than *only* the purposes specified in 27. But 27a does no more than that.

And the argument that 27a’s language is mandatory—and that this conclusion is supported by the existence of a Rule 403 qualifier in 27b—thus also proves too much. If the only foundation for admissibility under 27a is relevance, then *no* other evidentiary qualifier can apply. Not only would Rule 403 be inapplicable, but so would admissibility limitations on hearsay as well as statutory privileges. The People can find no support in any jurisdiction for such a view. Even 27b, under this argument, would allow evidence in the form of hearsay as well as information privileged by statute, for the *sole* qualifier under 27b is Rule 403 (“is admissible for any purpose for which it is relevant, *if it is not otherwise excluded under Michigan rule of evidence 403*”). The conclusion that 27a requires only a showing of relevance, *all other evidentiary principles regarding admissibility being inapplicable* (and that 27b requires only a showing of relevance as well as admissibility under Rule 403, all other evidentiary principles regarding admissibility being inapplicable) must be supported by sterner stuff than this. But it is not. And the contrary argument—that what 27a accomplished was to render the formerly prohibited propensity inference now permissible, but that all other principles of admissibility of evidence, such as Rule 403 (with the propensity inference on the probative rather than the “unfairly prejudicial” side of the scale),

hearsay, and privileges, fully applicable—is supported by the introductory phrase to 27a—“Notwithstanding section 27....”

It is true that one principle of construction is that the “omission of a provision in one statute that is included in another statute should be construed as intentional, and provisions not included in a statute by the Legislature should not be included by the courts.”⁸⁶ This is ordinarily a sound rule, and in a particular case may be persuasive. But it is an *aid* to construction, and is not always so. The overarching principle is that the text of the statute—even the “plain” text—must be “placed alongside the remainder of the *corpus juris*”⁸⁷ to ascertain its meaning, for in the law, as in life, *context* is often determinative. The principle that when a “particular provision appears in one statute but is omitted from a related statute, the most obvious conclusion from the omission is that a different legislative intent existed. . . .” is not inflexible or to be applied mechanically, and an examination of other materials, such as the “remainder of the *corpus juris*,” may “suggest that the omission was an oversight” or that the inclusion of the provision in the one statute was a matter of emphasis, rather than a suggestion that its absence in the other statute was meaningful.⁸⁸ The rule is a “general” rule; it may “generally” be taken as indicative of legislative intent—but not always. Again, while 27b includes the specific qualifier of MRE 403, 27a in no way suggests that the ordinary requirements of the law of evidence—other than the propensity prohibition contained in Rule 404—are displaced by the statute. And for the reasons previously stated, use of the

⁸⁶ *People v Underwood*, 278 Mich App 334 (2008).

⁸⁷ Scalia, *A Matter of Interpretation* (Princeton University Press: 1997), p.17.

⁸⁸ *People v. Goodloe*, 37 Cal.App.4th 485, 491, 44 Cal.Rptr.2d 15, 19 (Cal.App. 1 Dist.,1995).

introductory phrase “Notwithstanding section 27” establishes that the function of 27a is to negate the limitations of 27, at least with regard to child-molestation cases.

The “mischief to be remedied”⁸⁹ by 27a also demonstrates the point. The House Legislative Analysis of H.B. 4937, which became 27a, notes the provisions of 27, and states that “House Bill 4937 would add a new section to the Code of Criminal Procedure to add another exception. Notwithstanding the exception detailed above, the bill would allow evidence that an individual had previously been convicted of a listed offense (crimes which require registration as a sex offender) committed against a minor to be *admissible as evidence of the individual's character* in any other criminal proceeding in which the individual has been alleged to have committed a listed offense against a minor” (emphasis added). That 27a contains no reference to Rule 403—or to the law of hearsay, or privileges, for that matter—does not suggest that these evidentiary prerequisites to admissibility are inapplicable; it is only the reference to Rule 403 in 27b that creates an ambiguity, and thus reference both to context and to the mischief designed to be remedied is appropriate. After all, “[a]mbiguity is a creature not of definitional possibilities but of statutory context,”⁹⁰ so that “a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ . . . A court must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ . . . and ‘fit,

⁸⁹ A court must also ascertain “the evil or mischief which it is designed to remedy, and will apply a reasonable construction which best accomplishes the statute's purpose.” *Pittsfield Charter Twp. v. Saline*, 103 Mich.App. 99, 105 (1981).

⁹⁰ *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994).

if possible, all parts into an harmonious whole.’’⁹¹ That 27b refers to Rule 403 does not overcome the fact that 27a’s rule of admissibility is one allowing all relevant uses of the described acts in the described circumstances “notwithstanding” that 27 allows specific acts to be admitted *only* in specific situations that do not go to propensity, thus overcoming that propensity prohibition—and nothing else.

- (2) Rule 403 has unanimously been found applicable to FRE 414, from which 27a was drawn, with the propensity inference on the “probative” rather than the “unfairly prejudicial” side of the scale**

As indicated previously, the similarity of 27a to FRE 414 is striking. Rule 414 contains no reference to Rule 403, nor to any other prerequisite to the admissibility of evidence, such as hearsay. But federal courts⁹² have unanimously—based both on principles of statutory construction and out

⁹¹ *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133, 120 S.Ct. 1291, 1300 - 1301 (2000). And see *Scott v. State*, 465 A.2d 1126, 1132 (Md.,1983) (“In determining whether the meaning of a statute is ambiguous, it is not proper to confine interpretation to the isolated section to be construed. Rather, in determining the meaning of a particular provision or section, even where its language appears to be clear and unambiguous, it is necessary to examine that provision or section in context”); *State v. Herman*, 640 N.W.2d 539, 544 (Wis.App.,2001) (“Although we have concluded that Wis. Stat. § 961.50 is unambiguous on its face, we recognize that a statute that is plain on its face may be rendered ambiguous by the context in which it is sought to be applied”).

⁹² And see also F.S.A § 90.404(2)(b), providing that “In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant’s commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.” In *McLean v State*, 934 So.2d 1248 (2006) the Florida Supreme Court upheld the constitutionality of the statutory rule of evidence, finding that the analogue to Rule 403, F.S.A. § 90.403 is applicable to section 90.404(2)(b).

of constitutional necessity—found Rule 403 applicable.⁹³ One of the first cases was from the second circuit:

The extent to which the court may exclude proper Rule 414 evidence as a result of a Rule 403 balancing analysis has not previously been addressed by this Court. The sponsors of the legislative amendment that introduced Rule 414 noted that, in contrast to Rule 404(b), Rule 414 permits evidence of other instances of child molestation as proof of, *inter alia*, a “propensity” of the defendant to commit child molestation offenses but that [i]n 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. 140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (Statement of Sen. Dole); 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) (Statement of Rep. Molinari). With respect to the Rule 403 balancing, however, the sponsors stated that “[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.” 140 Cong. Rec. at S12990 (Statement of Sen. Dole); 140 Cong. Rec. at H8992 (Statement of Rep. Molinari (its probative value is “normally” not outweighed)).⁹⁴

And all federal circuits addressing the question have followed suit, holding that Rule 403 applies to Rule 414 (and Rule 413).⁹⁵ But because the formerly prohibited propensity inference is

⁹³ And Rule 403 is not self-executing. “The burden under Rule 403 is on the party opposing admission, who must show that the probative value “is *substantially outweighed* by the danger of *unfair prejudice*.” *United States v. Tse*, 375 F.3d 148, 164 (CA 1, 2004) (emphasis in the original). See also Graham, 1 *Handbook of Federal Evidence*, § 404.5: “The balancing test . . . prescribed in Rule 403 requir[es] the admissibility of evidence unless substantially outweighed by the danger of unfair prejudice. The opponent of the evidence thus bears the burden of persuasion.”

⁹⁴ *United States v. Larson*, 112 F.3d 600, 604 (CA2,1997).

⁹⁵ See *United States v. Kelly*, 510 F.3d 433, 437 (CA 4, 2007) (“ . . . as is true of all admissible evidence, evidence admitted under Rule 414 is subject to Rule 403 's balancing test”); *United States v. Seymour*, 468 F.3d 378 (CA 6, 2006); *United States v Hawpetoss*, 478 F.2d 820 (CA 7, 2007); *United States v. Bentley*, 561 F.3d 803, 815 (CA 8, 2009) (“ . . . evidence admitted

now permissible, the propensity use of the evidence, when Rule 403 is applied, falls on the “probative value” side of the scale and not the “unfairly prejudicial” side; indeed, federal courts have been careful to point out that trial courts may not use Rule 403 to avoid the Congressional will.

- We have stated that evidence found admissible under Rule 413 or its close analog, Rule 414 (“Evidence of Similar Crimes in Child Molestation Cases”), may still be subject to exclusion under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir.1997). We have held, however, that *Rule 403 must be applied in this context in a manner that permits Rules 413 and 414 to have their intended effect, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity. . . .* (“This danger [that jury will use bad acts to find propensity] is one that all propensity evidence in such trials presents. It is for this reason that the evidence was previously excluded, and it is precisely such holdings that Congress intended to overrule.”); *United States v. Medicine Horn*, 447 F.3d 620, 623 (8th Cir.2006) (allowing Rule 413 evidence over a Rule 403 objection and stating, “*the inflammatory potential inherent in the sexual nature of prior sexual offenses cannot be considered in evaluating the admissibility of evidence under Rule 413*”).⁹⁶
- The evidence was “prejudicial” in the sense that it tended to suggest that Tail had a propensity to commit sexual assaults, but this does not constitute *unfair* prejudice. . . . *To require the exclusion of this*

pursuant to Rule 414 is subject to Rule 403's balancing test, ‘which calls for the exclusion of evidence whose probative value is substantially outweighed by its potential for unfair prejudice.’ *Withorn*, 204 F.3d at 794. In order to exclude evidence under Rule 403, however, it must be unfairly prejudicial. *Gabe*, 237 F.3d at 960. ‘Because propensity evidence is admissible under Rule 414,’ the fact that evidence of prior acts suggests a propensity to molest children, ‘is not *unfair* prejudice’); *United States v. Sumner*, 119 F.3d 658, 661 (CA 8, 1997) (“The government takes the position that the Rule 403 balancing test applies to evidence admitted pursuant to Rule 414. We agree”); *United States v. LeMay*, 260 F.3d 1018, 1022 (CA 9, 2001) (“We agree with numerous other courts that Rule 403 remains applicable to evidence introduced under Rule 414”); *United States v. Benally*, 500 F.3d 1085, 1090 (CA 10, 2007) (“Even where evidence is determined to be relevant, however, the admissibility of Rule 413/414 evidence is subject to the Rule 403 balancing test”).

⁹⁶ *United States v. Benais*, 460 F.3d 1059, 1063 (CA 8, 2006) (emphasis supplied).

*evidence based on the asserted “inflammatory nature” of sexual offenses would be at odds with the “strong legislative judgment” in favor of admitting such evidence that Congress expressed in adopting Rule 413.*⁹⁷

- A court considering the admissibility of Rule 414 evidence must first determine whether the evidence has probative value, recognizing “the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible.” . . . Holly Thompson's testimony is prejudicial to Gabe for the same reason it is probative—it tends to prove his propensity to molest young children in his family when presented with an opportunity to do so undetected. Because propensity evidence is admissible under Rule 414, this is not *unfair* prejudice.⁹⁸

With the propensity inference on the probative side of the scale, how then is Rule 403 to be applied? Federal decisions suggest a non-exhaustive illustrative list of considerations that inform the decision: (i) the similarity between the previous offense and the charged crime, (ii) the temporal proximity between the two crimes, (iii) the frequency of the prior acts, (iv) the presence or absence of any intervening acts, and (v) the reliability of the evidence of the past offense, with reviewing courts to defer to the trial court’s decision “using these or other factors ‘unless it is an arbitrary or irrational exercise of discretion.’”⁹⁹ With Rule 403 so applied, Rule 414 (and Rule 413)—from which 27a was drawn—has unanimously been found constitutional by the federal circuits, a number of which have held that the application of Rule 403 is not only appropriate as a matter of construction, but required by due process.

⁹⁷ *United States v. Tail*, 459 F.3d 854, 858 (CA 8, 2006) (emphasis supplied).

⁹⁸ *United States v. Gabe* 237 F.3d 954, 959-960 (CA 8, 2001) (emphasis in original).

⁹⁹ *United States v. Kelly*, 510 F.3d 433, 437 (CA 4, 2007), citing *United States v. Hawpetoss*, 478 F.3d 820, 825-26 (CA 7, 2007); *United States v. LeMay*, 260 F.3d 1018, 1027-29 (CA 9, 2001).

E. 27a Does Not Violate Due Process

The federal circuits have found Rule 414's allowance of other acts to show propensity in child-molestation cases constitutional, a number finding that the applicability of Rule 403 is necessary to that result. Should this court disagree with the People's argument that as matter of textual construction MRE 403 is applicable to 27a, this court should apply MRE 403 nonetheless if, as the federal circuits have held with regard to FRE 414, applicability of Rule 403 is necessary to a finding of constitutionality of the statute. In this circumstance, the statute should be read as subject to MRE 403, for if there are "two possible interpretations of a statute, by one of which it would be constitutional and by the other it would be constitutionally suspect, it is the duty of a court construing the statute to adopt the interpretation that will save the statute."¹⁰⁰

Before review of the salient federal-circuit decisions, it is interesting to observe that California has upheld its similar statute, that statute including reference to the California analogue to Rule 403. The California statute provides:

In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.¹⁰¹

¹⁰⁰ *People v. Nyx*, 479 Mich. 112, 124 (2007); *Loose v. City of Battle Creek*, 309 Mich. 1 (1944). See also *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (opinion of Holmes, J.)("as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act").

¹⁰¹ West's Ann.Cal.Evid.Code § 1108. 1101 is the California analogue to MRE 404, and 352 is the California analogue to MRE 403.

The defendant argued before the California Supreme Court that the allowance of propensity evidence violates due process. In *People v Falsetta*,¹⁰² that court disagreed. First, the court took note of the fact that the statute represented a legislative policy decision: “Our elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence.”¹⁰³ With respect to the due-process challenge, the court concluded that though “the general rule against admitting such evidence is one of long-standing application. . . .a long-standing practice does not necessarily reflect a *fundamental*, unalterable principle embodied in the Constitution.”¹⁰⁴ After observing that there is authority suggesting that the propensity ban has historically been applied with, at the least, some ambivalence in sex cases,¹⁰⁵ the court concluded that

¹⁰² *People v Falsetta*, 986 P.2d 182 (Cal, 1999).

¹⁰³ 986 P.2d at 186.

¹⁰⁴ 986 P.2d at 187-188.

¹⁰⁵ See discussion at 986 P.2d 187-188, and authorities cited there, including 1A *Wigmore on Evidence* § 62.2, pp. 1334-1335 (“Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.”).

Further, the change here is not as drastic as it may seem. Rule 404(b) allows other-act evidence to show motive. In at least two classes of cases—those involving child molesters and those involving “firebugs”—where those committing the acts have a motive different from the run of people, other acts have been found admissible to show motive in this sense. See the discussion in *United States v. Cunningham*, 103 F.3d 553, 556-57 (CA 7, 1996), noting that motive and propensity “do overlap when the crime is motivated by a taste for engaging in that crime or a compulsion to engage in it (an 'addiction'), rather than by a desire for pecuniary gain or for some other advantage to which the crime is instrumental in the sense that it would not be committed if the advantage could be obtained as easily by a lawful route. See, e.g., . . . State v. Wedemann, 339 N.W.2d 112, 115 (S.Dak. 1983) (firebug) *Sex crimes provide a particularly clear example*. Most people do not have a taste for sexually molesting children. As between two suspected molesters, then, only one of whom has a history of such molestation, the history establishes a motive that enables the two suspects to be distinguished. In 1994, Rule 414 was

it saw “no undue unfairness in its limited exception to the historical rule against propensity evidence.”¹⁰⁶ Critical to the court’s determination was its view that “section 352 [the California Rule 403] provides a safeguard that strongly supports the constitutionality of section 1108. . . .we think the trial court’s discretion to exclude propensity evidence under section 352 saves section 1108 from defendant’s due process challenge.”¹⁰⁷

The federal decisions proceed along similar lines. One of the lead cases is *United States v LeMay*,¹⁰⁸ considered in the context of Rule 414, the federal child-molestation/propensity evidence rule. The court began by noting that “[t]he Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread such practices may be,” for the Supreme Court of the United States has “cautioned against the wholesale importation of common law and evidentiary rules into the Due Process Clause of Constitution,” that clause having a very

added to the Federal Rules of Evidence to make evidence of prior acts of child molestation expressly admissible, without regard to Rule 404(b). . . .But the principle that we are discussing is not limited to sex crimes. A ‘firebug’—one who commits arson not for insurance proceeds or revenge or to eliminate a competitor, but for the sheer joy of watching a fire—is, like the sex criminal, a person whose motive to commit the crime with which he is charged is revealed by his past commission of the same crime. . . .No special rule analogous to Rules 413 through 415 is necessary to make the evidence of the earlier crime admissible, because 404(b) expressly allows evidence of prior wrongful acts to establish motive. The greater the overlap between propensity and motive, the more careful the district judge must be about admitting under the rubric of motive evidence that the jury is likely to use instead as a basis for inferring the defendant’s propensity, his habitual criminality, even if instructed not to. But the tool for preventing this abuse is Rule 403, not Rule 404(b).”

¹⁰⁶ 986 P.2d at 188.

¹⁰⁷ 986 P.2d at 189-190.

¹⁰⁸ *United States v LeMay*, 260 F.2d 1018 (CA 9, 2001).

limited role in this regard.¹⁰⁹ As did the California Supreme Court, the court found the historical evidence ambiguous, given that

courts have routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions. . . . In many American jurisdictions, evidence of a defendant's prior acts of sexual misconduct is commonly admitted in prosecutions for offenses such as rape, incest, adultery, and child molestation. . . . As early as 1858, the Michigan Supreme Court noted that “courts in several of the States have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists of illicit intercourse between the sexes.” *People v. Jenness*, 5 Mich. 305, 319-20, 1858 WL 2321 at 8 (Mich.1858). . . . Today, state courts that do not have evidentiary rules comparable to Federal Rules 414 through 415 allow this evidence either by stretching traditional 404(b) exceptions to the ban on character evidence or by resorting to the so-called ‘lustful disposition’ exception, which, in its purest form, is a rule allowing for propensity inferences in sex crime cases. . . . Thus, “the history of evidentiary rules regarding a criminal defendant's sexual propensities is ambiguous at best, particularly with regard to sexual abuse of children.”¹¹⁰

Given this historical background, the court concluded that there is “nothing fundamentally unfair about the allowance of propensity evidence under Rule 414” but only “[a]s long as the protections of Rule 403 remain in place. . . .”¹¹¹

¹⁰⁹ 260 F.3d at 1025-1026. See *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (“[B]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate “fundamental fairness” very narrowly.... Judges are not free, in defining due process, to impose on law enforcement officials their personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. They are to determine only whether the action complained of violates those 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”).

¹¹⁰ 260 F.3d at 1025-1026, and citing *United States v. Castillo*, 140 F.3d 874, 881 (10th Cir.1998).

¹¹¹ 260 F.3d at 1026.

The admission of relevant evidence, by itself, cannot amount to a constitutional violation. Nor does the admission of even highly prejudicial evidence necessarily trespass on a defendant's constitutional rights. Thus, the claim that Rule 414 is unconstitutional can be reduced to a very narrow question: “whether admission of ... evidence that is both relevant under Rule 402 and not overly prejudicial under 403 may still be said to violate the defendant's due process right to a fundamentally fair trial.” *Castillo*, 140 F.3d at 882. As the *Castillo* court noted, “to ask that question is to answer it.” Rule 414 is constitutional on its face.¹¹²

Other federal courts have taken a striking similar approach to reach the same conclusion—the Rule is constitutional, at least so long as Rule 403 remains applicable (and it does).¹¹³

F. Conclusion

MCL § 768.27a reflects a policy decision by the Michigan Legislature, identical to the one made by the United States Congress, that in child-molestation cases other acts of child molestation of the defendant not be precluded from evidence on the ground that the relevant inference of propensity is too “dangerous” for the jury to handle. The evidence is admissible for any purpose for which it is relevant, including propensity. This conflicts with MRE 404(b)’s ban on the use of other acts to show propensity, and something other than the “dispatch” of judicial business being involved, the statute prevails. But the statute evinces no purpose of exempting this evidence from the other ordinary principles of evidence, such as hearsay, privilege, and Rule 403. The statute does not provide that “evidence that the defendant committed another listed offense against a minor *shall be*

¹¹² 260 F.3d at 1026. To the extent that defendant argues a violation of the presumption of innocence independent of a due-process claim, *LeMay* rejects that claim as well: “Rule 414 does not create a presumption that a defendant is guilty because he has committed similar acts in the past; it merely allows the jury to consider prior similar acts along with all other relevant evidence.” 260 F.3d at 1031.

¹¹³ See e.g. *United States v Castillo*, *supra*; *United States v Enjady*, 134 F.3d 1427, 1430-35 (CA 10,1998); *United States v Mound*, 149 F.3d 799, 800-802 (CA 8, 1998).

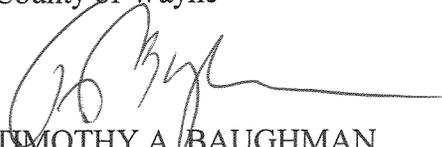
admitted for its bearing on any matter to which it is relevant,” but that it “is admissible” (meaning “not prohibited”) for any relevant purpose “notwithstanding” the limitation to specified relevant purposes in Section 27, and thus all other prerequisites of the law of evidence save section 27 must be met. But Rule 403 must be applied recognizing that the propensity inference goes on the probative rather than the “unfairly prejudicial” side of the scale, and trial judges may not employ Rule 403 to avoid the statutory command. So understood, the statute comports fully with due process. The evidence here was thus admissible.

Relief

WHEREFORE, the People respectfully request this Honorable Court affirm the Court of Appeals.

Respectfully submitted,

KYM L. WORTHY
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County of Wayne

A handwritten signature in black ink, appearing to read 'Timothy A. Baughman', with a long horizontal line extending to the right.

TIMOTHY A. BAUGHMAN
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