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Representative Tyler Clancy
Utah House of Representatives
350 North State, Suite 350
Salt Lake City, UT 84114
Via email: tclancy@le.utah.gov

Re: Support for Joint Resolution Amending Rules of Evidence to
Ensure Admissibility of Evidence of Other Sexual Assault Crimes

Dear Representative Clancy,

I write in strong support of the proposed Joint Resolution amending Utah's rules of evidence to allow admissible of prior crimes evidence in sexual assault cases. The resolution would amend Utah's rules of evidence to follow the approach of all federal courts and many state courts and to make similar crimes evidence presumptively admissible in sexual assault cases. The Federal Rules of Evidence have contained such a rule (Rule 413) for more than two decades. Similarly, numerous states—either through rule or caselaw—have adopted the same approach, which was in effect part of the common law approach of admitting evidence to prove a “lustful disposition.” Utah's rules would benefit from a provision codifying this result—such as adding a new rule 404(d) that would allow propensity evidence in all sexual assault cases.

In this letter, I want to make six points in support of such a rule. First, in Utah (as in other states), under-prosecution of sex offenses is an extremely serious problem—and a problem that disproportionately harms women and girls.

Second, given the fact that most sex crimes are committed by perpetrators against victims in private places, the admission of similar crimes evidence is often critical to a successful prosecution of those perpetrators.

Third, in reviewing the empirical need for a similar crimes rule, statistical information regarding “recidivism” evidence is largely irrelevant. More useful is serial perpetration evidence—i.e., information supporting the conclusion that a defendant is a serial perpetrator of sex offenses.

Fourth, historically Utah law recognized a similar crimes exception, only to have that precedent ignored due to what appears to have been sexist assumptions about the unreliability of women who reported sexual assaults.

Fifth, most jurisdictions in the United States now often allow the admission of similar crimes evidence in sexual assault cases.

Sixth, I discuss how the language in the proposed Joint Resolution would operate.

It may be worth noting that I am a professor teaching criminal law at the S.J. Quinney College of Law at the University of Utah and have previously written an article specifically urging the addition to the Utah Rules of Evidence of a propensity evidence rule for sexual assault cases.¹

I. In Utah (as in Other States), Sexual Offenses Are Frequently Unprosecuted, Particularly Offenses Against Women and Girls.

The available empirical data clearly demonstrate the great difficulty in prosecuting sexual offenses in Utah (as in other states), particularly such offenses committed against women and girls.

Rape and other forms of sexual violence against women and girls leads to pervasive victimization in the United States in general and Utah in particular. National epidemiological data indicate that 18% to 25% of women will be raped or sexually assaulted during their adult lifetimes.² For example, the National Violence Against Women Survey conducted in 1995 and 1996 found that “17.7 million women and 2.8 million men in the United States were forcibly raped at some time in their lives, with 302,091 women and 92,748 men forcibly raped in the year preceding the survey.”³ A more recent survey reported that the number of females age 12 or older who experienced “completed, attempted, or threatened rape or sexual violence” is estimated to be about 270,000 in 2010.⁴

¹ See Paul G. Cassell, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145.

² Rebecca Campbell, et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, *Violence Against Women* 1, 2 (May 2014).

³ See Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, 1 (2006), available at <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

⁴ Michael Planty et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010*, 1 (2013), available at <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>. See also Staff of Sen. Jud. Comm., *Violence Against Women: The Increase of Rape in America 1990*, 102d Cong. 1 (1991) (describing the “rape epidemic” in this country).

Sadly, Utah's women and girls suffer great harm from sexual violence, at rates above national averages. An important recent report from the Utah Office on Domestic and Sexual Violence found that "[d]omestic and sexual violence are two of the most serious crimes in Utah" and identified significant and long-term physical and psychological health consequences for victims of sexual violence.⁵ Another important report from Utah's Commission on Criminal and Juvenile Justice ("CCJJ") found that "[r]ape is the sole Violent Crime Index offense for which Utah's rate rises above that of the nation's average" and that, among the adult Utah women surveyed, about one in three—28.9 percent—reported having been sexually assaulted during their lifetimes.⁶ FBI reports document that rape occurs in Utah at a significantly higher rate than the national average. According to the FBI's Uniform Crime Reporting data, the number of rapes in Utah in 2016, as reported by law enforcement agencies, was 56.8 per 100,000 inhabitants, as compared to 42.6 nationally.⁷

Sexual violence is not evenly suffered by males and females but is disproportionately concentrated among females. Both national and Utah-specific studies show that females (i.e., women and girls⁸) experience significantly higher rates of sexual assault crimes compared to males. For example, one study used data from the National Crime Victimization Survey to examine the prevalence of sexual violence committed against U.S. female residents age 12 or older from 1995 to 2005 and found that 10 percent of rape and other sexual assault victimizations were perpetrated against men.⁹ Another national survey of adult men and women found that approximately 86 percent of rape and attempted rape victims are women.¹⁰ Utah is no exception to this pattern. As the Utah Office on Domestic and Sexual Violence reported (based on Utah Department of Health data collected in 2010), 12.2 percent of females and 1.2 percent of males in Utah reported experiencing rape or attempted rape in their lifetimes.¹¹

⁵ Utah Office on Domestic & Sexual Violence, *No More Secrets: Utah's Domestic & Sexual Violence Report 2013* at i (2013), available at https://justice.utah.gov/Violence/Annual%20Reports/nms_annualreport_2013.pdf.

⁶ Christine Mitchell & Benjamin Peterson, CCJJ, *2007 Rape in Utah Survey*, 2, 5 (2008), available at <https://justice.utah.gov/Documents/Research/SexOffender/RapeinUtah2007.pdf>.

⁷ U.S. Dep't of Justice, Federal Bureau of Investigation, *2019 Crime in the United States, Violent Crime, Rape* (table 4).

⁸ Sexual violence research, including research cited here, is generally framed in gendered terms (e.g., "female," "women," "girls"), without clearly differentiating whether these terms exclusively reference persons whose gender was assigned at birth.

⁹ Michael Planty et al., *supra* note 4, at 3.

¹⁰ Tjaden & Thoennes, *supra* note 3, at iii, 1, 3; see also U.S. Dep't of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, U.S. Dep't of Justice Guidance Document 5 (2015) (citing research showing that "[s]exual assault and domestic violence are crimes that disproportionately impact women, girls, and lesbian, gay, bisexual, and transgender (LGBT) individuals in the United States").

¹¹ *No More Secrets: Utah's Domestic & Sexual Violence Report 2013*, *supra* note 5, at 18.

In addition to the prevalence of sexual assault crimes, it is important to understand the truly horrific consequences of these crimes. As the U.S. Supreme Court has explained, “[s]hort of homicide, [rape] is the ‘ultimate violation of self.’”¹² Victims of sexual violence may experience post-traumatic stress disorder (PTSD), depression, substance abuse, and suicidal thoughts or behavior. One meta-study reviewed 37 studies involving over three million male and female participants with history of “sexual abuse” and concluded that there is “an association between a history of sexual abuse and a lifetime diagnosis of anxiety, depression, eating disorders, PTSD, sleep disorders, and suicide attempts.”¹³ Another study found “[s]exual assault is a particularly potent predictor of PTSD” while another indicates adult female rape victims have “[l]ifetime prevalence rates of PTSD . . . [that] range from approximately 32% to 80%.”¹⁴ Research by Utah’s CCJJ found that, in this State, “[w]omen with a history of sexual assault reported poorer physical and mental health than non-victims, including increased rates of PTSD and depression.”¹⁵ In considering issues relating to sex crimes prosecutions, the Legislature should give weight to the tremendous harms that these crimes inflict on their victims.

Despite the widespread prevalence and devastating impacts of sexual violence against women and girls, such crimes are under-prosecuted in Utah (as in other states). The problems begin with the fact that a comparatively low percentage of crimes of sexual violence are ever reported to law enforcement. A commonly cited figure is that most rapes cases—in fact, over 80 percent—go unreported.¹⁶ Indeed, “[r]ape and other forms of sexual victimization” are “among the most severe and underreported crimes in the United States.”¹⁷ One comprehensive study found that only 19.1 percent of the women who were raped (or experienced attempted rape) since their 18th birthday reported the crime to the police.¹⁸ Racial disparities also exist, as the rate of reporting for sexual violence is even lower for victims who are women of color.¹⁹ And under-

¹² *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (quoting U.S. Dept. of Justice Law Enforcement Assistance Administration Report, *RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES* 1 (1975)).

¹³ Laura P. Chen, et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis*, 85 MAYO CLIN PROC. 619, 625 (July 2010) (emphasis omitted).

¹⁴ Melissa A. Polusny & Paul A. Arbisi, *Assessment of Psychological Distress and Disability After Sexual Assault in Adults*, in *PSYCHOLOGICAL KNOWLEDGE IN COURT* 97, 98 (Gerald Young et al. eds., 2006).

¹⁵ Mitchell & Peterson, *supra* note 6, at 6.

¹⁶ *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases*, Hearing Before the Subcomm. on Crime and Drugs, Sen. Jud. Comm., 111th Cong., 2d Sess. 27 (2010) (statement of Dean G. Kilpatrick).

¹⁷ Patricia L. Fanflick, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, Special Topics Series, Nat’l Dist. Attorneys Ass’n at 1 (2007).

¹⁸ Tjaden & Thoennes, *supra* note 3, at 3, 33.

¹⁹ See, e.g., Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, CHRON. HIGHER EDUC. (June 18, 2015), available at <https://www.chronicle.com/article/Another-Challenge-on-Campus/230977>.

reporting of sexual violence is pervasive in Utah and, indeed, may be even more pronounced than in other parts of the country.²⁰ The Utah Supreme Court, too, has recognized that “women raped by acquaintances, as opposed to strangers, are much less likely to report those rapes to police.”²¹

If reporting to authorities was the only problem, interventions to increase accessibility of reporting and responsiveness of law enforcement might be the answer. Even when victims report sexual assault crimes, however, most are never prosecuted. This has long been the reality for victims across the country—and particularly in Utah.²² One widely cited study examined data obtained from state criminal justice statistical analysis centers for 1990 and found that “98% of the victims of rape never see their attacker caught, tried and imprisoned.”²³ Another study reviewed 1995-1996 national survey data and found that only 37 percent of the rapes and attempted rapes against women that were reported to the police resulted in criminal prosecution.²⁴

In Utah, it appears that non-prosecution is even more pronounced than in other States. For example, the CCJJ found that among the 11.8 percent of sexual assault crimes reported to the police, charges were filed in 44.3 percent of those cases—producing an overall prosecution rate in Utah of just 5.2%.²⁵

A variety of factors contribute to the low prosecution rate. Recent research reports deep “skepticism of rape accusations” within America’s criminal justice system.²⁶ Part of the

²⁰ Mitchell & Peterson, *supra* note 6, at 6 (finding only 11.8 percent of adult female victims surveyed in Utah reported the sexual assault to the police).

²¹ *State v. Blake*, 2002 UT 113, ¶ 14, 63 P.3d 56.

²² See Campbell et al., *supra* note 2, at 2 (“[d]espite the alarming prevalence of this crime, most sexual assault victims do not report to law enforcement, and of those incidents that are reported, the vast majority will not be prosecuted”).

²³ See Majority Staff of the Senate Committee on the Judiciary, 102d Cong., *The Response to Rape: Detours on the Road to Equal Justice*, 2, 57 (1993).

²⁴ Tjaden & Thoennes, *supra* note 3, at 3.

²⁵ Mitchell & Peterson, *supra* note 4, at 6.

²⁶ Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 32 & n.181 (2017).

skepticism stems from systemic gender-bias.²⁷ Other research shows an acceptance of “rape myths” by actors within the system.²⁸

The likelihood of a prosecution is particularly low when the accused perpetrator is a person known to the victim. The Utah Supreme Court has acknowledged a “long held institution-wide distrust of rape victims in cases where they were acquainted with their assailants.”²⁹

II. Admitting Similar Sex Crimes Evidence is Important to Securing Convictions for Sex Offenses.

Against this backdrop of low prosecution rates for sexual assault, it is important to provide juries with full information about other similar crimes a defendant has committed.³⁰

Perhaps the most crucial reason for admitting other crimes evidence is the fact that sex crimes are typically committed in private, resulting in a lack of neutral witnesses. This unavailability of witnesses frequently turns sex offense prosecutions into unresolvable “swearing matches” between the victim and the defendant. In a criminal justice system that requires proof beyond a reasonable doubt for a conviction, it is quite difficult for prosecutors to meet their burden without evidence supporting a victim's testimony. In many cases, the only available supporting evidence comes from the pattern of the defendant's attacks.

This problem of supporting evidence is particularly acute in so-called acquaintance rape cases, where the defendants often claim that the victim “consented” to having sex. In such cases the accused will often admit inflicting sexual contact on the victim, thus making physical evidence of sexual relations irrelevant. This distinguishes other crimes evidence in sexual assault cases from other types of cases, because claims of consent are rarely offered for other crimes. Senior Justice Department Attorney David Karp explained this point clearly, noting that “the accused mugger does not claim that the victim freely handed over his wallet as a gift. In contrast, claims are regularly heard in rape cases that the victim engaged in consensual sex with

²⁷ See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. Rev. 1287, 1312-34 (2016) (discussing the Justice Department’s findings of systematic gender-based bias that contributed to the under-investigation and under-enforcement of sexual assault crimes against women).

²⁸ See generally *Rape Victims’ Access to Justice: Understanding and Combatting Pervasive Rape Myths*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Apr. 2014, available at <https://law.lclark.edu/live/files/16725-ncvliwrape-victims-access-to>.

²⁹ *State v. Blake*, 2002 UT 113, ¶ 11, 63 P.3d 56.

³⁰ The following paragraph draws on Cassell, *supra* note 1, at 165-66. See also David Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994) (developing this argument, which forms the basis for the paragraph in text above).

the defendant and then falsely accused him.”³¹ In such instances, giving the jury information that the defendant has committed rapes on other occasions may well be critical in assessing the relative plausibility of these conflicting claims.

In light of frequently conflicting testimony from victims and defendants in sexual assault cases, admitting similar crimes evidence serves to arm the jury with more information from which to determine the truth and reach an accurate verdict. When the defendant claims to have been unjustly accused, allowing evidence of other acts of misconduct often puts an entirely different light on the matter. Combining direct evidence of guilt with evidence of the defendant's past crimes may thus eliminate reasonable doubt in a case that would otherwise be inconclusive. As Utah Senator Orrin Hatch concluded in co-sponsoring legislation adding Rule 413 to the Federal Rules of Evidence, the public interest in admitting evidence “that will illuminate the credibility of the charge and any denial by the defense is truly compelling.”³²

Utah has already adopted a rule of evidence—Rule 404(c)—that follows this exact approach of allowing similar crimes evidence to be used for propensity purposes in child molestation prosecutions.³³ This Rule has now been in effect for more than a decade, without (so far as I am aware) any reported problems. Utah should now follow the same approach for sex offense cases involving adult victims.

Admitting similar crimes evidence does not violate any constitutional right of the defendant. The Tenth Circuit (among many other courts) has carefully reviewed these issues in upholding Federal Rule of Evidence 413 against constitutional challenge.³⁴ The Tenth Circuit explained that even the critics of Rule 413 “acknowledge the merits of the rule.”³⁵ In particular, Rule 413 “continues the movement toward focusing on the perpetrators, rather than the victims, of sexual violence.”³⁶ Because neither stranger nor acquaintance rapes generally occur in the presence of credible witnesses, Rule 413 “permits other victims to corroborate the complainant’s account via testimony about the defendant’s prior sexually assaultive behavior. Broader admissibility of prior rapes places before the jury evidence that the defendant lacks the moral inhibitions that would prevent him from committing rapes and implies that the threat of criminal sanctions has not deterred the defendant in the past.” Acknowledging the existence of rape myths, the Tenth Circuit concluded that “[c]orroboratory information about the defendant also limits the prejudice to the victim that often results from jurors’ tendencies to blame victims in acquaintance rape cases. Thus, like rape shield statutes codified in the federal and state rules of

³¹ Karp, *supra* note 30, at 21.

³² Letter from Sen. Orrin G. Hatch, Rep. Susan Molinari, and Rep. John Kyl to Chief Justice William H. Rehnquist 2 (Oct. 11, 1994).

³³ Utah R. Evid. 404(c).

³⁴ *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998), opinion clarified, 1998 WL 133994 (10th Cir. 1998).

³⁵ *Id.* at 1432.

³⁶ *Id.* (internal quotation omitted).

evidence, Rule 413 “encourages rape reporting and increased conviction rates by directing the jury’s attention to the defendant.”³⁷

The Tenth Circuit also pointed to safeguards for defendants that exist in Rule 413—safeguards that could be incorporated into a similar rule in Utah. Most important, Rule 413 remains subject to Rule 403, which allows a trial court to exclude similar crimes evidence if its probative value is outweighed by the risk of unfair prejudice.³⁸ The Rule 403 balancing test requires a trial court to consider (among other things) “(1) how clearly the prior act has been proved; (2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material fact is; and (4) whether the government can avail itself of any less prejudicial evidence.”³⁹ The trial court must then weigh these factors favoring admissibility against the prejudicial dangers, including “(1) how likely is it such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct.”⁴⁰ As part of this balancing, the trial court must “make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the ‘other act’ occurred.”⁴¹ Rule 413 also requires prosecutors to disclose such similar crimes evidence to the defendant in advance of trial.⁴² In light of these procedural safeguards, the Tenth Circuit concluded that Rule 413 was constitutional—and a conclusion uniformly reached by the nation’s federal appellate courts.

A rule comparable to Rule 413 in the Utah Rules of Evidence would presumably contain the same sorts of protections. For example, in *State v. Lucero*,⁴³ in interpreting Rule 404(b), the Utah Supreme Court required a trial court determination, by a preponderance of the evidence, that there was sufficient evidence from which a reasonable jury could find that the similar bad act occurred and that the defendant was the actor.⁴⁴ The Court also emphasized that a Rule 403 prejudice versus probative value assessment is required as well.⁴⁵ These protections for defendants would also apply to any similar crimes evidence rule for sexual assault cases.

³⁷ *Id.* (internal quotation omitted). See also Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB L.J. 271 (1994).

³⁸ 134 F.3d at 1433 (citing Fed. R. Evid. 403).

³⁹ *Id.* (internal quotation omitted).

⁴⁰ *Id.* (internal quotation omitted).

⁴¹ *Id.* (internal quotation omitted). See also *United States v. Mercer*, 653 F. App’x 622, 629 (10th Cir. 2016) (explaining balancing process and affirming trial court decision to admit similar crimes evidence).

⁴² 134 F.3d at 1433.

⁴³ 2014 UT 15, 328 P.3d 841, *overruled on other grounds by* *State v. Thornton*, 2017 UT 9, 391 P.3d 1016.

⁴⁴ *Id.* at ¶ 19.

⁴⁵ *Id.* at ¶¶ 30-33.

III. Recidivism Statistics Are Not the Proper Indicator for Whether Similar Crimes Evidence Should be Admitted.

The points raised above explain why sex offenses require special treatment in the rules of evidence when issues relating admitting similar crimes evidence arise. None of the arguments advanced above link to whether the recidivism rate of sex offenders is uniquely high or low. The recidivism argument is not the true basis for Rule 413 or other similar state rules.⁴⁶ Indeed, while Rule 413 is sometimes casually referred to as involving “prior” bad acts evidence, in fact nothing in the rule requires that the evidence to involved acts that occurred before the charged offense. Thus, if a defendant is accused of having raped a woman on Monday of a particular week, evidence that he committed similar crimes later on Tuesday, Wednesday, and Thursday of that week could all be admitted—even though those crimes did not take place before the charged crime.

Moreover, “recidivism” is the wrong label to attach to the subject of interest. Consider, for example, a case in which a male defendant is charged with sexually assaulting a woman on a college campus. He says she consented; she says she did not. The prosecution wishes to introduce evidence that three other women also allege that they were assaulted by the defendant in a similar way. In such circumstances, the issue is not whether the defendant is a “recidivist” in the sense of having previously been convicted of a crime and then having gone on to repeat it. Instead, the issue is whether the allegations of the three other women make it more likely that the fourth woman—the victim of the charged crime—is providing accurate testimony when she says she did not consent.

Under Rule 413, the trial court considers the similarity between the charged offense and the other crime evidence that will be admitted.⁴⁷ The helpfulness of such evidence of similar crimes is confirmed by empirical studies concerning who commits rapes, particularly campus rapes. A recent study examined the offenses of college men, including fraternity men and student athletes, in taking advantage of someone sexually who was under the influence of alcohol.⁴⁸ The study reported evidence that the problem of campus rape is predominantly one of serial perpetrators. Based on data from 49 campuses and well over 10,000 men, the authors reported that more than 87% of alcohol-involved sexual assaults on campus were committed by serial perpetrators.⁴⁹ Specifically, the study authors reported that “[i]n our study, 266 incidents were

⁴⁶ See, e.g., Karp, *supra* note 30 (article by principal drafter of Fed. R. Evid. 413 that does not mention recidivism as a basis for the rule); *but cf.* Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CINN. L. REV. 795, 811-12 (2013) (collecting examples of advocates for propensity evidence in sex offense cases relying on recidivism arguments).

⁴⁷ See, e.g., *U.S. v. Hawpetoss*, 478 F.3d 820, 824-26 (7th Cir. 2007).

⁴⁸ John D. Foubert et al., *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study*, 26 VIOLENCE AGAINST WOMEN 296 (Mar. 2020).

⁴⁹ *Id.* at 304.

committed by one-time offenders. In stark contrast, those who committed two or more incidents committed 1,805 acts of taking advantage of someone sexually under the influence of alcohol.”⁵⁰

In light of studies such as this one concerning serial sexual assault,⁵¹ the issue before the legislature is not truly one of “recidivism” so much as it is one concerning the usefulness of evidence concerning serial perpetration. Evidence that would tend to support the inference that a defendant is a serial perpetrator is highly useful in sex offense cases.

Several recent high-profile cases help illustrate this point. For example, comedian Bill Cosby has been accused by more than 30 women of having committed sexual assaults against them.⁵² Common sense would strongly suggest that, in the criminal case against Cosby, the jury should hear from multiple women.⁵³ And yet the reason for this commonsense intuition is not that Cosby is some sort of “recidivist” but rather that he is a serial rapist. Ultimately, as Cosby’s criminal trial, it took “an army of accusers” to convict Cosby of one sexual assault.⁵⁴

Similarly, movie producer and Hollywood executive Harvey Weinstein has been accused of sexual misconduct by more than eighty women, including allegations of rape.⁵⁵ Here again, in adjudicating issues related to the veracity of these women, hearing about the pattern of behavior—i.e., Weinstein’s propensity (or “lustful disposition”)—would seem to be exceedingly useful to the jury. One can debate whether such evidence would be admissible as part of a “common scheme” or “motive”, but that is a thin line to draw. The more direct answer seems to be that testimony of multiple victims is useful to the jury to show propensity. In any event, these

⁵⁰ *Id.*

⁵¹ Other studies also suggest that serial rapes should be a primary focus of the criminal justice system. See, e.g., Rebecca Campbell et al., *Serial Sexual Assaults: A Longitudinal Examination of Offending Patterns Using DNA Evidence* (Mar. 2019), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/252707.pdf> (“The sizeable number of serial offenders identified in our study should encourage law enforcement officers to approach investigations as suspected serial, rather than isolated, incidents.”).

⁵² Noreen Malone & Amanda Demme, *‘I’m No Longer Afraid’: 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture that Wouldn’t Listen*, N.Y. MAG. (July 26, 2015, 9:00 PM), <http://nymag.com/thecut/2015/07/bill-cosbys-accusers-speak-out.html>.

⁵³ Wesley M. Oliver, *Bill Cosby, the Lustful Disposition Exception, and the Doctrine of Chances*, 93 WASH. U.L. REV. 1131 (2016) (“Even though evidence of a defendant’s bad character is ‘not admissible for the purpose of proving the person acted in conformity therewith,’ common sense would dictate that a trier of fact should hear from the other victims who claim Cosby similarly assaulted them.”).

⁵⁴ See Matt Peardce, *It Took 13 Years, Two Trials and an Army of Accusers to Convict Bill Cosby of One Sexual Assault*, L.A. TIMES, Set. 25, 2018, available at <https://www.latimes.com/nation/la-na-cosby-army-20180925-story.html>.

⁵⁵ See Sara Khorasani, *Harvey of Hollywood: The Face That Launched A Thousand Stories*, 41 HASTINGS COMM. & ENT L.J. 103, 104 (2019).

issues have nothing to do with recidivism and everything to do with Weinstein's serial behavior. Recently Weinstein was convicted of sexual assault after the jury heard from six victims.⁵⁶

To the extent that the legislature is interested in recidivism statistics, it is important to bear in mind the limitations of that data.⁵⁷ To be sure, the data on *observed* recidivism by sex offenders tends to show a relatively low rate of reoffending. For example, a recent Bureau of Justice Statistics (BJS) study found that while 84% of state prisoners were rearrested for any crime, a smaller percentage—67%—of sex offenders were re-arrested.⁵⁸ But drilling into the data, released sex offenders were more than three times as likely as other released prisoners to be arrested for rape or sexual assault (7.7% vs. 2.3%).⁵⁹

More important, the recidivism studies are generally of questionable value, because often they use arrest rates, which are inadequate measures of recidivism because of the low percentage of sex crimes that are reported to police and then lead to the arrest of a suspect. As the Indiana Supreme Court has explained, “The low recidivism rate generally attributed to such [sex] offenders can be understood due to the low visibility of such offenses.”⁶⁰ Supporting this conclusion is a methodological analysis finding that “there was a marked underestimation of recidivism when the criterion was based on conviction or imprisonment.”⁶¹

IV. Utah Precedent at the Time of the State's Admission to the Union Recognized Admission of Similar Crimes Evidence—Until Sexist Assumptions Created Conflicting Precedent.

One additional point is worth making regarding the admission of similar crimes evidence in Utah: Such evidence was admitted in Utah was granted statehood, but then those precedents were disregarded in what appears to have been a Utah Supreme Court decision motivated by sexist assumptions about women who had reported being raped.⁶²

⁵⁶ See Shayna Jacobs, *Harvey Weinstein Guilty on Two Charges, Acquitted on Others in New York Sexual Assault Case*, WASH. POST, Feb. 24, 2020, available at https://www.washingtonpost.com/lifestyle/harvey-weinstein-trial-verdict/2020/02/24/057b9f36-5284-11ea-b119-4faabac6674f_story.html.

⁵⁷ See Cassell, *supra* note 1, at 166 n.142.

⁵⁸ Mariel Alper & Matthew R. Durose, *Recidivism Of Sex Offenders Released From State Prison: A 9-Year Follow-Up (2005-14)*, NCJ 251773 (May 2019), available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6566>.

⁵⁹ *Id.*

⁶⁰ *Lannan v. State*, 600 N.E.2d 1334, 1337 n.6 (Ind. 1992) (*quoting* A. Nicholas Groth, et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQUENCY 450, 457 (1982)).

⁶¹ Robert A. Prentky et al., *Recidivism Rates Among Child Molester and Rapists: A Methodological Analysis*, 21 LAW & HUMAN BEH. 635, 635 (1997).

⁶² See Cassell, *supra* note 1, at 156-60.

In 1900, the Utah Supreme Court first addressed whether evidence of prior acts of sexual intercourse between the accused and the victim were admissible in a prosecution for statutory rape. In *State v. Hilberg*,⁶³ while the Court noted the general prohibition against propensity evidence, it also discussed some important exceptions to that rule in sexual assault cases:

[W]here the offense consists of illicit intercourse between the sexes, such as is charged here, or in case of incest, adultery, or seduction, courts have relaxed the rule, and hold that previous acts of improper familiarity between the parties, occurring prior to the alleged offense, were admissible as explaining the acts, and as having a tendency to render it more probable that the act charged . . . was committed, though such acts would be inadmissible as independent testimony.⁶⁴

Applying this exception, the Court ruled that prior acts of intercourse between the parties (but not subsequent acts) were admissible to show the accused committed the crime charged.⁶⁵ The court reached an identical conclusion the following year in *State v. Neel*.⁶⁶

In 1909, *State v. Williams*⁶⁷ reached the Utah Supreme Court. In its decision, the Court appeared to depart from the rationale of *Hilberg* and *Neel*. In *Williams*, a seventy-year-old man had been convicted of sexual assault on a ten-year-old girl.⁶⁸ On appeal, he challenged the admission of evidence that he had committed similar acts against other girls in the neighborhood. In overturning the conviction, the Court held that a general prohibition against propensity evidence controlled.⁶⁹ The Court quoted *Hilberg*'s language about previous acts of "improper familiarity" making it "more probable" that the charged crime was committed, but narrowed the application of this language to prior sexual conduct between the defendant and the victim of the charged offense.⁷⁰ The Court reasoned that the authorities "uniformly" hold that crimes "wholly disconnected from the crime charged on some person other than the one mentioned in the information or indictment is never admissible."⁷¹

⁶³ 61 P. 215 (Utah 1900).

⁶⁴ *Id.* at 216.

⁶⁵ *Id.* The Court thus reversed the conviction on grounds that evidence of other subsequent sexual acts between the parties was not admissible, reasoning that subsequent acts are not probative of prior conduct. *See id.* at 217. This aspect of the Court's decision is persuasively criticized in II John Henry Wigmore, WIGMORE ON EVIDENCE, § 398, at 455 n.1 (James H. Chadbourn rev. 1979).

⁶⁶ 65 P. 494 (Utah 1901) (holding that evidence of prior sexual acts between parties is admissible to explain acts).

⁶⁷ 103 P. 250 (Utah 1909).

⁶⁸ *Id.* at 251.

⁶⁹ *Id.* at 252.

⁷⁰ *Id.*

⁷¹ *Id.*

In addition to clearly misstating the state of the law in this country,⁷² the Court's opinion curiously offered no reason for distinguishing the defendant's prior sexual conduct with the victim of the charged offense from that with other victims. Nor did the *Williams* Court attempt to reconcile its holding with *Hilberg's* holding that prior sexual acts with the victim of a charged offense make subsequent sexual misconduct "more probable." Shortly before *Williams*, the renowned evidence scholar John Henry Wigmore had examined this very point, and concluded that "a previous rape-assault of another woman has equal probative value for the purpose, for it is the general desire to satisfy lust that is involved in this crime, and no particular woman is essential for this."⁷³ Moreover, although *Williams* Court excluded evidence that the accused had committed previous sex crimes, the Court upheld the admission of evidence of the accused's good character.⁷⁴ Specifically, the Court stated that the accused "was a man of good character, and up to the time of this trouble his reputation for chastity and virtue was good."⁷⁵ The unanswered question, of course, is how the Court could simultaneously hold that evidence of the accused's prior bad acts was inadmissible, while allowing general statements about his good character to be presented to the jury.⁷⁶

The *Williams* decision seems so odd that perhaps its true rationale is reflected in its reference to the dictum from Lord Hale that rape of a woman "'is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent.'"⁷⁷ This claim about false rape claims has now been thoroughly discredited; it reflects sexist notions about the untruthfulness of women who have come forward to report being sexually assaulted.⁷⁸ But the

⁷² See, e.g., 3 Joel Prentiss Bishop, NEW CRIMINAL PROCEDURE § 970 at 1846 (2d ed. 1913); § 970 at 46 (1st ed. 1880) (explaining that in England such sexual predisposition evidence was not admissible, but "(t)he contrary to this, believed to be the better law, has been adjudged with us"); see also 1A WIGMORE, *supra* note 65, § 62.2, at 1334 (collecting authorities on this point); see also *Losasso v. People*, 87 Colo. 290, 287 P. 647, 648 (holding that *Williams* was "inconsistent with our own decisions").

⁷³ 1 John Henry Wigmore, WIGMORE ON EVIDENCE § 357, at 432 (1904); see also *Bracey v. United States*, 142 F.2d 85, 88-89 (D.C. Cir. 1944) (including dicta supporting this view).

⁷⁴ *Williams*, 103 P. at 251.

⁷⁵ *Id.*

⁷⁶ Today under the Utah Rules of Evidence and the Federal Rules, if *Williams* had offered evidence of his good character and chastity, the door would almost assuredly be opened, under Rule 404(a)(1), for the prosecution to offer rebutting evidence. See Utah R. Evid. 404(a)(1).

⁷⁷ *Williams*, 103 P. at 254 (quoting 3 GREENL. EV. S212).

⁷⁸ See generally Susan Estrich, REAL RAPE 28-79 (1987) (describing distrust society experiences toward women who allege rape); Linda A. Fairstein, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 14-15 (1993) (noting "archaic requirements" that stemmed from Hale's admonition); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10-12 (1977) (noting that Hale's admonition singles out rape for unique treatment and proposing to treat rape like other crimes).

unfortunate effect of the poorly-reasoned *Williams* decision was to overshadow the Court's earlier holdings to the contrary.

V. Prevailing Law in this Country Allows Admission of Similar Sexual Assault Evidence.

In 1909, the Utah Supreme Court in *Williams* cited Wigmore's renowned treatise on evidence, but it is important to understand what American law truly looked like then and more recently. "An exhaustive analysis of the cases," the treatise's edition in 1983 explained, "shows there is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities."⁷⁹ These "decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions."⁸⁰

The Wigmore treatise noted that a number of states "forthrightly" admit propensity evidence in sexual assault cases under a "lustful disposition" or "sexual proclivity" exception to the general rule barring the use of character evidence against an accused.⁸¹ Those states not expressly recognizing a lustful disposition exception "may effectively recognize such an exception by expansively interpreting . . . various well-established exceptions to the character rule."⁸²

Similarly, the U.S. Department of Justice concluded in 1986 that "free use of propensity evidence in prosecutions of sex crimes is widespread."⁸³ While exact quantification of case law in particular jurisdictions is always difficult, a fifty-state survey by Professor Thomas J. Reed in 1993 found that twenty-nine states "admit sexual misconduct evidence via the common-law lustful disposition rule."⁸⁴ (Utah was listed as among the 29.⁸⁵) That rule, in short, is that "the prosecution in its case in chief could prove the defendant's lustful disposition to commit sex crimes by proof of prior or later instances of sexual misconduct with the same victim or a different victim."⁸⁶ Even

⁷⁹ 1A John Henry Wigmore, WIGMORE ON EVIDENCE § 62.2, at 1334 (Peter Tillers rev. 1983)

⁸⁰ *Id.* at 1334-35.

⁸¹ *Id.* at § 62.2, at 1335 (collecting cases).

⁸² *Id.* at 1336 (collecting cases).

⁸³ See generally Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General: THE ADMISSION OF CRIMINAL HISTORIES AT TRIAL (rep. 4) at 10 (Aug. 14, 1986).

⁸⁴ Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 188 & n.340 (1993); see also Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U.L. REV. 515, 526-27 (1995) ("During the twentieth century, common-law courts created the lustful disposition exception").

⁸⁵ See Reed, *supra* note 84, at 188-90 n.339 (citing *State v. Neal*, 65 P. 494, 495 (Utah 1908) (holding evidence of prior "illicit intercourse" with victim admissible in statutory rape prosecution to show "more probable that the offense charged was committed"). Cf. *supra* note 71 and accompanying text (discussing *Williams* case distinguishing *Neal*).

⁸⁶ Reed, *supra* note 84, at 168.

in states that did not follow a lustful disposition approach but instead applied 404(b), the survey found that “the courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct” evidence even when the other purpose besides propensity “is not truly an issue in the case.”⁸⁷

And, of course, in 1994, the Congress simply followed this well-trodden path in adding a similar crimes rule into the Federal Rules of Evidence, by adopting Rule 413. The federal rule was essentially a codification of the common law lustful disposition rule.⁸⁸

As a result of the amendment to the Federal Rules of Evidence, the admission of propensity evidence in sexual assault cases has now expanded. The current (i.e., 2019) Wigmore treatise on evidence notes the enactment of Rule 413 and concludes that “recent developments in evidence law have rendered such evidence [i.e., evidence of uncharged misconduct evidence in prosecutions for sex crimes] more broadly admissible in many jurisdictions”⁸⁹ The treatise hastened to emphasize, in addition, that even apart from specific rules of evidence, “courts have long approved admission of such evidence in sexual crime and child molestation cases.”⁹⁰ The basic rationale across the country is that proof of such sex crimes is “exceedingly difficult to muster” for three reasons:

First, these crimes generally take place in private, meaning that the only witnesses are likely to be the defendant and the alleged victim, who often will give diametrically opposed stories. Second, these crimes are often committed without leaving significant physical traces, making circumstantial proof difficult. Third, even if physical evidence did exist at one time, it often has been destroyed by the time the crime is reported and investigated.⁹¹

I have recently had an opportunity to read an analysis from the Office of Legislative Research and General Counsel regarding the Joint Resolution. This analysis reports that “14 states and the federal government permit the admission of evidence of prior acts of sexual assault in a sexual assault case.”⁹² The analysis did not contain specific citations to the jurisdictions that the Office was including. My sense is that the Office only included jurisdictions that allow prior sexual

⁸⁷ *Id.* at 200.

⁸⁸ See Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 341 (2012).

⁸⁹ David P. Leonard, *THE NEW WIGMORE: A TREATISE ON EVIDENCE; EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS* § 8.5.3 (2d ed. 2019).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Office of Legislative Research and General Counsel, FL456: Joint Resolution Amending Rules of Evidence Concerning Crime or Other Acts (Aug. 25, 2025).

evidence in by a specific rule that tracked Federal Rule of Evidence 414. If my understanding is correct, then the analysis does include many other states that reach the same result through judicial interpretations of other rules or judicial precedents achieving the same result.

VI. A Proposed Rule Admitting Similar Crimes Evidence for the Utah Rules of Evidence.

The proposed Joint Resolution would add a new provision to Rule 404 of the Utah Rules of Evidence—provision 404(d). This new rule allows for presumptive admission of other sex crimes evidence in sexual assault cases for propensity purposes, essentially tracking Federal Rule of Evidence 413 and the law in many other states.

The drafting of this provision is straightforward. Rule 413 provides that “[i]n a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault.”⁹³ Similarly, California Evidence Code § 1108 provides that “[i]n 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 [which tracks Federal Rule 404(b)], if the evidence is not inadmissible pursuant to Section 352 [which tracks Federal Rule 403]. Georgia has simply adopted Federal Rule of Evidence 413 in toto.⁹⁴

The Joint Resolution thus follows the simplest way for the Legislature to proceed. The new provision 404(d) tracks existing Rule 404(c), which allows admission of similar crimes evidence in child molestation cases. For the reasons explained above, such a rule constitutes sound public policy. However, some might argue that the rule is unnecessary, because evidence of similar sexual misconduct is already admissible in some cases under Utah Rule of Evidence 404(b). This bridge has already been crossed for child molestation cases. In adopting Rule 404(c) in 2008, the Utah Supreme Court apparently recognized that the frequency with which these issues arise requires a specific rule that provides more clarity to trial courts and litigants about what evidence is admissible in child molestation prosecutions. Moreover, in adopting Rule 404(c), the Utah Supreme Court determined, as a matter of public policy, that such an amendment was appropriate. As the Utah Court of Appeals recently explained, “[t]he drafters of our rules of evidence have determined, *as a policy matter*, that propensity evidence in child molestation cases can come in on its own terms, as propensity evidence, even if there is no other plausible or avowed purpose for such evidence.”⁹⁵ As a policy matter, the same general reasoning supports a new Rule 404(d) admitting propensity evidence in sexual assault cases generally.⁹⁶

⁹³ Fed. R. Evid. 413, added via Pub. L. 103–322, title XXXII, §320935(a), Sept. 13, 1994, 108 Stat. 2135).

⁹⁴ Ga. Code Ann. § 24-4-413.

⁹⁵ State v. Fredrick, 2019 UT App 152, ¶ 42, 450 P.3d 1154, 1166 (emphasis added), *cert. denied*, 458 P.3d 748 (Utah 2020).

⁹⁶ Some of the benefits of a new rule 404(d) could also be captured through an expansive rule codifying the “doctrine of chances.” See State v. Argueta, 2020 UT 41, ¶ 32, 469 P.3d 938, 946

Moreover, forcing these issues to be decided under the general language of Utah Rule of Evidence 404(b) leads to considerable litigation—which is, presumably, one reason why the Legislature is investigating the issue.⁹⁷ As David Karp has explained in connection with Federal Rule 404(b):

The vagueness of the standards of Rule 404(b) ensures considerable variation in their application by the courts, and this tendency is magnified in sex offense cases by the special pressures courts have felt to find some way of getting the evidence in. People's security against sexual violence should not have to depend on the willingness of courts to stretch evidentiary rules in particular cases.

[Rule 413] ... provides a reasonable and honest alternative. It permits the use of evidence of other sex crimes in sex offense cases, while providing appropriate safeguards of fairness for the defendant. No fictions of limited admissibility are relied on; evidence admitted under the new rules would be subject to rational assessment. The result would be a major step forward in achieving justice and protecting people from one of the most atrocious forms of criminal violence.⁹⁸

This point about the vagueness of Rule 404(b)'s language may apply with particular force to Utah Rule 404(b). Utah's rule has been subject to conflicting interpretations. Indeed, in 1998, the rule was subjected to a unique, Utah-only amendment following a confusing interpretation of the rule by the Utah Supreme Court in 1997.⁹⁹ More recently, in 2017, the Utah Supreme Court altered the standards for review of a trial court's decision to admit evidence under Utah Rule 404(b), concluding that the issue was not the "scrupulousness" of the district judge's review of the other bad acts evidence, but rather whether "the district judge made an error in admitting or excluding the evidence in question."¹⁰⁰

(discussing doctrine of chances). Because the proposed Rule 404(d) discussed here would expansively cover all of the situations where a doctrine of chances rule would operate in sexual assault cases, I do not discuss this doctrine further.

⁹⁷ Cf. Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 612 (1997) (arguing that many of the prior acts of rape covered by Rule 413 could also be admitted under Rule 404(b)'s motive exception without relying on Rule 413); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. REV. 1547, 1565 (noting that "the creative manipulation of the exceptions authorized by Rule 404(b)" is often used to admit prior sexual crimes to demonstrate a disposition to commit such offenses).

⁹⁸ Karp, *supra* note 30, at 35.

⁹⁹ See Advisory Comm. Note, Utah R. Evid. 404(b) (amending Rule 404(b) so as to "abandon[]" additional requirements for admissibility imposed by *State v. Doporto*, 935 P.2d 484 (Utah 1997) (discussed in Cassell, *supra* note 1, at 163-64, 169)).

¹⁰⁰ *State v. Thornton*, 2017 UT 9, ¶ 53, 391 P.3d 1016.

Since then, Utah courts have sometimes interpreted Utah Rule 404(b) as allowing something akin to propensity evidence. For example, in February of this year, in *State v. Richins*, the Utah Court of Appeals affirmed the admission of evidence relating to a defendant's prior acts of lewdness under Rule 404(b). The Court of Appeals concluded that the prosecution did not use the evidence for propensity purposes but rather for rebutting a defendant's argument that a victim was either mistaken or intentionally lying about the defendant's actions.¹⁰¹ This reasoning would seem to allow similar sex offense evidence into a wide variety of cases, since a defendant will almost invariably argue that the victim has inaccurately described him as the perpetrator of a crime. Interestingly, the Utah Supreme Court has granted certiorari to review the issue further—demonstrating how reasonable jurists can find questions of the applicability of Utah Rule 404(b) to be complicated.

More broadly, outside of Utah, courts around the country have had difficulty in deciding whether something like the lustful disposition rule survives Rule 404(b) or is abolished by it.¹⁰² Utah should end any possible confusion by simply adopting a new Rule 404(d) that directly answers that question and permits similar sexual assault evidence to be admitted against a defendant for propensity purposes.

Conclusion

I urge the Legislature to approve a Joint Resolution creating a new provision—Utah Rule of Evidence 404(d)—which would create a presumption of admissibility for similar crimes evidence in sexual assault cases.

Sincerely,



Paul G. Cassell

¹⁰¹ *State v. Richins*, 2020 UT App 27, ¶ 21, 460 P.3d 593, 600, *cert. granted*, 466 P.3d 1072 (Utah 2020).

¹⁰² See Reed, *supra* note 84, at 186-88 (discussing conflicting interpretations in various state courts).