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THE NEED TO HOLD BATTERERS ACCOUNTABLE: ADMITTING PRIOR ACTS OF ABUSE IN CASES OF DOMESTIC VIOLENCE

Pamela Vartabedian*

I. INTRODUCTION

Domestic violence¹ is one of the most prevalent crimes and frequently handled cases for prosecutors across the country.² Data from the American Psychological Association (APA) indicates that one-third of all women will be assaulted by a partner during adulthood.³ The Centers for Disease Control and Prevention reported that “nearly two-thirds of women who reported being raped, physically assaulted, or stalked since the age of 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date.”⁴

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1. There is considerable inter- and intradisciplinary confusion regarding the meaning of the terms “domestic violence,” “battering,” and “domestic abuse.” See generally Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (2003) (explaining that in the scientific field, “spousal abuse, domestic violence, marital assault, woman abuse, and battering . . . are used interchangeably to refer to the broad range of behaviors considered to be violent and abusive with an intimate relationship”); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 122-23 n.2. (2001) (adopting a definition of domestic violence that includes “the establishment of control and fear in a relationship through the use of physical violence, intimidation, and other forms of abuse”). From a criminal justice perspective, domestic violence is defined exclusively by existing criminal statutes. See *infra* Part II.D.1.

2. Jennice Vilhauer, Essay, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 953 (2000).

3. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, VIOLENCE AMONG FAMILY MEMBERS AND INTIMATE PARTNERS 339 (2003), available at http://www.fbi.gov/ucr/cius_03/pdf/03sec5.pdf.

4. PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, FULL

Nevertheless, when such domestic violence cases enter the criminal justice system, prosecutions are difficult because of circumstances unique to this crime that the evidence codes in most jurisdictions do not take into account.⁵

Currently, the majority of state evidence rules admit a defendant's prior acts of domestic violence into evidence for limited purposes other than to show that the defendant acted in accordance with this propensity to batter, and only after satisfying the state's balancing test between the evidence's probative value and its prejudicial effect.⁶ Only California and Alaska have enacted evidence codes that explicitly provide for the admissibility of a defendant's prior acts of domestic violence for propensity purposes in domestic violence cases.⁷

In order to fully understand the need for change in evidentiary rules, one must understand the cyclical pattern of abuse and how this hinders the successful prosecution of domestic violence cases. Part II of this comment begins with a brief discussion of the cycle of abusive behavior inherent in domestic violence crimes.⁸ Part II then elaborates on the character evidence ban codified in Federal Rule of Evidence (FRE) 404⁹ and its exceptions,¹⁰ and explains how its exceptions led California and Alaska to adopt evidence codes that explicitly provide for the admissibility of prior acts of domestic violence for propensity purposes in the prosecution of domestic violence cases.¹¹ Part II concludes by explaining the current scheme in the majority of state evidence codes regarding domestic violence.¹²

Part III of this comment identifies the problem with the current scheme in the majority of state evidence codes.¹³ Part IV discusses how the current scheme in the majority of state

REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 46 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

5. See *infra* Part II.A.

6. See *infra* notes 121-22 and accompanying text.

7. See *infra* Part II.D.1-2.

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.C.

11. See *infra* Part II.D.1-2.

12. See *infra* Part II.D.3.

13. See *infra* Part III.

evidence codes does not adequately protect domestic violence victims¹⁴ and sets forth arguments in favor of a new evidence rule that provides for the admissibility of prior acts of domestic violence for propensity purposes.¹⁵ Finally, Part V urges all states to adopt rules similar to those of California and Alaska that admit prior acts of domestic violence for propensity purposes.¹⁶ Such rules are needed in order to hold recidivist batterers accountable for domestic violence.

II. BACKGROUND

A. *The Cycle of Violence*

Domestic violence creates a complicated relationship between the victim and the batterer that is not present in most other crimes.¹⁷ The psychological interplay between the parties is often set in place long before the battering first occurs.¹⁸ Domestic violence generally cycles through three periods: tension building, acute battering, and a honeymoon phase.¹⁹ During the tension building stage, the batterer, who is usually charming at the beginning of the relationship, becomes edgy and irritable, and verbally insults the victim in ways that are meant to damage the victim's self-esteem.²⁰ The batterer becomes gradually more abusive and the victim attempts to placate the abuse to prevent the abuse from escalating.²¹ This stage, which may last anywhere from a few days to years, is often described as the most psychologically damaging to the victim.²²

The second stage is the violent phase, in which the batterer engages in physical battering.²³ The batterer becomes enraged and violent for no apparent reason.²⁴ At

14. *See infra* Part IV.A.

15. *See infra* Part IV.B.

16. *See infra* Part V.

17. Vilhauer, *supra* note 2, at 953.

18. *Id.*

19. DAWN BRADLEY BERRY, DOMESTIC VIOLENCE SOURCEBOOK: EVERYTHING YOU NEED TO KNOW 31 (1995).

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* at 32.

24. *Id.*

first, the victim often does not perceive any real danger.²⁵ Nevertheless, the battering becomes increasingly more violent, and can sometimes end in the death of the victim.²⁶

The third phase is the "honeymoon phase."²⁷ During this phase, the batterer calms down and realizes that the victim is hurt and may leave the relationship.²⁸ The batterer is remorseful and apologetic and swears that the abuse will never happen again.²⁹ The batterer will often promise to change, bring the victim gifts, and shower the victim with attention and romantic gestures.³⁰ It is a period of relief for the victim; the victim wants to believe that the batterer will never engage in violent behavior again.³¹ Nevertheless, unless there is an intervention, the cycle often begins again, with the abuse becoming even more severe.³² A batterer who intersperses abuse with loving behavior is using one of the most effective means of convincing the victim to stay in the relationship.³³

It is during the honeymoon phase that prosecutors typically become involved in domestic violence cases, making it extremely difficult for them to conduct proper investigations.³⁴ The victim perceives a loving and caring partner, and may refuse to testify as a witness or may recant incriminating statements made to the police.³⁵ The victim may also be reluctant to testify because of intimidation by the batterer, threats of retaliation, cultural or family pressures, or uncertainty about whether the jury will believe her testimony.³⁶ Furthermore, victims of domestic violence may suffer from Battered Women's Syndrome as a result of the continued abuse, causing them to forget the details of the

25. Vilhauer, *supra* note 2, at 954.

26. *Id.*

27. *Id.* at 955.

28. *Id.*

29. BERRY, *supra* note 19, at 32.

30. *Id.* One woman noted, "He thought he could beat me, then take me to bed and have sex with me, and that would make everything all right." *Id.*

31. See Vilhauer, *supra* note 2, at 955.

32. BERRY, *supra* note 19, at 32.

33. *Id.* at 33.

34. Vilhauer, *supra* note 2, at 955.

35. *Id.*

36. Andrea M. Kovach, Note, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1126 (2003).

traumatic events.³⁷

B. The Ban on Character Evidence in the Federal Rules of Evidence

In a court proceeding, issues regarding a person's character arise in two fundamentally different ways.³⁸ When the character of a person is at issue in litigation because it is an element of a crime, claim, or defense, evidence concerning the person's character is admissible.³⁹ For example, the competency of a driver is a direct issue in an action for negligently entrusting a motor vehicle to an incompetent driver.⁴⁰ The character evidence is direct and there is no problem in limiting admissibility of this evidence.⁴¹ When character evidence is offered "for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character," the evidence is circumstantial and the Federal Rules of Evidence limit the use of character evidence for this purpose.⁴² For example, evidence of honesty is circumstantial when offered to disprove a charge of theft and will be barred as character evidence.⁴³

Federal Rule of Evidence 404,⁴⁴ which addresses the

37. See Vilhauer, *supra* note 2, at 955. Battered Women's Syndrome (BWS) "can be divided into three parts: 1) the traumatic effects of victimization; 2) learned helplessness; and 3) self-destructive coping responses to the violence." *Id.* "Women who suffer from BWS are less likely to respond to the violence against them, and consequently, become more deeply entrenched in the violent relationship. [They] are likely to be more reluctant to cooperate with prosecutors, even though they are in great need of advocacy." *Id.* at 955-56.

38. FED. R. EVID. 404 advisory committee's note.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. FRE 404 states:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of

admissibility of character evidence, is divided into two parts.⁴⁵ The first part, FRE 404(a), establishes a general rule stating that character evidence is not admissible as propensity evidence, with three exceptions: (1) evidence of the character of the accused or the victim may be admitted by the accused; (2) evidence of the character of the accused may be admitted by the prosecution as rebuttal evidence; and (3) character evidence may be admitted to discredit a witness.⁴⁶ If the character evidence falls under one of these exceptions, however, proof may be made only by "testimony as to reputation or by testimony in the form of an opinion."⁴⁷ Accordingly, specific acts, such as prior acts of battering, may only be admitted on cross-examination or on direct examination where character is a central issue to the case.⁴⁸

Even if character evidence is admissible under FRE 404(a), the judge has discretion to determine whether the evidence is admissible based on the evidence's probative and

peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

45. *See id.*

46. *See* FED. R. EVID. 404(a).

47. FED. R. EVID. 405(a). Rule 405 recognizes the three evidentiary ways in which one can show character—by reputation, opinion, or specific instances of prior conduct. *See* FED. R. EVID. 405. FRE 405 states:

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

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Id.

48. *See* FED. R. EVID. 405.

prejudicial value.⁴⁹ This balancing test, codified in FRE 403,⁵⁰ is a general rule applicable to all forms of evidence.⁵¹ The rule requires the judge to weigh the probative value of evidence against such factors as: (1) the danger of unfair prejudice; (2) the danger of the evidence confusing the jury; (3) the danger of the evidence generally misleading the jury; or (4) the danger of the presentation of the evidence causing an undue delay or waste of time.⁵² The evidence may be excluded if the judge finds that the probative value of the evidence is substantially outweighed by any of these dangers.⁵³ The purpose of FRE 403 is to prevent a jury from making inaccurate judgments based on emotion and to ensure an orderly, efficient, and fair process of trial.⁵⁴

Though prior acts may be excluded under FRE 404(a) or FRE 403, there is another method which may be used to admit this prior conduct. Federal Rule of Evidence 404(b) allows admission of prior acts for any relevant reason other than to prove the defendant's propensity to commit the charged crime.⁵⁵ Under FRE 404(b), prior instances of conduct, such as past crimes or wrongs, may be admissible as evidence for other purposes, such as proof of motive, knowledge, preparation, and intent.⁵⁶ These purposes are neither mutually exclusive nor collectively exhaustive.⁵⁷

Under FRE 404(b), evidence of prior acts is admissible because it is distinguishable from character evidence.⁵⁸ Evidence of a defendant's prior acts admitted purely as

49. Michael S. Ellis, *The Politics Behind Federal Rules of Evidence* 413, 414, and 415, 38 SANTA CLARA L. REV. 961, 963 (1998) (citing FED. R. EVID. 403 advisory committee's note).

50. FRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

51. Ellis, *supra* note 49, at 963.

52. FED. R. EVID. 403. "Unfair Prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note.

53. FED. R. EVID. 403.

54. See FED. R. EVID. 403 advisory committee's note.

55. MCCORMICK ON EVIDENCE § 190, at 284 (John W. Strong ed., 5th ed. 1999).

56. FED. R. EVID. 404(b).

57. MCCORMICK, *supra* note 55, § 190, at 284.

58. Ellis, *supra* note 49, at 967.

character evidence is considered by the jury in determining the defendant's character and whether the actions in question are consistent with that character.⁵⁹ But when the evidence is admitted under FRE 404(b), the jury no longer considers the character of the defendant. Instead, the jury considers how past actions reflect upon the state of mind of the defendant.⁶⁰

C. Additional Exceptions to the Ban on Character Evidence in the Federal Rules of Evidence

The Violent Crime Control and Law Enforcement Act of 1994 was signed into law by President Clinton on September 13, 1994, and became effective on July 9, 1995.⁶¹ Pursuant to the Act, Congress enacted FRE 413, 414, and 415, which allow specific instances of prior conduct to be admissible as character evidence against the accused in sexual assault cases.⁶² By enacting these rules, Congress sought to ensure that federal trial judges could admit evidence of a defendant's prior sexual offenses in sexual assault and child molestation

59. *Id.*

60. *Id.* at 967-68.

61. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 320935, 108 Stat. 1796, 2135-37 (codified as amended at 28 U.S.C. app. art. IV, Fed. R. Evid. 413-15 (1994)) (effective July 9, 1995); see also Ellis, *supra* note 49, at 968.

62. FRE 413, 414, and 415 read in pertinent part:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.

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

FED. R. EVID. 413.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases.

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

FED. R. EVID. 414.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation.

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

FED. R. EVID. 415.

cases without having to stretch the meaning of the exceptions under FRE 404(b).⁶³ Federal Rule of Evidence 404(b) serves as a model for most state evidence codes, and prior to FRE 413, 414, and 415, many courts narrowly interpreted FRE 404(b) and refused to admit evidence of a defendant's prior sexual offenses unless one of the recognized exceptions was clearly met.⁶⁴

Federal Rules of Evidence 413, 414, and 415 supersede the restrictive aspects of FRE 404(b) in sex offense cases.⁶⁵ These rules allow specific instances of prior conduct to be admitted as character evidence against a defendant in sexual assault cases.⁶⁶ Federal Rules of Evidence 413 and 414 are specific to criminal cases of sexual assault and child molestation respectively.⁶⁷ Federal Rule of Evidence 415 applies to civil cases.⁶⁸ Therefore, prosecutors are able to introduce evidence of uncharged past sexual misconduct in cases involving sexual assault or child molestation to prove that a defendant has the propensity to commit the charged crime.⁶⁹ However, since their introduction, these rules have been the subject of heated debate.⁷⁰

The proponents of FRE 413, 414, and 415 argue that sexual assault cases are often difficult to prove because of the unique circumstances of these cases.⁷¹ Sexual assault cases may be more difficult to prosecute because they typically

63. GEORGE FISHER, EVIDENCE 193 (2002).

64. Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 514 (1995). Even courts favoring a broad policy of admissibility with respect to past sexual misconduct felt compelled to exclude prior acts evidence. *Id.* As a result of the inconsistency in the law regarding the admissibility of past sexual misconduct, victims were denied justice. *Id.*

65. 140 Cong. Rec. H8991 (1994) (statement of Rep. Molinari).

66. Ellis, *supra* note 49, at 968.

67. *Id.* FRE 413 provides that in criminal cases in which the defendant is accused of sexual assault, evidence of a defendant's commission of another offense or prior offense of sexual assault is admissible in sexual assault cases, and jurors may consider this evidence to decide any matter to which it is relevant. *See* FED. R. EVID. 413. FRE 414 sets forth the same provision for criminal cases involving child molestation. *See* FED. R. EVID. 414.

68. *See* FED. R. EVID. 415.

69. *See* FED. R. EVID. 413-15.

70. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 382 (1996).

71. Kovach, *supra* note 36, at 1123.

become “swearing matches” between the victim and the defendant.⁷² Therefore, evidence of the defendant’s prior sexual assaults may bolster the victim’s credibility and lessen the chances of the defendant’s acquittal.⁷³ Proponents also argue that availability and use of these rules will encourage sexual assault victims to press charges.⁷⁴ Furthermore, a person who commits one act of sexual assault is likely to be the kind of person who would do it again, and thus, supporters argue that these rules are “based upon reliable indictors that lead to fair outcomes.”⁷⁵

Opponents of FRE 413, 414, and 415 argue that defendants should be held accountable for “what they do and not for what they are,”⁷⁶ and that the new rules abolish the defendant’s protection from impermissible character inferences.⁷⁷ They claim that jurors are likely to judge a defendant based on his uncharged prior bad acts and may convict him on a “bad guy theory.”⁷⁸ That is, the jury may decide that it wants the defendant punished because the defendant is a bad person, deserving of punishment, and fail to consider whether the defendant actually committed the crime for which he or she is on trial.⁷⁹ Furthermore, critics argue that a person’s past actions are not necessarily a good indicator of their future behavior.⁸⁰

D. Exceptions to the Ban on Character Evidence in State Evidence Codes

Despite such debate, FRE 413, 414, and 415 have

72. De Sanctis, *supra* note 70, at 383. For example, in rape cases where physical evidence is recovered, the defendant will usually use the defense that the victim consented, turning the case back to the defendant’s word against the victim’s. *Id.*

73. Kovach, *supra* note 36, at 1123.

74. *Id.*

75. *Id.* Supporters argue that FRE 413 “secure[s] fairness in administration . . . and [promotes] growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” *Id.* (citing FED. R. EVID. 102).

76. *Id.* at 1124 (citing Miguel A. Méndez & Edward J. Imwinkelried, *People v. Ewoldt: The California Supreme Court’s About-Face on the Plan Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 475-76 (1995)).

77. De Sanctis, *supra* note 70, at 386.

78. *Id.*

79. *See id.*

80. *See Ellis, supra* note 49, at 982.

survived constitutional challenges.⁸¹ Their passage has sparked state legislatures to adopt similar evidence rules for sexual assault and child molestation cases.⁸² Only two states have further extended the reach of these rules by adopting provisions allowing for the admission of prior acts of domestic violence by a defendant for propensity purposes in domestic violence cases.⁸³ While no federal rule has been passed regarding the admissibility of prior acts of domestic violence for propensity purposes, both California Evidence Code (CEC) section 1109⁸⁴ and Alaska Rule of Evidence (ARE) 404(b)(4)⁸⁵

81. Kovach, *supra* note 36, at 1125; *see also* United States v. Enjady, 134 F.3d 1427, 1433-35 (10th Cir. 1998) (upholding FRE 413 in due process and equal protection challenges).

82. *See, e.g.*, CAL. EVID. CODE § 1108 (West 2006) (permitting the admission of a defendant's prior sexual offenses); IND. CODE ANN. § 35-37-4-15 (West 1998) (admitting evidence of similar crimes in prosecutions for child molestation, incest, and conspiracy to commit child molestation or incest); MO. REV. STAT. § 566.025 (2000) (permitting evidence of prior similar crimes in prosecutions for crimes involving victims under the age of fourteen).

83. Kovach, *supra* note 36, at 1125-26. Those states are California and Alaska. *See id.* at 1132-44.

84. CEC section 1109 reads as follows:

Evidence of defendant's commission of other acts of domestic violence.

(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

....

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.

(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

(d) As used in this section:

(1) "Abuse of an elder or dependent person" means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering.

explicitly provide for the admissibility of prior acts of domestic violence by a defendant for propensity purposes in domestic violence cases.

1. *California's Exception to the Ban on Character Evidence in Domestic Violence Cases*

The California State Assembly passed a law in 1996 that waived the ban on propensity evidence in prosecutions of domestic violence.⁸⁶ Later codified in CEC section 1109 (Section 1109), it is often referred to as the "Nicole Brown Simpson Law" because its sponsors were outraged by the exclusion of prior acts evidence in the murder trial of O.J. Simpson.⁸⁷ Section 1109, modeled after CEC section 1108 (Section 1108),⁸⁸ permits the introduction of evidence of the defendant's commission of prior domestic violence if the evidence is not made inadmissible under CEC section 352 (Section 352).⁸⁹ Section 1109 applies to the defendant's

(2) "Child abuse" means an act proscribed by Section 273(d) of the Penal Code.

(3) "Domestic violence" has the meaning set forth in Section 13700 of the Penal Code. . . .

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

(f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section.

CAL. EVID. CODE § 1109 (West 2006).

85. ARE 404 reads as follows:

(b) Other Crimes Wrongs or Acts.

.....

(4) In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, "domestic violence" and "crime involving domestic violence" have the meanings given in AS 18.66.990.

ALASKA R. EVID. 404(b)(4).

86. Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 701 (2003).

87. *Id.* at 701-02.

88. Section 1108 provides an identical exception for the admission of sexual offenses in sexual assault cases. Kovach, *supra* note 36, at 1136.

89. See CAL. EVID. CODE § 1109 (West 2006). Section 352 is modeled after FRE 403 and states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its

uncharged prior acts of domestic violence against either the same victim⁹⁰ or different victims.⁹¹ It defines domestic violence as “abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.”⁹² Although this definition does not specifically mention rape as an act of domestic violence, rape is included under Section 1109.⁹³ Evidence of acts occurring more than ten years before the charged offense is inadmissible under this section, unless the court determines that the admission of such evidence is in the interest of justice.⁹⁴

Section 1109 has been upheld against constitutional challenges. In *People v. Johnson*,⁹⁵ a California Court of Appeal held that admission of evidence of a defendant’s prior domestic violence was not a violation of due process when the evidence was admitted in a prosecution involving domestic violence.⁹⁶ The court ruled Section 1109 constitutional under the same reasoning used by the California Supreme Court in

admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” CAL. EVID. CODE § 352 (West 1995 & Supp. 2006).

90. See *People v. Hoover*, 77 Cal. App. 4th 1020, 1026 (Ct. App. 2000) (finding that the trial court correctly admitted evidence of defendant’s previous uncharged acts of domestic violence against the same victim under Section 1109).

91. See *People v. Brown*, 77 Cal. App. 4th 1324, 1332 (Ct. App. 2000) (finding that the trial court’s admission of evidence of defendant’s previous violent acts toward two other girlfriends pursuant to Section 1109 did not violate defendant’s right to due process).

92. CAL. PENAL CODE § 13700(b) (West 2000 & Supp. 2006). “‘Abuse’ means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.” *Id.* § 13700(a). “[C]ohabitant’ means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. *Id.* § 13700(b).

93. See *People v. Poplar*, 70 Cal. App. 4th 1129, 1139 (Ct. App. 1999) (holding that when prosecution charged defendant with rape of defendant’s girlfriend, evidence of defendant’s domestic violence committed against former girlfriends were admissible, even though Section 1109 and California Penal Code section 13700 do not specifically mention rape as an act of domestic violence).

94. CAL. EVID. CODE § 1109(e) (West 2006).

95. *People v. Johnson*, 77 Cal. App. 4th 410 (Ct. App. 2000).

96. See *id.* at 417-18; see also *People v. Hoover*, 77 Cal. App. 4th 1020, 1026 (Ct. App. 2000) (holding that Section 1109 does not violate the Due Process Clause).

People v. Falsetta.⁹⁷ In *Falsetta*, the court determined that Section 1108 does not violate due process by allowing the admission of a defendant's prior sex offenses in a sexual offense prosecution.⁹⁸ The court in *Falsetta* stated: "[t]he legislature has determined the need for [prior acts evidence] is critical given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial."⁹⁹ The rationale underlying that opinion applied to Section 1109 as well "since the two statutes are virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence."¹⁰⁰ Similarly, the *Johnson* court deferred to the legislature's determination that the policy considerations favoring the exclusion of evidence of the defendant's prior acts of domestic violence in domestic violence cases are outweighed by the policy considerations favoring the admission of such evidence.¹⁰¹

In *People v. Jennings*,¹⁰² a California Court of Appeal held that admission of prior acts of domestic violence under Section 1109 did not violate a defendant's right to equal protection and that the trial judge had no *sua sponte* duty to give a limiting instruction as to that evidence. In *Jennings*, the defendant argued that by treating those accused of domestic violence differently from those accused of other criminal offenses, Section 1109 violated his right to equal protection of the law.¹⁰³ Applying the analysis from *People v. Fitch*,¹⁰⁴ the court held that Section 1109 treats defendants charged with domestic violence equally; the only distinction the section makes is between domestic violence defendants

97. *People v. Falsetta*, 21 Cal. 4th 903 (1999).

98. *Id.* at 916.

99. *Id.* at 911 (internal citations omitted). In response to *Falsetta*'s arguments against the admission of propensity evidence, the court noted that Section 1108 was only limited to prior sex offenses in prosecutions for sex offenses (thus avoiding far ranging attacks), Section 1108 expressly allowed the trial court to exclude evidence under Section 352 (allowing the trial court to avoid mini-trials), and that Section 352 provided a safeguard against undue prejudice. *Hoover*, *supra* note 90, at 418-19 (citing *Falsetta*, 21 Cal. 4th, at 916).

100. *Johnson*, 77 Cal. App. 4th at 417; *see also Hoover*, 77 Cal. App. 4th at 1027 (also relying on *Falsetta* to uphold Section 1109).

101. *Johnson*, 77 Cal. App. 4th at 420.

102. *People v. Jennings*, 81 Cal. App. 4th 1301 (Ct. App. 2000).

103. *Id.* at 1309.

104. *People v. Fitch*, 55 Cal. App. 4th 172 (Ct. App. 1997) (upholding Section 1108 on equal protection grounds).

and defendants accused of other crimes.¹⁰⁵ The court stated: "The equal protection clause simply requires that, 'in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made.'"¹⁰⁶ In light of the special nature of domestic violence cases, the court concluded that the distinction drawn by Section 1109 between domestic violence offenses and all other offenses is clearly relevant to the evidentiary purposes for which the distinction was made.¹⁰⁷

2. *Alaska's Exception to the Ban on Character Evidence in Cases of Domestic Violence*

In 1997, the Alaska legislature passed ARE 404(b)(4), which provides that in "a prosecution for a crime involving domestic violence . . . evidence of other crimes involving domestic violence by the defendant against the same or another person . . . is admissible."¹⁰⁸ Like CEC section 1109, ARE 404(b)(4) specifically allows admission of a defendant's prior acts of domestic violence for propensity purposes.¹⁰⁹ The rule even admits prior acts of domestic violence when the charged offense is "interfering with a report of a crime involving domestic violence."¹¹⁰

Alaska's evidence rule provides many of the same procedural safeguards to defendants as found in CEC section 1109.¹¹¹ Prior acts of domestic violence are subject to the balancing test of the state counterpart of CEC section 352 and FRE 403, and thus are not automatically admissible.¹¹² Furthermore, ARE 404(b)(2) protects domestic violence defendants' rights by insisting that the evidence of prior acts must be less than ten years old from the date of the charged offense, must be similar to the charged offense, and must

105. *Jennings*, 81 Cal. App. 4th at 1311.

106. *Id.* (citing *Estelle v. Dorrough*, 420 U.S. 534, 538-39 (1975)).

107. *Id.* The *Jennings* court also held that Section 1109 does not violate a defendant's constitutional right to a fair trial. *Id.* at 1314 ("A careful weighing of prejudice against probative value under that section is essential to protect a defendant's due process right to a fundamentally fair trial.").

108. ALASKA R. EVID. 404(b)(4); *see also supra* note 85.

109. *Id.*

110. *Kovach, supra* note 36, at 1141.

111. *Id.* at 1142.

112. *Id.* at 1141.

have been committed upon persons similar to the victim.¹¹³

Alaska Rule of Evidence 404(b)(4) also withstood attacks on its constitutionality. In *Fuzzard v. State*,¹¹⁴ the trial court admitted the defendant's prior acts of domestic violence, which included breaking into the victim's apartment and pulling the phone from the wall when the victim tried to call the police.¹¹⁵ On appeal, the defendant argued that the admission of this evidence was a violation of due process and equal protection.¹¹⁶ The Alaska Court of Appeals stated that the Alaska state legislature enacted ARE 404(b)(4) with the intent to expand the use of propensity evidence in domestic violence cases in order to "resolve the difficult proof problems posed by conflicting accounts of domestic violence."¹¹⁷ Based on the legislature's intent, the court concluded that the evidence's tendency to show propensity could no longer be deemed unfairly prejudicial.¹¹⁸ In holding that ARE 404(b)(4) did not violate due process, the court relied on a recent decision in which it rejected the contention that propensity evidence was "invariably so prejudicial as to destroy any possibility of a fair trial."¹¹⁹ The court also held that ARE 404(b)(4) did not violate the defendant's right to equal protection because the defendant failed to show how the admission of prior acts evidence seriously infringed upon a constitutional right.¹²⁰

3. *The Current Scheme in the Majority of State Evidence Rules Regarding Cases of Domestic Violence*

Unlike California and Alaska, the majority of states have adopted evidence codes based on the Federal Rules of Evidence.¹²¹ Federal Rule of Evidence 404(b) allows for

113. ALASKA R. EVID. 404(b)(2); Kovach, *supra* note 36, at 1141.

114. *Fuzzard v. State*, 13 P.3d 1163 (Alaska Ct. App. 2000).

115. *Id.* at 1164.

116. *Id.*

117. *Id.* at 1167.

118. *Id.* The court also stated that "[Alaska] Rule 404(b)(4) has adequate safeguards to survive a facial due process challenge, [and that] the defendant's prior misconduct did not place him at unreasonable risk of conviction based on his earlier acts." *Id.*

119. *Id.* at 1166 (quoting *Allen v. State*, 945 P.2d 1233, 1238 (Alaska Ct. App. 1997)).

120. *Fuzzard*, 13 P.3d at 1168.

121. Kovach, *supra* note 36, at 1118. By 2000, these forty-one states had adopted codes based on the federal model: Alabama, Alaska, Arizona, Arkansas,

evidence of a defendant's prior acts of domestic violence to be admitted in domestic violence cases only when done so on a noncharacter theory.¹²² Therefore, in states that have adopted rules based on FRE 404(b), prosecutors are allowed to admit into evidence the defendant's prior acts of domestic violence to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.¹²³ Although evidence of other crimes might logically be relevant to the determination of guilt, FRE 404(b) excludes such evidence if it is offered only to prove propensity.¹²⁴ If the trial court determines that the proffered evidence is relevant under FRE 404(b), it must still evaluate the evidence's probative value versus its prejudicial effect pursuant to FRE 403.¹²⁵

States often narrowly construe the admissibility of prior acts under their counterpart rule to FRE 404(b).¹²⁶ For example, Illinois evidence rules, based on common law, support the traditional ban on admitting evidence of prior acts for propensity purposes.¹²⁷ Prior acts evidence is admissible for a range of other purposes, similar to those found in FRE 404(b).¹²⁸ Nevertheless, cases in Illinois illustrate the difficulty prosecutors have in properly admitting other domestic violence acts when the prior act is factually dissimilar from the charged incident.¹²⁹ Therefore,

Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 1118 n.17.

122. *See id.* at 1127-28. It is important to note, however, that Colorado, Kansas, and Minnesota have permitted evidence of prior acts of domestic violence to be admitted under noncharacter theories not specified in FRE 404(a), but under more expansive theories unique to their own state efforts to hold batterers accountable for domestic violence. *Id.* at 1144-48.

123. FED. R. EVID. 404(b).

124. *See supra* Part II.B.

125. FED. R. EVID. 404(b) Senate Judiciary Committee's note.

126. *See infra* Part IV.A.

127. *See People v. Kimbrough*, 485 N.E.2d 1292, 1295-96 (Ill. App. Ct. 1985) (holding that evidence of the defendant's other crimes or wrongful conduct was not admissible to show the defendant's character or propensity to commit a crime or wrongful act).

128. *See id.* at 1296.

129. *See infra* note 153 and accompanying text.

there are presumably a large number of domestic violence victims whose testimony of prior acts of domestic violence will never reach the jury because of the state's adherence to these strictly construed categories.¹³⁰

Hawaii has also stringently applied its state counterpart of FRE 404(b).¹³¹ Hawaii's Supreme Court overturned a number of cases because of the trial court's admission of prior crimes into evidence.¹³² In many of these cases, while the prosecutors appeared to meet the hurdles set forth by Hawaii Rule of Evidence (HRE) 404(b), the court still used its discretion to exclude prejudicial evidence.¹³³

III. IDENTIFICATION OF THE PROBLEM

Batterers are not being held accountable for their crimes of domestic violence because the majority of state evidence codes prohibit the admission of a defendant's prior acts of domestic violence for propensity purposes. The propensity inference is particularly appropriate in the area of domestic violence because of the on-going cycle of violence that is the norm in domestic violence cases.¹³⁴ One battering episode is likely to be just a small part of a larger scheme of dominance and control that increases in frequency and severity.¹³⁵ Without the propensity inference, the escalating nature of domestic violence is masked.¹³⁶

The majority of states allow evidence of prior acts to be admitted in domestic violence cases only when done so on a noncharacter theory, and not for propensity purposes.¹³⁷ Due

130. See *infra* note 153 and accompanying text.

131. Hawaii Rule of Evidence 404(b) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

HAW. R. EVID. 404(b); see also Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221, 231 (1998).

132. Lee, *supra* note 131, at 231.

133. See *infra* notes 165-83 and accompanying text.

134. See *supra* Part II.A.

135. De Sanctis, *supra* note 70, at 388.

136. *People v. Hoover*, 77 Cal. App. 4th 1020, 1028 (Ct. App. 2000).

137. See *supra* note 121.

to the difficulties in admitting prior acts of domestic violence under these noncharacter theories, states are not adequately protecting victims of domestic violence.¹³⁸ The admissibility of prior acts of domestic violence for propensity purposes is necessary in order to deter future abusive behavior by holding batterers accountable for their actions.

IV. ANALYSIS

A. The Majority of State Evidence Rules Unduly Restrict Admission of Evidence of Prior Acts of Domestic Violence

Admitting evidence of prior acts on noncharacter theories¹³⁹ proves difficult for domestic violence prosecutors because courts often refuse to admit such evidence unless one of the recognized exceptions is clearly met.¹⁴⁰ Additionally, the narrow openings through which evidence of prior acts may be admitted under FRE 404(b) “do not reflect the realities of domestic violence.”¹⁴¹ Domestic violence cases usually encompass a broad range of uniquely violent and controlling acts which are dissimilar in their facts, such as being slapped, kicked, pushed, choked, sexually assaulted, shoved, or chased.¹⁴² The problem with FRE 404(b) is that the noncharacter theories of admissibility require factual similarity.¹⁴³ For example, for an uncharged crime to be admissible under the theory of intent, the mental state of the defendant must be in dispute and the uncharged crime and the charged crime must be “sufficiently similar to support the inference that the defendant ‘probably harbored the same intent in each instance.’”¹⁴⁴ While repeated acts of battering are similar in concept, as a part of the cycle of violence to regain control and power, they are rarely similar in fact and are thus unlikely to be admitted under this theory.¹⁴⁵

138. See *infra* Part IV.A.

139. These theories include intent, plan, and identity. FED. R. EVID. 404(b).

140. See, e.g., *infra* note 153 and accompanying text.

141. Kovach, *supra* note 36, at 1129 (internal citations omitted). Since most state evidence codes are modeled after the Federal Rules of Evidence, this section will refer to FRE 404.

142. *Id.*

143. *Id.*

144. De Sanctis, *supra* note 70, at 376 (quoting *People v. Ewoldt*, 867 P.2d 757, 770 (Cal. 1994)).

145. *Id.*

Similar problems occur regarding the other theories listed in FRE 404(b).¹⁴⁶ Acts admitted on the basis of a common plan or scheme are admissible only when the defendant's bad acts bear a significant similarity to the defendant's alleged actions in the charged crime such that the "similarity is not merely coincidental, but indicate[s] that the conduct was directed by design."¹⁴⁷ The identity theory, which requires the highest degree of similarity between the uncharged act and the charged crime,¹⁴⁸ is also not very useful in domestic violence cases. "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts."¹⁴⁹

If prosecutors are able to introduce evidence of prior acts based on one of the narrowly construed theories of FRE 404(b), they face yet another obstacle. For an uncharged act of domestic violence to be admitted into evidence under a state law similar to FRE 404(b), it must also pass the balancing test of the state counterpart of FRE 403.¹⁵⁰ To pass the balancing test, the uncharged act must be determined to have a degree of probative value that is not substantially outweighed by its prejudicial effect.¹⁵¹

Illinois and Hawaii's evidence rules, like the majority of state evidence rules, are modeled closely after the Federal Rules of Evidence and admit prior acts evidence for the range of purposes found in FRE 404(b).¹⁵² The Illinois case of *People*

146. See *id.* at 376-78 (noting that acts admitted under the plan and identity theory require a high degree of similarity which is often not the case in domestic violence cases).

147. *State v. Lough*, 125 P.2d 487, 494 (Wash. 1995); see also *People v. Ewoldt*, 27 Cal. Rptr. 2d 646, 764 (1994) (explaining that in establishing a common design or plan, evidence of uncharged conduct must demonstrate a "concurrence of common features" so that the "various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations").

148. *Ewoldt*, 27 Cal. Rptr. at 659.

149. *Id.*; see also MCCORMICK, *supra* note 55, § 190, at 284 (stating that for identity to be established, "[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature").

150. See *supra* note 50 and accompanying text.

151. FED. R. EVID. 403.

152. See *supra* notes 127-33 and accompanying text.

*v. Knight*¹⁵³ illustrates the difficulty involved in prosecuting domestic violence cases when the uncharged act is factually dissimilar from the charged crime. In *Knight*, the defendant was charged with aggravated criminal sexual assault and two counts of domestic battery.¹⁵⁴ The victim testified that after she made a comment about a previous relationship, the defendant began to beat her.¹⁵⁵ According to the victim, the defendant grabbed the front of her shirt, threw her across the living room, banged her head on the floor, kicked and punched her, and pulled her up the stairs by her hands and wrists.¹⁵⁶ The victim alleged that the defendant then sexually assaulted her.¹⁵⁷ The jury convicted the defendant on both counts of domestic battery.¹⁵⁸ However, the appellate court reversed the defendant's conviction due to the admission of a statement made by the defendant to the victim six weeks after the charged incident.¹⁵⁹ He told the victim that "if [she] ever slept with one of his friends again, he would break [her] legs and kill [her] . . ."¹⁶⁰ The appellate court held that this statement was irrelevant and that the "jury likely considered it only as showing a propensity on defendant's part to commit crime."¹⁶¹ Due to the factual dissimilarity between the charged incident and the other statement, the theories of motive or pattern of conduct were not applicable.¹⁶² The intent theory also did not apply since the defendant's state of mind was not at issue.¹⁶³

Hawaii's application of Hawaii Rule of Evidence (HRE) 404(b) has also been stringent.¹⁶⁴ Even if prior acts evidence is admissible under HRE 404(b), the court still has discretion to exclude the evidence if its probative value is substantially outweighed by its unfair prejudicial effect.¹⁶⁵ In performing

153. *People v. Knight*, 722 N.E.2d 331 (Ill. App. Ct. 1999).

154. *Id.* at 332.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 332.

159. *Knight*, 722 N.E.2d at 335.

160. *Id.* at 333.

161. *Id.* at 335.

162. *Id.* at 334.

163. *Id.*

164. *Lee*, *supra* note 131, at 231. HRE 404(b) is closely modeled after FRE 404(b).

165. *See* HAW. R. EVID. 403; *see also Lee*, *supra* note 131 at 231-35.

this balancing test, the court takes into consideration the need for the evidence, alternative methods of proof, and remoteness in time.¹⁶⁶ It is often the case that the court excludes prior acts evidence as too prejudicial.¹⁶⁷ For example, in *State v. Castro*,¹⁶⁸ the trial court admitted evidence that the defendant, charged with the attempted murder of his girlfriend, had previously "slapped her, punched her, threatened her while wielding a knife, held a gun to her head, raped her, and threatened her on the telephone."¹⁶⁹ On appeal, while the court acknowledged that prior bad act evidence was relevant in the establishment of the defendant's intent, the conviction was overruled because the evidence was unduly prejudicial.¹⁷⁰ The court stated that the evidence was likely to "weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."¹⁷¹

In *State v. Pintero*,¹⁷² the Hawaii Supreme Court held that a year-old incident was too remote from the charged crime to be admissible under HRE 404(b), even though the prior bad act was remarkably similar to the charged crime.¹⁷³ The defendant was charged with first degree murder for shooting a police officer who was attempting to serve a temporary restraining order upon him.¹⁷⁴ The defendant allegedly grabbed the officer's revolver in a struggle and shot and killed the officer.¹⁷⁵ On a previous occasion, at the same location and under similar circumstances, the defendant grabbed the revolver of another officer who was also attempting to serve the defendant with a court order.¹⁷⁶ At trial, the State offered this evidence under HRE 404(b) to disprove the defendant's claim of accident.¹⁷⁷ Although the evidence was relevant, the

166. Lee, *supra* note 131, at 234-35.

167. *Id.* at 235.

168. *State v. Castro*, 756 P.2d 1033 (Haw. 1988).

169. *Id.* at 1039-40.

170. *See id.* at 1042.

171. *Id.* (citing *Michelson v. United States*, 335 U.S. 469, 476 (1948)).

172. *State v. Pintero*, 778 P.2d 704 (Haw. 1989).

173. *See id.* at 711.

174. *Id.* at 708.

175. *Id.*

176. *Id.* at 709.

177. *Id.*

Hawaii Supreme Court held that the trial court's admission of this prior act was an abuse of discretion due to its unduly prejudicial effect.¹⁷⁸ In cases of domestic violence, where it is often the case that prior acts of domestic violence occur more than a year before the charged incident, such a stringent application of this rule will exclude highly relevant prior acts of abuse.

Finally, in *State v. Pemberton*,¹⁷⁹ the Hawaii Supreme Court again found evidence of a prior similar act to be inadmissible under HRE 404(b).¹⁸⁰ The State presented evidence that the defendant, on trial for an alleged stabbing incident, had provoked a fight using a knife just a few weeks prior to the charged offense.¹⁸¹ Although the trial court only admitted the evidence for impeachment purposes, on appeal, the State proffered the same evidence as relevant to the defendant's state of mind at the time of the offense and to rebut his claim of self defense.¹⁸² Despite its closeness in time and similarity to the charged crime, the Hawaii Supreme Court held the prior evidence inadmissible because it "could only prejudice [the] [d]efendant by showing [his] propensity towards provoking fights with a knife: the very inference HRE 404 was meant to prohibit."¹⁸³

As the cases point out, courts have great discretion to exclude evidence so unfairly prejudicial that it substantially outweighs its probative value. This seems to be the usual result in domestic violence cases due to the highly prejudicial nature of prior acts evidence.¹⁸⁴ Nevertheless, while CEC section 1109 is subject to a similar balancing test, courts have taken into consideration the legislature's intent in enacting a statute that admits prior acts for the purpose of showing propensity in domestic violence cases.¹⁸⁵ In enacting Section

178. See *Pinero*, 778 P.2d at 710-11.

179. *State v. Pemberton*, 796 P.2d 80 (Haw. 1990).

180. *Id.* at 83.

181. *Id.* at 82.

182. *Id.* at 83.

183. *Id.*

184. See *Lee*, *supra* note 131, at 235.

185. See *People v. Soto*, 64 Cal. App. 4th 966, 984 (Ct. App. 1998) (discussing the analogous CEC section 1108). The *Soto* court stated:

[E]vidence offered under [Section] 1108 could not be excluded on the basis of [Section] 352 unless "the probability that its admission will . . . create substantial danger of undue prejudice" . . . substantially outweighed its probative value As with other forms of relevant

1109, the California Legislature concluded that evidence of a defendant's prior acts of domestic violence is sufficiently probative to override the obvious prejudice to a defendant, rendering such evidence admissible in new prosecutions involving domestic violence against the same defendant.¹⁸⁶

B. Arguments in Favor of a New Evidence Rule that Provides for the Admissibility of Prior Acts of Domestic Violence for Propensity Purposes

As described above, prosecutors face great difficulty in admitting prior acts of domestic violence under FRE 404(b)'s noncharacter theories. Due to the factual dissimilarities of domestic violence incidents and the court's discretion to exclude prejudicial evidence, an evidence rule allowing the admission of prior acts for the purpose of showing propensity would give the fact finder a more complete and accurate picture of the defendant's ongoing abuse. Furthermore, there are additional reasons to adopt such a rule.

1. Prior Acts of Domestic Violence Are Probative in Showing a Batterer Committed the Charged Crime

The Federal Rules have recognized that certain evidence should be admissible in sexual offense cases to show propensity because its probative value sufficiently outweighs its prejudicial effect.¹⁸⁷ Prior acts of domestic violence are also sufficiently probative to substantially outweigh the unfair prejudicial effect of such evidence.¹⁸⁸ In fact, evidence of prior domestic violence is more probative for showing that a defendant committed the crime than it is in sexual assault cases because the recidivism rate of domestic violence batterers is higher than that of sexual abuse offenders.¹⁸⁹ "The American Medical Association found that 47 [percent] of

evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission.

Id.

186. *Id.* at 983-84.

187. *See supra* Part II.C.

188. *See* Linell A. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973 (2000).

189. *Id.* at 998.

batterers who beat their intimate partners do so at least three times a year, while the recidivism rate for sexual offenders is only 7.7 [percent] within three years.”¹⁹⁰ The high recidivism rate of batterers is likely due to the larger scheme of dominance and control occurring in most relationships that involve domestic violence.¹⁹¹

2. *Prior Acts of Domestic Violence Will Help Jurors Evaluate Victim Credibility and Eliminate Juror Bias*

Like victims of sexual assault and child molestation, domestic violence victims are often the only witnesses to the crime, thereby making the victim’s credibility central to a prosecutor’s case.¹⁹² However, it is often the case that domestic violence victims recant prior statements about abuse or are unwilling to testify.¹⁹³ “Allowing evidence of prior bad acts [would] help alleviate the difficult credibility problems in domestic violence cases.”¹⁹⁴

If a victim or witness testifies for the prosecution, admission of prior acts will help jurors properly evaluate the victim’s credibility.¹⁹⁵ Most jurors do not understand the complicated relationship between the batterer and victim, and may blame the victim for not leaving the abusive relationship.¹⁹⁶ Without corroborating evidence of prior abuse, jurors are often reluctant to believe a victim’s testimony.¹⁹⁷ Therefore, the admission of acts of prior abuse will help eliminate juror bias and allow jurors to view evidence from an unbiased perspective.¹⁹⁸

190. *Id.*

191. *See supra* Part II.A.

192. Letendre, *supra* note 188, at 999.

193. *Id.* “The victim’s reluctance may be due to a number of factors such as intimidation by the defendant, including threats of retaliation, susceptibility to the batterer’s promises to cease abuse, cultural or family pressures, or uncertainty whether she will be believed or that her batterer will be held accountable.” Kovach, *supra* note 36, at 1126.

194. Letendre, *supra* note 188, at 999.

195. *See id.*

196. *See id.* Many victims wish to leave abusive relationships, but do not have the means to do so. For example, it is not uncommon for a batterer to gain control over the victim’s financial assets and isolate the victim. Vilhauer, *supra* note 2, at, 959-960.

197. Letendre, *supra* note 188, at 999.

198. *Id.*

According to survey comments and interviews with California prosecutors, CEC section 1109 has proved invaluable in convicting recidivist batterers.¹⁹⁹ Evidence of prior acts assists jurors in their decision making by showing that a person with a history of battering is likely to have battered in the current offense.²⁰⁰ Additionally, the defendant's prior violent acts corroborate the victim's testimony in the current trial.²⁰¹ When the prosecution is able to call prior domestic violence victims as witnesses to support the current victim, defendants are less likely to get away with fabricating the testimony.²⁰²

Alaska Rule of Evidence 404(b)(4) has also strengthened prosecutors' ability to prove instances of domestic violence.²⁰³ Prosecutors state that ARE 404(b)(4) holds defendants accountable for their actions by keeping the "focus [on] the truth-seeking process."²⁰⁴ In one case, the defendant, a recidivist batterer, kidnapped and beat up his girlfriend, who had a substance abuse problem.²⁰⁵ The prosecutor admitted the medical records of the defendant's ex-wife, who had previously been beaten by the defendant.²⁰⁶ The medical records corroborated the victim's testimony of the defendant's repeated abuse and assisted the jury in looking past the victim's substance abuse problem and convicting the defendant.²⁰⁷

3. *Prior Acts of Domestic Violence Will Help Prevent Future Violence by Providing an Incentive for Batterers to Seek Treatment*

Holding batterers accountable is also important in preventing future abuse. In order to stop the cycle of violence, batterers must be punished for their abusive behavior and undergo counseling concerning their repetitive violent actions.²⁰⁸ The virtual certainty that prior acts of

199. Kovach, *supra* note 36, at 1138.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1143.

204. *Id.*

205. Kovach, *supra* note 36, at 1143.

206. *Id.*

207. *Id.*

208. Letendre, *supra* note 188, at 1003.

domestic violence will be used against them in future cases provides a needed incentive for batterers to seek treatment.²⁰⁹ Additionally, evidence rules allowing victims to testify about prior abuse may encourage victims to report domestic violence.²¹⁰

V. PROPOSAL

In order to adequately protect victims of domestic violence, this comment urges every state to enact an evidence rule that allows the admission of a defendant's prior acts of domestic violence for propensity purposes.²¹¹ States should model such evidence rules after CEC section 1109 and ARE 404(b)(4).²¹² The proposed rule does not restrict a jury's consideration of the evidence to those enumerated categories of FRE 404(b), but instead enables a jury to consider such evidence for any relevant purpose, including propensity. Admissible evidence of prior acts of domestic violence includes any act between partners that satisfies the state's definition of domestic violence.²¹³ Additionally, the proper standard for proving that past conduct occurred under this rule is by a preponderance of the evidence.²¹⁴

The proposed rule also includes safeguards to ensure a fair trial for the defendant and to guard against the historical concerns of admitting prior misconduct. Evidence of a defendant's prior acts of domestic violence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury.²¹⁵ This determination is entrusted to the sound discretion of the trial

209. *Id.*

210. *Id.*

211. *See, e.g.,* ALASKA R. EVID. 404(b)(4); CAL. EVID. CODE § 1109 (West Supp. 2006).

212. *See supra* notes 84-85.

213. *See, e.g.,* CAL. EVID. CODE § 1109(d) (West Supp. 2006) (stating that "domestic violence" has the meaning set forth in section 13700 of the California Penal Code). The California Penal Code defines domestic violence as "abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." CAL. PENAL CODE § 13700 (West 2000 & Supp. 2006).

214. *See e.g.,* *People v. Hoover*, 77 Cal. App. 4th 1020, 1030 (Ct. App. 2000).

215. *See, e.g.,* CAL. EVID. CODE § 352 (West 1995 & Supp. 2006).

judge, who is in the best position to evaluate the evidence. However, to prevent the result that all prior acts of domestic violence will be excluded because of its obvious prejudice to the defendant, the proposed rule must explicitly state that *it is presumed that the probative value of prior abuse evidence is not substantially outweighed by the probability that the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury.* The defendant must rebut this presumption in order to exclude prior acts of abuse under this balancing test.²¹⁶ Furthermore, if the defendant is able to rebut this presumption, the prosecution may then attempt to admit a less prejudicial version of the prior abuse.²¹⁷ This evidence is subject to the same balancing test.

Additionally, prior to trial, the prosecution is required to provide a defendant with adequate notice of the intended use of such evidence and any statements of witnesses concerning the prior bad act.²¹⁸ To ensure the probative nature of the prior bad acts, this rule also requires that admission of evidence be limited to those acts occurring within a specified time period, such as ten years.²¹⁹

The policy arguments that persuaded Congress to alter the Federal Rules of Evidence regarding prior acts of sexual assault and child molestation offenses apply equally, if not more so, to domestic violence cases.²²⁰ As was the case in the prosecution of sex offense crimes before Congress enacted

216. While Section 1109 does not explicitly define this as the appropriate test, case law regarding the analogous Section 1108 has suggested a similar result by considering the legislature's intent in enacting such a rule. *See People v. Soto*, 64 Cal. App. 4th 966, 983-84 (Ct. App. 1998); *see also People v. Harris*, 60 Cal. App. 4th 727, 737-40 (Ct. App. 1998) (recognizing that different considerations regarding the factors of Section 352 apply in the context of Section 1108). However, to ensure that all courts follow this presumption, it should be explicitly stated in the rule.

217. For example, the prosecution may attempt to admit the fact that defendant previously abused the victim without admitting the brutal details, photographs, etc.

218. *See, e.g., CAL. EVID. CODE* § 1109(b) (West 2006) (“[T]he people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.”).

219. *See, e.g., id.* § 1109(e) (“Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.”).

220. *See supra* Part II.C.

FRE 413, 414, and 415, admitting prior acts of evidence on noncharacter theories proves difficult for domestic violence prosecutors.²²¹ The proposed rule eliminates this difficulty by admitting prior acts evidence for the explicit purpose of showing propensity. Additionally, the high recidivism rate among defendants committing these types of crimes makes prior acts probative of a defendant's propensity to have committed the current charged crime.²²² The proposed rule is even more justified in the domestic violence context since the recidivism rate of domestic violence batterers is higher than that of sexual abuse offenders.²²³

Furthermore, the need to counteract juror biases against victims²²⁴ and deter future acts of violence justifies the proposed rule.²²⁵ The complex relationship between the victim and perpetrator in both sexual abuse and domestic violence cases, "with their unusually private and intimate context," distinguishes these offenses from others.²²⁶ This is especially true in domestic violence cases, where jurors often do not understand the complicated relationship between the victim and batterer, and may place the blame on the victim.²²⁷ The proposed rule would eliminate such bias by corroborating the victim's testimony with the batterer's prior acts of domestic violence. By corroborating the victim's testimony with the batterer's prior acts, victims would also be more willing to bring charges against their batterers while providing a much needed incentive for batterer's to seek counseling.²²⁸

VI. CONCLUSION

Countless victims are physically abused by their partners every day. Yet the majority of state judicial systems continue to ignore this problem by prohibiting the admission of prior acts of domestic violence for propensity purposes, creating hurdles for prosecutors attempting to convict batterers. The

221. *See supra* Part IV.A.

222. *See supra* Part IV.B.1.

223. *See supra* note 189 and accompanying text.

224. *See supra* Part IV.B.2.

225. *See supra* Part IV.B.3.

226. *People v. Jennings*, 81 Cal. App. 4th 1301, 1313 (Ct. App. 2000).

227. *See supra* note 195-96 and accompanying text.

228. *See supra* notes 208-10 and accompanying text.

California Legislature recognized the dangers inherent in such a system and stated that “if we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner.”²²⁹ In order to hold batterers accountable for their actions, states must adopt evidence rules that admit evidence of prior acts of domestic violence for the explicit purpose of showing propensity. CEC section 1109 and ARE 404(b)(4) demonstrate a successful balance between the search for truth and the defendant’s rights. It is time for every state to follow in these footsteps to help end the cycle of domestic violence.

229. *People v. Hoover*, 77 Cal. App. 4th 1020, 1028 (Ct. App. 2000) (quoting ASSEMB. COMM. PUBLIC SAFETY, S. REP. No. 1876, at 3-4 (1996)).