Pace Law Review

Volume 16
Issue 1 *Fall 1995*
Domestic Violence and the Law Symposium

Article 6

September 1995

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I. Introduction

There is probably not a person in the Land who does not have some knowledge or familiarity with the so-called "trial of the century," the O.J. Simpson murder case. The celebrity of the defendant, the other major players, and the case itself had, and continues to have, society as a whole discussing domestic violence and the effectiveness of our laws that deal with this area of criminal law.

Since the commission of the crimes in June of 1994, the *Simpson*[1] case brought to the forefront the issue of what role evidence of prior domestic violence should play in criminal prosecutions. In addition to the forensic evidence which the Los Angeles prosecutors relied upon to attempt to convict Mr. Simpson, the theory of the prosecution's case rested on the proposition that Mr. Simpson committed the murders against his former wife, Nicole Brown Simpson (hereinafter Ms. Brown), and her friend, Ronald Goldman, because of jealousy, obsession, and the need to dominate Ms. Brown. The prosecution's case rested entirely upon circumstantial evidence, and as such, the prosecutors sought to introduce evidence of Mr. Simpson's past abusive conduct toward Ms. Brown to establish the

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1. No. BA097211 (Cal. App. Dep't Super. Ct. Oct. 3, 1995).

identity of the perpetrator and his motives to commit the brutal crimes. The prosecution argued that the history of domestic violence and prior threats were probative evidence of Mr. Simpson's motive, intent, plan, and identity as the killer. According to Los Angeles District Attorney Gil Garcetti, the trial judge's ruling on the admissibility of this evidence was the "most critical ruling" that the Court would make in the case.[2]

The prior conduct which the prosecution wanted to introduce on its direct case included acts of physical beatings upon Ms. Brown by Mr. Simpson, some of which were documented by photographs showing Ms. Brown's injuries.[3] Other incidents included an episode in which Mr. Simpson had thrown Ms. Brown out of a moving car; a 1989 assault for which Ms. Brown had been hospitalized due to her injuries; Mr. Simpson's 1989 no contest plea to spousal abuse for which he was ordered to undergo counseling and pay a fine; letters of apology for the abuse written by Mr. Simpson to Ms. Brown; Mr. Simpson's repeated threats to kill Ms. Brown; a 1993 recording of a "911" telephone call made by Ms. Brown to the police, during which the voice of Mr. Simpson was heard making threats and shouting obscenities at Ms. Brown; evidence that Mr. Simpson was stalking Ms. Brown, and that shortly before her death, Ms. Brown had made contact with a battered women's shelter help-line; and many other instances of actual and threatened violence committed by Mr. Simpson against Ms. Brown dating back to 1977.[4]

In January 1995, Judge Lance Ito, who presided over the murder trial, ruled that much of the domestic violence history would be admissible on the prosecution's direct case, including the 1993 "911" tape-recorded telephone call by Ms. Brown. The evidence was admitted to provide the jury with an appreciation of the "nature and quality" of the relationship between Mr. Simpson and Ms. Brown, and to aid in establishing motive, intent, plan, and identity of the killer.[5] The judge's ruling was

2. *Ito Allows Domestic Violence Evidence*, THE REPORTER DISPATCH (White Plains, N.Y.), Jan. 19, 1995, at 1B.

3. Linda Deutsch, *Officer Describes Beaten, Hysterical Nicole Simpson*, PORTLAND OREGONIAN, Feb. 1, 1995, at A01.

4. Susan B. Jordan, *Curve Ball for the Defense: How Will They Answer the Spousal Abuse Evidence in Trial*, 1995 WL 20934 (O.J. Comm. at 2, Jan. 23, 1995).

5. David Margolick, *Prosecutors Win Key Simpson Fight: Judge Allows Most Material About Domestic Violence*, N.Y. Times, Jan. 19, 1995, at B8.

considered a significant "victory" for the prosecution: a major battle won in its war against O.J. Simpson.[6]

This reaction to the judge's ruling however, raised some questions regarding the admissibility of so-called "bad act" evidence such as: Is evidence of prior abuse and threats always relevant and material in a domestic violence prosecution? In order for the trier of fact to fully understand the relationship between the accused and the victim, does common sense not dictate that they be presented with as much information as possible as to ensure a truly informed verdict? If evidence of prior domestic violence is critical in this type of criminal case, why does its admissibility depend entirely upon legal argument and judicial discretion rather than legislative mandate?

The purpose of this Article is to explore the current law in New York State regarding the use of prior charged and uncharged crimes, bad acts, and threats in the prosecution of domestic violence cases. This Article also discusses the importance of creating a "paper trail" to document a history of abuse so that valuable evidence will be preserved should a victim of domestic violence decide to avail herself or himself[7] of the services of the court systems, or in the unfortunate event of a domestic homicide where the victim is unable to relate the history of violence.

II. Admissibility of Domestic Violence History Evidence[8]: The Law in New York

Judicial hesitancy to admit evidence of prior charged and uncharged crimes is rooted in the notion that such evidence, by its nature, is potentially prejudicial to the criminal defendant. Judges are hesitant to admit this type of evidence out of concern that the jury will convict the accused because he is an individual who possesses a bad character or criminal propensity,

6. *Jordan*, *supra* note 4, at 1.

7. Hereinafter, this Article will refer to the victim as a female and the offender as a male. These references are based on the fact that in approximately 95% of the domestic violence cases handled in Westchester County, the victims are female and the offenders are male. Statistics on file with Westchester County District Attorney's Office.

8. "Domestic violence history evidence" is a term that refers to charged and uncharged crimes, bad acts, threats and other statements by a defendant toward a victim in a domestic violence prosecution.

rather than on the legal standard of proof "beyond a reasonable doubt."[9] As a general rule, evidence of prior charged and uncharged crimes and bad acts is inadmissible, despite its probative value, if the purpose for which it is offered is to discredit the defendant.[10]

A general rule of evidence, however, is that "all relevant evidence is admissible unless its admission violates some exclusionary rule."[11] Evidence of prior charged and uncharged crimes is admissible if it tends to establish an element of the crime charged, or is relevant to one of the well-recognized exceptions. The Court of Appeals, in *People v. Molineux*,[12] recognized some of the issues for which evidence of prior charged and uncharged crimes and bad acts of a defendant may be relevant.[13] Such evidence is commonly referred to as "Molineux Evidence." The recognized theories under which "Molineux Evidence" may be introduced include: intent, motive, knowledge, common scheme or plan, and identity of the defendant.[14] This list is merely illustrative, however, and is not exhaustive of other purposes for which "Molineux Evidence" may be properly introduced.[15] While "Molineux Evidence" usually involves the admission of crimes and bad acts that occurred prior to the crime for which the defendant stands charged, the *Molineux* principles are equally applicable to crimes and bad acts committed subsequent to the pending charges.[16]

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9. JEROME PRINCE, RICHARDSON ON EVIDENCE, § 170, at 139 (10th ed. 1973).

10. *See* People v. Hudy, 73 N.Y.2d 40, 535 N.E.2d 250, 538 N.Y.S.2d 197 (1988); People v. Alvino, 71 N.Y.2d 233, 519 N.E.2d 808, 525 N.Y.S.2d 7 (1987); People v. Lewis, 69 N.Y.2d 321, 506 N.E.2d 915, 514 N.Y.S.2d 205 (1987); People v. Ventimiglia, 52 N.Y.2d 350, 420 N.E.2d 59, 438 N.Y.S.2d 261 (1981); People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).

11. *Lewis*, 69 N.Y.2d at 325, 506 N.E.2d at 916, 514 N.Y.S.2d at 207 (citing Ando v. Woodberry, 8 N.Y.2d 165, 167); PRINCE, *supra* note 9, § 5, at 5.

12. 168 N.Y. 264, 61 N.E. 286 (1901).

13. *Id.* at 293, 61 N.E. at 294.

14. *Id.*

15. People v. Jackson, 39 N.Y.2d 64, 68, 346 N.E.2d 537, 539, 382 N.Y.S.2d 736, 738 (1976); People v. Santarelli, 49 N.Y.2d 241, 248, 401 N.E.2d 119, 204, 425 N.Y.S.2d 77, 82 (1980).

16. *See* People v. Ingram, 71 N.Y.2d 474, 522 N.E.2d 439, 527 N.Y.S.2d 363 (1988); People v. Calvano, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 430 (1972); People v. Dupree, 110 A.D.2d 777, 487 N.Y.S.2d 847 (2d Dep't 1985); People v. Powell, 107 A.D.2d 718, 484 N.Y.S.2d 75 (2d Dep't 1985).

The trial court must engage in a two-part inquiry to determine which of the defendant's crimes and/or bad acts will be admissible upon application by the prosecution.[17] The first part of the inquiry involves a question of law; that is, whether or not the prosecution has established, as a threshold matter, some issue relevant to the case other than the mere criminal propensity of the accused.[18] Once the prosecution meets this threshold showing, the trial court must then evaluate the probative value of the proffered evidence against its prejudicial effect.[19] This balancing process is entirely within the discretion of the trial judge.[20] It is the prosecutor who bears the responsibility of educating the trial judge as to the law that favors the admissibility of evidence of prior charged and uncharged crimes and bad acts in the domestic violence prosecution. Since domestic violence cases turn, in large part, on the credibility of the victim, the prosecution's success in introducing such evidence before the trier of fact often results in the difference between conviction and acquittal. The purpose for which this evidence is offered is the critical focus of the court's inquiry. Thus, if the prosecution can meet its burden by establishing a theory or purpose other than showing the defendant's criminal propensity, the appellate courts tend to approve the trial court's admission of such evidence.[21]

A. *Motive and Identity*

In domestic violence cases, particularly where the prosecution's case is circumstantial in nature, evidence of the defendant's motive to commit the charged crimes is significant. To prove motive and/or identity when these are in issue in the case,[22] the trier of fact must know the nature of the relationship

17. *Hudy*, 73 N.Y.2d at 55, 535 N.E.2d at 258, 538 N.Y.S.2d at 206 (citations omitted).

18. *Id.*

19. *Id.*

20. *Id.*

21. *See* People v. Hudy, 73 N.Y.2d 40, 535 N.E.2d 250, 538 N.Y.S.2d 197 (1988).

22. In New York, "Molineux Evidence" may be admissible on the issue of identity, provided that the defendant's identity with respect to the charged crimes has not been conclusively established and is actually in issue. *See* People v. Allweiss, 61 A.D.2d 74, 401 N.Y.S.2d 501 (1st Dep't 1978), *aff'd* 48 N.Y.2d 40, 47, 396 N.E.2d

between the defendant and the victim. Although motive, unlike identity, is not an element of any criminal offense, there is an inextricable connection between the reason a defendant would commit the crimes charged and his past conduct toward the victim. This is especially true when there has been a prior intimate relationship between the defendant and the victim. In domestic homicides, for example, the perpetrator's motive to kill his spouse or intimate partner is often rooted in his anger over the dissolution of his relationship with his spouse or partner, jealousy, and his loss of control over his spouse's or partner's actions. When the prosecution's proof is circumstantial, evidence of motive assumes even greater importance in establishing the defendant's identity as the perpetrator of the crime charged.[23]

In addition to a defendant's prior abusive conduct toward his spouse or intimate partner, his threats to commit future acts of violence are probative evidence of motive, which may be utilized in the domestic violence case. A threat to commit an act, in the wake of its attempt or accomplishment, serves as evidence that the act threatened was attempted or accomplished.[24]

In a 1987 Westchester County homicide case,[25] a young mother was killed by a gunman whose identity was initially unknown.[26] The defendant, Michael Linton, was the estranged husband of the victim and was ultimately charged with, and convicted of murder in the second degree.[27] The case was entirely circumstantial in nature. The prosecution established the defendant's motive and identity by introducing evidence of the defendant's prior charged and uncharged crimes and bad acts,

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735, 738, 421 N.Y.S.2d 341, 345 (1979); People v. Hill, 163 A.D.2d 813, 558 N.Y.S.2d 345 (4th Dep't 1990).

23. People v. Mixon, 203 A.D.2d 909, 611 N.Y.S.2d 723 (4th Dep't 1994), *appeal denied*, 84 N.Y.2d 830, 641 N.E.2d 171, 617 N.Y.S.2d 150 (1994); People v. Harris, 122 A.D.2d 493, 505 N.Y.S.2d 254 (3d Dep't 1986); People v. Dyes, 122 A.D.2d 69, 504 N.Y.S.2d 223 (2d Dep't 1986); PRINCE, *supra* note 9, § 171, at 141.

24. *See* People v. Liberatore, 167 A.D.2d 425, 561 N.Y.S.2d 832 (2d Dep't 1990), *appeal denied*, 78 N.Y.2d 956, 578 N.E.2d 449, 573 N.Y.S.2d 651 (1991); People v. Linton, 166 A.D.2d 670, 561 N.Y.S.2d 259 (2d Dep't 1990), *appeal denied*, 77 N.Y.2d 879, 571 N.E.2d 92, 568 N.Y.S.2d 922 (1991); People v. McCaskill, 144 A.D.2d 496, 533 N.Y.S.2d 1020 (2d Dep't 1988).

25. People v. Linton, 166 A.D.2d 670, 561 N.Y.S.2d 259 (2d Dep't 1990).

26. *Id.* at 670-71, 561 N.Y.S.2d at 259.

27. *Id.*

which included: (1) evidence that the victim had expressed an increasing fear of being killed by the defendant; (2) the defendant's prior threats with a gun; (3) an order of protection that had been issued against the defendant on behalf of the victim; and (4) evidence that the victim had sought refuge at a battered women's shelter prior to her death.[28] The Appellate Division affirmed the murder conviction and specifically approved of the use of "Molineux Evidence" on the prosecution's case-in-chief, as it was "highly probative of the defendant's motive"[29] and "directly related to or 'inextricably interwoven' with the issue of his identity as the killer."[30]

The use of domestic violence history evidence to establish motive or identity is not limited to homicide cases. In *People v. Shorey*,[31] the Second Department affirmed the defendant's conviction of assault in the first degree upon his estranged wife. The trial court allowed evidence of the defendant's prior bad acts and threats, which demonstrated that the defendant's marriage was unstable. The appellate court noted that in addition to being admissible on the issues of motive and identity, the evidence was also admissible as background information to provide the jury with a better understanding of the nature of the defendant's relationship with the victim, and to put the facts into an understandable context.[32] Likewise, in domestic arson cases, evidence of a defendant's threats and prior conduct has been admissible to establish motive and identity of the arsonist.[33] In cases of sexual assault[34] and reckless endangerment,[35]

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28. *Id.* at 671, 561 N.Y.S.2d at 260.

29. *Id.* (citing People v. Ely, 68 N.Y.2d 520, 529, 503 N.E.2d 88, 94, 510 N.Y.S.2d 532, 538 (1986), *appeal after remand*, 164 A.D.2d 442, 563 N.Y.S.2d 890 (3d Dep't 1990), *appeal denied*, 77 N.Y.2d 905, 572 N.E.2d 620, 569 N.Y.S.2d 937 (1991)). *See also* People v. Dyes, 122 A.D.2d 69, 504 N.Y.S.2d 223 (2d Dep't 1986)(affirming the defendant's murder conviction based in part on the prosecution's use of testimony from the children of the victim who related that the defendant had threatened and menaced their mother months before her death).

30. *Id.*

31. 172 A.D.2d 634, 568 N.Y.S.2d 436 (2d Dep't 1991), *appeal denied*, 78 N.Y.2d 974, 580 N.E.2d 426, 574 N.Y.S.2d 954 (1991).

32. *Id.*

33. People v. Martinez, 169 A.D.2d 561, 564 N.Y.S.2d 414 (1st Dep't 1991), *appeal denied*, 77 N.Y.2d 908, 572 N.E.2d 623, 569 N.Y.S.2d 940 (1991); People v. McCaskill, 144 A.D.2d 496, 533 N.Y.S.2d 1020 (2d Dep't 1988); People v. Roides, 124 A.D.2d 967, 508 N.Y.S.2d 826 (4th Dep't 1986), *appeal denied*, 69 N.Y.2d 886,

such evidence has been admitted to establish elements of the crimes and related issues.

B. *Intent and Absence of Mistake or Accident*

Prior bad act evidence is especially probative and material in establishing the *mens rea* of intent,[36] especially where a defendant's intent is not easily inferred from the commission of the crimes themselves without reference to his prior conduct.[37] When a defendant is charged with domestic violence crimes involving burglary, assault, attempted murder, or murder, he may try to discredit the prosecution's proof on the issue of his intent at the time of the crime. The defendant may, in a burglary case, for example, claim that his intent was not to commit a crime against his spouse or intimate partner once inside her home, but merely to "talk" with the victim, thus asserting an innocent explanation for the otherwise unlawful entry.

Likewise, in a case involving an intentional assault, attempted murder or intentional murder, the defendant may claim that the victim's injuries were caused by accident or mistake, and that they were not the result of his intentional conduct. The element of intent must be established beyond a reasonable doubt on the prosecution's case-in-chief. Accordingly, admission of proof of prior abusive conduct and threats toward the victim becomes especially critical in order for the trier of fact to understand that the defendant's conduct was not accidental in nature.[38] Indeed, in cases where a defendant claims that the victim herself was somehow responsible for her

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507 N.E.2d 1104, 515 N.Y.S.2d 1034 (1987); People v. Harris, 122 A.D.2d 493, 505 N.Y.S.2d 254 (3d Dep't 1986).

34. People v. Castrechino, 134 A.D.2d 877, 521 N.Y.S.2d 960 (4th Dep't 1987).

35. People v. Hernandez, 139 A.D.2d 477, 527 N.Y.S.2d 233 (1st Dep't 1988).

36. "Intent" is defined as "[acting] intentionally with respect to a result or to conduct described by a statute defining an offense when [the perpetrator's] conscious objective is to cause such result or to engage in such conduct." N.Y. PENAL LAW § 15.05 (1) (McKinney 1992).

37. People v. McDonald, 150 A.D.2d 805, 806, 542 N.Y.S.2d 42, 43 (2d Dep't 1989); People v. Roides, 124 A.D.2d 967, 508 N.Y.S.2d 826 (4th Dep't 1986), *appeal denied*, 69 N.Y.2d 886, 507 N.E.2d 1104, 515 N.Y.S.2d 1034 (1987).

38. People v. Henson, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973); People v. Simpson, 132 A.D.2d 894, 518 N.Y.S.2d 453 (1987), *appeal denied*, 70 N.Y.2d 937; People v. Band, 125 A.D.2d 683, 509 N.Y.S.2d 570 (2d Dep't 1986); People v. Sims, 110 A.D.2d 214, 494 N.Y.S.2d 114 (2d Dep't 1985).

own injuries or that her injuries were otherwise caused by the defendant's unintentional conduct, the domestic violence history evidence is necessary to discredit such claims.[39] The likelihood of accidental or mistaken occurrences diminishes as the number of previous episodes of domestic violence increases.[40]

Domestic violence history evidence assumes significant relevance when the accused plans to present a defense which, if accepted by the trier of fact, could negate the element of intent. Such defenses include, intoxication,[41] or the psychiatric defenses of extreme emotional disturbance[42] or not responsible by reason of mental disease or defect.[43]

C. *Necessary Background and Narrative*

The typical juror hearing the domestic violence case is likely to bring with him or her many misconceptions regarding intrafamilial violence. Despite the fact that issues such as child rearing and ordinary family life may be within the ken of the average juror, "the dynamics of sexually and physically abusive relationships within a family are not as familiar."[44] As such, an abuser's past history of bad acts and threats toward his spouse or intimate partner is relevant and material to the understanding of the relationship between the parties by the trier of fact. Thus, domestic violence history evidence is admissible as necessary background material to assist the trier of fact in under-

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39. *See* People v. Sims, 110 A.D.2d 214, 494 N.Y.S.2d 114 (2d Dep't 1985).

40. *Id.* at 494 N.Y.S.2d at 121; *see also* People v. Basir, 179 A.D.2d 662, 578 N.Y.S.2d 603 (2d Dep't 1992).

41. N.Y. PENAL LAW § 15.25 (McKinney 1992).

42. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1992). This section states:

> A person is guilty of murder in the second degree when:
>
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
>
> (a) the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

Id.

43. *Id.* at § 40.15.

44. People v. Taylor, 75 N.Y.2d 277, 288, 552 N.E.2d 131, 135, 552 N.Y.S.2d 883, 887 (1990).

standing the nature of the crime, or to explain or to establish a material fact.[45]

It is often necessary to inform the trier of fact of the sequence of events leading up to the crime in order to complete the narrative of the events. Prior bad act evidence is admissible pursuant to this theory, particularly in domestic violence cases where the admission of such evidence will facilitate the jury's comprehension of the dynamics of the relationship so as to enhance their understanding of the crime itself.[46] The thrust of the argument favoring the admission of domestic violence history evidence is that such evidence is inextricably interwoven with otherwise admissible evidence and is thus necessary for a full comprehension of directly related evidence.[47] Specifically, evidence of a defendant's prior bad acts and threats toward the victim is essential to aid the trier of fact in understanding common issues such as a victim's delaying the disclosure of the crimes, recanting of allegations, or the victim's staying with an abusive partner.[48] These issues can be particularly troublesome to a jury, especially if the jury is comprised of individuals with no personal experience with domestic violence. Admission of domestic violence history evidence ensures that there will not be undue speculation on these issues.[49]

In connection with the theory that prior domestic violence history evidence should be admitted at trial as it is essential to necessary background and interwoven with other evidence in

45. People v. Shorey, 172 A.D.2d 634, 635, 568 N.Y.2d 436, 437 (2d Dep't 1991), *appeal denied*, 78 N.Y.2d 974, 580 N.E.2d 426, 574 N.Y.S.2d 954 (1991); People v. LeGrand, 76 A.D.2d 706, 431 N.Y.S.2d 850 (2d Dep't 1980).

46. People v. Singh, 186 A.D.2d 285, 588 N.Y.S.2d 573 (2d Dep't 1992) (Miller, J. dissenting).

47. People v. Ely, 68 N.Y.2d 520, 510 N.Y.S.2d 532, 503 N.E.2d 88 (1986); People v. Pitts, 202 A.D.2d 368, 612 N.Y.S.2d 827 (1st Dep't 1994); People v. Linton, 166 A.D.2d 670, 561 N.Y.S.2d 922, 571 N.E.2d 92 (1991); People v. Cheeseboro, 162 A.D.2d 286, 556 N.Y.S.2d 637 (1st Dep't 1990); People v. Powell, 157 A.D.2d 524, 549 N.Y.S.2d 716 (1st Dep't 1990); People v. Tabora, 139 A.D.2d 540, 527 N.Y.S.2d 36 (2d Dep't 1988), *appeal denied*, 72 N.Y.2d 925, 529 N.E.2d 189, 532 N.Y.S.2d 859 (1988).

48. *See* People v. Singh, 186 A.D.2d 285, 588 N.Y.S.2d 573 (2d Dep't 1992); People v. Ranum, 122 A.D.2d 959, 506 N.Y.S.2d 105 (2d Dep't 1986); People v. Gomez, 112 A.D.2d 445, 492 N.Y.S.2d 415 (2d Dep't 1985); People v. Mattison, 97 A.D.2d 621; PRINCE, *supra* note 9, § 292, at 263.

49. *See generally* People v. Millington, 134 A.D.2d 645, 521 N.Y.S.2d 167 (3d Dep't 1987).

the case, the prosecution frequently calls expert witnesses in domestic violence cases. These expert witnesses provide juries with relevant information regarding a victim's state of mind at the time of the crime, and provide them with a framework within which they, as the triers of fact, can make an informed assessment of the victim's credibility, which is the essence of the case. Expert witnesses in domestic violence cases have been permitted to testify about the dynamics of abusive relationships, common patterns of behavior, and characteristics of women who are involved in these relationships.[50]

In order for the expert witness to adequately address the specific issues in a particular domestic violence case, the expert must be permitted to comment on the prior history of violence between the defendant and the victim, as it relates to such issues as why the battered woman did not leave the relationship after a single episode of abuse, and the nature of the continuous threat under which the battered woman lived. The presence of a continuous threat of abuse bears significantly on such issues as: (1) delayed disclosure to law enforcement officials; (2) recanted allegations; and (3) continued contact between a victim and her abuser subsequent to his arrest. Additionally, expert testimony can explain why a victim may refuse to cooperate with the prosecution, or why, perhaps, she is called to testify on behalf of her abuser. The psychological and societal aspects of a relationship involving domestic violence are not within the understanding of the average juror; as such, expert testimony is often needed to clarify and to explain this area of human relations which is otherwise viewed inaccurately and skeptically. Thus, evidence of a defendant's prior domestic violence against his victim is inextricably interwoven with the admissible testimony by an expert witness in these cases.

50. *See* People v. Taylor, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990); People v. Keindl, 117 A.D.2d 679, 68 N.Y.2d 410 (2d Dep't 1986); People v. Emick, 103 A.D.2d 643, 481 N.Y.S.2d 552 (4th Dep't 1984); People v. Fisher, 73 A.D.2d 886, 424 N.Y.S.2d 197 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 907, 423 N.E.2d 53, 440 N.Y.S.2d 630 (1981); People v. Torres, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (N.Y.C. Crim. Ct. Bronx County 1985).

D. *To Establish an Element of the Crime Charged*

Where a victim's state of mind is in issue, such as in connection with the element of forcible compulsion in a domestic sexual offense case, the prosecution must establish this material element of force beyond a reasonable doubt on its case-in-chief. Accordingly, the way the victim perceived her abuser's force is critical to the jury's assessment of whether or not the defendant committed the crimes of rape in the first degree,[51] sodomy in the first degree,[52] sexual abuse in the first degree,[53] and aggravated sexual abuse in the first degree[54] or second degree.[55]

In connection with a forcible sexual offense, the prosecution must prove that the defendant compelled the victim to act by forcible compulsion. Forcible compulsion is "the use of physical force, or a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped."[56] All too often in domestic violence cases involving sexual crimes, the defendant does not actually strike the victim or use a weapon to ensure her compliance with his sexual demands. The victim generally testifies that she "submitted" to the sexual acts because of the defendant's prior abuse toward her, and because she believed that if she did not comply, he would cause her, or perhaps her children, physical injury or death. It is because of the prior abusive conduct that the victim believes that an implied threat toward her, or someone close to her, exists. It is thus imperative that prosecutors be allowed to introduce the prior charged and uncharged crimes, bad acts, threats, and statements of the defendant, which contributed to the victim's state of mind at the time of the sexual offense.[57]

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51. N.Y. PENAL LAW § 130.35 (1) (McKinney 1992).
52. *Id.* at § 130.50 (1).
53. *Id.* at § 130.65 (1).
54. *Id.* at § 130.70 (1)(a).
55. *Id.* at § 130.67 (1)(a).
56. *Id.* at § 130.00 (8)(a)(b).
57. People v. Thompson, 72 N.Y.2d 410, 530 N.E.2d 839, 534 N.Y.S.2d 132 (1988)(the evidence provided a sufficient basis for the conclusion that defendant's threats caused the victim to fear death or serious injury); People v. Thompson, 158 A.D.2d 563, 551 N.Y.S.2d 332 (2d Dep't 1990)(evidence of sexual molestation was

Likewise, when a defendant is charged with the crime of unlawful imprisonment in the first or second degrees,[58] the prosecution must prove the material element of restraint; specifically that the defendant unlawfully restrained the victim without her consent. In order to show that the defendant restrained the victim without her consent, the prosecution must prove beyond a reasonable doubt that the victim was moved or confined by physical force, intimidation, or deception.[59] Prior bad acts and threats by the defendant toward the victim are therefore relevant and probative in establishing this material element in connection with the charge of unlawful imprisonment.

In a domestic homicide case where the defendant is charged with depraved indifference murder by causing the death of his spouse or intimate partner "under circumstances evincing a depraved indifference to human life,"[60] the prosecution must show on its direct case the factual setting in which the defendant's conduct occurred. It is this factual setting that elevates the homicide to murder, despite the fact that the *mens rea* of this crime is one of recklessness, and differentiates it from the lesser crime of reckless manslaughter. A history of prior domestic violence by the defendant toward the victim, particularly when in close proximity to the death, may assist the trier of fact in assessing the degree of risk presented by the defendant, and in determining whether or not the defendant's conduct was "so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law im-

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offered to show the victim's continuing fear of the defendant); People v. Bermudez, 109 A.D.2d 674, 487 N.Y.S.2d 5 (1988) (evidence that defendant grabbed the victim constituted a threat, which placed the victim in fear of death or personal injury); People v. Grant, 104 A.D.2d 674, 479 N.Y.S.2d 914 (3d Dep't 1984)(prior and subsequent uncharged crimes were admissible to show the defendant's intent, motive, and plan to promote prostitution and coercion); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dep't 1984)(the victim's testimony of prior abuse by the defendant was sufficient to support an inference of a continuous threat of injury, if the victim did not submit to sexual acts); People v. Barlow, 88 A.D.2d 668, 451 N.Y.S.2d 254 (3d Dep't 1982)(the defendant's violent treatment of his wife and children was admissible as relevant to prove the victim's state of mind, and to prove the element of forcible compulsion).

58. N.Y. PENAL LAW §§ 135.05, 135.10 (McKinney 1992).

59. *Id.* at § 135.00 (1)(a).

60. *Id.* at § 125.25 (2).

poses upon a person who intentionally causes the death of another."[61]

E. *To Counter Defenses and Other Claims by the Defendant*

Domestic violence history evidence is particularly effective in refuting the defense of justification,[62] and psychiatric defenses, such as extreme emotional disturbance[63] and not responsible by reason of mental disease or defect.[64] Evidence of prior domestic violence may also be utilized to counter defense claims in the criminal trial that the defendant was intoxicated at the time of the incident, and that such intoxication negated an element of the crime charged.[65] Additionally, such evidence may be used to rebut impeachment of the domestic violence victim's credibility by claiming that the witness has a motive to fabricate the charges or that some of her allegations are the result of a recent fabrication.

Other charged and uncharged crimes and bad acts of the defendant assume particular significance when the defendant puts his mental state into issue at a criminal trial by setting forth a so-called insanity defense. In *People v. Santarelli*,[66] the Court of Appeals noted that:

> [E]vidence of uncharged criminal or immoral conduct may be admitted as part of the People's case on rebuttal if it has a tendency to disprove the defendant's claim that he was legally insane at the time of the crime. . . . Having placed his mental state before the trier of fact, the defendant cannot complain when the People seek to bring forth additional evidence bearing upon that issue.[67]

Thus, the defendant cannot have it both ways; if he puts his mental state at the time of the crime before the trier of fact, he cannot then try to preclude the prosecution from introducing

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61. People v. Fenner, 61 N.Y.2d 971, 972, 463 N.E.2d 617, 618, 475 N.Y.S.2d 276, 277 (1984); People v. Register, 60 N.Y.2d 270, 457 N.E.2d 704, 469 N.Y.S.2d 599 (1983); People v. Moquin, 142 A.D.2d 347, 536 N.Y.S.2d 561 (3d Dep't 1988); People v. Sika, 138 A.D.2d 935, 526 N.Y.S.2d 683 (4th Dep't 1988).

62. N.Y. PENAL LAW art. 35 (McKinney 1992).

63. *Id.* at § 125.25 (1)(a).

64. *Id.* at § 40.15.

65. *Id.* at § 15.25.

66. 49 N.Y.2d 241, 401 N.E.2d 199, 425 N.Y.S.2d 77 (1980).

67. *Id.* at 248-49, 401 N.E.2d at 204, 425 N.Y.S.2d at 82; *see also* People v. Ryklin, 150 A.D.2d 509, 541 N.Y.S.2d 103 (2d Dep't 1989).

relevant and material evidence of his prior conduct that may be dispositive of that issue.[68] When the defendant "opens the door" to his prior mental history such as by presenting expert testimony in connection with a psychiatric defense, the prosecution must be allowed to cross-examine the defendant's psychiatric expert as to the expert's awareness of the defendant's prior bad acts, as they are relevant to the issue of the expert's credibility, as well as the merits of the psychiatric defense itself.[69]

Other instances when the defendant "opens the door" to the admission of prior bad act evidence include situations when the defendant relies upon a justification defense to explain his use of physical or deadly physical force against his spouse or intimate partner,[70] or when the defendant asserts a claim of diminished capacity at the time of the crime as the result of intoxication. One such example is *People v. Hawker*.[71] In *Hawker*, the Second Department affirmed the defendant's conviction for murder in the second degree in connection with the stabbing death of the defendant's wife in the presence of their three children.[72] The defendant claimed at trial that he was intoxicated at the time of the stabbing, and thus, did not have the requisite intent to commit the crime of murder.[73] The defendant interposed a justification defense as well. The trial court admitted the children's testimony regarding the defendant's prior assaults upon their mother as probative not only on the issues of the defendant's motive and intent, but also because such domestic violence history evidence "reflected a pattern of similar acts inspired by the same underlying motive, and tended to show that the fatal stabbing was a continuation of that pattern of violence, and was likewise intentional rather than merely the product of intoxication or an act of self-defense."[74]

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68. *Ryklin*, 150 A.D.2d at 511, 541 N.Y.S.2d at 105; *see also* People v. Foster, 159 A.D.2d 801, 553 N.Y.S.2d 489 (3d Dep't 1990).

69. People v. Gantz, 104 A.D.2d 692, 480 N.Y.S.2d 583 (3d Dep't 1984).

70. People v. Montana, 192 A.D.2d 623, 596 N.Y.S.2d 154 (2d Dep't 1993); People v. Barnes, 176 A.D.2d 337, 574 N.Y.S.2d 522 (2d Dep't 1991).

71. 626 N.Y.S.2d 524 (2d Dep't 1995).

72. *Id.* at 524.

73. *Id.*

74. *Id.* at 525.

In domestic violence cases where the defense attempts to impeach the victim's credibility by demonstrating that she has a motive to fabricate the allegations against the defendant, particularly where there has been a delayed disclosure of the crime, the victim may be permitted to testify about prior episodes of violence committed by the defendant. In order to impeach the victim, the defendant will typically try to attribute motives such as jealousy or financial interest to the victim as a basis for her fabrication. By putting these issues before the jury, the defense "opens the door" to the admission of prior domestic violence history evidence.[75] Furthermore, if the defense claims that a victim fabricated some or all of the allegations at or around the time of the trial, the prosecution should be permitted to introduce prior consistent statements of the victim made at a time when she had no motive to fabricate in order to repel that imputation. This evidence would not improperly bolster the victim's credibility.[76]

F. *The Application and Cautionary Instruction*

An application must be made to the trial judge, and a pretrial ruling rendered, before the prosecution may properly introduce domestic violence history evidence. The prosecution's application should be made as early as possible to give sufficient notice and to obtain a ruling. This allows the prosecutor to address this evidence in his or her jury *voir dire* and opening statement.[77]

The *motion in limine*, commonly referred to as the "Ventimiglia Application,"[78] should be made by way of a full offer of proof by the prosecutor. Although a hearing is not always re-

75. People v. Melendez, 55 N.Y.2d 445, 451-52, 434 N.E.2d 1324, 1327, 449 N.Y.S.2d 946, 949-50 (1982); People v. Wilens, 198 A.D.2d 463, 603 N.Y.S.2d 585 (2d Dep't 1993), *appeal denied*, 83 N.Y.2d 812, 633 N.E.2d 503, 611 N.Y.S.2d 148 (1994); People v. Jones, 173 A.D.2d 331, 575 N.Y.S.2d 472 (1st Dep't 1991), *appeal denied*, 78 N.Y.2d 1012, 581 N.E.2d 1066, 575 N.Y.S.2d 820 (1991); People v. Stanley, 135 A.D.2d 910, 522 N.Y.S.2d 309 (3d Dep't 1987); People v. Respass, 623 N.Y.S.2d 337, (2d Dep't 1995), *appeal denied*, 85 N.Y.2d 979, 653 N.E.2d 635, 629 N.Y.S.2d 739 (1995).

76. People v. Sease-Bey, 111 A.D.2d 195, 488 N.Y.S.2d 822 (2d Dep't 1985), *appeal denied*, 66 N.Y.2d 618, 485 N.E.2d 245, 494 N.Y.S.2d 1041 (1985).

77. People v. Ventimiglia, 52 N.Y.2d 350, 420 N.E.2d 59, 438 N.Y.S.2d 261 (1981).

78. *Id.*

quired, the trial judge may order a hearing, at which time the prosecutor must produce witnesses to detail the proffered evidence.[79] At the hearing, the prosecutor must establish the purpose for which the evidence is being offered, and as a threshold matter, must identify a purpose other than mere criminal propensity. Thereafter, the prosecutor must demonstrate how the probative value of the proffered evidence outweighs its prejudicial effect. The prosecutor must establish the defendant's involvement in the prior incidents by clear and convincing evidence.[80]

A pre-trial memorandum of law should be prepared when a favorable *Ventimiglia* ruling is critical to the prosecution's case. The memorandum should contain the facts of the case, the proffered evidence, and supporting case law, because the ultimate decision on admissibility rests entirely within the trial judge's discretion. Despite a plethora of cases which supports the admissibility of prior bad act evidence in domestic violence prosecutions, the application may fall on deaf ears if the trial judge is not educated as to the applicable decisional law.

If the prosecutor is permitted to introduce domestic violence history evidence on the direct case, the trial judge must instruct the jury as to the limited purposes for which the jury must consider this evidence. The judge must also advise the jury that they must not consider such evidence as probative of a criminal propensity or general bad character of the defendant. The cautionary instruction should be given both at the time of the admission of the evidence, and as part of the general charge to the jury at the conclusion of the case, before commencement of deliberations.[81]

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79. People v. Battes, 190 A.D.2d 625, 594 N.Y.S.2d 153 (1st Dep't 1993), *appeal denied*, 81 N.Y.2d 1011, 616 N.E.2d 855, 600 N.Y.S.2d 198 (1993); People v. Charleston, 175 A.D.2d 602, 572 N.Y.S.2d 260 (4th Dep't 1991), *appeal denied*, 78 N.Y.2d 1126, 586 N.E.2d 67, 578 N.Y.S.2d 884 (1991).

80. *See* People v. Hudy, 73 N.Y.2d 40, 535 N.E.2d 250, 538 N.Y.S.2d 197 (1988); People v. Robinson, 68 N.Y.2d 541, 503 N.E.2d 485, 510 N.Y.S.2d 837 (1986); People v. Ventimiglia, 52 N.Y.2d 350, 420 N.E.2d 59, 438 N.Y.S.2d 261 (1981).

81. *See* People v. Robinson, 68 N.Y.2d 541, 503 N.E.2d 485, 510 N.Y.S.2d 837 (1986); People v. Ingram, 67 N.Y.2d 897, 492 N.E.2d 1220, 501 N.Y.S.2d 804 (1986); People v. Williams, 50 N.Y.2d 996, 409 N.E.2d 949, 431 N.Y.S.2d 477 (1980); People v. Mees, 47 N.Y.2d 997, 394 N.E.2d 283, 420 N.Y.S.2d 214 (1979); People v. Maggio, 137 A.D.2d 623, 524 N.Y.S.2d 511 (2d Dep't 1988).

III. The Legislative Response to Family Violence

In 1994, the New York State Legislature passed a comprehensive law known as "The Family Protection and Domestic Violence Intervention Act of 1994" (hereinafter the Act).[82] The Legislature acknowledged in the preamble to the Act that in New York, domestic violence is a prevalent and serious problem with detrimental consequences to our families, as well as to our "social services, legal, medical and criminal justice systems."[83]

The Legislature also recognized the need to enhance the laws in New York that address issues of domestic violence, including increasing penalties for certain crimes,[84] and holding law enforcement and the judiciary more accountable to the victims of family violence by requiring training,[85] maintaining records,[86] and mandating arrests in certain types of cases.[87]

As a result of the Act, the Criminal Procedure Law now mandates that police prepare written reports which document domestic violence incidents.[88] Police officers must file their reports along with witness statements. This creates a "paper trail" of domestic violence episodes, which can be crucial in the successful prosecution of future crimes. Such documentation may serve to circumstantially identify the killer in a homicide case where the victim is unable to do so, or may corroborate a victim's account of a history of violence, if such evidence is admissible at trial pursuant to any of the theories previously discussed. The preparation and maintenance of domestic violence incident reports is required by law whether or not an arrest is made, and the responding law enforcement agency must keep the report on file for at least four years.[89]

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82. Ch. 222, [1994] N.Y. Laws 786 (McKinney)(revised at ch. 224, § 1 [1994] N.Y. Laws 808).

83. *Id.*

84. N.Y. PENAL LAW § 170.55 (McKinney 1992)(Adjournment in Contemplation of Dismissal); N.Y. PENAL LAW § 120.14(3)(McKinney 1992)(Menacing in the Second Degree); N.Y. PENAL LAW § 215.51 (b)(c) and (d)(McKinney 1992)(Criminal Contempt in the First Degree).

85. Ch. 222, § 48 [1994] N.Y. Laws 800 (McKinney).

86. N.Y. CRIM. PROC. LAW § 140.10(5)(McKinney 1995).

87. N.Y. CRIM. PROC. LAW § 140.10 (4)(McKinney 1995)(amended by ch. 224, § 5-a [1994] N.Y. Laws 810 (McKinney)).

88. N.Y. CRIM. PROC. LAW § 140.10 (5) (McKinney 1995).

89. N.Y. CRIM. PROC. LAW § 140.10 (5)(McKinney 1995)(amended by ch. 224, § 5 [1994] N.Y. Laws 811 (McKinney 1995).

Victims of family violence must be encouraged to come forward and to report the crimes perpetrated upon them when it is safe for them to do so. In the past, police officers frequently did not effectively respond to calls for help in domestic violence situations. In the event that an abuser was not arrested, police officers rarely prepared a report of the incident. Without documentary evidence, such as incident reports and depositions, as well as such evidence as "911" tapes and photographs of injured victims, a witness who testifies in a domestic violence prosecution regarding prior bad acts by the defendant is left to carry the entire burden of convincing the trier of fact that there actually was a history of violence; in essence, the strength of the domestic violence case rests solely on the victim's credibility. In an age where jurors' expectations from law enforcement agencies are greater than ever before, the testimony of the victim alone is often viewed as insufficient to warrant a guilty verdict, despite its legal sufficiency. The documentation of this type of evidence by law enforcement officials and the admission of the evidence by the judge on the prosecution's case at trial, will strengthen the case, and thus, give victims more incentive to proceed. The criminal justice system will be perceived as working to protect the victim, while also preserving the accused's constitutional rights to a fair trial.

While the Act creates a mandate for the creation of a paper trail in all domestic violence cases, and even sets forth an evidentiary rule permitting a written or oral admission or testimony from the Family Court to be received into evidence in a criminal proceeding for impeachment purposes,[90] the law is silent on the use of prior domestic violence history evidence in a criminal case. The Legislature has left the determination of this weighty evidentiary matter to the sole discretion of the judiciary. The problem, however, is that if a trial judge is not receptive to this type of evidence, legal arguments will not be persuasive; thus, the prosecution may be severely impaired.

Previously, the New York State Legislature had taken a strong position to encourage the protection of crime victims by passing laws that made the prosecution of sexual offenses less embarrassing and more encouraging to the victim. For exam-

90. N.Y. CRIM. PROC. LAW § 60.46 (McKinney 1995).

ple, in 1975, the "Rape Shield Law"[91] went into effect setting forth the general evidentiary rule that a victim's prior sexual history is inadmissible in a sexual offense prosecution, unless it comes within one of the specifically designated statutory exceptions.[92] With the passage of this law, the Legislature made it clear that harassment of victims of sexual crimes would not be tolerated in New York, nor would confusion of issues that have no bearing on the defendant's guilt or innocence be allowed by way of cross-examination into the victim's past sexual conduct.[93] This law "serves an important public interest by removing one of the impediments that caused many victims of sex offenses not to report them."[94] Judicial discretion is not entirely eliminated and is actually incorporated into the Rape Shield Law. The thrust of the legislative provision, however, reflects public policy by prohibiting the introduction of evidence of the victim's sexual history.

Similarly, in 1990, the Legislature expanded the Rape Shield Law to include victims of non-sexual offenses in Criminal Procedure Law section 60.43.[95] As in New York Criminal Procedure Law section 60.42, the issue of a victim's sexual history is presumed to be irrelevant in a non-sexual offense case. Unlike Criminal Procedure Law Section 60.42, however, section 60.43 does not set forth legislative exceptions for admissibility. Before the trial judge receives evidence of a victim's sexual history in the interests of justice, the proponent of such evidence must make a threshold showing of relevance. The judge must set forth his or her reasons for admission of the evidence to prevent the exercise of arbitrary discretion. According to McKinney's Practice Commentary, "[Section 60.43] reflects a legislative judgment that the frequency of unjustified use of the victim's prior sexual conduct to cloud the relevant issues in criminal trials justifies the establishment of a presumption of irrelevance of such evidence."[96]

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91. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).
92. *Id.*
93. *Id.*
94. *Id.*
95. N.Y. CRIM. PROC. LAW § 60.43 (McKinney 1995)
96. N.Y. CRIM. PROC. LAW § 60.43 commentary at 15 (McKinney 1992).

In 1994, New York Criminal Procedure Law Section 60.48, prohibiting evidence of a victim's manner of dress at the time of the commission of a sexual crime, became effective.[97] As noted in the Practice Commentary to this law:

> Absent this legislation, an attempt to introduce such evidence, if met with an objection, would be subject to a ruling as to relevance governed by judicial discretion. While there is no reason to believe that judges in this state would admit such evidence on the ground that the manner of the victim's dress somehow indicated consent, the legislative sponsors believed that a special safeguard would be appropriate, citing a newspaper report quoting the remark of a juror after acquittal of a Florida rape defendant subsequently convicted of rape in Georgia, to wit: 'the way she was dressed, she was asking for it.'[98]

This provision does not completely eliminate judicial discretion but does put the burden of proof on the proponent of this type of evidence (who would no doubt be the defense and not the prosecution). The trial judge is held to a standard of accountability should he or she rule that this evidence is admissible.[99] The judge must make findings that the victim's manner of dress is relevant and admissible in the interests of justice, and must further set forth on the record, his or her findings that support this decision.[100]

These laws were enacted to ease the way for crime victims who testify in criminal cases that are replete with sensitive, if not difficult, issues. They reflect public policy and eliminate prejudicial and irrelevant information from being placed before the trier of fact; information that may, and often does, cloud the real issues and evidence surrounding the defendant's guilt or innocence.

With the enactment of the Family Protection and Domestic Violence Intervention Act of 1994, New York State lawmakers have taken a stand and publicly announced that acts of domestic violence are criminal and threaten the very fabric of our communities. The time has come for the legislature to go even

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97. N.Y. CRIM. PROC. LAW § 60.48 (McKinney Supp. 1995).

98. *Id.*

99. N.Y. CRIM. PROC. LAW § 60.48 commentary at 83-84 (McKinney Supp. 1995).

100. N.Y. CRIM. PROC. LAW § 60.48 (McKinney Supp. 1995).

further by creating laws that establish a presumption of relevance and admissibility of domestic violence history evidence in the criminal case. Many judges throughout the State still hesitate to grant a victim of a family offense an order of protection, even when the abuser has been arrested and there is evidence of injury. Judges are often reluctant to send a convicted abuser to jail, even when there has been a violation of an order of protection. Jail sentences are often reserved for only the most egregious of cases which, by law, require the imposition of a mandatory state prison sentence.

If, as the preamble to the Act suggests, our lawmakers have declared war on domestic violence, they now have a concomitant responsibility to provide prosecutors with the legal weapons with which to fight the battle. Other states have gone further than New York and have enacted creative laws that permit the use of prior bad act evidence in a criminal case.[101] While it is commendable that the New York Legislature wants to take a strong position against domestic violence crimes, all of the heightened awareness will be for naught if these cases are not successfully prosecuted in our courts of law. Perhaps the only way to change judicial attitudes about domestic violence is to legislatively mandate rules of evidence as to ensure that both parties, the defendant and the victim, will receive a fair trial. Prosecutors have but one opportunity to convict an abuser. An acquittal may ultimately result in the victim becoming yet another statistic, and an example of how the system failed.

The time has come for our legislators to once again take a position in safeguarding the rights of domestic violence victims. As Ann Jones repeatedly states in her book, *Next Time She'll Be Dead*, "women and children have an absolute right to live free

101. *See* CAL. EVID. CODE § 1101(b) (West 1995); FLA. STAT. ANN. § 90.404(2)(a) (West 1979); IDAHO CODE § 404(3)(b) (1995); IND. CODE § 404(b) (1995); KAN. STAT. ANN. § 60-455 (1994); MICH. COMP. LAWS ANN. § 768.27 (West 1982); MINN. STAT. §§ 634.20, 609.185, 609.185(5) (Supp. 1995); MONT. CODE ANN. § 404(3)(b) (1993); NEB. REV. STAT. § 27-404(2) (1989); N.M. STAT. ANN. § 11-404(B) (Michie 1994); OHIO REV. CODE ANN. § 404(B) (Anderson 1995); TENN. CODE ANN. § 39-13-202(a)(4) (Supp. 1993); UTAH CODE ANN. § 404(b) (1995); VT. STAT. ANN. § 404(b) (1994); WASH. REV. CODE § 9A-32.005; WIS. STAT. ANN. § 904.04(2) (West 1993); *see* Margaret C. Hobday, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 Minn. L. Rev. 1285 (1994).

from bodily harm."[102] Jurors must hear about the history of domestic violence when determining the guilt or innocence of an abuser so that a miscarriage of justice does not occur. The relevance and materiality of this type of evidence cannot be overemphasized; its admission in, or preclusion from, the criminal case may ultimately make the difference between life and death.

102. ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT, 4 (1994).