

Maine Law Review

Volume 62 | Number 1

Article 13

January 2010

Opportunity Lost, Opportunity Found: A Proposal to Amend Maine's Rule of Evidence 404 to Admit "Prior Acts" Evidence in Domestic Violence Prosecutions

Tina Heather Nadeau
University of Maine School of Law

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Evidence Commons](#)

Recommended Citation

Tina H. Nadeau, *Opportunity Lost, Opportunity Found: A Proposal to Amend Maine's Rule of Evidence 404 to Admit "Prior Acts" Evidence in Domestic Violence Prosecutions*, 62 Me. L. Rev. 351 (2010).
Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol62/iss1/13>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

OPPORTUNITY LOST, OPPORTUNITY FOUND: A
PROPOSAL TO AMEND MAINE’S RULE OF
EVIDENCE 404 TO ADMIT “PRIOR ACTS”
EVIDENCE IN DOMESTIC VIOLENCE
PROSECUTIONS

Tina Heather Nadeau

- I. INTRODUCTION: WHY MAINE, WHY NOW?
- II. THE DYNAMICS OF DOMESTIC VIOLENCE
- III. DOMESTIC VIOLENCE IN MAINE
- IV. MAINE’S 2008 CRIMINAL CODE AMENDMENTS
 - A. *Impetus for Change*
 - B. *The Story Behind the Changes*
 - C. *What Are the Effects of These New Laws?*
- V. MAINE RULE OF EVIDENCE 404
 - A. *Exceptions Articulated by Rule 404(b)*
 - B. *Maine “Prior Acts” Jurisprudence from the 1800s to the Present*
 - C. *Evidence Rulings in the Sexual Assault and Child Sexual Abuse Contexts*
 - D. *Maine Prosecutors’ View of “Prior Acts” Admissibility*
 - E. *Has the Law Court Provided a Pathway to Admissibility?*
- VI. AMENDING MAINE’S RULES OF EVIDENCE TO BRIDGE THE GAP BETWEEN CHARGING AND SENTENCING IN DOMESTIC VIOLENCE PROSECUTIONS
- VII. CONCLUSION

OPPORTUNITY LOST, OPPORTUNITY FOUND: A PROPOSAL TO AMEND MAINE'S RULE OF EVIDENCE 404 TO ADMIT "PRIOR ACTS" EVIDENCE IN DOMESTIC VIOLENCE PROSECUTIONS

Tina Heather Nadeau *

"Not a week goes by that we don't hear of another horrific event. Domestic violence is a cancer that is eating at the fabric of our society."¹

I. INTRODUCTION: WHY MAINE, WHY NOW?

In 2008, thirty-one people were the victims of homicide in the state of Maine.² Even more startling: nineteen of these homicides stemmed from domestic violence,³ possibly the largest number of domestic-violence-related killings in the state's history. This means that nearly 70 percent of Maine's homicides in 2008 were the result of domestic violence. Each year, the percentage of Maine's homicides that derive from acts of domestic violence far exceeds the national or even the regional average.⁴ This is more than an anomaly. It is a tragedy. If Maine is serious about reducing its murder rate and saving the lives of Mainers, the most obvious place to start would be in curbing homicidal cases of domestic violence.

Amendments made in 2007 (and implemented in February 2008) to Maine's

* J.D. Candidate, 2010, University of Maine School of Law; A.B. Bowdoin College, 2001. I would like to thank my family and friends, as well as my professors, especially Deborah Tuerkheimer, for all their support and encouragement throughout this process. This Comment is dedicated to Maine's domestic violence victims and survivors, as well as the state's prosecutors who struggle to tell their stories.

1. Sharon K. Mack, *Statewide Forums Tackle Topic of Domestic Violence*, BANGOR DAILY NEWS, July 12, 2008, at A1 (quoting James Ross, domestic violence investigator at the Somerset County District Attorney's Office). See also David Hench, *2008 Sees Surge in Maine Homicides; Mainers Should Not Fear That the State is Becoming Less Safe, Authorities Say*, PORTLAND PRESS HERALD, Mar. 1, 2008, at A1.

2. David Hench, *Domestic Violence: Progress, Problems; An Analysis Outlines the Areas Needing Attention, Such as Services for Children Who See Abuse*, PORTLAND PRESS HERALD, Feb. 25, 2009, at B1. See also WCSH6.com, *Increase in Homicides Has Experts Looking for Trends*, <http://www.wcsh6.com/includes/tools/print.aspx?storyid=98584> (last visited Sept. 30, 2009).

3. MAINE DEP'T OF PUB. SAFETY, *A REPORT TO THE JOINT STANDING COMMITTEE ON CRIMINAL JUSTICE AND PUB. SAFETY FROM THE MAINE DEP'T OF PUB. SAFETY PURSUANT TO L.D. 1990* at 2 (2009) available at <http://www.maine.gov/dps/Docs/LD%201990%20report.pdf>.

4. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: *HOMICIDE TRENDS IN THE UNITED STATES* (2007), available at http://www.ojp.usdoj.gov/bjs/homicide/tables/int_urbtabs.htm. In 2005, intimate homicides accounted for 5.8 percent of all homicides in large cities, while in small cities, the rate was 11.3 percent. *Id.* In suburban environments, the intimate homicide rate was 13 percent; and rural areas, the number spiked to 17.8 percent. *Id.* See also *An Act to Protect Families and Enhance Public Safety by Making Domestic Violence a Crime: Hearing on L.D. 1627 Before the Joint Standing Comm. on Criminal Justice & Pub. Safety*, 123rd Leg. (Me. 2007) [hereinafter *Hearing on L.D. 1627*] (testimony of G. Steven Rowe, then Attorney General of Maine.).

Criminal Code have criminalized particular instances of domestic violence as “enhanced” crimes of violence.⁵ This allows prosecutors to consider “prior acts” of domestic abuse when deciding how to charge a criminal defendant accused of a domestic-violence-related crime.⁶ These new laws additionally provide that prosecutors may introduce evidence of prior acts of domestic violence in the sentencing phase of an adjudication, provided that the defendant has either been found guilty by trial or has plead guilty.⁷ However, enhanced sentences and the allowance of evidence of prior acts into sentencing considerations does little to ensure that more batterers are actually convicted of domestic violence crimes. Under the revised Criminal Code, evidence of prior acts of domestic violence has the ability to impact only those batterers who are prosecuted successfully, or who decide to plead guilty. At trial, however, evidence of a batterer’s prior acts of violence against his victim cannot be admitted, as they are generally prohibited by Maine Rule of Evidence 404.⁸ While the prosecutor and the sentencing judge have access to such evidence, the most important actors in a jury trial—the jurors—are not allowed to hear such evidence, view the charged crime in the context of an abusive relationship, and then render a decision.

The vision of those who first suggested that Maine criminalize domestic violence is not reflected in the ultimate amendments to the Criminal Code as adopted by the Maine Legislature.⁹ Under the original construction of the bill, domestic violence itself would constitute a crime under Maine law,¹⁰ encompassing a variety of behaviors under its provision and allowing prosecutors to bring forward evidence that would tend to prove domestic violence as a “course of conduct” crime.¹¹ Once the initial bill was divided into particularized, temporal, and incident-specific crimes, the evidentiary benefits of the initial bill, as well as the bill’s theoretical and practical thrust, were destroyed.¹² The Maine Supreme Judicial Court, which promulgates and has power to amend its Rules of Evidence,¹³ could help address this evidentiary gap between charging and sentencing by amending its Rules of Evidence to allow for prior acts of violence to be admissible

5. See ME. REV. STAT. ANN. tit.17-A, § 207(A) (2008); *infra* Part IV.

6. See *infra* Parts IV.C, V.

7. *Id.*

8. Maine Rule of Evidence 404, in full, reads:

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

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

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

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.

ME. R. EVID. 404.

9. See *generally* L.D. 1627 (123rd Legis. 2007).

10. *Id.*

11. *Id.*

12. See *infra* Part IV and accompanying notes (discussing the legislative history behind L.D. 1627).

13. ME. REV. STAT. ANN. tit. 4, § 9-A (2008).

in domestic-violence-related prosecutions under the exception of acts which tend to show relationship between the parties. Amending the Rules of Evidence to construe prior acts of relationship to include a host of behaviors within the domestic violence context would help revive some of the power of the original legislation by recognizing that domestic violence is unique and that reducing the crime of domestic violence to a particularized incident fails to reflect the realities of battering.

This Comment will first explain the dynamics of domestic violence, focusing on emerging trends in legal scholarship, which has begun to reflect the social science behind understanding domestic violence. Next, this Comment will discuss domestic violence in Maine in order to set the context for the proposed amendments to the Criminal Code. This Comment will then look at the Criminal Code amendments themselves, including the reasoning behind them, a behind-the-scenes look at the significant changes made during the legislative process of recommendation and adoption, and the actual and potential effects of these amendments on the criminal justice response to domestic violence. Thereafter, this Comment will then move into Maine's Rules of Evidence, particularly the development of the State's jurisprudence surrounding Rule 404, and the evidence ban on introduction of prior acts to demonstrate propensity to commit domestic-violence-related crimes.

In addition, this Comment will review the results of a survey from some of Maine's prosecutors concerning their ability to introduce evidence of prior acts in domestic-violence-related prosecutions. Moreover, this Comment will argue that in order to reintroduce much of the power of the original Criminal Code proposals to the Legislature, the Law Court should amend the Rules of Evidence to specify that in domestic-violence-related prosecutions, prior acts evidence should be given broad admissibility as it bears on the relationship between the two parties. Finally, this Comment will contend that by amending the Rules of Evidence, the Court will help to better close the gap between charging and sentencing, giving the 2007 domestic violence Criminal Code amendments much of the power they need to truly be effective in combating domestic violence in the State of Maine.

Maine has a compelling state interest in facilitating the prosecution of repeat batterers. Several states already have adopted similar evidentiary proposals—but, as we will see, in a different theoretical framework—because of compelling interests and public policy considerations in ensuring the effective criminal prosecution of batterers.¹⁴ Domestic violence prosecutions often are hampered by a host of evidentiary issues, which have become all-the-more pronounced given the United States Supreme Court's recent decisions in *Crawford v. Washington*¹⁵ and

14. See *infra* Part VI.

15. 541 U.S. 36 (2004) (holding, in general, that “testimonial” out-of-court statements by witnesses are excluded from evidence under the Confrontation Clause, unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witness; holding, more specifically, that the admission into evidence of the wife's out-of-court statements to police officers violated the Confrontation Clause). See generally Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006) (discussing the impact of *Crawford* on domestic violence prosecutions).

Giles v. California.¹⁶ Evidence-based domestic violence prosecutions, such as those implemented by the Cumberland County District Attorney's office, would benefit from allowing prior specific acts during the guilt phase of the trial and as additional leverage for prosecutors during plea negotiations with the accused batterer. Until our criminal code can reflect accurately the realities of domestic violence—an opportunity lost during the code approval process with the Criminal Law Advisory Commission in 2007¹⁷—the best hope victims and prosecutors have for making domestic-violence-related charges “stick” is to allow the introduction of prior acts evidence to contextualize the specified incidents criminalized by the latest code amendments. This Comment argues that by not allowing jurors to consider incidents of domestic violence within their proper context, domestic violence will never be truly criminalized in our State.

II. THE DYNAMICS OF DOMESTIC VIOLENCE

The term “domestic violence” encompasses a wide variety of behaviors through which an abusive partner exerts power and control, not all of which necessarily involve physical violence.¹⁸ For example, financial control, property damage, emotional terrorism, and forced isolation are all non-physical methods that an abuser employs to subjugate his victim.¹⁹ Physical violence is the most obvious manifestation of the abuser's attempt at power and control—and the one to which the criminal justice system most readily responds. “Violence need only symbolize the threat of future abuse in order to keep the victim in fear and control her

16. 128 S. Ct. 2678 (2008) (holding that the doctrine of “forfeiture by wrongdoing,” as adopted by the California Supreme Court, was not an exception to the Confrontation Clause at the time of the nation's founding and is therefore unconstitutional). For a discussion of the potential impact of *Giles* on domestic violence prosecutions, see generally Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context,”* 13 LEWIS & CLARK L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288122.

17. ME. REV. STAT. ANN. tit. 17-A, §§ 1351-54. See also *infra* Part IV.

18. Domestic violence survivor and advocate Ann Jones argues that the term “domestic violence” obfuscates more than it elucidates. See ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 81 (2000). “Domestic violence is one of those gray phrases, beloved of bureaucracy, designed to give people a way of talking about a topic without seeing what's really going on,” she writes. *Id.* (citation and internal quotations omitted). The phrase “wife torture,” she adds, would help conjure the scenes *between* beatings: the sullen husband, withdrawn and sulking, or angry and intimidating, dumping dinner on the floor, throwing the cat against the wall, screaming, twisting a child's arm, needling, nagging, manipulating, criticizing the bitch, the slut, the cunt who never does anything right, who's ugly and stupid, who should keep her mouth shut, who should spread her legs now, who should be dead, who will be if she's not careful. *Id.* (internal quotations omitted).

For the sake of consistency, if not accuracy, I will employ the term “domestic violence” in this Comment. Throughout this Comment, I will refer to “batterers” as “he” and “victims” as “she.” The reason for this is to acknowledge the gendered nature of domestic violence, in which 85 percent of intimate partner violence reported and recorded by law enforcement authorities is perpetrated by men against women. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: INTIMATE PARTNER VIOLENCE, 1993-2001 (2003).

19. ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 39 (2d ed. 2008).

behavior.”²⁰

Psychologist Lenore Walker first characterized abusive relationships as being comprised of three distinct phases in her foundational 1979 work, *The Battered Woman*.²¹ The “Cycle of Violence,” according to Dr. Walker, includes “the tension-building phase; the acute battering incident; and the tranquil, loving (or at least non-violent) phase that follows.”²² “During the tension-building phase,” writes Dr. Walker, “minor battering incidents occur [including] slaps, pinches, controlled verbal abuse, and psychological warfare.”²³ It is during this phase that the victim tries to placate the abuser, to avoid the inevitable explosion of violence that will follow it.²⁴ The physical incidents escalate into the “acute battering incident,” which Dr. Walker characterizes by “rampage, injury, brutality, and sometimes death.”²⁵ After the acute battering incident comes the “honeymoon phase,”²⁶ as the batterer feels remorse for his violent behavior and attempts to make amends with his victim.²⁷ It is during this phase that the victim, if she reported the acute battering incident to the police, will have contact with the prosecutor, which often results in recanted statements and an unwillingness to cooperate.²⁸ The victim often thinks that “things will get better.” But, as Dr. Walker notes, the cycle of violence will begin again, resulting in more violent and more acute battering.²⁹ The victim may also be unwilling to testify for a multitude of reasons, including intimidation by the batterer, threats of retaliation, and cultural or familial pressures.³⁰

According to former domestic violence prosecutor Professor Deborah Tuerkheimer, “[T]he law applied to domestic abuse conceals the reality of an ongoing pattern of conduct occurring within a relationship characterized by power

20. Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2128 (1993), reprinted in SCHNEIDER, *supra* note 19, at 51.

21. See SCHNEIDER, *supra* note 19, at 56 (discussing LENORE E. WALKER, *THE BATTERED WOMAN* (1980)).

22. LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42 (1989), reprinted in SCHNEIDER, *supra* note 19, at 56.

23. *Id.*

24. *Id.*

25. *Id.*

26. See, e.g., Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992).

27. WALKER, *supra* note 22, at 44.

28. See Walker, *supra* note 26.

29. WALKER, *supra* note 22, at 46.

30. Andrea M. Kovach, Note, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1126. Additionally, battered women have a realistic fear of leaving their batterers, as a woman is 75 percent more likely to be murdered when she tries to flee or had fled the abusive relationship. Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, COLO. LAW., Oct. 28, 1999, at 19-20. Women often stay in these relationships because they feel it is their safest option. See *id.* The theory of “separation assault” was first developed by Martha R. Mahoney in her article, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991) (stating that “separation assault is the attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return”).

and control.”³¹ Professor Tuerkheimer argues that, while outside of criminal law, domestic violence is understood “as patterned in nature and largely defined by non-physical manifestations of domination,”³² the traditional criminal law has failed to adopt this more expansive and inclusive view, instead myopically focusing on discrete and overt physical acts.³³ In so doing, argues Professor Tuerkheimer, the criminal law as it currently stands is not in a position to either address or remedy battering.³⁴

Additionally, batterers notoriously are prone to repeat their actions; rates of recidivism are astonishingly high. Following a study, the American Medical Association found that 47 percent of batterers beat their partners at least three times a year, while the recidivism rate for sexual offenders is only 7.7 percent three years after their convicted offense.³⁵ There seems to be evidence that as the years go on, batterers grow more brazen, more violent, and more effective at subjugating their victims. “Many of the violent acts that prompt domestic violence arrests would be classified as felonies if committed against strangers,” remarked sociologist Evan Stark, “and most of the men arrested resemble the worst class of felons: they are repeat offenders, are typically unrepentant, and frequently retaliate against, threaten, or otherwise intimidate their victims after an arrest.”³⁶ These facets of repeat batterers’ behavior, contends Stark, “suggest a high-profile crime worthy of an aggressive criminal justice response.”³⁷

Stark also proposes a model to understand domestic violence that reflects the

31. Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960-61 (2004) (critiquing traditional criminal law structures as inadequate to address the realities of domestic violence).

32. *Id.* at 961.

33. *Id.*

34. *Id.* at 962, 1018-19. Professor Tuerkheimer proposed in this article a battering statute, which reads as follows:

A person is guilty of battering when:

He or she intentionally engages in a course of conduct directed at a family or household member; and

He or she knows or reasonably should know that such conduct is likely to result in substantial power or control over the family or household member; and

At least two acts comprising the course of conduct constitute a crime in this jurisdiction.

Id. at 1019-20. Professor Tuerkheimer further provides definitions for the following:

“Family or household member,” means spouses, former spouses, adults related by consanguinity or affinity, an adult with whom the actor is or has been in a continuing relationship of a sexual or otherwise intimate nature, and adults who have a child in common regardless of whether they have been married or have resided together at any time.

“Course of conduct” means a pattern of conduct comprised of a series of acts over a period of time, however short, evidencing a continuity of purpose.

“Crime” means a misdemeanor or a felony.

Id. Professor Tuerkheimer was instrumental in the original drafting of L.D. 1627, calling for the codification of “domestic violence” as a course of conduct crime.

35. Linell A. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 998 (2000).

36. EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 61 (2007).

37. *Id.*

work of Professor Tuerkheimer. He writes, “[T]he treatment of abuse as a series of discrete acts rather than as a unitary phenomenon . . . is an ideological strategy that should be assessed like any other political choice, by whether its consequences are benign or harmful, rather than as an objective reflection of reality.”³⁸ Stark further argues that in viewing specific incidents of domestic violence outside of their battering context, law enforcement fails to recognize the escalating danger and frequency of the assaults, which can lead to more severe injury and eventually death.³⁹ This Author agrees with Professor Stark’s central premise that “[t]he only way to afford genuine protection to abused women is to provide an enhanced response predicated on the course of malevolent conduct to which they are being subjected and their special vulnerability due to sexual inequality.”⁴⁰ Domestic violence all-too-often has been relegated to second-class misdemeanor status within the criminal law. Understanding domestic violence as a course of conduct crime would cast a more accurate light on the severity and escalating nature of the conduct within its proper relationship context.

The dynamics of domestic violence lead to often frustrated attempts to prosecute and convict the perpetrators of the violence. Failure to cooperate can manifest itself in several ways: victims not feeling comfortable testifying, victims wanting to “drop charges,” or, in many instances, victims testifying on behalf of defendants. This reluctance to cooperate with the prosecution can be traced to many factors: threats of retaliation and intimidation by the defendant; succumbing to the batterer’s persuasive techniques; convincing the victim that things will get better; cultural or family pressures to not air dirty laundry or try to work it out; or a belief that cooperation with the prosecution is useless at best, dangerous at worst.⁴¹ As domestic-violence-related crimes see some of the lowest successful prosecution rates within the criminal justice system, victims’ belief that cooperation is futile has some grounding in reality.⁴²

In a recent article focusing on domestic violence prosecutions in Maine, Judith Lewis noted that:

[The] disconnect between domestic violence as defined by the law and domestic violence as experienced by the battered woman not only misrepresents a battered woman’s experiences, but also inhibits successful prosecution of batterers by limiting the prosecution’s ability to present its case and its evidence in the full context of the battering relationship.⁴³

Though Lewis was advocating for the admission of expert testimony about battering in domestic violence prosecutions, her underlying rationale is the same as that advanced by domestic violence scholars and this Comment: in order for the jury to understand the charge alleged in such crimes, they have to be allowed access to evidence of the context and course of the battering relationship.

38. *Id.* at 94.

39. *Id.* at 99.

40. *Id.* at 368.

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

42. *Id.*

43. Judith Lewis, *Setting the Wrong Right: Prosecutorial Use of Expert Testimony on Dominance and Control*, 23 *ME. B.J.* 48, 48 (2008) (footnote omitted).

The important lesson to draw from the emerging legal commentators' work is that domestic violence cannot be understood fully as particularized incidents of explosive violence. According to domestic violence attorney Fredrica L. Lehrman, "Domestic violence is a pattern of coercive power and control. This prosecution theme should resonate from every piece of evidence gathered, every pretrial motion filed, and every trial strategy employed."⁴⁴ As we shall see, the ultimate decision over the admissibility of such evidence will have far-reaching effects on the preparation and trial strategy of the prosecutor and ultimately on the success of prosecuting batterers effectively.

III. DOMESTIC VIOLENCE IN MAINE

Over the past decade, approximately 50 percent of homicides in Maine each year involve domestic violence.⁴⁵ In 2005, domestic violence assaults increased by 5.2 percent, according to the Maine Department of Public Safety.⁴⁶ Also in 2005, close to 5,500 reported assaults happened between family or household members, which averages one assault every hour and a half.⁴⁷ However, underreporting is an enormous hindrance to compiling accurate data on the actual incidence rate of domestic violence in the state.

Between the years of 1995 and 2005, reported incidents of domestic violence in Maine increased by 22 percent; 2006 data show a ten-year high in the number of reported domestic violence assaults.⁴⁸ In 2005, domestic violence assaults represented 46.1 percent of all assaults in Maine, also a ten-year high.⁴⁹ Weapon use during domestic violence assaults is also prevalent in Maine. Protection From Abuse Orders comprise 13 percent of the Maine's district court civil docket, "but limitations in Maine's court system, such as inconsistent safety measures, too few personnel, and limited access to legal representation" serve as demonstrable barriers to victim safety throughout the state, particularly in its rural regions.⁵⁰ According to the STOP Implementation Program, nearly 60 percent of all domestic violence assaults are perpetrated by adult men against adult women, with 16 percent perpetrated by adult women against adult men.⁵¹ Fifteen percent of reported domestic violence homicides involved children, with 11 percent of

44. *Pretrial Motions, Domestic Violence Prac. & Proc.* (West) § 7:47 (Aug. 2007).

45. Letter from G. Steven Rowe, Attorney General, to the Joint Standing Comm. on Criminal Justice & Public Safety (May 2, 2007) (on file with author) [hereinafter Rowe Letter].

46. *Id.*

47. *Id.*

48. ME. DEP'T OF PUB. SAFETY JUSTICE ASSISTANCE COUNCIL, 2007-2010: IMPLEMENTATION PLAN FOR THE STOP (SERVICES*TRAINING*OFFICERS*PROSECUTORS) VIOLENCE AGAINST WOMEN PROGRAM 13-14 (2006), available at <http://www.state.me.us/dps/cjg/docs/VAW0710%20STOP%20Implementation%20Plan.pdf> [hereinafter STOP VIOLENCE AGAINST WOMEN PROGRAM]. The levels of reported domestic violence assaults in Maine, from 1995 to 2006, are as follows: 1995: 4,412; 1996: 3,914; 1997: 4,222; 1998: 3,855; 1999: 3,986; 2000: 4,486; 2001: 4,922; 2002: 4,813; 2003: 5,364; 2004: 5,188; 2005: 5,459; 2006: 5,549. Maine Marks, *Number of Domestic Violence Assaults in Maine: 1995-2005*, <http://www.mainemarks.org/indicators2008/indT.html>.

49. STOP VIOLENCE AGAINST WOMEN PROGRAM, *supra* note 48, at 14.

50. National Coalition Against Domestic Violence, *Domestic Violence Facts: Maine*, <http://www.ncadv.org/files/Maine.pdf>.

51. STOP VIOLENCE AGAINST WOMEN PROGRAM, *supra* note 48, at 15 fig.8.

domestic violence assaults falling into the “other” category.⁵² The STOP committee reports, “With the high share of murders occurring in a domestic violence setting and the high number of rapes in the state, violence against women constitutes a significant share of the violent crime in Maine.”⁵³

Perhaps the most disturbing figures of all these reports is data concerning the percentage of Maine’s homicides that result from domestic violence; the number of these homicides from Maine’s rural communities is even more startling. In 2008, Maine saw more than thirty homicides; of these homicides, nineteen of them stemmed from domestic violence, and four of these homicides involved child victims.⁵⁴ Between 1985 and 1995, 44 percent of all homicides in Maine were linked to domestic violence.⁵⁵ In the past decade, that number has increased to nearly 50 percent.⁵⁶ And though only 40 percent of Maine residents fall into the category of “rural,” the link between rurality and domestic violence homicide is undeniable. Between 1990 and 1995, more than 60 percent of all domestic-violence-linked homicides in Maine took place in rural communities.⁵⁷ From 2000 to 2004, the percentage of rural domestic violence homicides in Maine spiked to more than 80 percent.⁵⁸ This tracks closely with the national trend of increased

52. *Id.*

53. *Id.* at 17.

54. Megan V. Malloy, “A Terrible Year” for Homicide, KENNEBEC J.-MORNING SENTINEL, Aug. 31, 2008, at A1. Compare this number to 2007, when out of twenty-one total homicides, eight had domestic violence roots. “Eight individual men murdered eight people in acts of Domestic Violence homicide from January 1, 2007, to December 31, 2007. The Homicide Victims’ relationships to their murderers are two female intimate partners; three wives; and three mothers.” *Maine’s Closed Domestic Homicides, January 1, 2007 to December 31, 2007*, DOMESTIC VIOLENCE WATCH (Maine Coalition to End Domestic Violence, Bangor, ME), Jan. 2008 at 2. Also, compare to 2006-2007, when out of twenty-one total homicides, thirteen had domestic violence roots. “Twelve individual men murdered thirteen people in acts of Domestic Violence homicide from October 1, 2006 to September 30, 2007 The Homicide Victims relationships to their murders are 2 female intimate partners; 4 wives; 2 mothers; 2 fathers; 1 daughter; 1 son; and 1 brother.” *Maine’s Domestic Homicides, October 1, 2006 to September 30, 2007*, DOMESTIC VIOLENCE WATCH (Maine Coalition to End Domestic Violence, Bangor, ME), Dec. 2007 at 2.

55. MAINE COALITION FOR FAMILY CRISIS SERVICES, DOMESTIC ABUSE IN MAINE: DATA PROJECT 1990-1995, at 26 (1996) [hereinafter DATA PROJECT 1990-1995].

56. Rowe Letter, *supra* note 45.

57. Numbers compiled by Author from data in DATA PROJECT 1990-1995, *supra* note 55, at 26-32. Out of nine domestic violence homicides in 1990, six were rural (Steep Falls, Rockport, Lebanon, Richmond, Dover-Foxcroft, Castine); in 1991, three of eight domestic violence homicides were rural (Lebanon, Trenton, Peru); in 1992, seven of fourteen domestic violence homicides were rural (Franklin, Presque Isle, South Hope, Embden [two murders], Houlton, Van Buren); in 1993, six of eleven domestic violence homicides were rural (Manchester [two murders], Harrington, Monticello, Skowhegan, Sangerville); in 1994, nine out of eleven domestic violence homicides were rural (Stonington, Berman, Pittsfield, Lagrange [two murders], Mt. Vernon, Belfast, Sidney, Rockland); and in 1995, seven of ten domestic violence homicides were rural (Heron, Verona, Brownfield [three murders], Springvale, Fairfield). *Id.*

58. Numbers compiled by Author from data in MAINE COALITION FOR FAMILY CRISIS SERVICES, DOMESTIC ABUSE IN MAINE: DATA PROJECT III, 2000-2004, 47-49 (2005) [hereinafter DATA PROJECT III]. In 2000, six of six domestic violence homicides were rural (St. Agatha, Swanville, Township 10, Winthrop, Greenbush, Camden); in 2001, five of five domestic violence homicides were rural (Jonesboro, Chelsea, Carmel, Tremont, Swan’s Island); in 2002, two of three domestic violence homicides were rural (Sweden, Milo); in 2003, five of eight domestic violence homicides were rural (Casco, Lisbon Fall, Fairfield, Sabattus, South Berwick); and in 2004, nine of eleven domestic violence

percentages of rural intimate partner homicide.⁵⁹ Not only is domestic violence a growing problem in Maine, its deadly effects are becoming more frequent and more alarming for Maine's rural areas.

Alcohol abuse and its destructive effects are inextricable from domestic violence incidents in Maine.⁶⁰ In rural areas, alcohol far outpaces its more notorious counterparts (cocaine, heroin, and methamphetamine) in its human toll. "Nearly 52 percent of adults in Maine report that someone in their family has a severe alcohol problem. Nearly 100,000 Mainers [or nearly 10 percent] are considered alcohol abusers or alcoholics."⁶¹ According to national statistics, 80 percent of Maine residents in treatment for substance abuse are addicted to alcohol; nationally, the percentage is closer to fifty.⁶² When law enforcement responds to a domestic violence call in Maine, they know that they are likely going to arrest at least one drunken person, most often the perpetrator of the abuse.⁶³ Portland Police Detective Lisa Beecher, responsible for investigating nearly 1,000 domestic violence incidents each year, has commented that victims often say, "If he hadn't been drinking, he wouldn't have hit me." In many of the homes [the Portland Police Department goes] to, there's an awful lot of alcoholism out there. Alcohol isn't the cause of domestic violence, but I don't think anyone can dispute the fact it exacerbates the problems that already exist."⁶⁴ Cumberland County Deputy District Attorney Meg Elam reports, "Virtually every domestic [violence] case we see, there's alcohol involved."⁶⁵ Alcohol abuse and domestic violence in Maine cannot be separated, and, as the state and nation's economic situation worsens, the problem of alcohol and domestic abuse will become more pronounced and deadlier.

Despite increased statewide attention to the problem of domestic violence in Maine over the past two decades, reported incidents of domestic violence are not decreasing. Funding for domestic violence crisis groups and education efforts remains woefully inadequate, and, with the current state budgetary and economic crisis, many victims cannot access the court system in a meaningful way.⁶⁶

homicides were rural (Masardis, Waldoboro, Lee, Boothbay Harbor [two murders], Fort Kent, Brooks, Dixfield, Farmingdale). *Id.*

59. See Adria Gallup-Black, *Twenty Years of Rural and Urban Trends in Family and Intimate Partner Homicide: Does Place Matter?*, 9 HOMICIDE STUD. 149, 163-64 (2005).

60. See Barbara Walsh & Meredith Goad, *The Deadliest Drug: Maine's Addiction to Alcohol*; MAINE SUNDAY TELEGRAM, Oct. 19, 1997, at A1; Barbara Walsh, *Police Find Drunkenness Feeds Domestic Violence*, PORTLAND PRESS HERALD, Oct. 24, 1997, at A12.

61. *Maine Pays Dearly as Families are Ruined by Alcohol Abuse*, MAINE SUNDAY TELEGRAM, Oct. 26, 1997, available at <http://pressherald.maintoday.com/specialrpts/alcohol/d8summ.htm>.

62. *Id.*

63. *See id.*

64. *Id.* "Nationally, alcohol is found in 50 to 60 percent of domestic violence cases. Studies show that one-third to one-half of all batterers are reported to be problem drinkers." Walsh, *Police Find Drunkenness Feeds Domestic Violence*, *supra* note 60, at A12.

65. *Id.* at A12. See also Barbara Walsh, *Drinking Plays Role as Partner in Crime*, PORTLAND PRESS HERALD, Oct. 24, 1997, at A1 (stating that "[n]ationally, rates of domestic violence are nearly 15 times higher in homes where batterers commonly get drunk").

66. The worsening economic situation will impact domestic violence advocacy in immediate ways. Executive Director Deborah Shepherd of the Family Violence Project warned that in light of Governor John Baldacci's proposed budget cuts, nine of the state's domestic violence programs might close.

Domestic violence has reached epidemic levels in the state, and in order to more fully combat it, advocates in the past several years have attempted to convince lawmakers that the way Maine criminalizes domestic violence must reflect the realities of domestic violence.

IV. MAINE'S CRIMINAL CODE AMENDMENTS

A. *Impetus for Change*

In January 2007, Maine Senate President Beth Edmonds and Maine Coalition to End Domestic Violence Coordinator Gretchen Ziemer published an editorial in the *Kennebec Journal* entitled, "It's Time for Maine to Make Battering a Crime."⁶⁷ "Our current law," wrote Edmonds and Ziemer, "was not written in such a way to take into account the pattern of long-term behaviors that constitute domestic violence."⁶⁸ Domestic violence, they contended, is "a matter of power and control, in which the abusers will do whatever they believe is necessary to maintain control of their victims. They do this through a series of manipulative and abusive tactics that develop and occur over time."⁶⁹ Furthermore, the authors argued, "[T]he complete picture of domestic violence is relevant to gaining a full understanding of the illegal behaviors."⁷⁰

Also, Edmonds and Ziemer announced that they were working on legislation, later known as L.D. 1627, to "allow victims to tell their full story, providing an accurate view of the abusive behavior. Right now, they can't and this can result in difficulty in holding abusers legally responsible for their actions."⁷¹ Edmonds and Ziemer articulated two major benefits that such legislation could provide: (1) "By defining and classifying battering as a crime, we will more effectively prosecute abusers because their numerous acts of abuse will not be ignored";⁷² and (2) "Repeated batterings will provide a foundation for more stringent punishment and a strong message will be sent to our whole community that domestic violence will not be taken lightly."⁷³ With the announcement of their plans, Edmonds, Ziemer, and dozens of lawyers, victim advocates, and legislators began work crafting the legislation that would become L.D. 1627.

In March 2007, Senate President Edmonds submitted L.D. 1627, "An Act to Protect Families and Enhance Public Safety by Making Domestic Violence a Crime," to the Joint Standing Committee on Criminal Justice and Public Safety.⁷⁴ They announced the bill at the Maine Statehouse Hall of Flags on March 15,

Mechele Cooper, *What Anti-Violence Budget Cuts Will Look Like*, KENNEBEC J.-MORNING SENTINEL, Mar. 15, 2008, at A1, available at <http://morningsentinel.maintoday.com/news/local/4870813.html>.

67. Beth Edmonds & Gretchen Ziemer, Op-Ed., *It's Time for Maine to Make Battering a Crime*, KENNEBEC J., Jan. 23, 2007, at A5.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Edmonds & Ziemer, *supra* note 67, at A5.

74. See L.D. 1627 (123rd Legis. 2007).

2007.⁷⁵ “How many more deaths will it take before we realize whatever it is we’re doing is not enough?” asked Senator Edmonds.⁷⁶ According to Senator Edmonds, the bill would criminalize domestic violence by “get[ting] at the signature aspect of domestic violence, which is its nature as a course of conduct, not a single event.”⁷⁷ Laura Harper, director of public policy for Maine Women’s Lobby, reinforced Senator Edmonds’s remarks:

Because Maine law currently does not define the pattern of violence that battered women experience as a crime, law enforcement and prosecutors lack a critical tool for stopping abuse. We know that domestic violence occurs over a period of time and encompasses a continuum of abuse; now it’s time for the law to recognize that as well

. . . . Currently, Maine prosecutes domestic violence crimes on a case-by-case basis without regard to the patterned behaviors perpetrators use to maintain a power and control dynamic. Existing crimes used to prosecute domestic violence such as assault, criminal threatening, terrorizing, stalking, reckless conduct, violation of a protection order, and violation of condition of release, are incident-based and conceive of a crime that occurs in an instant of time. Currently, charges cannot be elevated to account for more severe cases and do not adequately account for the dynamics of domestic violence.⁷⁸

Co-sponsor of L.D. 1627, Representative Leila Percy, said that if the bill passed, Maine would be “poised to become the first state in the nation to establish domestic violence as a crime, with specific sentencing guidelines.”⁷⁹ Recognizing the input of attorneys and advocates from across the state, Percy noted that domestic violence as a course of conduct crime distinguishes it from a “bar room fight. It is rare for domestic violence to be a one-time, isolated situation.”⁸⁰ Percy added that the new crime designation would “take into account the pattern of violence [of domestic abuse] and . . . provide prosecutors and district attorneys more leverage to prosecute offenders.”⁸¹ Percy also quoted a state prosecutor, who said, “To change the culture, sometimes you have to change the law.”⁸² Percy advocated for the change in law and culture to make “Maine homes safe.”⁸³

Then Attorney General Steven Rowe remarked,

[A]ssault is not the only crime that is regularly occurring in Maine families. The other crimes involved criminal threatening, terrorizing, stalking and reckless conduct. While these types of crimes involving family and household members are commonly referred to [as] crimes of “domestic violence,” there is no crime

75. Susan M. Cover, *Lawmakers Take Aim at Domestic Violence*, KENNEBEC J., Mar. 16, 2007, at B1.

76. *Id.*

77. *Hearing on L.D. 1627, supra* note 4 (testimony of Sen. Beth Edmonds) (on file with author).

78. *Id.* (testimony of Laura Harper, Director of Public Policy, Maine Women’s Lobby) (on file with author).

79. *Id.* (testimony of Rep. Leila J. Percy) (on file with author).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

with this official label in Maine.⁸⁴

In recognizing that the state's "current system of accountability is not working," Rowe continued to explain that "if an abuser who has a prior domestic assault conviction commits a second domestic assault, it is clear that he has engaged in a course of violent conduct that demonstrates a heightened risk of future harm to the victim."⁸⁵ Rowe concluded, "[u]ltimately, this bill is about saving lives."⁸⁶

In addition, then Speaker of the Maine House of Representatives Glenn Cummings acknowledged that "[b]y creating a specific crime [of domestic violence, then the Criminal Code] will recognize the unique circumstances that domestic violence presents. Domestic violence is usually not an isolated incident; it is a pattern of incidents."⁸⁷ Pragmatically, Cummings continued, "[i]nstead of having to prosecute domestic violence only through existing crimes like assault or criminal threatening [the new crime of domestic violence] will give prosecutors a defined tool that recognizes the pattern."⁸⁸

Also submitted to the Joint Standing Committee on Criminal Justice and Public Safety were comments from an "i-petition," in which respondents from across the state were able to share their views about the need for L.D. 1627.⁸⁹ According to one response, "We can never reach our full potential in our fight against domestic violence until all agencies involved recognize the cyclical, patterned process that abuse follows. Perpetrators will not be held fully accountable until this legislation is passed and enforced."⁹⁰ Another commentator remarked, "I strongly support LD 1627 to help put teeth into criminalizing abuse and violence in Maine."⁹¹

Former Co-Chair of the Maine Coalition to End Domestic Violence Lois Galgay Reckitt speaking on behalf of the nine member projects of the coalition, testified that "[t]he victims of domestic abuse are trapped and persecuted in a repeating pattern—that our existing criminal justice methodology—dealing with crime in an 'incident-based' way would never fully touch."⁹² Moreover, Reckitt encouraged the Maine Committee on Criminal Justice and Public Safety to send the bill, as written, to the Legislature floor with "a unanimous ought to pass."⁹³

Anne Jordan, Commissioner of the Maine Department of Public Safety, also supported the bill as originally written.⁹⁴ She explained that under the current law, "[W]hen a person is prosecuted and convicted for abusing a household or family

84. *Hearing on L.D. 1627, supra* note 4 (testimony of G. Steven Rowe, then Attorney General of Maine) (on file with author).

85. *Id.*

86. *Id.*

87. *Id.* (testimony of Rep. Glenn Cummings, then Speaker of the House) (on file with author).

88. *Id.*

89. *Hearing on L.D. 1627, supra* note 4 (comments from i-petition, Help Us Make Domestic Violence a Crime in Maine!) (on file with author).

90. *Id.*

91. *Id.*

92. *Hearing on L.D. 1627, supra* note 4 (testimony of Lois Galgay Reckitt, Maine Coalition to End Domestic Violence) (on file with author).

93. *Id.*

94. *Hearing on L.D. 1627, supra* note 4 (testimony of Anne H. Jordan, Commissioner of the Maine Department of Public Safety) (on file with author).

member, the resulting conviction is for a crime such as, for example, assault, terrorizing, or stalking. Undoubtedly a conviction for any one of those crimes is a serious matter; however, the elements—and even names—of the crimes fail to appreciate or convey the context in which the crimes were committed.”⁹⁵ L.D. 1627, testified Jordan, would “ensure that Maine’s statutes not only address criminal conduct in itself, but also criminal conduct that is committed as part of a destructive, and all too often lethal, pattern of conduct.”⁹⁶ In addition, Jordan predicted that the benefits of passing L.D. 1627 as written would lie in permitting law enforcement officers “to better appreciate and enforce the laws, allow them to better track violators and assist in the review and processing of weapons requests and restrictions under the Federal Violence Against Women Act.”⁹⁷ Jordan further testified that members of the Maine Prosecutors Association relayed to her that their work in “combat[ing] the horrors of domestic violence” would be facilitated by criminalizing domestic violence.⁹⁸

Domestic violence survivor and advocate Donna Melanson also submitted testimony in support of L.D. 1627. Melanson alleged that she was also a victim of the state’s “present judicial system . . . [b]ecause our system fails to acknowledge the abuser’s history of domestic violence.”⁹⁹ As part of her stirring testimony, Melanson added that “each court case [involving domestic violence] is processed as [an] isolated incident. And when we fail to recognize the pattern of domestic violence as a crime, it changes the way people perceive abuse when it occurs in intimate relationships.”¹⁰⁰ Melanson wrote, “No one can truly understand the complexity of domestic violence until they live it.”¹⁰¹ This complexity, she asserted, is not reflected in the narrow way in which incidents of domestic violence are charged and prosecuted in the state.¹⁰²

The only recorded dissent against L.D. 1627 came from the Maine Association of Criminal Defense Lawyers (MACDL), who argued that domestic violence was already classified as a crime in Maine and treated “very seriously” by Maine judges, making this proposal superfluous.¹⁰³ MACDL focused on the portion of the bill that would allow for violations of protection from abuse orders to be a predicate offense to raise the crime classification level to a felony.¹⁰⁴ According to MACDL President Walter F. McKee, “Judges are not clamoring at this time for any more significant opportunities to provide additional jail time for defendants convicted of assault on family members.”¹⁰⁵ Despite this criticism, the bill rode into committee on a wave of overwhelming support.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Hearing on L.D. 1627, supra* note 4 (testimony of Donna Melanson) (on file with author).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Hearing on L.D. 1627, supra* note 4 (testimony of Walter F. McKee, President, Maine Association of Criminal Defense Lawyers) (on file with author).

104. *Id.*

105. *Id.*

B. The Story Behind the Changes

The legislative intent behind L.D. 1627 was clear: to categorize domestic violence as a course of conduct crime, thereby recognizing a wide variety of abusive behavior under its provisions. Such a classification would have allowed past abusive behavior—broadly construed—to come to light during trial, as this behavior would be used to prove that the defendant had, in fact, committed “domestic violence.”

The bill, and the attendant hearings about L.D. 1627, generated much popular support, as evidenced by statewide media coverage of the bill. Former *Portland Press Herald* Editor Jeannine Guttman remarked,

LD 1627 . . . takes an aggressive stance. A series of malevolent phone calls or an assault on a family member would no longer be prosecuted as just criminal threatening or assault—they would also be legally considered as “domestic violence.” Under the bill, those convicted of DV crimes would have a record that better indicates a criminal history that too often represents a pattern of abusive behavior.¹⁰⁶

According to Glenn Adams of the Associated Press, “The bill’s prospects appear good, given its co-sponsorship by nearly half of the Legislature and presiding officers of the House and Senate.”¹⁰⁷ Donna Baietti, executive director of the Battered Women’s Project in Aroostook County, remarked that the bill would allow law enforcement to “look at what’s really happening in that household, in that relationship. It also allows for the crime to address the patterns of behaviors, abusive behaviors or violent behaviors that are present in abusive relationships.”¹⁰⁸ Between the public hearing and the eventual adoption of the bill, however, the thrust of L.D. 1627 was greatly diminished.

The Criminal Law Advisory Commission’s (CLAC), comprised of nine non-Legislative members appointed by the state attorney general,¹⁰⁹ recommendations changed the bill significantly, functionally gutting it of its intended evidentiary import and conceptual foundations. “Regarding the structure of the proposed [L.D. 1627],” the committee wrote, “CLAC believes that the ‘catch-all’ nature of the section as currently drafted is inconsistent with the prevailing structure of the Criminal Code.”¹¹⁰ According to CLAC, the Maine Legislature had revised the structure of the criminal code so that each crime was given a specific statutory citation.¹¹¹ CLAC argued that the revisions helped an “ongoing computerization effort, but also had the effect of allowing people to determine the exact nature of the conduct the defendant engaged in from the caption and citation of a charge.”¹¹²

106. Jeannine Guttman, *Bill on Domestic Violence Pins a Legal Label on Abusers*, PORTLAND PRESS HERALD, May 9, 2007, at A5.

107. Glenn Adams, *Bill Seeks Crime Designation for Domestic Abuse*, BANGOR DAILY NEWS, May 4, 2007, at B1.

108. Jennifer Ruth, *Lawmakers Sponsor Crime Bill*, HOULTON PIONEER TIMES, May 9, 2007, at 1.

109. ME. REV. STAT. ANN. tit. 17-A, § 1352 (2006).

110. Memorandum from the Criminal Law Advisory Comm’n, Memo to the Comm. on Criminal Justice and Pub. Safety (May 1, 2007) (on file with author).

111. *Id.*

112. *Id.*

CLAC further argued that if the bill was enacted as written, an observer looking at the conviction would not know the particular crime the defendant committed without looking at the actual court file.¹¹³ In order to alleviate these concerns, CLAC made a recommendation that completely changed the tenor and power of the bill. CLAC recommended that rather than adopt L.D. 1627 (or, as it was proposed, M.R.S.A. section 214) as written, that the bill be amended to create, for example, a crime of “domestic violence assault” in one section, and a crime of “domestic violence criminal threatening” in another.¹¹⁴ “While making the Criminal Code more voluminous, this approach would enhance the goals of precision and clarity with respect to future convictions under these provisions,” CLAC’s members contended.¹¹⁵

Ultimately, L.D. 1627 as amended passed unanimously, with the amendments suggested by CLAC and adopted by the Maine Senate and House.¹¹⁶ As a result, the following laws were enacted on June 27, 2007, and became effective on February 1, 2008: 17-A M.R.S.A. § 207-A Domestic Violence Assault;¹¹⁷ 17-A M.R.S.A. § 209-A Domestic Violence Criminal Threatening;¹¹⁸ 17-A M.R.S.A. § 210-B Domestic Violence Terrorizing;¹¹⁹ 17-A M.R.S.A. § 210-C Domestic Violence Stalking;¹²⁰ and 17-A M.R.S.A. § 211-A Domestic Violence Reckless

113. *Id.*

114. *Id.*

115. *Id.*

116. Committee Amendment, Criminal Justice and Public Safety, Filing No. S-276, June 11, 2007.

117. ME. REV. STAT. ANN. tit. 17-A, § 207-A (Supp. 2008-2009). The statute reads in relevant part: “A person is guilty of domestic violence assault if: (A) The person violates section 207 and the victim is a family or household member” *Id.* Under section 207, “a person is guilty of assault if: (A) the person intentionally, knowingly, or recklessly caused bodily injury or offensive physical contact to another person.” *Id.* § 207.

118. ME. REV. STAT. ANN. tit. 17-A, § 209-A (Supp. 2008-2009). The statute reads in relevant part: “A person is guilty of domestic violence criminal threatening if: (A) The person violates section 209 and the victim is a family or household member” *Id.* Under section 209, “[a] person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury.” *Id.* § 209.

119. ME. REV. STAT. ANN. tit. 17-A, § 210-B (Supp. 2008-2009). The statute reads in relevant part: “A person is guilty of domestic violence terrorizing if: (A) The person violates section 210 and the victim is a family or household member” Under section 210,

A person is guilty of terrorizing if that person in fact communicates to any person a threat to commit or to cause to be committed a crime of violence dangerous to human life, against the person to whom the communication is made or another, and the natural and probable consequence of such a threat, whether or not such consequence in fact occurs, is:

(A) to place the person to whom the threat is communicated or the person threatened in reasonable fear that the crime will be committed.

Id. § 210.

120. ME. REV. STAT. ANN. tit. 17-A, § 210-C (Supp. 2008-2009). The statute reads in relevant part: “A person is guilty of domestic violence stalking if: (A) The person violates section 210-A and the victim is a family or household member” Under section 210,

A person is guilty of stalking if (A) [t]he actor intentionally or knowingly engages in a course of conduct directed at a specific person that would in fact cause both a reasonable person and that other specific person:

(1) To suffer intimidation or serious inconvenience, annoyance, or alarm;

Conduct.¹²¹ The state's prosecutors now are bringing charges under the new laws.¹²²

C. What Are the Effects of These New Laws?

All these new laws make the domestic violence offenses Class D crimes for first-time offenders and Class C crimes for repeat offenders.¹²³ The effect of the new laws in helping to address Maine's domestic violence crisis has yet to be seen. However, the enacted criminal laws, the new "domestic violence" crimes, have eviscerated the intent of and potential benefits that would have grown from adoption of L.D. 1627 as originally conceived. By refusing to classify domestic violence as a "course of conduct" crime, CLAC effectively knocked the legs out from under the original law. The Maine Legislature, which was largely unaware of the severity of these changes, passed scarecrow legislation.

If the language of the original bill had been retained, all evidence about the battering relationship would have been admissible, under *State v. Friel*.¹²⁴ The Law Court there held that where it is "an element of the offense the evidence of the prior [acts] was highly relevant and not excludable under any rule."¹²⁵ Since evidence of the course of conduct aspect of domestic violence has been eliminated as an integral element of the charge, such prior acts are not automatically admissible. Therefore, the prosecutor generally cannot introduce such evidence in her case-in-chief.

Domestic violence is best understood as a cluster of crimes, and the original construction of the law would have allowed prosecutors to present evidence of a variety of illegal acts under the label "domestic violence." However, the laws as they now stand focus, once again, on discrete acts, divorced from the context of the battering relationship. Without the ability to introduce evidence of "prior acts," these new domestic violence laws lose their bite and intended effect. Sentencing will be enhanced for repeat offenders who are prosecuted successfully, but the evidence of these prior acts will never be presented to the jury for consideration. The ultimate goals of "holding batterers accountable" and "recognizing domestic violence as a course of conduct crime" will not be realized by the law as it

(2) To fear bodily injury or to fear bodily injury to a member of that person's immediate family; or

(3) To fear death or to fear the death of a member of that person's immediate family.

Id. § 210.

121. ME. REV. STAT. ANN. tit. 17-A, § 211-A (Supp. 2008-2009). The statute reads in relevant part: "A person is guilty of domestic violence reckless conduct if: (A) The person violates section 211 and the victim is a family or household member" Under section 211, "[a] person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person." *Id.* § 211.

122. Interview with Katherine Tierney, Assistant District Attorney, Domestic Violence Division, Cumberland County District Attorney's Office (Nov. 5, 2008). See also Jen Lynds, *Two Men Going to Jail for Assault in Separate Cases*, BANGOR DAILY NEWS, Dec. 19, 2008, at B2; Ann S. Kim, *Man Charged with Criminal Threatening, Domestic Violence*, PORTLAND PRESS HERALD, Dec. 28, 2008, available at <http://news.maintoday.com/updates/037621.html>.

123. ME. REV. STAT. ANN. tit. 17-A, §§ 207-A, 209-A, 210-A, 210-B, 210-C, 211-A.

124. 508 A.2d 123 (Me. 1986).

125. *Id.* at 128.

currently exists.

V. MAINE RULE OF EVIDENCE 404

A. Exceptions Articulated by Rule 404(b)

According to Maine's Rule of Evidence 401, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹²⁶ Additionally, all relevant evidence is deemed admissible unless prohibited by another rule of evidence or by the Maine or federal Constitution.¹²⁷ The Law Court reinforced this principle in 2006, holding in *State v. Allen* that "[a]ll facts which tend to prove or disprove the matter at issue or which constitute a link in the chain of circumstantial evidence with respect to the act charged are relevant and should be admissible into evidence within judicial discretion *unless excluded by some rule or principle of law*."¹²⁸ Furthermore, under Maine law, trial court judges have "broad discretion to determine whether proffered evidence is relevant."¹²⁹

Admitting prior acts evidence on non-character theories has proven nearly impossible for the state's prosecutors in domestic-violence-related non-homicide prosecutions. Judges are hesitant to admit such evidence, even if prosecutors present clearly articulated exceptions to the general prohibition against prior acts evidence. The barrier that prosecutors face is Maine Rule of Evidence 404 ("Rule 404"), which presents a general ban on character-based evidence.¹³⁰ In particular, Rule 404(b) places an express ban on prior acts evidence being used to prove action "in conformity" with a defendant's character, with a few delineated exceptions.¹³¹ According to the Advisory Committee Note to Rule 404, "This rule is not based on lack of relevancy but rather because the danger of prejudice ('he's a bad man, so he is probably guilty') outweighs the probative value."¹³² The Advisory Committee also determined that Rule 404(b) "does not exclude the evidence [of prior acts] when offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹³³

These exceptions "do not reflect the realities of domestic violence,"¹³⁴ which encompasses a wide range of violent and controlling acts. The non-character permissible uses under Rule 404(b) require factual similarity to a degree that does not arise from most domestic violence situations. For example, for a prior act to be

126. ME. R. EVID. 401.

127. ME. R. EVID. 402.

128. 2006 ME 20, ¶ 18, 892 A.2d 447, 453 (quoting *State v. Brown*, 321 A.2d 478, 482 (Me. 1974)) (emphasis added).

129. *Merrill v. Sugarloaf Mountain Corp.*, 2000 ME 16, ¶ 20, 745 A.2d 378, 386 (citation omitted).

130. ME. R. EVID. 404.

131. ME. R. EVID. 404(b). See also ME. R. EVID. 404 advisory committee's note.

132. ME. R. EVID. 404 advisory committee's note.

133. *Id.*

134. Kovach, *supra* note 30, at 1129 (quoting Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 819 (1997)). See also Lewis, *supra* note 43, at 48 (arguing that most courts do not perceive expert testimony in domestic violence cases as violative of the evidentiary rules against character propensity evidence).

admissible under the theory of intent, the mental state of the defendant must be in dispute and the prior act and the prosecuted act must be sufficiently similar to support the inference that “the defendant probably harbor[ed] the same intent in each instance.”¹³⁵ Although acts of domestic violence are generally part of the same cycle to gain power and control over the batterer’s victim, they do not often share a degree of similarity sufficient to satisfy admissibility under the theory of intent. Additionally, the identity exception, along with most of the other exceptions under Rule 404(b), is not of particular value in domestic violence prosecutions, as the identity of the perpetrator, as well as his motive, is generally not an issue in dispute.

Another stumbling block that prosecutors face when attempting to persuade judges to admit prior acts under non-character theories is the requisite Rule 403 “balancing test.”¹³⁶ In the off chance that a judge would consider admitting evidence of a prior act of domestic violence, she must weigh the probative effect of such evidence against its potential of prejudicing the jury against the defendant. If the risk of prejudice substantially outweighs its probative value, the evidence may be excluded under Rule 403. In performing this balancing test, the court takes into consideration the need for the evidence, alternative methods of proof, and remoteness in time to the action being prosecuted.¹³⁷ Although such trial court Rule 403 determinations will be reviewed on appeal only for abuse of discretion,¹³⁸ the Rule 403 hurdle at the trial level is difficult to clear. In domestic violence cases, because of the highly prejudicial nature of prior acts evidence, such evidence tends to be excluded, even if it surmounts the Rule 404(b) exclusionary barrier. Accordingly, “[b]ecause of the accessibility of propensity inferences from evidence of prior acts, evidence of either acts which resemble the act in question or acts which carry with them overall negative connotations calls for the court to exercise special caution in admitting such evidence even for limited purposes under general rubrics, such as intent, motive and relationship.”¹³⁹ In addition, the Law Court’s policy on the rules of evidence, is that if there is any doubt regarding the admissibility of evidence, that doubt should be resolved in favor of the defendant.¹⁴⁰ The general trend, therefore, is to exclude even highly relevant evidence of prior acts if it risks prejudicing the jury against the defendant for the particular crime charged.

Appellate courts in all states remain fearful of other crimes’ evidence and continue to impose a number of substantive and procedural restrictions on its admission. Restrictions are particularly placed on the trial courts’ role in making the

135. *People v. Ewoldt*, 867 P.2d 757, 770 (Cal. 1994) (citation and internal quotations omitted).

136. *See* ME. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). According to the advisory committee’s note, “The trial judge has broad discretion in determining whether the probative value of evidence is outweighed by the risk of unfair prejudice or confusion of issues or by sheer waste of time.” ME. R. EVID. 403 advisory committee’s note.

137. *Id.*

138. *State v. LeClair*, 425 A.2d 182, 186 (Me. 1981).

139. RICHARD H. FIELD & PETER L. MURRAY, *MAINE EVIDENCE*, § 404.4 at 143 (6th ed. 2007) (internal quotations omitted).

140. *State v. Trafton*, 425 A.2d 1320, 1324 (Me. 1981).

preliminary determination of admissibility and in instructing the jury as to the appropriate use of the evidence.¹⁴¹

As a result, courts seem to err on the side of caution and refuse to admit prior acts evidence in a close call situation, or, in most domestic violence prosecutions, refuse to admit such evidence at all.

B. Maine “Prior Acts” Jurisprudence from the 1800s to the Present

The oftentimes conflicting history of Maine’s Rule 404(b) jurisprudence has left many prosecutors feeling as though they cannot introduce prior acts evidence in domestic violence prosecutions at all. As derived from the common law, first articulated in *State v. Tozier*,¹⁴² in 1862, Rule 404(b) stands for the proposition that the state in a criminal action cannot introduce in its case-in-chief evidence of the “bad character” of the accused.¹⁴³ The rule, the holding explains, is not based on irrelevancy but rather is a safeguard against the danger of prejudice outweighing the evidence’s probative value.¹⁴⁴ This jurisprudence has had a disproportionate impact on domestic violence prosecutions in the state, as “the cycles of violence and the power dynamics in abusive relationships dramatically affect the quality and quantity, as well as the type of evidence available in domestic violence cases.”¹⁴⁵

In *State v. Pike*,¹⁴⁶ a 1876 case before the Law Court, in which a husband was found guilty for the killing of his wife, Margaret, “by seizing and dragging her by the hair of her head, and throwing her with force and violence upon a sofa, giving her mortal wounds, of which she died,” the court held that evidence of other acts of abuse during the night in question were properly admitted during Pike’s trial.¹⁴⁷ However, the court noted, “[I]t is undoubtedly true . . . that neither proof of another distinct felony, nor proof of another distinct assault upon [Margaret] was admissible.”¹⁴⁸ The evidence in this case, the court reasoned, was “not of that description. It was limited to acts of violence on the same evening, and only a short time before [Margaret’s] death.”¹⁴⁹ The temporal element between the particularized “incidents” of the crime was dispositive: As the events were so close in time, the court construed them to be part of the same event, namely, the eventual killing of Margaret Pike. The court stated quite clearly, however, that if the incidents were “distinct assaults,” apart from the night in question, the court would not admit such evidence.¹⁵⁰

In the 1951 case of *State v. Hume*,¹⁵¹ a larceny prosecution, the Law Court decided that “[r]elevant evidence to support a charge may be received within the court’s discretion although it may tend to show that the respondent committed

141. *Domestic Violence Prac. & Proc.*, *supra* note 44, at 7-74.

142. 49 Me. 404 (1862).

143. *Id.* at 405.

144. *See generally id.*

145. *Domestic Violence Prac. & Proc.*, *supra* note 44, at 7-67.

146. 65 Me. 111 (1876).

147. *Id.* at 112-13.

148. *Id.* at 113-14.

149. *Id.* at 114.

150. *Id.* at 113-14.

151. 146 Me. 129, 78 A.2d 496 (1951).

another offense not charged or that the acts charged are part of a common scheme.”¹⁵² While this holding sounds promising in leaving open the possibility that judicial discretion alone could determine the admissibility of uncharged acts in a prosecution, upon closer inspection, the court focused on the fact that the evidence was introduced by the defendant’s attorney, as opposed to the state prosecutor.¹⁵³ However, the effect of the court’s holding is procedural, not substantive. According to the court, the analysis of admissibility would change drastically if the prosecutor had attempted to introduce the evidence of the prior act in his case-in-chief.¹⁵⁴

Nearly two decades later, the Law Court proclaimed that “[e]vidence that is otherwise competent and relevant to prove a [d]efendant’s guilt of the particular crime charged is not made inadmissible by the fact that it also, but incidentally, tends to prove him guilty of another distinct crime.”¹⁵⁵ Also in 1971, the court decided, in *State v. Smith*:

Where the acts showing the commission of the substantive offense of the crime against nature were all so closely related in point of time and place and so intimately associated with the acts evidencing the offense charged that they formed together a continuous transactional episode, the whole event could be shown, including what immediately preceded and what immediately followed the act complained of, for the purpose of showing the intent of the accused.¹⁵⁶

The close temporal proximity of events in the court’s 1973 decision in *State v. Eaton*¹⁵⁷ proved to be the fulcrum upon which the court’s reasoning turned in admitting prior acts, seemingly unrelated, into a prosecution for assault with a dangerous weapon with intent to kill.¹⁵⁸ The defendant contended that the trial judge committed reversible error when he admitted into evidence “numerous threats made by [the defendant] to a number of persons other than [the victim].”¹⁵⁹ According to the court, “Where the intent of a party is an ingredient of the crime charged, evidence of conduct of a similar nature may be introduced to establish the intent of the defendant”¹⁶⁰ The court continued to explain, “The previous threats and assaults in the instant case were part of a single set of circumstances, closely related in nature and time, all linked together by a common purpose”¹⁶¹ Because the court could not tease out the ultimate crime from the context in which it was committed, it decided to admit all evidence of the night’s events.

In the late 1970s and early 1980s, the Law Court reiterated its commitment to the general prohibition provided by Rule 404(b): evidence of prior bad acts is not admissible against a criminal defendant if its sole purpose and relevance is to

152. *Id.* at 140, 78 A.2d at 503 (citation and internal quotations omitted).

153. *Id.* at 136-37, 78 A.2d at 501.

154. *Id.* at 137, 78 A.2d at 501.

155. *State v. Castonguay*, 263 A.2d 727, 729-30 (Me. 1970).

156. 277 A.2d 481, 491 (Me. 1971).

157. 309 A.2d 334 (Me. 1973).

158. *Id.* at 339.

159. *Id.* at 337.

160. *Id.* at 339.

161. *Id.*

demonstrate the defendant's propensity to commit crimes.¹⁶² However, in a 1982 murder prosecution,¹⁶³ the Law Court held that the trial judge properly admitted evidence of a defendant's prior beating of his victim and chasing of the victim with a knife, in order to allow the prosecution to demonstrate that the defendant committed the murder knowingly or intentionally.¹⁶⁴ As the court's reasoning has rarely been replicated in domestic violence prosecution appeals since, it is useful to read that portion of the court's decision in full:

Over defense objection, the court allowed a prosecution witness to testify that in the summer of 1979 she once heard Valentine beat Tripp for an hour. The witness testified that during the beating Valentine would stop to smoke or fix a drink and then continue hitting Tripp. Following this incident, Valentine said: "She was damn lucky I wasn't wearing my knife. I reached for it and it was gone." Another witness, again over objection, testified that on June 30, 1980, Valentine, who was apparently intoxicated, chased Tripp up a street with a knife. After Tripp escaped, Valentine gave the knife to the witness and said: "I was going to kill the bitch." Evidence of prior bad acts is not admissible to prove that a defendant acted on a particular occasion in conformity with his past behavior. . . . When such conduct was directed at the victim of the crime the evidence may be admissible, however, to prove motive or intent. . . . Here, the State initially sought to prove Valentine's conduct was knowing or intentional. Accordingly, intent was in issue at trial and the evidence was properly admitted.¹⁶⁵

Here, not only was the time lapse between these two beatings and the ultimate murder of the victim significant (from more than a year to a few months before the murder itself), the court allowed the evidence of the beatings in with no more corroboration than the witnesses' sworn testimony.¹⁶⁶ The courts, both the Law Court and the trial court, relied on the articulated exceptions under Rule 404(b) to admit the probative evidence of the defendant's prior acts of abuse.¹⁶⁷

Additionally, in 1984, the Law Court clarified its *State v. Bourgeois*¹⁶⁸ decision that the main issue "is whether there is some sort of logical or experiential 'nexus' between the prior acts and the act charged other than a general propensity on the part of the defendant to commit such acts."¹⁶⁹ In *Bourgeois*, evidence of the defendant's violent acts against his former wife were not admissible in a prosecution concerning the attempted murder of his current wife.¹⁷⁰ Though in child sexual abuse prosecutions (see below) the court will uphold the admission of evidence of prior acts between the defendant and a third party, in domestic violence and other prosecutions, the evidentiary nexus has been held to be insufficient.

The Law Court held in 1988 in *State v. Hezick*¹⁷¹ that the trial court's

162. See *State v. Cyr*, 389 A.2d 834 (Me. 1978); *State v. Wallace*, 431 A.2d 613 (Me. 1981).

163. *State v. Valentine*, 443 A.2d 573 (Me. 1982).

164. *Id.* at 578.

165. *Id.*

166. *Id.*

167. *Id.*

168. 639 A.2d 634 (Me. 1994).

169. FIELD & MURRAY, *supra* note 139, § 404.8, at 153. See also *Bourgeois*, 639 A.2d at 636-37 (quoting *State v. Shuman*, 622 A.2d 716, 718 (Me. 1993)).

170. *Bourgeois*, 639 A.2d at 637.

171. 539 A.2d 207 (Me. 1988).

“exclusion of evidence about a separate protection-from-abuse proceeding against [the defendant] fell well within the scope of the presiding justice’s discretion to assess relevancy of proffered evidence.”¹⁷² In the 1991 Law Court decision of *State v. Nile*,¹⁷³ the court decided that evidence of prior acts against a victim could be admissible for the limited purpose of allowing the jury to consider the victim’s “state of mind at the time these alleged events were happening”¹⁷⁴ The defendant in this case was convicted of kidnapping, aggravated assault, and witness tampering in a prosecution for crimes he committed against his estranged wife.¹⁷⁵ The court argued that the victim’s state of mind was relevant in proving that she was threatened and coerced into the defendant’s car, and that the evidence of his prior abuse of her was introduced “for the very limited purpose” of demonstrating her state of mind.¹⁷⁶ That same year the Law Court also decided that evidence of other wrongful acts could be admissible to demonstrate that a defendant had the requisite intent to harass the subject of a protection from harassment order.¹⁷⁷

In an arson prosecution in 1992, the court expanded the bounds of what “relationship” meant in order to admit prior acts of vandalism.¹⁷⁸ Drawing upon its 1989 decision in *State v. Giovanini*,¹⁷⁹ the Law Court decided that “the vandalism evidence was probative on the crucial issue of the perpetrator of the arson, and was admitted on that issue to show the relationship between [the defendant] and [the victim] and that [the defendant] had a motive to burn [the victim’s] home.”¹⁸⁰ The court decided that a vandalism on the victim’s car two weeks before the arson established a relationship between the accused and the victim.¹⁸¹ The court seemed to rely on the temporal proximity between the two acts, rather than the substantial similarity between the acts, to uphold the evidence’s admissibility.

A 1993 domestic-violence-based prosecution for attempted murder and aggravated assault and its subsequent convictions were upheld by the Law Court. In *State v. Shuman*,¹⁸² the trial court admitted evidence of the defendant’s threats against his wife and children, even though his violent act was directed at another man. “Similar threats or acts against others are relevant if there is a sufficient nexus between the evidence sought to be introduced and the elements of the crime charged,” wrote the court.¹⁸³ The court added that the threat of undue prejudice was “ameliorated by the lack of evidence that [the defendant] made any effort to carry out his threat to his wife, the evidence of his later, non-threatening conversation with his wife, and the time lag between the statement and the assault

172. *Id.*

173. 595 A.2d 1047 (Me. 1991).

174. *Id.* at 1049 (internal quotations omitted).

175. *Id.* at 1047.

176. *Id.* at 1049.

177. *State v. Ilsley*, 595 A.2d 421, 423-24 (Me. 1991).

178. *State v. Webber*, 613 A.2d 375 (Me. 1992).

179. 567 A.2d 1345, 1346 (Me. 1989) (“We have upheld the admission of prior acts to show the relationship between the parties and the defendant’s motive, intent or opportunity.”).

180. *Webber*, 613 A.2d at 377.

181. *Id.*

182. 622 A.2d 716 (Me. 1993).

183. *Id.* at 718.

on [the victim.]”¹⁸⁴ Domestic abuse evidence was, therefore, admitted in a connected, but non-domestic-violence-specific prosecution.

However, in 1997, the court held in *State v. Jordan* that the trial court committed reversible error when it allowed testimony about harassing phone calls from the defendant to his estranged wife.¹⁸⁵ The trial court allowed a witness to testify “*in detail* that [the defendant] had made fifteen or twenty harassing phone calls, that he had followed her in a vehicle and nearly ran her off the road, and that he had stalked her.”¹⁸⁶ However, the current case against the defendant did not involve his estranged wife directly, as he was convicted of reckless conduct with the use of a firearm against a police officer.¹⁸⁷ “[T]he evidence of [the defendant’s] prior bad acts directed against his wife had no probative value in proving his guilt of the later crime committed against someone else and, therefore, the court erred in admitting [his estranged wife’s] testimony,” wrote the court.¹⁸⁸

In a more recent decision, the Law Court upheld the murder conviction of a defendant over his objection that prior acts evidence concerning an incident of domestic violence was improperly admitted at his trial.¹⁸⁹ The court reasoned:

At trial, the prosecution claimed that the killing of [the victim] was intentional. The testimony that [the defendant] had previously engaged in an act of domestic violence toward [the victim] by kicking in the locked front door of their home causing the door to strike her in the head, was offered to prove the absence of mistake or accident as to the murder and is, therefore, admissible under Rule 404(b). Further, the trial court acted within its discretion in applying Rule 403 and concluding that this evidence was not so prejudicial as to substantially outweigh its probative value.¹⁹⁰

This decision seems to align itself with other evidence rulings in murder prosecutions. Because the probative value of the evidence in a murder prosecution will rarely be substantially outweighed by its prejudicial effect, evidence of prior acts—under a recognized and well-articulated Rule 404(b) exception—will often be admitted. In lesser crimes, however, the potential prejudicial effect of such evidence increases, whereas the “need” for the evidence decreases, resulting in judges being much more willing to exclude any prior acts evidence from the purview of the jury.

Most recently, in *State v. Dilley*, the Law Court upheld the manslaughter convictions of Jon Dilley, who killed his mother and estranged wife.¹⁹¹ On appeal, Dilley alleged that the trial court erred in admitting evidence concerning statements he made to a co-worker about killing his wife.¹⁹² The court stated: “In criminal trials involving an intent element, we have repeatedly held that evidence of the prior relationship between the accused and the victim is relevant and admissible to

184. *Id.*

185. 1997 ME 101, ¶ 8, 694 A.2d 929, 931.

186. *Id.* (emphasis in original).

187. *Id.* ¶ 7, 694 A.2d at 931.

188. *Id.*

189. *State v. Lockhart*, 2003 ME 108, ¶ 37, 830 A.2d 433, 446.

190. *Id.*

191. 2008 ME 5, ¶ 1, 938 A.2d 804, 806.

192. *Id.*

establish the accused's motive, intent, or opportunity to commit the crime, or to demonstrate the absence of any mistake or accident."¹⁹³ The court continued: "If the evidence regarding the accused's relationship to the victim concerns events that arose a significant amount of time before the crime, that remoteness in time generally goes to the weight, not the admissibility, of the evidence."¹⁹⁴ If the prosecution, as was done in *Dilley*, presents evidence of prior acts relating to the intent element of the crime charged, the Law Court consistently holds that such acts—at least in homicide prosecutions—are admissible over Rule 404 and Rule 403 objections.

The Law Court's jurisprudence of the admissibility of prior acts is largely dependent upon the type of prosecution in which the evidence is being offered. Generally, in homicide prosecutions, because the risk of prejudice is diminished, at least theoretically, by the enormity of the crime alleged, judges do not hesitate to admit a wide variety of prior acts evidence under articulated Rule 404(b) exceptions.

C. Evidence Rulings in the Sexual Assault and Child Sexual Abuse Contexts

Whereas Maine's lower courts and the Law Court have been hesitant to allow the admission of prior acts evidence, there is one context in which the courts have been consistent: the admission of prior acts evidence in sexual assault and child sexual abuse cases. Though there is no official rule regarding admissibility in these types of prosecutions—unlike in federal law, in which the Federal Rules of Evidence 413, 414, and 415 explicitly allow for the admissibility of prior convictions and uncharged acts in sex crimes¹⁹⁵—the state courts have admitted

193. *Id.* ¶ 30, 938 A.2d at 811 (citing *State v. Roman*, 622 A.2d 96, 98-99 (Me. 1993); *State v. Young*, 560 A.2d 1095, 1096 (Me. 1989); *State v. Lewisohn*, 379 A.2d 1192, 1201 (Me. 1977)).

194. *Id.* On the federal side of things, the United States District Court for the District of Maine held in 1984 that several factors are to be considered by judges in determining the admissibility of prior acts into evidence, including the "force of the Government's demonstration of need for the evidence," the "strength of the evidence of prior acts," the "persuasive or probative force of the other acts evidence," and the "risk of prejudice that will be occasioned by the admission of the prior acts evidence." *United States v. Kenney*, 598 F. Supp. 883, 887 (D. Me. 1984). The court wrote, "[U]se of prior acts evidence to complete the story of the crime on trial by proving its immediate context is proper as where it is used to prove that the charged acts are part and parcel of a continuing course of similar criminal activity." *Id.* at 889 (citations and internal quotations omitted).

195. FED. R. EVID. 413-15. In 1995, the United States Congress approved three new rules of evidence that allow for the admissibility of prior bad acts evidence for character-propensity purposes in federal cases involving sexual assault or child molestation. *Id.* Federal Rules of Evidence 413, 414, and 415 recognize that in sex crimes the probative value of prior acts evidence outweighs its potential prejudicial effect. *See id.* However, these Federal Rules of Evidence have come under heavy criticism in academic circles and among defense attorneys, in particular. *See, e.g.,* Rosanna Cavallaro, *Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31 (2007); R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather Than Guilt?*, 33 TEX. TECH L. REV. 1167 (2002); 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 (1996); Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487 (2005); Jeffrey Waller, *Federal Rules of Evidence 413-415: "Laws Are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil,"* 30 TEX. TECH L. REV. 1503 (1999). Despite the

such evidence largely under the “relationship” or “intent” exceptions in Rule 404(b). The Law Court has affirmed, in several instances, the admission of evidence of prior acts to demonstrate the existence of a “relationship” between the accused and the victim.

According to the authors of Maine’s treatise on evidence:

The rubric of “relationship” can be extended to allow the admission of a wide range of evidence that otherwise would be barred by [Rule 404(b)]. The theory is that the prior conduct supports inferences of the existence of a relationship between the actor and some other person that is relevant either to an issue in the case or the credibility of a witness.¹⁹⁶

The authors also seem skeptical that “[a]lthough the evidence was ostensibly offered and admitted to show the defendant’s ‘intent’ or the ‘relationship’ between the parties, those issues do not appear to have been of actual importance in the cases.”¹⁹⁷ Even accompanied by limiting instructions as to the relevance of such prior acts evidence, the authors question the propriety of the admission of the evidence as “its real probative force seems quite close to the inference that the defendant acted in conformity with those past actions on the occasion(s) in question at trial—precisely the inference Rule 404 is intended to block.”¹⁹⁸

In the 1958 decision *State v. Seaburg*,¹⁹⁹ the Law Court announced that it had “held that in an indecent liberties prosecution proof of prior acts of a nature similar to the principal offense charged in the indictment is admissible.”²⁰⁰ In *Seaburg*, the trial judge allowed testimony about games of strip poker between the victim and the defendant as relevant to explain their relationship.²⁰¹ In its 1986 decision *State v. Adams*,²⁰² the Law Court held that evidence of the defendant’s prior sexual misconduct over a six-year period was admissible to show motive, intent, or opportunity in the present crime and was not overly prejudicial to force its exclusion.²⁰³ Similarly, in *State v. Ouellette*,²⁰⁴ the Law Court held that, in a prosecution for sexual misconduct, it was not abuse of discretion to permit the prosecution “to elicit testimony concerning sexual episodes between [the defendant] and the victim that were not charged in the indictment in order to show the relationship between them.”²⁰⁵ In its 1992 *State v. Smith*²⁰⁶ decision, the Law Court upheld the admission of the victim’s testimony concerning prior acts of

controversy, federal district courts and circuit courts, since the adoption of the rules, consistently have upheld convictions of sexual offenders whose guilt was determined, in part, by the admission of prior acts evidence.

196. FIELD & MURRAY, *supra* note 139, § 404.7, at 149.

197. *Id.* § 404.5, at 146.

198. *Id.*

199. 154 Me. 162, 145 A.2d 550 (1958).

200. *Id.* at 171, 145 A.2d at 555.

201. *Id.*

202. 513 A.2d 854 (Me. 1986).

203. *Id.* at 856.

204. 544 A.2d 761 (Me. 1988). *See also* *State v. Nadeau*, 653 A.2d 408, 411 (Me. 1995) (holding that evidence of prior sexual acts was admissible to show motive, intent, or opportunity to commit the charged offense).

205. *Ouellette*, 544 A.2d at 763.

206. 612 A.2d 231 (Me. 1992).

violence against her on the ground that such evidence went to the issue of compulsion in a gross sexual assault case.²⁰⁷ The Law Court further held that the prosecutors were allowed to demonstrate through this evidence that the victim had submitted out of fear based on these prior incidents.²⁰⁸ Because the details of the prior incidents were vague, the Law Court found that this minimized the potential prejudicial effect under Rule 403.²⁰⁹

In an even greater stretch of the bounds of the Rule 404(b) exceptions, in *State v. Thompson*,²¹⁰ the Law Court upheld the trial court's decision to allow evidence of the defendant's prior bad acts involving only one of two sex-offense victims to be used in charges involving only the other victim.²¹¹ Thus, prior uncharged acts against another person were deemed admissible for the prosecution of an offense not involving that particular victim. In a recent case involving a juvenile sex offender, the Law Court upheld the admission of evidence of "[p]ast, uncharged acts between a defendant and complainant [as admissible to demonstrate the] defendant's intent to commit the crime with which he is charged."²¹² These two cases highlight the general trend of the Law Court to allow prior acts evidence in sexual assault prosecutions if introduced under the "relationship" exception of Rule 404(b).

However, in a child sexual abuse prosecution, *State v. Palmer*,²¹³ the Law Court held that evidence of prior acts cannot be admitted solely as "background information."²¹⁴ Notably, it was evidence of past physical abuse of the victim's mother that was, in the opinion of the court, improperly admitted.²¹⁵ The mother had testified at trial that while she was in the process of divorcing the defendant, she had, along with her children, spent time in an abused women's shelter.²¹⁶ The Law Court reasoned that "[a]lthough evidence about other crimes, wrongs, or acts of a defendant may be admitted . . . , it is not admissible as background information."²¹⁷ The effect of this information was not considered to be harmless, and thus the court vacated the judgment against the defendant.²¹⁸ The net that the Law Court has cast for the admissibility of prior acts in sexual assault prosecutions is wide. However, the Law Court has foreclosed as a possibility attempts to admit the defendant's prior acts against *third* parties as a part of the prosecutor's case-in-chief.

Within the realm of sexual abuse prosecutions, particularly if there is a child involved, the Law Court has demonstrated its willingness to expand the bounds of admissible prior acts evidence as demonstrated by the preceding cases. There is an important lesson to learn from this: Establishing a "relationship" between the

207. *Id.* at 234-35.

208. *Id.* at 235.

209. *Id.*

210. 1997 ME 109, 695 A.2d 1174.

211. *Id.* ¶ 13 n.7, 695 A.2d at 1178.

212. *State v. Joel H.*, 2000 ME 139, ¶ 18, 755 A.2d at 520, 524.

213. 624 A.2d 469 (Me. 1993).

214. *Id.* at 470.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 471.

accused and his victim is an important exception to the general ban against prior acts evidence by Rule 404(b). Crimes involving sexual abuse are different, the Law Court seems to acknowledge, and thus, in such sexually-based prosecutions, the court adheres to a broad admissibility of prior acts evidence standard.

D. Maine Prosecutors' View of "Prior Acts" Admissibility

While the Law Court is the ultimate authority as to whether and when prior acts evidence may be admissible against a criminal defendant, it is the state's prosecutors who most acutely feel the effects of the trial courts' decisions regarding evidence admissibility. And while the Law Court decisions represent only the smallest slice of criminal cases in the state, it is the district attorneys who can provide the most complete picture of how evidence admissibility affects their prosecution of domestic-violence-related crimes. District attorneys from across the state completed an Author-generated survey in the fall of 2008 in which they were asked to detail their views on the admissibility of prior acts evidence in domestic-violence-related prosecutions.²¹⁹ Their answers, despite experience and geographic differences, were rather uniform.

The prosecutor survey respondents all commented that they rarely, if ever, attempt to introduce prior acts evidence in a domestic violence prosecution. Deputy District Attorney for Aroostook County Carrie L. Linthicum remarked, "In cases where the defendant has a prior similar offense, which is a lot of the cases, not one of our judges (two District Court and one Superior Court) will allow evidence of prior assault or similar convictions to be entered into evidence."²²⁰ Assistant District Attorney Todd Collins remarked that while such acts are relevant and used at sentencing, they are "generally inadmissible" in his experience at trial.²²¹ Three assistant district attorneys from Penobscot County remarked that admitting prior acts of domestic violence under the Maine Rules of Evidence would be "impermissible."²²² Assistant District Attorney Katherine Tierney, a prosecutor in the Domestic Violence Unit in Cumberland County, remarked that while prior acts could be admissible for the limited purpose of demonstrating the victim's sense of fear in a terrorizing, threatening, or stalking prosecution, they are excluded generally from other types of domestic-violence-related prosecutions.²²³ The end result, these prosecutors agree, is that despite some favorable case law, they do not attempt to introduce prior acts evidence in the vast majority, if not all, of their domestic violence prosecutions for fear of exclusion, wasting time, or, according to one prosecutor, making the judge angry, which will not help the prosecution's

219. I developed a survey that was sent to district attorneys across the state, focusing on their experiences with domestic violence prosecutions and Rule 404(b) exceptions. The following responses were generated from that survey.

220. Survey of Carrie L. Linthicum, Deputy District Attorney, Aroostook County, in Presque Isle, Me. [hereinafter Survey of Linthicum] (Oct. 28, 2008) (on file with author).

221. Survey of Todd Collins, Assistant District Attorney, Aroostook County, in Caribou, Me. (Oct. 31, 2008) (on file with author).

222. Survey of Assistant District Attorneys, Penobscot County, in Bangor, Me. [hereinafter Survey of Penobscot County] (Oct. 30, 2008) (on file with author).

223. Interview with Tierney, *supra* note 122.

case.²²⁴

The prosecutors similarly agreed that uncooperative victims are the single-most insurmountable barrier to successful convictions in domestic violence cases. Linthicum remarked, “The admissibility of priors is the least of our concerns since we know they won’t be admitted.”²²⁵ However, according to A.D.A. Tierney, allowing the jury to hear evidence of prior acts of violence against the victim could go a long way in helping the jury understand the context of the relationship and why the victim is not testifying on her own behalf.²²⁶ “We need to have these prior acts in order to show why [the victim] would be scared of retaliation by the defendant,” said Tierney.²²⁷ She added that prosecutors, if allowed to, should use their discretion in deciding which prior acts of abuse should be admitted during trial. “These acts would be used to show a course of conduct of putting the victim in fear,” said Tierney. “You wouldn’t need ten years of atrocities to accomplish that.”²²⁸ Tierney said that while she is bringing charges under the new domestic violence laws of the criminal code, these crimes have not made admitting evidence about prior acts of domestic violence easier. “There’s tons of abuse,” she said.²²⁹

Particularly in “no-drop” or “evidenced-based” prosecutorial districts,²³⁰ of which Cumberland County is officially and Aroostook County is in practice, the admissibility of prior acts evidence could increase the success rates of prosecution dramatically. Tierney remarked that, “After *Davis*, getting excited utterances and other hearsay-type evidence admitted when the victim is not there to testify has gotten even harder. We are limited as to what we can do without more evidence, given the victim’s unavailability.”²³¹ Linthicum remarked that the end result of victim recantation is that the office will “opt for deferred dispositions or long continuances for the defendant to engage in counseling in hopes that he will not repeat the behavior. Sometimes the magic works, sometimes it doesn’t.”²³² In a prosecution district like Penobscot County, where there is not a “no-drop” domestic violence prosecution policy in place, prosecutors cannot bring charges against the defendant if the victim recants or there is no corroborating evidence to support the charge itself.²³³ According to one assistant district attorney, this can result in dropping a more serious charge—assault, threatening, reckless conduct—to disorderly conduct, a misdemeanor that rarely results in any jail time.²³⁴

In essence, prosecutors are being prevented from successfully and fully prosecuting domestic violence defendants because their evidence base may not be enough to prove the crime charged beyond a reasonable doubt. Rule 404(b), in

224. Survey of Linthicum, *supra* note 220.

225. *Id.*

226. Interview with Tierney, *supra* note 122.

227. *Id.*

228. *Id.*

229. *Id.*

230. “Evidence-based” prosecutions, or a “no-drop” policy, are those in which “the victim’s testimony [is] no longer the sole or primary source of evidence,” and the prosecutions “proceed[] regardless of the victim’s wishes.” SCHNEIDER, *supra* note 19, at 315.

231. *Id.*

232. Survey of Linthicum, *supra* note 220.

233. Survey of Penobscot County, *supra* note 222.

234. *Id.*

their opinions, has provided a systematic and often insurmountable barrier to presenting relevant, probative evidence of the battering relationship to the jury. According to Tierney, the A.D.A. knows about the defendant's history; the judge knows about the history; it affects what prosecutors charge and how judges sentence. But the jury can never hear of it.²³⁵ The arguably most important actors in the criminal justice process, the jury members, are deprived of having a more complete and accurate picture of the domestic violence course of conduct through the overly draconian utilization of Rule 404(b) to exclude evidence of prior acts.

In the domestic violence context, prosecutors must make the preliminary decision concerning the charge they seek against a particular offender. They must take into account several factors, the most important of which is usually the strength of the evidence against the defendant for the crime charged. If prosecutors were confident that the evidence of prior acts of domestic violence would be admissible to show the relationship between the defendant and his victim, they would be more confident in bringing charges, even without victim testimony: a classic barrier to successful domestic violence prosecutions. Maine's prosecutors have responded overwhelmingly that, given their knowledge of local judges' tendencies in ruling against the admission of prior acts evidence, they have decided not to attempt to introduce such evidence in the majority of situations. In domestic violence prosecutions, this can prove fatal to the prosecution itself. Furthermore, as the prosecutors have no ability to appeal the evidence admissibility decision of the individual judge if the case ends in a plea or acquittal, the improper judicial decision to *exclude* the evidence will never be reviewed. Ultimately, the Law Court's confusing jurisprudence on the admissibility of prior acts is wreaking havoc on the ground: Prosecutors are not attempting to introduce prior acts evidence, even with well-articulated (and non-exhaustive) exceptions under Rule 404(b). As a result, valuable evidence will never be presented to the jury, and, perhaps more importantly given the rise of plea bargaining in the criminal justice system, cannot be used as a bargaining chip during the course of plea negotiations in having defendants plead to more appropriate charges for their domestic violence-related conduct. More fundamentally, the particularized "frozen in time" discrete instances of domestic violence that are currently being prosecuted are devoid of context and lose much of their narrative power because they are presented divorced from the relationship from which they emerge. The new criminal law code amendments have done nothing to address this problem.

E. Has the Law Court Provided a Pathway to Admissibility?

Through its jurisprudence concerning Rule 404(b), the Law Court has proven itself conflicted over the issue of prior acts evidence admissibility, to say the least. In many instances, the court has upheld the conviction of criminal defendants against whom evidence of prior acts was admitted at trial. It has done so for different reasons: the articulated exception to Rule 404(b) was recognized as valid; the evidence itself was not so prejudicial as to substantially outweigh its probative value under Rule 403; admitting such evidence was not "clear error" by the trial

235. Interview with Tierney, *supra* note 122.

court; or the error stemming from the evidence's admission was "harmless." In many other instances, however, the Law Court has held that admission of prior acts evidence was too prejudicial to be admitted, or did not fit neatly into a clearly delineated exception to the general ban against prior acts evidence. Oftentimes, it appears that the court's decision-making as to the propriety of the trial court's decision to admit prior acts evidence has been determined by the severity and type of crime charged. In homicide prosecutions, the court has proven itself much more amenable to the admission of even inflammatory prejudicial prior acts evidence. Additionally, in sexual abuse prosecutions, trial judge discretion largely remains untouched by the Law Court in admitting a wide variety of prior acts evidence under the rubric of "relationship" or "intent."

This has led to a contradictory and confusing state of affairs, and has made prosecutors unsure about when and whether to attempt to introduce prior acts evidence at trial. The Law Court needs to provide clarity to prosecutors and, perhaps more importantly, to the Maine District and Superior Court judges and justices who confront these issues of admissibility daily. Within the realm of domestic violence prosecutions, clarity could mean the difference between a dropped charge and an adjudication or a finding of "not guilty" and a conviction. The stakes are remarkably high when it comes to domestic violence prior acts admissibility. The Law Court has a tremendous opportunity to amend the Maine Rules of Evidence to allow explicitly for the introduction of prior acts evidence in domestic violence prosecutions when those prior acts elucidate the relationship between the defendant and his victim as well as the context of battering from which the charges stem.

VI. AMENDING MAINE'S RULES OF EVIDENCE TO BRIDGE THE GAP BETWEEN CHARGING AND SENTENCING IN DOMESTIC VIOLENCE PROSECUTIONS

Though several state legislatures have adopted statutory changes to their rules of evidence to allow for prior acts of domestic violence to be admissible in criminal prosecutions, these statutory schemes focus on the "propensity" of batterers to commit acts of domestic violence.²³⁶ The proponents of such statutes argue largely by analogy—batterers are like sexual offenders. They act by compulsion, they cannot resist the urge to beat, and they are psychologically predisposed to harm their loved ones. Arguing for the propensity purpose poses several distinct and serious problems, namely in focusing on the pathology of the individual batterer rather than the offense itself, as well as the fact that bending the rule for propensity purposes flies in the face of the well-rooted foundations and rationales behind the general character evidence ban. People should not be punished for who they are, the saying goes, but rather for what they do.

The propensity rationale for prior acts admission in domestic violence prosecutions is not what this Comment advocates. Rather, Maine's Law Court could look to its New England counterpart in Vermont, who has articulated within

236. See, e.g., CAL. EVID. CODE § 1109 (West, Westlaw through 2008 Ch. 267, 2007-08 Third Ex. Sess., Prop. 99); AK R. EVID. 404(b)(4); MICH. COMP. LAWS ANN. § 768.27b (West, Westlaw through 2008 Act 268); MINN. STAT. ANN. § 634.20 (West, Westlaw through 2009 Ch. 1); COLO. REV. STAT. ANN. § 18-6-801.5 (West, Westlaw through 2008 Sess.).

the context of its decisions that admitting prior acts in domestic violence prosecutions is allowable. In its 1998 decision of *State v. Sanders*,²³⁷ the Vermont Supreme Court held in an appeal involving aggravated domestic assault that evidence of prior incidents of domestic abuse was relevant to portray the history surrounding the abusive relationship and thus was admissible.²³⁸ The facts themselves were quite typical of a domestic assault prosecution. The assault itself stemmed from a March 31, 1996, incident in which the victim was threatened with a knife by her live-in boyfriend, who said, “[S]omeone is going to die . . . who’s it gonna be?”²³⁹ The state prosecutors informed the defense that it would be introducing two prior assaults upon the victim at trial.²⁴⁰ Over the defendant’s motion *in limine* to exclude the acts, which included an incident when the defendant choked the victim and bloodied her nose, the trial court admitted evidence of both acts, even though the victim recanted on the stand her statements to the police.²⁴¹ The Vermont Supreme Court upheld the admissibility of this evidence.²⁴² The court reasoned:

[W]e need not decide whether the prior bad acts may be admissible solely to show fear or intent because the evidence was relevant also to portray the history surrounding the abusive relationship, providing the needed context for the behavior in issue. The purpose of establishing defendant’s history of abusing the victim is not to show his general character for such abuse, but to provide the jury with an understanding of defendant’s actions on the date in question.²⁴³

The court continued to explain that:

Allegations of a single act of domestic violence, taken out of its situational context, are likely to seem “incongruous and incredible” to a jury. . . . Without knowing the history of the relationship between the defendant and the victim, jurors may not believe the victim was actually abused, since domestic violence is “learned, . . . controlling behavior aimed at gaining another’s compliance” through multiple incidents.²⁴⁴

The court also determined that prior acts of abuse were relevant to “put the victim’s recantation of prior statements into context for the jury.”²⁴⁵ The court recognized that:

Victims of domestic abuse are likely to change their stories out of fear of retribution, or even out of misguided affection. . . . This prior history of abuse gives the jury an understanding of why the victim is less than candid in her testimony and allows them to decide more accurately which of the victim’s statements more reliably reflect reality.²⁴⁶

237. 716 A.2d 11 (Vt. 1998).

238. *Id.* at 13.

239. *Id.* at 12.

240. *Id.*

241. *Id.*

242. *Id.* at 13.

243. *Sanders*, 716 A.2d at 13.

244. *Id.*

245. *Id.*

246. *Id.*

Thus, without relying on propensity reasoning, the court held that prior acts of abuse were relevant and necessary for the prosecution to paint a more complete and accurate picture of the domestic violence on trial.²⁴⁷ The court focused on the cyclical nature of domestic violence when determining admissibility of the prior acts evidence rather than the propensity of the offender to commit violence.

Because Maine is facing a domestic violence crisis, the Law Court simply cannot wait for the appropriate case to make its common law declaration, as did the Vermont Supreme Court. Further, because prior acts evidence has largely been excluded in non-homicide and non-sexual offense prosecutions, the question of the admissibility of prior acts evidence in the context of the battering relationship may never reach the court. The Law Court must be proactive; it must amend the Maine Rules of Evidence.

However, rather than amend the text of Rule 404, the Law Court should amend its advisors' note, explaining when and how prior acts evidence could be relevant. The new text, in order to allow prosecutors to introduce prior acts evidence between the defendant and the victim in domestic violence prosecutions, would read:

Subdivision (b) deals with evidence of other crimes, wrongs, or acts. Such evidence is not admissible to prove character in order to show that a person acted in conformity therewith. The subdivision does not exclude the evidence when offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or in domestic violence-related crimes, to establish the context of the abusive relationship. This listing of possible exceptions to the general prohibition on prior acts evidence is not exhaustive.²⁴⁸

The amendment would recognize that domestic violence crimes are different, and that the state's rules of evidence should reflect the particular cyclical nature of domestic violence by allowing prior acts into evidence to give jurors the necessary context of the relationship between the accused and the victim. The legislative opportunity to criminalize domestic violence as a course of conduct crime has been lost. In order to re-inject the evidentiary vitality of the originally proposed bill, the Law Court should move to amend the articulated and recognized exceptions to Rule 404(b). It should do so quickly and it should do so loudly, as a unified voice against the domestic violence epidemic in Maine. In order to close the gap between charging and sentencing, jurors should and must understand the context of the battering relationship from which the particular charges emerge. This proposed amendment would help close that gap.

VII. CONCLUSION

Commissioner of Maine's Department of Public Safety Anne Jordan lamented in 2009 that looking at domestic violence in Maine can "be very discouraging,

247. *Id.* The Vermont Supreme Court reaffirmed its *Sanders* holding, and its underlying rationale, in *State v. Hendricks*, 787 A.2d 1270, 1276 (Vt. 2001).

248. ME. R. EVID. 404 advisory committee's note with the suggested changes underlined.

because the arrests keep coming and the deaths keep occurring.”²⁴⁹ There exists a disconnect in this state between the number of arrests and the increase in domestic violence deaths. Somewhere between arrest and final adjudication, batterers are not being held accountable for their actions. As such, they are not being subjected to the heightened sentencing penalties that would help prevent them from returning to their victims to continue their abuse, or, as is too often the case, to kill them.

This Comment seeks to convince the Law Court to take the lead on the initiative to close the gap between arrests and deadly violence. Understanding that domestic violence is a course of conduct crime is essential to its successful criminalization in society. The crime of domestic violence does not comport well with traditional evidence bans on prior acts, as domestic violence cannot be reduced to a single isolated incident, divorced completely from its context. Recognizing this, the efforts of dozens of lawyers, activists, and legislators were combined to present a comprehensive bill to criminalize domestic violence. That bill, however, was carved up into incident-specific crimes, eviscerating the intent behind the bill and its intended potential effect and power. In an ironic and tragic twist, the same year that Maine adopted these new “domestic violence” laws, it saw an enormous increase in the number of domestic-violence-related deaths.²⁵⁰ The disconnect between the reality of battering and the law that seeks to address the problem has turned deadly.

Maine’s jurisprudence surrounding prior acts admissibility in criminal prosecutions is spotty and inadequately deals with domestic violence. As it currently stands, judicial discretion in much of the state trends toward excluding evidence of prior acts in domestic violence cases as either banned by Rule 404(b) or as overly prejudicial against the criminal defendant. As stated by Professor Andrew King-Ries, “No other evidence rule goes to the heart of a crime the way that the character evidence ban does with domestic violence. The character evidence ban prevents the true nature of domestic violence from exposure to public scrutiny and, therefore, sanctions and perpetuates domestic violence.”²⁵¹ The issue at hand is not the character of the defendant, but rather, the nature of domestic violence itself. By essentially limiting prior acts evidence in domestic violence homicide prosecutions or sexual abuse cases, the Law Court has, in essence, failed to recognize the patterned course of conduct that marks domestic violence as different from other crimes.

As a state, and as a society, we can no longer afford tacitly to accept domestic violence through our unresponsive criminal law. If the original L.D. 1627 had passed as it was envisioned, amending the state’s rules of evidence would be unnecessary. However, as the code amendments do not and cannot reflect the needs and realities of domestic violence victims in the criminal justice system, something must be done. The Law Court must respond. Domestic violence must be criminalized and prosecuted successfully in Maine if we are to ever stem the tide

249. David Hench, *Domestic Violence: Progress, Problems; An Analysis Outlines the Areas Needing Attention, Such as Services for Children Who See Abuse*, PORTLAND PRESS HERALD, Feb. 25, 2009, at B1.

250. *Id.*

251. 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, 315 (2004).

of unrelenting abuse against our women, our children, and our families. Amending our rules of evidence could be an important step in that process.