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## A Positive First Step, But Maryland’s New “Evidence of Other Sexually Assaultive Behavior” Statute Does Not Go Far Enough: Why Maryland Should Allow Relevant Evidence of a Defendant’s Sexually Assaultive Behavior to be Admissible in Court in All Sex Crimes Cases – Similar to the Federal Rules of Evidence 413 and 414

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## COMMENT

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### **A Positive First Step, But Maryland’s New “Evidence of Other Sexually Assaultive Behavior” Statute Does Not Go Far Enough: Why Maryland Should Allow Relevant Evidence of a Defendant’s Sexually Assaultive Behavior to be Admissible in Court in All Sex Crimes Cases – Similar to the Federal Rules of Evidence 413 and 414.**

**By: Sameerah Mickey \***

#### **I. Introduction**

Modern day rape and sexual assault cases often center on the question of consent.<sup>1</sup> Prosecutors face obstacles prosecuting rape and sexual assault cases because these cases tend to lack physical evidence and hinge on the credibility of the victim.<sup>2</sup> In 2004, it was proposed that Maryland adopt a version of the Federal Rules of Evidence (FRE) 413 and 414, in addition to including constitutional protections for the accused.<sup>3</sup> At that time, Maryland’s law regulating testimony in sexual assault and rape cases was being applied inconsistently in Maryland’s courts.<sup>4</sup> Several efforts have been made to introduce legislation similar to FRE 413 and FRE 414 in an attempt to have evidence of past sex crimes, sexual misconduct or sexually assaultive behavior admitted into court.<sup>5</sup> After the high profile case of *Clifford v. State*,<sup>6</sup>

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\* J.D. Candidate, 2019, University of Baltimore School of Law. I would like to thank the Staff of the University of Baltimore Law Forum for this opportunity and their hard work during the drafting process. I would also like to thank my faculty advisor, Michele Gilman for her knowledge, encouragement and thoughtful critiques. Lastly, I would like to thank my family and friends for their continuous support throughout law school.

<sup>1</sup>See Senate Judicial Proceedings, Judicial Proceedings (Feb. 8, 2017) <http://mgahouse.maryland.gov/mga/play/29b57d21-26f6-4768-a7ca-ab0e5cb33868/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>. See Also House Judicial Proceedings, Judicial Proceedings (Jan. 30, 2018) <http://mgahouse.maryland.gov/mga/play/6e6fb8b9-fcc9-4522-8a70-7a4340eb309b/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>.

<sup>2</sup>See Debra Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 38 (2017).

<sup>3</sup>See Joyce R. Lombardi, *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 That Permit Propensity Evidence of A Criminal Defendant’s Other Sex Offenses*, 34 U. BALT. L. REV. 103, 128 (2004).

<sup>4</sup>See *id.*

<sup>5</sup>See *infra* Part II.B.2 (discussing the failed attempts at changing Maryland law).

<sup>6</sup>*Clifford v. State*, No. 0803 SEPT. TERM 2015, 2016 WL 2647664, at \*1 (Md. Ct. Spec. App. May 10, 2016).

Maryland's current "Evidence of Other Sexually Assaultive Behavior" ("Sexually Assaultive Behavior") statute was passed.<sup>7</sup>

In *Clifford*, a Baltimore woman, ("K.A."), encountered a man who had broken into her home, was wearing a hoodie, and lying in wait on the floor in her apartment.<sup>8</sup> The man used his hands to restrain K.A. on her bed and proceeded to undress her.<sup>9</sup> He began to perform oral sex on K.A.<sup>10</sup> Due to K.A.'s persistent struggle to get away from him, he was unable to penetrate her vagina with his penis.<sup>11</sup> The man eventually used two belts to restrain K.A.'s hands and legs, and he left after telling her that he would not hurt her.<sup>12</sup> After K.A. successfully freed herself, she found a cell phone in her apartment that did not belong to her or her boyfriend.<sup>13</sup> She immediately called the police to report the assault and was taken to the hospital.<sup>14</sup> According to K.A., she could not see the man's face during the assault because his hoodie was tightly drawn around his face.<sup>15</sup>

Days later, K.A. noticed her laptop and forty dollars were missing from her apartment.<sup>16</sup> She immediately reported the missing items to the police.<sup>17</sup> Although K.A. could not positively identify the man, Nelson Bernard Clifford was later identified as a possible suspect from the contacts in the cell phone that K.A. had found in her apartment and DNA found on the belts used to restrain her.<sup>18</sup>

Clifford admitted that he was in K.A.'s apartment, but proclaimed that K.A. was a prostitute who had invited him into her apartment.<sup>19</sup> Clifford stated that they both agreed that K.A. would perform oral sex on him for forty dollars.<sup>20</sup> The State of Maryland later charged Clifford with first-degree sexual offense, second-degree sexual offense, third-degree sexual offense, attempted first-degree rape, attempted second-degree rape, first-degree burglary, third-degree burglary fourth-degree burglary, and theft.<sup>21</sup> The jury acquitted Clifford of all charges, except two counts of third-degree sexual offenses and theft.<sup>22</sup> On

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<sup>7</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923 (West).

<sup>8</sup> *Clifford*, at \*1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Clifford*, at \*1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*2.

<sup>19</sup> *Id.*

<sup>20</sup> *Clifford*, at \*2.

<sup>21</sup> *Id.* at \*1.

<sup>22</sup> *Id.*

May 8, 2015, Clifford was found guilty and sentenced to two, concurrent 30-year terms of incarceration for the sexual offense convictions and sentenced to 18 months for the theft conviction.<sup>23</sup> The Court of Special Appeals of Maryland affirmed the convictions.<sup>24</sup>

This was not Clifford's first time being accused or convicted of sexual assault.<sup>25</sup> Clifford had been accused of multiple sexual assaults since 1997.<sup>26</sup> At 18 years old, Clifford broke into a woman's house with a knife and sexually assaulted her.<sup>27</sup> Clifford entered a guilty plea to a second-degree sex offense, and received a 10 year sentence.<sup>28</sup> After being released in 2007, Clifford was accused of committing approximately a half-dozen sexual offenses.<sup>29</sup> However, Clifford was found not guilty of four of these alleged assaults.<sup>30</sup> Even though there was substantial DNA evidence connecting him to each crime, he was acquitted after claiming each encounter was consensual.<sup>31</sup> At each of these trials, prosecutors' attempts to have these previous sexual assault encounters presented to the jury failed.<sup>32</sup> The jury heard that Clifford claimed consent as his defense against each of the allegation against him.<sup>33</sup>

Three years after Clifford was convicted of sexually assaulting K.A, Maryland passed the Sexually Assaultive Behavior statute, which provides for admission of relevant evidence of a defendant's sexual assaultive behavior.<sup>34</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> WBAL, *Serial Rapist Sentenced to 30 years in Prison*, (May 28, 2015, 2:07 PM) <http://www.wbaltv.com/article/serial-rapist-sentenced-to-30-years-in-prison/7093835>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> WBAL, *supra* note 18.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923. ("Sexually assaultive behavior" is an act that would constitute (1) a sexual crime under Title 3, Subtitle 3 of the Criminal Law Article; (2) sexual abuse of a minor under § 3-602 of the Criminal Law Article; (3) sexual abuse of a vulnerable adult under § 3-604 of the Criminal Law Article; (4) a violation of 18 U.S.C. Chapter 109A (federal sexual abuse statutes); or (5) a violation of a law of another state, the United States, or a foreign country that is equivalent to an offense" under this section. Sexually assaultive behavior includes sexual crimes such as rape, attempted rape, sexual offense, sodomy, unnatural and perverted sexual practice, incest and sexual; solicitation of minors. In addition, sexually assaultive behavior includes sexual abuse of a vulnerable adult, which is an adult who lacks

The statute provides constitutional safeguards to the defendant by requiring the court to find that the defendant had a chance “to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior; the sexually assaultive behavior was proven by clear and convincing evidence; and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.”<sup>35</sup> However, this statute does not allow the prosecutor to present relevant evidence of a defendant’s past sexually assaultive behavior in all cases; instead it only applies to prove lack of consent or to rebut an express or implied allegation that a minor victim fabricated the sexual offense.<sup>36</sup> This statute was enacted to aid in the prosecution of alleged offenders, but the narrow construction of the statute limits its applicability.

This comment will explain that the Sexually Assaultive Behavior statute is a positive first step to assist with the admissibility of certain relevant evidence of sexually assaultive behavior in court, but it is not broad enough. Particularly, this comment will discuss the effects the new law has on prosecutors and sex crime victims, and how Maryland law can be improved by expanding its reach beyond the defense of consent and fabrication of a minor. Part II will outline the history of how propensity rules and sex crime laws were developed on the federal level and in Maryland. Part III will discuss how prosecutors should have the reasonable opportunity to support the allegations with relevant evidence of a defendant’s sexually assaultive behavior, regardless of the defense presented. In addition, it will discuss other options prosecutors have in cases where the defendant does not claim a defense of consent or fabrication of a minor. Finally, Part IV will explain why Maryland’s new Sexually Assaultive Behavior statute should be amended to allow evidence of previous sexually assaultive behavior in all cases of sexual assault, molestation, or rape, like FRE 413 and 414, but keep its safeguards for the defendant in Maryland’s current statute.

## II. BACKGROUND/HISTORICAL DEVELOPMENT

### A. *Development of Federal Evidence Rules Involving Propensity*

It is a longstanding principle of the United States criminal law that a defendant’s past character may not generally be used to establish the defendant’s guilt for a separate crime.<sup>37</sup> The inquiry into character can weigh too much on the jury and persuade them to “pre-judge” a defendant, thus

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physical and mental capacity. The evidence of sexually assaultive behavior could have occurred before or after the offense the defendant is facing in the current trial).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 10-923(e)(1)(i)-(ii).

<sup>37</sup> *Michelson v. United States*, 335 U.S. 469, 475, (1948).

resulting in the denial of a fair trial.<sup>38</sup> Prosecutors cannot introduce evidence of another crime against a criminal defendant separate from the crime charged, especially if such evidence may logically show the defendant has a propensity to commit such crimes.<sup>39</sup>

In 1975, Congress codified this common law rule on the federal level upon enacting the FRE 404.<sup>40</sup> This evidentiary rule provides that character evidence is not admissible to show propensity, unless the defendant's character itself is directly at issue.<sup>41</sup> "Character is a generalized description of one's disposition ... in respect to a general trait, such as honesty, temperance, or peacefulness."<sup>42</sup> "Character in issue" refers to a situation where character itself is an "element of a crime, claim, or defense"; however, this situation rarely arises.<sup>43</sup> However, propensity is when character evidence is offered to show that the defendant acted in the same way during a prior incident as the defendant did for the current incident.<sup>44</sup> Psychologists question whether we can reliably determine how a person acted on a particular occasion because people are not predictable characters.<sup>45</sup> The constraint on the use of character evidence addresses the concern that the jury has the potential to "misuse the evidence by overvaluing its persuasiveness."<sup>46</sup> Although FRE 404(a) prohibits the use of character evidence for propensity purposes, Congress also enacted FRE 404(b) to include other ways character evidence can be offered and admitted

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<sup>38</sup> *Id.* at 474-76. See generally Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. Cin. L. Rev. 795, 797 (2013)

<sup>39</sup> *Id.*

<sup>40</sup> Fed. R. Evid. 404 ("[E]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

<sup>41</sup> *Id.*

<sup>42</sup> Fed. R. Evid. 406 advisory committee's note (quoting Charles T. McCormick, *Handbook of the Law of Evidence* § 162 at 340 (1954)).

<sup>43</sup> Fed. R. Evid. 404 advisory committee's note (explaining that illustrations of "character in issue" include "the chastity of a victim under a statute specifying her chastity as an element of the crime or seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver.").

<sup>44</sup> Fed. R. Evid. 404 (The Advisory Committees Notes indicate that character evidence is of slight probative value and may be very prejudicial" because it can distract the fact finder from the "main question" of what happened on the specific incident at issue).

<sup>45</sup> Orenstein, 798 (explaining that character evidence is objectionable because whatsoever probative value it possessed may be outweighed by unfair distraction, prejudice, or confusion.)

<sup>46</sup> *Id.*

into court.<sup>47</sup> FRE 404(b) provides that character evidence can be admitted in civil and criminal cases if the State offers it to establish motive, identity, knowledge, preparation, mistake or absence thereof, intent, plan, or other non-propensity purposes.<sup>48</sup>

After the enactment of FRE 404(a)-(b), some lawyers and policy-makers were concerned that sexual misconduct was going unpunished due to difficulties in proving the crimes charged.<sup>49</sup> In 1991, U.S. Senator Robert Dole and Representative Susan Molinari, introduced new rules as a part of the Women's Equal Opportunity Act<sup>50</sup> to allow evidence into court of prior sexual misconduct by the accused in either sexual assault or sexual molestation cases to establish that the accused has a "lustful disposition"<sup>51</sup> to commit such crimes. Some representatives did not approve of the new rules; Representative William Hughes of New Jersey called the proposed rules "absolutely awful"<sup>52</sup> and former New York City Mayor Ed Koch called the proposed rules "disgraceful".<sup>53</sup> However, due to public concern over crime, Congress and President Clinton were under significant pressure to pass a crime bill.<sup>54</sup> As a result, Senator Dole and Representative Susan Molinari's proposal later passed in 1995, when Congress enacted FRE 413, 414 and 415 as a part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>55</sup>

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<sup>47</sup> See Fed. R. Evid. 404(b)(2). The alternative purposes provided in these rules are consistent with the common law.

<sup>48</sup> See Fed. R. Evid. 404(b)(2).

<sup>49</sup> See generally David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 560-61 (1994) (arguing that a common reason for reversals of lower court decisions is based on the admissibility of sex crimes evidence).

<sup>50</sup> Daniel L. Overbey, *Federal Rule of Evidence 415 and Paula Corbin Hones v. William Jefferson Clinton: The Use of Propensity Evidence in Sexual Harassment Suits*, 12 NORTE DAME J.L. ETHICS & PUB. POL'Y 343, 346 (1998).

<sup>51</sup> *Id.* at 365. See Lombardi, at 109 (Senator Dole explained that evidence of a person consistently committing sex crimes should be allowed into court "without a protracted struggle over whether common evidence has been properly admitted under Rule 404(b) or some other exception."). See also 139 CONG. REC S15,137-38 (daily ed. Nov. 5, 1993).

<sup>52</sup> Overbey, at 347. See 140 CONG. REC H8989 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes).

<sup>53</sup> Overbey, at 347.

<sup>54</sup> James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of A Very Bad Idea*, 157 F.R.D. 95, 96 (1994).

<sup>55</sup> Overbey, at 344. See generally Fed. R. Evid. 415 (indicating that admission evidence that the defendant committed a sexual assault or child molestation is permissible in civil cases).

It is important to note that the Supreme Court and Rules Enabling Act disseminate most federal procedural rules.<sup>56</sup> However, Congress holds “the ultimate power” in deciding to enact rules.<sup>57</sup> As such, Congress diverted the normal process and directly passed the rules through the crime bill.<sup>58</sup> However, the Judicial Conference Committee of the United States (“Judicial Conference Committee”)<sup>59</sup> was given 150 days to submit a report encompassing recommendations for amending the newly adopted FRE 413, 414, and 415.<sup>60</sup> On February 9, 1995, the Judicial Conference Committee delivered a report to Congress specifically requesting a reconsideration of the substantive portions of FRE 413, 414, and 415.<sup>61</sup> The Judicial Conference Committee petitioned comments from the legal community, including judges, practicing lawyers and law professors, and other interested organizations<sup>62</sup>, who all expressed that the rules would allow evidence that is unfairly prejudicial into court”.<sup>63</sup> Congress did not address the Judicial Conference’s suggestions, and the rules took effect as originally drafted on July 9, 1995.<sup>64</sup>

It was contended that FRE 413, 414, and 415 would shield the community from repeat rapists and child molesters.<sup>65</sup> Under these rules, evidence of the defendant’s other acts of sexual assault or child molestation can be offered in

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<sup>56</sup> *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998), *opinion clarified*, No. 96-2285, 1998 WL 133994 (10th Cir. Mar. 25, 1998). See The Rules Enabling Act, 28 U.S.C § 2072 (1994) See also Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 969-70 (1998) (“[T]he Rules Enabling Act is intended to provide the judiciary with an opportunity to assist in drafting of laws that it will later be applying.”).

<sup>57</sup> *Enjady*, at 1431.

<sup>58</sup> See Ellis, at 970.

<sup>59</sup> *Id.* at 969 (“Judicial Reviewing Conference may have that opportunity to review legislation proposed by Congress ... to provide feedback from the judicial branch as to the anticipated results of the proposed legislation’s enactment.”).

<sup>60</sup> *Id.* at 970-71.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 971-72. See Judicial Conference of the United States, *Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases §III*, 159 F.R.D. 51, 52 (1995).

<sup>63</sup> See Ellis, at 972.

<sup>64</sup> *Id.* at 972.

<sup>65</sup> Lombardi, at 114. See Overbey, at 347. See 140 CONG. REC H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari calling the passage of the new rules “a triumph for the public – for the women who will not be raped and the children who will not be molested.”).



federal court<sup>66</sup> in cases where the defendant is accused of a sex crime.<sup>67</sup> These rules, however, do not extend to state courts, which have their own evidence rules.<sup>68</sup> Nonetheless, several states including Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, Tennessee, Texas, and Utah have codified statutes similar to FRE 413 and 414.<sup>69</sup> However, the Supreme Courts in Indiana, Iowa, Missouri, and Washington have “rejected the rules as unconstitutional.”<sup>70</sup>

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<sup>66</sup> See generally Lynn McLain, *New Federal Rules in Sex Offense Cases*, 28 Md. B.J. Nov.-Dec. 1995, at 35 (explaining that the most sex crimes cases are held in state court. Sex crimes cases that are tried in federal court are very few and involve “assaults or child molestation on military bases and American Indian reservations.”).

<sup>67</sup> See Fed. R. Evid. 413(a) and 414(a).

<sup>68</sup> See generally McLain, *New Federal Rules in Sex Offense Cases*, 28 Md. B.J. Nov.-Dec. 1995, at 35 (emphasizing that states can be influenced by rules enacted by Congress).

<sup>69</sup> See Orenstein, 800-801. See Lombardi, at 116. See Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321, 323–24 (2015). See also ALASKA R. EVID. 404(b) (2)-(3) (effective 1998 & 2013); ARIZ. R. EVID. 404(c) (2004) (effective 1997); ARIZ. REV. STAT. ANN. § 13-1420(West 2001); CAL. R. EVID. § 1108 (2014) (effective 2003); COLO. REV. STAT. ANN. § 16-10-301(1), (3) (2014); CONN. CODE EVID. §4-5(b) (2014) (effective 2012); FLA. STAT. § 90.404(2)(b)-(c) (2014) (effective 2001); GA. CODE ANN. § 24-4-413 to -415 (2014) (effective 2013); ILL. COMP. STAT. ANN. 5/115-7.3 (West 2002); IND. CODE ANN. § 35-37-4-15(a) (Michie Supp. 1998); KAN. STAT. ANN. 60-455(d) (2014) (effective 2011); LA. CODE EVID. ANN. art. 412.2 (2014) (effective 2001); MICH. COMP. LAWS § 768.27a (2014) (effective 2006); NEB. REV. STAT. §§ 27-413 to -415 (2014) (effective 2010); OKLA. STAT. tit. 12, §§ 2413-14 (2014) (effective 2007); TENN. CODE ANN. § 40-17-124 (2014) (effective 2004); TEX. CRIM. PROC. CODE ANN. § 38.37 (Vernon Supp. 2004); UTAH R. EVID. 404(c) (2014) (effective 2008).

<sup>70</sup> IND. CODE ANN. § 35-37-4-15(a) (West) (*See Day v. State*, 643 N.E.2d 1,3 (Ind. Cty.App.1994) (The statute was held by the Indiana Supreme Court to be a “nullity since it conflicts with the common law rules of evidence.”); IOWA CODE § 701.11 (2014), *invalidated by State v. Cox*, 718 N.W.2d 757, 768 (Iowa 2010) (“Based on Iowa’s history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, we hold the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity.”); MO. REV. STAT. § 566.025 (2014) (effective 1995), *invalidated by State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2017) (en banc) (“Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant’s propensity. Evidence of a defendant’s prior criminal acts, when admitted purely to demonstrate the defendant’s criminal propensity, violates one of the constitutional protections vital to the integrity of our criminal justice system.”); WASH. REV. CODE § 10.58.090 (2014) (effective 2008) (holding the statute unconstitutional).

B. *Development of Propensity Rules and Sex Crimes Laws in Maryland*

1. Development of Propensity Rules

Maryland courts have consistently followed the common law principle barring propensity evidence in criminal cases.<sup>71</sup> In 1993, Maryland codified the FRE 404 propensity rule when it enacted its evidence code.<sup>72</sup> Maryland Rule 5-404(a) mirrors FRE 404, in that character evidence is not admissible to show propensity.<sup>73</sup> Like the federal rule, Maryland Rule 5-404(b) also provides for non-propensity uses of character evidence.<sup>74</sup> Before evidence of prior bad acts or crimes can be admitted into evidence for a non-propensity purpose, the trial court must engage in the three-step analysis adopted in *State v. Faulkner*.<sup>75</sup> Under *Faulkner*, the trial court must first determine if the evidence falls “within one or more of the pre-existing exceptions to the rule.”<sup>76</sup> Next, the trial court must decide if “the accused’s involvement in the other crimes is established by clear and convincing evidence.”<sup>77</sup> Finally, in using its discretion, the trial court must weigh the “probative value of the ‘other

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<sup>71</sup> Lombardi, at 106. See *Cross v. State*, 282 Md. 468, 469–73, 386 A.2d 757, 759–61 (1978) (The Court of Appeals of Maryland emphasized the universally accepted legal principal of American jurisprudence that evidence of other crimes is not admissible, unless such evidence is offered for a non-propensity purpose).

<sup>72</sup> See Md. Rule 5-404. (Similarly to the federal rules, Maryland courts have emphasized that character evidence cannot be presented unless the defendant’s character itself is directly at issue under the pleadings and the substantive law).

<sup>73</sup> Compare *Id.* 5-404(a) with Fed. R. Evid. 404(a) (demonstrating that admitting character evidence is collectively not allowed to show that a person acted a certain way during a specific incident.) See *Streater v. State*, 352 Md. 800, 806, 724 A.2d 111, 114 (1999) (“[T]he prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial.”); *Harris v. State*, 324 Md. 490, 496, 597 A.2d 956, 960 (1991) (emphasizing that the main concern underlying the propensity ban is a “fear that jurors will conclude from evidence of other bad acts that the defendant is a ‘bad person’ and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.”).

<sup>74</sup> See Md. Rule 5-404(b). See also *Wynn v. State*, 351 Md. 307, 317, 718 A.2d 588, 593 (1998) (explaining that this list is not exhaustive). See *State v. Faulkner*, 314 Md. 630, 634, 522 A.2d 896, 898 (1989) (emphasizing that evidence presented by the State for admission must be substantially relevant to a disputed claim in the case).

<sup>75</sup> See *Faulkner*, at 634–35, 522 A.2d 896, 898.

<sup>76</sup> Lombardi, at 108. See *Faulkner*, at 634.

<sup>77</sup> *Faulkner*, at 634.

crimes” evidence against any undue prejudice likely to result from its admission.”<sup>78</sup>

Maryland also recognizes a sexual propensity exception.<sup>79</sup> Under the sexual propensity exception, evidence of a defendant’s past sex crimes can be admitted into court in criminal prosecutions where the prior sexual acts are similar to the acts charged at the current trial.<sup>80</sup> Under this exception, evidence of prior illicit sexual acts can be admitted only if it involves the same victim and the accused.<sup>81</sup>

## 2. Maryland’s Failed Attempts to Pass Legislation to Address the Concerns of Admitting Sex Crimes Evidence into Court

From 2004-2017, Senator Brochin and other representatives consistently introduced legislation in hopes to have prior bad acts or sexual misconduct admitted as evidence in court against a defendant.<sup>82</sup> Each of the proposed bills

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<sup>78</sup> *Id.* at 635.

<sup>79</sup> *Vogel v. State*, 315 Md. 458, 466, 554 A.2d 1231, 1234 (1989).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 466, 554 A.2d 1234-35. (While the sexual propensity exception can assist victims who were abused by the same person, it does not assist those victims who have been abused for the first time or whose abusers are different from the prior incident).

<sup>82</sup> Maryland General Assembly’s session in 2005, H.B. 832 (proposing to admit evidence that a defendant committed separate acts of sexual misconduct against a minor in a case involving a victim who is a minor, but would require a closed hearing to review evidence prior to introduction at trial.); Maryland General Assembly’s session in 2006, H.B. 541 and S.B. 159 (proposing to admit evidence that a defendant committed separate acts of sexual misconduct against a minor in a case involving a victim who is a minor, but would require a closed hearing to review evidence prior to introduction at trial.); Maryland General Assembly’s session in 2007, S.B. 61 (proposing to admit evidence that a defendant committed separate acts of sexual misconduct against a minor in a case involving a victim who is a minor, but would require a closed hearing to review evidence prior to introduction at trial.); Maryland General Assembly’s session in 2008, H.B. 425 (proposing “to admit evidence of a defendant’s conviction for a specified separate act of sexual misconduct” against a minor in a case involving a victim who is a minor, but would require a closed hearing to review evidence prior to introduction at trial.); Maryland General Assembly’s session in 2010, S.B. 1042 (proposing to admit evidence that a defendant committed separate acts of sexual misconduct against a minor in a case involving a victim who is a minor, but would require a closed hearing to review evidence prior to introduction at trial.); Maryland General Assembly’s session in 2011, S.B. 447 (proposing that a court would be allowed to admit evidence that a defendant committed of “a separate act of sexual misconduct involving a minor.”); Maryland General Assembly’s session in 2014, H.B. 1528 (proposing to admit “evidence of a defendant’s past sex crime or past sex abuse of a minor”, but would require a prosecutor to “disclose the evidence to the defendant at least 15 days before trial or later if authorized by the court for good

consistently focused on protecting minors and adult victims from sexual assault from repeat predators.<sup>83</sup> Specifically in 2013, the discussion about prior sex crimes evidence took a shift from focusing on admitting prior acts of sexual misconduct with a minor, to the situation where a defendant claimed “consensual” sex as a defense to counter why his or her DNA evidence was present on the victim.<sup>84</sup> When the alleged perpetrator claims a consent defense or when there is inadequate evidence to substantiate the victim’s accusation, credibility of the victim is central and relevant evidence of a defendant’s past bad acts can be necessary to successful court case.<sup>85</sup>

Governor Larry Hogan introduced The Repeat Sexual Predator Prevention Act (“RSPPA”) of 2017 as part of his 2017 Justice for Victims Initiative

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cause shown”), and S.B. 720 (indicating that a court could admit evidence separate criminal act committed by the defendant “for any purpose.”) Maryland General Assembly's session in 2015, H.B. 1191 and H.B. 1205 (proposing to admit “evidence of a defendant’s past sex crime or past sex abuse of a minor”, but would require a prosecutor to “disclose the evidence to the defendant at least 15 days before trial or later if authorized by the court for good cause shown”); Maryland General Assembly's session in 2015, S.B. 933 (proposing that the court be prohibited from barring “evidence that the defendant committed a prior sexual offense on the ground that the admission is unfairly prejudicial, unless the court makes a specified finding.”); Maryland General Assembly's session in 2016, H.B. 218 (proposing that the court be prohibited from barring “evidence that the defendant committed a prior sexual offense on the ground that the admission is unfairly prejudicial, unless the court makes a specified finding”), and S.B. 235 (proposing to authorize the court to admit evidence of a defendant’s “sexually assaultive behavior” only “if the court finds that the evidence is being offered to prove lack of consent or rebut a specified allegation that a minor victim fabricated the sexual offense, but would require a closed hearing to review evidence prior to introduction at trial.)

<sup>83</sup> *Id.*

<sup>84</sup> See Justin Fenton, *Marilyn Mosby, with Growing Coalition, Pushes Sexual Assault Legislation for the Fourth Year*, BALTIMORE SUN (Feb. 20, 2017, 10:04 PM) <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-mosby-sexual-assault-bill-20170220-story.html>. See also WBAL, *Serial Rapist Sentenced to 30 years in Prison*, (May 28, 2015, 2:07 PM) <http://www.wbal.com/article/serial-rapist-sentenced-to-30-years-in-prison/7093835>.

<sup>85</sup> Michelle Harper Lawson, *Federal Rules of Evidence 413 and 414: A guide for Massachusetts Evidentiary Law*, 37 Suffolk U. L. Rev. 1175, 1191 (2004).

(“JVI”).<sup>86</sup> The focus of this initiative was to lessen crime.<sup>87</sup> By request of Hogan’s Administration, the Speaker of the Maryland House of Delegates, Michael Erin Busch (“Speaker Busch”), introduced the RSPPA of 2017 as House Bill 369; and the President of the Maryland Senate, Thomas V. Miller Jr. (“President Miller”), introduced the RSPPA of 2017 of 2017 as Senate Bill 316.<sup>88</sup> The RSPPA of 2017 received strong support from advocates, lawmakers and law enforcement.<sup>89</sup> Despite strong support, the RSPPA of 2017 was not passed based on continued concerns that prior sex crimes evidence would cause the defendant undue prejudice and conflict with the settled principles of the United States criminal law against admission of propensity evidence.<sup>90</sup> In the following year by the request of Hogan’s Administration, both Speaker Busch and President Miller proposed the RSPPA of 2018 (House Bill 353 and Senate Bill 298) with the same language.<sup>91</sup> The bill received an unfavorable report by the House Judiciary committee.<sup>92</sup>

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<sup>86</sup> *Governor Larry Hogan Announces 2017 Justice for Victims Initiative*, OFFICE OF GOVERNOR LARRY HOGAN, <http://governor.maryland.gov/2017/01/12/governor-larry-hogan-announces-2017-justice-for-victims-initiative/> (last visited Mar. 20, 2019).

<sup>87</sup> *Id.* (As a part of Governor Hogan’s Victim’s initiation, the Repeat Sexual Predator Prevention Act sought to allow courts “to admit evidence of a defendant’s prior history of sexual assault convictions during a prosecution for subsequent sexual offenses.” Victim’s right advocate Roberta Roper, anti-drunk driving advocates Rich Leotta and Mary Goldman, along with Baltimore County Senator Jim Brochin joined the announcement of the Justice for Victims Initiative).

<sup>88</sup> *See* Maryland General Assembly’s session in 2017, H.B. 369 and S.B. 316 (both bills proposing to authorize the court to admit evidence of a defendant’s “sexually assaultive behavior” only if the court finds that “the evidence is being offered to prove lack of consent or rebut a specified allegation that a minor victim fabricated the sexual offense,” but would require a closed hearing to review evidence prior to introduction at trial.)

<sup>89</sup> *See* JUDICIAL PROCEEDINGS, 2017, *supra* note 1. (State’s Attorney Mosby asserted that Hogan’s bill would align Maryland with the other states that follow federal law, Chief David Morris of the Maryland Chiefs of Police Association suggested that this Act would give the victims justice, and Adam Rosenberg of the Baltimore Child Abuse Center noted that this Act would assist in prosecuting defendants of pedophile cases).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Maryland General Assembly’s session in 2018, H.B. 353 and S.B. 298.

<sup>92</sup> Maryland House Bill 353, LEGISCAN,

<https://legiscan.com/MD/supplement/HB353/id/82078> (last visited Apr. 29, 2019).

## 3. Maryland's Success in Passing Legislation to Admit Relevant Sex Crimes Evidence into Court

Delegate Atterbeary and Senator Brochin both proposed a similar bill by the same name, the RSPPA of 2018, in the form of House Bill 301 and Senate Bill 270.<sup>93</sup> On January 30, 2018, the House Judiciary Committee held a hearing for House Bill 301.<sup>94</sup> House Bill 301 sponsored by Delegate Atterbeary was the same as Governor Hogan's proposal in that courts would be able to admit evidence of a defendant's prior history of sexually assaultive behavior during a prosecution for a subsequent sexual offense, so long as the defendant offers a consent or fabrication by a minor defense.<sup>95</sup> However, House Bill 301 differed from House Bill 353 in that House Bill 301 provided the defendant with the opportunity to confront and cross examine the witness or witnesses that may be testifying to the sexually assaultive behavior.<sup>96</sup>

At the committee hearing in January of 2018, several lawyers, law enforcement, victims, and advocates testified in favor of House Bill 301.<sup>97</sup> Delegate Atterbeary noted several instances at trial where prosecutors could not admit evidence of the defendant's prior sexual assaults or bad acts under Maryland Rule 5-404(b).<sup>98</sup> Representatives from the Black Caucus and the Women's Caucus emphasized that this bill protects the rights of the accused because the judge can exclude the evidence if it is unfairly prejudicial.<sup>99</sup> Several prosecutors and State's Attorneys pleaded with the committee to take action.<sup>100</sup> Baltimore Assistant State's Attorney Jennifer McAllister emphasized that House Bill 301 was needed for victims and justice, "to try and save other women, men and children from becoming victims of these defendants."<sup>101</sup>

While there was a significant amount of support for the bill, the committee still had uncertainties about the bill.<sup>102</sup> Delegate Kathleen Dumais recognized

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<sup>93</sup> Maryland General Assembly's session in 2018, H.B. 301 and S.B. 270.

<sup>94</sup> See JUDICIAL PROCEEDINGS, 2018, *supra* note 1.

<sup>95</sup> Maryland General Assembly's session in 2018, the bill number was H.B. 301. <http://mgaleg.maryland.gov/2018RS/bills/hb/hb0301f.pdf> (last visited Dec 21, 2018).

<sup>96</sup> See Maryland General Assembly's session in 2018, H.B. 301. But see Maryland General Assembly's session in 2018, H.B. 353.

<sup>97</sup> See JUDICIAL PROCEEDINGS, 2018, *supra* note 1.

<sup>98</sup> *Id.* (Delegate Atterbeary said, "We are failing our women and children of Maryland. This piece of legislation has an actual ability to protect individuals across our State now!").

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See JUDICIAL PROCEEDINGS, 2018, *supra* note 1.

<sup>102</sup> *Id.*

that bills similar to House Bill 301 have been presented to the Maryland Senate and House Committees for the several years, but asserted that this is an issue for the Rules Committee.<sup>103</sup> In addition, Delegate Dumais had two major questions: (1) whether House Bill 301 would allow evidence of prior convictions (as opposed to underlying acts); and (2) why Maryland Rule 5-404(b) was not sufficient to get a defendant's prior sexual offense admitted.<sup>104</sup> Deputy State's Attorney of Calvert County, Catherine Marsh, noted that this bill would not necessarily allow admission of the conviction, but would allow the State to address the "acts" committed that lead up to the conviction.<sup>105</sup>

Assistant State's Attorney of Howard County, Colleen McGuinn, indicated that in all the sexual assault or rape cases where she attempted to admit prior bad acts or misconduct into evidence under Maryland Rule 5-404(b), the judges held that it does not fit under the non-propensity purposes.<sup>106</sup> Shortly after the first hearing, on March 19, 2018, House Bill 301 was unanimously passed by the House and was unanimously passed by the Senate on April 5, 2018.<sup>107</sup> Similarly, the Senate Judiciary Committee held a hearing for Senate Bill 270 on January 22, 2018.<sup>108</sup> Following the hearing, Senate Bill 270 unanimously passed in the Senate on March 16, 2018 and was unanimously passed by the House on April 9, 2018.<sup>109</sup> Governor Hogan simultaneously signed both House Bill 301 and Senate Bill 270 into law on May 8, 2018.<sup>110</sup>

Effective July, 1, 2018, Maryland codified House Bill 301 and Senate Bill 370 into the Sexually Assaultive Behavior statute.<sup>111</sup> In criminal prosecutions

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<sup>103</sup> *Id.* See Standing Committee on Rules of Practice and Procedure, MARYLAND COURTS, <https://mdcourts.gov/rules> (last visited on Mar. 18, 2019) (explaining that "[T]he standing Committee on Rules of Practice and Procedure, often referred to as the Rules Committee was appointed originally in 1946 to succeed an ad hoc Committee on Rules of Practice and Procedure created in 1940. Its members meet regularly to consider proposed amendments and additions to the Maryland Rules of Procedure and to submit recommendations for change to the Court of Appeals.").

<sup>104</sup> See *supra* note 102.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at hour 3 minute 27, (State's Attorney McGuinn quoted a judge who said, "Aren't you all trying to pass that down there in Annapolis? Until you do, it doesn't fit.").

<sup>107</sup> See *Maryland House Bill*, LEGISCAN, <https://legiscan.com/MD/bill/HB301/2018> (last visited Mar. 20, 2019).

<sup>108</sup> See *Maryland Senate Bill 270*, LEGISCAN, <https://legiscan.com/MD/bill/SB270/2018> (last visited Mar. 20, 2019).

<sup>109</sup> *Id.*

<sup>110</sup> See *Maryland Senate Bill 301 (Prior Session Legislation)*, LEGISCAN, <https://legiscan.com/MD/votes/HB301/2018> (last visited Mar. 20, 2019). See also *Maryland Senate Bill 270 (Prior Session Legislation)*

<sup>111</sup> Md. Code Ann., Cts. & Jud. Proc. § 10-923(b).

for a sex crime, other evidence of the defendant's sexually assaultive behavior that occurred prior to or after the current offense may be admissible in the current prosecution.<sup>112</sup> To introduce evidence of sexually assaultive behavior, a motion must be filed 90 days before the trial by the State indicating the intent to introduce such evidence.<sup>113</sup> If the motion is not filed within the 90 day time frame, the motion can be filed subsequently with permission from the "court for good cause."<sup>114</sup> The copy of the motion must be given to the defendant, the motion must describe the evidence, and provide any other information required to be disclosed during inspection and discovery.<sup>115</sup>

The court is required to hold a separate hearing to determine if the presented evidence is admissible.<sup>116</sup> According to the statute, other evidence of a defendant's sexually assaultive behavior can be offered in criminal prosecutions where the defendant claims a defense of consent or fabrication of a minor.<sup>117</sup> In addition, the court must find that: (1) the sexually assaultive evidence has been proven by clear and convincing evidence; (2) there was opportunity for defendant to confront and cross-examine any witnesses testifying in support of the evidence; and (3) the evidence was more probative than substantially prejudicial.<sup>118</sup> These aforementioned elements provides protections for the defendant and remedy the concern that prior sex evidence would cause the defendant undue prejudice and conflict with the settled principles of American criminal law against admission of propensity evidence.<sup>119</sup>

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<sup>112</sup> *Id.* § 10-923(b) ("Sexually assaultive behavior" is an act that would constitute (1) a sexual crime under Title 3, Subtitle 3 of the Criminal Law Article; (2) sexual abuse of a minor under § 3-602 of the Criminal Law Article; (3) sexual abuse of a vulnerable adult under § 3-604 of the Criminal Law Article; (4) a violation of 18 U.S.C. Chapter 109A (federal sexual abuse statutes); or (5) a violation of a law of another state, the United States, or a foreign country that is equivalent to an offense" under this section. Sexually assaultive behavior includes sexual crimes such as rape, attempted rape, sexual offense, sodomy, unnatural and perverted sexual practice, incest and sexual solicitation of minors. In addition, sexually assaultive behavior includes sexual abuse of a vulnerable adult, which is an adult who lacks physical and mental capacity).

<sup>113</sup> *Id.* § 10-923(c)(1). *See* Maryland 90 Day Report, 2018 Sess., Part E.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 10-923(c)(2)-(3). (Md. Rule 4-262 discusses discovery and inspection in a district court. Md. Rule 4-263 discusses discovery and inspection in a circuit court).

<sup>116</sup> *Id.* § 10-923(d).

<sup>117</sup> *Id.* § 10-923(e)(1)(i)-(ii).

<sup>118</sup> *Id.* § 10-923(e)(2)-(4).

<sup>119</sup> *See* JUDICIAL PROCEEDINGS, 2018, *supra* note 1.



### III. Maryland's New "Evidence Of Sexually Assaultive Behavior" Statute Does Not Go Far Enough

Maryland's Sexually Assaultive Behavior statute is a positive step in the right direction because prosecutors can now move to admit relevant evidence of the defendant's sexually assaultive behavior that occurred prior to or after the offense of the current trial when the defendant is claiming consent or fabrication of a minor defense.<sup>120</sup> However, the Sexually Assaultive Behavior statute does not go far enough because it is not available to be used in all sex crimes cases.<sup>121</sup> This statute was passed in response to high profile cases in which the defendants had offered consent or fabrication of minor defenses during their trial, and thus, it does not address other defenses that may be offered by a defendant.<sup>122</sup> Most notably, legislators focused on the high profile *Clifford* case when advocating for a change in Maryland's sex evidence law.<sup>123</sup> This narrow statute is not enough to diffuse the credibility issue involved in all sexual assault and rape cases. This is an issue because sex crimes are different from other crimes, and the admission of evidence should not be limited based on the defense raised by the defendant.<sup>124</sup> By focusing only on the consent and fabrication by a minor defenses, the law favors one victim over another.<sup>125</sup>

#### A. *Due to the Narrow Construction of the Sexually Assaultive Behavior Statute, it Cannot be Used in All Sex Crimes Cases*

Several factors make it difficult to present evidence in trials involving sex crimes. Sexual offenses frequently happen in private places without witnesses and sometimes present little direct evidence available for trial.<sup>126</sup> The Department of Justice reported that 8 of 10 people are raped by a person that the victim knows<sup>127</sup>, thus leaving minimal to no marks or wounds as evidence

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<sup>120</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923 (West).

<sup>121</sup> See *id.*

<sup>122</sup> See JUDICIAL PROCEEDINGS, *supra* note 1.

<sup>123</sup> *Id.*

<sup>124</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923.

<sup>125</sup> See generally *id.*

<sup>126</sup> See Lombardi, at 117. See also Debra Sherman Tedeschi, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient,"* 57 U. PITT. L. REV. 107, 112 (1995).

<sup>127</sup> *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Mar. 20, 2019) (citing Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016 (2017)).

of the crime.<sup>128</sup> In addition, sex crimes often turn into a “credibility”<sup>129</sup> issue.<sup>130</sup> Sexual assault victims are scrutinized more than victims of crimes such as robbery, murders or kidnappings.<sup>131</sup> For an example, when a person is robbed, questions that focus on their resistance are not asked; but in a case where a person is raped or sexually assaulted, the jury may heavily focus on the lack of resistance.<sup>132</sup> Former U.S. Representative, Susan Molinari, described sexual assault and rape trials to be “unresolved swearing matches”.<sup>133</sup> Credibility in sex crime cases has been a forefront issue.<sup>134</sup> It has been recognized that some state court systems have obvious gender prejudices during sex crime proceedings.<sup>135</sup> The credibility battle that surrounds rape or sexual assault

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<sup>128</sup> *Lombardi*, at 117.

<sup>129</sup> *See id.* *See* Orenstein, at 805.

<sup>130</sup> Tuerkheimer, at 1.

<sup>131</sup> *See id.* *See* Nathaniel Haas, Why aren't rape and sexual assault treated like other crimes? THE DENVER POST (2016), <https://www.denverpost.com/2016/08/20/why-arent-rape-and-sexual-assault-treated-like-other-crimes>. (last visited Jan. 26, 2018).

<sup>132</sup> *See* Shaila Dewan, *She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims*, THE NEW YORK TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html>. *See also* Dr. Karen DeCocker, *The Credible Victim: Does it include women who were sexually assaulted?*, GARNET NEWS, (Oct. 1, 2018), <http://garnetnews.com/2018/10/01/the-credible-victim/> (comparing the questions asked to victims of sexual assault versus victims of robbery.) *See generally* Seffen Bieneck & Barbara Krahe, *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is there a Double Standard?*, JOURNAL OF INTERPERSONAL VIOLENCE, [https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/40290/file/phr365\\_online.pdf](https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/40290/file/phr365_online.pdf) (last visited Mar. 23, 2019) (reporting the findings from a study in Germany showing that “perpetrators of robbery were blamed more than perpetrators of rape and that the victims of rape were blamed more than the victims of robbery.”).

<sup>133</sup> *See Lombardi*, at 117. *See also* 140 CONG. REC. H23,603 (daily ed. Aug. 21, 1994) (quoting statement of Rep. Molinari).

<sup>134</sup> *See* Orenstein, at 812; *Lombardi*, at 117; Tuerkheimer, at 1.

<sup>135</sup> *Id.* *See* Tuerkheimer, at 9 (explaining that “the rape accuser is malicious or vindictive and therefore lying about her rape; she is regretful about consenting to sexual activity with the accused and therefor lying about her rape; or she is incapable of assessing whether she consented due to intoxication, and therefore lying when she claims otherwise.” Police officers, prosecutors and jurors also disregard allegations that are truthful because rape is misunderstood and there is a false perception of a substantial amount of false rape reports). *See* Paul Duggan, *In sex-crime cases, credibility a thorny issue*, (July 1, 2011), <https://www.washingtonpost.com/local/in-sex-crime-cases-credibility-a-thorny->

reports cause the victim to be viewed as undeserving of protection by the law because it is assumed that the victim welcomed the alleged attacker or embellished the incident.<sup>136</sup>

Due to the unique differences in sex crimes, prosecutors should have reasonable opportunity to support the victims' allegations with relevant sexually assaultive evidence, regardless of the defense presented. The prosecutor has a significant role in that he or she decides who will be charged, the type of charge to file, and whom or whom not to prosecute.<sup>137</sup> This process is centered on determining the gravity of the crime, the quality of evidence, the wrongdoing of the defendant, and the magnitude of irrelevant characteristics of the victim displayed at trial.<sup>138</sup> As a result, Maryland has recognized the need to shield female sexual assault or rape victims from unrelated cross-examination<sup>139</sup> by passing the rape shield statute.<sup>140</sup> The stated purpose of the rape shield law was to safeguard victims of rape from potential harassment and to and to encourage reports of sex crimes.<sup>141</sup> The rape statute specifically excluded "reputation and opinion evidence" in reference "to a victim's chastity" and it limited evidence only to the relevant sexual encounters of the victim.<sup>142</sup> It is evident that even with the rape shield statute

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issue/2011/07/01/AGvuLPuH\_story.html?utm\_term=.21eb9625c7c7 (last visited December 11, 2018).

<sup>136</sup> *Id.* at

<sup>137</sup> See Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, at 3, <https://www.ncjrs.gov/pdffiles1/nij/199720.pdf> (last visited Mar. 17, 2019).

<sup>138</sup> *Id.*

<sup>139</sup> Lynn McLain, *Reforming the Criminal Law: University of Baltimore School of Law Group Goes to Annapolis*, 34 U. Balt. L.F. 2, 4 (2003) (explaining that the Legislature sought to address the issue of intimidation of rape victims by defendants).

<sup>140</sup> See Md. Code Ann., Crim. Law § 3-319 (West).

<sup>141</sup> *Bell v. State*, 118 Md. App. 64, 88, 701 A.2d 1183, 1195 (1997), *rev'd*, 351 Md. 709, 720 A.2d 311 (1998). See Md. Code Ann., Crim. Law § 3-319.

<sup>142</sup> See Md. Code Ann., Crim. Law § 3-319 (Under Maryland's current rape shield statute, evidence involving a victim's reputation or opinion "for chastity or abstinence" cannot be admitted in court, unless the judge finds that evidence is relevant, material, and the probative value of evidence is not substantially outweighed by prejudice. Additionally, evidence could be admitted if the evidence (1) involves prior sexual conduct with the victim and the defendant; (2) is a specific instance of sexual conduct entailing "the source or origin of semen, pregnancy, disease, or trauma"; (3) indicates that the victim has a hidden motive for accusing the defendant; or (4) is being used for impeachment purposes). See also McLain, at 5. (Overtime, the rape shield statute was amended and now applies first degree or second degree rape cases, any sexual offenses in the first or second degree, attempted rape and attempted sexual offense in the first or second degree, sexual abuse of a minor or a vulnerable adult or a lesser included crime).

in place, credibility of the victim is still a forefront issue, which is why Maryland legislators have advocated for a change in Maryland law for over 15 years.<sup>143</sup>

1. How Not Claiming a Consent or Fabrication of Minor Defense Could Impact Maryland Cases

Imagine the facts from the *Clifford* case before a court today. Envision that he broke into a K.A.'s home, sexually assaulted her, and left the scene of a crime.<sup>144</sup> But instead of claiming that K.A. consented to the sexual encounter, Clifford claimed that while he was in K.A.'s apartment, he did not have sexual intercourse with her. Although there was DNA evidence retrieved from K.A.'s nightshirt and from one of her belts, Clifford could explain that this DNA evidence was found in these places because he touched her belt and her nightshirt. If Clifford claimed that the alleged sexual assault never occurred, and prosecutors knew that he had claimed this several times as a defense to prior separate allegations, the Sexually Assaultive Behavior statute would not apply and thus evidence of the Clifford's prior sexually assaultive behavior would not be admissible into court.<sup>145</sup>

Essentially, defendants, by strategically picking the defense, can control what evidence against them becomes admissible. This shows how the narrow construction of the Sexually Assaultive Behavior statute leaves out cases where the alleged perpetrator claims that he or she did not commit the crime. As a result, prosecutors in a case where the defendant claims he or she did not commit the crime, may have to rely on Maryland Rule 5-404(b), which is likely to not be as helpful due to Maryland's Court of Appeals interpretation.<sup>146</sup>

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<sup>143</sup> See *supra* note 100.

<sup>144</sup> See generally *supra* notes 8-20 and accompanying text.

<sup>145</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923.

<sup>146</sup> See *Behrel v. State*, 151 Md. App. 64, 122, 823 A.2d 696, 729 (2003) (the court found that the evidence "does fit within a niche, and I'm not sure what it should be called, whether identity, opportunity, preparation, identical method ..."). See also Lombardi, at 109, 117-119 (arguing that in cases involving sex crimes, Md. Rule 5-404(b) "is so narrowly drawn it excludes an enormous amount of sex crimes evidence – even more so than in other jurisdictions with a similar rule." The author further contended that sex crimes often occur in private places and leave minimal physical evidence, cause shame to the victim, will likely occur again, and center on the claim of consent).

2. Likelihood of Having Relevant Sex Crimes Evidence Admitted into Court Under Md. Rule 404(b)

Maryland Rule 5-404(b) itself does not provide a definition or complete list as to what factors courts must weight when considering if evidence falls within a non-propensity exception, as a signature crime or *modus operandi*.<sup>147</sup> The Court of Appeals of Maryland addressed this issue in *Hurst v. State*, where a mentally disabled woman, Gertrude P., alleged that Richard Hurst approached her on the side of the road and asked for directions twice in the same day.<sup>148</sup> The State presented testimony of another woman, Jacqueline E., who was raped by Hurst twenty-one years prior.<sup>149</sup> The State argued that the testimony was admissible as proof of *modus operandi* or signature evidence under Maryland Rule 5-404(b).<sup>150</sup>

The trial court admitted the testimony of Ms. E.,<sup>151</sup> and Hurst was later convicted of first and second-degree rape, first and second-degree sexual offense, kidnapping, and false imprisonment.<sup>152</sup> The Court of Appeals of Maryland subsequently reversed the admission of the testimony because the testimony only showed propensity of criminal activity.<sup>153</sup> The Court of Appeals of Maryland further held that *modus operandi* or signature does not apply in this case, as the crimes were not “so nearly identical” to establish “them as the handiwork of the accused.”<sup>154</sup> The lack of clarity in Maryland Rule 5-404(b) itself is likely to continue to cause different and competing interpretations.

Although Maryland Rule 5-404(b) provides several non-propensity options that the prosecution can use in an attempt to admit prior evidence of other crimes or wrongs by a defendant,<sup>155</sup> these exceptions have not always proved helpful regarding the admissibility of prior sexually assaultive behavior.<sup>156</sup>

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<sup>147</sup> See Md. Rule 5-404(b).

<sup>148</sup> See generally *Hurst v. State*, 400 Md. 397, 401-02, 929 A.2d 157, 159 (2007). <sup>149</sup> *Id.* at 403, 929 A.2d 157, 160.

<sup>150</sup> *Id.* (“The trial court admitted Ms. E.’s testimony on the grounds that the testimony was admissible ‘[b]oth as to the gaining or offsetting the consent defense and the similarities proffer.’”).

<sup>151</sup> *Id.* at 403, 929 A.2d 157, 158.

<sup>152</sup> *Id.* at 401, 929 A.2d 157, 158.

<sup>153</sup> *Id.* at 410, 929 A.2d 157, 164.

<sup>154</sup> *Id.* at 414, 929 A.2d 157, 166. (The court explained that the *modus operandi* and “signature crime” evidence is useful in *identifying* the defendant who claims that he was not the person who committed the crime.”).

<sup>155</sup> See Md. Rule 5-404(b).

<sup>156</sup> See Lombardi at 109 (arguing that in cases involving sex crimes, Md. Rule 5-404(b) “is so narrowly drawn it excludes an enormous amount of sex crimes evidence – even more so than in other jurisdictions with a similar rule.”).

Currently prosecutors may rely on Maryland Rule 404(b) to admit evidence of rape or sexual assault when a defendant is not claiming a consent or fabrication of a minor defense.<sup>157</sup>

#### IV. SOLUTION

A. *Maryland Should Amend its New Sexually Assaultive Behavior Statute to Expand its Coverage to All Sex Crimes Cases, Similar to the Federal Rules of Evidence 413 and 414*

Maryland has made positive progress by making changes to laws that impact the admissibility of relevance evidence in certain sex crimes cases.<sup>158</sup> The Sexually Assaultive Behavior statute<sup>159</sup> gives prosecutors greater discretion to offer relevant evidence of a defendant's prior sexual assaultive behavior in court, and the statute provides constitutional safeguards for the defendant.<sup>160</sup> However, in order to expand the scope beyond the defenses of consent and fabrication by a minor, it is still necessary for Maryland to adopt FRE 413 and 414, but only in a limited capacity.<sup>161</sup>

Under these federal rules, any other relevant evidence of the defendant's prior acts of sexual assault or child molestation can be offered in federal court in criminal cases where the defendant is accused of a sex crime,<sup>162</sup> so long as the court has balanced the probative value of the evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>163</sup> Amending the Sexually Assaultive Behavior statute

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<sup>157</sup> But See *Galvez v. State*, No. 893, SEPT.TERM,2017, 2018 WL 2331996, at \*5 (Md. Ct. Spec. App. May 23, 2018) (showing how testimony of defendant's guilty plea to second degree assault was admissible as hearsay); *Parker v. State*, 156 Md. App. 252, 267, 846 A.2d 485, 494 (2004) (holding that a hearsay statement referencing a rape by the defendant was properly admitted); *Gaerian v. State*, 159 Md. App. 527, 545–46, 860 A.2d 396, 406 (2004) (holding that the hearsay statements of the defendant's sexual assault were properly admitted).

<sup>158</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923 (West).

<sup>159</sup> See *id.*

<sup>160</sup> *Id.*

<sup>161</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923.

<sup>162</sup> See Fed. R. Evid. 413(a) and 414(a).

<sup>163</sup> *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998). See Fed. R. Evid. 403.

to extend the scope of applicability like FRE 413(a) and 414(a)<sup>164</sup> would provide prosecutors with reasonable opportunity to have relevant evidence of the defendant's sexually assaultive behavior admitted into court in all cases.

*B. Support and Criticisms of FRE 413 and 414*

Since FRE 413 and 414 were enacted, there have been arguments for and against states adopting the rules.<sup>165</sup> Overall, the arguments are the same. Generally, advocates believe these rules are necessary to assist with prosecuting sex crime, while critics worry about the defendant's constitutional right.<sup>166</sup> These arguments will be discussed and it will be demonstrated why these rules, and similar versions of these rules, are valid and should be adopted in other states, including Maryland.

1. Supporters of FRE 413 and 414

FRE 413 and 414 were created for the purpose of protecting the public from rapists and child molesters.<sup>167</sup> Additionally, FRE 413 was passed to address a perceived problem of repeat offenders discrediting survivors; and FRE 414 is designed to address the accuser who asserts that child victims are "vengeful, confused, fanciful, or had been encouraged to fabricate accusations by an adult."<sup>168</sup> Thus, the issue of power imbalance is addressed through application of FRE 413 and 414.<sup>169</sup> Moreover, defenders of FRE 413 and 414 argue that "perpetrators are deviant."<sup>170</sup> A prior lawyer of the Justice Department, David Karp, contended "that ordinary people do not commit outrages."<sup>171</sup> Representative Molinari proffered that "a history of [child molestation in a defendant] tends to be exceptionally probative" in showing a strange disposition of an interest in children, "that simply does not exist in ordinary people."<sup>172</sup>

In addition, FRE 413 and 414 are deemed necessary by supporters due to the high conviction standard for criminal offenses.<sup>173</sup> The standard for

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<sup>164</sup> Compare Md. Code Ann., Cts. & Jud. Proc. § 10-923 (West) with Fed. R. Evid. 413(a) and 414(a) (showing how the language from FRE 413 and 414 would be placed in Md. Code Ann., Cts. & Jud. Proc. § 10-923).

<sup>165</sup> See *infra* notes 172-91.

<sup>166</sup> *Id.*

<sup>167</sup> Lombardi, at 114.

<sup>168</sup> Orenstein, at 806.

<sup>169</sup> *Id.*

<sup>170</sup> Orenstein, at 807-09.

<sup>171</sup> *Id.* at 808.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 806.

conviction of sex crimes, as with all crimes, is “beyond a reasonable doubt”.<sup>174</sup> Supporters suggest that because of this standard, corroborative evidence is necessary to aid the victim’s testimony to convince the fact finder.<sup>175</sup> It is further argued that without additional supporting evidence, the fact finder may be “uncomfortable rendering a guilty verdict”.<sup>176</sup> “Supporters empathize the necessity of admitting prior sex evidence” to assist with convicting the accused.<sup>177</sup> Overall, supporters of FRE 413 and 414 assert that considering the accused’s prior bad acts or misconduct to show propensity will “increase conviction rates and imprisonment”.<sup>178</sup> This propensity evidence will also “sensitize our society to the prevalence of sex crimes and empower.”<sup>179</sup>

## 2. Criticism of FRE 413 and 414

While FRE 413 and 414 have support among prosecutors, these rules have also been heavily criticized.<sup>180</sup> One concern is that FRE 413 and 414 might encourage juries to make a decision about the defendant based on prior conduct, rather than on the evidence presented regarding the charged crime of the current trial.<sup>181</sup> Opponents argue that allowing evidence of other crimes, wrongs or acts is overly prejudicial because these acts may have occurred “years prior to the charged offense.”<sup>182</sup> It has been argued that FRE 413 and 414 are unconstitutional because the rules “conflict with a tradition of excluding propensity evidence,”<sup>183</sup> thus violating the “due process clause of the Fifth Amendment.”<sup>184</sup> Critics also argue “that FRE 404(b) already provides

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 807.

<sup>179</sup> *Id.*

<sup>180</sup> See Christopher B. Mueller, Laird C. Kirkpatrick & Liesa Richter, §4.35 *Evidence of Similar Offenses in Sexual Assault and Child Molestation Cases*, [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2641&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2641&context=faculty_publications) (last visited Mar. 23, 2019). See also Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, at 106-25; Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 *Am. Crim. L. Rev.* 57, 69-86 (1995); Jessica D. Khan, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 *Vill. L. Rev.* 641, 654-65 (2007); Lombardi, at 121-28.

<sup>181</sup> See Mueller, at 3.

<sup>182</sup> Khan, at 656. See Lombardi, at 123.

<sup>183</sup> Khan, at 663.

<sup>184</sup> See Lombardi, at 121.



adequate basis for admitting evidence of prior crimes,”<sup>185</sup> wrongs or misconduct through the non-propensity purposes, this making FRE 413 and 414 unnecessary.

C. *Why Maryland Should Only Make its Sexually Assaultive Behavior Statute “Similar” to FRE 413 and 414*

While Maryland’s Sexually Assaultive Behavior statute should be as broad as FRE 413 and 414, it should retain Maryland’s unique protections that safeguard the defendant.<sup>186</sup> Evidence under Maryland’s Sexually Assaultive Behavior statute cannot be admitted unless additional elements are satisfied.<sup>187</sup> First, the defendant must have been given the chance to “confront and cross examine” any witnesses.<sup>188</sup> This is not required under FRE 413 and 414.<sup>189</sup> Second, the prosecution must prove by clear and convincing evidence that the sexually assaultive behavior occurred.<sup>190</sup> Clear and convincing evidence is more than a preponderance, but does not extend beyond a reasonable doubt.<sup>191</sup> Specifically, “the evidence should be ‘clear’ in the sense that it is certain, plain to the understanding, and unambiguous and ‘convincing’ in the sense that it is so reasonable and persuasive as to cause one to believe it.”<sup>192</sup> This is another safeguard for the defendant that both FRE 413 and 414 do not have as a requirement.<sup>193</sup>

Lastly, the probative value of the evidence cannot be substantially outweighed by the unfair prejudice.<sup>194</sup> While the probative value and prejudicial effect must be evaluated by the court under FRE 413 and 414<sup>195</sup>, these rules do not require that the defendant have a chance to cross-examine witnesses or that the presented evidence be proven by clear and convincing evidence like Maryland’s law.<sup>196</sup> As such, the Sexually Assaultive Behavior statute offers more protection for the defendant because the prosecutor has to meet additional elements before the evidence can be admitted.<sup>197</sup>

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<sup>185</sup> Mueller, at 3.

<sup>186</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923 (e)(2)-(4).

<sup>187</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923.

<sup>188</sup> *Id.* § 10-923(e)(2).

<sup>189</sup> See Fed. R. Evid. 413 and 414.

<sup>190</sup> Md. Code Ann., Cts. & Jud. Proc. § 10-923(e)(3).

<sup>191</sup> *Attorney Grievance Comm’n of Maryland v. Smith*, 376 Md. 202, 229–30, 829 A.2d 567, 583 (2003).

<sup>192</sup> *Mathis v. Hargrove*, 166 Md. App. 286, 312, 888 A.2d 377, 392 (2005).

<sup>193</sup> See Fed. R. Evid. 413 and 414.

<sup>194</sup> Md. Code Ann., Cts. & Jud. Proc. § 10-923(e)(4).

<sup>195</sup> See Fed. R. Evid. 403.

<sup>196</sup> Compare Md. Code Ann., Cts. & Jud. Proc. § 10-923(e)(2)-(3) with Fed. R. Evid. 413 and 414 (showing the differences in the safeguards for the defendant).

<sup>197</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923.

#### IV. CONCLUSION

Sex crimes are a serious concern in Maryland.<sup>198</sup> They are different from other types of crimes because there may be little to no physical evidence available, and the victim's credibility is frequently on the line.<sup>199</sup> When prosecuting a case, the State should be afforded the appropriate tools necessary to present their case and all relative, constitutional evidence to the trier of fact.<sup>200</sup> Maryland made a positive step in adding additional protections when they adopted the Sexually Assaultive Behavior statute. However, the statute is too narrow because a defendant may not always raise a consent or a fabrication of a minor defense.

In order to treat all sexual crime cases the same, the Sexually Assaultive Behavior statute should be amended to make it applicable to the same scope of cases as FRE 413 and 414. With this proposed amendment, the defendant will still be safeguarded because the court must find that (1) the sexually assaultive evidence has been proven by clear and convincing evidence; (2) there was opportunity for defendant to confront and cross-examine any witnesses testifying in support of the evidence; and (3) the evidence was more probative than substantially prejudicial.<sup>201</sup> Essentially, the proposed amendment to the statute will balance and protect the rights of the victims and the accused in all cases. While consent proves to be a strong defense when asserted by the defendant as shown in the *Clifford* case,<sup>202</sup> the Sexually Assaultive Behavior statute should not be limited to certain defenses. With this proposed amendment, Maryland will be closer to having laws that target serial predators and child molesters.

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<sup>198</sup> See supra note 83. See also Maryland Coalition Against Sexual Assault, *Sexual Assault in Maryland* [https://www.mcasa.org/assets/files/GeneralMDSexualAssaultFSUpdated\\_10.24.17.pdf](https://www.mcasa.org/assets/files/GeneralMDSexualAssaultFSUpdated_10.24.17.pdf) (last visited Mar. 15, 2018); *Crime In Maryland 2016 Uniform Crime Report*, MARYLAND DEPARTMENT OF STATE POLICE, at 30-32, (May 15, 2018), <https://mdsp.maryland.gov/Document%20Downloads/Crime%20in%20Maryland%202016%20Uniform%20Crime%20Report.pdf> (The Maryland Department of State Police reported that in 2012, there were 1,236 rapes reported; in 2013, there were 1,169 rapes reported; in 2014, there were 1,144 rapes reported; in 2015, there were 1,758 rapes reported; and in 2016, there were 1,815 rapes reported).

<sup>199</sup> See supra Part III.A.

<sup>200</sup> *Id.*

<sup>201</sup> See Md. Code Ann., Cts. & Jud. Proc. § 10-923 (e)(2)-(4).

<sup>202</sup> See supra Part I.