

PROPENSITY EVIDENCE IN CASES OF WOMAN ABUSE: AN ESSAY IN MEMORY OF PROFESSOR MYRNA RAEDER

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This symposium celebrates the work of Myrna Raeder,¹ so I'll start with a story about her. For years we argued about who applied for a Georgetown Law School Prettyman Fellowship first. I had an awful experience and she had a wonderful experience. It finally occurred to me to ask her what year she graduated. She graduated two years after me. When I applied for a Prettyman and went to Washington in 1969 to meet with the people running the program, it clearly had never occurred to them that a woman might want to practice criminal law. I don't know if they thought the name Marina was a man's name. They had no idea what to do with me. It was the shortest interview on record. But their heads connected woman = woman, and they

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My prior articles on abuse of women and girls are: Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229 (1996); Marina Angel, *Susan Glaspell's Trifles and A Jury of Her Peers: Woman Abuse in a Literary and Legal Context*, 45 BUFF. L. REV. 779 (1997) (translated into French by the National Judicial Institute of Canada in 2001); Marina Angel, *Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 TEMP. POL. & CIV. RTS. L. REV. 283 (1999); Marina Angel, *Foreword to Symposium on Redefining Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 273 (1999); Marina Angel, *The School Shooters: Surprise! Boys Are Far More Violent Than Girls and Gender Stereotypes Underlie School Violence*, 27 OHIO N.U. L. REV. 485 (2001); Marina Angel, *A Classical Greek Influences An American Feminist: Susan Glaspell's Debt to Aristophanes*, 52 SYRACUSE L. REV. 81 (2001); Marina Angel, *Teaching Susan Glaspell's A Jury of Her Peers and Trifles*, 53 J. LEGAL EDUC. 548 (2003); Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65 (2008).

1. A symposium honoring Professor Myrna S. Raeder by the Southwestern Law Review, Friday, November 14, 2014, at the Southwestern Law School, Los Angeles, CA.

sent me over to talk to Barbara Babcock who was then the head of the Defender's system for the District of Columbia. I congratulated Barbara because I'd never seen a woman lawyer in a supervisory position. The Prettyman people must have discussed the matter and realized they would get women applicants and they'd better start treating them well. When Myrna showed up, she was treated like visiting royalty.

Myrna, because of her experience with the Prettyman Program, decided that her career should be in criminal law and evidence. I made many of the same choices. I don't know if Myrna had the same feeling I did in those early days, but I kept wishing that "the woman thing" would go away and just let me be a lawyer. It finally occurred to me that "the woman thing" was not going away during my lifetime and that I'd better go with the flow and examine the law's impact on women and children. I went into an LL.M. graduate program run by Anthony Amsterdam at the University of Pennsylvania where we worked with the Philadelphia Voluntary Defender's Association. I spent a year trying cases, writing appellate briefs, and arguing appellate cases in the Pennsylvania courts. I also handled a few jury trials in federal court. Then I asked to be assigned to juvenile court. My male colleagues in the same program could not understand why anybody would give up the glamor and excitement of state and federal criminal jury trials to work in "Kiddy Court." Like Myrna, I thought children represented the future of our society and their treatment by the judicial system was critical in determining that future.

We both knew woman abuse was important.² The problem was brought to the public's attention in the late 1970's by sociologist Lenore Walker. She invented the term Battered Woman Syndrome (BWS).³ The good thing was that the term caught the public's attention and exposed the problem. The bad thing was that syndromes are mental illnesses, meaning that people who have them are defective. Walker posited a very tight three-part analysis.⁴ Not very

2. I use the terms "woman" and "she" because the overwhelming number of abused are women. In the case of an abused man, "man" and "he" should be used.

3. LENORE E. WALKER, *THE BATTERED WOMAN* (1st ed. 1979); see also Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); 1 PAUL C. GIANNELLI, EDWARD L. IMWINKELRIED, ANDREA ROTH, & JANE CAMPBELL MORIARTY, *SCIENTIFIC EVIDENCE* § 9.03 (5th ed. 2012).

4. WALKER, *supra* note 3, at 55. According to Walker, a battering relationship consisted of three distinct phases that repeated continuously. *Id.* The first phase was a tension-building phase, which consisted of minor battering incidents. *Id.* at 56. The battered woman during this phase engaged in a pattern of denial regarding the batterer's conduct, possibly finding reasons to blame herself for the minor battering incidents. *Id.* The tension continued to build, inevitably leading to the second phase of acute battering, a much more serious incident of abuse. *Id.* at 59. The third phase of the cycle was the reconciliation phase. *Id.* at 65. The batterer attempted to make up for his

bright people—students, teachers, practitioners, judges, and members of the public—love three part lists; a tension building stage, an acute battering stage, and a reconciliation stage. According to Walker, a woman had to go through this three-part cycle at least twice before she could be labeled a battered woman.⁵

Walker's introduction of the theory was well received by many lawyers and judges, but it failed to obtain legitimate medical status. The Merck Manual of Diagnosis and Therapy is recognized as the leading medical text on diseases and injuries. It does not list BWS as a recognized disease.⁶ The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders is the leading text on mental disorders. It does not list BWS as a recognized mental disorder.⁷ Nor could Lenore Walker's BWS and learned helplessness pass the Supreme Court's *Daubert*⁸ standard which is the standard to be used for admitting scientific expert testimony. The Court required a series of factors that needed to be considered by a judge to decide if the proposed conclusion was produced by scientific methodology and therefore is scientific knowledge: whether the conclusion can be empirically tested, whether the conclusion has been subject to peer review, the known or potential error rate, the existence and maintenance of standards controlling the operation, and whether the theory and technique are generally accepted in the scientific community.⁹ Proof of all of these factors determines whether expert testimony will be allowed. *Daubert* replaced the long recognized *Frye* Standard, which only required that scientific expert testimony need only be sufficiently established and accepted.¹⁰

Walker lost all credibility with those working to eliminate woman abuse when she agreed to testify for the defense in the O.J. Simpson trial. Abuse never became an issue in the trial of O.J. Simpson for killing his wife, Nicole Simpson. The prosecutors made the tactical choice not to raise abuse at his murder trial.¹¹ Woman abuse was not well known or well understood in

actions by acting lovingly and caringly, allowing the battered woman to forgive and to believe that he would never act that way again. *Id.*

5. WALKER, *supra* note 3, at xv. "Any woman may find herself in an abusive relationship with a man once," but she is not considered a battered woman unless she and her intimate partner go through a cycle a second time and she remains in the relationship. *Id.*

6. ROBERT S. PORTER, ED., THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, (19th ed. 2011).

7. AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

8. *Infra* note 10.

9. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-94 (1993).

10. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

11. Bettina Boxall, *Abuse Expert Stirs Uproar with Simpson Defense Role*, L.A. TIMES (Jan. 19, 1995), http://articles.latimes.com/1995-01-29/news/mn-25821_1_battered-women. The news

1994-95. After the not guilty verdict, a jury member said, “[t]his was a murder trial not domestic abuse. If you want to get tried for domestic abuse, go in another courtroom and get tried for that.”¹²

Walker also invented a doctrine of learned helplessness based on the claim that abused women became more and more helpless as the abuse continued.¹³ Studies show that abused women increase rather than decrease their attempts to leave their abuser, to exit.¹⁴ Walker’s theories limited abused women’s options. In the case of an abused woman who finally escapes by killing her abuser, the question always is “if she’s so helpless how did she manage to kill?”¹⁵

The question in such cases is always “why didn’t she leave?”¹⁶ Abusive men aim to completely control “their women.”¹⁷ If they allow their women to work, they time them coming and going from the workplace, and they take their paychecks.¹⁸ Abusers systematically cut ties to friends and relatives,

that Lenore Walker would be testifying on behalf of the defendant, O.J. Simpson, an acknowledged batterer, spread quickly throughout the community of people that followed Walker’s work. Many were astonished and confused by the news; they believed that Walker would not abandon her life’s work, but they were perplexed as to how her testimony could remain consistent with her findings and teachings. *Id.*

12. *Jurors Say Acquittals Were Based on Lack of Evidence*, U.S.A. TODAY (Oct. 18, 1996, 7:40 PM), <http://usatoday30.usatoday.com/news/index/nns070.htm>.

13. WALKER, *supra* note 3, at 45. Walker derived her learned helplessness theory from Martin Seligman’s experiments with dogs being subjected to electric shocks. *Id.* Walker theorized that, like dogs, battered women came to believe that they had no control over their situation. *Id.* at 47-48. This explained why battered women did not attempt to escape their battering relationships. *Id.* They perceived they had no ability to help themselves. *Id.*

14. Angel, *Judy Norman*, *supra* note *, at 76.

15. *Id.* at 75-76; see also Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1285 (1992).

16. Mahoney, *supra* note 15, at 1288. Many pose this question without regard to the dangers that face a woman in her attempts to leave. *Id.* Abused women are most in danger of death at the time they prepare to leave a batterer and after they have left the batterer. Angel, *Judy Norman*, *supra* note *, at 69. Those who question why she did not leave also fail to consider the lack of money or a place to go, as well as a mother’s fear for her children’s lives and her own. *Id.* at 67-69.

17. Angel, *Judy Norman*, *supra* note *, at 67-68.

18. *Id.* Extreme control existed in the case of Judy Norman, whose husband beat her, burned her, and forced her into prostitution as a means of raising income for him and the family for over 20 years. *State v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989); see also Angel, *Judy Norman*, *supra* note *, at 69.

leaving women with nowhere to go¹⁹ and no money to get there.²⁰ Lenore Walker's BWS makes it difficult for people to understand that an abused woman acts reasonably when she stays, leaves, or kills her abuser.

Myrna was a leading commentator during the O.J. Simpson trial. She made the national news.²¹ I only made the local Philadelphia market. It was her knowledge of abuse and the criminal law that allowed her to become so effective as a national commentator and educator on woman abuse.

The prosecutors in the Simpson case did not raise the issue of abuse, but the facts of the case resonated with a lot of women. We have seen a massive turnaround in the national understanding of the seriousness of woman abuse. A video of Ray Rice, a professional football player, dragging his fiancée, now his wife, out of an elevator caused widespread public outrage.²² Roger Goodell, the Commissioner of the National Football League (NFL), imposed a lenient two-game suspension. Because of public outcry, he attempted to raise it to an indefinite suspension.²³ An arbitrator found the increased penalty amounted to double jeopardy,²⁴ but no team has been willing to hire Rice.²⁵ The Commissioner on December 10, 2014, issued a statement regarding the NFL's new personal conduct policy, which includes stronger penalties for those involved in domestic violence.²⁶

19. Shirley Darby Howell, *Domestic Violence: Flawed Interpretations of 42 U.S.C. § 1437(D)(L)(6), Sexual Harassment in Public Housing, and Municipal Violations of the Eighth Amendment: Making Women Homeless and Keeping Them Homeless*, 13 JONES L. REV. 1, 1 (2008) ("Homeless women accompanied by at least one child comprise the fastest growing segment of America's homeless population."); *Domestic Violence*, NAT'L ALLIANCE TO END HOMELESSNESS, http://www.endhomelessness.org/pages/domestic_violence (last visited Feb. 1, 2015) (Studies show that 63% of homeless women have experienced domestic abuse or intimate partner battering.).

20. Angel, *Judy Norman*, *supra* note *, at 67-68.

21. Charles Feldman, *Concluding the Drama*, CNN (Sept. 26, 1995, 1:25 AM), http://www.cnn.com/US/OJ/daily/9-25/simpson_argument/index.html.

22. Ken Belson, *Ravens' Rice Draws 2-Game Suspension From Goodell*, N.Y. TIMES (July 24, 2014), <http://www.nytimes.com/2014/07/25/sports/football/ray-rice-draws-2-game-suspension-from-nfl.html>.

23. Ken Belson, *A Punch is Seen, and a Player is Out*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/sports/football/ray-rice-video-shows-punch-and-raises-new-questions-for-nfl.html>.

24. Ken Belson, *Ray Rice Wins Reinstatement to N.F.L. in Arbitration*, N.Y. TIMES (Nov. 28, 2014), <http://www.nytimes.com/2014/11/29/sports/football/ray-rice-suspension-overturned-in-arbitration.html>.

25. Richard Sandomir, *To Rescue Image, Ray Rice Turns to Best Ally, the Woman He Hit*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/sports/football/on-today-janay-rice-says-ray-rice-hit-her-only-that-one-time.html>.

26. Ken Belson, *N.F.L. Sets Strict Rules for Actions Off Field*, N.Y. TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/sports/football/roger-goodell-wont-assess-penalties-under-revised-conduct-policy.html>.

Myrna attacked the problem of women abuse on two evidentiary fronts; the introduction of hearsay by women, dead or alive, about the violence they suffered from their abusers;²⁷ and the introduction of propensity evidence against the abuser.²⁸ I will address only the second. Both were methods of broadening the contexts of abuse at trials. Rather than focusing on only a few minutes before an acute abusive episode, propensity evidence and the expansion of the doctrine of immediacy allow evidence of ongoing abuse over a longer time period. A lengthened time period gives judges and juries the opportunity to understand an abused woman's acts in the context of her life and to understand why she reacted as she did.

Judicial training can remedy built in biases and allow judges to appreciate the context of abuse. Canada translated Susan Glaspell's *A Jury of Her Peers*,²⁹ and one of my articles into French for use in judicial training.³⁰ Jurisdictions can provide education that allows judges to share their experiences and to establish best practices.³¹ Education on abuse cannot

The National Hockey League (NHL) reacted quickly in indefinitely suspending player, Slava Voynov, who was arrested for domestic violence. NHL Commissioner, Gary Bettman, said these cases would be handled on a case-by-case basis, but Deputy Commissioner Bill Daly noted that "the landscape has changed for all of us over the past six months." Jeff Z. Klein & Billy Witz, *N.H.L. Suspends Player After Domestic Abuse Arrest*, N.Y. TIMES (Oct. 20, 2014), <http://www.nytimes.com/2014/10/21/sports/hockey/kings-defenseman-voynov-suspended-after-domestic-violence-arrest.html>.

27. Myrna focused primarily on the introduction of women's hearsay statements: Myrna S. Raeder, *History Redux: The Unheard Voices of Domestic Violence Victims, a Comment on Aviva Orenstein's Sex, Threats, and Absent Victims*, 79 FORDHAM L. REV. 21 (2011); Myrna S. Raeder, *Thoughts About Giles and Forfeiture in Domestic Violence Cases*, 75 BROOK. L. REV. 1329 (2010); Myrna S. Raeder, *Being Heard After Giles: Comments on The Sound of Silence*, 87 TEX. L. REV. SEE ALSO 105 (2009); Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions after Crawford*, 20 CRIM. JUST., Summer 2005, at 24; Myrna S. Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005); Myrna S. Raeder, *Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over*, 21 Q.L.R. 1013 (2003).

28. She also wrote three articles on the admissibility of prior acts and BWS: Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147 (1997); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996).

29. Susan Glaspell, *A Jury of Her Peers*, EVERYWEEK, Mar. 5, 1917, at 4, available at <http://everyweek.unl.edu/view?docId=xml/ew.issue.19170305.xml;query=&brand=default>.

30. Angel, *Literary and Legal Context*, *supra* note *.

31. Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 219-20 (2008); see also ROBERT WOLF, LIBERTY ALDRICH, & SAMANTHA MOORE, CTR. FOR COURT INNOVATION, PLANNING A DOMESTIC VIOLENCE COURT: THE NEW YORK EXPERIENCE 20 (2004); Judith S. Kaye & Susan K. Knipps,

be limited to judges. It must extend to all participants in the criminal justice system: prosecutors, defense attorneys, police, and probation and parole officers. The general public needs education on abuse in order to recognize and report abuse, to be sensitive to the abused, and to serve intelligently on grand and petit juries.³²

In 1996, partly in response to the O.J. Simpson trial, the California state legislature reacted to the ban on propensity evidence in prosecutions dealing with domestic violence.³³ The law is often referred to as the “Nicole Brown Simpson Law,” because previous acts of domestic violence had been excluded at O.J. Simpson’s murder trial.³⁴ Alaska followed in 1997.³⁵

California’s law remains the broadest as to the admissibility of prior acts of abuse. It allows propensity evidence, either factual or expert, in any prosecution for domestic violence, either of the abuser or of the abused who assaults or kills her abuser.

In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects . . . when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge

. . . .

Expert opinion testimony on intimate partner battering and its effects shall not be considered a new scientific technique whose reliability is unproven.³⁶

It does not use the term BWS, allowing a broad range of expert testimony.

Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach, 27 W. ST. U. L. REV. 1, 11 & n.24 (2000).

32. See Angel, *Criminal Law and Women*, *supra* note *, at 309 (“Until there is widespread societal understanding of woman abuse, education must take place during the trial. The education must include specific evidence about the events at issue, context evidence surrounding the specific events, and expert evidence to explain both specific and context evidence. Education will also take place during the jury deliberations if the jury is representative of the diverse constituencies that make up the community. The defense’s objective at the trial of an abused woman who kills her abuser should be to have the jury perceive her acts as reasonable rather than inappropriate or insane. This includes recognizing her fear and actions within a context of long-term abuse and understanding the danger of separation attack.”) (footnote omitted).

33. CAL. EVID. CODE § 1109 (West 2009 & Supp. 2015).

34. Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 168 (2007).

35. ALASKA R. EVID. 404(b)(4) (2015) (effective Jan. 15, 1998), <http://courts.alaska.gov/ev.htm#404>. The Alaska statute is limited. It seems to allow propensity evidence only in the prosecution of the abuser. See *id.* (“In a prosecution for crime involving domestic violence . . . evidence of other crimes involving domestic violence by the defendant against the same or another person . . . is admissible.”). The statute does not directly apply to the case involving an abused woman’s use of self-defense.

36. CAL. EVID. CODE § 1107 (West 2009).

Massachusetts allows an abused woman to raise in cases of self-defense or defense of another the reasonableness of her belief that death or serious bodily injury was imminent, that she had exhausted all available means to avoid the use of deadly force, and that the amount of force was appropriate. A defendant can introduce evidence of physical, sexual, or psychological harm or abuse. An expert can testify to common patterns in abusive relationships.

In the trial of criminal cases charging the use of force against another where the issue of defense of self or another . . . is asserted, a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he had availed himself of all available means to avoid physical combat or the reasonableness of a defendant's perception of the amount of force necessary

. . . .

(a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse;

(b) evidence by expert testimony regarding the common pattern in abusive relationships³⁷

The Massachusetts statute does not use the term BWS, which allows a broad range of expert testimony.

Kentucky's statute is also broad in allowing the use of deadly physical force when the defendant believes, reasonably or unreasonably, such force is necessary. Evidence of prior acts of domestic violence or abuse are admissible. The evidence is not limited to expert testimony.

(1) The use of physical force by a defendant upon another person is justifiable when the defendant [*reasonably or unreasonably*] believes that such force is necessary to protect himself against the use or imminent use of unlawful force by the other person.

(2) The use of deadly physical force . . . [when] necessary to protect himself against death, serious physical injury

. . . .

(3) Any evidence by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the

37. MASS. GEN. LAWS ANN. ch. 233 § 23F (West 2000 & Supp. 2014).

person against whom the defendant is charged with employing physical force shall be admissible under this section.³⁸

The major change in this statute is the requirement that the defendant's subjective belief in the necessity for the use of force is adequate.

Many states' statutes use the term BWS and establish its scientific validity by legislative fiat, despite the fact that the syndrome is not recognized by either the American Medical Association or the American Psychiatric Association³⁹ and does not meet the *Daubert* Standard.⁴⁰ Such statutes allow expert testimony that the woman "suffered" from the syndrome. Ohio is typical of these states.

(A) The general assembly hereby declares that it recognizes both of the following, in relation to the "battered woman syndrome:"

(1) That the syndrome currently is a matter of commonly accepted scientific knowledge;

(2) That the subject matter and details of the syndrome are not within the general understanding or experience of a person who is a member of the general populace and are not within the field of common knowledge.

(B) If a person is charged with an offense involving the use of force against another and the person . . . raises the affirmative defense of self-defense, the person may introduce expert testimony of the "battered woman syndrome" and expert testimony that the person suffered from the syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm . . . as an element of the affirmative defense⁴¹

Ohio's Supreme Court justified compelling the woman who raises BWS to submit to examination by another expert. In the *Goff* case, the woman was prepared to use expert testimony from a psychiatrist. The Ohio Supreme Court authorized the trial court to require an examination by another expert, without specifying whether that expert should be a psychiatrist or a

38. KY. REV. STAT. ANN. § 503.050 (West 2008 & Supp. 2013); see also KY. CRIME COMM'N, LEGISLATIVE RESEARCH COMM'N, KY. REV. STAT. ANN. § 503.050, commentary (1971).

39. See Angel, *Judy Norman*, *supra* note *, at 75; PORTER, *supra* note 6.

40. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-94 (1993).

41. OHIO REV. CODE ANN. § 2901.06 (West 2010 & Supp. 2013).

psychologist.⁴² Maryland,⁴³ Missouri,⁴⁴ South Carolina,⁴⁵ and Wyoming⁴⁶ followed the Ohio pattern.

A majority of states have adopted evidence codes based on Federal Rule of Evidence [FRE] 404(b) which allows evidence of a defendant's prior acts

42. *State v. Goff*, 942 N.E.2d 1075, 1086-87 (Ohio 2010).

43. MD. CODE ANN. CTS. & JUD. PROC. § 10-916 (West 2013).

Definitions

....

(2) "Battered Spouse Syndrome" means the psychological condition of a victim of repeated physical and psychological abuse by a spouse, cohabitant, or former cohabitant which is also recognized in the medical and scientific community as the "Battered Woman's Syndrome."

(3) "Defendant" means an individual charged with:

(i) First degree murder, second degree murder, manslaughter

....

Evidence and Expert Testimony

(b) Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat . . . when the defendant . . . was . . . suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both

(1) Evidence of repeated and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and

(2) Expert testimony of the Battered Spouse Syndrome.

44. MO. REV. STAT. ANN. § 563.033 (West 2014).

(1) Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of . . . self-defense or defense of another.

(2) If the defendant proposes to offer evidence of the battered spouse syndrome, he shall file written notice thereof with the court in advance of trial. Thereafter, the court, upon motion of the state, shall appoint one or more private psychiatrists or psychologists . . . or physicians with a minimum of one year training or experience in providing treatment or services to intellectually disabled or mentally ill individuals . . . to examine the accused or

(3) No statement made by the accused in the course of such examination and no information received by any physician or other person in the course thereof . . . shall be admitted in evidence against the accused on the issue or whether he committed the act charged against him in any criminal proceeding then or thereafter pending in any court, state or federal.

45. S.C. CODE ANN. § 17-23-170 (West 1995).

(A) Evidence that the actor was suffering from the battered spouse syndrome is admissible in a crimination action on the issue of . . . self-defense This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(B) Expert opinion testimony on the battered spouse syndrome shall not be considered a new scientific technique the reliability of which is unproven.

46. WYO. STAT. ANN. § 6-1-203 (West 1993).

(a) The "battered woman syndrome" is defined as a subset under the diagnosis of Post-Traumatic Stress Disorder established in the Diagnostic and Statistical Manual of Mental Disorders III – Revised of the American Psychiatric Association.

(b) If a person is charged with a crime involving the use of force against another, and the person raises the affirmative defense of self-defense, the person may introduce expert testimony that the person suffered from the syndrome, to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force.

But see AM. PSYCH. ASSOC., DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS 26, 236-38 (3d ed. 1980) (the term "Battered Woman Syndrome" does not appear under the Diagnoses of Post-Traumatic Stress Disorder).

of domestic violence to be admitted in domestic violence cases only when done on a non-propensity theory.⁴⁷ States following FRE 404(b) restrict the admission of prior acts of domestic violence only to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. One or more of these should be easy to show in a typical abuse case. Even if the admission of prior acts is appropriate under FRE 404(b), they must pass a balancing test under FRE 403.⁴⁸

The United Kingdom, the country from which the United States received its laws, including the ban on propensity evidence, abolished its common law rules governing the admissibility of character evidence in favor of a very lenient position on bad character evidence.⁴⁹ Sections 98 through 111 in the 2003 Criminal Justice Act provide numerous “gateways” by which evidence of defendants’ and non-defendants’ bad character can be introduced, including evidence of prior instances of domestic violence.⁵⁰

The Federal Rules of Evidence and some state rules carve out exemptions for victims of sexual offenses,⁵¹ but propensity exceptions have not been created in cases involving victims of domestic violence by either the Federal Rules or a majority of the states. The exemptions for sexual offenses exist because evidence showing propensity has a probative value that sufficiently outweighs any prejudicial effect. Domestic violence cases should have similar exemptions due to the repetitive nature of domestic violence and the fact that the recidivism rate of domestic violence batterers is at least as high as that of sexual abuse offenders.

Evidence of abuse should not be limited to criminal cases. Abused women often need to introduce evidence of abuse in custody battles and divorce cases. Such evidence can be used to show that the batterer father does not deserve custody of the children.⁵²

47. See FED. R. EVID. 404(b)(1) (“Prohibited Uses. Evidence 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.”).

48. See FED. R. EVID. 403 (“[T]he 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, wasting time, or needlessly presenting cumulative evidence.”).

49. Criminal Justice Act, 2003, c. 44, §§ 98-111 (Eng.).

50. Chris Chambers Goodman, *The Gate(way)s of Hell and Pathways to Purgatory: Eradicating Common Law Protections in the Newly Sculpted Character Evidence Rules of the United Kingdom’s 2003 Criminal Justice Act*, 66 U. MIAMI L. REV. 79, 81 (2011).

51. FED. R. EVID. 413(a) (“In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.”).

52. See Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L.

We have a lot of work to do, but there is hope for abused women. Public attitudes on woman abuse have changed. California and the United Kingdom have given us examples of workable propensity statutes in abuse cases. Federal Rule of Evidence 413(a) allows propensity evidence in sexual assault cases and provides an example of what can be done for abused women.

REV. 111, 156-57 (2000); Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers*, 64 FORDHAM L. REV. 141, 179-80 (1995).

Evidence of Battered Woman Syndrome Often Hinders a Victim's Claim

....

[W]omen have lost custody of their children because of the claim that they suffer from learned helplessness The opposing counsel argues that because a woman is helpless in the context of her relationship with her husband, she must, therefore, not be a good parent, and it would not be in the best interest of her children to remain in her custody.