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The Evidentiary Rules of Engagement in the War against Domestic Violence

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ARTICLES

THE EVIDENTIARY RULES OF ENGAGEMENT IN THE WAR AGAINST DOMESTIC VIOLENCE

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Our criminal justice system promises defendants a fair and just adjudication of guilt, regardless of the character of the alleged offense. Yet, from mandatory arrest to "no-drop" prosecution policies, the system's front-end response to domestic violence reflects the belief that it differs from other crimes in ways that permit or require the adaptation of criminal justice response mechanisms. Although scholars debate whether these differential responses are effective or normatively sound, the scholarship leaves untouched the presumption that, once the adjudicatory phase is underway, the system treats domestic violence offenses like any other crime.

This Article reveals that this presumption is false. It demonstrates that many jurisdictions have adopted specialized evidence rules that authorize admission of highly persuasive evidence of guilt in domestic violence prosecutions that would be inadmissible in other criminal cases. These jurisdictions unmoor evidence rules from their justificatory principles to accommodate the same iteration of domestic violence exceptionalism that underlies specialized front-end criminal justice policies. The Article argues that even though such evidentiary manipulation may be effective in securing convictions, enlisting different evidence rules in our war on domestic violence is unfair to defendants charged with such offenses and undermines the integrity of the criminal justice system. It also harms some of the people the system seeks to protect by both reducing the efficacy of the criminal justice intervention and discrediting those complainants who do not support prosecution.

 Acting Assistant Professor, New York University School of Law. Many thanks to Bennett Capers, Leigh Goodmark, Aya Gruber, Claire Houston, Kate Levine, Holly Maguigan, Erin Murphy, Stephen Schulhofer, and Jocelyn Simonson for helpful comments and conversations. This Article also benefited from comments from Miriam Baer, Nina Chernoff, and Anders Kaye at the ABA Criminal Justice Section Faculty Workshop, and from the NYU Lawyering faculty at the Lawyering Scholarship Colloquium. Christopher Van Zele and Laura Wilson-Youngblood provided excellent research assistance.

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INTRODUCTION

> *This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.*[1]

> *[W]e have treated evidence that illuminates the history of the relationship between an accused and a victim [in a domestic violence prosecution] differently . . . . We believe this different treatment is appropriate in the context of the accused and the alleged victim of domestic abuse.*[2]

Although many laud the criminal justice system for treating domestic violence the same as all other crimes,[3] in fact the strategies used to police and prosecute domestic violence are quite different from those used in response to other crimes. A report of domestic violence triggers a series of unique responses, including mandatory arrest and "no-drop" prosecution policies[4] and specialized investigation practices that facilitate prosecution without the complainant's support. The purported aim of these differential arrest, investigatory,

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[1] United States v. Salerno, 505 U.S. 317, 322 (1992).
[2] State v. McCoy, 682 N.W.2d 153, 161 (Minn. 2004).
[3] *See infra* note 61.
[4] *See infra* Part I.

and charging practices is to increase the number of domestic violence cases that enter the adjudicatory system where domestic violence will be treated "like every other case."[5]

It was unsurprising, therefore, that the Supreme Court rejected the suggestion that it adopt a "special, improvised" Confrontation Clause for domestic violence prosecutions in *Giles v. California*.[6] The majority specified that legislatures may "combat" domestic violence through "many means," but "abridging the constitutional rights of criminal defendants is not in the State's arsenal."[7] Invoking the rhetoric of battle, the Court confirmed that we are at "war" against domestic violence, but clarified that there are specific rules of engagement in this war, and compromising defendants' constitutional rights violates these rules.[8]

Yet, while *Giles* prohibits the relaxation of constitutional protections for those accused of domestic violence, the decision authorizes—and seems to encourage—the relaxation of evidentiary standards in such prosecutions. Responding to concerns about the obstacles the ruling would erect in domestic violence prosecutions, the Court emphasized that the decision's reach was rather limited, since it applied "only" to those testimonial statements that implicate the Confrontation Clause.[9] Nontestimonial statements, such as statements to friends or neighbors about "abuse and intimidation" and statements to medical providers, would be excluded "if at all, only by hearsay rules," and states remained "free to adopt" less stringent for-

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[5] *See* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 611–12 (2007) ("Even when procedural reforms like mandatory arrest policies treated domestic violence cases differently, it was with the aim of moving the cases into the system where they could be judged under the criminal law like every other case."). For a discussion of how mandatory arrest and "no-drop" prosecution policies emerged to redress the historical reluctance of police and prosecutors to pursue cases involving domestic violence, see LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 107–13 (2012).

[6] Giles v. California, 554 U.S. 353, 376 (2007). The issue presented in *Giles*, a domestic homicide prosecution, was whether the forfeiture by wrongdoing exception to the Confrontation Clause required proof that the defendant acted with the intent to prevent the witness from testifying. *Id.* at 355. What *was* surprising about *Giles* was the apparent willingness of the three dissenting Justices to adapt the Court's Confrontation Clause jurisprudence to alleviate the practical difficulties in securing convictions in domestic violence prosecutions. *See id.* at 376 ("The dissent closes by pointing out that a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships—or at least particularly helpful in punishing their abusers."). For further discussion, see *infra* Part II.C.

[7] *Giles*, 554 U.S. at 376.

[8] *Id.*

[9] *Id.*

feiture standards for the admission of such hearsay.[10] Thus, even after *Giles*, the adoption of targeted, specialized evidence rules aimed at securing convictions remains firmly within the arsenal of weapons the government may use to fight domestic violence.

Surprisingly, although domestic violence law and policy has generated abundant scholarly attention, the question of whether states do or should enlist evidentiary doctrine to combat domestic violence remains largely undertheorized. Scholars have offered competing normative arguments about the proper role of the criminal justice system in responding to domestic violence[11] and the merits of policies that encourage or mandate arrest and prosecution of domestic violence offenses.[12] Some support a criminalization model, which prioritizes a strong criminal justice response over other alternatives, and suggest that the criminal law should expand further to address domestic violence.[13] Others criticize this model and suggest that the response to domestic violence should extend beyond the criminal justice arena,[14] or bypass it altogether.[15]

And yet, while the literature provides diverse perspectives on the back-end efficacy of the criminalization model and the propriety of the front-end mandatorization of the government's response in service of that solution, scholars have paid relatively little attention to what

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[10] *Id.*; *see also* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . .").

[11] *See* Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 323–26 (2013) (summarizing competing views of criminalization).

[12] *Compare* GOODMARK, *supra* note 5, at 118–24 (critiquing mandatory policies for depriving complainants of autonomy and agency), *with* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996) (concluding that the "societal benefits gained" from mandatory policies "far outweigh any short-term costs to women's autonomy and collective safety"). For an overview of these competing perspectives, see ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 184–88 (2000).

[13] *See, e.g.*, Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962 (2004) (calling for a "reconceptualization of the crime of domestic violence" that "accurately reflects its true nature and harm").

[14] *See, e.g.*, GOODMARK, *supra* note 5, at 178–97 (describing a range of possible responses to domestic violence "beyond the law" including restorative justice, increased economic stability, engagement with abusive men, and community accountability); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 163 (2012) (critiquing the criminalization model for presenting a criminal justice response in "isolation from other possible responses" instead of as "part of a menu of options for women who are harmed by male violence" and offering alternative responses).

[15] Linda G. Mills, for example, advocates for a restorative justice approach to domestic violence. LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSE TO INTIMATE ABUSE 134, 140 (2003).

happens in "the middle," specifically whether and to what extent evidence rules are manipulated to support prosecutions of domestic violence offenses. They largely overlook the process of proof and instead focus on how the state should respond to domestic violence.[16]

The few scholars who have considered evidentiary doctrine in domestic violence prosecutions have universally criticized the application of traditional, transsubstantive evidence rules and standards in domestic violence prosecutions and advocated for the adoption of specialized evidence rules that reflect the realities of domestic violence.[17] Emanating from a theoretical perspective that supports the criminalization model, these analyses identify targeted and more permissive evidence rules as appropriate, and underutilized, weapons in the war against domestic violence.[18]

This Article challenges aspects of this conventional wisdom. It argues not only that courts and legislatures already manipulate rules of evidence in domestic violence prosecutions, but also that in so doing they undermine the integrity of the criminal justice system and the efficacy of criminal justice intervention. This Article offers a perspective largely overlooked in existing literature: critical attention to the evidentiary standards used to prosecute male defendants accused of domestic violence.[19] Taking a broad view of the national eviden-

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[16] The notable exception to this oversight of trial rules and procedures is the abundant attention to the Confrontation Clause in domestic violence prosecutions after *Crawford v. Washington*. *E.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 749–55 (2005); Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311–15 (2005).

[17] *See, e.g.*, Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 819 (1997) (arguing that prosecutors "are genuinely burdened with evidentiary rules that do not reflect the realities of domestic violence" and proposing "broadening the evidentiary standard of relevancy in domestic violence cases"); 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, 366 (1996) (proposing to "bridge the gap between following the rules of evidence and serving justice for victims of domestic violence" through the adoption of a "specialized evidentiary rule for the admissibility of uncharged offenses of domestic violence in domestic violence prosecutions"); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond*, 69 S. CAL. L. REV. 1463, 1516 (1996) (proposing a "[d]omestic [v]iolence [h]earsay exception"); Tuerkheimer, *supra* note 13, at 990 (critiquing evidence rules for "mut[ing] stories of battering").

[18] *See, e.g.*, Raeder, *supra* note 17, at 1485 (identifying "appropriate evidentiary rules" as one of the changes that will "diminish the untold suffering of women and the silent victims—their children"); Comment, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221, 223 (1998) (advocating the adoption of a "special rule allowing evidence of prior abuse in domestic violence cases" as an essential step toward "ending the continuing cycle of domestic violence").

[19] By contrast, many have analyzed the development of new evidentiary concepts and theories of relevancy to defend women accused of killing their abusive male partners. *See,*

tiary landscape, it identifies evidence rules and standards that have been unmoored from their justificatory principles in order to reflect prevailing presumptions about domestic violence and the harms that result from such consequentialist manipulation.[20] Drawing on anti-essentialist feminist insights, it demonstrates how the manipulation of evidence rules works to the detriment of some complainants[21] by overriding the explanations and experiences of those whose lived realities do not fit within the prevailing narrative of domestic violence or do not support the presumption that state-imposed separation is the only solution to domestic violence.[22]

The Article proceeds in four parts. Part I recounts the development of "domestic violence exceptionalism,"[23] or the idea that domestic violence is different from other crimes in ways that warrant

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e.g., SCHNEIDER, *supra* note 12, at 112 ("Legal reform for battered women who kill has been one of the most significant areas of feminist lawmaking on domestic violence."); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 381–82 (1991) (providing an overview of proposed reforms for evidentiary laws in prosecutions of women who killed their abusive partners). Although the vast majority of criminal cases are now resolved by plea bargain, such bargaining occurs, to some extent, "in the shadow" of the expected trial outcome. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (developing "shadow of the law" bargaining theory). *But see* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004) ("[M]any plea bargains diverge from the shadows of trials."). Rules that increase the evidence available to the prosecution can influence both the prosecutor's offer and the likelihood the defendant will accept the plea.

[20] This Article identifies trends in evidentiary rules and rulings across state jurisdictions. It does not purport to offer a detailed fifty-state survey of evidence rules in domestic violence prosecutions.

[21] Choosing terms to describe the parties involved in domestic violence prosecutions is an obstacle everyone who writes on the subject must confront, and there are many different approaches. *See, e.g.*, GOODMARK, *supra* note 5, at 199 n.1 (explaining why she uses "woman subjected to abuse"); Tuerkheimer, *supra* note 13, at 960 n.3 (opting to use the terms "battered woman" and "victim" to "emphasize the basic proposition that women are indeed harmed by battering"). Since this analysis focuses on the prosecution of domestic violence offenses, and since most of the case law involves allegations of abuse against women by male intimate partners, I generally will use female pronouns and "complainant" to identify the person who the state believes has been subjected to domestic violence and male pronouns and "defendant" to identify the person accused of such violence, underscoring the fact that guilt has not yet been established. Of course, domestic violence is not limited to heterosexual relationships, and is not committed only by men against women.

[22] Thus, this analysis rejects the neoliberal presumptions that victims and offenders are engaged in a "zero-sum policy game . . . wherein the offender's gain is the victim's loss, and being 'for' victims automatically means being tough on offenders" and "[a]ny untoward attention to the rights or welfare of the offender . . . detract[s] from the appropriate measure of respect for victims." DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 11 (2002).

[23] I thank Leigh Goodmark for suggesting the term "domestic violence exceptionalism" to describe this phenomenon.

specialized criminal justice responses, and its influence in the development of unique arrest and prosecution policies for domestic violence crimes. Part II documents the largely overlooked extension of domestic violence exceptionalism into the very standards used to adjudicate guilt through an analysis of trends in the interpretation and application of the character evidence rule, the medical treatment and diagnosis hearsay exception, and the forfeiture by wrongdoing doctrine in domestic violence assault prosecutions. Part III demonstrates that this specialization of evidentiary doctrine assists the state in securing convictions in domestic violence prosecutions by enabling admission of otherwise inadmissible—but highly persuasive—evidence of guilt.

In Part IV, the Article identifies harms that result from manipulating evidence doctrine in domestic violence prosecutions. Such manipulation undermines the integrity of the criminal justice system and its promise of adjudication under rules that ensure fairness and reliability. Furthermore, domestic violence-specific evidence rules also harm some of the complainants that they purport to protect. By facilitating prosecutions that complainants repudiate, and undermining the credibility of complainants whose testimony challenges the prosecution's theory, such rules reinforce an ineffective and insufficient "one size fits all" model of criminalization. Finally, by undermining defendants' and complainants' sense of procedural fairness, this evidentiary manipulation may reduce both the effectiveness of criminal justice intervention and the likelihood that complainants will enlist the assistance of the criminal justice system in the future.

In short, although the evidentiary manipulation that occurs in domestic violence prosecutions may assist the state in securing convictions, it causes a number of troubling consequences. In other words, domestic violence-specific evidence rules cause significant harm even when they work.[24]

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[24] I. Bennett Capers recently came to a similar conclusion about rape shield laws. *See* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 832 (2013) ("When rape shields do work, they do so at extraordinary cost, reinscribing the very chastity requirement that they were intended to abolish."). The manipulation of evidentiary doctrine is not unique to domestic violence prosecutions. *See, e.g.*, People v. Johnson, 110 Cal. Rptr. 3d 515, 521–22 (Ct. App. 2010) (noting that "[d]omestic violence is but one of the areas in which the rules of evidence have been relaxed in recent years" and identifying elder abuse and child abuse as other examples); Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585, 1601–02 (1998) (noting that the "war on drugs . . . generates its own share of evidentiary reanalysis"). However, this Article focuses on the particular manipulation that occurs in domestic violence prosecutions.

I
THE EMERGENCE OF DOMESTIC VIOLENCE EXCEPTIONALISM

Until shamefully recently, domestic violence was widely treated as an issue that did not warrant public acknowledgement, let alone intervention. Although a husband's right to subject his wife to corporal punishment had been abrogated by the end of the nineteenth century,[25] rhetoric of marital privacy and domestic harmony continued to frame violence against women as a personal matter that did not concern the criminal justice system until the 1970s.[26] Against this backdrop of disavowal of gendered violence, second-wave feminists began to call for acknowledgement of and response to domestic violence.[27] Initially, many feminists were skeptical of the efficacy of criminalization as a solution to this complex issue, and focused instead on creating self-sufficient shelters and supportive services for those impacted by domestic violence.[28] Eventually, however, they began to "engage with the state" and target the criminal justice system as the

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[25] *See, e.g.*, Fulgham v. State, 46 Ala. 143 (1871) (rejecting the chastisement defense of a man accused of assaulting his wife); *see also* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2129 (1996) ("By the 1870s, there was no judge or treatise writer in the United States who recognized a husband's prerogative to chastise his wife."). This right of "chastisement" was a corollary to the doctrine of "marital unity," which dictated that a woman's identity "merged" into her husband's upon marriage. *Id.* at 2122–23.

[26] *See* Siegel, *supra* note 25, at 2153–70 (surveying criminal and tort cases that followed the formal repudiation of chastisement and demonstrating that courts continued to "invoke concepts of privacy to justify giving wife beaters immunity from public and private prosecution"); *see also* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 13 (2009) (discussing the historical treatment of domestic violence). *But see* Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860–1930*, 86 IND. L.J. 185, 185–89 (2011) (challenging the popular assumption that the state failed to respond to domestic violence in the late nineteenth and early twentieth centuries).

[27] The term "second-wave feminism" encompasses the range of feminist organizing and theorizing that occurred "within a temporal time frame, namely the 1960s up until the 1990s." Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1331 (2013). "Second-wave feminis[ts]" were not a monolithic group, and generated "several feminist schools of thought, ranging from purely liberal (those dedicated to giving women 'equal' rights to men) to extremely radical (those calling for an overhaul of the 'male' legal and social structure)." *Id.* at 1331–32.

[28] *See* KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 3 (2008) (describing the "anti-state" sentiment of early feminist organizing efforts around domestic violence); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 56–62 (1982) (detailing the emergence and growth of the shelter movement); SCHNEIDER, *supra* note 12, at 182–83 (providing a brief overview of the shelter movement). This "anti-state" sentiment was reflected in the shelter movement, a grassroots effort to build self-sufficient shelters run by and for women who experienced abuse. BUMILLER, *supra*, at 3.

primary site of reform.[29] Influenced both by feminist demands for criminal justice reform as well as a political climate that was increasingly eager to appear tough on crime, the state responded by declaring "war" on domestic violence.[30]

Although, from the outset of this war, the state identified domestic violence as a criminal justice problem to be solved with criminal justice solutions,[31] it struggled to determine how to treat it relative to other crimes. Responding initially to early liberal feminist demands for "formal equality in prosecutions,"[32] the state characterized domestic violence as a crime like any other. The Reagan administration's 1984 Attorney General's Task Force on Family Violence Final Report, for example, declared that the government's response to "family violence" should be guided "primarily by the nature of the abusive act, not the relationship between the victim and the abuser."[33] In other words, there was nothing unique about domestic violence, and the state would simply apply established criminal justice policies and procedures to this "new" crime.

It soon became clear that the liberal feminist-influenced "add domestic violence and stir"[34] approach to the criminalization of domestic violence would not suffice; "[a]lthough the law formally treated spousal battering like any other criminal assault, . . . [s]tate actors continued to downplay the seriousness of domestic violence cases either because of chauvinistic predispositions or because of skepticism regarding the prospects of prosecutorial success."[35] Due to

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29 SCHNEIDER, *supra* note 12, at 182.

30 *See, e.g.*, Lynne Marek, *U.S. Joining War on Domestic Violence*, CHI. TRIB. (Mar. 12, 1994), http://articles.chicagotribune.com/1994-03-12/news/9403120068_1_domestic-violence-shalala-domestic-partner (quoting then-Secretary of Health and Human Services Donna Shalala as pledging to "put the federal government back in the fray of fighting such 'terrorism in the home'"); *see also* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 798–99 (2007) ("George W. Bush advanced the domestic violence cause by declaring 'war' on domestic violence the same way Reagan declared war on drugs.").

31 *See* GOODMARK, *supra* note 5, at 18 (quoting a member of the 1984 Attorney General's Task Force on Family Violence who argued: "We believe [domestic violence] is a criminal problem and the way to handle it is with criminal justice intervention").

32 Gruber, *supra* note 27, at 1361.

33 Gruber, *supra* note 30, at 795 (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE FINAL REPORT 4 (1984)).

34 This is an adaptation of the phrase "add women and stir," which is used as a shorthand critique in feminist theory of liberal, rights-based solutions that do not affect substantive structural change. *See, e.g.*, Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1279–80 n.2 (1987) ("'Male-dominated' and 'male-biased' are the terms usually used by feminists writing within the liberal legal tradition. Such terminology is, however, too easily read as implying that 'gender-neutral' institutions will result if we merely 'add women and stir'. . . .").

35 Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 590 (2012).

entrenched biases, police and prosecutors remained resistant to arresting and prosecuting those accused of domestic violence-related crimes. And even when prosecutors pursued charges, they often ran into insurmountable evidentiary hurdles because, for a variety of reasons, complainants in domestic violence cases often were reluctant or unwilling to participate in those prosecutions that did proceed.[36] Without defendants to prosecute or evidence with which to prosecute them, the state could not hope to win its war against domestic violence.

The ascending feminist legal theory of dominance feminism assisted the state in resolving this quandary.[37] In contrast to liberal feminism, which targets differential treatment as the source of women's inequality and demands formal equality from the state,[38] dominance feminism identifies women's powerlessness relative to men as the cause of their subordination[39] and supports state interventions that correct this power imbalance.[40] According to dominance feminism, domestic violence is one of many practices—like sexual assault, sexual harassment, prostitution, and pornography—that reinforce male dominance over women.[41]

Psychologist Lenore Walker's theories illustrated and essentially codified the dominance feminist conception of domestic violence. Walker posited that domestic violence occurs in an escalating cycle of

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[36] *See infra* Part IV (discussing various feminist legal scholars' critiques of the dominance feminism perspective). It is now widely acknowledged that domestic violence complainants decline to participate in prosecutions for many reasons other than fear of retaliation from the defendant, including financial reliance, a desire to keep family structures intact, distrust of the police, fear of immigration consequences for themselves or the defendant, and love. GOODMARK, *supra* note 5, at 70–75.

[37] Dominance feminism, also known as radical feminism, emanated largely from the work of Catharine MacKinnon. GOODMARK, *supra* note 5, at 10–12. It became the "prevailing feminist ideology of the 1980s and 1990s." *Id.* at 2. "The feminists who fought for laws and policies to address domestic violence looked at domestic violence through the lens of dominance feminism." *Id.* at 3.

[38] Gruber, *supra* note 27, at 1332–33 ("[L]iberal feminism stands for women's formal equality within the current social, cultural, political, and legal structure and a commitment to women's rights as the vehicle of empowerment.").

[39] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 170–71 (1988) ("[M]aleness is a form of power and femaleness is a form of powerlessness."). As Leigh Goodmark succinctly summarizes, according to dominance feminism "men are actors, women acted upon; men are subjects, women are objects." GOODMARK, *supra* note 5, at 11.

[40] Gruber, *supra* note 35, at 592 ("Dominance feminism . . . calls for the reversal of the gender power structure by utilizing penal law to stamp out instances of sexual domination."); *see also* Gruber, *supra* note 27, at 1343–44 (noting that dominance feminism "sees the key to remedying women's unequal status as reconfiguring power" and "unabashedly calls upon the state to authoritatively, even violently, enforce true equality by stamping out instances of male sexual domination").

[41] GOODMARK, *supra* note 5, at 11.

violence that consists of three predictable and distinct phases: tension-building, acute battering incident, and honeymoon.[42] During the tension-building phase, the batterer subjects his victim to verbal, emotional, and perhaps minor physical abuse and she, in turn, attempts to mollify him to prevent further abuse.[43] Tensions continue to build until they explode in an acute battering incident in which the batterer inflicts serious physical injury upon the victim.[44] This is followed by a period of contrition, during which the batterer begs for forgiveness and promises never to harm the victim again.[45] The cycle repeats endlessly, with the violence increasing and the period of contrition shrinking, until the victim either is killed or leaves the relationship.[46] According to the corollary theory of "learned helplessness," however, the latter result is unlikely: As a result of the incessant cycle of violence, victims of domestic violence come to believe that they are powerless to avoid or prevent future acts of abuse and "[i]nstead of actively seeking to escape violent relationships, . . . sink into passivity, self-blame, and fatalism."[47]

Walker eventually expanded her theory into battered woman syndrome, which purports to explain the "psychological effects that the trauma of battering produces in women."[48] This conceptualization of domestic violence was initially developed to explain how female defendants charged with killing their abusive partners reasonably acted in self-defense. Yet, it quickly gained traction beyond the self-defense arena to become the prevailing explanation for the dynamics of domestic violence.[49]

Although Walker's theories—and the dominance feminist perspective they embody—have been subjected to widespread criticism,[50] this conception of domestic violence was politically palatable and

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[42] LENORE E. WALKER, THE BATTERED WOMAN 56–70 (1979).

[43] *Id.* at 56–59.

[44] *Id.* at 59–65.

[45] *Id.* at 65–70.

[46] GOODMARK, *supra* note 5, at 31–33 (describing Walker's conclusions); *see also* WALKER, *supra* note 42, at 49–50 (arguing that "[r]epeated batterings . . . diminish the woman's motivation to respond," causing her to become "passive" and to believe she cannot do anything that "will result in a favorable outcome").

[47] GOODMARK, *supra* note 5, at 57.

[48] SCHNEIDER, *supra* note 12, at 23.

[49] *See id.* at 23–24 (detailing how battered woman syndrome became a "catch-all phrase . . . to describe a great range of issues: a woman's prior responses to violence and the context in which those responses occurred; the dynamics of the abusive relationship; a subcategory of post-traumatic stress disorder; or woman abuse as a larger social problem").

[50] *See infra* Part IV (reviewing and analyzing some of the major critiques directed at this perspective).

highly influential.[51] It provided a universal explanation for a complex problem that justified an equally universalized response: strong and mandatory state intervention to end the relationship the victim has been unable or unwilling to end on her own. Indeed, according to this conceptualization of domestic violence, relationships in which domestic violence occurred are fundamentally and irreversibly broken, and the only solution is to end the relationship before the victim is killed. Resistance by the victim to the imposition of this solution is further evidence of her learned helplessness and underscores the need for intervention.[52] Thus, under this narrative, there can be no choice about how to respond to domestic violence; each act of violence is a "prelude to murder"[53] and could present the last chance to intervene.

Viewed through the lens of dominance feminism, then, domestic violence is not like any other crime, but rather is a distinctly gendered phenomenon that reinforces the subjugation of women. Thus, dominance feminism demands not that the state treat domestic violence the same as other crimes, but rather that it take specialized, forceful, and affirmative actions to stop domestic violence and correct the gendered power imbalance it perpetuates.[54] In other words, according to dominance feminism, domestic violence is an exceptional crime that demands an exceptional response.

Adopting this theory of domestic violence exceptionalism as well as its interventionist mandate, individual states responded by removing all choice from reluctant state actors.[55] First, they targeted police inaction by implementing mandatory arrest policies, which required police to make at least one arrest in every domestic violence

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[51] *See* GOODMARK, *supra* note 5, at 3 (recounting the influence of dominance feminist theory on domestic violence law and policy).

[52] At least one scholar has suggested that women who resist state intervention should be subjected to legal guardianship. Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 612 (2000).

[53] SUK, *supra* note 26, at 36 (under the "paradigm story," domestic violence is a "prelude to murder").

[54] As Goodmark points out, this invocation of state power seems to contradict the dominance feminist view that the state is "male jurisprudentially" and that "the law sees and treats women the way men see and treat women." GOODMARK, *supra* note 5, at 11 (quoting CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161–62, 163 (1989)).

[55] This merger between feminism and the state to "wield state power together" is an example of what Janet Halley has called "Governance Feminism." Karen Engle et al., *Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 224 (2003); *see also* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 20–22 (2006) (describing Governance Feminism as a movement characterized by feminism exerting control over legal, cultural, and familial aspects of society by harnessing the power of the state).

call.[56] A handful of states had adopted mandatory arrest laws by 1992,[57] and those that had not quickly did so to qualify for funding under the 1994 Violence Against Women Act (VAWA).[58] States then attempted to redress prosecutors' historical reluctance to prosecute domestic violence cases by imposing "no-drop" prosecution policies in domestic violence cases.[59] "No-drop" policies, as their name implies, prohibit prosecutors from dismissing viable criminal charges, regardless of whether the complainant supports the prosecution and even—and most controversially—if the complainant wants the state to drop the charges.[60]

Thus, in an attempt to keep its promise to treat domestic violence the same as every other crime, the state, guided by dominance feminist legal theory, created a system that responds to it remarkably differently.[61] From the initial report through the decision whether to prosecute, the state's response to domestic violence has been marked by a systematic removal of discretion, the factor that guides state

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[56] GOODMARK, *supra* note 5, at 107–10.

[57] *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239 n.2 (2005) ("By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah, and Wisconsin had passed legislation mandating arrest for domestic violence.").

[58] *See* 42 U.S.C. § 3796hh(c)(1)(A) (2012) (requiring eligible grantee states to have laws or polices that "encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed"). For a summary and comparison of mandatory arrest laws, see April M. Zeoli, Alexis Norris & Hannah Brenner, *A Summary and Analysis of Warrantless Arrest Statutes for Domestic Violence in the United States*, 26 J. INTERPERSONAL VIOLENCE 2811, 2815–25 (2011).

[59] *See* GOODMARK, *supra* note 5, at 110–11 (recounting the proliferation of "no-drop" prosecution policies); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520 n.52 (1998) (identifying jurisdictions with "no-drop" prosecution policies). As Jeannie Suk recounts, another "crucial step in the criminalization of [domestic violence]" was the emergence of the general-purpose civil or family court protection orders, which allow individuals to seek protection against their partners directly from the court. SUK, *supra* note 26, at 14.

[60] Some jurisdictions adopted "hard" no-drop policies, which require prosecutors to pursue prosecution at any cost: subpoenaing, arresting, or incarcerating a reluctant complainant if necessary to secure her testimony at trial. GOODMARK, *supra* note 5, at 112. Others took a "soft" approach, attempting to overcome complainants' resistance by providing supportive services such as courtroom advocates and rides to court. *Id.*

[61] Michelle Madden Dempsey highlights this contradiction by noting that the calls for law enforcement to "take domestic violence seriously" generally entail a demand to both implement "no-drop" prosecution policies and to "treat domestic-violence cases similarly to cases of generic violence." MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 179 (2009); *see also* SCHNEIDER, *supra* note 12, at 186 (proponents of mandatory arrest and prosecution policies believe "they send a message that domestic violence shall not be treated as a less serious crime than violence between strangers"); Miccio, *supra* note 57, at 240 (concluding that mandatory arrest statutes require "the criminal justice system to treat male intimate crimes in a manner equivalent to stranger crimes").

actors in every other criminal case and increasingly defines our criminal justice system.[62] The purported aim of the targeted, specialized response was to increase the number of domestic violence crimes that are prosecuted, at which point domestic violence would be treated, once again, "like every other case."[63]

That the state treats domestic violence differently from other crimes is not a new observation, and has drawn abundant scholarly attention and debate. Unsurprisingly, those scholars who adopt the dominance feminist perspective of domestic violence have supported the development of mandatory arrest and no-drop prosecution policies[64] and pushed for even stronger state interventions aimed at subjecting batterers to criminal punishment and ending relationships in which domestic violence occurs.[65] In contrast, as will be discussed further in Part IV, many others, including anti-essentialist feminist legal scholars, have critiqued the dominance feminist perspective for overlooking the needs and desires of those who do not wish, for a variety of reasons, to invoke the punitive power of the state in responding to their abusive partner.[66] Accordingly, anti-essentialist theorists have pushed for the development of extracriminal responses to domestic violence that are responsive to the particular needs of those involved.

And yet, while scholars have offered diverse perspectives on the back-end efficacy of criminalization as the solution to this entrenched social problem[67] and the propriety of the front-end mandatorization of the government's response in service of that solution,[68] these debates largely overlook what happens in "the middle," specifically

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[62] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long."). In *Castle Rock v. Gonzales*, however, the Supreme Court nevertheless ruled that the "well established tradition of police discretion" continues to "coexist[ ] with apparently mandatory arrest statutes." 545 U.S. 748, 760 (2005).

[63] Burke, *supra* note 5, at 611–12.

[64] *See, e.g.*, Hanna, *supra* note 12, at 1857 ("The societal benefits gained [from mandatory policies] far outweigh any short-term costs to women's autonomy and collective safety."); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 182 (1997) (arguing in support of "[a]ggressive prosecution of domestic violence offenders," because such a policy "rejects the notion that victims should be given the choice of whether to press or drop charges").

[65] *See* Tuerkheimer, *supra* note 13, at 962 (calling for a stronger and more specific criminal law response to domestic violence).

[66] *See, e.g.*, GOODMARK, *supra* note 5, at 106–35 (critiquing mandatory policies for depriving complainants of autonomy and agency).

[67] *See* Brenner, *supra* note 11, at 323–26 (summarizing competing views of criminalization).

[68] For an overview of these competing perspectives on mandatory arrest and prosecution policies, see SCHNEIDER, *supra* note 12, at 184–88.

whether the processes used to adjudicate allegations of domestic violence are or should be guided by the same domestic violence exceptionalism that has shaped the state's front-end responses.[69] As a result, the scholarship leaves relatively untouched the presumption that, once the adjudicatory phase is underway, the state's response to domestic violence is again guided by liberal, equality-focused principles.

The few scholars who have examined evidentiary doctrine in domestic violence prosecutions universally support the creation of specialized rules in service of a strong criminalization-focused response.[70] Emanating from a dominance feminist perspective, these analyses largely follow the same syllogistic reasoning enlisted in support of mandatory arrest and prosecution policies: Domestic violence is substantively different from other crimes, and traditional evidence rules (like traditional arrest and prosecution policies) do not account for these differences, rendering conviction difficult. Given the escalating cycle of violence, if the defendant is not convicted, he will assault the complainant again, possibly killing her. In order to secure conviction and save the complainant's life, therefore, it is essential that the state adapt its evidence rules.[71] Characterizing specialized evidence rules as appropriate and necessary weapons in the effort to end domestic violence,[72] they call for rules that reflect the prevailing, dominance feminist-influenced, iteration of domestic violence exceptionalism embodied by mandatory arrest and prosecution policies.

As the next section demonstrates, this notion has gained traction in some jurisdictions. Courts and legislatures draw on these presumptions to conclude that domestic violence is substantively different

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[69] As noted above, the widespread scholarly attention to the Confrontation Clause after *Crawford v. Washington* is an exception to this general trend. *See supra* note 16 and accompanying text.

[70] For description of various proposals of scholars to amend evidentiary rules, see sources cited *supra* note 17. One commentator has even suggested that the application of the character evidence ban in domestic violence prosecutions amounts to a modern-day rule of chastisement and perpetuates "the legal sanction of domestic violence." Andrew King-Ries, *True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence Prosecutions*, 23 ST. LOUIS U. PUB. L. REV. 313, 314–15 (2004).

[71] *See* King-Ries, *supra* note 70, at 315 (summarizing the arguments of those who advocate for a change in evidentiary law in domestic violence prosecutions as follows: "[D]omestic violence is a societal epidemic; domestic violence prosecutions are difficult; the particular rule change will make it easier to prosecute domestic violence perpetrators; more successful prosecution will reduce the societal epidemic of domestic violence; therefore, the law should be changed.").

[72] Myrna S. Raeder, for example, identifies "appropriate evidentiary rules" as one of the changes that will "diminish the untold suffering of women and the silent victims—their children." Raeder, *supra* note 17, at 1485.

from other crimes, and that this difference requires specialized (and more permissive) evidence rules. In so doing, they enlist theories developed to be a shield in the defense of women accused of killing their abusive partners as a sword with which to justify admission of inculpatory evidence against men accused of domestic violence.

II
EVIDENTIARY DOMESTIC VIOLENCE EXCEPTIONALISM

Although the mandatorization of the police and prosecutorial response to domestic violence is perhaps an extreme example, it is not uncommon for the state to adopt policies aimed at increasing arrests for and prosecutions of certain crimes, especially those that are "new" or considered particularly socially destructive. The 1980s, for example, witnessed a wave of new policies and procedures to target drunk driving,[73] and more recently legislatures and police departments have taken action to "get[ ] tough on bullying."[74] Yet operating in the background of these tough-on-crime policies is the promise that once a defendant enters the criminal justice system he will be afforded a fair and just adjudication of guilt, regardless of the strength of society's disdain for the offense with which he is charged.[75]

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[73] *See* JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA, at xv–xviii (1989) (recounting the rise and legislative successes of the anti-drunk driving movement).

[74] Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1696–97 (2012) (describing recent legislative actions aimed at "getting tough on bullying"); *see also* Jessica R. Key, *Getting Tough on Bullying: Can Extreme Measures Solve This Issue?*, INDIANAPOLIS RECORDER (May 15, 2014), http://www.indianapolisrecorder.com/news/print_highlights/article_85b53fb8-dc6f-11e3-854b-001a4bcf887a.html (describing ongoing attempts to criminalize bullying in Carson, California). Of course, which crimes are considered worthy of social reprobation can change. Some actions, such as domestic violence, can be transformed from a legally sanctioned activity to a serious crime. *See supra* Part I (describing the transformation of how domestic violence is viewed in the eyes of the law). Other activity once deemed intractably criminal, such as marijuana use, may be decriminalized. *See* Dan Frosch, *Measures to Legalize Marijuana Are Passed*, N.Y. TIMES, Nov. 7, 2013, at A18 (describing the legalization of marijuana through ballot measures in Colorado, Michigan, and Maine).

[75] For example, despite the widespread debate about the invocation of the "public safety" exception to *Miranda* in the attempt to obtain a statement from Boston Marathon bombing suspect Dzhokhar Tsarnaev, commentators invoked as a point of pride that he will enjoy a fair trial. *See, e.g.*, Leon Neyfakh, *What We Want from the Marathon Bombing Trial*, BOS. GLOBE (Apr. 26, 2013), http://www.bostonglobe.com/ideas/2013/04/26/what-want-from-marathon-bombing-trial/91Hq5V5zcddBIwoFNTK3IO/story.html ("Subjecting Tsarnaev to the particular power of our legal system carries its own symbolic victory . . . : By treating him the same way we treat everyone we prosecute, we will deny him whatever special status he sought in carrying out the attacks.").

Evidence rules play a central role in the assurance of a fair and impartial trial.[76] As a general matter, evidence rules either facilitate the adjudicatory process or promote a substantive policy of the law.[77] Most evidence rules fall within the former category and are drafted to promote values *intrinsic* to the adjudicatory process such as efficiency, accuracy, and fairness.[78] Significantly, those few that fall in the latter category promote substantive policies *extrinsic* to the subject matter of litigation,[79] such as encouraging candor between spouses[80] or the making of settlement offers.[81] Whether intrinsically or extrinsically oriented, the rules purport to reflect transsubstantive values and policies that are independent of the particular matter at issue in litigation.[82]

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[76] *See* Brinegar v. United States, 338 U.S. 160, 174 (1949) ("These rules . . . safeguard [defendants] from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.").

[77] David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1186 (1998).

[78] The Federal Rules of Evidence, for example, must be construed to ensure fairness with an eye toward serving dual ends: "ascertaining the truth" and "securing a just determination." FED. R. EVID. 102. The Rules also must be read to eliminate expense and promote evidence law. *Id.*; *see* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006) (noting that most evidence rules are "(internally) epistemic" and are designed to increase "the accuracy and efficiency of fact finding under circumstances of jury decision making").

[79] *See* Leonard, *supra* note 77, at 1187 ("Rules of this type do not primarily serve important substantive legal policies or values."); Schauer, *supra* note 78, at 167–68 (noting that some evidence rules are extrinsically oriented and "designed to create the proper incentives for socially desirable out-of-court conduct" and do not serve epistemic goals).

[80] Trammel v. United States, 445 U.S. 40, 53 (1980) (holding that a spousal privilege rule that vests the privilege in the witness-spouse "furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs").

[81] *See, e.g.*, FED. R. EVID. 408(a)(1) (making inadmissible any evidence of "furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim").

[82] *See* David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 306 (1995) (arguing that a "key assumption[ ]" underlying the Federal Rules of Evidence is that "the evidence rules, for the most part, should apply the same way in different kinds of cases and treat different types of litigants similarly"); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 551 (1980) ("A basic premise of evidentiary rules is that they . . . do not develop differently for each substantive crime and civil cause of action."); *see also* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1174 (1994) ("The Federal Rules of Evidence are a paradigm of transsubstantive rules that are applicable across the near-entirety of the litigation landscape."). Although the transsubstantivity principle has existed since the seventeenth century, D. Michael Risinger, *Guilt vs. Guiltiness: Are the Right Rules for Trying Factual Innocence Inevitably the Wrong Rules for Trying Culpability?*, 38 SETON HALL L. REV. 885, 886 n.3 (2008), the notion that evidentiary rules should transcend the boundary between civil and criminal law has been called into doubt. Raeder, *supra* note 24, at 1587–88.

This intrinsic/extrinsic divide promotes the development of evidence rules as outcome-neutral guidelines that ensure a fair and accurate process or encourage certain out-of-court behavior generally, regardless of the offense with which the defendant has been charged.[83] As the following discussion demonstrates, however, courts and legislatures in many jurisdictions have blurred this traditional divide between intrinsically and extrinsically oriented rules in domestic violence prosecutions by adopting specialized evidence rules that promote a substantive policy goal intrinsic to the prosecution: redressing the social ill of domestic violence through conviction. Drawing on the dominance-feminist informed explanation of domestic violence as cyclical, escalating, incapacitating, and requiring immediate and unflinching state intervention, courts and legislatures in these jurisdictions reason that domestic violence is substantively different from other crimes, and that this difference requires specialized evidence rules. This section demonstrates this phenomenon through the examination of three trends in domestic violence prosecutions: the admission of prior acts of domestic violence to prove propensity, the expansion of the medical diagnosis and treatment hearsay exception to include statements of identification, and the increasing elasticity of the forfeiture by wrongdoing standard to admit evidence otherwise precluded by the hearsay proscription or the Confrontation Clause. These domestic violence-specific rules and standards differ from each other in many ways. One has been codified, the others developed in common law. Some reflect the explicit rejection of traditional evidentiary principles, others, the implicit conclusion that traditional standards mean something different in the context of domestic violence. What unites these diverse rules and standards is that each is guided not by traditional evidentiary principles, but rather tenets of domestic violence exceptionalism, and each aims to enable admission of evidence that comports with prevailing presumptions about domestic violence—and to override that which does not.

A. Character Evidence Exceptions

The character evidence rule prohibits prosecutors from introducing evidence of a defendant's character, including prior crimes or bad acts, to demonstrate that he acted in conformity with that char-

[83] *See* Edward K. Cheng, *The Perils of Evidentiary Manipulation*, 93 VA. L. REV. IN BRIEF 207, 211 (2007), http://www.virginialawreview.org/sites/virginialawreview.org/files/cheng.pdf ("Evidence rules arguably carry special legitimacy because they are—or are at least supposed to be—transsubstantive. Being transsubstantive ensures greater neutrality and honesty, because evidentiary doctrines are double-edged swords that can both help and hinder substantive objectives.").

acter on the date of the charged incident.[84] Character evidence is excluded not because it is irrelevant, but rather because a fact finder may deem it *too* relevant; "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[85] The rule thus reflects a fairness-based policy judgment that the danger that a fact finder will give undue weight to past bad acts is so great that this evidence must be excluded, regardless (or because) of its probative value.[86]

While the character evidence rule precludes admission of evidence of prior bad acts solely to prove that a defendant has a bad character that predisposes him to committing the charged offense, it does not proscribe admission of acts that are relevant for a non-propensity purpose such as motive, intent, knowledge, or lack of mistake or accident.[87] Nor does it prohibit reference to acts that are so "inextricably intertwined" with the charged offense that the prosecution cannot comprehensibly convey the allegations without referencing them.[88] At its heart, the ban on propensity reasoning is rooted in a "jealous regard for the liberty of the individual";[89] it seeks to protect the possibility that a defendant's future is not determined by his past, but rather that he retains the free will to break from his past and change his behavior. It reflects a belief that even the "most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried he might acquit himself."[90] Thus, it allows a defendant to "start[ ] his life afresh when he stands before the jury."[91] By preventing the fact finder from convicting a defendant for what he has done in the past, the character evidence ban upholds the pillars of our criminal justice system: the presumption of innocence and the rea-

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[84] This rule is codified as FED. R. EVID. 404, and every state has adopted it. Leonard, *supra* note 77, at 1167.

[85] Michelson v. United States, 335 U.S. 469, 475–76 (1948).

[86] *Id.* ("The overriding policy of excluding [character] evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.").

[87] The leading case on this issue is *People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901). These exceptions are codified in FED. R. EVID. 404(b)(2). Evidence admitted under any of these exceptions, like all other relevant evidence, may be excluded if its probative value is substantially outweighed by its prejudicial effect. FED. R. EVID. 403.

[88] *See generally* Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U. L. REV. 719, 726 (2010) (discussing the justification for the "inextricably intertwined" doctrine).

[89] *Molineux*, 61 N.E. at 293.

[90] *Molineux*, 61 N.E. at 300.

[91] People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).

sonable doubt standard.[92] It is so crucial to ensuring a fair and just adjudication and "so deeply imbedded in our jurisprudence" that it assumes "almost constitutional proportions."[93]

It was unsurprising, therefore, that when Congress exempted sexual assault and child molestation crimes from the centuries-long ban on propensity evidence through the adoption of Federal Rules of Evidence 413 and 414,[94] the move drew widespread criticism from practitioners,[95] the American Bar Association,[96] evidence scholars,[97] and even some feminist activists and legal theorists.[98] Interestingly, these Rules were passed as part of the same Act that initially author-

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[92] *See* Dowling v. United States, 493 U.S. 342, 361–62 (1990) (Brennan, J., dissenting) (citing United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978)) ("One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense."); Spencer v. Texas, 385 U.S. 554, 572–75 (1967) (Warren, J., concurring) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged."). The *Molineux* court stressed that the propensity evidence ban distinguished the American common law system—a "product of all the wisdom and humanity of all the ages"—from civil law systems in which a defendant's history "is an open book" and "[e]very crime or indiscretion of his life may be laid bare to feed the presumption of guilt." *Molineux*, 61 N.E. at 300.

[93] FED. R. EVID. 404 advisory committee's note. Some, including Justice Warren, have suggested that violation of this rule offends the Due Process Clause. *Spencer*, 385 U.S. at 573–75 (Warren, J., concurring). *But see* Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1517–18 (2005) (noting that every federal appellate court to consider the constitutionality of FED. R. EVID. 413–414, which exempt sexual assault offenses from the propensity ban, has held that they do not violate due process).

[94] Rules 413 and 414 authorize admission of prior acts of sexual assault and child molestation, respectively, for "any matter to which it is relevant" in criminal prosecutions for those crimes. FED. R. EVID. 413(a), 414(a). Congress also adopted Rule 415 to authorize admission of this evidence in civil proceedings for relief "based on a party's alleged sexual assault or child molestation." FED. R. EVID. 415.

[95] *E.g.*, Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 58–59 (1995).

[96] Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates, reprinted in* 22 FORDHAM URB. L.J. 343, 353 (1995) ("Rules 413–415 are ill designed and raise troubling policy issues.").

[97] *E.g.*, Leonard, *supra* note 82, at 306 ("These changes do not bode well for the future stability of the Federal Rules of Evidence."); Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 3 (1996) (arguing that Rules 413 and 414 violate due process).

[98] *See* Capers, *supra* note 24, at 845 n.94 ("[T]he National Organization of Women's Legal Defense Fund opposed the rule out of concern that it would diminish basic safeguards accorded criminal defendants."). Of course, some feminist scholars supported the rules. *See, e.g.*, 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, 507–10 (1996) (arguing that FED. R. EVID. 413–415 "provide greater justice for victims of sex crimes").

ized VAWA,[99] which requires states to adopt mandatory arrest policies for domestic violence offenses to qualify for federal funding under the Act.[100] Yet, even then-Senator Joseph Biden, VAWA's primary sponsor,[101] vociferously opposed the adoption of these rules.[102]

As the following analysis demonstrates, many jurisdictions have also explicitly or implicitly eviscerated the propensity ban in domestic violence prosecutions. A handful of states, taking a cue from Federal Rules of Evidence 413 and 414, explicitly authorize the use of propensity reasoning in domestic violence prosecutions.[103] Many more do so under the guise of a purportedly nonpropensity "domestic violence context" theory to demonstrate the "nature of the relationship" between the defendant and complainant or to help the jury assess the credibility of a recanting complainant.[104] Yet, despite the extensive scholarly attention to Federal Rules of Evidence 413 and 414,[105] this trend in domestic violence prosecutions has developed relatively unnoticed.

1. "Domestic Violence Propensity" Exceptions

Seven states have amended their evidence rules or adopted statutes to authorize the admission of prior acts of domestic violence in domestic violence-related prosecutions.[106] Four of these states—

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[99] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[100] *See supra* Part I (describing requirements that VAWA imposes on states).

[101] *See* S. REP. NO. 102-197, at 35 (1991) (describing the introduction of VAWA).

[102] Senator Biden characterized FED. R. EVID. 413–415 as a "very dangerous amendment," 139 CONG. REC. 27,550 (1993), and said the rules violated "every basic tenet of our system." 140 CONG. REC. 18,930 (1994).

[103] Many jurisdictions also admit prior abusive acts in civil protection order proceedings. *See* Coburn v. Coburn, 674 A.2d 951, 958–59 (Md. Ct. App. 1996) ("In holding that evidence of past abuse is relevant in determining the present need for a protective order, this Court follows the trend of many jurisdictions.").

[104] *See infra* notes 133–34 (describing how states authorize propensity reasoning under various rationales).

[105] *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 251–52 n.342 (2005) (listing articles supporting and opposing FED. R. EVID. 413–414).

[106] CAL. EVID. CODE § 1109 (West 2009) (excepting "evidence of the defendant's commission of other domestic violence" from the state's ban on character evidence); COLO. REV. STAT. ANN. § 18-6-801.5 (West 2014) (authorizing admission of "evidence of any other acts of domestic violence between the defendant and the victim named in the information, and between the defendant and other persons . . . as provided in subsection (3) of this section"); 725 ILL. COMP. STAT. ANN. 5/115-7.4 (West 2014) ("[E]vidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant."); MICH. COMP. LAWS ANN. § 768.27b (West 2014) ("[E]vidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant . . . ."); MINN. STAT. ANN. § 634.20 (West 2015) ("Evidence of domestic conduct by the accused

California, Alaska, Illinois, and Michigan—authorize admission of prior acts of domestic violence for any relevant purpose, including to establish the defendant's propensity to commit domestic violence.[107]

These domestic violence propensity statutes reflect the same theory of domestic violence exceptionalism that underlies mandatory arrest and no-drop prosecution policies, particularly its presumptively cyclical nature. The Committee on Public Safety Report submitted to the California Assembly in support of the state's propensity statute concluded, for example, that the "propensity inference" was "particularly appropriate" in domestic violence prosecutions because "ongoing violence and abuse is the norm in domestic violence cases."[108] It continued, "[n]ot only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity."[109]

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against the victim of domestic conduct, or against other family or household members, is admissible [unless overly prejudicial, confusing, or misleading]."); MO. ANN. STAT. § 565.063(13) (West 2015) ("Evidence of similar criminal convictions of domestic violence . . . within five years of the offense at issue, shall be admissible for the purposes of showing a past history of domestic violence."); ALASKA R. EVID. 404(b)(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 . . . is admissible.").

107 CAL. EVID. CODE § 1109; 725 ILL. COMP. STAT. ANN. 5/115-7.4; MICH. COMP. LAWS ANN. § 768.27b; ALASKA R. EVID. 404(b)(4). Although the Minnesota statute also authorizes admission of evidence of prior domestic abuse subject only to the restriction against evidence whose probative value is substantially outweighed by danger of unfair prejudice, MINN. STAT. ANN. § 634.20, the Minnesota Supreme Court has limited its application to the purportedly nonpropensity "relationship" theory of admissibility. *See* State v. McCoy, 682 N.W.2d 153, 159 (Minn. 2004) (emphasizing the relevance of such evidence when it occurred between the victim and defendant). Accordingly, this exception will be analyzed as one of the "nonpropensity" domestic violence exception, *infra* Part II.A.2. The Missouri statute restricts admissibility to convictions of domestic violence offenses within the preceding five years and authorizes admission to demonstrate "a past history of domestic violence." MO. ANN. STAT. § 565.063. Though the Missouri Supreme Court has not considered this statute, it has ruled that there are "no exceptions" to the rule against propensity evidence. State v. Ellison, 239 S.W.3d 603, 606 (Mo. 2007) (en banc). This statute, therefore, will also be discussed as a "nonpropensity" exception, *infra* Part II.A.2. Colorado courts have interpreted the state statute as requiring that prior acts evidence be relevant for a nonpropensity purpose. *See, e.g.*, People v. Raglin, 21 P.3d 419, 424–25 (Colo. App. 2000), *overruled by* Fain v. People, 329 P.3d 270, 274 (Colo. 2014) (upholding admission of prior acts under COLO. REV. STAT. ANN. § 18-6-801.5 because the trial court implicitly found them relevant for a nonpropensity purpose).

108 CAL. ASSEMB. COMM. PUB. SAFETY, BILL ANALYSIS OF S.B. 1876, at 3 (1996).

109 *Id.* The Colorado legislature similarly found that "domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness," and declared that "evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence." COLO. REV. STAT. ANN. § 18-6-801.5.

Similarly, the Illinois statute was created because "domestic violence is a recurring crime,"[110] and a "rationale" proffered for the Michigan law was that defendants charged with domestic violence offenses "often" had "committed similar acts of abuse in the past."[111] Thus, proponents concluded the "rules of evidence regarding past actions . . . should not apply in domestic violence cases."[112] In other words, the cyclical and recurrent nature of domestic violence differentiates it from other crimes, requiring different evidence rules.

At first blush, this justification for domestic violence propensity statutes sounds like a straightforward truth rationale: that propensity reasoning should be allowed in domestic violence prosecutions because the inference is likely to be true. While perhaps viscerally compelling, the truth rationale is doctrinally unsatisfying. The ban on propensity reasoning exists not because the propensity inference may be false, but rather because the jury may give the inference too much weight, convicting based on the strength of the inference instead of the strength of the evidence of the defendant's guilt. Thus, even absolute accuracy would not justify an exception to this centuries-old, fairness-based rule.

In any event, a truth rationale does not fully explain the impetus behind the adoption of these statutes. If the statutes were concerned simply with admitting evidence to support an inference about the defendant's behavioral pattern against the complainant, they would only admit evidence of prior acts committed within the context of that intimate relationship. Instead, however, they also permit admission of past abusive acts against *other intimate partners*.[113]

In the Michigan case of *People v. Cameron*, for example, the defendant was charged with assault and battery against his girl-

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[110] *See* People v. Dabbs, 919 N.E.2d 501, 504 (Ill. App. 2009) (quoting state representative during proceedings to adopt the statute).

[111] MICH. S. FISCAL AGENCY, BILL ANALYSIS OF S.B. 120 & 263, at 1 (2006).

[112] *Id.* at 3.

[113] The Alaska and Michigan statutes specifically authorize admission of prior acts of domestic violence against former partners. *See* statutes cited *supra* note 106. The California and Illinois statutes simply permit introduction of other offenses of domestic violence, and their legislative history and application confirm that they extend to acts against former partners. People v. Dabbs, 940 N.E.2d 1088, 1098–99 (Ill. 2010) (reviewing legislative history of the Illinois propensity statute and noting that it is intended to demonstrate that "the present victim is worthy of belief because her experience is corroborated by the experience of *another victim* of the same abuser") (emphasis added); CAL. ASSEMB. COMM. PUB. SAFETY, *supra* note 108, at 5 (discussing California propensity statute's intent to admit domestic violence offenses "committed against the victim of the charged crime or another similarly situated person"); *see also* People v. Cabrera, 61 Cal. Rptr. 3d 373, 381 (Ct. App. 2007) (upholding admission of testimony by two former girlfriends about acts of domestic violence under California's domestic violence propensity statute).

friend.[114] In addition to evidence of six acts of violence the defendant had committed against the complainant in the years before the charged crime,[115] the trial court also admitted, under the state's domestic violence propensity statute, the testimony of a woman the defendant had dated for a few months—*seven years* before the charged incident—about his violent behavior towards her during their relationship.[116] The Michigan Court of Appeals upheld the trial court's ruling that this evidence demonstrated the defendant's "propensity to commit acts of violence against women who were or had been romantically involved with him."[117]

As *Cameron* illustrates, domestic violence propensity statutes reflect a presumption not just about the nature of domestic violence, but about the nature of domestic violence offenders. They allow the fact finder to infer that domestic violence offenders are apt to recidivate not only within a particular relationship, but also in all intimate relationships.[118] But the statutes are not motivated by a simple judgment that domestic violence offenders exhibit high recidivism rates. As Lisa Marie De Sanctis, author of the California propensity statute,[119] acknowledged, a high recidivism rate was not "the only justification for using a propensity inference" in domestic violence prosecutions.[120] Indeed, if increasing the accuracy of fact-finding were the only aim of these statutes, their proponents would support the abolition of the propensity evidence ban for all crimes characterized by a high recidivism rate, such as property or drug offenses.[121] But instead, they suggest the ban is appropriate in other prosecutions.[122]

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114 806 N.W.2d 371, 372 (Mich. Ct. App. 2011).

115 *Id.* at 374–75.

116 *Id.* at 375.

117 *Id.* at 378.

118 *See, e.g.*, People v. Johnson, 110 Cal. Rptr. 3d, 515, 524 (Ct. App. 2010) (noting that the domestic violence propensity statute reflects a conclusion about the "psychological dynamic" of domestic violence that is "not necessarily involved in other types of crimes").

119 *See* De Sanctis, *supra* note 17, at 361–62 (describing the process of amending Senate Bill 1976 to include De Sanctis's proposal).

120 *Id.* at 390.

121 A recent Department of Justice study of state prisoners released in 2005 demonstrated that 82.1% of property offenders were convicted of a new offense within five years of release, compared to 76.9% of drug offenders and 71.3% of violent offenders. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 9 tbl.10 (2014), *available at* http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

122 For example, Judith Armatta argues that the character evidence ban is "useful in nondomestic violence assault cases to ensure that the defendant is not convicted because he has a bad character or reputation," but that its abolition in domestic violence cases is necessary to "establish the seriousness of an ongoing pattern of violent behavior." Armatta, *supra* note 17, at 819. However, some who advocate for domestic violence propensity exceptions also support the adoption of propensity exceptions for sexual assault

At their core, domestic violence propensity statutes reflect a presumption about the difference between the psychology of domestic violence offenders and those who commit other types of crimes. They presume not simply that domestic violence offenders often recidivate, but that they are unable to refrain from doing so. In other words, their past behavior shows that they lack the free will to change their behavior.[123] From this perspective, it is "[c]ommon sense" not only to distinguish domestic violence offenders from other offenders,[124] but also to deprive them of the benefit of the "fresh start" before the jury that the propensity evidence ban protects.[125]

Understood through this psychological rationale, domestic violence propensity statutes are concerned not just with holding the defendant accountable for his past actions, but also preventing the inevitable future violence that will occur if he is not convicted. Proponents of propensity statutes assert that one of the only plausibly effective interventions that can change a domestic violence offender's behavior is the intervention of the criminal justice system.[126] Thus, they underscore the perceived urgency of interposing the criminal jus-

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and child molestation prosecutions. *See, e.g.*, De Sanctis, *supra* note 17, at 387–88 (modeling a proposal to create a specialized evidentiary rule for the admissibility of uncharged offenses of domestic violence in domestic violence prosecutions on FED. R. EVID. 413–414, which accomplish the same for victims of rape and sexual molestation).

123 This argument was made explicitly in support of sex abuse and child molestation propensity statutes, which served as a model for domestic violence propensity statutes. *See* CAL. ASSEMB. COMM. PUB. SAFETY, *supra* note 108, at 3 (noting that the Bill that became California's domestic violence propensity statute was "modeled on" the state's sex offense propensity statute). For example, David J. Karp, the author of FED. R. EVID. 413–415, contrasted the behaviors of "[o]rdinary people," who "do not commit outrages against others because they have relatively little inclination to do so," with a person who has committed rape or child molestation, whose past conduct, he argued, "provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him." *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 20 (1994); *see also Johnson*, 110 Cal. Rptr. 3d at 524 n.9 (noting that the legislative history of California's sex offense propensity statute "suggests an underlying psychological abnormality that makes such evidence especially probative"). De Sanctis heavily relied on Karp's reasoning to justify California's domestic violence propensity statute. *See* De Sanctis, *supra* note 17, at 383–85 (citing Karp's reasoning to describe arguments in favor of FED. R. EVID. 413–414).

124 De Sanctis, *supra* note 17, at 388 ("Common sense suggests that a person with a history of beating his intimate partner stands on different ground than does a person without that history.").

125 *Contra* People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (contending the ban on propensity reasons that a defendant should "start[ ] his life afresh when he stands before the jury").

126 CAL. ASSEMB. COMM. PUB. SAFETY, *supra* note 108, at 4 ("[C]riminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence . . . .").

tice system between the defendant and his partner, thereby breaking the "cycle" and preventing future inevitable acts of violence. For example, the authors of the California domestic violence propensity statute vividly described the perceived stakes of sticking with the status quo: "[W]e 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."[127] From this perspective, domestic violence propensity statutes are an appropriate and essential "tool for law enforcement and victims"[128] in the war against domestic violence.

2. *"Domestic Violence Context" Exceptions*

As mentioned above, the character evidence rule does not prohibit the introduction of prior bad acts that are relevant for a nonpropensity purpose, such as establishing motive, intent, or modus operandi.[129] These malleable and diverse nonpropensity theories of admissibility can be and have been used to admit prior acts of abuse in many domestic violence prosecutions.[130] Nevertheless, legislatures or appellate courts in at least ten states have supplemented this list of generally applicable theories with a specialized theory that will be referred to here as the "domestic violence context" exception.[131]

Like domestic violence propensity statutes, the domestic violence context exception reflects the presumption that domestic violence occurs according to a predictable cycle of violence, that this cyclical nature differentiates domestic violence from other crimes, and that

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[127] *Id.* at 3–4 (emphasis added). Tellingly, this statute was originally denominated 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." Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 701–02 (2003).

[128] People v. Dabbs, 919 N.E.2d 501, 504 (Ill. App. 2009).

[129] *See supra* note 87. David P. Leonard identified these as "theoretically noncharacter" purposes, since their application often is difficult to distinguish from character reasoning. Leonard, *supra* note 77, at 1166.

[130] *See, e.g.*, People v. Illgen, 583 N.E.2d 515, 520 (Ill. 1991) ("[E]vidence of the defendant's prior unprovoked assaults on his wife tended to negate the likelihood that the shooting was an accident and thereby tended to prove his intent."); State v. Taylor, 689 N.W.2d 116, 128 (Iowa 2004) (admitting prior acts of abuse to establish motive and intent); Ortega v. State, 669 P.2d 935, 944 (Wyo. 1983) (stating a defendant's prior abuse of victim provides "insight into a person's feelings for another which may help establish motive") *overruled on other grounds by* Jones v. State, 902 P.2d 686 (Wyo. 1995).

[131] "Exception" is perhaps a misnomer, since this is technically not an exception to the ban on propensity reasoning, but rather a purportedly nonpropensity theory of admissibility. But since this section concludes that it actually is a justification for admitting propensity evidence, it will be denominated an exception.

this difference justifies admission of prior bad acts.[132] But unlike the propensity statutes, which eschew the propensity ban altogether, the domestic violence context exception purports to uphold the traditional propensity ban by admitting prior abusive acts for a nonpropensity purpose: contextualizing the alleged behavior. Courts reason that evidence admitted under this exception does not demonstrate a defendant's propensity to commit abusive acts, but rather demonstrates the "nature of the relationship" within which the charged crime occurred (the "relationship rationale")[133] or provides information relevant to the jury's assessment of the recanting complainant's credibility (the "credibility rationale").[134] As will be demonstrated below, however,

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[132] In analyzing the Minnesota "domestic violence context" exception, for example, the Supreme Court of Minnesota reasoned that it was "appropriate" to treat prior acts of domestic violence differently from other prior acts evidence because "[d]omestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." State v. McCoy, 682 N.W.2d 153, 161 (Minn. 2004) (citation omitted).

[133] *See* MO. ANN. STAT. § 565.063(13) (West 2015) (authorizing admission of prior conviction of domestic violence to demonstrate "a past history of domestic violence"); Ross v. State, 676 N.E.2d 339, 346 (Ind. 1996) (admitting prior acts of abuse to "illuminat[e] the relationship between the defendant and victim"); State v. Green, 652 P.2d 697, 699, 701 (Kan. 1982) (finding evidence of "marital discord" admissible to demonstrate the "relationship between the parties"); *McCoy*, 682 N.W.2d at 159 (interpreting MINN. STAT. ANN. § 634.20 as authorizing admission of prior acts of abuse to "illuminate[ ] the . . . relationship" between the defendant and the complainant and put the alleged crime in "the context of [that] relationship"); People v. Shorey, 568 N.Y.S.2d 436, 437 (App. Div. 1991) (admitting prior acts evidence "as background material in order for the jury to understand the nature of" the abusive relationship); State v. Sanders, 716 A.2d 11, 13 (Vt. 1998) (holding evidence of prior instances of abuse was relevant "to portray the history surrounding the abusive relationship" and put the allegedly abusive "behavior" in "context").

[134] *See* State v. Clark, 926 P.2d 194, 207 (Haw. 1996) (finding prior abusive acts admissible to show the "context of the relationship," when the relationship is offered as a possible explanation for the complainant's recantation); Commonwealth v. Butler, 839 N.E.2d 307, 313 (Mass. 2005) ("The jury were entitled to consider evidence that depicted the hostile relationship between [the victim] and the defendant [in order to help] explain her recantation, so that they could adequately assess her credibility . . . ."); *McCoy*, 682 N.W.2d at 161 (authorizing admission of defendant's alleged prior abuse of complainant, who testified she could not remember what she told the police about the alleged incident, provided the jury with "a context with which it could better judge the credibility of the principals in the relationship"); Bigpond v. State, 270 P.3d 1244, 1250 (Nev. 2012) ("[V]ictim's prior accusations of domestic violence were relevant because they provide insight into the relationship and the victim's possible reason for recanting her prior accusations, which would assist the jury in adequately assessing the victim's credibility."); *Sanders*, 716 A.2d at 13 (stating that because "[v]ictims of domestic abuse are likely to change their stories out of fear of retribution, or even out of misguided affection," evidence of prior abuse can elucidate "why the victim is less than candid in her testimony and allows [the jury] to decide more accurately which of the victim's statements more reliably reflect reality" (citations omitted)); State v. Magers, 189 P.3d 126, 133 (Wash. 2008) ("[P]rior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.").

each of these rationales in fact requires the fact finder to draw the impermissible propensity inference.

The "relationship rationale" focuses on the presumptively cyclical nature of domestic violence. Domestic assaults are, like most crimes, transaction-based offenses committed at a certain date and time.[135] Many domestic violence assault defendants are charged under general assault statutes;[136] others are charged under domestic violence-specific assault statutes, which differ from the general statutes only through the addition of an element that the assault was committed against an intimate partner or family member.[137] Nevertheless, courts applying the relationship rationale look beyond the elements of the crime to the prevailing stereotypes about domestic violence to conclude that, in order to assess whether a domestic violence defendant committed a single assaultive act, the jury must learn whether he has committed similar acts in the past.

For example, in *State v. Sanders*, the leading Vermont decision addressing the domestic violence context exception, the Vermont Supreme Court reasoned that prior acts of domestic violence were admissible in a prosecution for a single assault because domestic violence is "controlling behavior aimed at gaining another's compliance through *multiple incidents*."[138] It concluded that without knowledge of the prior abusive acts, the present allegation of abuse would seem "incongruous and incredible."[139] Thus, the court ruled that evidence of prior acts was properly admitted for the nonpropensity purpose of "portray[ing] the history surrounding the abusive relationship," and "providing the needed context for the behavior in issue," specifically "an understanding of defendant's actions on the date in question."[140]

The "credibility rationale," by contrast, focuses on the presumptive psychological effects of domestic violence on the complainant.

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135 *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 934 (1987) (noting that the system's transaction-based character has "deep roots" and that the "very nature of criminal punishment" requires that "[b]efore the state can deprive a citizen of liberty in a punitive way," the individual must commit "some concrete prohibited act"); Tuerkheimer, *supra* note 13, at 972 (observing that most paradigmatic criminal offenses are "transaction-bound"). While some have criticized the limitations of this transaction-based model for failing to reflect the persistent nature of battering, *see, e.g.*, *id.* (criticizing the model for failing to address nonphysical forms of abuse that are part of the "full spectrum of battering conduct"), it is the current approach the criminal justice system uses, so this Article assesses courts' and legislatures' reasoning within that context.

136 Burke, *supra* note 5, at 558.

137 *Id.* at 561 (citations omitted).

138 716 A.2d at 13 (citations omitted) (emphasis added).

139 *Id.* (citations omitted).

140 *Id.*

Courts reason that, as a result of the dynamics of domestic violence relationships, complainants are likely to lie to protect their abusive partners from punishment,[141] themselves from future harm, and/or their relationship.[142] Therefore, evidence of prior acts of domestic violence is essential to the jury's ability to assess the credibility of complainants who have recanted their allegations of abuse. Significantly, this rationale is used to undermine the credibility of complainants *the prosecution calls to testify*, despite knowing that they will not inculpate the defendant.[143] For example, in *Commonwealth v. Butler*, the Supreme Court of Massachusetts ruled that absent evidence that the defendant had abused the complainant in the years leading up to the charged assault, it would have had "difficulty" understanding why the complainant—whom the prosecution called as its first witness, despite her pre-trial recantation—"was testifying that the defendant had not harmed her or behaved criminally."[144] Therefore, the jury was "entitled to consider evidence that depicted the hostile relationship between [the complainant] and the defendant and helped to explain her recantation, so that they could adequately assess her credibility, a central issue at trial."[145]

Rhetorically, these rationales sound like a variation of the "inextricably intertwined" theory for admitting prior bad acts, under which courts will admit prior acts that are so closely related to the charged crime that proof of their commission is essential to convey a comprehensible narrative to the jury.[146] Yet, unlike the inextricably intertwined theory, which is limited to prior acts that are so "causally,

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[141] *See, e.g.*, State v. Clark, 926 P.2d 194, 206 (Haw. 1996) (crediting prosecution's argument that prior abusive acts by the defendant could establish that, as an "individual in an abusive relationship," the complainant "could be expected to protect [the defendant] by taking blame for the injuries she suffered").

[142] *See, e.g.*, *Sanders*, 716 A.2d at 13 (ruling prior acts were admissible and relevant to the recanting complainant's credibility because "[v]ictims of domestic abuse are likely to change their stories out of fear of retribution, or even out of misguided affection").

[143] Courts also admit the defendant's prior abusive acts to bolster, explain, or rehabilitate the credibility of complainants whose credibility has been undermined by defense cross-examination. *See, e.g.*, State v. Laprade, 958 A.2d 1179, 1182–83 (Vt. 2008) (allowing evidence of prior abusive acts, noting complainant changed her story about instant abusive acts).

[144] Commonwealth v. Butler, 839 N.E.2d 307, 312–13 (Mass. 2005).

[145] *Id.* at 313.

[146] Imwinkelried, *supra* note 88, at 725. Minnesota, for example, calls this "immediate-episode evidence," and admits prior bad acts under this theory when there is a close causal and temporal link between the prior act and the charged crime "so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae." State v. Riddley, 776 N.W.2d 419, 425 (Minn. 2009) (citations omitted).

temporally, or spatially"[147] related to the charged act that they are "linguistically inseparable" therefrom,[148] courts use the context exception to admit acts of domestic violence that occurred months[149] or years[150] before the charged incident, and even against intimate partners other than the complainant.[151] In essence, courts conclude that the prior acts are *conceptually inseparable* from the charged incident. Given the presumptively unique nature of domestic violence, jurors are thought to be unable to comprehend the charges or the complainant's recantation without knowing that similar acts occurred before.

Despite courts' assertions to the contrary, evidence of acts of prior abuse admitted under either rationale permits or requires the jury to engage in impermissible propensity reasoning. If the "relationship" between the defendant and the complainant has been abusive in the past, and the jury is instructed that it may consider that abusive "nature" in ascertaining whether the defendant abused the complainant on the date of the charged incident, it will necessarily apply propensity reasoning to assess whether he committed the charged crime. That is precisely what the New Hampshire Supreme Court recently concluded when it held that evidence of prior acts of abuse admitted to demonstrate the "context" of a domestic violence relationship is "merely a synonym for propensity."[152]

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147 Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 972 (1988).

148 Imwinkelried, *supra* note 88, at 738–39. In *People v. Till*, for example, after observing the defendant commit an armed robbery, a police officer arrested him and recovered a gun. The defendant was not charged with robbery, but at the ensuing weapon possession trial the court permitted the officer to testify about the uncharged robbery because it provided "background information" and demonstrated the "continuity of the events." 661 N.E.2d 153, 154 (N.Y. 1995) (citations omitted).

149 *See, e.g.*, State v. Sanders, 716 A.2d 11, 13 (Vt. 1998) (admitting acts that occurred in the month before the charged assault).

150 *See, e.g.*, State v. Sinthavong, No. A12-0853, 2013 WL 1500714, at *2 (Minn. Ct. App. 2013) (permitting complainant to provide a detailed account of five abusive incidents that occurred in the three years before the charged crimes and testify about "the general context of her relationship with [defendant], explaining that he called her names, controlled when she could see her family, and did not allow her to work" to demonstrate "the nature and the extent of the relationship" and to assist the jury in determining "whether [the defendant] committed the acts with which he was charged").

151 In *State v. Taylor*, for example, the defendant was charged with domestic assault by strangulation based on allegations that he choked his girlfriend. The Minnesota Court of Appeals found that the trial court properly admitted, under the state's "relationship evidence" exception, proof that he had "impeded [the complainant's] breathing on five or six occasions prior to the charged offense" and evidence that he grabbed a former girlfriend by the throat ten years earlier. No. A11-1953, 2012 WL 4475706, at *1 (Minn. Ct. App. 2012).

152 State v. Davidson, 44 A.3d 454, 461 (N.H. 2012) (citation omitted); *see also* State v. Melcher, 678 A.2d 146, 150 (N.H. 1996) (finding, in a prosecution for sexual assault, that

The credibility rationale similarly requires propensity reasoning. Prior abuse is not directly probative of the complainant's credibility under traditional impeachment theories.[153] That the complainant may have been abused in the past has no bearing on her general character for truthfulness, does not impair her ability to perceive or recall the charged incident, and does not constitute a prior inconsistent statement. And when the complainant testifies that the charged act did not occur, but does not claim the relationship has never been violent,[154] prior abusive acts do not contradict the substance of her testimony. Finally, these prior acts do not logically demonstrate bias in favor of the defendant; that the complainant had been abused in the past suggests that she would be biased against the defendant, yet in these cases the prior acts are introduced to show that her exculpatory testimony is untruthful.

Instead, the jury may link the prior acts to the complainant's credibility by inferring that, because defendant abused her in the past, it is likely he committed the charged offense, rendering her present denial of abuse untruthful. That line of reasoning persuaded the Washington Court of Appeals to conclude that evidence of prior abusive acts introduced to undermine a recanting complainant's credibility was impermissible propensity evidence in *State v. Cook*.[155] Nevertheless, the Washington Supreme Court overruled *Cook* in *State v. Magers*.[156] Acknowledging a trend toward admitting evidence of a defendant's prior acts of domestic violence under nontraditional theories that are "tied to the characteristics of domestic violence itself," the court concluded that "at least insofar as evidence of prior domestic violence is concerned," prior abusive acts are admissible to shed light on the credibility of a recanting witness.[157]

Finally, in some states, the context exception also incorporates the same presumption about the psychological impairment of domestic violence offenders that is reflected in domestic violence propensity statutes. Minnesota and Missouri, for example, allow admis-

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prior bad acts evidence admitted to demonstrate the "'relationship between the parties' [was] nothing more than the history of the defendant's prior sexual contact with the victim" and amounted to inadmissible propensity evidence (citations omitted)).

153 Generally, a witness's credibility may be impeached in one of five ways: providing proof of (1) bias, (2) a "sensory or mental incapacity," (3) "bad character for truth and veracity," (4) a prior inconsistent statement, or (5) contradicting the substance of her testimony. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:75 (4th ed. 2013).

154 *E.g.* State v. Clark, 926 P.2d 194, 197–98 (Haw. 1996); Commonwealth v. Butler, 839 N.E.2d 307, 309 (Mass. 2005).

155 129 P.3d 834, 838 (Wash. Ct. App. 2006).

156 189 P.3d 126, 133 (Wash. 2008).

157 *Id.* (citations omitted).

sion of the defendants' prior acts of abuse against former intimate partners to demonstrate the "nature of the relationship."[158] As the Minnesota Court of Appeals reasoned in upholding admission of evidence of abusive acts against the defendant's former girlfriend under the relationship rationale, "evidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, *sheds light on how the defendant interacts with those close to him*, which in turn suggests how the defendant may interact with the victim."[159]

B. The Medical Treatment and Diagnosis Hearsay Exception

Statements made to medical providers for the purpose of medical treatment have been exempted from hearsay proscriptions for well over a century.[160] This reliability-focused hearsay exception[161] developed under common law to reflect the belief that individuals are motivated by strong self-interest to speak truthfully to their medical provider in order to receive accurate medical treatment (the "self-interest rationale").[162] When it was codified as Federal Rule of Evidence 803(4), the exception was expanded to reflect a second reliability theory: that "life and death decisions are made by physicians in reliance on such facts and as such should have sufficient trustworthi-

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158 The Minnesota statute extends to admission of acts "against other family or household members," MINN. STAT. ANN. § 634.20 (West 2015), and includes former intimate partners. State v. Valentine, 787 N.W.2d 630, 637 (Minn. Ct. App. 2010). The Missouri statute admits any "similar" convictions for domestic violence within five years, regardless of the identity of the complainant. MO. ANN. STAT. § 565.063 (West 2015).

159 *Valentine*, 787 N.W.2d at 637 (emphasis added).

160 *See* Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 259 (1989) (noting that the exception "has a long history under the common law"). The rule has existed in New York State since at least 1866. *See* Matteson v. N.Y. Cent. R.R. Co., 35 N.Y. 487, 493 (1866) (holding that statements of pain and suffering made to examining physicians are not hearsay).

161 The exception is codified federally under FED. R. EVID. 803, which "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." FED. R. EVID. 803 advisory committee's note.

162 *See* Mosteller, *supra* note 160, at 257 ("The theory of the exception in its archetypal form is straightforward: a patient's selfish interest in receiving appropriate treatment guarantees the trustworthiness of the statement."); *see also* White v. Illinois, 502 U.S. 346, 356 (1992) ("[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.").

ness to be admissible in a court of law"[163] (the "expert-reliance rationale"). Thus, as codified federally, and adopted verbatim or nearly verbatim in most states,[164] a statement that is "made for—and is reasonably pertinent to—medical diagnosis or treatment" and "describes medical history; past or present symptoms or sensations; their inception; or their general cause"[165] is exempted from the general hearsay proscription.

Even as expanded in Federal Rule of Evidence 803(4), however, this exception "ordinarily" does not authorize admission of statements "as to fault,"[166] including statements identifying the perpetrator of an act that prompted the patient to seek medical treatment.[167] The reason for this exclusion is simple, and consistent with both the self-interest and expert-reliance rationales: A doctor treating someone who is seeking treatment for injuries sustained during a physical assault, for example, will administer the same medical treatment for the injuries regardless of whether the assailant was a stranger or the patient's neighbor, boss, or friend. Knowing this, the patient has no motivation to truthfully identify the assailant, and the doctor does not rely on this information for any medical purpose, so identity is beyond the scope of the exception.[168]

Despite this well-established limitation, appellate courts in at least eight states[169] and one federal circuit[170] have expanded the med-

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163 United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980); *see also* United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985) (identifying the "twin policy justifications" underlying FED. R. EVID. 803(4)).

164 *See* Mosteller, *supra* note 160, at 257 n.2 (listing twenty-five states that have adopted FED. R. EVID. 803(4) verbatim or with stylistic variation and seven states that have adopted modified versions). For further discussion of the history of this exception, see *id.* at 261–64.

165 FED. R. EVID. 803(4).

166 FED. R. EVID. 803 advisory committee's note. To illustrate this point, the drafters explained that "a patient's statement that he was struck by an automobile would qualify [for admission] but not his statement that the car was driven through a red light." *Id.*

167 *See, e.g.*, *Iron Shell*, 633 F.2d at 84 (finding that statements of identity would "seldom, if ever" fall within FED. R. EVID. 803(4)).

168 *See Renville*, 779 F.2d at 436 (discussing why statements of identity generally fall outside the scope of the medical treatment and diagnosis exception).

169 *E.g.*, Moore v. City of Leeds, 1 So. 3d 145, 150 (Ala. Crim. App. 2008); Nash v. State, 754 N.E.2d 1021, 1025 (Ind. Ct. App. 2001); People v. Backlund, No. 240641, 2003 WL 21246619, at *2 (Mich. Ct. App. May 29, 2003); State v. Woodward, 908 P.2d 231, 238 (N.M. 1995); People v. Ortega, 942 N.E.2d 210, 215–16 (N.Y. 2010); Williams v. Alexander, 129 N.E.2d 417, 420 (N.Y. 1955); State v. Moen, 786 P.2d 111, 120 (Or. 1990) (en banc); State v. Sims, 890 P.2d 521, 523–24 (Wash. Ct. App. 1995); Oldman v. State, 998 P.2d 957, 962 (Wyo. 2000); *see also* Commonwealth v. O'Connor, No. CRIM.A. 98-0269, 2000 WL 34601353, at *132 (N. Mar. I. June 28, 2000). While the issue presented in *Ortega* was whether a statement in a hospital record fell within the business records hearsay exception, in the context of hospital records the scope of that exception is coterminous with the medical treatment and diagnosis exception. In addition, the Minnesota Supreme Court has

ical treatment and diagnosis hearsay exception in domestic violence prosecutions to encompass a patient's identification of the assailant to medical providers. In these jurisdictions, when an individual seeks medical treatment following a domestic assault and discloses to the medical provider that her boyfriend caused her injuries, the provider may recount at an ensuing trial both that the patient reported that she had been assaulted *and* that she identified her boyfriend as the assailant.

Although the medical treatment and diagnosis exception reflects reliability principles, in expanding this exception courts do not consider, let alone decide, whether a patient's identification of her partner as her assailant is more reliable than other identifications.[171] Eschewing the self-interest rationale, courts instead tangentially invoke the expert-reliance rationale by emphasizing the presumptively unique medical treatment rendered to those who report domestic violence.[172] Starting from the presumption that domestic violence causes emotional and psychological trauma, they reason that this nonphysical injury distinguishes domestic violence from other types of violence.[173] They then extrapolate that "a doctor faced with a victim who has been assaulted by an intimate partner is not only concerned with bandaging wounds,"[174] but rather will take actions to treat the nonphysical injuries by providing "information about domestic violence and necessary social services,"[175] advising the patient to leave her abusive partner[176]

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declined to "foreclose the possibility" that it might adopt a "limited categorical rule of admissibility under the medical exception to hearsay for statements of identification by victims of domestic violence." State v. Robinson, 718 N.W.2d 400, 407 (Minn. 2006).

170 United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) ("[T]he identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case . . . .").

171 Interestingly, doing so would raise consistency problems for courts that have concluded, in other contexts, that domestic violence complainants are more likely to lie about the cause of their injuries or the identity of their assailant. *See supra* Part II.A.

172 *See, e.g.*, *Ortega*, 942 N.E.2d at 215 ("[Domestic violence] differs materially, both as an offense and a diagnosis, from other types of assault in its effect on the victim and in the resulting treatment.").

173 *See, e.g.*, *Joe*, 8 F.3d at 1494 ("All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser."); *accord Moore*, 1 So. 3d at 150 (quoting *Joe*, 8 F.3d at 1494–95); *Nash*, 754 N.E.2d at 1025 (same); *see also Ortega*, 942 N.E.2d at 215–16 ("In addition to physical injuries, a victim of domestic violence may have a whole host of other issues to confront, including psychological and trauma issues . . . ."); People v. Swinger, 689 N.Y.S.2d 336, 340 (Crim. Ct. 1998) ("Unlike other types of assault, domestic violence results not only in physical injuries to its frightened and battered victims but also will have a traumatic impact on the victims' psychological well-being.").

174 *Ortega*, 942 N.E.2d at 215–16; *see also Joe*, 8 F.3d at 1495 ("[T]he physician's treatment will necessarily differ when the abuser is a member of the victim's family or household.").

175 *Ortega*, 942 N.E.2d at 215–16.

or seek counseling,[177] and/or contacting the police.[178] Therefore, because the revelation of domestic violence causes a medical provider to treat the nonphysical injuries, the identification of the assailant is medically relevant and falls within the medical treatment and diagnosis hearsay exception.[179]

Yet there is a significant disconnect between the courts' reasoning and the evidentiary ruling. The causation of emotional and psychological trauma hardly distinguishes domestic violence from other forms of assault; all or most acts of violence cause nonphysical injuries.[180] The true "difference" between domestic violence and other types of assault that seems to motivate the expansion of this hearsay exception is not the causation of nonphysical trauma, per se, but rather an assumption about the impact of such trauma on the patient's ability or willingness to prevent future harm. Invoking the specter of learned helplessness, courts imply that patients who report domestic violence require doctors to intervene and take preventative measures on their behalf.

The Oregon Court of Appeals' decision in *State v. Roberts* is illustrative. The complainant sought medical treatment at an emergency room after being assaulted.[181] Though she wanted only to be "examined, treated, and allowed to leave the hospital" and was unwilling to discuss what happened to her, the doctor believed her injuries were the result of domestic violence.[182] The doctor testified that "such patients are often, because of psychological dependencies, unable to leave the abusive relationship and unwilling to report the

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176 *See Joe*, 8 F.3d at 1496 ("In the domestic sexual abuse case . . . the treating physician may . . . instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere."); State v. Roberts, 775 P.2d 342, 343 (Or. Ct. App. 1989) (accepting doctor's testimony that identity was relevant in treating patients who disclose domestic violence).

177 *Joe*, 8 F.3d at 1496 ("[T]he treating physician may recommend special therapy or counseling.").

178 Commonwealth v. O'Connor, No. CRIM.A. 98-0269, 2000 WL 34601353, at *128 (N. Mar. I. June 28, 2000); *Roberts*, 775 P.2d at 343.

179 Nash v. State, 754 N.E.2d 1021, 1025 (Ind. Ct. App. 2001) ("[W]here injury occurs as the result of domestic violence, which may alter the course of diagnosis and treatment, trial courts may properly exercise their discretion in admitting statements regarding identity of the perpetrator.").

180 A brochure published by the Department of Justice's Office for Victims of Crime, for example, counsels that *all* assault victims may experience emotional consequences and that the assault may cause a "significant immediate and long-term emotional impact." OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC HELP SERIES FOR CRIME VICTIMS: ASSAULT, *available at* http://www.ovc.gov/pubs/helpseries/pdfs/HelpBrochure_Assault.pdf.

181 *Roberts*, 775 P.2d at 343.

182 *Id.*

abuse," so he "attempts to discover the history of the patient's relationship with the assailant so that, in a proper case, he may advise the patient to leave the relationship and to seek psychological counseling."[183] After the complainant eventually disclosed that her boyfriend had caused her injuries, the doctor called the police, advised her to "remove herself from the abusive environment," and referred her to a crisis center for counseling.[184] At the defendant's trial for second-degree assault, the complainant recanted her allegations of abuse, but her identification to her doctor of the defendant as her assailant was admitted as substantive evidence of guilt under the medical treatment and diagnosis hearsay exception.[185]

The origins of this hearsay expansion substantiate the inference that courts are concerned primarily with the patient's perceived inability to prevent future harm. The first jurisdictions to expand the medical treatment and diagnosis exception to include identification statements in domestic violence prosecutions drew directly upon decisions that authorized a similar expansion in child abuse prosecutions.[186] Explicitly analogizing domestic violence to child abuse, courts concluded that the same expansion was warranted in domestic violence prosecutions.[187] Yet, these courts glossed over a key distinction between the two scenarios: A primary justification for expanding the

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183 *Id.*

184 *Id.*

185 *Id.*

186 *See* Blake v. State, 933 P.2d 474, 477 n.2 (Wyo. 1997) ("[A]n overwhelming majority of jurisdictions, including at least 32 states and 4 federal circuits, allow into evidence statements regarding the identity of the perpetrator in child physical or sexual assault cases."); 2 MCCORMICK ON EVIDENCE § 278, at 251 (John William Strong ed., 4th ed. 1992) ("In [child abuse cases], a number of courts have admitted a broad range of statements by children, including statements identifying a particular individual as the perpetrator of the offense.").

187 *See, e.g.*, United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (analyzing the expansion of the medical treatment and diagnosis exception in child abuse proceedings and concluding that, although the complainant was not a child, "the identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, even those not involving children"); Commonwealth v. O'Connor, No. CRIM.A. 98-0269, 2000 WL 34601353, at *130 (N. Mar. I. June 28, 2000) (discussing *Joe* and discerning "no reason to stray from the sound reasoning of other courts which have refused to apply this exception solely to children"); State v. Sims, 890 P.2d 521, 523 (Wash. Ct. App. 1995) (holding that, for reasons "similar" to those relied on in child abuse prosecutions, "a statement attributing fault to an abuser can be reasonably pertinent to treatment in domestic sexual assault cases involving adults"). *See also* Moore v. City of Leeds, 1 So. 3d 145, 149–50 (Ala. Crim. App. 2008) (describing how often child abuse cases admit identifications of perpetrators by abuse victims); Nash v. State, 754 N.E.2d 1021, 1024–25 (Ind. Ct. App. 2001) (explaining that rationales used in child abuse cases are often similarly applicable in domestic violence cases); State v. Moen, 786 P.2d 111, 121 (Or. 1990) (en banc) ("Admissibility of statements of the type challenged here is not limited to cases involving child abuse.").

scope of "medical treatment" for children is the existence of a legal mandate that doctors intervene on behalf of minors, who are unable to make decisions about their aftercare, to prevent them from being returned to an abusive guardian.[188] Adult domestic violence patients, by contrast, are legally and developmentally capable of making their own medical and relationship decisions.[189] The two scenarios simply are not parallel: Even if the expansion is justified in child abuse prosecutions, it does not follow that the expansion is warranted in domestic violence prosecutions.

In any event, the actions taken by the doctor upon the disclosure of domestic violence are not the type of "medical treatment" this hearsay exception is intended to encompass. In the cases cited above, the revelation of domestic violence did not cause the doctor to directly treat the emotional trauma, but rather to refer the patient to social services, dispense relationship advice, or contact the police.[190] These actions do not require the kind of specialized medical risk analysis that renders statements for the purpose of medical treatment and diagnosis reliable; erroneously informing the patient about available social services, for example, does not have the same kind of deleterious impact as prescribing the wrong medication or performing an unnecessary operation. As a normative matter, we may want to encourage doctors and other medical providers to take these extramedical steps and act as intermediaries between patients and social services. Yet, simply because a medical provider—as opposed to a social worker or a police officer—fills this role does not render it a "medical" act that carries an imprimatur of reliability.

Thus, in expanding the medical treatment and diagnosis exception to include the identity of the perpetrator in domestic violence prosecutions, courts conclude neither that domestic violence com-

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188 *See* United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985) ("[P]hysicians have an obligation, imposed by state law, to prevent an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse."); *see also* 2 MCCORMICK ON EVIDENCE, *supra* note 186, § 278, at 251 n.9 (emphasis added) ("[K]nowledge of the perpetrator is important to the treatment of psychological injuries that may relate to the identity of the perpetrator *and to the removal of the child from the abuser's custody or control.*").

189 There is a growing—and controversial—trend toward the adoption of mandatory reporting requirements for medical providers who have reason to believe their patients have experienced domestic violence. *See* Thomas L. Hafemeister, *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 950 (2011) (describing the "trend toward enacting mandatory reporting of [intimate partner violence]" that began in California and has sparked controversy). Although, as of 2011, 21 states and the District of Columbia had adopted some form of mandatory reporting requirement, *id.* at 951, only four states had required direct reporting to law enforcement. *Id.* at 952.

190 *See supra* notes 175–79, 181–85 and accompanying text.

plainants are more likely to speak truthfully to their medical providers nor that medical providers stake "life and death" medical decisions[191] upon the revelation that the assailant is an intimate partner.[192] Avoiding both of the reliability-focused rationales that motivated the exception's adoption, they instead invoke prevailing presumptions about the impact of domestic violence on the complainant's ability or willingness to end the relationship to justify the departure from this well-established limit to this hearsay exception.[193]

The expansion of this hearsay exception is hardly inconsequential, particularly for prosecutions in which the complainant declines to testify.[194] Dicta in *Giles v. California* imply that statements to medical providers are firmly beyond the scope of the Confrontation Clause.[195] Therefore, prosecutors can comfortably use this exception to fill evidentiary gaps created by the complainant's absence by introducing her prior accusation against the defendant through the sterilized testimony of a medical professional.

C. *Forfeiture by Wrongdoing*

Under the longstanding doctrine of forfeiture by wrongdoing,[196] a defendant forfeits his right to prevent, on hearsay and Confrontation Clause grounds, the admission of statements from unavailable declar-

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191 United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980).

192 *See supra* notes 172–73 and accompanying text.

193 *See, e.g.*, Moore v. City of Leeds, 1 So. 3d 145, 149–50 (Ala. Crim. App. 2008) (ruling the identity of a domestic abuser relevant to medical treatment so that the medical provider can advise the patient to leave the abuser and seek shelter elsewhere); State v. Roberts, 775 P.2d 342, 343 (Or. Ct. App. 1989) (deeming identity of domestic abuser relevant to medical treatment because domestic violence renders patients "unable to leave the abusive relationship and unwilling to report the abuse").

194 When the complainant testifies at trial that the defendant assaulted her, the introduction of her prior identification to her medical provider will corroborate her in-court testimony, but may add little to the overall weight of the evidence.

195 *See* 554 U.S. 353, 376 (2008) ("[O]nly *testimonial* statements are excluded by the Confrontation Clause. . . . [S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules . . . .").

196 The doctrine was used as early as 1666 in *Lord Morley's Case*. James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 462 (2003) ("As early as 1666, English law recognized that an absent witness's deposition could be admitted in lieu of live testimony if the witness was unavailable because a party procured the absence . . . ."). The Supreme Court first applied the forfeiture doctrine in *Reynolds v. United States*, 98 U.S. 145 (1879), holding that the statements' admission "did not violate the right of the defendant to confront witnesses at trial, because when a witness is absent by the defendant's 'wrongful procurement' the defendant 'is in no condition to assert that his constitutional rights have been violated' if 'their evidence is supplied in some lawful way.'" *Giles*, 554 U.S. at 366 (quoting *Reynolds*, 98 U.S. at 158)).

ants whose absence that defendant "obtain[ed] . . . by wrongdoing."[197] Unlike most hearsay exceptions, the forfeiture doctrine is not a "surrogate" for the statement's reliability.[198] Rather, it is an equitable principle that prevents one who procures a witness's absence by wrongful means from benefiting from that wrong.[199] In other words, a defendant who wrongfully renders a witness unavailable to testify—through coercion, intimidation, chicanery, homicide, or other nefarious means—cannot reap the benefit of that wrongful action at trial by preventing admission of that witness's hearsay statements.[200]

Given the frequency with which domestic violence complainants decline to testify at trial,[201] many have identified the forfeiture doctrine as crucial to prosecution's ability to proceed in the complainant's absence, particularly after *Crawford v. Washington*.[202] Equity, however, is "a two-way street";[203] while the forfeiture doctrine protects the integrity of the court from wrongful defendant-induced eviden-

197 Davis v. Washington, 547 U.S. 813, 833 (2006).

198 Crawford v. Washington, 541 U.S. 36, 62 (2004).

199 *Id.*

200 *See Reynolds*, 98 U.S. at 158 (ruling that one who "wrongful[ly] procure[s]" the absence of a witness "cannot complain if competent evidence is admitted to supply the place of that which he has kept away" and "cannot insist on" the constitutional privilege of being "confronted with the witnesses against him"). Because one loses his or her right to invoke the protection of the Confrontation Clause or hearsay rules only through actions intended to interfere with the truth-seeking process of the criminal justice system, *see* Flanagan, *supra* note 196, at 482–84 (describing the intent requirement used by courts in invoking the misconduct exception), some courts and commentators have aptly characterized the doctrine as based on waiver principles instead of forfeiture. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (referring to "waiver by misconduct"); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982), *superseded by rule on other grounds*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Nelson, 242 F. App'x 164, 170–71 (5th Cir. 2007) ("[A] defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation . . . ."); Flanagan, *supra* note 196, at 483 ("Nothing in these opinions suggests that either the federal or state courts were establishing the broader principle that responsibility for the witness's absence, regardless of intent, would be a waiver of constitutional and evidentiary rights.").

201 *See, e.g.*, De Sanctis, *supra* note 17, at 367–68 ("[V]ictims of domestic violence are uncooperative [with the prosecution] in approximately eighty to ninety percent of cases."); Lininger, *supra* note 16, at 768 ("Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.").

202 *See, e.g.*, Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 449 (2006) (arguing that forfeiture by wrongdoing "may present an opportunity for domestic violence prosecutors to combat domestic violence under the worst of circumstances: namely, when the victim is unable to participate in the prosecution"); Lininger, *supra* note 16, at 807–08 (recommending universal codification of a forfeiture by wrongdoing hearsay exception to "diminish the detrimental effect of *Crawford* on prosecutions of domestic violence").

203 James F. Flanagan, *We Have a "Purpose" Requirement if We Can Keep It*, 13 LEWIS & CLARK L. REV. 553, 575 (2009).

tiary gaps,[204] it also prevents criminal defendants from being stripped of essential evidentiary and constitutional protections upon a mere allegation they committed any wrongful act in the past. Forfeiture of essential constitutional and evidentiary protections is an equitable response only if the defendant *intentionally* prevents the declarant from cooperating with a court proceeding.[205] Therefore, the doctrine, as developed in common law, codified in the Federal Rules of Evidence[206] and state evidence codes,[207] and recently clarified in *Giles v. California*, requires three criteria: that the defendant (1) engaged in wrongful conduct (2) for the purpose of preventing a witness from testifying that (3) caused the witness's unavailability.

Scholars have thoroughly examined the connection between the first two elements in domestic violence prosecutions, especially in light of the Supreme Court's decisions in *Crawford v. Washington* and

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[204] *See* Davis v. Washington, 547 U.S. 813, 833 (2006) (suggesting the forfeiture doctrine is appropriate when defendants "undermine the judicial process by procuring or coercing silence from witnesses and victims" or otherwise act "in ways that destroy the integrity of the criminal-trial system"). The doctrine was codified in the Federal Rules of Evidence to provide "a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" FED. R. EVID. 804 advisory committee's note (quoting *Mastrangelo*, 693 F.2d at 273).

[205] Joan Comparet-Cassani, Crawford *and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185, 1207 (2005) (discussing the "law of equity" and concluding that, "without the presence of that intent [to prevent the witness from testifying] there is no legal justification for the equitable reprimand" embodied in the forfeiture doctrine).

[206] FED. R. EVID. 804(b)(6) authorizes admission of a "statement offered against a party *that wrongfully caused*—or acquiesced in wrongfully causing—the declarant's unavailability *as a witness, and did so intending that result*." FED. R. EVID. 804(b)(6) (emphasis added). This rule "codifies the forfeiture doctrine." *Davis*, 547 U.S. at 833. As developed under common law, the same forfeiture standards apply to both constitutional and evidentiary forfeiture. *See* United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997) ("More commonly . . . courts have taken the view . . . that misconduct leading to the loss of confrontation rights also necessarily causes the defendant to forfeit hearsay objections." (citation omitted)). The majority opinion in *Giles*, however, stressed that states may adopt a less demanding standard for evidentiary forfeiture. Giles v. California, 554 U.S. 353, 376 (2008).

[207] At least 18 states have codified this hearsay exception. *See* CAL. EVID. CODE § 1350 (West 1995 & Supp. 2015); GA. CODE ANN. § 24-8-804(b)(5) (2013); MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2013 & Supp. 2014); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); IND. R. EVID. 804(b)(5); Iowa R. EVID. 5.804(b)(6); KY. R. EVID. 804(b)(5); MASS. R. EVID. 804(b)(6); MICH. R. EVID. 804(b)(6); N.J. R. EVID. 804(b)(9); N.M. R. EVID. 11-804(B)(5); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(B)(6); OR. R. EVID. 804(3)(f); PA. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6); VT. R. EVID. 804(b)(6). New York, which lacks codified rules of evidence, also recognizes this exception. People v. Geraci, 649 N.E.2d 817, 820–21 (N.Y. 1995). For an overview of the slight variances between the state statutes, see *Giles*, 554 U.S. at 367–68 n.2. Despite the variations, states "use the general principles found in the federal cases . . . ." Flanagan, *supra* note 196, at 470.

Giles v. California.[208] Instead of repeating those analyses, this section will briefly recount the developments of *Giles* before focusing on an area that has received less attention: the nexus between the defendant's wrongful conduct and the causation element.

In *Crawford v. Washington*, the Supreme Court held that the Sixth Amendment guaranteed criminal defendants the opportunity to cross-examine declarants of testimonial statements.[209] By reinvigorating a defendant's right to an in-court confrontation with his accuser, *Crawford* cast doubt on the continued viability of tactics that had been developed to enable prosecution of domestic violence crimes without the complainant's participation.[210]

In response, scholars and prosecutors demanded a more permissive forfeiture standard that reflected the need for hearsay evidence in domestic violence prosecutions.[211] Reasoning that *Crawford* permitted—and even compelled—the expansion of the forfeiture by wrongdoing exception beyond deliberate witness tampering,[212] courts began finding forfeiture in domestic homicide prosecutions without

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208 *E.g.*, Flanagan, *supra* note 203, at 553 ("[T]he purpose requirement of *Giles*, and ultimately *Crawford*'s protection of the Confrontation Clause, will be undermined unless the courts require strict 'but for' proof of the reason for the witness's absence, including proof that the witness did not have independent personal reasons for avoiding testifying."); Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 874–75 (2009) ("The most controversial topic in *Giles* was the notion that domestic violence, by its very nature, might amount to wrongful conduct sufficient to forfeit confrontation rights. . . . [A] majority of the Court apparently endorsed the notion of 'inferred intent' whereby a long-term abusive relationship might support a finding of forfeiture."); Myrna S. Raeder, *Thoughts About* Giles *and Forfeiture in Domestic Violence Cases*, 75 BROOK. L. REV. 1329, 1345–47 (2010) (discussing the roles of "inferred intent" stemming from misconduct in domestic violence cases).

209 541 U.S. 36, 68–69 (2004).

210 Under these "evidence-based" or "victimless" prosecution tactics, police were required to respond "differently and more thoroughly" to domestic violence cases than they would other acts of violence by collecting physical evidence and statements from complainants immediately following the reported abuse. GOODMARK, *supra* note 5, at 110–11. Prosecutors would rely on this evidence, in combination with medical records and 911 calls, to pursue charges even if the complainant declined to testify at trial. *Id.*

211 *See, e.g.*, King-Ries, *supra* note 202, at 460–61 (identifying the forfeiture by wrongdoing doctrine as a "solution to *Crawford*" that permits the continued viability of "victimless prosecutions"); Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *in Domestic Violence Cases*, PROSECUTOR, Nov.–Dec. 2004, at 14, 15–16 (identifying "forfeiture by domestic violence" as a "long-term solution" to the obstacles to evidence-based prosecution after *Crawford*).

212 *See, e.g.*, People v. Giles, 152 P.3d 433, 443–44 (Cal. 2007), *vacated*, 554 U.S. 353 (2008) (acknowledging that the forfeiture doctrine generally applied to deliberate witness tampering, but concluding that after *Crawford*, courts should admit "relevant evidence that the defendant caused not to be available through live testimony," even if the defendant did not intend to cause the declarant's unavailability as a witness); State v. Jensen, 727 N.W.2d 518, 535 (Wis. 2007) ("[W]e believe that in a post-*Crawford* world [a] broad view of forfeiture by wrongdoing . . . is essential.").

any proof that the defendant killed the decedent to prevent her from testifying or cooperating with the authorities.[213] A six-justice majority of the Supreme Court put a halt to this practice in *Giles v. California*, ruling that a defendant forfeits his confrontation right only if he commits a wrongful act *for the purpose of* procuring her absence as a witness.[214]

Ultimately the *Giles* decision, which was comprised of five opinions,[215] "left open more questions than it answered,"[216] one of which is worth highlighting here. Though the majority purportedly rejected calls for a "special" forfeiture standard that exempted domestic violence from the intent requirement,[217] the question remains whether, in fact, the intent requirement carries a different meaning in domestic violence prosecutions. Justice Souter, joined by Justice Ginsburg, wrote in his concurring opinion that the requisite intent to forfeit could be "inferred" from a "classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[218] Justice Breyer, joined by Justices Stevens and Kennedy in his dissent, agreed with this passage, which he interpreted as a conclusion that proof of past domestic abuse is "sufficient" for a finding of forfeiture in a domestic homicide prosecution.[219] Thus, it seems *this* five-justice "majority"[220] in fact supports the adoption of a "special, improvised"[221] intent standard for domestic violence prosecutions under which a defendant who abuses a complainant prospectively forfeits his future confrontation and hearsay objections to the admission of her statements in a future legal proceeding.[222]

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213 *E.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005); United States v. Mayhew, 380 F. Supp. 2d 961, 963, 966–69 (S.D. Ohio 2005); *Giles*, 152 P.3d at 443–44; *Jensen*, 727 N.W.2d at 521, 534–36 (embracing the *Garcia-Meza* court's view on intent in applying the forfeiture by wrongdoing doctrine).

214 Giles v. California, 554 U.S. 353, 354, 359–62 (2008). The Court clarified that the only "wrong" from which the doctrine prevented a defendant from benefitting was "conduct *designed* to prevent the witness from testifying." *Id.* at 359.

215 Justices Roberts, Thomas, and Alito joined Justice Scalia's majority opinion in full, and Justices Souter and Ginsberg joined in part. *Id.* at 354. Justices Thomas and Alito filed concurring opinions. *Id.* Justice Souter filed an opinion concurring in part. *Id.* Justice Breyer filed a dissenting opinion in which Justices Stevens and Kennedy joined. *Id.*

216 Raeder, *supra* note 208, at 1332.

217 *Giles*, 554 U.S. at 376–77.

218 *Id.* at 379–80 (Souter, J., concurring).

219 *Id.* at 380, 404–05 (Breyer, J., dissenting).

220 This refers to Justices Souter and Ginsburg in concurrence and Justices Breyer, Stevens, and Kennedy in dissent.

221 *Giles*, 554 U.S. at 376.

222 For further discussion of this "inferred intent" standard, see Raeder, *supra* note 208, at 1343–47; Lininger, *supra* note 208, at 874–75.

Under this "majority" standard, forfeiture may be an equitable response to abusive acts that occurred well before any criminal proceeding was underway. Furthermore, states remain "free to adopt" less stringent forfeiture standards for the admission of hearsay.[223] In this era of the "[i]ncredible [s]hrinking Confrontation Clause,"[224] evidence rules may have an increasingly greater impact on the adjudication of guilt than Sixth Amendment confrontation restrictions.

An area that has garnered less attention is one that the Court did not have to address in *Giles*: the requisite nexus between the defendant's wrongful conduct and the declarant's unavailability as a witness.[225] When a witness does not appear in court, and the prosecution can establish that the defendant has engaged in threatening or other coercive behaviors, establishing causation is rather straightforward. A more challenging inquiry arises with some frequency[226] in nonhomicide domestic violence prosecutions: A complainant will be present in court, but refuse to testify for the prosecution, invoke a privilege, and/or claim to not remember the substance of her requested testimony, and deny that the defendant threatened her or otherwise caused her "unavailability" as a witness.[227]

Of course, a witness's insistence that she has not been intimidated into unavailability is not the last word on causation; "in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions procuring his or her unavailability."[228] Thus, courts routinely examine the circumstances surrounding the unavailability to determine causation.[229]

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223 *Giles*, 554 U.S. at 376.

224 Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1865, 1867–68 (2012) (summarizing Supreme Court jurisprudence restricting the scope of the Confrontation Clause after *Crawford v. Washington*).

225 In *Giles* it was uncontested that the defendant caused the witness's death and, consequently, her unavailability as a witness. *See* 554 U.S. at 356 (describing the events of the witness's death and defendant's testimony confirming responsibility, but claiming self-defense).

226 *See supra* note 201 (describing the frequency with which domestic violence complaining witnesses decline to testify at trial).

227 A witness may be "unavailable" for forfeiture purposes even if she is present but refuses to testify, invokes a privilege, or testifies she cannot remember the subject matter of her requested testimony. *See* FED. R. EVID. 804(a) (defining "unavailability").

228 United States v. Scott, 284 F.3d 758, 764 (7th Cir. 2002); *see also* People v. Geraci, 649 N.E.2d 817, 823 (N.Y. 1995) ("[G]iven the inherently surreptitious nature of witness tampering," the party seeking a forfeiture finding "will often have nothing more to rely upon than circumstantial proof.").

229 In *United States v. Scott*, for example, an uncooperative witness did not testify at the forfeiture hearing, so the court examined the circumstances in which the witness became "unavailable" to determine whether the defendant had forfeited his right to object to the admission of the witness's grand jury testimony. Based on testimony from a third party that the defendant had told the witness to "keep his mouth shut" and that the witness seemed

There is a growing consensus that there are many reasons that a domestic violence complainant will become "unavailable" as a witness, including love, financial reliance, immigration concerns, a desire to keep their family intact, and threats or coercion that lead to fear of reprisal.[230] Only one of these reasons—fear induced by defendant's threats or coercion—should result in imposition of the "equitable" remedy of forfeiture. Indeed, it is hardly fair to apply the doctrine "when it does not appear that the witness was absent by the suggestion, connivance, or procurement of the accused . . . ."[231] Nevertheless, in a few jurisdictions, even when complainants offer reasons for refusing to testify that are not attributable to the defendant's wrongful conduct, courts draw on prevailing stereotypes about domestic violence to find that, in fact, the defendant caused her unavailability.[232] In essence, these courts conclude that a different "equitable" equation applies in domestic violence prosecutions: If the defendant has abused the complainant in the past it is fair to infer that he caused her to absent herself as a witness—even if she says otherwise. While this practice is currently limited to only a few jurisdictions, commentators

"nervous and scared," the court found forfeiture. 284 F.3d at 762–64. And in *People v. Geraci*, the court found that the defendant had caused the witness's unavailability for forfeiture purposes, despite the witness's denial that the defendant had threatened him, based on the witness's previous statements to officers that he feared reprisal from the defendant and that the defendant had paid him to refrain from testifying. 649 N.E.2d at 819–20, 823–24.

230 *E.g.*, SCHNEIDER, *supra* note 12, at 52 ("Legal intervention may provide women certain protection from battering, but it does not provide women housing, support, child care, employment, community acceptance, or love. It also does not deal with the economic realities of life."); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232 (1993) (identifying contextual factors that may influence a battered woman as "fear of retaliation," available "economic (and other tangible) resources," "concern for her children," "emotional attachment to her partner," "personal emotional strengths, such as hope or optimism," "race, ethnicity, and culture," "emotional, mental, and physical vulnerabilities," and "perception of the availability of social support"); Miccio, *supra* note 57, at 307 ("If we listen to women survivors, we learn that they stay [with their abusers] for myriad reasons—fear of reprisal, fear of losing their children, economic concerns, emotional ties to the batterer or his family, lack of social or familial support, and lack of a place to go.").

231 Motes v. United States, 178 U.S. 458, 474 (1900).

232 For example, in *United States v. Montague*, the Tenth Circuit affirmed a district court that found that the defendant caused the unavailability of his wife, who refused to testify against him and invoked marital privilege, based on evidence that he abused her in the past and had contact with her before trial—when she went to visit him in prison. 421 F.3d 1099, 1101, 1103–04 (10th Cir. 2005); *see also* People v. Byrd, 855 N.Y.S.2d 505, 509–10 (App. Div. 2008) (relying on expert testimony that the complainant was a battered woman to reject the complainant's testimony that she was not testifying for reasons not attributable to the defendant's conduct); People v. Santiago, No. 2725-02, 2003 WL 21507176, at *2, *11–13 (N.Y. Sup. Ct. Apr. 7, 2003) (same).

have suggested that it may[233] or should[234] be used more frequently, especially after *Giles*.

A handful of decisions emerging from New York State domestic violence prosecutions highlight the troubling implications of this specialized causation standard. In *People v. Santiago*, the defendant was arrested for violating an order of protection against his girlfriend.[235] The complainant reluctantly testified before the grand jury, but soon thereafter left messages for the prosecutor explaining that life as a "single parent" was "very hard" and that she could not work full time because no one else was available to watch her daughter (presumably because the defendant was in jail), and asking that the prosecutor drop the charges.[236] When the complainant declined to testify at trial, the prosecution argued the defendant had forfeited his right to object to the admission of her inculpatory grand jury testimony.[237]

At an extensive forfeiture hearing, the complainant testified that she loved the defendant, had falsified accusations against him in the past out of jealousy, and had acted violently towards him on occasion.[238] The prosecution called an expert witness who testified that this was a "classic example of a domestic violence relationship" and that the complainant was an "abused woman whose current behavior is explained by Battered Women's Syndrome."[239] She opined that the complainant's behavior reflected an "imposed lack of self esteem" and "level of desperation" that "can only be attributed to the coercion inherent in the honeymoon phase of the cycle of violence" and the "tremendous pressure" the defendant placed on her.[240]

The court admitted that, in "other kinds of cases" it would "take[ ] for granted that a complainant's desire to withdraw from the prosecution" was not attributable to the defendant.[241] Yet, it reasoned, domestic violence cases "are to be viewed differently from other crimes of violence which come through our courts."[242] The court

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233 *See* Flanagan, *supra* note 203, at 573–76 (offering "cautionary thoughts" on establishing causation after *Giles*).

234 *See* Deborah Tuerkheimer, *Forfeiture After* Giles*: The Relevance of "Domestic Violence Context,"* 13 LEWIS & CLARK L. REV. 711, 726 (2009) ("With respect to both mens rea and causation, then, *Giles* represents an invitation to prosecutors to make salient the full spectrum of abuse that resulted in a live victim's absence from trial.").

235 2003 WL 21507176, at *1.

236 *Id.* at *9–10. The complainant also visited the defendant ten times in jail, and the defendant called her more than 100 times. *Id.* at *11.

237 *Id.* at *1.

238 *Id.* at *2, *4.

239 *Id.* at *12.

240 *Id.*

241 *Id.* at *14.

242 *Id.* at *15.

contrasted complainants in "the vast majority of cases," who will "follow through [with the prosecution] because they have the strength, the will and the need to do so," with domestic violence complainants, who "lack the self esteem and strength to seek retribution or permanent safety from their attackers."[243] It concluded a domestic violence complainant's "attempts to become unavailable as a prosecuting witness cannot be viewed as . . . voluntary,"[244] and that the defendant had caused the complainant's refusal to testify by using her "desires for a normal and loving relationship to his own end."[245] Therefore, it ruled that the defendant had forfeited his right to objection to the admission of her inculpatory grand jury testimony.[246]

A similar fact pattern unfolded in *People v. Byrd*, and to the same effect.[247] While the allegations against the defendant were more troubling than in *Santiago*,[248] the complainant's assertion that he did not cause her unavailability was even more adamant. At the forfeiture hearing, she "maintained that her refusal to testify was a product of her free choice, that she wanted to forgive defendant and that she believed he needed treatment rather than incarceration."[249] She denied that the defendant had asked her to refrain from testifying, and stated that she initially cooperated with the prosecution "out of fear that the Administration for Child Services would take her child from her."[250] She also wrote a letter to the court indicating she did not want the defendant to remain in jail, expressing confidence that he could change if given the chance to do so, and conveying sadness that their daughter would spend another holiday season without him.[251]

The prosecution presented the same expert witness who had testified in *Santiago*,[252] and the expert again recounted the cycle of violence theory and concluded that the defendant and complainant's

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243 *Id.*

244 *Id.*

245 *Id.* at *13. This conclusion is all the more notable since New York applies the demanding clear and convincing evidence standard to forfeiture rulings. Flanagan, *supra* note 196, at 469. Most states apply a less demanding preponderance standard. *See id.* at 477 ("Following the majority of courts the [advisory committee for the Federal Rules of Evidence] concluded that the proponent's burden of proof was the preponderance of the evidence.").

246 2003 WL 21507176, at *16.

247 855 N.Y.S.2d 505, 507, 509–10 (App. Div. 2008).

248 Byrd was charged with attempting to murder the complainant based on allegations that he brutally assaulted the complainant and then prevented her from seeking medical care for six days. *Id.* at 507.

249 *Id.*

250 *Id.*

251 *Id.* at 509.

252 The expert in both cases was Professor Ann Burgess. *Id.* at 508; People v. Santiago, No. 2725-02, 2003 WL 21507176, at *2 (N.Y. Sup. Ct. Apr. 7, 2003).

relationship fit this "typical pattern."[253] Although the expert had never met the complainant,[254] she concluded that the complainant was "in a coercive controlled relationship with the defendant," that he could control her "without engaging in any conduct whatsoever,"[255] and that such control caused the complainant to "lie under oath to protect him."[256] Crediting the expert's testimony over the complainant's, the court concluded that the defendant had caused the complainant's unavailability as a witness. The state appellate court upheld this decision on appeal,[257] as did the Southern District of New York in reviewing defendant's habeas petition.[258]

These decisions demonstrate a willingness, even in the absence of evidence of direct or implied threats connected to the complainant's impending testimony, and even when the complainant herself testifies that she is refusing to inculpate the defendant of her own free will, to infer from proof of past abuse that the defendant caused the witness's unavailability. The complainants in both cases offered alternative and reasonable reasons for refusing to support the prosecution: love, the desire to keep the family intact, and the practical daily need for the defendant's assistance.[259] Nevertheless, these courts seem to conclude that when a complainant has been abused, fear of reprisal is the only reason she could refuse to cooperate with the prosecution.

An even more recent New York State forfeiture decision in *People v. Copney* underscores this myopic interpretation of causation.[260] There, the trial court invoked the tort doctrine of res ipsa loquitur to conclude that a "complainant would not ordinarily stop

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253 People v. Byrd, 855 N.Y.S.2d at 508.

254 Byrd v. Brown, No. 09 CIV. 5755(GBD)(JCF), 2010 WL 6764702, at *4 (S.D.N.Y. Oct. 25, 2010), *adopted by* No. 09 CIV. 5755(GBD)(JCF), 2011 WL 2162140 (S.D.N.Y. June 1, 2011).

255 *Id.*

256 People v. Byrd, 855 N.Y.S.2d at 508.

257 *Id.* at 510.

258 Byrd v. Brown, 2011 WL 2162140.

259 *See supra* note 230 and accompanying text (outlining reasons complainants might refuse to cooperate). And the *Byrd* court refused to engage the complainant's claim that she had been coerced not by defendant, but rather by the Administration of Children's Services, through threats to take her children from her. People v. Byrd, 855 N.Y.S.2d at 510. Yet, this threat was credible and verifiable: The incident at issue in *Byrd* occurred in 2002. Until the 2004 settlement in *Nicholson v. Scoppetta*, New York State Administration for Children's Services routinely removed children from the care of mothers who were abused by their partners. *See* Kathleen A. Copps, *The Good, the Bad, and the Future of* Nicholson v. Scoppetta*: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 503–09 (2009) (discussing ACS practices and New York State law leading up to and following the settlement in *Nicholson v. Scoppetta*). For an explanation of the complex procedural history of that case, see *Nicholson v. Scoppetta*, 820 N.E.2d 840, 842–43 (N.Y. 2004).

260 969 N.Y.S.2d 898 (Sup. Ct. 2013).

cooperating with the district attorney but for the agency of the defendant's [phone] calls [from prison] in which she did not voluntarily act or contribute."[261] Therefore, despite conflicting evidence as to whether the defendant's phone calls caused the complainant's unavailability, the court concluded it was "clear that the wrongful calls of the defendant, aimed and intended to silence the witness, made and caused her to be unavailable to the People."[262] In other words, the domestic violence "speaks for itself" and it can convey only one story, regardless of what the complainant says.

III
THE IMPACT OF EVIDENTIARY DOMESTIC VIOLENCE EXCEPTIONALISM

Professor Deborah Tuerkheimer and others have critiqued the use of traditional evidence rules in domestic violence prosecutions for "mut[ing] stories of battering" and evidentiary doctrine for "unmoor[ing]" domestic violence from its context.[263] Yet, as the preceding discussion demonstrates, in many jurisdictions, it is evidentiary doctrine that is "unmoored" from its underlying principles to reflect prevailing presumptions about domestic violence; courts and legislatures justify the adaptation of fairness-based rules by appealing to reliability principles (as in domestic violence propensity exceptions), or by redefining what is "equitable" in the context of domestic violence (as in the forfeiture by wrongdoing exception), and/or by eschewing engagement with underlying reliability principles altogether (as in the medical treatment and diagnosis hearsay exception).

This evidentiary unmooring is hardly inconsequential. Evidence introduced under these specialized rules can be so persuasive it may be dispositive. For example, empirical studies confirm that exposure to uncharged misconduct evidence "greatly increases the likelihood of a guilty verdict."[264] It is unsurprising, therefore, that prosecutors in jurisdictions with domestic violence propensity statutes reported that the statutes are "invaluable" in obtaining guilty pleas and verdicts[265] and "greatly strengthened [their] ability to prove their domestic vio-

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261 *Id.* at 900.

262 *Id.*

263 Tuerkheimer, *supra* note 13, at 990.

264 Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, 7 CRIM. JUST. 16, 21 (1992).

265 *See* Andrea M. Kovach, *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, 1138, 1148 (citing to survey responses from prosecutors in Minnesota and California).

lence cases beyond a reasonable doubt."[266] The case law supports this observation. In the Alaska case of *Carter v. State*, for example, the defendant was charged with fourth-degree assault based on allegations that he punched his wife.[267] Through the application of the state's domestic violence propensity statute, the jury learned that he had assaulted her *nine years* before the charged incident and again *five years* before the charged incident.[268] Acknowledging that the state's case against the defendant was otherwise weak, the Alaska Court of Appeals upheld admission of this evidence under the state's domestic violence propensity statute.[269]

Similarly, the addition of the domestic violence context exception to an already malleable list of purportedly nonpropensity theories of admissibility for past bad acts can be immensely helpful to the prosecution. Generally, noncharacter theories of admissibility, such as motive or intent, depend on the theory of defense and therefore permit introduction of prior bad acts evidence only in rebuttal or if the defense "opens the door" to such evidence.[270] Evidence of prior bad acts that is probative of the "domestic violence context," by contrast, is generally admissible in the prosecution's case-in-chief, regardless of the theory of the defense. Moreover, studies substantiate that jurors use prior acts evidence admitted for a nonpropensity purpose for propensity reasoning, despite limiting instructions prohibiting them from doing so.[271] The "naïve assumption" that limiting instructions could overcome these prejudicial effects is an "unmitigated fiction."[272] Thus, by increasing the frequency with which prior bad acts are admitted in domestic violence prosecutions, the domestic violence context exception inevitably increases the frequency with which juries convict domestic violence defendants based on propensity reasoning.

The specialization of the hearsay-related rules is also a substantial boon for prosecutors. Since statements that fall within the medical treatment and diagnosis hearsay exception are considered presumptively reliable, statements of identification made by a patient who

266 *Id.* at 1143.

267 No. A-10677, 2011 WL 3667222, at *1 (Alaska Ct. App. Aug. 17, 2011).

268 *Id.* at *1–2.

269 *Id.* at *3.

270 Generally, a defendant may "take an issue . . . out of a case" and, therefore, render the nonpropensity prior acts evidence irrelevant. United States v. Tarricone, 996 F.2d 1414, 1421–22 (2d Cir. 1993). In the Second Circuit, for example, a defendant may remove the issue of intent from a case by asserting that he did not commit a crime, as opposed to conceding that he did so, but innocently or mistakenly. *Id.*

271 Imwinkelried, *supra* note 264, at 21.

272 Krulewitch v. United States, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." (citation omitted)).

reports domestic violence to her doctor are admissible even if she does not testify at trial,[273] or if she testifies but recants her identification.[274] Moreover, dicta in *Giles v. California* strongly suggest that statements to medical providers are not testimonial and, therefore, a Confrontation Clause objection to such testimony would be futile.[275] This specialized exception, therefore, allows prosecutors to avoid calling a reluctant complainant altogether; instead, they can simply call the treating physician to recount her identification. On the other hand, since the forfeiture doctrine is based on principles of equity, rather than reliability, establishing forfeiture permits introduction of evidence that is patently unreliable, yet highly persuasive.

IV
THE HARMS OF EVIDENTIARY DOMESTIC VIOLENCE EXCEPTIONALISM

Although the overriding purpose of a criminal trial is to determine the truth about an alleged criminal act,[276] every criminal defendant is guaranteed a number of protections that preclude the collection or introduction of evidence many consider essential to the truth-seeking process.[277] While the criminal justice system undoubtedly values truthseeking, it also values fairness in addition to, and sometimes at the expense of, ascertaining truth.[278] Thus, a criminal trial is properly understood not as a search for the absolute truth of an

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[273] *See, e.g.*, Oldman v. State, 998 P.2d 957, 960, 962 (Wyo. 2000) (admitting nontestifying patient's report to her doctor).

[274] *See, e.g.*, State v. Roberts, 775 P.2d 342, 343 (Or. Ct. App. 1989) (admitting report to doctor of patient who recanted).

[275] *See* Giles v. California, 554 U.S. 353, 376 (2008) ("[O]nly *testimonial* statements are excluded by the Confrontation Clause. . . . [S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.").

[276] Nix v. Whiteside, 475 U.S. 157, 166 (1986) (explaining "the very nature of a trial as a search for truth").

[277] *See, e.g.*, Tehan v. United States, 382 U.S. 406, 416 (1966) (noting that, although the "basic purpose of a trial is the determination of truth," the "Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth," but nonetheless demands "undiluted respect"); Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The overriding policy of excluding [character] evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.").

[278] Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1063–64 (1975) ("We are concerned, however, with far more than a search for truth, and the constitutional rights . . . serve independent values that may well outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, may well impede it."). Of course this proposition is not without its critics. *See* Kenneth W. Starr, Speech, *Truth and Truth-Telling*, 30 TEX. TECH L. REV. 901, 902–03 (1999) (summarizing debate between Alan Dershowitz and Akhil Reed Amar about whether truthseeking should be the goal of the criminal justice system).

event, but rather a search for a mitigated "courtroom truth,"[279] a process whereby a fact finder determines whether the state established beyond a reasonable doubt that the defendant committed the charged crime, through procedures and proof deemed fair and just without regard for the nature of the underlying substantive allegations.[280] Evidence rules are crucial to the construction of this courtroom truth. They are "historically grounded rights" that protect the reasonable doubt standard and safeguard defendants "from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."[281]

As demonstrated in Part II, however, many jurisdictions have manipulated evidence rules to shape the courtroom truth in domestic violence prosecutions to comport with the prevailing preconceptions about the dynamics of domestic violence. Rejecting transsubstantive evidence rules and standards, courts and legislatures reason that domestic violence is different and that this difference requires specialized evidence rules and standards. Although these are persuasive and effective weapons in the criminal justice-focused war against domestic violence, even when these tactics work, they nevertheless cause harm.[282]

A. Legitimacy and Fairness Harms

As recounted above, the dominance feminist account of domestic violence exceptionalism shapes evidentiary doctrine in many jurisdictions. And, as will be discussed below, this account, both generally, and in its specific application to evidentiary doctrine, is detrimental to many complainants. But its employment to shape evidentiary doctrine

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279 John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 238 (1935) ("Courtroom truth is what a jury or the judge finds after full and fair presentation of evidence.").

280 *See* Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 468–69 (1998) (arguing the fusion of a variety of criminal justice system elements, "including evidentiary and procedural rules," achieves "a 'legal' truth that ultimately meets our current social expectations of 'fundamental fairness' or 'justice'" (citations omitted)). In New York State, parties and courts are prohibited from instructing a criminal jury that the trial is a "search for the truth," since doing so suggests the jury may convict if it concludes the verdict represents the "truth," even if the prosecution has not established proof thereof beyond a reasonable doubt. *See* People v. Ward, 966 N.Y.S.2d 805, 807 (App. Div. 2013) (concluding that "the prosecutor's characterization of the trial as a 'search for the truth' was indeed improper," though not finding a deprivation of a fair trial); People v. Jackson, 571 N.Y.S.2d 721, 724 (App. Div. 1991) (holding that prosecutor's comment that "a trial is 'the search for the truth'" impaired defendant's right to a fair trial).

281 Brinegar v. United States, 338 U.S. 160, 174 (1949).

282 *See* Capers, *supra* note 24, at 832 ("When rape shields do work, they do so at extraordinary cost, reinscribing the very chastity requirement that they were intended to abolish.").

also has troubling consequences for the legitimacy of the criminal justice system and individual defendants that have heretofore escaped critical analysis.

As a preliminary matter, the assumptions about domestic violence that fuel the evidentiary manipulation recounted in Part II, namely that domestic violence occurs according to a universal pattern and is inflicted on a person who is unable, because of the abuse, to leave the relationship, are empirically unfounded. This narrative emanates from psychological studies conducted by Lenore Walker, whose work has been roundly critiqued as methodologically flawed.[283] For example, the data set upon which Walker based her cycle of violence theory consisted of the stories of 120 battered women, "fragments" of other stories, and interviews of people who "offered their services to battered women."[284] Walker used no control group to test her cycle of violence hypotheses, employed flawed interview tactics to gather her data, and, most troublingly, drew conclusions unsupported by her own data; only approximately thirty-eight percent of the women she interviewed actually experienced all three of the phases that the study identified and from which Walker drew the "cycle of violence" theory.[285]

The learned helplessness theory stands on even shakier methodological footing.[286] The theory was originally developed by psychologist Martin Seligman to explain why dogs repeatedly subjected to electrical shocks in a laboratory experiment remained in their cages, even when they were permitted egress.[287] Applying this theory to battered women, Walker concluded that they did not leave their abusive relationships because, like the dogs in Seligman's study, they believed resistance was futile.[288] Yet, in drawing this comparison, Walker overlooked a glaring mismatch between this theory and her data: Many of the women she interviewed did not express helplessness, but rather felt that they were in control of what happened to them; many

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283 *See* GOODMARK, *supra* note 5, at 61 (summarizing critiques of Walker's studies).

284 WALKER, *supra* note 42, at xiii.

285 David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 77–78 (1997) (identifying five methodological flaws in the study upon which Lenore Walker built the cycle of violence theory and explaining how they came to the thirty-eight percent figure).

286 *See, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 81–83 (1994) (critiquing Walker's application of learned helplessness to battered women); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 798 (1996) (noting "general agreement that learned helplessness has its limitations," and discussing alternative research finding that complainants can and do seek help).

287 *See* WALKER, *supra* note 42, at 45–46 (describing Seligman's experiment).

288 *Id.* at 46–50.

reported that they "analyze what is necessary to control the batterers' behavior, develop a plan—which may include leaving the batterer—and attempt to carry it out," even if they are not successful.[289] Because of its obfuscation of women's strategic resistance to violence, learned helplessness and battered woman syndrome have been thoroughly critiqued as disempowering complainants by "emphasiz[ing] the disabling effects of violence rather than women's survival skills."[290] Moreover, the concept of learned helplessness is fundamentally incompatible with the question it purported to answer: why some battered women respond violently to their abusers—the antithesis of a learned helplessness response—instead of ending the relationship.

The point to be drawn from these critiques is not that domestic violence never comports with prevailing stereotypes; undoubtedly, the experiences of *some* people who experience domestic violence comport with this narrative, even though it has not been rigorously empirically validated.[291] The point, rather, is that not all, and possibly not even most, domestic violence occurs according to an escalating pattern that renders the complainant unwilling and unable to respond.

Once it is acknowledged that the cycle of violence and learned helplessness theories do not embody an accurate, universalized description of domestic violence, the most explicit justifications for why domestic violence offenses require specialized rules fall away. What remains is the need-based justification, namely, that specialized and more permissive evidence rules are necessary because domestic violence offenses are notoriously difficult to prosecute. The specialized rules, therefore, are an attempt to compensate for the difficulty of proving and punishing allegations of domestic violence. But manipulating evidence rules to circumvent evidentiary difficulties in proving guilt represents an aberration in an adjudicatory system that purports to also uphold values beyond the simple ascertainment of truth,[292] and

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289 Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 How. L.J. 297, 318 (1995); *see* Coughlin, *supra* note 286, at 82 (describing how Walker's analysis fails to account for key features of the Seligman study that discredit her "crude comparison between the psychology of battered women and caged dogs"); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 St. Louis U. Pub. L. Rev. 107, 124 (2004) ("Research with women assaulted by their male partners has consistently demonstrated that women employ a range of creative ways through which they attempt to escape, avoid, minimize, or stop the violence against them.").

290 Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 1000 (1995).

291 *See* Raeder, *supra* note 286, at 797 ("[D]espite the problems of well-defined proof, there is massive anecdotal evidence generally confirming [battered woman syndrome].").

292 *See* Tehan v. United States, 382 U.S. 406, 416 (1966) (noting that, although the "basic purpose of a trial is the determination of truth," the "Fifth Amendment's privilege against

which errs on the side of protecting the innocent even if doing so comes at the expense of punishing the guilty.[293] It sets us down a slippery slope toward the consequentialist manipulation of evidence rules in other contexts, raising a number of troubling systemic questions. If we are willing to manipulate evidentiary doctrine to give the prosecution an advantage in domestic violence cases, why stop there? Why not extend this reasoning to other crimes that are difficult to prosecute, like organized crime offenses? This begs yet another question: If we are going to manipulate evidentiary doctrine to facilitate conviction, what is the purpose of a trial?

Furthermore, the decoupling of evidence rules from their justificatory roots to reflect the prevailing stereotypes about domestic violence is unfair to defendants. It modifies the rules—in advance of a trial at which an allegation of domestic violence will be adjudicated—to reflect the presumption that certain behavioral patterns on the part of the defendant and complainant are highly suggestive of the defendant's guilt of the charged offense. Since this narrative presumes a batterer, the rules are changed to depict the defendant as always and already guilty, as someone whose bad past dictates his present behavior and has impacted the complainant in a way that leaves her unable to meaningfully participate in the prosecutorial process. As such, these rules unfairly undermine the presumption of innocence and compromise the reasonable doubt standard.[294]

Some may respond that we are not heading down a slippery slope toward the dismantling of a transsubstantive evidentiary code, nor treating defendants unfairly, but rather carving out targeted and limited exceptions that simply rebalance the scales of justice for victims of domestic violence.[295] Applying traditional evidence rules in these cases, the argument goes, is unfair to complainants and society because doing so allows batterers to escape punishment, leaving them

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self-incrimination is not an adjunct to the ascertainment of truth," but nonetheless demands "undiluted respect").

293 *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

294 For an extensive analysis of the fundamental fairness and constitutional implications of vitiating the propensity ban for defendants accused of sex offenses and child molestation after the passage of FED. R. EVID. 413–415, which applies equally to domestic violence defendants, see Natali & Stigall, *supra* note 97, at 23–34, and also see Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413–415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883, 899–902 (1995) (arguing that Rules 413–415 undermine the presumption of innocence).

295 *See* sources cited *supra* notes 17–18.

free to commit future acts of violence.[296] Implicit in this argument is the normative presumption that criminalization is an ideal and effective response to every act of domestic violence. As the next section demonstrates, this presumption is false.

B. Instrumental Harms

The dominance feminist iteration of domestic violence exceptionalism was politically palatable because it provided a straightforward explanation of this complex problem that led to an equally straightforward policy: a universal criminal justice response to reports of domestic violence. The specialization of evidentiary doctrine that occurs in domestic violence prosecutions is the latest step—following mandatory arrest and no-drop prosecution policies—in this larger project of advancing a strong, criminalization-focused response to domestic violence.[297]

In the decades that have passed since the state began to take domestic violence seriously, however, it has become increasingly clear that this myopic focus on criminal justice responses to domestic violence is neither an effective nor sufficient solution for many complainants. It is undeniable that mandatory arrest and no-drop prosecution policies—the pillars of the criminalization model—have increased the number of arrests for and prosecutions of domestic violence offenses.[298] Yet data is, at best, "mixed" as to whether these strategies have increased victim safety.[299] Many studies indicate that mandatory arrest practices have an insignificant effect on victim safety, and some suggest they actually escalate violence[300] and can increase the likelihood of recidivism.[301] Similarly, the use of no-drop prosecution

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296 *See* sources cited *supra* note 18.

297 *See* Lisa Goodman & Deborah Epstein, *Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence*, 20 J. INTERPERSONAL VIOLENCE 479, 479 (2005) ("The bulk of recently adopted . . . criminal justice reforms [targeting domestic violence] have taken the form of relatively inflexible, one-size-fits-all mandatory responses focused on counseling, restraining, and punishing batterers to prevent them from reoffending.").

298 *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 217–18, 224–25 (2008) (summarizing studies demonstrating large increases in domestic violence arrests and decreases in the dismissal of domestic violence prosecutions).

299 *See* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 815 (2001) (summarizing the finding of a National Institute of Justice study of the deterrent effect of arrest as having "at best a modest and short-lived deterrent effect"); Kohn, *supra* note 298, at 237–38 (summarizing research on the effect of no-drop prosecution policies on victim safety and recidivism).

300 *See* Kohn, *supra* note 298, at 235–36 (summarizing studies).

301 Lawrence W. Sherman et al., 57 AM. SOC. REV. 680, 680 (1992), *cited in* Coker, *supra* note 299, at 815 (2001).

polices over the complainant's objection increases the risk of future abuse in some cases.[302] Thus, while compulsory criminal justice intervention may increase the safety of *some* women, it is an ineffective—and perhaps dangerous—response for others.[303]

The criminalization model not only provides a universalized response that does not work for some, but also problematically reinforces the dominance feminist conception of a universalized complainant: one who wants and is willing to invoke the criminal justice apparatus to end her abusive relationship.[304] But, as anti-essentialist feminist theorists have emphasized, "there is no unitary women's experience."[305] The criminalization model overlooks the ways in which factors such as race, class, sexual orientation, and citizenship status impact a complainant's willingness to call on the criminal justice system and participate in the state-mandated separation that so often results from such intervention. For example, as Kimberle Crenshaw has underscored, women of color "are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile."[306] Lesbian, gay, bisexual, and transgender individuals, whose communities have also been histori-

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[302] *See* Kohn, *supra* note 298, at 237–38 (summarizing studies). One explanation for this phenomenon is offered by research that suggests "battered women who oppose arrest and prosecution because they predict it will result in further violence are often accurate in their assessment." Coker, *supra* note 299, at 818.

[303] *See* RICHIE, *supra* note 14, at 3–4 (arguing that "there is evidence that *some* women are safer in 2012 than they were 25 years ago" as a result of the criminalization of domestic violence, but "women with less power"—particularly black women—are "in as much danger as ever"); Kohn, *supra* note 298, at 235 ("Most [studies] suggest that, while some victims may be at a decreased risk of re-abuse under a mandatory intervention regime, the policies tend to have an insignificant effect on victim safety and may even put some victims at increased risk."). Ironically, "the overall impact of mandatory arrest laws for domestic violence have [sic] led to decreases in the number of battered women who kill their partners in self-defense, but they have not led to a decrease in the number of batterers who kill their partners." Critical Resistance & Incite! Women of Color Against Violence, *Gender Violence and the Prison-Industrial Complex*, *in* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 223, 223 (Incite! Women of Color Against Violence ed. 2006).

[304] Beth E. Richie calls this the "everywoman analysis" and describes "everywoman" as "a white, middle-class woman who can turn to a counselor, a doctor, a police officer, or a lawyer to protect her from abuse." RICHIE, *supra* note 14, at 89–92.

[305] GOODMARK, *supra* note 5, at 4. In the context of domestic violence law and policy, "[a]nti-essentialist feminist theory prompts questions about why the law defines domestic violence as it does and whose interests are protected (and whose ignored)" and "rejects the notion that one set of solutions is appropriate for every woman subjected to abuse . . . ." *Id.* at 5.

[306] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

cally oversurveilled, may similarly hesitate to invoke the state's police power in response to domestic violence.[307]

Furthermore, the universalized complainant is one who wants to and can sever all ties with her abusive partner. Yet, many remain dependent on their abusive partners for many reasons, including financial, familial, or emotional support; they may decide, for those reasons, that pursuing prosecution is not in their best interests. While prosecuting the batterer under such circumstances may lead to a criminal justice "success," such an approach overlooks how and why such a result may represent a failure for the complainant. For example, it does nothing to address the financial difficulties the complainant may face if the defendant is incarcerated or the gaps in child care that may result from his absence.[308]

Although it is becoming increasingly clear that a compulsory criminal justice response is not a "one size fits all" solution to the complex social problem of domestic violence, state actors continue to pursue this myopic criminalization agenda. The development of specialized evidence rules is part of the larger project of forcing allegations of abuse to "fit" into the criminal justice system. They enable prosecutors to circumvent evidentiary gaps created by the complainant's absence, or undermine the testimony of complainants who testify unfavorably to the prosecution. The domestic violence context exception, for example, authorizes admission of evidence of prior acts of abuse to undermine the credibility of a recanting complainant and depict the relationship as eternally abusive.[309] The medical treatment and diagnosis exception allows prosecutors to substitute a medical provider's testimony recounting the complainant's allegations for the complainant's in-court testimony.[310] And developments in the forfeiture by wrongdoing exception increasingly enable courts to find the

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307 *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 37 (2009) (recounting reasons why lesbians may hesitate to "engage the criminal justice system" in response to domestic violence).

308 Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1017–18 (2000) ("[S]eparation may create catastrophic results for poor women. Separation threatens women's tenuous hold on economic viability, for without the batterer's income or his assistance with childcare, for example, women may lose jobs, housing, and even their children.").

309 *See supra* Part II.A.2 (recounting the consequences of the domestic violence context exception).

310 *See supra* Part II.B (discussing the medical treatment and diagnosis exception in the domestic violence context).

defendant responsible for the complainant's refusal to testify, even when she affirmatively refutes such a conclusion.[311]

Thus, the manipulation of evidence rules to reflect the dominance feminist iteration of domestic violence exceptionalism facilitates an ineffective universalized response mechanism. The conclusion to be drawn from this observation, however, is not that the criminal justice system has no role to play in responding to domestic violence. That police and prosecutors now take domestic violence seriously is an accomplishment, not a cause for concern. The problem, rather, is that the state presents the criminal justice system in "isolation from other possible responses," as the sole response mechanism for addressing domestic violence, instead of as "part of a menu of options for women who are harmed by male violence."[312] Emerging research suggests that "responding flexibly to victims' needs and providing them with advocacy and broad social support could be a more successful strategy for eliminating domestic violence" than criminal justice responses.[313] Yet, as a result of this criminalization myopia, we have lost sight of alternative, extracriminal responses that may be more desirable for some complainants and more effective for some defendants.[314]

C. *Rhetorical Harms*

The evidentiary manipulation that occurs in domestic violence prosecutions also causes a less functional, but equally troubling, harm: It rhetorically reinscribes the disempowering image of the "true victim" on those who resist state intervention. "True victims" are the embodiment of learned helplessness;[315] they are "entirely helpless" and refuse to cooperate because they are "paralyzed by fear."[316]

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311 *See supra* Part II.C (discussing the forfeiture by wrongdoing exception in the domestic violence context).

312 RICHIE, *supra* note 14, at 163.

313 Goodman & Epstein, *supra* note 297, at 480 (citation omitted); *see id.* at 484 (summarizing research).

314 *See* Goodmark, *supra* note 5, at 157 ("Reliance on the law has preempted creative thinking about other ways to assist women subjected to abuse and diminished the possibility of partnership with communities who are unwilling to increase state intervention into their members' lives."). Scholars have proposed many alternative responses. *See, e.g.*, GOODMARK, *supra* note 5, at 178–94 (summarizing proposals for responding to domestic violence "beyond the law," including forming community-based truth commissions, establishing economic security for people subjected to abuse, and working with men who abuse to change their behavior); RICHIE, *supra* note 14, at 163 (advocating for the involvement of non–law enforcement actors who may influence an offender's behavior, such as faith leaders or family members).

315 Hanna, *supra* note 12, at 1883 ("Women who do not want to proceed are characterized either as agents in the battering—allowing it to continue because of their lack of cooperation with the state—or as true victims who have 'learned helplessness.'").

316 Randall, *supra* note 289, at 145.

The specialized evidence rules are crafted to reflect only those traits that comport with this stereotype of domestic violence complainants as "passive, dependent, weak, and afraid."[317] The expanded medical hearsay and treatment exception, for example, reflects the paternalistic rationale that adult domestic violence complainants, like abused children, are unable to make independent, rational decisions about how to prevent future harm. And jurisdictions that are willing to infer that the defendant caused the complainant's unavailability—over her objection—insist that the only reason a complainant would become "unavailable" is because she is afraid of her abuser or has succumbed completely to his coercive control. In this way, the complainant becomes an agent of the defendant, unable to form an opinion independent of his influence.[318] Similarly, by allowing the jury to consider past acts of abuse in assessing a recanting complainant's credibility, courts signal that her recantation is not a result of independent and rational decision making, but rather the inescapable psychological byproduct of abuse. In these ways, specialized rules work as a one-way ratchet that recirculates the universalized image of battered women to enable admission of evidence that is consistent with conviction, and to silence that which is not.

D. Efficacy Harms

The manipulation of evidence rules imposes a final cost that should give pause even to those who continue to support the criminalization model: It may impede the efficacy of the criminal justice intervention altogether. Procedural justice studies demonstrate that the way in which defendants experience the criminal justice system is a significant factor in predicting future behavior. The experience of being treated fairly by an authority figure—even during a sanctioning process—legitimates that authority and increases one's satisfaction with the outcome of that process, even if the outcome is not favorable.[319] Outcome satisfaction, in turn, correlates positively with

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317 *See* GOODMARK, *supra* note 5, at 76 (discussing this stereotype in the context of domestic violence trainings).

318 This practice thus invokes the specter of coverture, under which a woman was assumed to be "one" with her husband. *See* Siegel, *supra* note 25, at 2122–23 (discussing the nineteenth century doctrine of marital unity).

319 *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 165 (1990) (outlining the impact of procedural fairness on outcome satisfaction); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1878–80 (2002) (summarizing procedural justice studies and concluding that "extensive data, obtained in a wide variety of contexts" reveals a "strong link" between "one's perceptions of fair treatment and one's attitude toward authority"). One study showed that the extent to which felony defendants felt criminal justice system actors treated them fairly

future compliance with authority.[320] For example, study of the impact of arrest on recidivism in domestic violence cases revealed that defendants who felt the police treated them fairly during the arrest procedures demonstrated a "significantly lower" recidivism rate than those arrested pursuant to processes perceived as unfair.[321] Procedural justice was so significant that those who were arrested, but felt that they were treated fairly, recidivated at a rate that approximated those who achieved the more "favorable" outcome of being warned and released without arrest.[322]

The application of specialized evidence rules undermines many of the "building blocks of procedural justice," particularly neutrality, process control, and consistency.[323] Specialized rules—based as they are upon the presumptively cyclical nature of domestic violence—undermine the appearance of neutrality by conveying that the court has presumed the defendant's guilt from his past behavior. This impression that the court has prejudged guilt and will adapt the evidence rules to reflect that judgment suggests to defendants that their version of events is insignificant, or that their input is irrelevant to the process by which guilt is adjudicated. Accordingly, such evidentiary manipulation undermines a defendant's sense of "process control," or the impression that he has a "genuine opportunity to state his case and that his needs are being treated as a matter of concern."[324] Finally, as discussed above, specialized domestic violence evidence rules emanate from the presumption that domestic violence is sub-

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"substantially influenced" their satisfaction with the outcome of their criminal proceedings. Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 503 (1988).

320 *See* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 169 (1997) ("[T]he use of fair procedures facilitates the development of perceptions that authorities are both legitimate and moral. Once the perception that legal authorities are legitimate has been shaped, compliance with the law is enhanced, even when it conflicts with one's immediate self-interest."). Procedural justice thus challenges a central tenet of deterrence theory, namely that an individual's self-interest is the only factor considered in assessing outcome satisfaction. Epstein, *supra* note 319, at 1874–75. Alternatively, some proponents of procedural justice take an instrumentalist position, consistent with deterrence theory, that procedural justice matters because fair procedures lead to fair outcomes, and fair outcomes inspire compliance. *Id.* at 1875; Paternoster et al., *supra* at 165.

321 Paternoster et al., *supra* note 320, at 163.

322 *Id.*

323 *See* Epstein, *supra* note 319, at 1876–77 (identifying the "building blocks of procedural justice" as trust or "process control," neutrality, consistency, and dignity).

324 *Id.* at 1876. Commentators have referred to this factor as "representation" and explain, "[w]hile disputing parties may not feel that they have the right to determine the outcome, it is important to their sense of fairness that they be given the opportunity to present their case to authorities and that their opinions be given consideration." Paternoster et al., *supra* note 320, at 167.

stantively "different" from other crimes of violence and, in fact, many courts specify this "difference" as the primary justification for their permissive evidence rulings.[325] This explicit acknowledgement that prosecutors can introduce evidence in domestic violence prosecutions that would be inadmissible but for the identity of the parties conveys to domestic violence defendants that the evidence against them is assessed according to a different, and more permissive, standard than that used against other defendants. In so doing, this evidentiary manipulation can undermine the defendant's sense of consistency by conveying that courts are not treating all defendants equally.[326]

Domestic violence defendants may become aware of this evidentiary manipulation in many ways, including through explanations by the court or their attorneys about the basis for the rulings or through their own independent knowledge of the legal system. Some undoubtedly will point out that defendants may not become aware of legal rulings because defense attorneys and/or courts are too overburdened to keep defendants apprised of legal rulings about the admissibility of evidence. As a normative matter, courts and attorneys should be encouraged to keep a defendant informed about all possibly dispositive developments in his case. As a practical matter, keeping a defendant in the dark may further reduce his sense of procedural justice.[327]

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325 *See, e.g.*, State v. McCoy, 682 N.W.2d 153, 161 (Minn. 2004) (noting that the court has treated evidence of prior abusive acts in the context of an intimate relationship "differently" than it does other types of abuse, and concluding that this "different treatment is appropriate in the context of the accused and the alleged victim of domestic abuse"); People v. Benston, 942 N.E.2d 210, 215–16 (N.Y. 2010) (concluding that domestic violence "differs materially, . . . from other types of assault" and relying on this difference to justify admitting doctor's statement diagnosing the complainant with "domestic violence").

326 *See* TYLER, *supra* note 319, at 118–19 ("Consistency refers to similarity of treatment and outcomes. Consistency toward people generally takes the form of equal treatment for all affected parties."). For example, to illustrate the concept of consistency, Tyler uses the example of a baseball game, in which an "umpire should define the same strike zone for all players." *Id.* In the evidentiary context, consistency requires that the court applies the same rules equally to every defendant. *See* Paternoster et al., *supra* note 320, at 168 ("To the extent that legal authorities provide equal and invariant treatment, citizens are more likely to view their experiences in a positive light, perceive authorities as moral and legitimate, and comply with rules.").

327 *See* Epstein, *supra* note 319, at 1892–95 (suggesting increasing both communication with defense attorneys and explanation of the trial process from the judge as strategies for increasing procedural justice in domestic violence prosecutions); Tom R. Tyler & Justin Sevier, *How do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1116–17 (2014) (arguing that authorities communicate trustworthiness—and increase procedural legitimacy—by "explaining what the procedures they are using are and why they are making the decisions they do").

This evidentiary specialization can also diminish the complainant's sense of procedural justice. Research indicates that a complainant who feels that government officials have listened to her story and are responsive to her individual needs is more likely to feel that she has been treated fairly and more likely to cooperate with the prosecution than one who feels "forced into a mandatory model dismissive of her input."[328] The use of specialized evidence rules to pursue prosecution against the complainant's wishes conveys that the complainant's unique and informed perspective about the appropriate response to this complicated event is irrelevant, and that the state knows better than she about how to best prevent future violence. This dismissal of her input and insight not only reduces the likelihood that the she will cooperate with the prosecution, but also decreases the likelihood that she will enlist the assistance of criminal justice authorities to address subsequent incidents of domestic violence.[329]

Thus, procedural justice insights suggest that even if evidentiary manipulation facilitates a "successful" outcome (i.e. conviction), the use of unfair processes that are unresponsive both to the defendant and complainant's input in order to achieve that result decreases the likelihood that a defendant will abstain from future violence. In other words, it is not just that the ends do not justify the means, but also that the means may impede the desired end.

CONCLUSION

This Article does not contest that domestic violence is exceptional; it is undeniably exceptional in the depth and breadth of its destruction, its diversity of causes and effects, and its proven resistance to a singular solution. And yet, the evidentiary manipulation recounted above reflects a narrow and singular exceptionalism—namely, that which emerged from dominance feminist theory, was reified by early psychological studies of battered women, and quickly gained traction with those empowered to set domestic violence law and policy. As argued above, extending into the adjudicatory realm this restrictive vision of what differentiates domestic violence from other crimes undermines the integrity of the criminal justice system and is unfair not only to defendants, but also to complainants whose experiences do not comport with the prevailing narrative.

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328 Goodman & Epstein, *supra* note 297, at 482 (citation omitted).

329 *See* Epstein, *supra* note 319, at 1891–92 (summarizing study finding that when prosecutors were unresponsive to domestic violence complainants, the complainants were unlikely to report subsequent assaults).

Crafting rules to reflect our presumptions about the character of a particular crime and its perpetrators and victims—as opposed to our judgments about what evidence is fair and reliable—sets us on the slippery slope toward the selective dismantling of our outcome-neutral evidentiary code. The conclusion to be drawn from this analysis, however, is not that the experience of prosecuting domestic violence cases has nothing to teach us about our evidence rules. The unique evidentiary hurdles in domestic violence prosecutions may indicate that our rules require revision. But any resultant changes to evidentiary rules should reflect shifting conclusions about the principles behind the rules themselves, not presumptions about the character of a particular crime. Such an approach would be more honest, fair, and, ultimately, less harmful than recirculating restrictive ideas about what domestic violence is—or is not.