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A VOICE FROM *PEOPLE v. SIMPSON*: RECONSIDERING THE PROPENSITY RULE IN SPOUSAL HOMICIDE CASES

"On doit des égards aux vivants; on ne doit aux morts que la vérité. We owe respect to the living; to the dead we owe only truth."

—Voltaire[1]

I. INTRODUCTION

On June 12, 1994, Ronald Goldman and Nicole Brown Simpson were brutally murdered.[2] By June 14, the leading suspect in the case was Orenthal James Simpson (O.J.),[3] the former husband of Nicole Brown Simpson, who had been physically and verbally abusing Nicole since the two met in 1977.[4] As the evidence linking O.J. to the crime mounted, the public wondered how the popular football player could have committed such a heinous crime.[5] Others more familiar with O.J. and Nicole knew better, having seen or heard about O.J.'s physical and verbal abuse of Nicole.[6] Warning signs of abuse and control behavior in O.J. and Nicole's relationship went unnoticed or ignored,[7] and the violence may have spiraled to a deadly conclusion.

Millions of women like Nicole[8] are beaten and dehumanized every year by their spouses.[9] Violence is now the "leading cause of

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1. FRANCOIS-MARIE AROUET VOLTAIRE, 1 OEUVRES 15 (1785), *reprinted in* THE OXFORD DICTIONARY OF QUOTATIONS 717 (Angela Partington ed., 4th ed. 1992).

2. Jim Newton & Shawn Hubler, *Simpson Held After Wild Chase; He's Charged with Murder of Ex-wife, Friend*, L.A. TIMES, June 18, 1994, at A1.

3. Jim Newton & Eric Malnic, *Police Sources Link Evidence to Simpson*, L.A. TIMES, June 15, 1994, at A1.

4. People's Response to Defendant's Motion to Exclude Evidence of Domestic Violence at *5, People v. Simpson, No. BA097211, 1994 WL 737964 (Cal. Super. Ct. L.A. County Dec. 14, 1994) [hereinafter People's Response].

5. *See* Paul Feldman, *D.A. Mounts Media Drive to Shape Opinion*, L.A. TIMES, June 21, 1994, at A1.

6. *See* discussion *infra* part IV.

7. *See infra* part IV.

8. I do not wish to minimize the tragedy of Ronald Goldman's death by focusing on O.J. and Nicole's relationship, but this Comment will only do so to illustrate the need to reform the evidence code in spousal homicide cases.

9. The use of the word "spouse" in this Comment should be read to include non-married partners who are in abusive relationships. Note, *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) [hereinafter

injuries to women ages 15 through 44 years."[10] It is now estimated that a man beats a woman every twelve seconds in the United States.[11] Between thirty and fifty percent of women murdered in the United States die at the hands of their husbands or boyfriends.[12] Despite these overwhelming statistics, domestic violence continues to be one of the most "pressing social and legal problem[s] in the United States."[13] Yet the legal response to domestic violence thus far can only be described as grossly inadequate.[14]

The treatment of women under the law in the United States has traditionally been inequitable.[15] At common law, following her marriage, a woman became the legal property of her husband.[16] "The historic sanction of woman abuse within marriage derives from the husband's ownership of his wife and his right to chastise her."[17]

Developments] (noting that there may be "as many as four million incidents of domestic violence against women every year"); *see also* Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 525 (1993) (citing FBI statistics showing that "[n]early thirty percent of all women murdered in America are killed by their husbands or boyfriends"); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 329 (1994) (observing that "[d]omestic violence is the leading cause of injury to women in the United States").

10. *See* Antonia C. Novello, *From the Surgeon General, US Public Health Service: A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992) (finding "falls were reported to be the leading cause of death overall," but "[s]uch high rates of falls among young women should make health care providers suspicious" that these falls "are actually sustained in beatings").

11. ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 6 (1994) ("A few years ago the FBI reported that in the United States a man beat [sic] a woman every eighteen seconds. By 1989 the figure was fifteen seconds. Now it's *twelve*.").

12. Bernstein, *supra* note 9, at 525 (citing a 30% figure); Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38, 41 (estimating that it is 33% to 50%).

13. *Developments*, *supra* note 9, at 1501.

14. *See* Bernstein, *supra* note 9, at 525 (concluding that "[t]raditional civil and criminal remedies have failed to protect domestic violence victims against the pattern of threats and harassment that constitute stalking and . . . foreshadow more violent acts including assault, rape, and murder"); *see also* A. Renée Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117, 118 (1994) (concluding that "at worst, the community's disregard of battered women borders on criminal"); *Developments*, *supra* note 9, at 1502 ("History is replete with reports of domestic abuse, and . . . an adequate legal response has long been lacking.").

15. *See* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 627-30 (1980) (discussing the legal origins of woman abuse).

16. *See id.*; *see also* Gail D. Rodwan & Jeanice A. Dagher-Margosian, *The Battered Woman as Criminal Defendant*, 73 MICH. B.J. 912, 920 (1994).

17. Schneider, *supra* note 15, at 628.

Until the late 19th century, a husband could lawfully punish his wife, as he would his child.[18] During this time, many states provided explicit legal protection for batterers.[19] Amazingly, not until 1871 did the first states in the United States, Alabama and Massachusetts, rescind their laws sanctioning wife abuse.[20] Over 100 years later, battered women still had "few legal remedies available to them."[21]

This predicament finally began to change in the early 1970s, as the battered women's movement brought public attention to the plight of abused women.[22] As societal exposure to domestic violence increased,[23] so did efforts to protect battered women, leading to new laws aimed at reducing domestic violence.[24] However, the continuing belief, shared by those charged with carrying out these new laws,[25] that the state[26] should not become involved in the private

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18. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 164 (1987).

19. *See Developments*, *supra* note 9, at 1502; *see also* Bernadette D. Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 991 (1989) (discussing an 1836 New Hampshire case in which "[t]he court concluded that although society condemned the husband's unmanly conduct in beating his wife, it abhorred even more the wife's unseemly rebellion against the proper exercise of his authority").

20. Sewell, *supra* note 19, at 992-93 n.74 (discussing Fulgham v. State, 46 Ala. 143, 146-47 (1871) and Commonwealth v. McAfee, 108 Mass. 458, 461 (1871)). *See* Maryanne E. Kampmann, Note, *The Legal Victimization of Battered Women*, 15 WOMEN'S RTS. L. REP. 101, 102 (1993) ("If the [husband] went too far, and . . . killed his wife, the law frowned on it, but this was a minor offense when compared with that of a woman killing her husband, a treasonous act for which the woman would be burnt alive.").

21. *Developments*, *supra* note 9, at 1502.

22. Callahan, *supra* note 14, at 119-20.

23. *Id.* at 117-18. The massive publicity surrounding the murder of Nicole Brown and the subsequent trial of O.J. Simpson have also brought the issue of domestic violence to the attention of the public once again. *See* David E. Hicks & Steven M. Goldstein, *Defending the Domestic Violence Client*, 68 FLA. B.J. 42, 42 (1994) ("Regardless of the outcome of *California v. Simpson* [sic], one thing is certain, the issue of domestic violence has now been thrust to center stage.").

24. Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 853 (1994) (noting increase in laws designed to help prosecute domestic abusers).

25. *Developments*, *supra* note 9, at 1503 ("Police officers have been trained, and have acted upon the belief, that domestic violence is a private matter.").

26. Callahan, *supra* note 14, at 118 n.3 ("Recent studies of the judicial response to domestic violence continue to document the failure of the judiciary to take seriously family violence, even in the face of clear-cut statutory mandates." (citing SAUL N. WEINGART, ADDING INSULT TO INJURY: DOMESTIC VIOLENCE AND PUBLIC POLICY 87 (1989)); *see also* Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1285 (1994) (reporting that the notion that spousal abuse is a private matter is one of the biggest obstacles to reform efforts).

affairs of a husband and wife, has dramatically undercut the practical effect of these reforms. Judges have been especially reticent to get too involved in "family affairs."[27] Most of the recent reform efforts have proven ineffective in curbing domestic violence,[28] and the problem remains epidemic.[29]

To Nicole Brown Simpson, the dead, we owe nothing less than the truth.[30] We owe her the certainty that the jury will hear her story and the stories of those like her. The judicial system should aim to provide jurors with the most relevant evidence that can be found in a spousal homicide case—evidence describing the nature and history of an abusive relationship. Jurors should receive historical background information about an abusive relationship so they can better understand the cycle of violence that leads to spousal homicide.[31] In cases where an abuser has killed his spouse, evidence in the form of specific acts of abuse should be admissible to show the propensity of the accused to abuse the victim.[32]

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27. Callahan, *supra* note 14, at 118 n.3 ("Judges are notoriously reluctant to sentence convicted batterers to jail or prison.").

28. Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1133 (1994) (noting that current solutions to domestic violence have not been successful enough).

29. *See* Callahan, *supra* note 14, at 118; Welch, *supra* note 28, at 1133; Hobday, *supra* note 26, at 1286.

30. *See* VOLTAIRE, *supra* note 1, at 15.

31. LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42 (1989). Dr. Walker describes the cycle of violence theory as the abusive treatment that a battered woman experiences consisting of three different stages: (1) the tension building stage; (2) the acute battering stage; and (3) the tension dropping or the contrition stage. *Id.* For works discussing Dr. Walker's cycle of violence theory see Dan Walkenhorst, *Domestic Abuse: Curbing a Widespread Epidemic in Missouri*, 51 J. MO. B. 9, 11 (1995); Scott Gregory Baker, *Deaf Justice?: Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 GOLDEN GATE U. L. REV. 99, 101-05 (1994); Christine Becker, Note, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297, 300 (1995); Kimberly B. Kuhn, Note, *Battered Woman Syndrome Testimony:* Dunn v. Roberts, *Justice Is Done by the Expansion of the Battered Woman Syndrome*, 25 U. TOL. L. REV. 1039, 1041-43 (1995).

32. Although there certainly are cases where abusive women murder their husbands, this is the exception. *See* Deborrah Ann Klis, *Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate*, 24 GOLDEN GATE U. L. REV. 131, 136 n.32 (citing Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 366 (1992)) (noting that "[b]etween .20% and .64% of battered women kill their abusive spouse or companion"). This means that of the 1.6 million to 4 million women who are abused each year, only 800 to 1000 will be charged with the murder of an abusive spouse or companion. Consequently, this Comment will

This Comment begins by discussing the origins of, and basis for, the general rule prohibiting propensity evidence[33] and the exceptions to that rule. Part III recommends an additional exception to the propensity rule which would make evidence of specific acts of domestic violence or abuse admissible in spousal homicide cases.[34] The proposal also suggests that jurors be allowed to consider these acts as evidence that the defendant had a propensity to abuse his spouse. Part IV is a case study of *People v. Simpson*,[35] which analyzes the court's legal basis for admitting acts of abuse by O.J. Simpson against Nicole Brown. Part V contrasts the treatment of prior acts of domestic violence by the court in *Simpson* with the approach proposed in part III.

II. THE TRADITIONAL PROPENSITY RULE

According to apologists, the judicial system in the United States is imperfect, but it is better than any other system in the world. These apologists may lament the unequal ways in which minorities and the poor are treated by the judicial system, but almost all agree that there is no replacement for the jury system—the community interposing itself between the awesome and immeasurable powers of the State and the accused. In the United States the jury system ideally presents the most desirable means for deciding factual questions and ultimately the guilt or innocence of the accused.[36]

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focus on the cases where the male is the defendant since the perpetrators of domestic violence are disproportionately male. *Developments*, *supra* note 9, at 1501 n.1. "Studies . . . indicate that women are . . . ten times as likely as men to be the victims of domestic violence." *Id.* (citing LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 39-40 (1986)). This Comment will also use male pronouns to reflect the statistical fact that men are more likely to batter and kill their spouses. *See also* Rachel A. Van Cleave, *A Matter of Evidence or of Law? Battered Women Claiming Self-Defense in California*, 5 UCLA WOMEN'S L.J. 217, 220 (1994) (discussing evidentiary issues in cases where a battered spouse has killed her batterer in self-defense).

33. Generally, the propensity rule prohibits using evidence of a person's uncharged misconduct to show the accused is a person of criminal character and is therefore more likely to have committed the charged offense. *See, e.g.*, CAL. EVID. CODE § 1101(a) (West 1995).

34. This determination will still be subject to the discretion of the trial judge to exclude unduly prejudicial evidence. CAL. EVID. CODE § 352 (West 1995).

35. People v. Simpson, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995).

36. Duncan v. Louisiana, 391 U.S. 145, 154 (1968) ("Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases . . . .").

However, there is considerable dissension over what kinds of evidence jurors should be allowed to hear.[37]

As laypeople, jurors are presumed incapable of properly determining the probative value of certain types of evidence.[38] Consequently, most states have adopted elaborate rules of evidence to help assure that jurors do not hear or see evidence that might be unduly prejudicial.[39] Among the most controversial and oft-contested rules of evidence are those relating to the admissibility of character evidence.[40]

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37. *See* Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816 (1994) (arguing against the admissibility of character impeachment evidence); Miguel A. Méndez & Edward J. Imwinkelried, People v. Ewoldt*: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473 (1994) [hereinafter Méndez & Imwinkelried, *About Face*] (arguing that use of the plan theory for introducing the accused's misconduct should be curtailed); Edward G. Mascolo, *Uncharged-Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 CONN. B.J. 281 (1993) (arguing accused should be allowed to remove element of intent from case by stipulation, thereby avoiding introduction of prejudicial uncharged misconduct evidence). *But see* Stuart H. Baggish & Christopher G. Frey, *Domestic Physical Abuse: A Proposed Use for Evidence of Specific Similar Acts in Criminal Prosecutions to Corroborate Victim Testimony*, 68 FLA. B.J. 57 (1994) (proposing that use of collateral act evidence should be expanded in domestic violence cases); Hank M. Goldberg, *Proposition 8: A Prosecutor's Perspective*, 23 PAC. L.J. 947 (1992) [hereinafter Goldberg, *Prosecutor's Perspective*] (suggesting that courts and prosecutors have failed to make arguments based on Proposition 8); Hank M. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A. L. REV. 621, 622 (1991) (applauding Proposition 8's amendment of the character evidence rules as bringing California into line with the majority of jurisdictions).

38. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 185 (John William Strong ed., 4th ed. 1992) ("[R]elevant evidence can confuse, or worse, mislead the trier of fact [who] is not properly equipped to judge the probative worth of the evidence.").

39. *See* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5005 (1977) (giving a comprehensive history of efforts to codify the rules of evidence in the states and the influence of those efforts on the Federal Rules of Evidence); *see also* Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 642 n.2 (1992) ("New York, Connecticut, Illinois, Indiana, Maryland, Massachusetts and Virginia are the only remaining states without evidence codes.").

40. Edward J. Imwinkelried, *Uncharged Misconduct*, 1 CRIM. JUST. 6, 7 (1986) [hereinafter Imwinkelried, *Uncharged Misconduct*] ("Not only is the admissibility of uncharged misconduct . . . the most important evidentiary issue in contemporary criminal practice, it is also among the most misunderstood."); *see also* Alma G. Lopez, *New Jersey's Other-Crimes Rule and the Evidence Committee's Abrogation of Almost Two Hundred Years of Judicial Precedent*, 24 SETON HALL L. REV. 394, 394 (1993) ("The introduction of extrinsic evidence of a defendant's other crimes, wrongs and acts is one of the most important and controversial means of proof in the resolution of criminal . . . disputes.").

Character evidence is generally offered in three ways:[41] (1) as testimony about a person's reputation;[42] (2) as opinion testimony about a person's character from a witness familiar with the accused;[43] and (3) as "evidence of specific instances of a person's conduct that tend circumstantially to reveal that person's character."[44] It is the manner in which California courts treat this third type of character evidence—commonly called circumstantial character evidence—that will be the central focus of this Comment.

A. The Traditional Basis for Excluding Uncharged Misconduct When Offered to Prove the Guilt of the Accused

Since the 17th century, the common law has deemed evidence of a person's uncharged misconduct inadmissible to demonstrate a propensity for criminal behavior.[45] During the late 18th century, American courts adopted the English rule and began excluding such evidence.[46] By the middle of the 19th century, California courts were also applying the rule.[47] This prohibition prevents prosecutors from introducing evidence of an accused's past crimes or bad acts to suggest the accused has a bad character and acted in conformity with that character in committing the charged crimes.[48] The rule bolsters the presumption of innocence by ensuring that criminal trials focus on the commission of acts charged by the State and not the character of the accused.[49] The Supreme Court has lifted this principle to a constitutional level by holding that the Eighth Amendment's prohibition against cruel and unusual punishment precludes legislatures and courts from criminalizing a person's status.[50]

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41. David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 306 (1995).

42. *Id.*

43. *Id.* at 306-07.

44. *Id.* at 307.

45. Mascolo, *supra* note 37, at 283-84 (observing that "[t]he rule originated in England in the late seventeenth century as a procedural device for countering the inquisitorial practices of the Star Chamber").

46. *Id.* at 284; Leonard, *supra* note 41, at 308.

47. Edward J. Imwinkelried & Miguel A. Méndez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1041 (1992) [hereinafter Imwinkelried & Méndez, *Character Evidence*].

48. People v. Felix, 14 Cal. App. 4th 997, 1004, 18 Cal. Rptr. 2d 113, 117 (1993) ("Evidence of prior offenses is not admissible simply as character evidence . . . .").

49. Mascolo, *supra* note 37, at 285.

50. Robinson v. California, 370 U.S. 660, 666-67 (1962); *see also* Méndez & Imwinkelried, *Character Evidence*, *supra* note 47, at 1045-46 (discussing constitutionality

Several rationales support the traditional exclusion of uncharged misconduct evidence. There is a concern that such evidence will cause the jury to concentrate on the character of the defendant and decide the case on an improper basis.[51] Rather than convicting the defendant based on the evidence presented, the jury may convict the defendant because they believe he is a bad person and deserves to be punished;[52] or because they believe even if he is not guilty of the present charge, surely he has done something bad in the past which warrants incapacitating him now.[53] "There is [also] a fear that if too many prior bad acts are introduced against the defendant, the jury will simply conclude that because he was bad before he must have committed the crime in this case."[54] Another worry is that jurors will overvalue the probative weight of the evidence showing the defendant's bad character.[55] Earlier concerns voiced by McCormick and Wigmore also discuss the undue amount of time character evidence and accompanying rebuttal evidence tend to consume.[56]

B. California Evidence Code Section 1101: The Modern Propensity Rule

The common law rules concerning character evidence are now codified in the Federal Rules of Evidence[57] and in most states.[58] California Evidence Code section 1101[59] codified the traditional, common law prohibition on the use of character evidence and governs

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of Proposition 8 and suggesting that the common law ban on character evidence may have survived Proposition 8's purported change to these rules).

51. *See* Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 8; Méndez & Imwinkelried, *About Face*, *supra* note 37, at 474; Imwinkelried & Méndez, *Character Evidence*, *supra* note 47, at 1007.

52. Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 8.

53. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (1983) [hereinafter WIGMORE].

54. Laurie L. Levenson, *Abuse by Any Other Name: The Admissibility of Domestic Violence Evidence in the Simpson Case*, at *1, Jan. 9, 1995, *available in* WESTLAW, O.J. Comm. database.

55. *Id.* at *2.

56. MCCORMICK, *supra* note 38, § 185; WIGMORE, *supra* note 53, § 58.2.

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

58. Imwinkelried & Méndez, *Character Evidence*, *supra* note 47, at 1008 ("The rule prohibiting use of character evidence to prove an accused's guilt has been followed in a substantially similar form in all American jurisdictions.").

59. CAL. EVID. CODE § 1101 (West 1995).

the admissibility of character evidence.[60] Specific acts of the accused cannot be offered to show he acted in conformity with his character[61] in committing the act for which he now stands accused.[62] However, it is acknowledged that a person's recent[63] and past behavior can be highly relevant.[64] The legislature has balanced the need for such evidence against the accused's right to a fair trial by allowing specific acts of the accused to be admitted in certain limited circumstances,[65] as when such acts are relevant to prove a material fact.[66]

California law allows the admission of specific acts against the accused "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .) other than his disposition to commit such acts."[67] Judges have the discretion to limit the impact of these exceptions by excluding unduly prejudicial character evidence.[68] This process of weighing the relative probative values of prohibited

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60. California Evidence Code § 1101(a) provides: "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." CAL. EVID. CODE § 1101(a) (West 1995).

61. *Id.*; People v. Fletcher, 34 Cal. App. 4th 1667, 1687, 36 Cal. Rptr. 2d 177, 190 (1994), *review granted*, 39 Cal. Rptr. 2d 823, 891 P.2d 803 (1995).

62. CAL. EVID. CODE § 1101(a).

63. United States v. Williams, 529 F. Supp. 1085, 1094 (E.D.N.Y. 1981), *aff'd*, 705 F.2d 603 (2d Cir. 1983), *cert. denied*, 464 U.S. 1007 (1983); United States v. Hearst, 563 F.2d 1331, 1335 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978); *see* Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 8 (concluding that "there should be no rigid requirement that the uncharged misconduct antedate the charged crime").

64. Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("[character evidence] is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record . . ."); *see* Mascolo, *supra* note 37, at 285-86.

65. Huey L. Golden, *Knowledge, Intent, System, and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 LA. L. REV. 179, 179-80 (1994) (noting balance struck between relevant character evidence and prejudice to defendant by exceptions to rule against propensity evidence).

66. People v. Terry, 38 Cal. App. 3d 432, 446, 113 Cal. Rptr. 233, 242 (1974); *see* David Ring, Comment, *Rush to Judgment: Criminal Propensity Clothed as Credibility Evidence in the Post-Proposition 8 Era of California Criminal Law*, 15 WHITTIER L. REV. 241, 242 (1994).

67. CAL. EVID. CODE § 1101(b) (West 1995); *see also* Baggish & Frey, *supra* note 37, at 59-60 (arguing that circumstantial character evidence should be admissible to prove any material fact other than a defendant's propensity to commit crimes); Leonard, *supra* note 41, at 307 (stating that "when character is 'in issue,' evidence rules admit character evidence essentially without limitation").

68. CAL. EVID. CODE § 352 (West 1995); People v. Long, 7 Cal. App. 3d 586, 590, 86 Cal. Rptr. 590, 592 (1970); *see infra* part IV.

propensity evidence against the permissible use of such evidence under one of the exceptions has been called "one of the most difficult analyses in the law of evidence."[69]

These exceptions allowing for the limited admissibility of character evidence have spawned a wealth of criticism throughout the United States.[70] Critics feel the exceptions have swallowed the rule, leaving little restraint on the introduction of uncharged misconduct.[71] In actuality, a clever prosecutor can easily find a way to fit a prior act into one of these "recognized pigeonholes,"[72] especially since many of the exceptions, such as identity, intent, knowledge, preparation, or plan are, or could be, elements of a criminal offense.[73] The remaining exceptions usually play an important part in any criminal prosecution, showing the defendant's motive, opportunity to commit the crime, and the absence of mistake.[74] Thus, "prosecutors often shape their case theory to ensure the admission of uncharged misconduct evidence."[75]

Judges are free to approve any logically relevant theory for admitting evidence, since the statutory prohibition is not limited to the enumerated categories.[76] In order to get evidence of uncharged

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69. Gerard A. Rault, *Fifth Circuit Symposium: Evidence*, 37 LOY. L. REV. 725, 727 (1991). *See* Lopez, *supra* note 40, at 394.

70. *See* Golden, *supra* note 65, at 215 (arguing that the required showing of independent relevance of specific acts should be more rigorously enforced); Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 9 (suggesting the courts have erred in their application of the logical relevance theory and have admitted evidence which was only probative of an accused's bad character); Ring, *supra* note 66, at 262-64 (arguing that criminal propensity evidence is being disguised as credibility evidence and eroding our sense of justice).

71. Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 579-80 (1985).

72. Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 8.

73. Golden, *supra* note 65, at 183; Edward J. Imwinkelried, *Uncharged Misconduct: What Would Irving Younger Have Done?*, LITIG., Fall 1989, at 6, 7 [hereinafter Imwinkelried, *Younger*] (citing Federal Rule of Evidence 404(b) and arguing that it gives prosecutors room to maneuver by allowing them to use "noncharacter theories of relevance to justify admission of evidence of uncharged crimes").

74. Golden, *supra* note 65, at 183.

75. Imwinkelried, *Younger*, *supra* note 73, at 7.

76. People v. Carter, 19 Cal. App. 4th 1236, 1246, 23 Cal. Rptr. 2d 888, 894 (1993) (For uncharged offenses to be material so as to be admissible, the "evidence need only tend to prove or disprove some fact in issue."); *see* Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 9 ("The trend in the case law is toward [permitting] the introduction of uncharged misconduct for any purpose other than proving the defendant's bad character [regarding Rule 404(b)] . . . . The words, 'such as,' manifest an intent that the list be illustrative rather than exhaustive."); *see also* T.M. Ringer, Jr., *A Six Step Analysis of*

misconduct admitted, the prosecution need only establish that the fact to be proved is material, that the uncharged misconduct tends to prove that fact, and that there is no other rule or policy mandating exclusion of the evidence.[77] However, a trial judge's discretion in this regard must constantly endure appellate scrutiny. The rules on character evidence provide the basis for a majority of all criminal appeals.[78]

This issue is commonly appealed because evidence of a defendant's uncharged misconduct simultaneously has tremendous probative value[79] and great potential to "tip the balance against the defendant."[80] Some argue that no other type of evidence can be more determinative of the outcome of a trial.[81] Consequently, proponents of the propensity rule advocate rigid enforcement of the rule's strictures to prevent the undue admission of a defendant's antisocial acts.[82] These commentators argue that the manner in which the exceptions are construed makes the prohibition on propensity evidence superfluous.[83] On the other hand, their opponents assert that the propensity rule prevents jurors from receiving highly probative evidence,[84] thereby allowing a certain number of

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"Other Purposes" Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence, 21 N.C. CENT. L.J. (1995) (discussing method for determining the logical relevance of uncharged misconduct).

77. People v. Tapia, 25 Cal. App. 4th 984, 1021, 30 Cal. Rptr. 2d 851, 871 (1994) (citing People v. Thompson, 27 Cal. 3d 303, 315, 611 P.2d 883, 888, 165 Cal. Rptr. 289, 294 (1980)).

78. *See* Méndez & Imwinkelried, *About Face*, *supra* note 37, at 474-75 (noting that the admissibility of uncharged misconduct is the most commonly litigated evidentiary issue on appeal and that Section 404(b) generates more published appeals than any other provision of the Federal Rules of Evidence).

79. Lopez, *supra* note 40, at 394.

80. Imwinkelried, *Uncharged Misconduct*, *supra* note 40, at 8; *see* People v. Dablon, 34 Cal. App. 4th 372, 379-82, 34 Cal. Rptr. 2d 761, 765-66 (1994), *rev. granted*, 37 Cal. Rptr. 2d 258 (1995).

81. Weissenberger, *supra* note 71, at 579 (commenting that the frequency of admission of specific acts indicates that exclusion may be the exception rather than the rule).

82. Golden, *supra* note 65, at 215.

83. Mascolo, *supra* note 37, at 297 ("[A] trial judge must be vigilant to ensure that the intent exception does not emasculate the propensity rule.").

84. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982) (arguing that there should be no limit on the introduction of character evidence except Federal Rule of Evidence 403); *see also* Levenson, *supra* note 54, at *1 ("The public is waiting to see whether the jury will be given the 'whole story' about Simpson and his relationship with his wife or whether, through its rules of evidence, the criminal justice system will sanitize the case for the jury.").

criminals to go free.[85] Some of these critics have called for a reevaluation of the character evidence rules in certain cases.[86]

III. A DOMESTIC VIOLENCE EXCEPTION TO THE PROPENSITY RULE IN SPOUSAL HOMICIDE CASES

A. The Proposal

This Comment proposes an exception to the propensity rule in addition to those already enumerated in California Evidence Code section 1101(b).[87] This exception would only apply in spousal homicide cases where the defendant had physically abused the victim in the ten years prior to the alleged murder.[88] This new exception would allow the use of specific acts of violence or physical abuse to show the propensity of the accused to abuse the victim. Jurors would be allowed to consider prior acts of abuse as evidence that the defendant had a tendency to abuse his spouse. Evidence of prior physical abuse would be relevant as it tended to show a pattern of abuse by the defendant against the particular victim.

In order to establish a pattern of abuse, the prosecution would be required to show evidence of at least two incidents of domestic violence during the previous ten years.[89] The definition of spouse would include: spouses, former spouses, persons who are presently residing together or who have resided together in the past, persons who have a child in common regardless of whether they have been married or have lived together at any time, and a man and woman if the woman is pregnant and the man is alleged to be the father regardless of whether they have been married or have lived together at any time. However, the definition does not include intimate

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85. David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 565 (1994).

86. *See infra* part III.C.

87. CAL. EVID. CODE § 1101(b) (West 1995). For a listing of the statutory exceptions see *supra* notes 57-62, and accompanying text.

88. Limiting the exception to cases where the defendant had abused the victim within the previous ten-year period would assure that any abuse evidence would be probative and not tenuous due to the passage of time.

89. *See* Hobday, *supra* note 26, at 1311 (describing a Minnesota domestic homicide statute requiring prosecutors to establish a pattern of abuse by proving at least two incidents occurred that fit the definition of domestic abuse). Hobday notes that requiring "a specific number of incidents would also focus too heavily on each isolated act of violence rather than attacking the abusive pattern of conduct." *Id.*

partners who have not resided together, if the relationship did not involve having a child.[90]

B. Rationale

This proposal is based on recent character evidence reforms undertaken in Missouri[91] and by Congress.[92] These new laws allow the admission of prior acts of sexual abuse to show the defendant's criminal propensity. These laws codify the so-called "depraved sexual instinct" exception, which allows evidence of prior crimes to be admitted in sexual assault and child abuse cases where the defendant has abused the same victim previously.[93]

Three commonly cited rationales endorse admitting evidence of the prior acts of the defendant in child and sexual abuse cases.[94] First, prior sexual misconduct is not offered into evidence to show a general propensity for crime but only to demonstrate a propensity toward criminal activity with the same person.[95] Second, the existence of similar crimes is probative of a continuing relationship between the defendant and the victim, making repetition of the crime more likely.[96] Third, "evidence of a lewd disposition . . . provid[es] necessary background information to explain and give credence to the victim's testimony."[97]

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90. This definition is based on the definition of family member in Minnesota's Domestic Abuse Act. *See* MINN. STAT. ANN. § 518B.01(2)(b) (West 1990 & Supp. 1995).

91. Missouri adopted the following statute dealing with uncharged acts in 1995: "evidence that the defendant has committed other . . . uncharged crimes involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime . . . with which he is charged." MO. ANN. STAT. § 566.025 (Vernon Supp. 1995).

92. This proposal is similar to the recently adopted Federal Rule of Evidence 413(a) which reads: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413.

93. People v. Salazar, 144 Cal. App. 3d 799, 810, 193 Cal. Rptr. 1, 7 (1983) ("In sex offense cases, our Supreme Court has set forth a less stringent test for the admission of evidence of uncharged offenses [when the prior offenses] . . . are committed upon persons similar to the prosecuting witness." (quoting People v. Thomas, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978))); *see also* Golden, *supra* note 65, at 213 (describing the "Depraved Sexual Instinct" exception as an unenumerated exception to Louisiana's character evidence rules accepted by the Louisiana courts).

94. Golden, *supra* note 65, at 213.

95. *Id.*

96. *Id.*

97. *Id.*

Each of these rationales equally support admitting prior evidence of abuse in a spousal homicide case. Prior acts of physical abuse would not be offered to show a general propensity for crime or violence but to demonstrate a propensity toward abusing the same victim.[98] Next, the existence of a pattern of abuse is probative of the nature of the continuing relationship between the defendant and his spouse, which makes repetition of the crime particularly likely. Evidence of a pattern of abuse provides necessary background information about the nature and quality of the relationship. Most importantly, since the victim is not available to testify in a spousal homicide case, admitting evidence of abuse may be the only way to get this information before the jury.[99]

C. Justification

Evidence code reform seems to be an inappropriate way to deal with the problem of spousal homicide. Since evidence law only regulates the admissibility of evidence at a trial, a change in the evidence code appears to be too late to save a victim of spousal homicide. However, a reform proposal is not meant to simply be a plug in a leaky dam.

Several justifications support this proposed change in the character evidence rules: (1) creating a statutory basis for admitting abuse evidence will assure that jurors hear this evidence; (2) jurors will better understand the dynamics of an abusive relationship if they know about a history of the violence in the relationship; (3) the public is becoming increasingly concerned about crime and is more willing to decrease the procedural rights of criminal defendants to obtain convictions and deterrence; and (4) admitting abuse evidence will deter domestic violence and spousal homicide by assuring that

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98. *Id.*; *see also* People v. Yarbrough, 37 Cal. App. 3d 454, 458, 112 Cal. Rptr. 391, 393 (holding that "where defendant denied any beating at all, it was not improper for the trial court to admit evidence which went to show prior beatings of same person").

99. In spousal homicide cases, the absence of the victim's testimony can be problematic if there are no other witnesses to corroborate allegations of abuse. In such a case, the defendant may get a "free ride" and the jury will not hear any evidence of abuse. *See* People v. Zack, 184 Cal. App. 3d 409, 415, 229 Cal. Rptr. 317, 320 (1986) ("Appellant was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship and their parting were peaceful and friendly."); *see also* Baggish & Frey, *supra* note 37, at 59 (arguing that past acts of abuse should be admissible to corroborate victim testimony in domestic violence cases).

batterers will have their abuse exposed and used against them in a public trial if they murder their spouses.

1. Making a specific exception for abuse evidence in spousal homicide cases will assure that jurors hear such evidence

Although it may not seem difficult for a prosecutor to get prior abuse evidence admitted,[100] there is no assurance that jurors will be allowed to hear of a batterer's abusive past in a spousal homicide case. Carving out a small exception in the evidence code for spousal homicide cases is a sensible way to include abuse evidence without having to overhaul the entire body of character evidence law. Because this evidence tends to be prejudicial, it is possible that some judges might exclude it altogether for fear of being overturned on appeal.[101]

Providing explicit statutory authority for the admission of abuse evidence will make it easier for trial judges to admit such evidence. Currently, judges may admit abuse evidence if it relates to a material issue,[102] but they may not admit it for its own sake. Including this exception in the evidence code acknowledges the importance of abuse evidence and shows that it must be presented to give the victim a fair trial.[103] The courts can be instrumental in preventing domestic violence[104] if judges have greater discretion to introduce an abusive spouse's battering history to a jury in a spousal homicide case.

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100. *See* discussion *supra* part II.B.

101. People v. Deeney, 145 Cal. App. 3d 647, 654, 193 Cal. Rptr. 608, 612 (1983) (holding that in an involuntary manslaughter case, the trial court improperly admitted evidence indicating the defendant's abuse of the victim since the evidence did not reveal any common features between defendant's prior acts and the victim's death which would identify defendant as the victim's murderer).

102. *See* discussion *supra* notes 71-75 and accompanying text.

103. Baggish & Frey, *supra* note 37, at 59 ("Something which seems often forgotten is that, in criminal cases, the victim [the State], too, is entitled to a fair trial. This entitlement is lost, however, in the judicially created vacuum of existing law pertaining to evidence of specific collateral acts.") (footnote omitted).

104. Judge Lynn Tepper, *The Court's Role in Ending Family Violence*, 68 FLA. B.J. 30, 32 (1994) (suggesting that judges should recognize that signs of domestic violence appear in all kinds of cases and that judges should look more closely at the behavior of the people before them to see if such behavior is indicative of prior exposure to domestic violence).

2. Jurors must be allowed to hear abuse evidence to understand the dynamics of an abusive relationship

Allowing jurors to hear abuse evidence gives them a valuable history of the relationship between the accused and the victim of a spousal homicide. Describing the pattern of violent behavior over time is necessary to help jurors understand the nature of the domestic violence environment experienced by the victim.[105] Bringing this evidence before juries will help to dispel the myths and stereotypes that have clouded beliefs about domestic violence.[106]

A common belief about domestic violence is that leaving the batterer will increase the woman's safety. Jurors may find it difficult to understand why women do not leave abusive relationships before they are killed.[107] However, "[a]t the point that separation (or the decision to separate) occurs, the risk of violence to the battered woman increases, a phenomena referred to as 'separation abuse.' "[108] Contrary to common belief, battered women are *more* likely to be killed by their spouse *after* having left the relationship.[109]

For further evidence that jurors can have serious misconceptions about domestic violence, one need only examine the attitudes of some of the prospective jurors in the *Simpson* case. When asked in juror questionnaires to speculate on the causes of domestic violence, jurors responded with answers reflecting common myths about domestic violence: juror 462 felt "[d]omestic violence [is] a family matter,"[110] juror 19's answer reflected the belief that "[d]omestic violence is a minor family problem and that there are no significant issues surrounding domestic violence,"[111] and juror 620's answer suggested that "[d]omestic violence only occurs in certain lower-class house-

105. Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 FLA. B.J. 24, 24 (1994).

106. LENORE WALKER, THE BATTERED WOMAN 19-31 (1979) (describing twenty-one common myths about domestic violence); *see also Developments*, *supra* note 9, at 1502-03 (stating that stereotypes and misconceptions about domestic violence must be exorcised for the law to adequately address the problems raised by domestic violence).

107. *Cf.* Dutton, *supra* note 105, at 24 ("Recognizing that a woman may be battered requires an understanding of the range of violence and abuse to which she may have been exposed . . . .").

108. *Id.* at 26 (citing M.R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991)).

109. BROWNE, *supra* note 18, at 144.

110. People's Response, *supra* note 4, at *33.

111. *Id.* at *34.

holds."[112] Allowing jurors to deliberate and render a verdict based upon these common misconceptions regarding domestic violence increases the likelihood that a grave injustice can occur.[113] To prevent these misconceptions from prejudicing juror decisions, jurors must be allowed to hear evidence of abuse coupled with expert testimony.[114] Expert testimony explains the significance of a pattern of violence and links it to known and proven theories about the behavior of batterers.[115] This framework will help jurors understand how murder may be the inevitable result of an escalating cycle of violence.[116]

3. Public concern about crime has decreased tolerance for the procedural rights of criminals

Reform efforts do not always garner approval from the academic community,[117] but this lack of support may be immaterial. Legislators, and the public through the initiative process, have shown a willingness to go forward with new crime-fighting laws, regardless of the dire consequences for criminal defendants predicted by academics.[118] Unsatisfied with the ability of the criminal justice system to deter crime in California, voters have repeatedly gone to the polls to express their disaffection. In 1990 California voters adopted Proposition 115 which approved the admission of hearsay evidence at

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112. *Id.*

113. People v. Day, 2 Cal. App. 4th 409, 419, 2 Cal. Rptr. 2d 916, 925 (1992).

114. Callahan, *supra* note 14, at 121.

115. Hobday, *supra* note 26, at 1300.

116. BROWNE, *supra* note 18, at 5 ("Familial homicide, in which victim and assailant are related by blood or marriage, is a common sequel to domestic violence. In 1984, two-thirds of all interspousal killings resulted in the death of the woman.").

117. *See generally* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 288 (1995) (arguing that Congress and the Missouri legislature have chosen a bad place to start a reform of the character evidence rules); Leonard, *supra* note 41, at 310-12 (arguing that the amendment of the Federal Rules of Evidence to allow the admission of past acts of sexual assault and child molestation is unwise).

118. Even though Proposition 8, proposed Federal Rule of Evidence 413(a), and Proposition 184, the "Three Strikes" law, faced opposition from the defense bar and the academic community, they were all enacted anyway. Victor Sze, Comment, *A Tale of Three Strikes: Slogan Triumphs Over Substance As Our Bumper-Sticker Mentality Comes Home to Roost*, 28 LOY. L.A. L. REV. 1047, 1049-50 (1995) (criticizing the adoption of Proposition 184 by the voters in the face of charges that it was poorly drafted); *see infra* notes 133-34.

preliminary hearings.[119] California voters again showed their concern about crime in 1994 as they adopted the "three strikes" initiative by an overwhelming seventy-two percent margin.[120]

General expressions of public sentiment reflect the perception that crime is one of the more significant problems facing society.[121] Public opinion polls conducted over the last four years reveal an unwavering public commitment to crime reduction.[122] With

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119. Eleanor Swift, *Does It Matter Who Is in Charge of Evidence Law?*, 25 LOY. L.A. L. REV. 649, 651-52 (1992) (Proposition 115 also created a "law officer" exception to the hearsay rule which authorized holding criminal defendants to answer on felony charges based upon hearsay statements made to police officers.).

120. Sze, *supra* note 118, at 1057.

121. Imwinkelried, *supra* note 117, at 294 ("In a . . . September 1994 poll conducted by the Wirthlin Group, 61% of the respondents stated that crime is a serious problem in the United States." (citations omitted)); *see also id.* at 297 (A 1989 study conducted by the Bureau of Justice Statistics, surveying 60,000 adults, concluded that homicide was perceived as the most serious crime. (citations omitted)).

122. The following statistics are the results of various national telephone surveys about crime conducted between 1991 and 1995. The information in these surveys was taken from the Roper Center for Public Opinion's Poll-C Westlaw database.

In a survey conducted by ABC News & the *Washington Post* on March 19, 1995, 1524 respondents were asked to name the most important problem facing this country. The leading response was crime at 18%.

In a survey conducted by The Roper Center for Public Opinion for the *L.A. Times* on January 22, 1995, 1353 respondents were asked which version of the 1994 crime bill they preferred: The original bill which had money for crime prevention programs, or a revised bill with no crime prevention funds. Of those polled, 72% favored the original bill, while only 20% favored the bill with no funds.

In a survey conducted by Princeton Survey Research Associates for *Times Mirror* on March 21, 1994, 2001 respondents were asked to identify the most important problem facing their local community. From a list of 20 possible responses, crime/violence led all responses at 29%.

In a survey conducted by Hart and Teeter Research Companies for NBC News & *The Wall Street Journal* on January 18, 1994, 1009 respondents were asked which of the following statements came closest to their point of view: (A) it will be possible to reduce violent crime by making changes in the current criminal justice system; (B) it will not be possible to reduce violence without a complete overhaul of our current criminal justice system. Of those polled, 37% responded it was possible with changes, 58% felt it would not be possible without a complete overhaul.

In a survey conducted by the Wirthlin Group on December 9, 1993, 1013 respondents were asked whether the federal government should spend more or should spend less on certain federal programs even if it increased their taxes. Of those polled, 64% thought more should be spent on crime prevention, even if it meant an increase in their personal tax burden. While 18% thought more should be spent to prevent crime if it did not increase taxes, only 10% thought less should be spent on crime prevention.

In a survey conducted by Gordon S. Black Corporation for *USA Today* on December 10, 1991, 806 respondents were asked whether certain positions a presidential candidate might take would make them more or less likely to vote for the candidate. Of those responding, 64% said they would be more likely to vote for a candidate who would spend

anticrime fervor running rampant,[123] the public seems ready to run the risk that jurors could convict criminal defendants based on their criminal history in spite of a lack of evidence supporting a conviction.[124] In past years, the public has embraced evidence code reform as an acceptable method for reducing crime.[125] While these new laws have been criticized as unfair,[126] society's willingness to accept the costs of admitting possibly prejudicial evidence to achieve deterrence and convictions is obvious. As crime continues to be an important concern it is plausible that evidence code reform should once again be considered.

4. Admitting abuse evidence will help deter spousal homicide and domestic violence

Allowing abuse evidence to become a part of spousal homicide cases will help deter abusers. Allowing prior abuse evidence in spousal homicide cases would make recidivists hesitate; they would know that if tried, they would be more likely to be convicted because of the freer admissibility of their prior misconduct. Furthermore, assuring that an abuser's battering history is subject to public scrutiny may also make a batterer think twice before he abuses. Once an abuser knows that he will not be able to hide his abuse forever, he may be more reluctant to abuse his spouse.

Although there is no guarantee that this proposal will have any effect on deterring spousal homicide or domestic violence, it may effect some or even one person. If one woman is spared from one beating, or if one woman's life is saved, then this proposal would be worthy of enactment by the California Legislature.

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more on rehabilitation and crime prevention and less on jails. Only 21% said this stance would make them less likely to vote for the candidate.

123. *See* Sze, *supra* note 118, at 1053 (noting the public fury surrounding the adoption of the so-called Three Strikes initiative).

124. Imwinkelried, *supra* note 117, at 296-97.

125. For example, California voters accepted Proposition 8's evidence reforms in 1982 as a means to promote victims' rights over the procedural rights of criminal defendants. *See infra* note 131.

126. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, Feb. 9, 1995, *available in* WESTLAW, U.S.-Orders database; *see* Imwinkelried, *supra* note 117, at 288; Leonard, *supra* note 41, at 306.

D. Response to Potential Criticism

There continues to be vigorous and vocal support for strict regulation of the use of character evidence.[127] These supporters feel there is no reason to change[128] the character evidence rules because the traditional rationales for these rules are as valid as when the rules were adopted.[129] They argue vigorously that any relaxation of the rule will lead to unjust convictions.[130] Consequently, any proposal to alter such a traditional tenet of evidence jurisprudence will undoubtedly meet with skepticism. In 1982 the adoption of Proposition 8[131] proposed to alter the character evidence rules.[132] Prior to its enactment, Proposition 8 generated considerable debate[133] and has since faced continued criticism.[134] As it turns out, Proposition 8 did not have the drastic and dire effect once predicted,[135] suggesting that the opponents of character evidence reform may be overly cautious. Unlike Proposition 8 which seemed to be a complete

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127. *See* Golden, *supra* note 65, at 213-15; Imwinkelried & Méndez, *Character Evidence*, note 47, at 1043-45; Leonard, *supra* note 41, at 342; Mascolo, *supra* note 37, at 281; Miguel Angel Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1044-60 (1984).

128. Golden, *supra* note 65, at 215.

129. *Id.* at 213.

130. *See* Méndez & Imwinkelried, *About Face*, *supra* note 37, at 475-76; Ring, *supra* note 66, at 246.

131. Proposition 8 was a referendum adopted by the voters of California in 1982 amending the California Constitution. Swift, *supra* note 119, at 650. The part of Proposition 8 most relevant to this paper is the so-called "Right to Truth-in-Evidence" provision which proposed to make all relevant evidence admissible in criminal trials. *Id.*

132. The California Constitution provides in pertinent part: "Relevant evidence shall not be excluded in any criminal proceeding .... Nothing in this section shall affect any existing statutory or constitutional rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103." CAL. CONST. art. I, § 28(d).

133. *See* Swift, *supra* note 119, at 652-57 (discussing the arguments marshalled for and against Proposition 8).

134. *See* Imwinkelried & Méndez, *Character Evidence*, *supra* note 47, at 1046-49 (arguing that Proposition 8 was ill-conceived); Goldberg, *Prosecutor's Perspective*, *supra* note 37, at 964 (expressing amazement that the validity of § 1101 was still in question ten years after the adoption of Proposition 8); Méndez, *supra* note 127, at 1016 (arguing that Proposition 8 will undermine the rationales for the common law character evidence rules); Ring, *supra* note 66, at 268-69 (suggesting that Proposition 8 is overly broad and threatens personal liberty); Swift, *supra* note 119, at 660 (criticizing the amendment of the evidence code through the initiative process in the case of Propositions 8 and 115).

135. *See* Imwinkelried & Méndez, *Character Evidence*, *supra* note 47, at 1012 (concluding that the California Supreme Court has actually reinstated the old character evidence rules through its interpretation of the provisions of Proposition 8).

overhaul of the character evidence rules,[136] the current proposal affects only a small number of cases[137] and only changes the way in which jurors can consider one kind of evidence. This proposal does not allow the introduction of evidence that is currently inadmissible.[138] It may settle this area of the law by codifying the right of the state to introduce evidence of abuse in a spousal homicide case, but it will not result in the admission of any currently inadmissible abuse evidence.

Critics will argue that allowing jurors to hear evidence about past abuse will direct their attention to the defendant's character and lead them to conclude that because the defendant abused his spouse he is a bad person and is more likely to commit criminal acts. Jurors are no more likely to draw this impermissible inference under the suggested proposal then they are under the current rules. The abuse evidence, if offered, would be limited by a jury instruction directing jurors to consider the abuse evidence only as it tended to show the defendant's propensity, if any, to abuse his spouse. Jurors could still be allowed to consider incidents of abuse as they related to motive, intent, identity, and so on, but they would receive strict instructions not to consider the evidence for any other purpose.[139]

Critics may also suggest that concentrating on the past acts of a person will result in an inordinate amount of time spent arguing whether a past act occurred. The time factor is not a concern under the new proposal, however, because evidence of spousal abuse is already admissible.[140] The proposal will not change the length of an

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136. *See supra* note 131.

137. Walkenhorst, *supra* note 31, at 10 ("20 percent of all murders in this country are committed within the family, 13 percent of which are committed by spouses.").

138. *See infra* parts IV-V.

139. The proposed instruction would read something like this:

> Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [a propensity of the defendant to physically abuse his spouse.] Now, for the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

This instruction is based on the California Jury Instructions used in criminal cases. CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (CALJIC) No. 250 (5th ed. 1988) [hereinafter CALJIC]; *see infra* note 169.

140. *See infra* parts IV-V.

admissibility hearing or increase the amount of evidence presented to a jury. It would only alter the scope of jurors' consideration of abuse evidence.

IV. A CASE STUDY: *PEOPLE V. SIMPSON*

On January 11, 1995, in one of the most important motions in the trial of O.J. Simpson,[141] Judge Lance Ito began hearing a defense motion to exclude evidence of "domestic discord."[142] The motion categorized evidence of O.J.'s past abuse of Nicole as inadmissible propensity evidence.[143] The defense argued the evidence was being used to show that O.J. was disposed to commit murder because he had abused his wife in the past.[144] Since evidence of prior acts cannot be used to show propensity,[145] the defense argued that O.J.'s abuse of Nicole was only admissible if offered to establish a material fact.[146] Anticipating the People's arguments for admitting these acts, the defense asserted that O.J.'s prior acts could not be admitted to show identity, intent, motive, common plan or scheme,[147] and requested the exclusion of the evidence because it was more prejudicial than probative.[148]

The People's response to this motion contained an exhaustive twelve-page listing of numerous incidents of abuse or misconduct by O.J. against Nicole.[149] In a somewhat novel approach, the prosecution argued for the introduction of this evidence, claiming it should be admitted to give the jury an idea of what the relationship between O.J. and Nicole was really like.[150] Before arguing that these prior

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141. Levenson, *supra* note 54, at *1 ("The hearing on the motion is important because it will force society to confront the realities of domestic violence and its horrible potential.").

142. *CNN: Text of O.J. Simpson Hearing—Part 8* (CNN television broadcast, Jan. 11, 1995).

143. Defendant's In Limine Motion to Exclude Evidence of Domestic Discord at *11, People v. Simpson, No. BA097211, 1994 WL 737962 (Cal. Super. Ct. L.A. County Dec. 14, 1994) [hereinafter Domestic Discord]. This motion also sought to exclude certain hearsay statements by Nicole Brown and evidence showing O.J. Simpson stalked Nicole Brown on numerous occasions. *Id.* at *22-*23. This part of the motion will not be analyzed here as it is outside the scope of this Comment.

144. *Id.* at *11.

145. CAL. EVID. CODE § 1101(a) (West 1995).

146. Domestic Discord, *supra* note 143, at *10.

147. *Id.* at *11-*18.

148. *Id.* at *21-*22.

149. People's Response, *supra* note 4, at *5-*16.

150. Susan B. Jordan, *What's Going on Here? The Hearings on Domestic Violence*, at

acts were admissible on statutory grounds, the People pointed out a special rule in relationship violence cases allowing for the admissibility of "abuse and control evidence."[151] The People went on to argue that the abuse and control evidence was also admissible under California Evidence Code section 1101 to show the defendant's motive, intent, identity, and his plan to control Nicole Brown Simpson.[152]

The court ruled[153] that the prosecution could introduce seven incidents of prior assaultive conduct by O.J. Simpson against Nicole Brown Simpson relating to motive, intent, plan, and identity.[154] Each incident was relevant as part of a pattern of conduct by the defendant and an incident of physical violence against Nicole Brown Simpson.[155] In support of its ruling, the court cited *People v. Zack*,[156] which provides a clear rule for guiding trial courts in admitting prior abuse evidence:

> From these precedents, as well as common sense, experience, and logic, we distill the following rule: Where a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, et cetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a "distinctive modus operandi" analysis of other factors.[157]

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*2, Jan. 16, 1995, *available in* WESTLAW, O.J. Comm. database.

151. People's Response, *supra* note 4, at *3.

152. *Id.*

153. Ruling on Defendant's In Limine Motion To Exclude Evidence Of Domestic Discord with Appendix at *2-*4, People v. Simpson, No. BA097211, 1995 WL 21768 (Cal. Super. Ct. L.A. County July 22, 1994) [hereinafter Ruling].

154. The court also found that these incidents were admissible over the defendant's § 352 objections. "[The incidents] involve either a direct observation of defendant engaged in assaultive conduct against Brown Simpson or an admission of such conduct by defendant. The probative value is strong and outweighs any danger of undue prejudice, confusion of the issues or misleading the jury." *Id.*

155. *Id.* at *4.

156. 184 Cal. App. 3d 409, 229 Cal. Rptr. 317 (1986). In *Zack* the defendant was convicted of murdering his former girlfriend whom he had beaten to death. *Id.* at 411, 229 Cal. Rptr. at 317-18. Zack presented an alibi defense and thus identity was the disputed issue. *Id.* at 412-13, 229 Cal. Rptr. at 318-19. The prosecution was allowed to present evidence of the defendant's prior assaults on the decedent to prove that it was he who had committed the murder. *Id.* at 413-15, 229 Cal. Rptr. at 319-20.

157. *Id.* at 415, 229 Cal. Rptr. at 320.

The holding in *Zack* alone justifies the admission of these seven incidents, but the court also based its ruling on the Evidence Code, stating that, "[i]t is the relationship between the alleged perpetrator and the victim that provides the necessary uniqueness required under Evidence Code Section 1101(b)."[158] Since O.J. Simpson did have a prior relationship with the victim, and his prior assaults of Nicole Brown Simpson were offered to show motive, intent, plan, and identity, the court properly admitted the following incidents under *Zack* and California Evidence Code section 1101(b).[159]

The first incident admitted occurred in 1982 when the defendant smashed framed photos of Nicole Brown Simpson's family members, threw Nicole against a wall, threw her clothing out of the house, and threw her physically out of the residence.[160] In 1985, a Westec security officer responded to a call at the defendant's residence.[161] Nicole Brown Simpson, crying, and with a puffy face, met the officer at the defendant's home.[162] She told the officer that she and O.J. had been fighting, and that when she tried to leave, O.J. beat her car with a baseball bat.[163] In 1987, witnesses observed O.J. striking Nicole Brown Simpson and knocking her to the ground in Victoria Beach.[164] In 1988, O.J. ordered Nicole Brown Simpson from their residence, stating that he was "serious" and had a gun in his hand.[165] In 1989, O.J. was convicted of spousal abuse of Nicole Brown Simpson.[166] In 1988 or 1989, a limousine driver saw O.J. strike Nicole Brown Simpson in the face and also observed her injuries.[167] In 1989, Denise Brown and a friend watched O.J. slap Nicole Brown Simpson and push her from a slowly moving car.[168]

The admission of these incidents could have been unduly prejudicial to O.J. Simpson. Jurors might have concluded that O.J. Simpson's past abuse of his wife demonstrates that he is a bad person and is therefore more likely to have committed the murder. Although

158. Ruling, *supra* note 153, at *2.
159. *Id.*
160. *Id.* at *3.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at *4.
168. *Id.*

the character evidence rules prohibit this very line of reasoning, the court admitted the evidence and gave the jury a limiting instruction admonishing them not to draw this forbidden conclusion.[169]

V. THE ADMISSIBILITY OF PRIOR ABUSE IN *PEOPLE V. SIMPSON* UNDER THE PROPOSED APPROACH

Each incident of abuse admitted by the court in *Simpson* would also be admitted under the proposed approach. All of the incidents would be relevant for the same purposes: to show the nature and quality of the relationship, and a pattern of conduct by O.J. toward Nicole. However, the proposed approach would not limit jurors to considering the abuse evidence only as it relates to intent, motive, identity, and plan. Jurors could also evaluate the abuse as evidence that O.J. Simpson had a propensity to beat his wife.

After providing the jurors with evidence of a pattern of abuse, the court would allow them to conclude that O.J. Simpson had a propensity to abuse Nicole Brown Simpson—as opposed to inferring that O.J. was a person with a general propensity for violence—and as a person with a tendency to abuse Nicole Brown Simpson, it is more likely that he was the person who committed this final act of violence. Allowing the jury to consider past abuse in this way, coupled with expert testimony about Battered Woman Syndrome,[170] will help jurors see how physical abuse in a relationship can be a precursor to a more serious violent incident, like murder. Expert testimony also

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169. California Criminal Jury Instruction 2.50 states:

> Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [The existence of the intent which is a necessary element of the crime charged;] [The identity of the person who committed the crime, if any, of which the defendant is accused;] [A motive for the commission of the crime charged;] .... For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

CALJIC, *supra* note 139, No. 2.50.

170. *See* CAL. EVID. CODE § 1107 (West 1995); People v. Romero, 13 Cal. Rptr. 2d 332, 338 n.9 (1992) ("Section 1107 appears to make expert testimony admissible in *any* criminal case, regardless of the charges or defenses, except a case in which the batterer is prosecuted for his acts of abuse and the evidence is offered to prove that he committed those acts."), *rev'd on other grounds*, 8 Cal. 4th 728, 883 P.2d 388, 35 Cal. Rptr. 2d 270 (1994).

helps jurors understand why a person repeatedly subjected to a pattern of violence would stay in such a relationship.[171]

VI. CONCLUSION

Contrary to common understanding, domestic violence is not a family problem or a private matter. Victims of domestic violence can only be helped if family, friends, neighbors, police, and judges overcome their reluctance to meddle in the seemingly private affairs of others. Greater understanding of how the battering cycle can escalate into more violent abuse will shatter this reticence. This process will succeed only if the public is truly informed about domestic violence and can recognize signs of abuse.[172]

Likewise, jurors should hear about abuse evidence so they can learn how domestic violence affects its victims. More importantly, jurors in spousal homicide cases should hear abuse evidence so they can put the homicide into context with the atmosphere of violence that was present in the relationship. The judicial system should be designed to include such important evidence to show the public that a trial really is a search for the truth.

The laws should favor harsh punishment for those who kill their spouses,[173] because this type of crime betrays the most basic trust.[174] Although this proposal does not provide for stiffer punishment of batterers who kill their spouses, it will treat them less favorably at trial. Perhaps the allowance of prior abuse as evidence

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171. The value of expert testimony was described in State v. Hodges, 716 P.2d 563 (Kan. 1986):

> Expert testimony on the battered woman syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any common sense conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. *Id.* at 567.

172. Dutton, *supra* note 105, at 24 ("Signs of domestic violence are not always easily recognized . . . . The reason has more to do with the complex dynamics of domestic violence and the secrecy and distortions that shroud it.").

173. I would also favor adopting a domestic homicide statute like Minnesota's which provides for a first degree murder charge for one who kills an intimate relation. *See generally* Hobday, *supra* note 26 (discussing Minnesota's first degree murder domestic homicide statute which presumes intent based on the defendant's prior abuse of the victim and other aspects of the victim-defendant relationship).

174. *Id.* at 1296-97 ("[W]omen, due largely to their traditional role as mothers and caretakers, are essentially 'connected' with others. This 'connection' creates for women a strong sense of duty and responsibility, which . . . explains why they often remain in abusive relationships. . . . [V]iolence between members of the same family or household constitutes a breach of trust." (citations omitted)).

of a propensity to abuse the victim will make it easier for a prosecutor to convict a batterer with a history of abuse. Giving such a procedural advantage to a prosecutor in a spousal homicide case may deter spousal homicide and domestic violence. By assuring the admission of abuse evidence, we can make certain that the violent acts of abusers have been noted and will work against them in the future if they murder their spouses.

Legislators, judges, lawyers, and the public all have roles to play in stopping domestic violence.[175] Legislators need to adopt new solutions, like the proposal suggested in this Comment, since the current system cannot protect women from batterers. However, reform efforts should not be limited to amending the evidence code.[176] Any solution that promotes public understanding of domestic violence and aims at preventing spousal abuse and homicide should be considered.

The absence of a special rule allowing past acts of domestic violence in spousal homicide cases can lead to unjust results. What if Judge Ito had agreed with the defense arguments which sought to prevent evidence of O.J. Simpson's abuse of Nicole Brown from being admitted? Would the jury have received an accurate portrayal of O.J.'s relationship with Nicole? Would it have been fair for O.J. to give the jury the impression that he got along well with Nicole? Would this have been justice? Would we have fulfilled our responsibility to Nicole, or would we still owe her the truth?

VII. EPILOGUE

On October 3, 1995, O.J. Simpson was acquitted of the murders of Nicole Brown Simpson and Ronald Goldman.[177] After 126 witnesses and 133 days of testimony, O.J. walked out of court a free man.[178] While many different conclusions can be drawn from this

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175. *See* William F. Blews, *Domestic Violence: We Can Help*, 68 FLA. B.J. 14, 14 (1994) (suggesting that lawyers as leaders have a special role to play in fighting domestic violence and in educating the public about domestic violence).

176. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1189 (1993) ("[T]here is a critical need for continued expansion and refinement of domestic violence statutes. No jurisdiction has yet designed the perfect model . . .".).

177. People v. Simpson, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995). *See* Lee Margulies, *Huge TV Audience Saw Trial Climax*, L.A. TIMES, Oct. 5, 1995, at A7 (noting that a television audience of 51 million people at home watched the reading of the verdict on October 3, 1995).

178. Mark Whitaker, *Whites v. Blacks*, NEWSWEEK, Oct. 16, 1995, at 28, 31.

verdict, it should not be forgotten that the sequestered jury saw and heard a different trial than the public. Furthermore, as in any jury trial the evidence in this case was filtered through the unique life experiences of the jurors. This was significant in the Simpson case, as there is evidence that the jury may have been predisposed toward the defense from the beginning.

Prior to jury selection, the prosecution's jury-consulting firm—DecisionQuest—concluded the jury favored the defense.[179] For example, 42% of the jury stated that they or a family member had a negative experience with law enforcement.[180] A staggering 75% of the jury believed that O.J. was unlikely to commit murder because he excelled at football.[181] Also surprising is that 42% of the jury thought it was acceptable to use physical force on a family member.[182] Only two of the jurors graduated from college, and 67% said they derived their information from evening tabloid news.[183] The background of the jury may explain in part why the public viewed the evidence so differently.[184]

Despite the seeming haste of the verdict, the jury could have reasonably concluded that there was doubt as to O.J. Simpson's guilt.[185] Thus, while the acquittal may seem unbelievable or unjust to some, we cannot and should not doubt the jury's verdict.[186] Rather than second guess the decision itself, we should look at how the jury reacted to and handled the domestic abuse evidence. At least two jurors disregarded the domestic violence evidence that was presented by the prosecution. Following the verdict, juror Lionel Cryer stated "[t]his was a murder trial, not domestic abuse. If you want to get tried for domestic abuse, go in another courtroom and get

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179. Mark Miller & Donna Foote, *How the Jury Saw It*, NEWSWEEK, Oct. 16, 1995, at 37, 39.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Public opinion polls taken after the verdict revealed that 74% of whites thought O.J. Simpson committed the murders while 66% of blacks thought O.J. did not commit the murders. *Id.*

185. Richard Lempert, *The O.J. Verdict: Why It Had to Be Right*, at *1, Oct. 4, 1995, *available in* WESTLAW, O.J. Comm. database ("Both a not guilty verdict and a guilty of Murder II verdict are defensible in the sense that reasonable people could honestly and intelligently look at the evidence differently and return either verdict.").

186. *Id.* at *2 ("One conclusion I draw is that this verdict is no reason to lose faith in the jury system however one feels.").

tried for that."[187] Juror Brenda Moran described the domestic abuse issue as "a waste of time."[188] The Simpson trial was in no way representative of the criminal justice system, thus we should be hesitant in drawing conclusions from such an aberrant trial.
Be that as it may, it is always important to examine the reactions of the jurors to the evidence and how it was presented.

Contrary to the fears of the defense, the jury did not convict O.J. Simpson because he had abused his wife. In fact, they were able to separate O.J.'s behavior in the past from the evidence linking him to the crime and regard the abuse evidence as irrelevant. However, neither the statements of the jurors nor the verdict should be taken to imply that domestic abuse evidence is not a proper matter to be considered in a spousal homicide case. To prevent jurors from hearing and seeing the ravages of domestic violence would be to disregard Nicole and all battered women.

Even though the Simpson case was presented to the public through media saturation, it should not be lightly assumed that the coverage of the case adequately exposed the problem of domestic violence. Nor should it be forgotten that many men are still abusing their girlfriends and wives every minute. Attempts to educate the public about domestic violence need to continue after O.J. Simpson's acquittal is forgotten by the short attention span of public opinion.[189]

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187. Rob Pool & Amy Pyle, *Case Was Weak, Race Not Factor, Two Jurors Say*, L.A. TIMES, Oct. 5, 1995, at A1, A6.

188. *Id.*

189. Anita Hill, *One Verdict, Clashing Voices*, NEWSWEEK, Oct. 16, 1995, at 46, 51. "Whatever you think of Simpson's guilt or innocence, there was uncontroverted evidence of his abusive behavior. Lest the message be to disregard domestic violence, we ought to pause and recognize our interest in ending this form of abuse." *Id.*

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