

PROSECUTORIAL USE OF OTHER ACTS OF DOMESTIC  
VIOLENCE FOR PROPENSITY PURPOSES: A BRIEF LOOK  
AT ITS PAST, PRESENT, AND FUTURE

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*Prosecution of domestic violence offenders is one of the most important tools of deterrence against the domestic violence epidemic in the United States. Domestic violence prosecutions, however, are notoriously difficult because of several unique circumstances, including lack of witnesses to the offense and reluctance of victims to testify against their abusers.*

*Several commentators have suggested an evidence rule for domestic violence cases that takes these unique circumstances into account. This evidence rule would allow prosecutors to admit other acts of domestic violence as evidence that the defendant has a propensity to commit domestic violence. There is little doubt that such a rule would greatly aid prosecutors, but it is controversial because it violates the traditional evidentiary prohibition against propensity evidence. This prohibition, however, is not absolute. The Federal Rules of Evidence allow propensity evidence to be admitted in prosecutions for sexual assault and child molestation. Propensity evidence should be admissible in domestic violence cases, the author argues, for reasons similar to those for admitting propensity evidence in sexual assault cases.*

*Only two states—California and Alaska—have adopted statutes allowing propensity evidence in domestic violence cases. The author analyzes the impact of these statutes, concluding that the statutes provide a valuable tool in domestic violence prosecutions. She also analyzes the positions of several other states on the propensity evidence issue, concluding that statutes allowing for propensity evidence are necessary for states to effectively hold batterers accountable for their actions.*

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## I. INTRODUCTION

Domestic violence is a criminal justice and public policy epidemic of enormous proportions. There has only recently been reliable data on the prevalence of domestic violence in the United States. One out of every five U.S. women has been physically assaulted by an intimate partner.<sup>1</sup> One survey analyzing data gathered from 1993 through 1998 found that women<sup>2</sup> experienced about 900,000 violent offenses at the hands of an intimate<sup>3</sup> in 1998, down from a staggering 1.1 million in 1993.<sup>4</sup> During this same time period, only about half the domestic violence against women was reported to the police.<sup>5</sup> Even when domestic violence cases enter the criminal justice system, prosecution of domestic violence is difficult because, among other reasons, there is typically a lack of documented physical evidence or witnesses;<sup>6</sup> the victim is often noncooperative;<sup>7</sup> and there is jury bias against victims of domestic violence.<sup>8</sup> As a result, many prosecutors' offices have changed their strategy, so that a domestic violence case is not centered on the victim's testimony but rather consists of other evidence.<sup>9</sup> One form of this "other evidence" can be the defendant's other domestic violence acts, which, if admitted, often

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1. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 7 (2000). This number was extrapolated from survey results from the National Violence Against Women (NVAW) Survey, which consisted of telephone interviews with 8,000 women and 8,005 men age eighteen and older; 22.1% of surveyed women and 7.4% of surveyed men said that they were physically assaulted by an intimate partner at some time in their lifetime. Thus, one out of every five U.S. women has been physically assaulted by an intimate partner, compared with one out of every fourteen U.S. men.

2. This Note will refer to women when referring to domestic violence victims because women comprise the greatest number of reported domestic violence victims. In fact, according to the NCVS survey cited below, in 1998 women were victims of intimate partner violence at a rate about five times that of males, or 767 versus 146 per 1,000,000 persons, respectively. CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, INTIMATE PARTNER VIOLENCE 2 (2000) [hereinafter DOJ SPECIAL REPORT]; see also United States Department of Justice, Bureau of Justice Statistics, *Crime Characteristics*, at [http://www.ojp.usdoj.gov/bjs/cvict\\_c.htm](http://www.ojp.usdoj.gov/bjs/cvict_c.htm) ("Intimate violence is primarily a crime against women—in 1998, females were the victims in 72% of intimate murders and the victims of about 85% of nonlethal intimate violence.").

3. Intimate refers to partner relationships involving current spouses, former spouses, current boy/girlfriends, or former boy/girlfriends. DOJ SPECIAL REPORT, *supra* note 2, at 8.

4. *Id.* at 1. The findings came from National Crime Victimization Survey (NCVS) with data collected by the Bureau of Justice Statistics. Between 1993 and 1998 approximately 293,400 households and 574,000 individuals age twelve or older were interviewed.

5. *Id.*

6. See *infra* note 96 and accompanying text.

7. See *infra* note 88 and accompanying text.

8. See *infra* note 91 and accompanying text.

9. See *infra* notes 87–99 and accompanying text. See generally Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 102–09 (1997); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1898–1906 (1996); Tonya McCormick, *Convicting Domestic Violence Abusers When the Victim Remains Silent*, 13 BYU J. PUB. L. 427, 436–45 (1999).

have a dispositive effect on the outcome of the case.<sup>10</sup> For instance, evidence of the defendant's other acts of domestic violence could serve to corroborate the victim's testimony, the physical evidence, or another witness's testimony.<sup>11</sup>

Currently, an overwhelming majority of states' evidence rules admit the defendant's other acts of domestic violence into evidence only for limited purposes other than to show propensity (such as intent, motive, identity, and plan), and only if it satisfies the state's balancing test between the evidence's probative value and its prejudicial effect.<sup>12</sup> Despite these open evidentiary doors, it is difficult for other acts of domestic violence to be admitted under these noncharacter theories, especially in cases involving the testimony of the defendant's prior victims.<sup>13</sup> In response, a minority of states have expanded their theories of admissibility to specifically allow for other acts of domestic violence to be admitted under either an explicit propensity theory or an expansive nonpropensity theory to show the background or context of the relationship, for example.<sup>14</sup> Therefore, prosecutors in these states have an evidentiary tool in these new rules that could prove invaluable in their obstacle-laden task of convicting batterers. However, similar to the federal evidence rules admitting testimony of sexual assault victims for propensity purposes, these new evidence rules admitting other acts propensity evidence in domestic violence cases broke through the historical ban on character evidence and are therefore controversial.<sup>15</sup> This note will explore the implementation and ramifications of these new evidentiary rules for domestic violence by reporting prosecutors' experiences with the rules and framing the debate in light of the past efforts to admit propensity evidence in sexual assault cases, as well as the historical difficulties in prosecuting domestic violence.

Part II of this note includes a brief history of the character evidence ban, codified in Federal Rule of Evidence (FRE) 404, and a discussion of FRE 413 and FRE 414, which allow for admission into evidence in a criminal case a defendant's other sexual assaults or child molestation. Part II also offers a brief overview of the critiques of FRE 413 and FRE 414 and discusses how their passage set the stage for the states to adopt similar provisions for sexual assault and child molestation cases, and eventually for domestic violence cases. Part III briefly discusses the typical evidentiary tools used in a domestic violence prosecution and reviews their availability and adequacy. Part III also assesses the need for an

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10. See *infra* notes 100–04, 183–85 and accompanying text. Also, the term “other” when referring to other acts of domestic violence, refers to charged or uncharged, prior or subsequent acts of domestic violence.

11. See *infra* notes 89–90, 139–41 and accompanying text.

12. See *infra* notes 100–41 and accompanying text.

13. See *infra* notes 116–33 and accompanying text.

14. See *infra* notes 134–272 and accompanying text.

15. See *infra* notes 70–82 and accompanying text.

evidence rule admitting other acts of domestic violence for propensity purposes. Survey comments from prosecutors in states that admit other acts of domestic violence for propensity purposes assist in this evaluation. Part IV recommends supporting similar rules in all states to provide a much needed tool to hold recidivist batterers accountable for their domestic violence, while simultaneously safeguarding defendant's rights. Part V concludes that states that currently disallow other acts evidence of domestic violence for propensity purposes have much to learn from states that have these rules, and these lagging states would better hold domestic violence offenders accountable by supporting similar evidence rules.

## II. BACKGROUND

Evidence of other acts of domestic violence is a subset of character evidence,<sup>16</sup> the admissibility of which is governed by Article IV of the FRE in federal cases and state evidence rules, statutes, or common law in the states. A majority of states have adopted evidence codes based on the FRE.<sup>17</sup> The ban on other acts for propensity purposes in criminal trials has a long history.<sup>18</sup> Indeed, FRE 404's Advisory Committee Notes state that this rule—which codified the historical ban<sup>19</sup>—“is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.”<sup>20</sup> Thus, many legal scholars have stated that a trial judge's ruling on other acts or character evidence is practically “decisive of the whole case.”<sup>21</sup>

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16. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.02 (Joseph M. McLaughlin ed., 2d ed. 2002) (defining *character* as a “generalized description of a person's disposition or a general trait, such as honesty . . . or peacefulness”) [hereinafter WEINSTEIN].

17. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 3 n.2 (4th ed. 2000). By 2000, these forty-one states had adopted codes based on the federal model: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

18. *Hurtado v. California*, 110 U.S. 516, 528 (1884) (stating that the ban against propensity evidence has been preserved by the courts for so long that it “must be taken to be due process of law”); see also Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 4 BYU L. REV. 1547, 1558 (1998). See generally Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes, 1840–1975*, 51 U. CIN. L. REV. 299 (1982).

19. MCCORMICK ON EVIDENCE § 186 (John W. Strong ed., 5th ed. 1999) [hereinafter MCCORMICK].

20. FED. R. EVID. 404(a) advisory committee's note; see also MCCORMICK, *supra* note 19, § 157. But see Melilli, *supra* note 18, at 1611, 1614 (“[T]he United States Supreme Court has never suggested that the admission of prior crimes evidence to establish the defendant's general propensity to engage in criminal conduct of the type charged would violate due process. In fact, the Court has held that the admission of prior crimes evidence under a state counterpart to Rule 404(b) does not offend due process . . . . The basic fact that the character evidence rule, at least in theory, has been around a long time does not alone establish it as a fundamental right of constitutional proportion.”).

21. Edward J. Imwinkelried, “*Where There's Smoke, There's Fire*”: *Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under*

Indeed, the importance of this type of evidence is difficult to overstate: the admissibility of other acts evidence is the “most commonly litigated evidentiary issue” in criminal appeals<sup>22</sup> and the unlawful “admission of such evidence is the most common ground for reversal.”<sup>23</sup>

Determining the admissibility of other acts evidence requires several levels of analysis. In the hearing for a prosecutor’s motion to admit other acts evidence, the judge will first ensure that the evidence is relevant under FRE 401,<sup>24</sup> and therefore generally admissible under FRE 402.<sup>25</sup> Even slight relevance is enough to satisfy FRE 401; the evidence must have any tendency to prove or disprove a matter at issue.<sup>26</sup> Character evidence has some relevancy because it shows a propensity to behave in a certain way.<sup>27</sup> For example, a violent person is more likely to attack someone than would a peaceful person.<sup>28</sup> Assuming relevancy, the judge will next decide whether there are reasons to exclude the relevant other acts evidence. FRE 403<sup>29</sup> offers two grounds under which other acts evidence is often excluded: it may be unfairly prejudicial, confusing, or misleading, and actually hinder, rather than help, the jury in reaching a rational decision; or the evidence may cause undue delay, waste time, or be needlessly cumulative.<sup>30</sup> FRE 403 favors admissibility because it provides that relevant evidence is inadmissible only if its probative value is “substantially outweighed” by the aforementioned two dangers.<sup>31</sup> Evidence of the defendant’s general character almost always has some probative value but, in some situations, the probative value is slight while the potential for prejudice is great.<sup>32</sup> Finally, the judge will ensure that the

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*Federal Rule of Evidence 404?*, 42 ST. LOUIS U. L.J. 813, 814 (1998) (“[U]ncharged misconduct evidence is so damning that it ‘will usually sink the defense without [a] trace.’”).

22. See Miguel A. Méndez & Edward J. Imwinkelried, *People v. Ewoldt: The California Supreme Court’s About-Face on the Plan Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 474 (1995).

23. See Imwinkelried, *supra* note 21, at 814.

24. FED. R. EVID. 401. *Definition of “Relevant Evidence.”* “Relevant evidence” means 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. *Id.*

25. FED. R. EVID. 402. *Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.* All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. *Id.*

26. THOMAS A. MAUET & WARREN D. WOLFSON, *TRIAL EVIDENCE* 80 (1997).

27. *Id.* at 93; Melilli, *supra* note 18, at 1594 (“[T]he most recent psychological literature supports the proposition that character evidence is indeed relevant. It suggests that character traits do have predictive value, even in cross-situational circumstances.”).

28. See MAUET & WOLFSON, *supra* note 26, at 93, 102.

29. FED. R. EVID. 403. *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.* 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. *Id.*

30. MAUET & WOLFSON, *supra* note 26, at 83–84. Virtually all of these dangers were used to argue against the ratification of FRE 413–415. See *infra* notes 72–82 and accompanying text.

31. MAUET & WOLFSON, *supra* note 26, at 84. This is the probative value versus prejudice balancing test in many, but not all, states.

32. MCCORMICK, *supra* note 19, § 186.

other acts evidence is admissible under FRE 404, which specifically governs the admissibility of character evidence.<sup>33</sup>

In a court proceeding, the topic of a person's character can arise in one of two ways: the character evidence is either direct, where the person's character is a main issue of the case,<sup>34</sup> such as in a defamation case;<sup>35</sup> or the character evidence is circumstantial or only suggestive of a particular inference.<sup>36</sup> FRE 404(a) only applies to instances where the evidence is circumstantial.<sup>37</sup> Thus, except for cases in which "character or a trait of character of a person is an essential element of a charge, claim, or defense,"<sup>38</sup> FRE 404(a) provides a "virtually absolute bar" against character evidence:<sup>39</sup> "evidence of other crimes . . . is not admissible to prove the character of a person in order to show action in conformity therewith."<sup>40</sup> FRE 404(b) allows admission of other act evidence for any relevant reason other than to prove the defendant's propensity to commit the charged crime.<sup>41</sup> The function of the character evidence ban

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33. FED. R. EVID. 404. *Character Evidence Not Admissible to Prove Conduct; Exceptions, Other Crimes.* Rule 404(a). *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; (2) *Character of alleged victim.* Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; (3) *Character of witness.* Evidence of the character of a witness, as provided by rules 607, 608, and 609. *Id.*

Rule 404(b). *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. *Id.*

34. MCCORMICK, *supra* note 19, § 186; WEINSTEIN, *supra* note 16, § 404.10[2].

35. MCCORMICK, *supra* note 19, § 187; WEINSTEIN, *supra* note 16, § 404.10[2] n.14.1.

36. MCCORMICK, *supra* note 19, § 186; Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 965 (1999).

37. WEINSTEIN, *supra* note 16, § 404.10 (i.e., where the character evidence is not being offered because the character trait itself is significant as an element of a crime, claim, or defense); Ellis, *supra* note 36, at 965.

38. FED. R. EVID. 405(b). Rule 405. *Methods of Proving Character.* (b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct. *Id.*

39. MAUET & WOLFSON, *supra* note 26, at 102; Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37, 46 (1994) (citing *United States v. Arias-Montoya*, 967 F.2d 708, 709 (1st Cir. 1992)).

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

41. MAUET & WOLFSON, *supra* note 26, at 103; see *infra* note 43 for a list of permissible nonpropensity reasons to admit other act evidence.

is to prevent “an inference of bad character from bad acts, and then an inference of guilt of the charged offense from the bad character.”<sup>42</sup>

FRE 404(b) provides for an expansive list of permissible uses of other acts evidence. The wording in FRE 404(b) “*such as*”<sup>43</sup> indicates that the court may admit evidence of other acts for a purpose not enumerated, if that purpose does not involve character reasoning or infer propensity.<sup>44</sup> The key inquiry is the purpose for which the evidence is offered: evidence of a character trait may be relevant to proving a material fact that is distinct from whether the person acted in conformity with that trait and may be admissible.<sup>45</sup> As indicated above, FRE 404(b) enumerates permissible theories upon which to admit the defendant’s other acts, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>46</sup> These enumerated theories do not compose a mutually exclusive nor exhaustive list.<sup>47</sup> Thus, if the proposed purpose for the other act evidence “has relevance without necessarily requiring a conclusion about general propensity, it is not character evidence and is not barred by the character evidence rule.”<sup>48</sup> This note analyzes the necessity for other acts evidence admitted in a prosecutor’s case-in-chief for propensity purposes or to prove that the defendant acted in conformity with his character,<sup>49</sup> as well as analyzes the adequacy of the various other permissible nonpropensity theories in the context of domestic violence cases.<sup>50</sup>

Evidence law in sexual assault cases provided the arena in which the evidence law landscape shifted to create a new exception to the ban on other evidence to show a defendant’s propensity to commit the charged

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42. David P. Bryden & Roger C. Park, “*Other Crimes*” *Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 540 (1994); see *infra* notes 72–82 and accompanying text for a discussion of policy reasons supporting the ban on character evidence for propensity purposes.

43. FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .”).

44. MCCORMICK, *supra* note 19, § 188; WEINSTEIN *supra* note 16, § 404.11[1] n.9; Bryden & Park, *supra* note 42, at 556.

45. MCCORMICK, *supra* note 19, § 188, at 653 (stating, by way of example, that “where extortion is charged, the defendant’s reputation for violence may be relevant to the victim’s state of mind”).

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

47. MCCORMICK, *supra* note 19, § 190, at 660 (listing other permissible purposes, including: “*res gestae*” or “to complete the story of the crime on trial by placing it in context of nearby and nearly contemporaneous happenings.” This rationale is used “only when reference to the other crimes is essential to a coherent and intelligible description of the offense.”).

48. Melilli, *supra* note 18, at 1549.

49. The admission of other acts for propensity purposes is disallowed by state evidence rules in all states except California and Alaska, and is prohibited by FRE 404(a)(1). See text accompanying notes 142–230.

50. WEINSTEIN *supra* note 16, § 404.11 (discussing direct character evidence when character is an element of the case, when circumstantial character evidence is offered to impeach the credibility of a witness, when offered by the defendant to show good character, when offered by the prosecution to rebut the defendant’s evidence of character, or when the defendant offers evidence that a homicide or assault victim was the first aggressor).

crime. The ban on character evidence began to erode when judges ruling on the admissibility of evidence in sexual assault cases stretched the permissible theories of other acts admission to the point where many academics argued that the theories were euphemisms for character evidence.<sup>51</sup> To codify what had already been happening in sexual assault cases in common law, FRE 413 (sexual assault)<sup>52</sup> and FRE 414 (child molestation)<sup>53</sup> were passed by Congress in 1994.<sup>54</sup> Unlike the other permissible purposes for other acts evidence, these sexual assault exceptions clearly contradicted the character evidence prohibition.<sup>55</sup> In criminal prosecutions for sexual assault or child molestation, FRE 413 and FRE 414 supercede FRE 404's general criteria<sup>56</sup> to allow the other victims of sexual assault or child molestation to testify in cases where the instant victim has been sexually assaulted or molested by the defendant.<sup>57</sup> Until FRE 413 and FRE 414 were enacted, other acts had never been admitted under the FRE on an explicit theory of propensity.<sup>58</sup> The rationale behind these revolutionary rules is that character evidence of the defen-

51. Imwinkelried, *supra* note 21, at 815; Méndez & Imwinkelried, *supra* note 22, at 487; Myrna S. Raeder, *Perspectives on Proposed Federal Rules of Evidence 413–415*, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 *FORDHAM URB. L.J.* 343, 351 (1995); see also Bryden & Park, *supra* note 42, at 557–60 (discussing the “lustful disposition” common law exception to the ban on character evidence in sexual assault cases, before the passage of Federal Rules of Evidence 413); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 *CHI.-KENT L. REV.* 15, 23 (1994) [hereinafter Karp, *Evidence of Propensity*].

52. FED. R. EVID. 413. Rule 413: *Evidence of similar crimes in sexual assault cases.*

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

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) for purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State . . . that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any other part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

*Id.*

53. FED. R. EVID. 414. This rule governs evidence of similar crimes in child molestation cases and its text is comparable to FRE 413. Discussion of FRE 414, however, is beyond the scope of this Note.

54. MCCORMICK, *supra* note 19, § 190, at 669; see also FED. R. EVID. 413.

55. MCCORMICK, *supra* note 19, § 190, at 669; see Melilli, *supra* note 18, at 1583–84 (stating that the new rules may constitute a first step in a plan to eradicate the character evidence rule in criminal prosecutions).

56. WEINSTEIN, *supra* note 16, § 404.02.

57. See FED. R. EVID. 413.

58. Karp, *Evidence of Propensity*, *supra* note 51, at 15. FRE 413 and FRE 414 are still subject to FRE 403's balancing test.

dant's disposition to commit acts of child molestation or sexual assault is admissible and considered "probative" and will enhance the likelihood of an accurate verdict, unless deemed too prejudicial on other grounds.<sup>59</sup>

Supporters of FRE 413<sup>60</sup> argued that sexual assault cases are often difficult to prove because of the unique circumstances of these cases.<sup>61</sup> For instance, according to FRE 413 proponents, sexual assault cases may be more difficult to prosecute because they typically involve swearing matches between the victims and defendants.<sup>62</sup> Thus, other acts evidence allowed under FRE 413 of the defendant's other sexual assaults may bolster the instant victim's credibility<sup>63</sup> and lessen the chance of an acquittal.<sup>64</sup> Supporters hoped the availability and use of FRE 413 would encourage sexual assault victims to proceed with charges against the defendant.<sup>65</sup> Also, the proponents urged that FRE 404's permissible uses to admit other acts on noncharacter theories were inflexible in sexual assault cases, and as a result, many judges' rulings manipulated the rule's permissible uses in a way inconsistent with their intended use.<sup>66</sup> Further, FRE 413 supporters argued that a person who commits one act of sexual assault is likely to be the kind of person who would do it again, and thus FRE 413 is based upon reliable indicators and leads to fair outcomes.<sup>67</sup> Thus, its supporters argued, FRE 413 supports the premise of the FRE, which is "to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."<sup>68</sup> Finally, sup-

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59. David J. Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49, 51 (1994) [hereinafter Karp, *Response to Imwinkelried*].

60. This Note will discuss only FRE 413 because this rule for sexual assault evidence is more closely analogous to admitting other acts of domestic violence for propensity purposes.

61. See Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 123-24 (1992). But see Melilli, *supra* note 18, at 1587 ("[T]he claim that sex offenses are singularly difficult to prove is unsubstantiated. Many other crimes (such as homicides, burglaries of unoccupied premises, thefts of unguarded property and so called victimless crimes) do not offer the government even the testimony of the victim, and sex offense prosecutions are frequently aided by medical and scientific evidence.").

62. Karp, *Evidence of Propensity*, *supra* note 51, at 20-21; Scheppelle, *supra* note 61, at 123-24.

63. Scheppelle, *supra* note 61, at 126-27 (discussing how sexually assaulted women may exhibit many of the characteristics commonly associated with liars—they delay in reporting, change their stories, and hesitate, waver, and procrastinate because of self-blame).

64. Bryden & Park, *supra* note 42, at 561; Imwinkelried, *supra* note 21, at 814.

65. Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 302 (1995); Karp, *Evidence of Propensity*, *supra* note 51, at 25; Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 688 n.106 (1998).

66. Orenstein, *supra* note 65, at 690 n.11 (citing 137 CONG. REC. S4925, S4927 (daily ed. Apr. 24, 1991) (statement of Sen. Dole, one of the sponsors of the bill to pass FRE 413)).

67. Bryden & Park, *supra* note 42, at 562 n.149 (listing scholarly works supporting trait theory). Trait theory suggests that human behavior is not situationally specific and that character traits do produce cross-situational stability into adulthood. *Id.*; see also Karp, *Evidence of Propensity*, *supra* note 51, at 20; Karp, *Response to Imwinkelried*, *supra* note 59, at 561, nn.147-49.

68. FED. R. EVID. 102.

porters assured that FRE 413 and FRE 414 contained adequate safeguards for the defendant's procedural rights.<sup>69</sup>

While FRE 413 and FRE 414 were fast-tracked through Congress,<sup>70</sup> they were denounced by many judges and the American Bar Association, and they were hotly debated in academia.<sup>71</sup> The opponents to these new rules argued that defendants should be held accountable "for what they do and not for what they are"<sup>72</sup> and that the new rules blatantly disregarded this sacred truism of evidence law. Further, the critics argued that a person's future actions could not be predicted from his past actions,<sup>73</sup> particularly for crimes of sexual assault.<sup>74</sup> In fact, the critics argued, some studies concluded that past behavior is actually a poor basis for predicting future behavior.<sup>75</sup> Further, the opponents urged that the use of character evidence could reinforce unfair police techniques.<sup>76</sup>

Many critics of other acts evidence focused on the potential damaging effect of the admission of such evidence on the jury. For instance, the dangers of jury distraction or confusion may offset whatever probative value the other acts evidence possesses.<sup>77</sup> Further, critics argued that ju-

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69. Karp, *Evidence of Propensity*, *supra* note 51, at 21–24 (discussing such procedural safeguards as pretrial disclosure; FRE 403's balancing test still must be applied; FRE 413 is not mandatory and still requires that the uncharged act be similar to the charged offense; assistance of counsel; right to cross-examination of witnesses and to present rebuttal evidence).

70. See Ellis, *supra* note 36, at 969–78 (critiquing the legislative process enacting FRE 413). *But see* 140 CONG. REC. H5437-03, \*H5438 (daily ed. June 29, 1994) (statement of Sen. Molinari responding to Sen. Hughes's criticism of passage of the new FRE 413–415 without hearings. Sen. Molinari responds that, "[W]e did not have hearings on this measure in this body, that is accurate. That is not by fault of this gentlewoman. I went before the Committee on Rules for the last three years to try to get a hearing in the people's body and was denied that opportunity.").

71. Raeder, *supra* note 51, at 345 ("The Summary of Comments on New Evidence Rules 413–415 prepared by the Rules Committee Support Office of the Administrative Office of the United States Courts, indicates that 100 individuals and organizations opposed the rules, 10 supported them and 18 recommended modifications or were neutral. Opponents included 11 lawyers, 56 evidence professors, 19 judges, and 12 organizations, among others.").

72. Méndez & Imwinkelried, *supra* note 22, at 475–76.

73. MCCORMICK, *supra* note 19, § 190 (discussing how people are not "predictable characters").

74. Bryden & Park, *supra* note 42, at 572–74.

75. Bryden & Park, *supra* note 42, at 561–62; Méndez & Imwinkelried, *supra* note 22, at 496. *But cf.*, Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 273 (1995) (discussing how in consent-defense cases of sexual assault, there is no danger of police "round[ing] up the usual suspects").

76. Bryden & Park, *supra* note 42, at 575 (discussing how in stranger rape cases, the police may show victims photographs of persons suspected of committing prior rapes, or otherwise focus their investigation on suspected sex offenders, increasing the defendant's chance of being accused, even if innocent); *id.* at 575–76 (discussing how police often "strongly suggest to the victim that certain people in the 'mug shot' book are the most likely perpetrators"); Raeder, *supra* note 51, at 349–50 (discussing scientific evidence demonstrating a high percentage of mistaken identifications in cases where assailant's identity is an issue, and theorizing that many of these cases originated because of the accused's inclusion in the mug book of sexual offenders).

77. Imwinkelried, *supra* note 65, at 303 ("Although the abolition of the character evidence prohibition does not directly criminalize an accused's status, the routine admission of bad character evidence heightens the risk that the jury will convict on account [of] the accused's status as a recidivist rather than the strength of the evidence of the charged crime.").

ries might overvalue the persuasiveness of character evidence.<sup>78</sup> That is, in evaluating the character evidence, the juror would use the character evidence in his decision of what type of person the defendant is, and then decide whether in the charged occasion the defendant acted “in character.”<sup>79</sup> This step in the jurors’ mental processes creates a risk for overvaluation, the opponents argued.<sup>80</sup> Also, a jury may desire to punish the accused for previous conduct regardless of whether the burden of “beyond a reasonable doubt” is satisfied for the charged crime.<sup>81</sup> Finally, the opponents to FRE 413 and FRE 414 urged that jurors might be less cautious in deliberating over a criminal case of a defendant who had committed similar other acts because the jurors may anticipate less regret over wrongfully finding the defendant guilty.<sup>82</sup>

Despite such criticism, FRE 413 and FRE 414 have withstood constitutional challenges.<sup>83</sup> Their passage set the stage for states to adopt similar evidence rule provisions for sexual assault and child molestation cases.<sup>84</sup> A few states have further extended this doctrinal creep of FRE 413 by adopting provisions allowing for admission under a propensity theory of other acts of domestic violence in domestic violence cases.<sup>85</sup> These states have evidence rules or statutes that allow for other acts of

78. 1A JOHN HENRY WIGMORE, EVIDENCE § 58.2, at 1212–13 (Peter Tillers ed., 1983) (“The natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime.”); Méndez & Imwinkelried, *supra* note 22, at 496.

79. Imwinkelried, *supra* note 65, at 290–92.

80. *Id.* But see Melilli, *supra* note 18, at 1599–1600 (“[T]here simply is no empirical support for the overvaluation hypothesis . . . . For the hypothesis to be true, we would need to be able to determine two things. First, we would need to be able to determine how jurors actually assess character evidence. Second, we would need to be able to determine the correct valuation of character evidence as a benchmark for measuring the appropriateness of the assessment of such evidence by jurors. Unremarkably, we simply lack the ability to make either one of these necessary determinations.”).

81. Imwinkelried, *supra* note 65, at 290–92; see also *Dowling v. United States*, 493 U.S. 342, 361–62 (1990) (Brennan, J., dissenting) (“One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic evidence. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged.”). But see Karp, *Evidence of Propensity*, *supra* note 51, at 27–31.

82. Bryden & Park, *supra* note 42, at 565; Orenstein, *supra* note 65, at 671. *Contra* Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 *FORDHAM URB. L.J.* 355, 359 (1995) (stating that the jury can be trusted to decide whether they believe the accused committed the uncharged acts and, “[i]n fact, if the jury comes to the conclusion that the prosecution has attempted to convict the accused of acts he did not commit (because evidence is weak), then the jury might be inclined to hold that against the prosecution, not the accused”); but cf. Park, *supra* note 75, at 275 (discussing how there is reliable evidence that jurors are actually prejudiced against the prosecution in sexual assault cases where the defense is over consent).

83. *United States v. Enjady*, 134 F.3d 1427, 1433–35 (10th Cir. 1998), *cert. denied*, 525 U.S. 887 (1998) (upholding FRE 413 on due process and equal protection challenges).

84. Sherry F. Colb, “Whodunit” Versus “What was Done”: When to Admit Character Evidence in Criminal Cases, 79 *N.C. L. REV.* 939, 941 n.9 (2001) (listing states that have adopted legislation based on FRE 413–415: California, CAL. EVID. CODE § 1108 (West Supp. 2001); Indiana, IND. CODE ANN. § 35-37-4-15 (Michie 1998); Missouri, MO. REV. STAT. § 566.025 (1999), amended by S.B. 757 (Mo. 2000)); Raeder, *supra* note 51, at 352; see also ALASKA R. EVID. 404(b)(3) (2002).

85. See *infra* Parts III.C.1, III.C.2 (discussing California and Alaska, the only two states which have an evidence rule explicitly providing for the admissibility of other acts of domestic violence for propensity purposes in the prosecution of cases of domestic violence).

domestic violence to be admitted for the purpose of showing the defendant's character in a case where the defendant is charged with a domestic violence crime. These states' evidence rules have also withstood constitutional challenges.<sup>86</sup> The next section evaluates the implementation of these rules in domestic violence cases.

### III. ANALYSIS

#### A. *Prosecution of Domestic Violence Cases*

Domestic violence cases contain unique factors that frequently hinder successful prosecutions. Often, the victim does not want the case to proceed, or the victim may refuse to testify for the prosecution, or may even testify on behalf of the defendant.<sup>87</sup> The victim's reluctance may be due to a number of factors such as intimidation by the defendant, including threats of retaliation, susceptibility to the batterer's promises to cease abuse, cultural or family pressures, or uncertainty whether she will be believed or that her batterer will be held accountable.<sup>88</sup> Domestic violence often occurs behind closed doors or away from witnesses who could testify on the prosecution's behalf.<sup>89</sup> Victims of domestic violence may suffer from Battered Women's Syndrome or from Post Traumatic Stress Disorder as a result of the frequent abuse, which often causes victims to be unable to remember violent events.<sup>90</sup> Finally, juror and judicial bias against domestic violence victims often hinders prosecution.<sup>91</sup>

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86. See *infra* notes 156–70, 214–26.

87. Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 953–55 (2000); see Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, COLO. LAW, Oct. 28, 1999, at 19–20 (listing reasons battered women stay with their abusers, including his threats to kill her and the children if she leaves and stating that the threat is real: "It is estimated that a battered woman is 75 percent more likely to be murdered when she tries to flee or has fled, than when she stays."); see also Hanna, *supra* note 9, at 1860 ("Victim noncooperation, reluctance, or outright refusal to proceed are often cited as the major reasons for . . . lack of criminal prosecution.").

88. Buel, *supra* note 87, at 21 (discussing how finances is just one of many obstacles to a domestic violence victim separating from her batterer: "A comprehensive Texas study found that 85 percent of the victims calling hotlines, emergency rooms, and shelters had left their abusers a minimum of five times previously, with the number one reason cited for returning to the batterer being financial despair."); Hanna, *supra* note 9, at 1884–85 (providing reasons why a victim would resist criminal sanctions against her abuser); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 160 (1996) (discussing how domestic violence victims may feel that their complaints are hopeless or may be traumatized or intimidated into silence); Vilhauer, *supra* note 87, at 959 (discussing how batterers control their victims through fear and intimidation: "Statistically, a woman is at the greatest risk of severe injury or death at the hands of the abuser within the first year after she decides to leave the relationship.").

89. 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, 999 (2000) ("Like victims of sexual assault and child molestation, domestic violence victims are normally the only witnesses to the crime, thereby making the victim's credibility central to a prosecutor's case.").

90. Vilhauer, *supra* note 87, at 955–57 (discussing symptoms of Post Traumatic Stress Disorder, including poor memory recall of traumatic events). Women who suffer from Battered Women's Syndrome (BWS), which is similar to Post Traumatic Stress Disorder, "are likely to be more reluctant to

A domestic violence prosecutor's case typically relies on the victim's testimony when available,<sup>92</sup> police officer testimony, recording of any 911 calls, documentation of the victim's injuries,<sup>93</sup> and, when available, admissible excited utterances of the victim or admissions of the defendant.<sup>94</sup> Where possible, statements of witnesses to the instant charge and medical reports of the victim's physical injuries are used.<sup>95</sup> However, many domestic violence victims forgo medical treatment either because of the abuser's demands or because of their own embarrassment; when they do seek medical attention, they often lie about the cause of their injuries.<sup>96</sup> Further, many medical records are not well documented and thus are unusable in court.<sup>97</sup> Witnesses are often reluctant to testify against the defendant because of fear of the abuser and/or unwillingness to expend the time.<sup>98</sup> Police reports may be incomplete or the police may do little more than take down the victim's statement.<sup>99</sup>

### B. Prosecution of the Defendant Using Other Acts of Domestic Violence

A prosecutor may also try to admit into evidence the defendant's other acts of domestic violence to show motive, intent, identity, common plan, or scheme.<sup>100</sup> Admitting other acts evidence upon these theories is

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cooperate with prosecutors, even though they are in great need of advocacy." *Id.* at 955–56. BWS victims are also more fearful of the perpetrator and more susceptible to his threats. *Id.*

91. Hunter, *supra* note 88, at 157 ("The belief that women lie or exaggerate about domestic violence . . . means that judges and juries often discount alleged incidents of violence if they are uncorroborated. This mistrust becomes a particular problem in cases where the woman did not seek help, police recording of domestic violence calls was deficient, or the woman provided some other explanation for her injuries in the emergency room."); *see also* Bryden & Park, *supra* note 42, at 578 (discussing research concluding that jurors have a tendency to blame the victim in acquaintance rape cases, which are analogous to domestic violence cases); Hanna, *supra* note 9, at 1899.

92. Hanna, *supra* note 9, at 1899–1900 (discussing how prosecutors typically overrely on domestic violence victims' testimony).

93. TJADEN & THOENNES, *supra* note 1, at ii (reporting that thirty-nine percent of female physical assault victims reported being injured during their most recent physical assault).

94. Hanna, *supra* note 9, at 1901–04 (discussing ideal police investigation strategies).

95. *Id.* at 1903; *see also* NANCY E. ISSAC & V. PUALANI ENOS, U.S. DEP'T OF JUSTICE, DOCUMENTING DOMESTIC VIOLENCE: HOW HEALTH CARE PROVIDERS CAN HELP VICTIMS, RESEARCH IN BRIEF 1 (Sept. 2001), available at [http://www.dvi.neu.edu/ers/med\\_doc](http://www.dvi.neu.edu/ers/med_doc) ("[M]any medical records contain shortcomings that prevent their admissibility as evidence in court and other legal proceedings.").

96. TJADEN & THOENNES, *supra* note 1, at 9, 14 (discussing survey results from the National Violence Against Women (NVAW) Survey, which consisted of telephone interviews with 8,000 women and 8,005 men age eighteen and older. "Of the women injured during their most recent physical assault, 30.2 percent said they received some type of medical treatment for their injury []. About three-quarters (76.1 percent) of the women who received medical treatment as a result of their most recent physical assault were treated in a hospital, either on an outpatient or inpatient basis.").

97. ISSAC & ENOS, *supra* note 95, at 3 ("[A]t present, many medical records are not sufficiently well-documented to provide adequate legal evidence of domestic violence. A study of 184 visits for medical care in which an injury or other evidence of abuse was noted revealed major shortcomings in the records" such as absence of a photograph or body map documenting the injuries or illegible handwriting by doctors and nurses.).

98. *See generally* Buel, *supra* note 87, at 22.

99. Hanna, *supra* note 9, at 1901.

100. FED. R. EVID. 404(b) (listing exceptions to the general ban on propensity evidence found in FRE 404(a)); Letendre, *supra* note 89, at 983 ("[E]very jurisdiction in the United States . . . has recog-

allowed because the evidence is not admitted to prove the defendant's character.<sup>101</sup> Procedural safeguards for the defendant when admitting other acts evidence under FRE 404 include that the proponent of the evidence must give notice to the accused upon request<sup>102</sup> and that the trial court must be satisfied that a rational jury could find that the other acts did occur.<sup>103</sup> The measure of proof necessary to show the defendant committed relevant bad acts has ranged from "sufficient . . . to support a finding by the jury," to a 'preponderance,' to 'substantial,' to 'clear and convincing.'"<sup>104</sup>

The connection between the other acts evidence and the permissible purpose for the current charged case should be clear, and the issue upon which the other acts evidence is said to bear should be the subject of a genuine dispute.<sup>105</sup> For instance, for an other act to be admitted on the theory of intent, the defendant's mental state must be in dispute, i.e., the defendant concedes that the current act occurred, but denies having the requisite intent because it was an accident or self-defense.<sup>106</sup> For an other act to be admitted on the theory that it is demonstrative of a similar plan of which the current charged act is a part,<sup>107</sup> each act—charged or uncharged—should be "an integral part of an overarching plan explicitly conceived and executed by the defendant."<sup>108</sup> An other act may be admitted as evidence on the issue of identity, usually where both the act and the intent are conceded but the identity of the perpetrator is disputed.<sup>109</sup> For an identity theory, courts usually require that both the other act and the current charged act bear similar features so distinctive that they represent the defendant's "signature."<sup>110</sup>

These noncharacter theories of admissibility (intent, plan, and identity) rely to various degrees on the similarity between the instant charged act and the other acts of misconduct. Those skeptical about the use of other acts evidence under these theories caution that their use carries a

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nized that in some situations the probative value of prior bad acts is sufficient to warrant its admission.").

101. MCCORMICK, *supra* note 19, § 190; *see also supra* notes 45–50 and accompanying text.

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

103. *See, e.g.,* Huddleston v. United States, 485 U.S. 681, 687–90 (1988). Even conduct that has been the subject of a prior acquittal (representing only the failure of the government's evidence to reach the higher threshold of proof beyond a reasonable doubt) may be introduced in a subsequent prosecution under FRE 404(b). Melilli, *supra* note 18, at 1627; *see* Dowling v. United States, 493 U.S. 342 (1990).

104. MCCORMICK, *supra* note 19, § 190.

105. *Id.*

106. *See* MAUET & WOLFSON, *supra* note 26, at 104–05.

107. MCCORMICK, *supra* note 19, § 190, at 661 n.19 (discussing how some courts construe "common plan" broadly, such as in *People v. Ewoldt*, 867 P.2d 757 (Cal. 1994), "which held that evidence of uncharged misconduct is admissible . . . if [i]t shares sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan").

108. MCCORMICK, *supra* note 19, § 190, at 661.

109. *Id.* at 660–61.

110. *Id.* at 663.

risk that jurors will misuse the other acts evidence as proof of the defendant's character to commit the charged offense.<sup>111</sup> However, this danger may be averted when the judge, following FRE 403,<sup>112</sup> balances the other acts evidence's probative value as proof of a noncharacter proposition against its risk of unfair prejudicial effect as proof of character.<sup>113</sup> A variety of factors are considered in this balancing test, including: "the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence,"<sup>114</sup> the possibility of a limiting jury instruction, and the degree to which the evidence will potentially create juror hostility toward the defendant.<sup>115</sup>

Admitting other acts evidence on these noncharacter theories often proves difficult for domestic violence prosecutors because the narrow openings in which to admit other acts evidence under FRE 404(b)'s non-propensity theories often "do not reflect the realities of domestic violence."<sup>116</sup> A prosecutor's ability to admit evidence of other acts of domestic violence under FRE 404(b) is restricted by the type of defense presented.<sup>117</sup> Although intent, motive, plan, identity, or another permissible theory FRE 404(b) may be issues in dispute in the criminal case, many of these noncharacter theories of admissibility require factual similarity rather than conceptual similarity between the other act and the current charged act.<sup>118</sup> This is problematic in domestic violence cases, which encompass an extremely broad range of uniquely violent and controlling acts, which are often dissimilar in their facts, such as being kicked, slapped, sexually violated, held down, put in a chokehold, chased by or pushed out of a moving vehicle, or shoved into an object or on the ground.<sup>119</sup> For example, while the theory of intent requires a low level of similarity between the instant charged act and the other acts,<sup>120</sup> this similarity is garnered from the facts of the act—when, where, how the act took place—and not on concept, such as whether the acts contained be-

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111. Méndez & Imwinkelried, *supra* note 22, at 502.

112. *See supra* note 29.

113. MCCORMICK, *supra* note 19, § 190, at 672; Méndez & Imwinkelried, *supra* note 22, at 502–03.

114. MCCORMICK, *supra* note 19, § 190, at 672–73.

115. *Id.*

116. Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 819 (1997). *But see* Melilli, *supra* note 18, at 1556 ("The volume of cases in which courts are both asked to admit evidence under Rule 404(b) and in fact grant such requests has led to the popular conception that creative prosecutors will usually be successful in generating a theory for introducing evidence of the defendant's prior, uncharged misbehavior before the jury.").

117. Letendre, *supra* note 89, at 994.

118. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 376 (1996); *cf.* Hunter, *supra* note 88, at 127 ("Courts shaped common law rules of evidence long before even recognizing legal claims based on persistent violence or sexual harassment. Thus, while the rules of evidence apply to these cases, they do not respond adequately to their particular features.").

119. Compare domestic violence to a robbery case where the elements are usually more straightforward and factually similar. Letendre, *supra* note 89, at 994–95.

120. Bryden & Park, *supra* note 42, at 552.

havior aimed to overpower and control a person. Specific acts of domestic violence are diverse in type and thus dissimilar in their facts, which decreases the likelihood that there will be a sufficient similarity between the other act and the charged act to support the required legal inference that the defendant probably harbored the same intent in each instance.<sup>121</sup> Also, to the detriment of admissibility of other acts evidence in domestic violence cases, if an act on a victim is too brutal, courts often rule that intent or state of mind is not really an issue and will disallow other acts evidence on that basis.<sup>122</sup>

Admitting evidence of other acts on a plan theory requires an increased level of similarity between the instant charged act and the other acts.<sup>123</sup> For instance, evidence of other acts of domestic violence against past victims rarely meets FRE 404(b)'s standard for common scheme or plan because courts often limit this evidence to testimony demonstrating an overarching plan or scheme based on "unusual and abnormal elements" or a "repetition of complex common features."<sup>124</sup> Despite being victim to similar abuse and control tactics by the same defendant, domestic violence victims' experiences often differ in both the type of offense (for example, verbal harassment versus physical attack) and triggering event (for instance, ending the relationship versus talking with a male coworker).<sup>125</sup>

Admitting evidence of other acts on an identity theory requires the highest degree of similarity between the instant act and the other act.<sup>126</sup> Usually, identity only becomes an issue in a domestic violence case if the victim recants.<sup>127</sup> Again, it is difficult to admit other acts on this theory because of the great factual—although not conceptual—differences among domestic violence incidents.<sup>128</sup>

Furthermore, courts will often deny a prosecutor's motion to admit other acts evidence when the defendant has not yet specified a defense and argues that the prejudice of the other acts outweighs any probative value.<sup>129</sup> Thus, the defendant can construct a defense in which it is less likely that his other acts of domestic violence will be admissible.<sup>130</sup> This restriction also precludes the prosecutor from being able to craft an ef-

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121. See De Sanctis, *supra* note 118, at 376 ("Even though they are conceptually similar—violent acts committed upon an intimate partner for the purpose of maintaining power, dominance, and control—they are factually *dissimilar* and therefore likely to be held inadmissible.")

122. See *id.*; Letendre, *supra* note 89, at 993.

123. See *People v. Ewoldt*, 867 P.2d 757, 770 (Cal. 1994). Again, based on facts—when, where, how—and not on concept.

124. Letendre, *supra* note 89, at 995.

125. *Id.*

126. *Id.* at 994–95.

127. See *supra* notes 87–99 and accompanying text; cf. MAUET & WOLFSON, *supra* note 26, at 105.

128. See Letendre, *supra* note 89, at 994–95 ("Because domestic violence can range from the killing of a favorite pet to shoving a victim into a wall, evidence of past domestic violence is unlikely to meet the admissibility standards for identity evidence.")

129. *Id.* at 994.

130. *Id.* at 995.

fective and revealing opening statement and case-in-chief containing the other acts evidence.<sup>131</sup> This prosecutor preference is effectively blocked in domestic violence cases by the limitations of FRE 404(b). Specifically, FRE 404(b) (and most state evidence rule counterparts) provides only a few permissible theories—such as intent—which allow the prosecutor to try to admit evidence regardless of the type of defense presented.<sup>132</sup> If the prosecutor is unable to meet FRE 404(b)'s requirements, the court will not admit the other acts evidence in the prosecutor's case-in-chief because the only remaining purpose of such evidence would be to show propensity, which is not currently permitted under FRE 404(b) or the vast majority of state evidence rules.<sup>133</sup>

The limited number of evidentiary tools at a domestic violence prosecutor's disposal, coupled with the difficulty in admitting other acts under FRE 404(b)'s noncharacter theories, have propelled a few states to adopt evidence rules allowing for admission of other acts of domestic violence for explicit propensity purposes.<sup>134</sup> Proponents of these rules adopted policy arguments similar to those previously argued in favor of FRE 413 in sexual assault cases.<sup>135</sup> Namely, studies have shown that batterers will continue the abuse unless there is some intervention: domestic violence defendants have a high rate of recidivism.<sup>136</sup> Proponents of these new state evidence rules also reasoned that successful prosecution protects not only the current domestic violence victim, but also other women who might enter into a relationship with the defendant.<sup>137</sup> They further argue that such a rule helps the current victim and those that live in her household because studies have also shown that, over time, domestic violence escalates in frequency and severity.<sup>138</sup>

Supporters of an evidence rule admitting other acts of domestic violence for propensity purposes also argue that such a rule is needed to build a just and fair case against a defendant whose abuse typically is

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131. *Id.* (“Prosecutors prefer to introduce prior bad acts in their opening statements to facilitate the jury’s comprehension of the state’s theory.”).

132. *Id.* at 994; *see also supra* notes 45–50 and accompanying text.

133. Letendre, *supra* note 89, at 993. *See infra* Parts III.C.1 and III.C.2 for analysis on California’s and Alaska’s evidence rules which admit other acts of domestic violence for propensity purposes.

134. *See infra* Parts III.C.1 and III.C.2 for a discussion of CEC section 1109 and ARE 404(b)(4).

135. Letendre, *supra* note 89, at 997–99.

136. Hanna, *supra* note 9, at 1895; Letendre, *supra* note 89, at 991, 998 (stating that, in fact, “[e]vidence of prior domestic violence is more probative for showing that a defendant committed the crime than lustful-disposition evidence because the recidivism rate of domestic violence batterers is higher than that of sexual abuse offenders”).

137. Hanna, *supra* note 9, at 1895 (arguing in favor of mandated prosecution and the need for the state to dedicate continual resources and effort to domestic violence cases before the cycle of violence will end); Letendre, *supra* note 89, at 1003.

138. De Sanctis, *supra* note 118, at 388; *see also* DOJ SPECIAL REPORT, *supra* note 2, at 6 (reporting that from 1993 until 1998, 43,910 women suffered serious injury as a result of intimate partner violence and sought medical treatment. Serious injury was defined as gunshot wound, knife wound, internal injuries, broken bones, knocked unconscious, or other serious injuries.); Hanna, *supra* note 9, at 1889 (finding that batterers often pose an ongoing threat).

without witnesses or other evidence.<sup>139</sup> The other acts evidence may serve to corroborate a victim's testimony as to an instant offense. If a past domestic violence victim testifies, her testimony can corroborate the instant victim's testimony or the prosecution's case.<sup>140</sup> If the instant victim recants or refuses to testify, admitting the defendant's other acts may explain to the fact finder why the injury was not a fabrication, the result of an accident or a first-time occurrence.<sup>141</sup>

### C. *Evaluation of States That Admit Other Acts of Domestic Violence for Propensity Purposes*

The vast majority of states allow for other acts evidence to be admitted in domestic violence cases only when done so on a noncharacter theory, not for propensity purposes.<sup>142</sup> Other states provide for more expansive noncharacter theories on which to admit other acts evidence, such as a theory of the history of the relationship—which provide wide evidentiary doors for domestic violence prosecutors.<sup>143</sup> Most significantly, a minority of states have adopted evidence rules allowing for admission of other acts of domestic violence for propensity purposes.<sup>144</sup> This section will briefly survey those states' evidence rules that admit other acts of domestic violence under a propensity theory and then will report on the implementation of these progressive and groundbreaking evidence rules.

#### 1. *California*

California's rule admitting other acts of domestic violence for propensity purposes is California Evidence Code (CEC) section 1109.<sup>145</sup>

139. Letendre, *supra* note 89, at 999.

140. Hunter, *supra* note 88, at 127 (stating that testimony of other witnesses regarding a history of domestic violence can corroborate the complaining witness's version of events or delayed complaint); Letendre, *supra* note 89, at 995.

141. Letendre, *supra* note 89, at 999.

142. Only California and Alaska have enacted evidence rules that explicitly provide for the admissibility of other acts of domestic violence on a propensity theory in domestic violence cases. All other states' evidence rules provide for admission of other acts on nonpropensity theories. There is variance among the states as to how flexible these nonpropensity theories are in admitting other acts.

143. See *infra* Parts D.1, D.2, D.3 (discussing nonpropensity theories admissible in Colorado, Kansas, and Minnesota, respectively).

144. ALASKA R. EVID. 404(b)(4) (2002); CAL. EVID. CODE § 1109 (West 2002).

145. CAL. EVID. CODE § 1109. This section was enacted in 1996 and effective January 1, 1997 and reads as follows: Section 1109. *Evidence of defendant's other acts of domestic violence*

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

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

CEC section 1109 is an exception to California's general rule under CEC section 1101<sup>146</sup> that evidence of a person's character or of a trait of his or her character is inadmissible to prove his or her conduct on a specified occasion.<sup>147</sup> Specifically, CEC section 1109 permits admission of other acts evidence for propensity purposes in criminal actions in which the defendant is charged with an offense involving domestic violence.<sup>148</sup> CEC section 1109 permits a prosecutor in her case-in-chief<sup>149</sup> to admit a defendant's uncharged acts of domestic violence for the purpose of showing a propensity to commit such crimes.<sup>150</sup> The rule is applicable to the other acts of domestic violence against either the same victim or a different victim.<sup>151</sup> The rule's definition of domestic violence encompasses all actions which intentionally or recklessly cause or attempt to cause bodily injury, or which place another person in reasonable apprehension of imminent

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

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

(d) As used in this section, "domestic violence" has the meaning set forth in Section 13700 of the Penal Code. "Abuse of an elder or a dependent adult" has the meaning set forth in Section 15610.07 of the Welfare and Institutions Code.

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

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

*Id.*

146. CAL. EVID. CODE § 1101. Section 1101. *Evidence of character to prove conduct*

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or trait of his or her character (whether in the form of opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

*Id.*

147. *People v. Ramsey*, No. F034758, 2002 WL 1455344, at \*10 (Cal. Ct. App. 2002); Jeffrey A. Schafer, *Criminal Law: Trial*, in CALIFORNIA JURISPRUDENCE, § 497, VII.D.3.d. (3d ed. rev. vol. 2001).

148. *See Schafer, supra* note 147, § 497, VII.D.3.d.

149. *People v. Poplar*, 83 Cal. Rptr. 2d 320, 324-25 (Cal. Ct. App. 1999).

150. *People v. Hoover*, 92 Cal. Rptr. 2d 208, 212 (Cal. Ct. App. 2000).

151. *People v. Brown*, 92 Cal. Rptr. 2d 433, 437-38 (Cal. Ct. App. 2000); *see also People v. Sosa*, No. B146167, 2002 WL 220774, at \*7-8 (Cal. Ct. App. Feb. 13, 2002) (finding no trial error in trial court admitting defendant's other acts of domestic violence against his mother and former girlfriend); *People v. Alcalá*, No. H021711, 2002 WL 194249, at \*6 (Cal. Ct. App. Feb. 8, 2002) (finding no trial error in trial judge admitting other acts of domestic violence against former girlfriend); *People v. Johnson*, No. A093707, 2002 WL 120810, at \*3 (Cal. Ct. App. Jan. 30, 2002) (same).

serious bodily injury to himself or herself, or another.<sup>152</sup> This definition captures the wide spectrum of domestic violence behaviors, such as slapping, pushing, kicking, violating an order of protection, threatening, and harassing the victim.

The FRE 403 counterpart, probative/prejudice balancing test, in California is CEC section 352.<sup>153</sup> Under CEC section 1109, the other acts evidence admitted for propensity purposes is considered a probative inference, specifically approved by CEC section 1109.<sup>154</sup> The court has discretion under CEC section 352 to exclude the other acts evidence when its “probative value is substantially outweighed by the probability that its admission will cause undue consumption of time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury.”<sup>155</sup>

CEC section 1109 has been challenged relentlessly on constitutional grounds.<sup>156</sup> In *People v. Hoover*,<sup>157</sup> CEC section 1109 was found constitutional under the same reasoning used earlier by the California Supreme Court in *People v. Falsetta*<sup>158</sup> when deciding the constitutionality of CEC section 1108, the parallel provision for sexual assault cases. In *Falsetta*, the California Supreme Court held that CEC section 1108 allows evidence of a defendant’s two prior rapes to be used to show his propensity

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152. “Abuse” means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another. “Domestic violence” means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. CAL. PENAL CODE § 13700 (a)–(b) (West 2000). Also, while the definition of domestic violence in CEC section 1109 does not specifically mention rape as an act of domestic violence, the definition of domestic violence stated above encompasses the statutory definition of rape (“fear of immediate and unlawful bodily injury on the person”). Schafer, *supra* note 145, § 536, VII.D.3.d. Legislative history indicates that “domestic violence” within CEC section 1109 is limited to conduct which is similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person. ASSEM. COM. ON PUBLIC SAFETY REPORT S. 1876, at 5 (Cal. 1996), available at [http://www.leginfo.ca.gov/pub/95-96/bill/se.../sb\\_1876\\_cfa\\_960624\\_094659\\_asm\\_comm.htm](http://www.leginfo.ca.gov/pub/95-96/bill/se.../sb_1876_cfa_960624_094659_asm_comm.htm) [hereinafter PUBLIC SAFETY REPORT].

153. CAL. EVID. CODE § 352 (West 2001). *Discretion of court to exclude evidence*. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. *Id.*

154. *People v. Ramsey*, No. F034758, 2002 WL 1455344, at \*10 (Cal. Ct. App. Jul. 8, 2002) (stating that the California “legislature has determined that in general, evidence of prior acts of domestic violence is sufficiently probative and that this is true despite the obvious prejudice that is inherent in this type of evidence”); see also *People v. Jennings*, 97 Cal. Rptr. 2d 727, 738–39 (Cal. Ct. App. 2000).

155. Schafer, *supra* note 145, § 536, VII.D.3.e(2)(b)(ii) (referring to CAL. EVID. CODE § 352 (2002), titled “Discretion of court to exclude evidence”); see also *People v. Hoover*, 92 Cal. Rptr. 2d 208, 214 (Cal. Ct. App. 2000).

156. In *People v. Falsetta*, 986 P.2d 182, 193 (Cal. Ct. App. 1999), the California Supreme Court upheld the constitutionality of CEC section 1108, which addresses sexual offenses, and at least four post-*Falsetta* cases from the appellate courts have subsequently upheld the constitutionality of CEC section 1109 against similar due process challenges: *People v. Jennings*, 97 Cal. Rptr. 2d 727, 734–37 (Cal. Ct. App. 2000); *People v. Brown*, 92 Cal. Rptr. 2d 433, 438–39 (Cal. Ct. App. 2000); *People v. Hoover*, 92 Cal. Rptr. 2d 208, 213–14 (Cal. Ct. App. 2000); and *People v. Johnson*, 91 Cal. Rptr. 2d 596, 600–02 (Cal. Ct. App. 2000).

157. *Hoover*, 92 Cal. Rptr. 2d at 208.

158. *Falsetta*, 986 P.2d at 187–93.

to commit the charged rape.<sup>159</sup> In *Hoover*, the California Court of Appeals replicated the California Supreme Court's constitutional analysis, and held that CEC section 1109, like CEC section 1108, does not violate the Due Process Clause.<sup>160</sup>

The *Hoover* court relied upon CEC section 1109's legislative history as well as the procedural safeguards it affords defendants. Specifically, the legislative intent supported the premise that domestic violence is a unique crime where propensity evidence is warranted:

The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their partners, even kill them, and go on to beat or kill the next intimate partner. Since criminal prosecution is one of the few factors that may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.<sup>161</sup>

The *Hoover* court was also satisfied with the provision of procedural safeguards for defendants under CEC section 1109. The balancing test provision under CEC section 352 ensures a fundamentally fair trial.<sup>162</sup> The CEC section 1109 also states that domestic violence acts occurring more than ten years before the charged offense are inadmissible unless the court finds that the admission of this evidence is in the interest of justice.<sup>163</sup>

CEC section 1109 has withstood other attacks on its constitutionality. CEC section 1109 was held not to violate a defendant's constitutional right to a fair trial.<sup>164</sup> The California courts have also decided that CEC section 1109 does not implicate a fundamental constitutional principle because the legislature determined that the "policy consideration favoring the exclusion of evidence of uncharged domestic violence of-

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159. *Id.* at 193, (determining that evidence code CEC section 1108, allowing the admission of prior sex offenses for propensity purposes, does not violate due process). The rationale underlying that opinion applies to CEC section 1109 as well: "We shall conclude, by parity of reasoning, the same applies to Evidence Code section 1109, since the two statutes are virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence." *Johnson*, 91 Cal. Rptr. 2d at 600.

160. *Hoover*, 92 Cal. Rptr. 2d at 214.

161. *Id.* at 213 (citing PUBLIC SAFETY REPORT, *supra* note 152, at 3-4).

162. *Id.* at 214.

163. CAL. EVID. CODE § 1109(e) (West 2002).

164. *People v. Jennings*, 97 Cal. Rptr. 2d 727, 734 (Cal. Ct. App. 2000).

fenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.”<sup>165</sup>

Finally, in *People v. Jennings*, the California Court of Appeals held that admission of prior acts of domestic violence under CEC section 1109 did not violate a defendant’s right to equal protection.<sup>166</sup> In *Jennings*, the defendant argued that by treating those accused of offenses involving domestic violence differently from those accused of other criminal offenses, CEC section 1109 violates his right to equal protection of the laws.<sup>167</sup> In upholding CEC section 1109, the *Jennings* court relied on *People v. Fitch*,<sup>168</sup> which upheld CEC section 1108 against the same equal protection challenge.<sup>169</sup> The *Jennings* court applied the *Fitch* analysis to CEC section 1109 and concluded that CEC section 1109 treats all defendants charged with domestic violence equally; the only distinction it makes is between domestic violence defendants who committed other acts of domestic violence and defendants accused of other crimes.<sup>170</sup>

CEC section 1109 was modeled on CEC section 1108, which provides an identical exception for the admission of other sexual offenses in a prosecution for a sexual offense.<sup>171</sup> Legislative history indicates that CEC section 1109 was necessary because the ban on propensity evidence in domestic violence cases “insulates defendants and misleads jurors into believing that the charged offense was an isolated incident, an accident, or a mere fabrication.”<sup>172</sup> CEC section 1109 was enacted to provide the jury with a more accurate picture of the defendant’s behavior.<sup>173</sup> CEC section 1109’s propensity inference was appropriate, according to its legislative supporters, because it highlights the ongoing violence as part of a larger scheme of power and control—which usually escalates in frequency and severity— as the norm in domestic violence cases.<sup>174</sup> The California appellate courts have clearly understood the intent of the legislature when enacting CEC section 1109:

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165. Schafer, *supra* note 145, § 537, VII.D.3.e(2)(b)(ii).

166. *Jennings*, 97 Cal. Rptr. 2d at 734; *see also* *People v. Alcalá*, No. H021711, 2002 WL 194249, at \*7 (Cal. Ct. App. Feb. 8, 2002).

167. *Jennings*, 97 Cal. Rptr. 2d at 734.

168. *People v. Fitch*, 63 Cal. Rptr. 2d 753 (Cal. Ct. App. 1997).

169. *Jennings*, 97 Cal. Rptr. 2d at 735.

170. *Id.* “Neither the federal nor the state constitution bars a legislature from distinguishing among criminal offenses in establishing rules for the admission of evidence; nor does equal protection require that acts or things which are different in fact be treated in law as though they were the same.” *Id.* The *Jennings* court also held that CEC section 1109 was not subject to strict scrutiny analysis for equal protection purposes, but would be upheld if it simply bore a rational relationship to a legitimate state purpose. *Id.* at 735–36.

171. *People v. Hoover*, 92 Cal. Rptr. 2d 208, 212 (Cal. Ct. App. 2000) (stating that CEC section 1109 was modeled on CEC section 1108, which provides for an identical exception for the admission of uncharged sexual offenses in a prosecution for a sexual offense); *see also* De Sanctis, *supra* note 118, at 362.

172. *People v. Nesbitt*, 2001 WL 1584377, at \*5 (Cal. Ct. App. Dec. 12, 2001).

173. *Hoover*, 92 Cal. Rptr. 2d at 213.

174. *Id.*

[D]omestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment and ambivalence on the part of the victim, as well as intimacy with and intimidation by the perpetrator. The special relationship between victim and perpetrator in . . . domestic violence . . . cases, with their unusually private and intimate context, easily distinguish [this] offense[] from the broad variety of criminal conduct in general.<sup>175</sup>

The question of a properly instructed jury in cases involving CEC section 1109 evidence is an issue currently being litigated in the California court system. Defendants have asserted that in cases where other acts of domestic violence for propensity purposes have been admitted into evidence, jury instructions confuse the jury as to which burden of proof applies to which offense, and ultimately reduce the prosecution's burden below the constitutionally required standard of "beyond a reasonable doubt."<sup>176</sup> For example, in *People v. James*, the defendant claimed that "the jury could reasonably have interpreted the instruction to allow them to convict [the defendant] based on an inference from his prior acts of abuse, without necessarily making findings on the elements of the charged offense."<sup>177</sup> While other acts are proven upon a standard of preponderance of the evidence,<sup>178</sup> each element of the charged offense must be proven beyond a reasonable doubt; thus the "jury must be reminded that propensity evidence alone cannot meet the prosecution's burden of proving the elements of a charged offense."<sup>179</sup> Trial court instructions should restrain the jury from misusing the evidence in this way. However, the trial court does not have a sua sponte duty to give a limiting instruction to the jury that would prohibit a conviction of the charged act based solely on the other acts evidence, as long as it instructs the jury that it may only convict the defendant after it has weighed all the evidence under the reasonable doubt standard.<sup>180</sup> California courts have upheld a widely used jury instruction, CALJIC No. 2.50.02.<sup>181</sup> Lastly, in

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175. *Jennings*, 97 Cal. Rptr. 2d at 737.

176. *People v. James*, 96 Cal. Rptr. 2d 823, 828 (Cal. Ct. App. 2000). This concern was also expressed when the legislature debated CEC section 1109. See PUBLIC SAFETY REPORT, *supra* note 152, at 7.

177. *James*, 96 Cal. Rptr. 2d at 828.

178. *Hoover*, 92 Cal. Rptr. 2d at 212.

179. *James*, 96 Cal. Rptr. 2d at 831.

180. *Jennings*, 97 Cal. Rptr. 2d at 739.

181. *People v. Escobar*, 98 Cal. Rptr. 2d 696, 703 (Cal. Ct. App. 2000); *Hoover*, 92 Cal. Rptr. 2d at 215; see also *People v. Garcia*, 2002 WL 220324, at\*4 (Cal. Ct. App. Feb. 11, 2002). This instruction states that the jury could consider defendant's prior domestic violence offenses as propensity evidence:

[I]f you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type offense. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. However, if you find by a preponderance of the evidence that defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crimes charged. The weight and significance, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

*People v. Johnson*, the court of appeals held that admission of evidence of a defendant's prior acts of domestic violence did not violate the Eighth Amendment prohibition of cruel and unusual punishment when the jury is instructed not to convict the defendant based on his status as a perpetrator of domestic violence, but rather to convict based on its belief beyond a reasonable doubt of his commission of the charged offenses.<sup>182</sup>

Survey comments from and interviews with California prosecutors reveal that CEC section 1109 has proved invaluable in convicting recidivist batterers. Other acts evidence for propensity purposes, typically in the form of victim testimony, assists jurors enormously in their decision-making process by showing that a person with a history of battering is likely to have battered in the current offense.<sup>183</sup> The virtual certainty that other acts of domestic violence will be admitted into evidence often encourages defendants to plead guilty and forgo trial on the charged offense.<sup>184</sup> The victim's testimony as to other acts provides strong corroboration for the victim's version of the charged act. One prosecutor stated that the defendant sounds "incredibly foolish" when arguing that the victim attacked him or fabricated the story when the prosecution is able to call prior domestic violence victims as witnesses to support the instant victim.<sup>185</sup>

In general, California judges admit CEC section 1109 evidence unless the other act is more than ten years old.<sup>186</sup> Judges may exclude CEC section 1109 evidence under the CEC section 352 balancing test in cases where the other act appears to be a weak example of domestic violence to the judge, or where the case for the charged offense is so strong that other act evidence appears unnecessary.<sup>187</sup> One domestic violence prosecutor even introduced CEC section 1109 evidence of prior statements to police to impeach the instant victim who recanted prior acts of domestic violence.<sup>188</sup> Many prosecutors indicated that there is a very high percentage of domestic violence victims who may initially be coop-

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CALJIC No. 2.50.02 (2002 Revision) (Evidence of Other Domestic Violence).

182. *People v. Johnson*, 91 Cal. Rptr. 2d 596, 602-03 (Cal. Ct. App. 2000).

183. Survey Response from Adam Pearlman, Ventura County Assistant States Attorney (Dec. 19, 2001) (on file with author) (stating that CEC section 1109 evidence is the most reliable predictor of future violence) [hereinafter Pearlman Survey]; Telephone Interview with Tracy Prior, Deputy District Attorney, San Diego County District Attorney's Office (Feb. 24, 2002) [hereinafter Prior Interview]; Telephone Interview with Mark Skeels, Assistant States Attorney in Chula Vista, California (Dec. 2001) (stating that it is extremely powerful to be able to tell and show the jury that the defendant is a wife-beater) [hereinafter Skeels Interview].

184. Pearlman Survey, *supra* note 183; Skeels Interview, *supra* note 183.

185. Pearlman Survey, *supra* note 183. Also, another prosecutor noted that juries are extremely responsive to the prosecutor's case when the prosecution is able to admit prior domestic violence against a different victim. Prior Interview, *supra* note 183.

186. Pearlman Survey, *supra* note 183 (stating that he has had situations where the court has allowed introduction of CEC section 1109 evidence that occurred more than ten years ago where the abuse has been consistent for decades or where the defendant was in custody during part of the prior ten years and thus had no opportunity to abuse women while in prison).

187. Prior Interview, *supra* note 183.

188. Pearlman Survey, *supra* note 183.

erative but eventually become reluctant or unwilling to testify.<sup>189</sup> Other acts evidence is crucial to establishing that the charged domestic violence offense is part of a larger pattern of the defendant's scheme of power and control. Thus, prosecutors will often subpoena the instant victim or other victims to testify as to the other acts or will use their recantation as proof of the defendant's far-reaching and potent control over his victims, even if he is in jail.<sup>190</sup>

The legislative history of CEC section 1109 indicates that its supporters argued the new evidence law would provide a much-needed opportunity for former domestic violence victims to testify on behalf of the defendant's current victim who may be reluctant or unwilling to testify in the current charged case because of her immediate fear of retaliation or the threat of economic loss.<sup>191</sup> These supporters of CEC section 1109 hypothesized that former domestic violence victims would be more ready and willing to testify because they are less likely to share these fears.<sup>192</sup> This prediction has proved true in some cases where past victims willingly testify for the current victim and afterwards feel empowered.<sup>193</sup> However, interviews with prosecutors revealed that, for a variety of other reasons, prior domestic violence victims may be reluctant to testify for the instant victim. Often, past victims have invested a significant amount of time and effort in leaving the defendant and disengaging from his emotional and financial grip, and thus are unwilling to voluntarily insert themselves in the defendant's criminal proceeding.<sup>194</sup>

Sometimes the biggest hurdle for prosecutors is locating the prior domestic violence victim. Typical challenges impeding locating prior victims involve whether the person has remarried and has a different last name, whether the person lives locally, or whether the prosecutor has adequate investigative support.<sup>195</sup> These factors are compounded in California where there is a high military population and where so many people cross the Mexico-United States border.<sup>196</sup>

Because CEC section 1109 evidence can be so powerful to the fact finder, California prosecutors often look first for this type of evidence

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189. *Id.*; Skeels Interview, *supra* note 183.

190. Pearlman Survey, *supra* note 183 (stating his willingness to subpoena victims in order to convict recidivist batterers and the importance of expert testimony on Battered Women's Syndrome to explain the occurrence of recanting victims to the jury).

191. PUBLIC SAFETY REPORT, *supra* note 152, at 4.

192. *Id.*

193. Pearlman Survey, *supra* note 183; Survey Response from Tracy Prior, Deputy District Attorney, San Diego County [hereinafter Prior Survey] (on file with author).

194. Pearlman Survey, *supra* note 183; Skeels Interview, *supra* note 183 (stating that he is often successful in obtaining a temporary order of protection against the defendant for the prior victim to last throughout the proceeding).

195. Pearlman Survey, *supra* note 183.

196. Prior Interview, *supra* note 183; Skeels Interview, *supra* note 183 (commenting that the military is not always willing to share information about its members and the military population in general is very transient).

when deciding whether to file a case against the defendant.<sup>197</sup> This can have positive effects: in some cases CEC section 1109 evidence provides the corroboration necessary for the prosecutor to feel comfortable filing a case.<sup>198</sup> Other acts evidence is also helpful in cases where it is the first time a charge has been filed against a recidivist batterer. Jurors who may otherwise be inclined to give the “first-timer” defendant a break are often persuaded to convict after hearing that the defendant has beaten many women with whom he has had relationships.<sup>199</sup>

California’s CEC section 1109 is a landmark evidentiary tool for prosecutors seeking convictions in domestic violence cases. Alaska is the only other state to have enacted a similar statute that allows propensity evidence to be admitted in domestic violence cases.<sup>200</sup>

## 2. *Alaska*

In 1997, the Alaska Court of Appeals first held that evidence of a defendant’s other crimes against the victim is admissible in some circumstances to explain the relationship between the defendant and victim.<sup>201</sup> In *Russell*, the court broadly construed Alaska Rule of Evidence (ARE) 404(b)(1) to hold that evidence of a defendant’s past relationship with the victim, including acts of abuse, or acts which caused the victim to be fearful, are relevant and admissible to show the defendant’s intent, the victim’s state of mind, the reasonableness of her actions, and the context of the relationship in which the charged offense occurred.<sup>202</sup> The court stated that other acts evidence can be relevant to explain why a person might fear another, or why a person might submit to the other’s will without a struggle.<sup>203</sup> The *Russell* court’s broad interpretation was a strong first step in making it easier for prosecutors to introduce other acts of domestic violence.

The Alaska legislature took the next step in widening the door for other acts of domestic violence to be admitted in the prosecution’s case-in-chief. In 1997, the Alaska legislature passed ARE 404(b)(4), which provides that in “a prosecution for a crime involving domestic violence . . . evidence of other crimes involving domestic violence by the defendant against the same or another person . . . is admissible.”<sup>204</sup> ARE

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197. Pearlman Survey, *supra* note 183; Prior Survey, *supra* note 193.

198. Pearlman Survey, *supra* note 183; Prior Survey, *supra* note 193 (commenting that propensity evidence often “pushes the case over the edge” and gives her a good faith belief that she can prove the charged offense beyond a reasonable doubt).

199. Pearlman Survey, *supra* note 183; Prior Interview, *supra* note 183.

200. ALASKA R. EVID. 404(b)(4) (2002).

201. *Russell v. State*, 934 P.2d 1335, 1341 (Alaska Ct. App. 1997).

202. *Id.* at 1340–41.

203. *Id.* In *Russell*, the defendant had committed prior acts of domestic violence against his wife. The charged incident was rape against his wife in which she conceded she did not resist because of the defendant’s past acts of violence. *Id.* at 1339.

204. ALASKA R. EVID. 404(b)(4). *Other Crimes, Wrongs, or Acts*. In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evi-

404(b)(4) specifically allows admitting other acts of domestic violence for propensity purposes<sup>205</sup> and its use is not contingent upon the defenses presented by the defendant at trial.<sup>206</sup> The rule even admits other acts of domestic violence when the charged offense is “interfering with a report of a crime involving domestic violence”; the definition of “domestic violence” itself is very broad.<sup>207</sup> The public policy considerations behind this evidence rule include the lack of witnesses in domestic violence cases and thus the need for corroboration, frequent victim reluctance to testify due to fear of the defendant,<sup>208</sup> and the cyclical nature of domestic violence: the ongoing pattern of abuse escalates in frequency and severity over time.<sup>209</sup>

Other acts of domestic violence are not automatically admissible under ARE 404(b)(4). ARE 403 requires the trial court to exclude other acts evidence that is more prejudicial than probative.<sup>210</sup> Indeed, domestic violence prosecutors in Alaska have indicated that judges routinely and without hesitation use ARE 403 to exclude other acts evidence, and that these rulings are virtually appeal-proof.<sup>211</sup> Further, ARE 404(b)(2) protects domestic violence defendants’ rights by insisting that, to be admissible, the other acts evidence must be less than ten years old from the date of the charged offense, must be similar to the charged offense, and must have been committed upon persons similar to the current victim.<sup>212</sup>

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dence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, “domestic violence” and “crime involving domestic violence” have the meanings given in AS 18.66.990. *Id.*

205. Evidence of “other crimes involving domestic violence by the defendant” does not require proof of a conviction to be admissible. *State v. Bingaman*, 991 P.2d 227, 228–29 (Alaska Ct. App. 1999).

206. Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 187 (2001).

207. ALASKA STAT. § 18.66.990 (3) (Michie 2000): “domestic violence” and “crime involving domestic violence” mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

- (A) a crime against the person under AS 11.41;
- (B) burglary under AS 11.46.300–11.46.310;
- (C) criminal trespass under AS 11.46.320–11.46.330;
- (D) arson or criminally negligent burning under AS 11.46.400–11.46.430;
- (E) criminal mischief under AS 11.46.480–11.46.486;
- (F) terroristic threatening under AS 11.56.810;
- (G) violating a domestic violence order under AS 11.56.740; or
- (H) harassment under AS 11.61.120(a)(2)–(4);

208. *An Act Relating to the Rights to the Rights of Crime Victims: Hearing on H.B. 9 Before the Alaska Legislature Senate Judiciary Comm.*, 20th Leg. (1997) [hereinafter *Alaska Hearings*] (testimony of Anne Carpeneti, Assistant Attorney General, Dept. of Law).

209. *Alaska Hearings*, *supra* note 208 (testimony of Jayne Andreen, Executive Director, Council on Domestic Violence and Sexual Assault).

210. *Fuzzard v. State*, 13 P.3d 1163, 1167 (Alaska Ct. App. 2000).

211. Survey Response from Leslie Dickson, Assistant District Attorney, Anchorage, Alaska (Feb. 27, 2002).

212. ALASKA R. EVID. 404(b)(2) (2002).

Alaska's evidence rule thus provides many of the same procedural safeguards to defendants found in California's CEC section 1109.<sup>213</sup>

ARE 404(b)(4) has withstood constitutional challenges on both due process and equal protection grounds.<sup>214</sup> In *Fuzzard v. State*, the defendant alleged that admission of his prior acts of domestic violence, which included breaking into the victim's apartment and pulling the phone from the wall when she tried to call the police, was a violation of due process and equal protection.<sup>215</sup> The Alaska Court of Appeals held that in enacting ARE 404(b)(4), the Alaska state legislature intended to expand the use of propensity evidence in domestic violence cases "to resolve the difficult proof problems posed by conflicting accounts of domestic violence."<sup>216</sup> Thus, the other acts evidence was relevant to show whether the defendant had committed the present charge of domestic violence, and although this evidence does show propensity, because of legislative intent, "the evidence's tendency in this regard can no longer be deemed unfair prejudice."<sup>217</sup> The court held that evidence admitted under ARE 404(b)(4) did not violate due process and based its holding on the same reasoning applied in an earlier case regarding a similar evidence rule.<sup>218</sup> Three years prior to *Fuzzard*, in the seminal case *Allen v. State*,<sup>219</sup> the Court of Appeals held that propensity evidence does not *per se* violate due process because the trial court judge retains the authority to exclude evidence that is more prejudicial than probative.<sup>220</sup> *Fuzzard* also held that the defendant's equal protection claim had no merit because the defendant was unable to show that the propensity evidence rule seriously infringed on a constitutional right, especially in light of the state's interest in addressing proof problems posed by domestic violence.<sup>221</sup> The Alaska Court of Appeals in *Kaser v. Alaska* also indicated that the other acts evidence could include testimony from the same victim who is the complaining witness in the charged offense, or from a different victim testifying to prior domestic violence inflicted by the defendant.<sup>222</sup> The Alaska Supreme Court has yet to rule on whether propensity evidence under ARE 404(b)(4) is constitutional.

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213. See *supra* text accompanying notes 145–200.

214. *Fuzzard*, 13 P.3d at 1163.

215. *Id.* at 1164.

216. *Id.* at 1167.

217. *Id.*

218. *Id.* at 1166.

219. *Allen v. State*, 945 P.2d 1233 (Alaska Ct. App. 1997). *Allen v. State* involved a due process challenge to ARE 404(a)(2), which authorizes a court to admit evidence of the defendant's character for violence to rebut a claim that the victim was the first aggressor. *Fuzzard*, 13 P.3d at 1166.

220. *Allen*, 945 P.2d at 1237–38. For a critique of the *Allen* and *Fuzzard* courts' analyses, see Dropkin & McComas, *supra* note 206, at 208 (stating that legislative fiat transformed the prejudicial value of propensity evidence into a probative value and thus the 403 balancing test is meaningless because the judge no longer has distinct, conflicting interests to weigh).

221. *Fuzzard*, 13 P.3d at 1167–68.

222. *Kaser v. Alaska*, No. A-7491, 2001 WL 540555, \*3 (Alaska Ct. App. May 23, 2001) (holding that other acts testimony by a different victim is admissible under 404(b)(4)).

Unlike California's CEC section 1109, Alaska's ARE 404(b)(4) does not limit admission to other acts of assault where there is a "substantial relationship" between the means chosen by the legislature and the ends sought to be achieved.<sup>223</sup> In fact, the *Fuzzard* court highlighted the fact that domestic violence takes many forms and that "[l]imiting admissibility to narrower categories of abuse or relationships might defeat the goal of prosecuting perpetrators of domestic violence before the abuse escalates."<sup>224</sup> However, the *Kaser* court noted that there may be cases where "an extremely broad application of 404(b)(4) would raise Constitutional problems."<sup>225</sup> The court stated that this may happen if a defendant's alleged offenses were outside the scope of "core conduct" of domestic violence, but did not define "core conduct."<sup>226</sup>

In practice, ARE 404(b)(4) has greatly strengthened prosecutors' ability to prove their domestic violence cases beyond a reasonable doubt.<sup>227</sup> Because domestic violence victims recant at such a high rate, and may abuse drugs to cope with the violence, ARE 404(b)(4) evidence is an invaluable prosecutorial tool to explain the victim's behavior to the jury and avoid victim blaming. Prosecutors state that ARE 404(b)(4) keeps the focus of the truth-seeking process on holding the defendant accountable for his actions. In one case, a victim with a substance abuse problem had been kidnapped and beaten by the defendant, her recidivist batterer boyfriend.<sup>228</sup> The prosecutor was able to admit the medical records of the defendant's ex-wife, who had formerly been beaten by the defendant and sought medical attention.<sup>229</sup> These medical records corroborated the current victim's history of abuse by the defendant and assisted the jury to look past the victim's substance abuse problem and find beyond a reasonable doubt that the defendant committed the charged offense.<sup>230</sup>

#### *D. Evaluation of Selected States That Admit Other Acts of Domestic Violence Under Expansive Nonpropensity Theories*

In some states, courts have permitted evidence of other acts of domestic violence to be admitted under noncharacter theories not specified in FRE 404(b),<sup>231</sup> but rather unique to their own state efforts to success-

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

224. *Id.*

225. *Kaser*, 2001 WL 540555, at \*3. See ALASKA STAT. § 18.66.990(3)(Michie 2000) for definition of domestic violence in Alaska.

226. *Kaser*, 2001 WL 540555, at \*3.

227. Telephone Interview with Sara L. Gehrig, Assistant District Attorney, Fairbanks, Alaska District Attorney Office (Feb. 2002) (stating that admission of 404(b)(4) evidence makes their cases ten times stronger).

228. *Id.*

229. *Id.*

230. *Id.*

231. FED. R. EVID. 404(b): "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

fully prosecute domestic violence cases. The states highlighted below permit evidence of other acts of domestic violence under theories significantly more expansive than states that follow the traditional enumerated noncharacter theories in FRE 404(b). These broad theories can be effective tools in domestic violence prosecutions and are thus worthy of attention.

### 1. *Colorado*

Colorado's Rules of Evidence (CRE) 404(b) contains the traditional permissible theories upon which to admit other acts evidence.<sup>232</sup> Namely, CRE 404(b) allows admission of other acts evidence for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>233</sup> However, Colorado's approach differs from other states in that its statute is specifically aimed at evidence of other acts of domestic violence.<sup>234</sup> In response to the unique circumstances of domestic violence cases—specifically that they frequently are "cyclical in nature" and "involve patterns of abuse" that "can consist of harm with escalating levels of seriousness"—the Colorado General Assembly enacted Colorado statute section 18-6-801.5 in 1994 to address these issues.<sup>235</sup> The statute gives the trial court discretion to admit other acts of domestic violence committed by the defen-

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therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."

232. COLO. R. EVID. 404(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 he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

233. *Id.*

234. COLO. REV. STAT. ANN. § 18-6-801.5 (West 2002).

235. *Id.* § 18-6-801.5(1). Domestic violence—evidence of similar transactions

(1) The general assembly hereby finds that domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness. The general assembly therefore declares that evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence.

(2) In criminal prosecutions involving domestic violence in which the defendant and the victim named in the information have engaged in an intimate relationship as of the time alleged in the information, evidence of any other acts of domestic violence between the defendant and the victim named in the information, and between the defendant and other persons, constitute other acts or transactions for the purposes of this section, and the court may authorize the admission of evidence as provided in subsection (3) of this section.

(3) The proponent of evidence of other acts or transactions under this section shall advise the trial court by offer of proof of such evidence and shall specify whether the evidence is offered to show a common plan, scheme, design, identity, modus operandi, motive, or guilty knowledge or for some other purpose.

(4) Upon the offer of proof under subsection (3) of this section, the trial court shall determine whether the probative value of the evidence of similar acts or transactions is substantially outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or misleading of the jury if the evidence is allowed or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(5) Upon admitting evidence of other acts or transactions into evidence pursuant to this section and again in the general charge to the jury, the trial court shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it.

dant, including acts committed against a prior victim, for such nonpropensity purposes as “common plan, scheme, design, identity, modus operandi, motive, or guilty knowledge or for some other purpose.”<sup>236</sup>

In cases where section 18-6-801.5 has been applied, the appellate courts have upheld other acts evidence in domestic violence cases for such traditional purposes as common scheme<sup>237</sup> and intent.<sup>238</sup> However, in *People v. Raglin*, the Colorado Court of Appeals applied section 18-6-801.5 and upheld the trial court’s admission of other acts evidence for the nonpropensity purpose of showing the defendant’s attitude toward the victim.<sup>239</sup> The term *attitude* was not expounded upon by the appellate court and seems to suggest admissibility of a wide range of acts within the domestic violence spectrum.<sup>240</sup> The purpose of showing the defendant’s attitude toward the victim is not enumerated in CRE 404(b), nor is it specified in section 18-6-801.5.<sup>241</sup> Now that the purpose of the defendant’s attitude toward the victim has been sanctioned as admissible by the court of appeals, prosecutors have a wider opening in which to introduce other acts evidence.<sup>242</sup>

## 2. *Kansas*

Kansas’s rules of evidence disallow admission of other act evidence for propensity purposes.<sup>243</sup> However, under Kansas Statute section 60-455, other acts are admissible “when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”<sup>244</sup> As early as 1982, the Supreme Court of Kansas interpreted Kansas Statute section 60-455 to allow evidence of marital discord between the defendant and victim.<sup>245</sup> In *State v. Green*, other acts evidence between the same parties was held

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236. *Id.* § 18-6-801.5(2)–(3).

237. *People v. Gross*, 39 P.3d 1279, 1282 (Colo. Ct. App. 2001).

238. *People v. Ramirez*, 18 P.3d 822, 829 (Colo. Ct. App. 2000).

239. *People v. Raglin*, 21 P.3d 419, 424 (Colo. Ct. App. 2000).

240. *Id.* The court also pointed out that the trial court’s admission of other act evidence for the purpose of showing the defendant’s attitude had support in *People v. Hulsing*, 825 P.2d 1027 (Colo. App. 1991), which upheld admission of other act evidence in a domestic violence case to show malice and motive. *Id.* In *Raglin*, the defendant was convicted of first degree murder and appealed the admission of evidence that defendant on separate occasions had previously threatened the victim with a gun, told the victim: “If I can’t have you, no one will. I’ll kill you first,” the defendant also hit the victim, entered the victim’s car without permission, and caused abrasions on the victim’s neck and tore the victim’s clothing during an argument. *Id.*

241. COLO. REV. STAT. § 18-6-801.5 (2001).

242. While there may be trial court cases where prosecutors introduce other act evidence for the purpose of showing the defendant’s attitude toward the victim, these cases have not been appealed and decided upon in the Colorado appellate courts as of February 26, 2003.

243. KAN. STAT. ANN. § 60-455 (West 2001).

244. *Id.*

245. *State v. Green*, 652 P.2d 697, 701 (Kan. 1982).

admissible to establish a continuous course of conduct between those parties or to corroborate the victim's testimony.<sup>246</sup>

The admissibility of other acts evidence to show prior discord has been routinely used by domestic violence prosecutors despite its absence as an enumerated permissible theory in Kansas Statute section 60-455.<sup>247</sup> The purposes of "continuing course of conduct" and "marital discord" are most successful when used in cases where the other acts involve the current victim.<sup>248</sup> Again, the Kansas Supreme Court's admission of other acts evidence for the purpose of showing marital discord and continuing course of conduct is illustrative of some state courts' willingness, through common law, to increase the nonpropensity purposes under which prosecutors can introduce other acts evidence and thus find ways to hold recidivist batterers accountable for their misconduct. Although these purposes are nonpropensity uses, their generality and legal malleability place them much further along the continuum toward propensity evidence.

### 3. *Minnesota*

In Minnesota, evidence of other acts is generally inadmissible for propensity purposes to prove that the defendant acted in conformity with that character on a particular occasion.<sup>249</sup> However, other acts evidence may be admitted for nonpropensity, limited purposes.<sup>250</sup> Consistent with Minnesota Rule of Evidence (MRE) 404(b), the Minnesota Supreme Court in *State v. Bauer*<sup>251</sup> held that evidence of a defendant's other acts may be admitted "for the purpose of illuminating the relationship of defendant and [victim] and placing the incident with which defendant was charged in proper context."<sup>252</sup> This common law rule exception to MRE 404(b) significantly expands the usefulness of noncharacter theories for domestic violence prosecution.

Minnesota also has a statutory provision concerning evidence of domestic violence. Minnesota state law allows for admission of a defen-

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246. *Id.*

247. Survey Response from Jan Satterfield, County Attorney, Butler County, Kansas, Office of the County Attorney (Dec. 10, 2001) [hereinafter Satterfield Survey] (on file with University of Illinois Law Review); E-mail Correspondence with Jacquie Spradling, Assistant District Attorney, Johnson County District Attorney's Office, Olathe, Kansas (Nov. 2001).

248. Satterfield Survey, *supra* note 247.

249. MINN. R. EVID. 404(a) (2002).

250. MINN. R. EVID. 404(b) (including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

251. 598 N.W.2d 352 (Minn. 1999); *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997) (holding that evidence that the defendant previously tried to poison the murder victim was relevant to show the "strained relationship"); *see also State v. Folkers*, 562 N.W.2d 5 (Minn. Ct. App. 1997) (holding that evidence of a tumultuous relationship with a homicide victim, including physical abuse, is admissible to show the history of the relationship); *State v. Elvin*, 481 N.W.2d 571 (Minn. Ct. App. 1992) (holding that evidence of previous domestic violence is admissible to illuminate relationship between defendant and victim).

252. *Bauer*, 598 N.W.2d at 364 (quoting *State v. Volstad*, 287 N.W.2d 660, 662 (Minn. 1980)).

dant's other acts of domestic violence, such as violation of an order of protection, "unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>253</sup> Minnesota statute chapter 634.20 was first enacted in 1985<sup>254</sup> and it has been interpreted not as permitting propensity evidence, but rather as allowing evidence of the history of the victim and defendant's relationship.<sup>255</sup> The statute applies to similar conduct of the accused against the instant victim of domestic violence or against other family or household members.<sup>256</sup> This law has proved useful to prosecutors who employ it to alert judges that the Minnesota legislature intended to increase awareness of the importance of other acts evidence in domestic violence cases.<sup>257</sup>

The Minnesota statute was tested in *State v. Waino*,<sup>258</sup> where a Minnesota appellate court held that the trial court testimony from the victim that the defendant had previously beaten and threatened her was admissible in the prosecution for assault, as this testimony involved similar prior conduct by the defendant towards the same victim and explained the context in which the charged assault occurred.<sup>259</sup> The appellate court held that the risk of unfair prejudice of this testimony was mitigated by the trial court's cautionary instruction to the jury.<sup>260</sup>

When the victim in *Waino* sought medical attention for injuries received on the date of the charged incident, she initially told the doctor

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253. MINN. STAT. ANN. § 634.20 (West 2002). *Evidence of conduct.* Evidence of similar prior conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Similar prior conduct" includes, but is not limited to, evidence of domestic abuse, violation of an order of protection under section 518B.01; violation of a harassment restraining order under section 609.748; or violation of section 609.749 or 609.79, subdivision 1. "Domestic abuse" and "family or household members" have the meanings given under section 518B.01, subdivision 2. *Id.*

254. *State v. Waino*, 611 N.W.2d 575, 578 (Minn. Ct. App. 2000).

255. Survey Comment from Alan Harris, Supervisor of the Domestic Abuse Division, Hennepin, Minnesota Prosecutors' Office (Feb. 2002).

256. MINN. STAT. ANN. § 634.20.

257. Survey Response from Jeanne Schleh, Assistant County Attorney, Ramsey County, Minnesota (Nov. 2001) [hereinafter Schleh Survey].

258. 611 N.W.2d 575.

259. *Id.* at 579. The victim testified that prior to the date of the charged offense, the defendant "beat her in a car and rammed her head against the dashboard. He told her not to flinch, and every time she flinched he hit her again. He dragged her from the vehicle and into the house. He beat her on the head with a telephone." In the charged incident the defendant "beat her, pulling her hair, throwing her head into the wall and kneeling her." An X-ray following the beating revealed two fractured ribs. *Id.* at 577.

260. *Id.* at 579 (allowing a jury instruction in which the trial court stated, "[D]uring the course of this trial, you also [] heard evidence about the prior relationship between [the defendant] and [the victim]. This evidence has been presented to you for the limited purpose of assisting you in determining whether [the defendant] committed the acts with which he is charged in the Complaint and relating to [the charged incident date]. You are instructed that [the defendant] is not being tried for and may not be convicted for anything occurring at any other time."). *Id.* at 578.

that the pain in her abdominal area was due to a previous fall; later, she told the doctor the truth about the beating.<sup>261</sup> Upon learning that the victim's injuries were due to domestic violence, the hospital staff notified the police.<sup>262</sup> The victim initially did not want to talk to the police because of fear of retaliation, feelings of powerlessness, and a belief that no one could help her.<sup>263</sup> Eventually, the victim decided to proceed with criminal charges and testified as to the beating she suffered on the date of the charged incident, as well as other beatings during the prior twelve months.<sup>264</sup> The defendant argued that the victim's ribs were cracked in a fall that predated the charged incident date.<sup>265</sup> Arguably, in the absence of other acts evidence and given the victim's initial story of a "fall," the defendant's version might have created reasonable doubt among the jury.<sup>266</sup>

Prosecutors are usually able to introduce in their case-in-chief other acts evidence for the purpose of showing history of the relationship.<sup>267</sup> Other acts evidence has proved invaluable in obtaining pleas and guilty verdicts in domestic violence cases.<sup>268</sup> The other acts evidence greatly assists the jury in assessing the victim's credibility and in understanding how the charged offense occurred.<sup>269</sup> If this evidence is excluded, it is usually because the other acts evidence is too dissimilar in facts or too remote compared to the current charge.<sup>270</sup> Unlike other acts evidence in nondomestic violence cases, other acts evidence in domestic violence cases to show the history of the relationship does not require pretrial notice to the defendant because the defendant is presumed to know his family history.<sup>271</sup> However, in practice, prosecutors routinely disclose this to the defense before trial.<sup>272</sup>

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261. *Id.* at 577.

262. *Id.*

263. *Id.*

264. *Id.* at 577-78.

265. *Id.* at 579.

266. *Id.* In response to the defendant's assertion, the appellate court stated that the "evidence at trial made it abundantly clear that there had never been any fall—the fall was a cover story made up by [the victim] because of her fear of retaliation by [the defendant]." *Id.*

267. Schleh Survey, *supra* note 257.

268. *Id.* Survey Response from Stephen N. Betcher, Goodhue County Attorney, Red Wing, Minnesota (Mar. 20, 2002) [hereinafter Betcher Survey].

269. Betcher Survey, *supra* note 268; Schleh Survey, *supra* note 257.

270. Schleh Survey, *supra* note 257.

271. *State v. Black*, 291 N.W.2d 208, 215 (Minn. 1980); *State v. Enger*, 539 N.W.2d 259, 263 (Minn. Ct. App. 1995); *see also State v. Doughman*, 384 N.W.2d 450, 456 (Minn. 1906) (holding that "the notice procedure serves to guard against the injustice of using evidence against an accused who is unprepared to demonstrate that such evidence is unsubstantiated").

272. Schleh Survey, *supra* note 257.

*E. Evaluation of Illinois's Evidence Law, Which Does Not Allow Admission of Other Acts of Domestic Violence for Propensity Purposes*

Illinois evidence rules are based on common law, which supports a traditional ban on other acts evidence admitted for propensity purposes.<sup>273</sup> Specifically, evidence showing the commission of other acts is admissible in Illinois if it is relevant for any purpose other than to show the defendant's propensity to commit crime.<sup>274</sup> Other acts evidence is admissible for a broad range of purposes, similar to those found in FRE 404(b), including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>275</sup> The other acts do not need to be identical to the charged crime to be admitted; they only need to be relevant to some proper purpose.<sup>276</sup>

Evidence of other acts may be used to show the defendant's previous domestic violence towards the victim under theories of demonstrating intent and motive. For instance, in *People v. Illgen*, the defendant shot his ex-wife and claimed it was an accident, but the evidence admitted of the almost two-decade-long history of domestic violence crippled this defense.<sup>277</sup> A "general similarity" between the other acts and the charged offense is sufficient for admission of other acts evidence to show lack of innocent frame of mind.<sup>278</sup> In *People v. Abraham*, where the defendant was charged with attempted murder and aggravated battery, the appellate court held that the defendant's other acts of domestic violence toward the victim tended to establish "a hostility on defendant's part toward the victim . . . Thus, they [were] probative of defendant's intent to kill [the victim] as well as his motive to kill her."<sup>279</sup>

The *Abraham* case is instructive as to how the ban on propensity evidence may perform a great disservice for many domestic violence victims. In *Abraham*, the court admitted the defendant's five other acts of domestic violence: holding a knife to the victim's throat, stomping on the victim's foot, beating the victim after she thwarted the defendant's suicide attempt, pouring gasoline in the victim's home and igniting a cloth as he threatened to kill the victim's family, and beating the victim, including striking her face with a dresser drawer.<sup>280</sup> The charged offenses of attempted murder and aggravated battery involved the defendant threat-

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273. See *People v. Kimbrough*, 485 N.E.2d 1292, 1295-96 (Ill. App. Ct. 1985).

274. See *id.* at 1292.

275. *People v. Richardson*, 528 N.E.2d 612, 617 (Ill. 1988). But see 725 ILL. COMP. STAT. ANN. 5/115-20 (West 2002) (admitting prior domestic violence convictions in domestic violence cases).

276. *Richardson*, 528 N.E.2d at 619-20.

277. *People v. Illgen*, 583 N.E.2d 515, 519-26 (Ill. 1991); see also *People v. McCarthy*, 547 N.E.2d 459, 464 (Ill. 1989) (holding in a murder case that the state was permitted to introduce evidence that the defendant had previously broken car windows of victim's family member and, on another instance, struck the victim several times).

278. *Illgen*, 583 N.E.2d at 523.

279. *People v. Abraham*, 753 N.E.2d 1219, 1227 (Ill. App. Ct. 2001).

280. *Id.* at 1225-26.

ening the victim, removing the phone from the wall, and stabbing her with a knife.<sup>281</sup> Notice the dissimilarity of many of the other acts of previous domestic violence compared with the incident in the charged offense. The dissimilarity in facts between the other acts and the charged incident make it a much tougher hurdle for the prosecution to admit the other acts of domestic violence. The admission of other acts on an intent theory requires one of the lowest degrees of similarity between the other acts and the charged offense.<sup>282</sup> Thus, the intent theory offers one of the more promising theories under which the prosecution can get the other acts admitted. However, the defendant in *Abraham* asserted that the other acts evidence was inadmissible because his intent was not at issue at trial: he did not claim that the stabbing was an accident; intent was not an issue because it was inferable from his actions.<sup>283</sup> The appellate court indicated that this might have been persuasive had the defendant been charged only with aggravated battery, rather than attempted murder where the prosecution had to prove a specific intent to kill.<sup>284</sup> The implication of this dictum is that the other acts evidence was admitted solely because the defendant went the extra step and attempted to kill the victim. Had the defendant not tried to kill the victim, the jury might not have heard about the prior threats to and beatings of the victim by the defendant, and thus may have discounted the defendant's instant acts as a one-time occurrence.<sup>285</sup> Because domestic violence is an ongoing and escalating pattern of abuse, many victims endure beatings classified as batteries and aggravated batteries before the defendant tries to kill them.<sup>286</sup> Under Illinois common law, there are presumably a large number of domestic violence victims<sup>287</sup> whose testimony on other acts of domestic violence will never reach a jury or judge's ears because of the state's adherence to limited purposes for admission of other acts.

Additionally, *People v. Knight* illustrates the detrimental effect on domestic violence victims when propensity evidence is disallowed.<sup>288</sup> In *Knight*, the defendant was charged with aggravated criminal sexual assault and two counts of domestic battery.<sup>289</sup> The victim alleged that in response to her remark about her sex life with her previous boyfriend, the defendant became enraged and began beating her, by grabbing her shirt,

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281. *Id.* at 1222.

282. *Illgen*, 583 N.E.2d 515, 523 (stating that a general similarity is sufficient when offered to prove "the absence of an innocent frame of mind or the presence of criminal intent").

283. *Abraham*, 753 N.E.2d at 1228.

284. *Id.*

285. *Id.* (stating that evidence of prior acts "many have been useful to the jury in distinguishing attempted murder from aggravated battery, with its lower mental state requirement").

286. See *Hanna*, *supra* note 9, at 1889.

287. The Illinois Department of Public Aid provides statistics on the prevalence of domestic violence in Illinois. The agency estimates that more than 43,000 individuals in Illinois require domestic violence services each year and that there are 300,000 domestic violence victims in Illinois.

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

289. *Id.* at 332.

throwing her across the room, banging her head on the floor, kicking and punching her, and pulling her up the stairs by her hands and wrists.<sup>290</sup> The victim alleged that the defendant then sexually assaulted her.<sup>291</sup> At trial, the judge allowed the victim to testify that six weeks after the date of the charged incident the defendant told the victim, “if [she] ever slept with one of his friends again, he would break [her] legs and kill [her] . . . .”<sup>292</sup> The jury convicted the defendant on the two domestic battery charges.<sup>293</sup> The appellate court reversed the defendant’s conviction due to the admission of the statement and held that the statement was “irrelevant for any purpose for which it was offered, and any other purpose we can think of, and that the jury likely considered it only as showing a propensity on defendant’s part to commit crime.”<sup>294</sup> The appellate court explained that the statement was inadmissible on an intent theory since the defendant’s state of mind was not at issue because the defendant alleged that he was not present when the victim was beaten.<sup>295</sup> Motive was not a plausible theory on which to admit the threatening statement, according to the appellate court, because of the factual dissimilarity between making the threatening statement and the charged incident of being raped and beaten.<sup>296</sup> The theory of pattern of conduct likewise did not apply because of the factual dissimilarity between the instant charged incident and other statement.<sup>297</sup> The *Knight* case is illustrative of the uphill battle prosecutors have in properly admitting other domestic violence acts when the other act is factually dissimilar from the charged incident but nevertheless displays the defendant’s power and control over the victim. The *Knight* court essentially stated that the only purpose for which the prior threatening statement could be admitted would be for propensity purposes, which is inadmissible under Illinois common law.<sup>298</sup> Because domestic violence relationships involve patterns of abuse with often dissimilar tactics of violence and emotional abuse, domestic violence victims will be disserved by Illinois evidence law that narrowly defines admissibility of other acts of domestic violence.

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290. *Id.*

291. *Id.*

292. *Id.* The theory under which the trial court judge admitted this prior statement was to show the defendant’s “consciousness of guilt.” *Id.* at 333.

293. *Id.* at 333.

294. *Id.* at 335.

295. *Id.* at 334.

296. *Id.*

297. *Id.* (stating that in order for the pattern of conduct exception to apply, both the other act and the instant charged offense must “share peculiar and distinctive common features so as to earmark both crimes as the defendant’s handiwork”).

298. *Id.* at 335.

## IV. RECOMMENDATION

The successful prosecution of batterers is hindered by a confluence of factors unique to the crime of domestic violence. Specifically, domestic violence cases have an exceptionally high percentage of reluctant or recanting victims, and the batterer's violence is usually implemented in a way that minimizes the number of witnesses, often reducing the trial proceeding to a swearing contest where reasonable doubt is easily achievable.<sup>299</sup> Unless held accountable, batterers will continue to batter, leaving a series of victims in their wake.<sup>300</sup> Also, domestic violence cases often involve a pattern of ongoing and escalating abuse that appear factually dissimilar because they can involve such a wide spectrum of abusive behaviors designed to achieve power and control over the victim.<sup>301</sup>

When prosecuting the batterer, the potency of these factors diminishes with the introduction of other acts of domestic violence for propensity purposes. Other acts evidence to show propensity reveals to the fact finder a demonstrated pattern of conduct and thus can be a strong contributing factor toward holding the defendant accountable for the charged incident. The other acts evidence illuminates the batterer's past behavior toward the victim to show that the charged incident is not a fabrication, an isolated event, or an accident. Because the factual dissimilarities of domestic violence incidents often result in excluding other acts under traditional FRE 404(b) nonpropensity purposes,<sup>302</sup> an evidence rule allowing other acts for the purpose of showing propensity would give the fact finder a more complete and accurate picture as to the ongoing abuse inflicted upon the victim by the defendant.

To adequately protect current and future victims of domestic violence, the remaining forty-eight states should explore the feasibility of enacting evidence rules that admit other acts of domestic violence for the explicit purpose of showing propensity. California's and Alaska's evidence rules provide useful models on which to begin this analysis.<sup>303</sup> As a preliminary step, states should appoint legislative committees to review California's and Alaska's evidence rules, as well as their own state law, and seriously consider passage of a similar rule.

Cases in California and Alaska reveal that laws admitting other acts evidence to show propensity in domestic violence cases can ensure defendants' procedural rights.<sup>304</sup> Future evidence rules admitting other acts evidence to show propensity should likewise guarantee notice to the defendant, have a reasonable time period before which the other act is not allowed, preserve the applicability of a probative/prejudicial balancing

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299. See *supra* text accompanying notes 87–99.

300. See Hanna, *supra* note 9, at 1889.

301. See *supra* text accompanying notes 116–33, 138.

302. See *supra* text accompanying notes 116–33.

303. See *supra* Parts III.C.1, III.C.2.

304. See *supra* notes 156–70, 214–22 and accompanying text.

test, allow for rebuttal evidence, and ensure a straightforward jury instruction on the limited use of the other domestic violence acts. The lessons of California's and Alaska's evidence rules demonstrate a successful balance between the search for truth and justice on the one hand, and the defendant's rights on the other. The state of Illinois has a history of being proactive in combating domestic violence, and thus the issue of admitting evidence of other acts for propensity purposes provides yet another opportunity for Illinois to lead the other states in supporting effective and progressive laws that hold batterers accountable and respond to the reality of domestic violence.

## V. CONCLUSION

When the California and Alaska legislatures enacted CEC section 1109 and ARE 404(b)(4), they overturned centuries of evidence law tradition prohibiting the use of other acts evidence for propensity purposes. By enacting these innovative evidence rules, these state legislatures effectively marched into the relatively settled waters of evidence law governing prosecution of domestic violence cases, and started a typhoon. However, California's and Alaska's legislatures were justified in taking the next logical step and following the lead of the 104th Congress's sponsors of FRE 413, which first broke through the propensity evidence ban. The public policy reasons that underlay FRE 413 for prosecution of sexual assault cases clearly also apply to the prosecution of domestic violence cases, and thus bolster the necessity for CEC section 1109 and ARE 404(b)(4). It is time for the remaining states to support similar evidence rules that truly hold batterers accountable and bridge the gap between traditional evidence law and the reality of domestic violence.

