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A Proposal to Amend Rule of Evidence 404 To Admit "Prior Acts" Evidence in Domestic Violence Prosecutions

Corttany Brooks*

INTRODUCTION

One of the first things learned about Omar Mateen, the gunman who killed forty-nine people in the 2016 Pulse nightclub shooting, was that he reportedly abused his ex-wife.1 Similarly, Nikolas Cruz, the student charged in the Parkland, Florida mass shooting, had a history of domestic violence.2 Data on mass shootings from 2009 to 2015 reveal that “57 percent of the cases included a spouse, former spouse or other family member among the victims—and that 16 percent of the attackers had previously been charged with domestic violence.”3 Studies have yet to reveal what explains this correlation.4 However, one expert opines that domestic violence can serve as a “psychological training ground” for more serious attacks.5 One argument is that domestic violence is more prevalent than people believe, and it often carries lesser consequences for perpetrators than other kinds of violence.

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3 Id.
4 Id.
5 Id.
Individuals who use violence to control their intimate partners routinely avoid criminal conviction due to the difficulties of prosecuting domestic violence cases. This is because domestic violence creates a unique type of prosecution where physical evidence may be lacking and the victim often refuses to cooperate, recants, or is made unavailable. Although prosecutors have found ways to introduce evidence of prior domestic violence in limited circumstances, Rule of Evidence 404 generally precludes the use of evidence showing prior bad acts by defendants.

In this note, I argue that this evidence rule prevents the admission of highly probative evidence of prior abuse against current or past victims that not only provides the essential backdrop to understanding these cases—but also can show a defendant’s propensity to batter. This note proposes that the state of Indiana recognize the difficulty in proving domestic violence cases and adopt a categorical exception to the general prohibition on the admissibility of prior acts evidence in domestic violence criminal prosecutions.

This note proceeds in three parts. Part I provides background and discusses the difficulties of prosecuting domestic violence cases and the current admissibility of evidence in Indiana domestic violence criminal prosecutions. Part II discusses other approaches to the general inadmissibility of character evidence under the law, including California’s categorical exception for crimes of domestic violence and the Federal Rules of Evidence which have adopted exceptions for sexual offenses. Part III argues for the application of these other approaches to domestic violence prosecutions in Indiana.

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6 See Part I, Section A.
7 See id.
8 See Part I, Section B, infra.
9 See id.
I. DOMESTIC VIOLENCE AND THE ADMISSIBILITY OF CHARACTER EVIDENCE UNDER THE LAW

A. The Difficulties with Prosecuting Domestic Violence

Domestic violence occurs when one intimate partner uses physical violence, coercion, threats, intimidation, isolation, or emotional, sexual, or economic abuse to maintain power and control over the other intimate partner.\(^{10}\) There is no one physical act that characterizes domestic violence\(^{11}\)—punishable crimes encompass a continuum of behaviors ranging from domestic battery to criminal confinement, sexual abuse, strangulation, and homicide.\(^{12}\) These crimes know no economic, racial, ethnic, religious, age, or gender limits.\(^{13}\) Although male victims must be treated with the same concern and respect as female victims, women are statistically more likely to be abused, and the consequences of the violence are more severe.\(^{14}\)

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\(^{11}\) Notably, “[C]yberstalking is now a standard part of domestic abuse in the U.S.” According to an NPR survey of domestic violence shelters, 85% reported working with victims whose abusers tracked them through GPS, and 75% reported abusers listening in on them remotely using mobile apps. Aarti Shahani, Smartphones are Used to Stalk, Control Domestic Abuse Victims, NPR (Sept. 15, 2014, 4:22 PM), https://www.npr.org/sections/alltechconsidered/2014/09/15/346149979/smartphones-are-used-to-stalk-control-domestic-abuse-victims.


\(^{13}\) See Dynamics of Abuse, supra note 10.

\(^{14}\) The economic effects of violence against women are enormous; according to a CDC study commissioned by Congress to quantify these effects, the cost of intimate partner violence (including physical assault, rape, and stalking) “exceed[s] $5.8 billion each year, nearly $4.1 billion of which is for direct medical and mental health care
As women are victims in the majority of intimate partner violence incidents with the abusers predominately men, this is a gendered phenomenon. At least one in three women experience physical or sexual violence at the hands of an intimate partner, and half of all murdered women are killed by a current or former intimate partner. More than 90% of female intimate partner rape and sexual violence survivors reported their perpetrators as male.

Moreover, although these crimes can and do occur independently, they often occur jointly, committed by the same perpetrator against the same victim. In order to understand the dynamics of a particular case, it is essential to understand the broader continuum of violence in which these cases occur.

Violence against women was not consistently recognized as a social problem until attention was focused by the feminist reformers of the 1970s. What was previously dismissed by society as a “private matter” became recognized as domestic and eventually expanded to intimate partner violence.

As social attitudes towards services. The total costs of intimate partner violence also include nearly $0.9 billion in lost productivity from paid work and household chores for victims of nonfatal violence and $0.9 billion in lifetime earnings lost by victims of intimate partner homicide. DEPT HEALTH & HUMAN SERV., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES, 2 (2003).


See generally LENORE WALKER, THE BATTERED WOMAN (1979) (discussing two components of Walker's battered woman syndrome theory, the “cycle of violence” and “learned helplessness,” used to explain the phenomenon of ongoing domestic violence).

See id.


See id. Beating one’s wife, known as the right of chastisement, was long condoned by the common law. Yet, when the common law right of chastisement was abolished, the case law developed doctrines that continued effectively to shield domestic violence from public intervention (e.g., marital privacy and inter-spousal tort immunity);
family violence progressed, domestic violence became not only a social problem, but also a crime. Before pressure from activists, there were no battered women’s shelters or rape crisis policies, no studies on the frequency of spousal abuse or rape, and no discussion of sexual harassment in the workplace. In the years that followed these reformers, society has seen increased awareness of the harm caused by intimate partner violence, lawsuits by citizens against police departments for failure to protect them from such violence, and “changing social attitudes towards gender roles and the relationship between the sexes.” Consequently, “domestic violence is now studied by many disciplines (criminology, psychology, sociology, gender studies, and law) and is treated much more seriously by the legal system and by society as a whole.”

Despite social progress, convictions for crimes related to domestic violence are notoriously difficult to secure. Part of the problem stems from “residual patriarchal social attitudes about male prerogative [and] women’s roles.” However, another aspect of the difficulty of such prosecutions is lack of physical evidence or other

21 See Orenstein, supra note 19, at 143.
23 Joan Zorza, The Criminal Law of Misdemeanor Domestic Violence, 1970–1990, 83 J. CRIM. L. & CRIMINOLOGY 46, 53–60 (1992). In the 70s and 80s major class action lawsuits were filed on behalf of battery victims in California and New York. These suits resulted in settlement or consent judgments incorporating new policies, including pro-arrest mandates and efforts to inform victims of their right to obtain civil protective orders and other available services.
24 Orenstein, supra note 19, at 143–44.
26 Orenstein, supra note 19, at 144.
27 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. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE,
witnesses and, particularly, the fact that victims often do not cooperate. They regularly recant, refuse to testify or to appear for depositions, or simply ignore court-ordered subpoenas. The reasons behind these actions are diverse and complicated. A victim of intimate partner violence may still love the perpetrator and may not want to get him in trouble. Alternatively, the victim may feel ashamed and be unwilling to testify about abuse that she likely blames on herself. Victims regularly fear that they might lose their children or the ability to care for their children because the batterer is their only source of housing or income. Further, the victim may fear the accused and distrust the legal system’s ability to protect them from, not only the abuser, but from the abuser’s family and friends. Because domestic violence is rooted in a desire to control, survivors confront an increased risk when they attempt to leave their abuser—in fact, the moment when a survivor attempts to end the relationship is often the most dangerous.

Although it is sometimes simpler to discuss persons “of color” as if they constituted a single category, racial and ethnic differences can have disparate impact on the recorded occurrences of domestic violence. Although 12% of the population, African Americans are almost one quarter of spousal homicide victims and almost half (48%) of the victims of homicide by a dating partner. Further complicating the effect of domestic violence on this community, African Americans can be suspicious of the justice system and unwilling to participate in a system

**INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN:**
**FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 9, 14 (2000) (discussing survey results the National Violence Against Women Survey, herein “NVAWS”).

28 See Orenstein, supra note 19, at 144.
29 See id.
30 See id.
31 See id.
32 See id.
33 See id. at 145; see also Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issues of Separation, 90 MICH. L. REV. 1, 58 (1991).
34 FAMILY VIOLENCE STATISTICS ON STRANGERS AND ACQUAINTANCES, U.S. DEPT. OF JUSTICE tbl.3.2 (2005).
that has historically treated Black males discriminatorily. Latinas are particularly vulnerable to domestic violence, for reasons that include limited English proficiency, lower levels of educational achievement, uncertain immigration, and overrepresentation in low-paying jobs. Like African American women, Latinas are often suspicious of police, prosecutors, and judges, who may be culturally distant from the community and have acted repressively toward it in the past.

In terms of social costs, every time a survivor goes to court, they must take time off from work, find childcare for children if they are not in school, miss opportunities, lose money, and go through the traumatic experience of retelling their story again and again.

Further complicating these cases is the criminal law’s incident-based approach to defining unlawful behavior, which is ill-suited to redress the ongoing, patterned nature of battering. Abusive behavior does not occur as a series of discrete events—a more accurate description of domestic violence is “premised on an understanding of coercive behavior of power and control” that takes place on a continuum. Because criminal prosecution is one of the few processes that can interrupt this escalation pattern unique to domestic violence, we must be willing to look at patterned behavior during the

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37 See Jenny Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. THIRD WORLD L.J. 231, 246–50 (1994). Note that it is outside the scope of this Article’s purpose to explore all the diverse reasons as to why individuals might remain in abusive relationships. That said, it is significant to point out that much of the academic community continues to ask that same question, focusing on the victims of domestic violence, instead of on the batterers.
39 Id. at 965.
criminal prosecution, or we neglect our opportunity to effectively address the problem at all.

B. The Current Scheme of Admissibility of Evidence in Domestic Violence Cases: Crawford through Character

Many prosecutors, facing the reality that victims regularly do not cooperate, can use strategic lawyering to prosecute “victimless” cases. However, such prosecution policy depends heavily upon the admissibility of the victim’s out-of-court hearsay statements to police and 911 operators.

The Sixth Amendment to the Constitution provides that in criminal prosecutions the accused shall enjoy the right “to be confronted with the witnesses against him.” The Supreme Court has interpreted this clause as providing various guarantees to criminal defendants, including the right to face-to-face presentation of witnesses at trial. The Confrontation Clause and hearsay doctrine have intertwined rules and purposes (some evidence that would be admitted under a hearsay rule may be excluded by the Confrontation Clause, and evidence that would be admitted under the Confrontation Clause may be excluded by a hearsay rule).

In the seminal Confrontation Clause case Crawford v. Washington, the Supreme Court held that the Sixth

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40 This note is written under the premise of no-drop prosecution policies, which I have experienced working in Marion County, Indiana. “Evidence-based” prosecutions are those in which “the victim's testimony [is] no longer the sole or primary source of evidence,” and “no-drop” prosecutions proceed regardless of a victim's cooperation. ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 39 (2d ed. 2008). This Note does not seek to address the effectiveness of these policies herein.

41 Sources of evidence may include: calls from inmates to their victims (“jail calls”), 911 calls, photographs, body and in-car videos, excited utterances (IND. R. EVID. 803 (2)), and statements for medical treatment (IND. R. EVID. 803(4)).

42 U.S. CONST. amend. VI.


Amendment requires two showings to introduce a “testimonial” out of court statement into evidence against a criminal defendant: (1) the unavailability of the witness, and (2) the prior opportunity to cross-examine the witness, overturning a long line of jurisprudence, including Ohio v. Roberts. Numerous articles followed discussing Crawford, often finding the defining of “testimonial” statements a difficult and unbalanced task. In Indiana and across the United States this opinion further impeded the prosecution of domestic violence cases, where victims are often unavailable for cross-examination due to the many reasons aforementioned in Part I, Section A.

The customary tools of introducing hearsay statements in domestic violence prosecutions through hearsay exceptions have become severely limited. For example, after Davis v. Washington, a post-Crawford decision by the U.S. Supreme Court, if a prosecutor wants to admit evidence of a recording of a 911 call when the witness is not available for cross-examination, the statement must be made when an ongoing emergency is present. If the statement becomes a narrative and is more akin to the victim “testifying” rather than seeking help, the statement cannot be admitted. While portions of 911 calls can still be admitted into evidence under Davis, many recordings are excluded if a judge finds the emergency ended. Further, in Hammon v. Indiana, the U.S. Supreme Court held that when a responding officer arrives, if there is no ongoing emergency, the statements...
made to the responding officer are testimonial. This means that any statement made to an officer who is investigating a crime rather than responding to a call for help will be held inadmissible if the victim is subsequently excluded as a witness.

In addition to these cases, current Indiana evidence law generally prohibits the introduction of a defendant's past acts of domestic violence. This prohibition affects domestic violence prosecutions because domestic violence is a highly recidivistic crime, and such rules prevent the admission of highly probative evidence of prior abuse against victims that provides essential context to cases and tends to show a defendant's propensity to batter. The *Crawford* decision and subsequent cases, paired with Indiana evidence law banning a defendant's prior acts of domestic violence admission into evidence, limit the tools available to prosecutors in already difficult domestic violence prosecutions, which can tip the balance at trial in favor of the defendant.

The admission of prior acts is governed by Indiana Rule of Evidence 404(b), which tracks Federal Rule of Evidence 404(b) almost verbatim. The Indiana rule provides, in relevant part, that “[e]vidence of a crime, corroborated by specific evidence of a prior bad act, may be admissible to prove a person's character in order to show that he acted according to the character thereby proven.”

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51 *Id.* at 822 (reversing Hammon v. State, 829 N.E.2d 444 (Ind. 2005)).
53 *Ind. R. Evid.* 404(b).
54 *See generally* Edward W. Gondolf, *A 30-Month Follow-Up of Court-Referred Batters in Four Cities*, 44 *J. Offender Therapy & Comp. Criminology* 111 (2000). Nearly two-thirds (61%) of domestic violence recidivism occurred within six months of the previous offence, with slightly more than one-third (37%) of the repeat victimization occurring within three months. Recidivism occurs sooner following the previous offence when using self-reported data compared to data collected from official criminal justice statistics.
55 See *Crawford*, 541 U.S. 36; see also *Clark* v. State, 808 N.E.2d 1183, 1189 n.2 (Ind. 2004) (noting that Crawford is inapplicable where the declarant testifies at trial); *but see* Fowler v. State, 829 N.E.2d 459, 464 (Ind. 2005) (affirming that a statement given to police who arrived at the scene and began informally questioning those around while the victim is still bleeding and crying from domestic violence was not testimonial and the evidence fell under the excited utterance exception and outside the Supreme Court's decision in *Crawford*).
56 *Ind. R. Evid.* 404(b); *cf.* *Fed. R. Evid.* 404(b).
wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”

Evidence of prior acts may, however, be admissible for other purposes, such as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Rule 404(b)'s list of permissible purposes is illustrative but not exhaustive.

When assessing the admissibility of 404(b) evidence, Indiana courts currently: (1) determine whether the evidence of other crimes or wrongs is relevant to a matter at issue—other than the defendant’s propensity to commit the charged crime; and (2) then balance the probative value of the evidence against its prejudicial effect pursuant to Ind. R. Evid. 403. Notably, the Supreme Court of Indiana has repeatedly held that a defendant’s prior acts of violence or threats of violence are “usually admissible” under Rule 404(b) to show the relationship between the defendant and the victim, and to show the defendant’s motive where the charge is battery or murder.

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57 IND. R. EVID. 404(b).
58 Id.
60 See id.; see also IND. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”).
61 E.g., Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997). See also, e.g., Spencer v. State, 703 N.E.2d 1053, 1056 (Ind. 1999) (holding that the state’s introduction of three prior batteries by defendant against the victim was not an abuse of discretion of the trial court to prove identity and motive); Ross v. State, 676 N.E.2d 339, 346 (Ind. 1996) (explaining defendant’s prior acts are usually admissible to show the relationship between the defendant and the victim in cases of murder); Elliott v. State, 630 N.E.2d 202, 204 (Ind. 1994) (finding appellant’s prior threats and statements concerning the victim admissible to show the relationship between the parties and appellant’s motive, plan, and absence of accident); Price v. State, 619 N.E.2d 582, 584 (Ind. 1993) (finding evidence of defendant’s prior attacks upon the victim was admissible to show the parties’ relationship and defendant’s motive and intent in the commission of the crime).
For example, in *Iqbal v. State*, the trial court allowed use of bad acts (a violent relationship with the victim) occurring within one year of the victim’s death to be introduced, although the State had evidence dating back several years.\(^{62}\) In this case, “the evidence was relevant to show motive, relationship between the parties, and absence of mistake.”\(^{63}\) The court found that the trial court had properly balanced the prejudicial effect of the prior acts against the probative value by limiting the prior acts which could be introduced to those occurring within one year of the murder.\(^{64}\)

Further, the Indiana Supreme Court allowed the admission of prior act evidence when defendants claimed the victim’s death was accidental. In *Crain v. State*, the Court allowed the admission the defendant’s two convictions for battery against his wife, in addition to evidence of four charges against the defendant for battering his wife that were pending at the time of her death.\(^{65}\) In light of the defendant’s claim that he accidentally killed his wife, the Court found these instances of prior act evidence admissible under Rule 404(b) because each was “relevant and probative in that it directly involved and shed light on Defendant’s relationship with [the victim].”\(^{66}\) Moreover, in *McEwen v. State*, evidence of the defendant’s previous battery against the victim was admissible under Rule 404(b).\(^{67}\) The Court stated “[The prior act evidence] was relevant to show a pattern of hostility . . . illustrated the depth of possible motive and was also relevant to assessing [the defendant’s] claim that [the victim] was stabbed accidentally.”

Any incident of prior act evidence is nonetheless excluded if its probative value is substantially outweighed by the danger of unfair prejudice.\(^{68}\) While these examples

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\(^{63}\) *Id.* at 408.
\(^{64}\) *Id.* at 408–09.
\(^{65}\) 736 N.E.2d 1223, 1235 (Ind. 2000).
\(^{66}\) *Id.* at 1235–36 (citing Evans v. State, 727 N.E.2d 1072, 1080 (Ind. 2000)).
\(^{67}\) 695 N.E.2d 79, 87–88 (Ind. 1998).
\(^{68}\) *See generally* IND. R. EVID. 403.
show Indiana is willing to admit prior acts evidence for certain purposes, these are often the most gruesome batteries and murders. In application, even where victims do cooperate, their testimony is limited to the discrete incident(s) for which the defendant is charged, and any past incidents that would provide context are excluded for the fear that the information will lead to the 404(b) forbidden inference. Current approaches do, however, indicate that Indiana courts may be willing to take that next step towards a categorical exception for domestic violence cases.

C. Problems with the Current Scheme: Why Indiana, Why Now?

Despite increased statewide attention to the problem of domestic violence in Indiana, reported incidents are only increasing. Year-to-year crisis calls are on the rise—from about 16,500 in 2010 to 23,000 in 2015 for central Indiana alone—an average of nearly fifteen calls every minute. Another side of the problem that has received less attention is that most cases of domestic violence are unreported—indicating that reported cases of domestic violence represent only a small part of the problem when compared with prevalent data.

69 See generally IND. R. EVID. 404(b).

70 For example, the Indianapolis Metropolitan Police Department’s (IMPD) predictive policing initiative, Baker One, is a “proactive approach to policing that involves identifying individuals at risk for perpetrating domestic violence, providing these individuals with increased access to supportive services, and promoting a heightened system response for incidents involving these individuals.” DOMESTIC VIOLENCE NETWORK, STATE OF DOMESTIC VIOLENCE IN CENTRAL INDIANA, 17 (2016).

71 Id. at tbl.1. For the purposes of this report, Central Indiana is defined as Marion County and the eight surrounding counties: Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Morgan, and Shelby.

72 JENNIFER TRUMAN, LYNN LANGLETON, & MICHAEL PLANTY, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, CRIMINAL VICTIMIZATION 2012, tbl.4 (2012). From 2003 to 2012, only about 55% of domestic violence was reported to police.
According to one report, “between 2009 and 2010, 116 women, children, and men died in Indiana when domestic abuse escalated to lethal levels of violence.”\(^73\) Domestic violence deaths were reported in only 38 of Indiana’s 92 counties, so these numbers are not representative for the entire state.\(^74\) The youngest identified victim was a seven-month-old baby and the eldest was an 80-year-old senior.\(^75\) Ninety-one percent of homicides attributed to domestic violence during this period were perpetrated by men.\(^76\) Charges were pursued against perpetrators in 52 of the 85 identified incidents.\(^77\) Lastly, of the 52 incidents that resulted in charges, 42 perpetrators were convicted.\(^78\)

By comparison, in 2013, the Marion County Prosecutor’s Office reviewed 5,581 domestic violence cases.\(^79\) Of the cases where charges were filed (both felonies and misdemeanors), 59% were dismissed.\(^80\) In my experience working at this office as a domestic violence and sex crimes intern, nearly all dismissed cases are due to lack of victim cooperation.

Separately, in an Indiana crime victimization survey, respondents were asked questions about domestic violence including various types of physical violence, threats of violence, frequency of violence, whether any of

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\(^73\) **Indiana Domestic Violence Fatality Review Report 2009-2010, Indiana Coalition Against Domestic Violence** (herein “ICADV”), 1.

\(^74\) *Id.* at 5. Indiana does not have a system for collecting data related to domestic violence homicides. The ICADV contacted coroners, law enforcement, and shelters to request relevant records. These requests for records received approximately a 60% response rate.

\(^75\) *Id.* at 1.

\(^76\) *Id.* at 9.

\(^77\) *Id.* at 13 (“[C]harges were irrelevant in cases where the perpetrator committed suicide and were not brought against individuals determined to be taking defensive or protective action.”).

\(^78\) *Id.* at 14 (“[T]hree were found not guilty, sentencing was unknown for three cases, three trials were still pending at the time of publication[,] and one alleged perpetrator died in incarceration prior to trial.”).

\(^79\) **Domestic Violence Network, An Update on Domestic Violence in the Criminal Justice System: Marion County, IN, 31** (Nov. 2014).

\(^80\) *Id.*
the incidents were reported to police, and, if not, why the crime was not reported.\textsuperscript{81} Of the 2,500 survey participants, 1.8\% indicated they were victims of domestic violence in the last year.\textsuperscript{82} When applying this figure to the adult population, the potential number of Indiana domestic violence victims is 87,759 during the 12-month survey period.\textsuperscript{83}

Though not fully representative, the numbers between potential crimes committed, crimes charged, and charges that resulted in meaningful sentences are unconscionable.\textsuperscript{84} National statistics similarly reveal under-reporting, under-enforcement, and inadequacy of punishment in domestic violence prosecutions that lead to conviction.\textsuperscript{85} Moreover, researchers have indicated that current penalties are not effective in the reduction of recidivism.\textsuperscript{86} Studies also reveal simple prosecution does not deter further criminal abuse.\textsuperscript{87} The key to reducing re-abuse is dependent upon the sentence imposed (for example, intrusive sentences, such as jail, work release, electronic monitoring and/or probation reduce recidivism in domestic violence cases).\textsuperscript{88} Fines and suspended

\textsuperscript{81} \textsc{Indiana Criminal Justice Institute, 2010 Indiana Criminal Victimization Survey: Sexual Assault and Domestic Violence}, 4 (2012).
\textsuperscript{82} \textit{Id.} at tbl.2. Domestic violence in the survey was defined as a slap, punch, kick or push; hitting with an object; using a weapon; threatening with violence or to kill survey respondents.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} This Note acknowledges the difference between charged crimes of domestic violence and overall potential domestic violence incidents, however, the goal of this section is to provide statistics on the scope of this issue in Indiana. See supra note 73.
\textsuperscript{88} \textit{Id.}
sentences without probation resulted in higher re-arrest rates.\textsuperscript{89} Nonetheless, cornered by the unavailability of evidence, prosecutors must dispose of many domestic violence cases by plea agreements to probation and suspended sentences.\textsuperscript{90}

There is an epidemic of violence against women, and Indiana is no different. To more fully combat domestic violence, we must convince lawmakers to adopt rules so that the way Indiana criminalizes domestic violence reflects the realities of the crime.

II. OTHER APPROACHES TO THE ADMISSIBILITY OF CHARACTER EVIDENCE UNDER THE LAW

A. Introduction

To overcome the unique hurdles of prosecuting domestic cases, a few states have authorized admission of evidence of prior acts of domestic violence for propensity purposes. Other states, including Indiana, have expanded the availability of non-propensity theories for admitting evidence of prior acts of domestic violence. Further, the Federal Rules of Evidence (FRE) have created exceptions for admitting specific instances of prior conduct in sexual assault and child molestation cases for many of the same reasons discussed herein.

Since 1997, California Evidence Code (CEC) section 1109 has provided for admission of evidence of prior acts for propensity purposes where the defendant is charged with a crime of domestic violence.\textsuperscript{91} The trial court has discretion, however, to exclude such evidence if its probative value is substantially outweighed by undue prejudice.\textsuperscript{92} That same year, the Alaska legislature took a similar step. Alaska Rule of Evidence 404(b) 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

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} See CAL. EVID. CODE § 1109.
\textsuperscript{92} See CAL. EVID. CODE § 352.
admissible.” Both states provide procedural safeguards for defendants. In addition to the required balancing of probative value and prejudice, the other acts evidence must be: less than ten years old, similar to the charged offense, and have been committed against persons similar to the victim in the charged case. Both rules have withstood due process and equal protection challenges.

Additionally, other states—including Colorado, Minnesota, and Kansas—have expanded the non-propensity theories under which evidence of other acts of domestic violence may be admitted. For example, Minnesota’s statute has been interpreted to allow evidence of the history of the relationship between the victim and the defendant to explain the context in which the charged assault occurred.

The ban on character evidence began to erode in sexual assault cases by judge-made law. To codify these common law exceptions, in 1994 Congress passed FRE 413 (sexual assault), 414 (child molestation), and 415 (civil cases involving sexual assault or child molestation). In criminal prosecutions for sexual assault or child molestation, FRE 413 and FRE 414 supersede FRE 404’s general prohibition to allow other victims of

93 ALASKA R. EVID. 404(b).
94 ALASKA R. EVID. 404(b)(2).
98 Indiana was one of many states that created a common law lustful disposition rule, although in Indiana it was termed the depraved sexual instinct exception and remains law today. See Lannan v. State, 600 N.E.2d 1334, 1335 (Ind. 1992) (discussing the “long settled” depraved sexual instinct exception in Indiana); see also Crabtree v. State, 547 N.E.2d 286, 288–89 (Ind. Ct. App. 1989) (discussing many of the ways in which the depraved sexual instinct exception had been used in Indiana).
sexual assault or child molestation to testify in cases where the instant victim has been sexually assaulted or molested by the defendant—clearly contradicting the character evidence prohibition. The experiences in these states and under the Federal Rules offer guidance on whether and how to amend our own rules.


FRE 404 controls character evidence and its admission into court. The first part of FRE 404(b) states that “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” The second part of FRE 404(b) allows admission of evidence of other crimes or acts for different purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” FRE 413 and 414 allow the admission of “prior convictions, similar specific instances[,] or even testimony of previous allegations or uncharged actions” when a defendant is accused of sexual assault or molestation.

The rationale behind these rules is that character evidence of the defendant’s propensity to commit acts of child molestation or sexual assault is highly probative and will enhance the likelihood of an accurate verdict, unless deemed too prejudicial on other grounds. Thus, its supporters argue, FRE 413 and 414 support the premise of the FRE, which is “to secure fairness in administration . . . and promotion of growth and

100 Fed. R. Evid. 413(a), 414(a).
101 See McCormick on Evidence, supra note 99, at § 190.
102 Indiana has not adopted equivalents of FRE 413, 414, or 415. See Lannon, 600 N.E. 2d at 98; see also Crabtree, 547 N.E. 2d at 288-89.
103 Fed. R. Evid. 404.
104 Id. at 404(b)(1).
105 Id. at 404(b)(2).
106 McCormick on Evidence, supra note 98, at 650.
107 Kovach, supra note 96, at 1122–23.
development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

Proponents of FRE 413 and 414 also argue that “sexual assault [and child molestation] cases are often difficult to prove because of the unique circumstances of these cases.” For instance, sexual assault cases are challenging to prosecute because they typically involve “he said, she said” testimony between the victims and defendants. Thus, other acts evidence allowed under FRE 413 of the defendant’s other sexual assaults may bolster the instant victim’s credibility and lessen the chance of a not guilty verdict. Finally, supporters assured that FRE 413 and FRE 414 contained adequate safeguards for the defendant’s procedural rights.

The concern, on the other hand, is that character evidence might allow the jury to infer—based solely on prior acts evidence—that because the defendant possessed the traits and capacity to commit a crime once, the same defendant committed the same crime on this occasion, and is, therefore, deserving of a guilty verdict. The motivation behind the ban on character evidence stems from this fear that its admission prejudices defendants and hinders their right to a fair trial. The reliability of this type of inference by the jury has been

108 Id. at 1123 (citing Fed. R. Evid. 102).
109 See id.
110 See id.
111 See id.
112 See David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Ch. -Kent L. Rev. 15, 21–24 (1994) (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).
113 Fed. R. Evid. 404 Advisory Committee’s Note (1973). The circumstantial use of character evidence is generally questionable because it requires the trier of fact to make an inference that the defendant acted in accordance with that character at the time in question. Id.
doubted.\textsuperscript{114} While this is a fundamental concern, exceptions to these rules have highlighted the significance of balancing defendants’ rights not only against victims’ rights but against legitimate public policy concerns.

\textit{C. California’s Expansion of the Admissibility of Prior Domestic Violence Acts}

California’s rule admitting other acts of domestic violence for propensity purposes is CEC section 1109.\textsuperscript{115} Under this section, prosecutors may admit defendants’ uncharged acts of domestic violence in their case in

\begin{quote}
\textsuperscript{114} Lindsay Gochnour, \textit{Sticks and Stones May Break My Bones, but Words Will Always Hurt Me: Why California Should Expand the Admissibility of Prior Acts of Child Abuse}, 43 \textit{PEPP. L. REV.} 417, 424 (2016) (“Both psychology and legal scholars have questioned the validity of such an inference over the decades following the adoption of the general rule.”).

\textsuperscript{115} \textsc{Cal. Evid. Code} § 1109. This section reads as follows: Section 1109. \textit{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. [\ldots]

(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.
\end{quote}
chief\textsuperscript{116} for propensity purposes.\textsuperscript{117} The rule is applicable to “prior acts of domestic violence against either the same victim or different victims.”\textsuperscript{118} The rule’s definition of domestic violence provides “intentionally or recklessly cause or attempt to cause bodily injury, or which place another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another”—capturing a number of domestic violence behaviors.\textsuperscript{119}

In California, the Penal Code and subsequent case law explains why special attention should be devoted to the prosecution of batterers:

\textit{[I]n domestic violence cases evidence of prior acts is particularly probative in demonstrating the propensity of the defendant . . . 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.\textsuperscript{120}}

CEC 1109 was reasoned necessary by the legislature because the ban on propensity evidence in domestic violence cases “insulates defendants and misleads jurors into believing that the charged offense was an isolated

\textsuperscript{116} See Kovach, supra note 96, at 1133 (citing People v. Poplar, 83 Cal. Rptr. 2d 320, 324–25 (Cal. Ct. App. 1999)).
\textsuperscript{117} See id.
\textsuperscript{118} See id. (citing People v. Brown, 92 Cal. Rptr. 2d 433, 437–38 (Cal. Ct. App. 2000)).
\textsuperscript{119} See id., at 1133–34 (citing CAL. PENAL CODE § 13700 (a)–(b)).
\textsuperscript{120} See, e.g., People v. Cabrera, 152 Cal. App. 4th 695 (2007) (upholding the constitutionality of CAL. EVID. CODE, § 1109) (“Admission of evidence of prior acts of domestic violence under Evid. Code, § 1109 is subject to the limitations of Evid. Code, § 352. Pen. Code, § 1109, subd. (a). This safeguard should ensure that § 1109 does not violate the Due Process Clause.”).
incident, an accident, or a mere fabrication.” As such, it was enacted to provide a more accurate picture of the defendant’s behavior to the jury. Further, this exception recognizes ongoing abuse as part of a larger scheme of power and control—which usually escalates in frequency and severity over time.

Following the enactment of these rules, researchers conducted surveys and interviews with California prosecutors that revealed CEC section 1109 has proved “invaluable in convicting recidivistic batterers.” This research also revealed that the use of prior acts evidence for propensity purposes “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.”

One prosecutor responded that a 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.”

Proponents of CEC section 1109 hypothesized that former domestic violence victims would be more willing to testify because they are less likely to still fear the defendant. This prediction proved true in some reported instances where past victims testified and afterwards felt empowered. However, interviews also revealed a reluctance by prior victims to testify for current victims. The reasons for this, again, are complicated

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121 Kovach, supra note 96, at 1136.
122 Id.
123 Id.
124 Id. at 1138.
125 Id.
126 See id.
127 Id.
128 Id. at 1139.
129 Id.
130 See id.
and varied.\textsuperscript{131} Another hurdle for prosecutors has been locating these prior victims.\textsuperscript{132}

Nonetheless, CEC section 1109 is a landmark evidentiary tool for prosecutors seeking convictions in domestic violence cases and a potential model for amending our own rules.

\section*{III. Applying Other Approaches to Domestic Violence Prosecutions in Indiana}

\subsection*{A. Prior Acts of Domestic Violence Are Probative in Showing a Batterer Committed the Charged Crime}

The Federal Rules of Evidence have recognized that certain evidence is admissible in sexual abuse cases to show propensity because its probative value is not sufficiently outweighed by its prejudicial effect.\textsuperscript{133} This Note argues for the same type of exception in prosecuting batterers. Further supporting this inference is research suggesting that evidence of prior domestic violence is more probative in showing that a defendant committed the crime than it is in sexual assault cases because the recidivism rate of domestic violence batterers is higher than that of sexual abuse offenders.\textsuperscript{134}

This is also evidenced by the cyclical nature of abuse. Despite underreporting, data collected reveals that domestic violence defendants have a high rate of recidivism and, over time, domestic violence often becomes more frequent and severe.\textsuperscript{135} The National Violence Against Women Survey found that nearly 70\% of women who had been assaulted by an intimate partner

\footnotesize
\begin{itemize}
\item\textsuperscript{131} See \textit{id.} (“Often, past victims have invested a significant amount of time and effort in leaving the defendant and disengaging from their emotional and financial grip, and thus are unwilling to voluntarily insert themselves in the defendant’s criminal proceeding.”).
\item\textsuperscript{132} See \textit{id.}
\item\textsuperscript{133} See \textit{generally} Part II, Section B.
\item\textsuperscript{135} See Part I, Section C.
\end{itemize}
reported that their victimization lasted more than one year.\textsuperscript{136} For more than a quarter of the women, the victimization occurred over more than five years, and the average duration of the violence was four and a half years.\textsuperscript{137}

Even the language used to describe the experience of abuse reflects its cyclical, ongoing nature. We say that a woman who has been assaulted by her husband has been “battered” or has been subjected to “domestic” or “intimate partner violence,” suggesting a general status. In contrast, when a person has been assaulted by a stranger or casual acquaintance, we say they have been “assaulted” or gotten into a “fight,” suggesting a one-time act of violence, not a continued phenomenon.

Lastly, notable work has been done evaluating batterers’ profiles.\textsuperscript{138} One expert phrased incidents of violence as “instrumental” rather than “expressive.”\textsuperscript{139} By this, the expert wants society to understand that “the violent episodes are not simply unconnected episodes of rage, loss of control, or an inability to manage anger (as batterers would like us to believe), but rather that the violence is a calculated, purposeful way to control the life of an intimate partner.”\textsuperscript{140} This “system of control” makes the propensity inference precisely appropriate in these unique crimes.\textsuperscript{141} Additional studies have shown that once a batterer has established a pattern of violence against an intimate partner, he is likely to continue “unless there is some intervention, such as criminal justice sanctions and/or treatment.”\textsuperscript{142}

Meanwhile, the current criminal law used to prosecute abusers continues to punish only individual incidents of threatening or violent behavior without opportunity for victims to testify to the context in which the charges occurred, ignoring the very nature of the crime itself.

\textsuperscript{136} See NVAWS, supra note 27, at 39.
\textsuperscript{137} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.; see also IPAC, supra note 87.
B. Prior Acts of Domestic Violence Will Help Jurors Evaluate Victim Credibility and Eliminate Juror Bias

Domestic violence cases are also difficult to prosecute because of the perceived lack of credibility of women as witnesses. The jury (or a judge) makes all decisions about the credibility of the witnesses and evidence. Yet women, who make up the majority of domestic violence victims, are often seen as “less credible” witnesses in the criminal justice system.143

Further, these bars on evidence leave jurors in domestic violence cases with an inadequate basis for understanding the full, relevant history of abuse by a defendant. This is not to say such history would be dispositive of the charged case, but such history is essential to placing the charged case within an appropriate context.144 “When a single act of violence is viewed outside of the broader pattern of abuse in which it occurred, jurors lack the context necessary for determining credibility and truth.”145 “They may treat the case with apathy if they assume that a relatively minor confrontation was an isolated incident in an otherwise nonviolent relationship.”146 Jurors may write off the case as an intoxicated disagreement or as an act of self-defense against an out-of-control wife or girlfriend.147 When jurors are shielded from the dynamics between a victim and the defendant in their intimate relationship, a victim’s allegations may sound irrational or even farfetched.148

In Indiana, we have already acknowledged that a reasonable juror might understandably desire access to evidence relevant to a criminal defendant’s relationship to his victim or for purposes of motive, intent, or absence of mistake. Such jurors effectively recognize—and are

144 See Alafair S. Burke, Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization, 75 GEO. WASH. L. REV. 552, 573 (2007); see also Tuerkheimer, supra note 38 at 980–88.
145 Burke, supra note 144.
146 Id. at 574.
147 Id.
148 Id.
instructed by the trial court—that the defendant must ultimately be proven guilty beyond a reasonable doubt of the charged offense.

C. Defendants’ Rights Remain Protected

The most compelling argument against the expansion of 404(b) and the admissibility of prior acts in domestic violence cases is the same argument that has opposed the overall admission of character evidence—it would impair defendants’ right to a fair trial.

Determining the admissibility of other acts evidence in Indiana requires several levels of analysis. To admit this evidence, the court must determine that: (1) the evidence of other crimes, wrongs, or acts is relevant to a matter at issue, other than the defendant’s propensity to commit the charged act; (2) the proponent has sufficient proof that the person who allegedly committed the act did, in fact, commit the act; and (3) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403.149 There must be sufficient proof from which a reasonable jury could find the uncharged conduct proven by a preponderance of the evidence.150 Direct evidence that the defendant perpetrated the similar act is not required; rather, substantial circumstantial evidence of probative value is sufficient.151

Under a domestic violence exception, the inquiry would still require 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 Rule 401, and therefore generally admissible under Rule 402. Assuming relevancy, the judge will next decide whether there are reasons to exclude the relevant prior acts evidence. This balancing analysis under Rule 403 gives judges the discretion to exclude evidence of prior acts if its probative value is substantially outweighed by any prejudice it would cause the defendant. Additional

150 Caldwell, 43 N.E.3d at 264.
151 Id.
restraints in the form of notice requirements, discovery rules, and limiting instructions remain mandatory.

Protecting defendants’ constitutional right to a fair trial is an essential and proper part of our criminal justice system codified in the Sixth Amendment. The expansion of the admissibility of prior acts of domestic abuse would not hinder this right. Just as the Federal Rules and other states have successfully codified, this proposal provides courts discretionary power to exclude any evidence found too prejudicial to the defendant—and the trial judge is granted tremendous deference in such situations.

D. Time and Efficiency Concerns

Critics of exceptions discussed in Part II cited time and efficiency as reasons to oppose those rules and are likely to have the same concerns here. The problem of “mini-trials” is often cited by critics. They argue that each admitted uncharged act will result in a trial within a trial due to the lesser standard of proof for admitting prior acts evidence. By consequence the proceeding is prolonged, and the defendant is required to defend their entire past, rather than the charged crime. “Defendants will likely argue that they did not commit the [prior] acts. This, of course, is their right, and they should be given adequate time to respond” to any admissible evidence in a proceeding, which is specifically protected by Rule 404 notice requirements.

These concerns are also abated by the showing required to admit such evidence. Moreover, it is important to note that it is only uncharged acts of domestic violence which have been admitted under these rules, and they do not supersede Rule 609. Critics further suggest that the admission of this type of evidence

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152 De Sanctis, supra note 138, at 392.
153 Id.
154 Id.
155 See generally Part III, Section C.
156 De Sanctis, supra note 138, at 392–93.
157 Rule 609 provides for limits in admitting evidence of a defendants’ prior criminal convictions (for impeachment purposes). FED. R. EVID. 609.
confuses juries about the charged crime(s).\textsuperscript{158} Due to the low reporting of these crimes, the low cooperation rate of victims, and the often lacking corroborating evidence, it is highly unlikely that any one defendant will have many, if any, prior acts to defend against, even if they have been batterers throughout their life.\textsuperscript{159} Further, it undermines the entirety of these rules to argue that such evidence “wastes time.”\textsuperscript{160}

\textit{E. Necessity as a Matter of Policy}

Domestic violence is a societal problem; it is not just two people in a private relationship working out their “family problems.”\textsuperscript{161} The harm caused by this violence impacts everyone—children, neighbors, extended family, coworkers, hospital emergency staff, and law enforcement.\textsuperscript{162} The state’s interest in maintaining public safety means ensuring that batterers are not allowed to remain unabated.\textsuperscript{163} When prosecutors pursue these charges and secure meaningful conviction, they reinforce that domestic violence is unacceptable criminal conduct in our society.\textsuperscript{164}

Children are secondary victims often dropped from this discussion. Each year, between three and ten million children witness one parent abusing or killing the other.\textsuperscript{165} Many are injured while trying to protect a parent, or are used as pawns or shields in abusive relationships.\textsuperscript{166} Children are born with birth defects because their mothers were battered during pregnancy.\textsuperscript{167} Studies reveal that a child's exposure to the father abusing the mother is a risk factor for transmitting

\textsuperscript{158} De Sanctis, \textit{supra} note 138, at 392.
\textsuperscript{159} \textit{Id.} at 393.
\textsuperscript{160} \textit{Id.} at 392–93.
\textsuperscript{162} \textit{See id.}
\textsuperscript{163} \textit{See id.}
\textsuperscript{164} \textit{See id.; see also IPAC, supra note 87.}
\textsuperscript{165} Wills, \textit{supra} note 161, at 175.
\textsuperscript{166} \textit{See id.}
\textsuperscript{167} \textit{See id.}
violent behavior from one generation to the next.\textsuperscript{168} In Indiana, 63% of juveniles serving time in jail for murder are there for killing an abusive father, step-father, or mother's live-in boyfriend in an attempt to protect their mother.\textsuperscript{169}

Shockingly, dating violence and abuse can start by age eleven, according to a study that included sexual assault, physical, emotional, and verbal abuse.\textsuperscript{170} In fact, one in five of thirteen- to fourteen-year-olds in relationships reported they know friends and peers who have been struck in anger by a boyfriend or girlfriend.\textsuperscript{171}

Further, the pattern of repeated abuse makes domestic violence calls particularly dangerous for law enforcement. Because victims of domestic violence typically wait to call police until after repeated assaults, officers are in an even more dangerous situation when they do respond.\textsuperscript{172} In 2017, more officers were shot responding to domestic violence than any other type of firearm-related fatality.\textsuperscript{173}

Lastly, “batterers are ‘master manipulators.'”\textsuperscript{174} They will do anything to convince their victims to get the prosecution to drop the charges or secure their victims’ unavailability through coercive and controlling means. In my job, I could daily listen to inmates’ calls to their victims where abusers’ pleas range from threatening

\textsuperscript{168} IPAC, \textit{supra} note 87.

\textsuperscript{169} \textit{Id.}


\textsuperscript{171} \textit{Id.}


\textsuperscript{174} Wills, \textit{supra} note 161, at 179.
retaliation to sweet-talking with promises of reform. I have heard the coordination with abusers’ family members to threaten victims. Abusers have secured alternative-living arrangements for their victims with family members who could keep watch. They convince victims to leave town, so they can ignore subpoenas. They warn for the loss of the family income, and therefore, the ability to care for children. They plan exactly what the victim will say in her recantation. If the case, nonetheless, makes it to trial, their lawyers then try to convince the judge or jury that the whole thing was the victim’s fault, that she attacked him, or that she is just “crazy.”

“Prosecutors watch with practiced patience as these vulnerable victims succumb to their batterers’ intimidation and manipulation.”175 To fill the gap between the criminal law and the realities of domestic violence, we must devise rules of evidence that prosecutors in this distinct situation can work with.

CONCLUSION

Domestic violence creates a unique type of prosecution where physical evidence may be lacking and the victim often recants, refuses to cooperate, or is made unavailable. Difficult prosecutions can be linked to an increase in the already-disturbing domestic violence statistics. Amending Rule 404 to admit prior acts evidence in domestic violence prosecutions allows finders of fact to consider past acts to provide context to the controlling and cyclical nature of an abusive relationship—and to show a propensity to batter. Enacting such a rule provides a lifeline to prosecutors facing abundant obstacles in domestic violence cases while safeguarding defendants’ rights in a manner consistent with the Constitution. This proposal is not a novel idea. Other states have created exceptions of their own. The next logical step for Indiana (and other states) is to adopt a rule similar to the described.

Before closing, I want to turn to the broader and more fundamental problem that reformers face in trying to achieve progress—when both sides reveal disturbing truths. On one side, we see under-reporting, under-

175 Wills, supra note 161, at 180.
enforcement, and inadequacy of punishment in domestic violence prosecutions that lead to conviction. All that is true and exists to an alarming degree. But, as proponents for this type of legislation, we must be equally willing to acknowledge the opposing dynamic that exists side-by-side with that neglect—a criminal justice system plagued by race bias and class bias in enforcement, an inadequate prison system, and rigidity and disproportionality in punishment.¹⁷⁶ The challenge for successful reform is to find ways we can maintain and strengthen our commitment to fairness, while also giving victims the protection they need from violence so prevalent in the world today.¹⁷⁷

Nonetheless, these truths, coupled with the continual and escalatory nature of domestic violence, all occurring within the contours of a society where women are still unequal and the overwhelming majority of victims of these crimes, makes domestic violence a decisive candidate for a categorical exception to the general prohibition on the admissibility of prior acts evidence in criminal prosecutions.


¹⁷⁷ I was reminded to conclude with the truth of the bigger picture by a noteworthy article—see generally Stephen J. Schulhofer, Reforming the Law of Rape, 35 LAW & INEQ. 335 (2017).