EVIDENTIARY ISSUES IN FEDERAL PROSECUTIONS OF VIOLENCE AGAINST WOMEN

TOM LININGER*

In the last decade, the federal government has played an increasing role in the prosecution of violence against women.[1] Beginning with the passage of the Violence Against Women Act ("VAWA") in 1994,[2] Congress has established several new federal offenses involving violence against women.[3] The number of charges filed under these statutes has steadily increased.[4] The United States

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* Assistant Professor, University of Oregon School of Law. B.A., 1988, Yale University; J.D., 1991, Harvard Law School. As a federal prosecutor, the author obtained the first conviction in the nation under a 1996 provision of the Violence Against Women Act, 18 U.S.C. § 922(g)(9). Bonnie Campbell, the Director of the U.S. Department of Justice's Violence Against Women Office during the Clinton Administration, has given the author a commendation as "a national leader in the prosecution of domestic violence." The author thanks the following students who helped with the research for this article: James Avery, Ray Cornwell, Shawn Dickey, Ivan Gardzelewski, Brian Haaland, Michael Harris, Ricardo Juarez, Michael McClaren, Andy Moore, and Derek Reiman. The author is also grateful for data compilations obtained from Margaret Groban of the Office on Violence Against Women at the U.S. Department of Justice.

1. A number of scholars have discussed the "federalization" of domestic violence law and other areas of the law that were historically the exclusive domain of the states. *See, e.g.*, William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1142 (concluding that, "by federalizing an area of law that state courts are more capable of adjudicating, Congress has seriously misallocated federal judicial resources"); Michelle W. Easterling, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 950-53 (1996) (advocating the elimination of criminal offenses under VAWA); David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role In Policing Domestic Violence*, 84 CORNELL L. REV. 252, 301 (1998) (applauding VAWA as "an appropriate congressional response to a national problem"); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1227 (2002) (noting that in Congress, "Democrats seek to federalize domestic violence law"); Pamela A. Paiotopoulos, *Violence Against Women Act: Federal Relief for State Prosecutors*, 30 PROSECUTOR 20, 30 (May/June 1996) (suggesting that the passage of VAWA is a salutary development because states have limited resources to investigate and prosecute domestic violence offenses).

2. Pub. L. No. 103-322 (codified as amended in various sections of 8, 16, 18, 20, 28, and 42 U.S.C.). VAWA included a civil remedy that was struck down by the U.S. Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000). The majority opinion noted in a footnote that the criminal provisions of VAWA relating to interstate domestic violence were not unconstitutional because they implicated the Commerce Power. *Id.* at 613 n.5.

3. These include criminal provisions pertaining to interstate domestic violence (18 U.S.C. § 2261), interstate violation of protective orders (18 U.S.C. § 2262), interstate stalking (18 U.S.C. § 2261A), possession of a firearm by a person against whom a restraining order is pending (18 U.S.C. § 922(g)(8)), and possession of a firearm by a person convicted of a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)). All of these statutes took effect in 1995, except for 18 U.S.C. § 922(g)(9), which took effect in 1996.

4. According to statistics maintained by the Executive Office of United States Attorneys

Department of Justice has also intensified its commitment to prosecuting violence against women in Indian country, where the United States has jurisdiction over certain major crimes such as rape and sexual assault.[5] In 1995,

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(EOUSA), the number of cases filed under 18 U.S.C. §§ 922(g)(8), 922(g)(9), 2261, 2261A, and 2262 have climbed in almost every year since the enactment of VAWA in 1994. In 1995, three cases were filed under these provisions. In 1996, eighteen cases were filed. In 1997, fifty-two cases were filed. In 1998, fifty-eight cases were filed. In 1999, 152 cases were filed. In 2000, 234 cases were filed. In 2001, 208 cases were filed. In 2002 (based on extrapolation of statistics compiled through June 2002), 276 cases were filed. The average annual increase in case filings was 134% during this period. It appears that most of the VAWA prosecutions have involved firearms charges under 18 U.S.C. §§ 922(g)(8), 922(g)(9). For example, under 18 U.S.C. § 922(g)(8) (the gun ban while a restraining order is pending) federal prosecutors filed three cases in 1996, thirteen in 1997, twelve in 1998, thirty-six in 1999, fifty-five in 2000, and sixty-eight in 2001, the last year for which complete data are available. Under 18 U.S.C. § 922(g)(9) (the gun ban for convicted domestic abusers) federal prosecutors filed one case in 1996, ten in 1997, sixteen in 1998, sixty-eight in 1999, 159 in 2000, and 125 in 2001. The foregoing figures were provided to this author in a series of reports faxed from EOUSA in July 2002 and January 2003 (on file with the author). The statistics in these reports were derived from data submitted regularly to EUOSA by the ninety-four United States Attorneys' Offices. The reports included all cases in which the above-listed statutes were charged, even if these statutes were not the lead charges. It is important to note that prior to 1999, the United States Attorneys' case management system did not include complete statutory citations, so the figures in the reports may underestimate the number of cases brought prior to 1999.

5. This jurisdiction arises under the Major Crimes Act, 18 U.S.C. § 1153. Tracy A. Henke, Principal Deputy Assistant Attorney General at the Office of Justice Programs in the U.S. Department of Justice, testified before the Senate Indian Affairs Committee on March 5, 2002, that the U.S. Department of Justice will strive to ensure "no domestic violence and sexual assault victims fall through the cracks" on Indian reservations. Her written testimony is available on the internet at http://www.usdoj.gov/otj/statementtracy/03-05-2002.htm. According to the Bureau of Justice Statistics, rape and sexual assault are more prevalent among American Indians than among the rest of the U.S. population. Between the years 1992 and 1996, seven out of 1000 American Indians were victims of rape or sexual assault, compared with two out of 1000 whites, three out of 1000 blacks, and one out of 1000 Asians. Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, Bureau of Justice Statistics Report Number NCJ-173386, February 1999, at 3, *available at* http://www.ojp.usdoj.gov/bjs/pub/. Data in this report show that in 1997, federal prosecutors brought 1126 cases against American Indians, and 47.5 % of these prosecutions were for crimes of violence; by contrast, only 6.7% of all federal prosecutions in that same year involved crimes of violence. *Id.* at 30. Overall, the number of federal prosecutions involving rape and sexual assault seems to be increasing. In 1994, the United States prosecuted 221 defendants on charges of rape, and ninety-three defendants on other sex offense charges. In 1995, the number of rape cases was 258, and the number of cases involving other sex offenses was 137. In 1996, these numbers were 275 and 388. In 1997, these numbers were 291 and 382. In 1998, these numbers were 307 and 472. The data were categorized differently after 1998, so it is difficult to evaluate whether this trend continued. The foregoing figures are set forth in the Bureau of Justice Statistics' Compendium of Federal Justice Statistics for the years 1994 through 1998 (NCJ-163063, NCJ-

the Justice Department created a special office—the Violence Against Women Office—which is charged with coordinating the prosecution of VAWA offenses, among other duties.[6]

As the number of federal prosecutions of violence against women has increased, so too has interest in revising the Federal Rules of Evidence (FRE) to facilitate such prosecutions. In 1995, for example, Congress passed a new evidentiary rule, FRE 413, to liberalize the admission of prior crimes evidence in federal prosecutions for sexual assault.[7] Some in Congress have sought to relax the ban on propensity evidence in other prosecutions of violence against women.[8] Other recent proposals would amend the Federal Rules of Evidence to

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164259, NCJ-172849, NCJ-176328, and NCJ-180258, respectively). All of these reports are available on the Internet at http://www.ojp.usdoj.gov/bjs/pub/ (last visited Jan. 30, 2003). While the figures for federal rape and sexual assault cases do not indicate which portion of the defendants were Native Americans, it is reasonable to assume that American Indians compose a large subset of the defendants in these cases, because federal jurisdiction over such offenses only arises in federal enclaves such as Indian reservations and military bases, and prosecutions of military personnel are not handled by the U.S. Department of Justice. *See* United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir. 2001) (defendant, a Native American prosecuted for child molestation, claimed that the liberal standard for admitting prior crimes evidence under Federal Rule of Evidence 414 violated the Equal Protection Clause because most defendants who are prosecuted federally for such offenses are Native Americans; the court noted the disproportionate effect but rejected the Equal Protection claim).

6. During the Clinton Administration, this office was called the Violence Against Women Office. After George W. Bush became president in 2000, the name of the office was changed to the Office on Violence Against Women. In addition to assisting prosecutors who are handling VAWA cases, the office performs other functions such as administering over $1 billion in grant funds. More information about the office is available at its web site at http://www.ojp.usdoj.gov/vawo/ (last visited Jan. 30, 2003).

7. Rules 413 through 415, admitting prior bad acts to show propensity in cases involving sexual assault or child molestation, are unique in that these rules were not drafted by the Advisory Committee and promulgated through the Rules Enabling Act, as were most of the other Federal Rules of Evidence. These rules were simply created by Congress. The Judicial Conference actually opposed these rules, objecting to the prejudicial effect of the evidence that the rules would admit, as well as numerous drafting errors in the rules. 159 F.R.D. 51, 52 (1995). For a further discussion of the "politicization" of the Federal Rules of Evidence, see Daniel J. Capra, *Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691 (2001) (discussing Rule 704(b), the "Hinckley Rule"). Another useful resource is the transcript from a symposium held during the annual meeting of the Association of American Law Schools' Evidence Section, entitled, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733 (2002) (focusing on Rules 413-15 and Rule 704(b)); *see also* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking,"* 53 HASTINGS L.J. 843 (2002) (commenting on symposium).

8. For example, Senator John Kyl proposed a bill in 1995 that would have suspended Rule 404(b) in certain cases involving domestic violence. A copy of the bill, S. 1483, is available on the internet at http://nsi.org/Library/Legis/bill1483.txt (last visited Jan. 30, 2003). In 1997, Senator Orrin Hatch offered a similar proposal and incorporated into the Omnibus Crime Control Bill, S.

admit out-of-court statements by victims of domestic violence.[9] States have innovated a number of special evidentiary rules for cases involving domestic violence,[10] and the suitability of these rules for federal court is an open question.

This short essay will consider whether the federal criminal justice system would benefit from adopting some of the new evidentiary rules that states have created for cases involving violence against women. In particular, this essay will address three questions. First, should the federal courts permit impeachment of a testifying defendant with his prior misdemeanor crimes involving domestic violence? Second, should the federal courts freely admit evidence of prior similar conduct to show propensity in a prosecution for a VAWA offense?

3, § 713, *available at* http://www.airportnet.org/ depts/federal/legisla2/s3.htm (last visited Jan. 30, 2003). Neither Senator Kyl's proposal nor Senator Hatch's proposal was ever adopted by Congress.

9. Douglas E. Beloof & Joel Shapiro, 11 COLUM. J. GENDER & L. 1, 14 (2002) (suggesting that FRE 803 be amended to admit out-of-court statements by victim to police within twenty-four hours of alleged domestic violence); Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Hearsay Exception the Answer?*, 49 DUKE L.J. 1041, 1060 (2000) (arguing that after Congress has created special evidentiary rules for prosecutions of sexual assault and child molestation, a special hearsay exception for domestic violence cases would be appropriate); Donna M. Matthews, *Making a Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 160-64 (1997) (urging that FRE 804 be amended to admit out-of-court statement by deceased victim of domestic violence).

10. David M. Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. B. J. 65, 65 (July/Aug. 1998) ("Recently, a number of states have amended both their statutes and evidence codes to ease the prosecution of domestic violence crimes"). Several authors have addressed the merit of these approaches in the context of state prosecutions of domestic violence, but little scholarship has considered whether the innovative state rules should be imported to federal court. *See* Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM 359 (1996); Peter R. Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299 (2001); David M. Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. BAR J. 65 (1998); Neal A. Hudders, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041 (2000); Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221 (1998); Linell A. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973 (2000); Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73 (1995); Donald W. North, *A License to Kill Your Spouse: A Critical Look at the Admissibility of Prior Acts Evidence as it Relates to the Louisiana Domestic Violence Exception*, 27 S.U. L. REV. 181 (2000); Debra Hayes Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(b) to Hold Batterers Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361 (1999); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996); Jeffrey S. Siegel, *Timing Isn't Everything: Massachusetts' Expansion of the Excited Utterance Exception in Severe Criminal Cases*, 79 B.U. L. REV. 1241 (1999).

Third, should the federal courts recognize a new hearsay exception for victims of domestic violence who speak to the police shortly after they are abused, whether or not the circumstances meet the requirements for traditional hearsay exceptions such as the excited utterance rule? Each of these questions will be addressed in turn below.

I. IMPEACHMENT WITH PRIOR MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE

Currently, under FRE 609(a), a witness can be impeached with two categories of convictions: 1) felonies of any sort,[11] or 2) misdemeanor crimes involving dishonesty or false statement.[12] The rationale for admitting felonies to impeach a witness is that "the desperate person who would commit [a felony] would also lie under oath."[13] The rationale for admitting misdemeanor convictions involving dishonesty or false statement is self-evident: a conviction for dishonest conduct in the past suggests that the witness may testify falsely in the present proceeding. The two-tiered categorization of convictions under FRE 609(a) is consistent with a long tradition of case law preceding the adoption of the Rules.[14]

States have taken various approaches to impeachment with prior convictions. Twenty-five states have adopted FRE 609(a) virtually verbatim, and these states allow impeachment with either felonies or misdemeanors involving dishonesty.[15]

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11. More precisely, FRE 609(a)(1) applies to crimes "punishable by death or imprisonment in excess of one year," which will be referred to hereafter by the short-hand term "felonies." FED. R. EVID. 609(a)(1).

12. The House-Senate Conference Committee Report on the original version of FRE 609(a) included this explanation: "By the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused propensity to testify truthfully," *reprinted in* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2002 FEDERAL RULES OF EVIDENCE WITH ADVISORY COMMITTEE NOTES, LEGISLATIVE HISTORY, AND CASE SUPPLEMENT 146 (Aspen 2002).

13. United States v. Lipscomb, 702 F.2d 1049, 1053 (D.C. Cir. 1983) (quoting trial judge's explanation for permitting impeachment with robbery conviction).

14. When FRE 609(a) was originally adopted, the Advisory Committee's Note accompanying this rule summarized the traditional approach to impeachment: "The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense," *reprinted in* MUELLER & KIRKPATRICK, *supra* note 12, at 142-43.

15. ALA. R. EVID. 609(a); ARIZ. R. EVID. 609(a); ARK. R. EVID. 609(a); DEL. R. EVID. 609(a); FLA. R. EVID. 609(a); IND. R. EVID. 609(a); IOWA R. EVID. 609(a); MAINE R. EVID. 609(a); MINN. R. EVID. 609(a); MISS. R. EVID. 609(a); NEB. R. EVID. 609(a); N.D. R. EVID. 609(a); N.H. R. EVID. 609(a); N.M. R. EVID. 609(a); OHIO R. EVID. 609(a); 12 OKLA. ST § 2609(a); S.C. R. EVID. 609(a); S.D. R. EVID. 609(a); TENN. R. EVID. 609(a); UTAH R. EVID. 609(a); VT. R. EVID. 609(a); WA. R.

Thirteen other states have adopted statutes that permit impeachment with convictions but do not limit these convictions to the categories set forth in FRE 609(a); judges in these states generally exercise their discretion to admit most felonies and also some misdemeanors involving moral turpitude and/or dishonesty.[16] Five states allow impeachment with felony convictions, but not with misdemeanors of any sort.[17] Five states permit impeachment with convictions for offenses involving dishonesty or false statement, but exclude all other convictions, even if they are felonies.[18] Montana does not allow any

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EVID. 609(a); W.V. R. EVID. 609(a); WYO. R. EVID. 609(a). The version of Rule 609(a) adopted in Texas permits impeachment with all felonies and misdemeanors involving "moral turpitude." TEX. R. EVID. 609(a); Arnold v. State, 36 S.W.3d 542, 546 (Tex. App. 2000) (crimes of moral turpitude include crimes of dishonesty and false statement).

16. COLO. REV. STAT. ANN. § 13-90-101 (West 2002) ("[T]he conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness."); 725 ILL. COMP. STAT. ANN. § 5/115-16 (West 2002) (conviction may be shown for the purpose of affecting the credibility of the witness); LA. CODE EVID. art. 609-1 (West 2002) (any conviction may be used to impeach a witness in a criminal case); MD. R. CT. 5-609(a) (West 2002) (conviction may be used for impeachment if "crime was an infamous crime or other crime relevant to the witness's credibility"); MASS. GEN. LAW ANN. ch. 233, § 21 (West 2002) (both misdemeanors and felonies may be used; misdemeanors must be no older than five years, and felonies must be no older than ten years); MO. ANN. STAT. § 491.050 (West 2002) ("any prior criminal convictions may be proved to affect [the witness'] credibility in a civil or criminal case"); N.C. R. EVID. 609(a) (convictions for felonies, Class A1 misdemeanors, Class 1 misdemeanors, and Class 2 misdemeanors may be used for impeachment); N.J. R. EVID. 609 ("For the purpose of affecting the credibility of any witness, the witness's conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes."); N.Y. CPLR LAW § 4513 ("A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony."); R.I. R. EVID. 609(a) (convictions for misdemeanors not involving dishonesty or false statement may be admitted, but the proponent must make an offer of proof outside the presence of the jury so the other side can contest admissibility; this special requirement does not apply to felonies or misdemeanors involving dishonesty or false statement); TEX .R. EVID 609(a) (impeachment permissible with prior conviction "only if the crime was a felony or involved moral turpitude, regardless of punishment");VA. CODE ANN. § 19.2-269 (West 2002) ("A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown to affect his credit."); WIS. STAT. ANN. § 906.09 (West 2002) (conviction for any crime may be used for impeachment). A Georgia statute allows impeachment of a testifying criminal defendant with unspecified types of prior convictions, but only if the defendant has "first put his character in issue." GA. CODE ANN. § 24-9-20(b) (2002).

17. CAL. EVID. CODE § 788 (West 2002) (only felonies can be used for impeachment); CONN. R. EVID. § 6-7 (felonies only); IDAHO R. EVID. 609 (felonies only); KY. R. EVID. 609(a) (felonies only); NEV. REV. STAT. ANN. § 50.095 (Michie 2002) (felonies only).

18. ALASKA R. EVID. 609(a) (for impeachment purposes, convictions are "only admissible if the crime involved dishonesty or false statement"); HAW. R. EVID. 609(a) ("For the purpose of attacking the credibility of the witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty."); KAN. CIV. PROC. CODE ANN.

impeachment with prior convictions.[19]

Oregon is the only state that has specifically tailored its version of Rule 609 for cases involving domestic violence. Prior to 2002, Oregon's Rule 609(a) followed the federal model, permitting impeachment with felonies and misdemeanor crimes involving dishonesty and false statement. As of January 1, 2002, a third category of convictions may be used for impeachment in Oregon. When a defendant is prosecuted for certain crimes of violence against a family or household member, and that defendant elects to testify, he may be impeached under Oregon's Rule 609 with a prior misdemeanor conviction for a crime involving assault, menacing, or harassment of a family or household member.[20]

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§ 60-421 (West 2002) ("Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of imparity his or her credibility"); MICH. R. EVID. 609(a) (impeachable offenses are limited to crimes involving dishonesty or false statement, or felony offenses involving theft); PA. R. EVID. 609(a) (only convictions for dishonesty or false statement may be used to impeach).

19. MONT. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

20. OR. EVID. CODE § 609(2) now provides as follows:

> (a) If a defendant is charged with one or more of the crimes listed in paragraph (b) of this subsection, and the defendant is a witness, evidence that the defendant has been convicted of committing one or more of the crimes against a family or household member, as defined in ORS 135.230, may be elicited from the defendant, or established by public record, and admitted into evidence for the purpose of attacking the credibility of the defendant:
>
> (A) Assault in the fourth degree under ORS 163.160.
> (B) Menacing under ORS 163.190.
> (C) Harassment under ORS 166.065.
> (D) Attempted assault in the fourth degree under ORS 163.160(1).
> (E) Attempted assault in the fourth degree under ORS 163.160(3).
>
> (b) Evidence may be admitted into evidence for the purpose of attacking the credibility of a defendant under the provisions of this subsection only if the defendant is charged with committing one or more of the following crimes against a family or household member, as defined in ORS 135.230:
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> (A) Aggravated murder under ORS 163.095.
> (B) Murder under ORS 163.115.
> (C) Manslaughter in the first degree under ORS 163.118.
> (D) Manslaughter in the second degree under ORS 163.118.
> (E) Assault in the first degree under ORS 163.185.
> (F) Assault in the second degree under ORS 163.175.
> (G) Assault in the third degree under ORS 163.165.
> (H) Assault in the fourth degree under ORS 163.160.
> (I) Rape in the first degree under ORS 163.375(1)(a).
> (J) Sodomy in the first degree under ORS 163.405(1)(a).
> (K) Unlawful sexual penetration in the first degree under ORS 163.411(a)(a).

In effect, misdemeanor crimes of domestic abuse are treated as if they were felonies for purposes of impeachment under Oregon's Rule 609.

Is it possible that the federal government might adopt Oregon's approach? Congress has recently determined that misdemeanor crimes of domestic violence are equivalent to felonies for purposes of the federal ban on firearm possession,[21] so it is not inconceivable that Congress might one day expand Federal Rule of Evidence 609(a) to permit impeachment of witnesses with misdemeanor crimes involving domestic violence.

Before proceeding down this path, Congress should consider several flaws in Oregon's new impeachment rule. To begin with, convictions for misdemeanor crimes of domestic violence have dubious probative value when offered to impeach the credibility of a witness. The tendency of a witness to commit a misdemeanor-level assault does not suggest a tendency to lie while testifying under oath. Most state courts that have evaluated the probative value of such convictions for impeachment purposes have decided to exclude this evidence.

In *Hunter v. Staples*,[22] the South Carolina Court of Appeals considered whether convictions for misdemeanor offenses of domestic violence should be

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(L) Sexual abuse in the first degree under ORS 163.427(1)(a)(B).
(M) Kidnapping in the first degree under ORS 163.235.
(N) Kidnapping in the second degree under ORS 163.225.
(O) Burglary in the first degree under ORS 164.225.
(P) Coercion under ORS 163.275.
(Q) Stalking under ORS 163.732.
(R) Violating a court's stalking protective order under ORS 163.750.
(S) Menacing under ORS 163.190.
(T) Harassment under ORS 166.065.
(U) Attempting to commit a crime listed in this paragraph.

21. 18 U.S.C. § 922(g)(9) (2000), also known as the "Lautenberg Amendment," prohibits the possession of a firearm by any person who has been convicted of a misdemeanor crime of domestic violence. Before the passage of the Lautenberg Amendment in 1996, the only convictions that led to a firearms disability were felonies. *Id.* § 922(g)(1). During floor debates on the Lautenberg Amendment, Senator Lautenberg stressed that he thought a misdemeanor crime of domestic violence was just as pernicious as a felony crime. 142 CONG. REC. S10,377-78 (1996); 142 CONG. REC. S11,226 (1996). Senator Diane Feinstein, a supporter of the Lautenberg Amendment, stated the gun ban should apply to convicted domestic abusers regardless of "the classification of the conviction" as a misdemeanor or felony. 142 CONG. REC. S10,379 (1996). Senator Feinstein, Senator Paul Wellstone, and Representative Pat Schroeder all noted the variation in states' charging practices, which necessitated a generic federal definition of the predicate offense so that batterers would uniformly be denied the right to possess firearms whether or not the states in which they lived had classified domestic violence as a felony offense. 142 CONG. REC. 1,110,434 (1996); 142 CONG. REC. S10,379 (1996); 142 CONG. REC. S10,377 (1996). If domestic violence misdemeanors should be treated as felonies in the context of the gun ban under 18 U.S.C. § 922(g), it is a small step to argue that domestic violence misdemeanors should be treated as felonies in the context of FRE 609(a).

22. 515 S.E.2d 261 (S.C. Ct. App. 1999).

admissible to impeach the credibility of a party testifying in a civil case. The court held that "[t]he domestic violence convictions, however reprehensible, do not establish Hunter was deceitful or untruthful," and therefore should not be admissible to impeach his credibility.[23]

Similarly, in *State v. Newell*,[24] the New Hampshire Supreme Court held that a witness could not be impeached with a prior misdemeanor conviction for assaulting a woman, because this offense was "[not] probative of truthfulness or untruthfulness."[25] Other courts have reached similar conclusions about the probative value of generic assault convictions in assessing the credibility of a witness.[26] The Hawaii Supreme Court could not discern "any rational connection" between "a crime of violence and the likelihood that the witness will tell the truth."[27] If generic assault convictions are not probative of truthfulness, it is difficult to understand why a subset of assault convictions involving intimate partners should be admissible for impeachment.[28]

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23. *Id.* at 265.

24. 679 A.2d 1142 (N.H. 1996).

25. *Id.* at 1146.

26. United States v. Akers, 374 A.2d 874, 878 (D.C. 1977) ("[t]he crime of assault does not involve dishonesty or false statement," so convictions for this crime should not be used to impeach); State v. Norgren, 616 A.2d 505, 507 (N.H. 1992) (determining that a conviction for misdemeanor assault did not involve dishonesty and should not be used for impeachment); Commonwealth v. Williams, 573 A.2d 536, 538-39 (Pa. 1990) (ruling that impeachment with assault conviction was improper because offense did not involve dishonesty; error was prejudicial and required reversal); State v. Brown, 583 N.E.2d 1331, 1334-35 (Ohio Ct. App. 1989) (determining that admission of misdemeanor assault conviction for impeachment was error because offense did not involve dishonesty); State v. Darveaux, 318 N.W.2d 44, 48 (Minn. 1982) (ruling that aggravated assault is not an offense that involves dishonesty).

27. Asato v. Furtado, 474 P.2d 288, 295 (Haw. 1970).

28. Perhaps one possible rationale for this distinction is that domestic assault involves betrayal of an intimate partner—which may demonstrate dishonesty to the extent that the assailant has implicitly pledged to protect and respect the intimate partner—while generic assault may often involve a stranger. Such a distinction is difficult to defend, however, because generic assaults could also involve friends or intimate partners. In fact, prosecutors often charge domestic violence offenses under generic assault statutes, and many states do not have any domestic assault statute. *See* 142 CONG. REC. S11,872-78 (1996) (statement of Sen. Lautenberg). Senator Lautenberg stated:

> Mr. President, convictions for domestic violence-related crimes are often for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence.

Id.; *see also* United States v. Barnes, 295 F.3d 1354, 1365 n.12 (D.C. Cir. 2002) (according to government's brief, only nineteen states have assault laws that include a relational element; the others prosecute domestic violence under generic assault statutes). Whatever the merit of the "betrayal theory" as a justification for admitting domestic assaults to impeach credibility, this rationale was not invoked at any time in the legislative history of Oregon's unique impeachment

Not only do misdemeanor assault convictions lack probative value on the issue of credibility, they also pose a significant danger of prejudice by suggesting an inference of propensity. Indeed, the sponsors of Oregon's unusual impeachment rule explicitly urged that propensity evidence should be admissible in prosecutions of domestic violence. Their bill originally began as a proposal to amend Oregon's version of FRE 404(b) in order to liberalize the admission of propensity evidence in domestic violence cases.[29] When the Oregon House

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rule, nor did the proponents of the rule offer any explanation as to why a misdemeanor crime involving domestic violence is probative of credibility. An appellate court in Texas has determined that, in impeaching a male defendant, a misdemeanor assault on a woman should be admissible, while a misdemeanor assault on a man should not. Hardeman v. State, 868 S.W.2d 404, 407 (Tex. Ct. App. 1993) (interpreting TEX. R. EVID. 609(a), which permits impeachment with any felony or a misdemeanor offense involving "moral turpitude"). The distinction drawn by the Texas court is not dependent on the "betrayal theory" or on the nature of the relationship between the male assailant and the female victim. Rather, the distinction appears to rest on notions of chivalry and on the difference between the physical strength of a man and woman. *Id.* ("We believe an assault by a man against a woman is generally regarded by the members of our society as more morally culpable than some other types of assaultive crimes."). Why wouldn't an attack by a man against a particularly weak or elderly male victim present the same "moral turpitude"?

29. The original proposal would have, inter alia, carved out the following exception to Oregon's Rule 404: "Notwithstanding any other provision of the Oregon Evidence Code, in a criminal action in which a defendant is charged with an offense involving domestic violence, evidence that the defendant has committed other acts of domestic violence is admissible unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusing the issues or misleading the jury." H.R. 3680, 71st Leg., Reg. Sess. (Or. 2001), *available at* http://www.leg.state.or.us/01reg/measures/hb3600.dir/hb3680.intro.html. The leading proponent of Oregon House Bill 3680, Gina Skinner of the Oregon District Attorney's Association, testified that the bill was modeled after California's 1997 law admitting propensity evidence in prosecutions of domestic violence. Ms. Skinner testified that, "ultimately, when the victim is ready to get out of that relationship, as a system we need to be there to help them, and to be able to prosecute the batterer for everything that they've done to that victim, and take into consideration those other acts as part of what happened." *Admissibility of Prior Domestic Violence Charges as Evidence of Current Domestic Violence Charge: Hearing on H.R. 3680 Before the Criminal Justice Subcomm. of the Oregon House Judiciary Comm.*, 71st Leg., Reg. Sess. 72A (Or. 2001) (statement of Gina Skinner, Oregon District Attorney's Assoc.). Representative Max Williams, Chair of the Oregon House Judiciary Committee and co-sponsor of House Bill 3680, commented during a hearing on April 24, 2001, that propensity evidence is valuable in domestic violence cases: "Most people understand that the odds are that if he's been beating her for 15 years [this evidence] does have a probative impact on whether or not it is more likely to have occurred in this case." *Id.* (statement of Rep. Max Williams, Chair of the Oregon House Judiciary Comm.). Representative Dan Doyle, another proponent of House Bill 3680, went so far as to describe the traditional ban on propensity evidence in domestic violence cases as an "oversight" in the Oregon Evidence Code: "Currently under the Oregon Evidence Code, evidence of a history of abusive behavior is not admissible in cases involving domestic violence, and this bill corrects the oversight in the that code, and ensures that past abuses count toward the conviction of current domestic violence offenders." *Id.*

Judiciary Committee expressed reservations about altering Rule 404 in domestic violence cases,[30] the proponents of the measure repackaged this proposal as an amendment of Federal Rule of Evidence 609, suggesting that the new bill represented a "compromise."[31] The justification for the measure was never changed, and, in particular, no proponent or legislator ever offered any analysis as to why domestic violence misdemeanors are somehow probative of credibility. The only justifications presented were thinly veiled discussions of propensity, using language such as "accountability," rather than focusing on the probative value of these convictions as an indication of credibility.[32]

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30. For example, on April 24, 2001, Representative Lane Shetterly made the following comments in opposition to Oregon House Bill 3680:

> Domestic violence is certainly one of the most difficult areas, and it's hard to turn away from that. But we know that burglary, for instance, is another crime in which usually you've caught somebody and they've got a long record of prior burglaries. Will we be looking at propensity evidence to convict burglars next? Where does it stop once we go this direction? I think this is a line that centuries of history have established, and it's a line that we don't want to cross, and frankly I'm not ready to. It's been a part of our law for centuries that we convict people on the basis of facts as applied to a particular case, and not just an array of facts over a period of time that tend to prove that the defendant is a bad actor and should go to jail anyway even if the facts of this particular charge can't be proven. And I think we need to be extremely cautious as we look to go down that road in terms of what we are doing to due process and fundamental constitutional rights. And I admit that this is one of those areas where the constitution gets in the way of where we sometimes would like to go. But I think we need to respect these constitutional limitations.

Id. (statement of Rep. Lane Shetterly).

31. At a hearing of the Subcommittee on Crime on May 10, 2001, Chair Williams announced that Ms. Skinner and others had revamped House Bill 3680, and "this bill essentially moves this whole issue over to a different part of the statute." *Id.* (statement of Rep. Max Williams, Chair of the Oregon House Judiciary Comm.) Chairman Williams continued:

> The idea here was, as we talked about this bill in its original form, was to determine if there was a way to deal with past evidence of actions where someone had been involved in domestic violence against a particular family member, but yet balancing the test that you just can't introduce that evidence necessarily for its propensity that this person had committed the crime.

Id. Bill Houser, representing the Oregon Criminal Defense Attorneys' Association, did not oppose the new version of House Bill 3680: "This is a reasonable compromise in our opinion." *Id.* Representative Shetterly also acquiesced: "I'm not enthusiastic about it, but I can support. I do have a question about adding a B misdemeanor to the list of impeachment crimes, but if Mr. Houser's willing to sign off, then I'm not going to stand in the way." *Id.*

32. *See, e.g.*, written testimony of Katy Yetter, staff attorney with the Oregon Coalition Against Domestic and Sexual Violence, before the Oregon Senate Judiciary Committee, June 12, 2001 ("Allowing in evidence of prior convictions of misdemeanor domestic violence crimes (among others) for the purpose impeaching the perpetrator's credibility is one way to hold batterers accountable for their actions."). *Id.* (statement of Katy Yetter, Staff Attorney, Oregon Coalition

No less an authority than the U.S. Supreme Court has held that admission of a prior assault conviction in a criminal prosecution for assault could give rise to harmful inferences of propensity. In *Old Chief v. United States*,[33] the defendant was tried on various charges including assault and possession of a firearm as a felon. The defendant offered to stipulate to the fact that he was a felon, rather than allow the prosecution to inform the jury of his prior felony conviction for assault. The prosecution declined to stipulate, and insisted on presenting evidence that showed the nature of the predicate offense. The Supreme Court reversed, holding that the similarity between the past assault conviction and the present assault charge was too prejudicial: "Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him."[34] This analysis should underscore concerns about the prejudice that could result from Oregon's approach of admitting prior convictions for domestic abuse in a prosecution for a similar offense.

Ordinarily, the prejudicial effect of admitting prior similar acts in a criminal prosecution is addressed under FRE 404(b), but the expansion of FRE 609(a) to include domestic violence misdemeanors would render FRE 404(b) inconsequential. Trial judges would pay little attention to an objection under FRE 404(b) if the proffered evidence were cross-admissible under the revised version of FRE 609. Trial judges would be aware that appellate courts would likely dismiss as harmless any error in admitting such evidence under FRE 404(b) if the evidence were separately admissible under FRE 609.[35] What would the trial judge have to lose by admitting the evidence under both theories? In fact, the trial judge would increase her odds of withstanding appellate review by relying on both theories, either of which would be sufficient to uphold admission of the evidence. Thus, the amendment of FRE 609(a) to include misdemeanor crimes of domestic violence would effectively gut FRE 404(b) in prosecutions of violence against women.

There are a number of other harmful effects to consider. The adoption of Oregon's impeachment rule in federal court would cause great disparity between the treatment of Native Americans and the treatment of other ethnic groups in prosecutions of violence against women. Native Americans charged with such offenses are generally prosecuted in federal court (where the new impeachment rule would apply) while other defendants charged with violence against women are generally prosecuted in state court (where the traditional impeachment rules would apply). This disparate treatment might not rise to the level of violating the Equal Protection Clause,[36] but it is objectionable as a matter of policy. Why

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Against Domestic and Sexual Violence).

33. 519 U.S. 172 (1997).

34. *Id.* at 185.

35. *See, e.g.*, United State v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); United States v. Smith, 49 F.3d 475, 478 (8th Cir. 1995).

36. In *United States v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001), a Native American man charged with child molestation challenged FRE 414, which admits prior acts of sexual

should Native Americans have fewer rights than other citizens in prosecutions for certain categories of crimes?

Another danger is that the liberalized admission of domestic violence misdemeanors in federal court could actually impose burdens on *victims* of domestic violence. If FRE 609(a) were amended simply to include domestic violence misdemeanors on the list of impeachable offenses—without limiting the application of this rule to criminal defendants—then conceivably such convictions could be admitted against victims who testified against their assailants. It is well established that victims of domestic violence often commit acts of violence themselves, either against their batterers or against their children.[37] FRE 609(a)(1) actually employs a more permissive balancing test when convictions are offered against witnesses as opposed to the accused.[38] A tragic irony could result: prior crimes of domestic violence would be more easily admissible against the testifying victim than against his or her assailant.

Given the questionable theoretical underpinnings of Oregon's approach and the numerous practical problems that could arise, one would expect that proponents of this unusual impeachment rule would offer a compelling justification for departing from the traditional limitations on impeachable offenses. But no such justification has ever been offered. As State Representative Bob Ackerman noted during a hearing of Oregon's House

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molestation to show propensity, on the ground that this rule violates the Equal Protection Clause due to its disproportionate impact on Native Americans. The Ninth Circuit rejected LeMay's argument, holding that, "this disproportion, if true, would arise simply because the federal government only has jurisdiction over crimes such as child molestation when they arise on Indian reservations, military bases, or other federal enclaves. There is no evidence of intent on the part of Congress to discriminate against Native Americans." *Id.* at 1030. The Ninth Circuit also found that "Rule 414 does not burden a fundamental right," and "sex offenders are not a suspect class," so the rule could be upheld on the ground that it "bears a reasonable relationship to a legitimate governmental interest," to wit, "[p]rosecuting crime effectively." *Id.* at 1030-31.

37. *See* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 151-53 (1991) (noting that, in training police to respond to cases in which women have attacked their male partners, it is sometimes difficult to distinguish between self-defense and mutual violence); Melissa Hooper, *When Domestic Violence Is No Longer an Option: What to do with the Female Offender*, 11 BERKELEY WOMEN'S L.J. 168, 173, 176-77 (1996) (observing that women may commit domestic violence as a result of the domestic violence that has been committed against them); *see also* Bill Bishop, *Abused Offenders: A Strong Link Exists Between Domestic Violence and Crimes Committed by Women, a Study Finds*, EUGENE REGISTER-GUARD, Oct. 27, 2002, at A1 (documenting that victims of domestic violence may respond with their own crimes).

38. In order to admit a felony conviction for impeachment of a witness, the proponent must demonstrate that the probative value of the conviction is not substantially outweighed by its prejudicial effect. By contrast, in order to admit a felony conviction for impeachment of the accused, the proponent must demonstrate that the probative value of the conviction outweighs its prejudicial effect—a more difficult test for the proponent. FED. R. EVID. 609(a).

Judiciary Committee, "[n]o evidence has been shown before the committee today that the prosecutors need this [bill] as a tool to secure convictions. They're not telling me they're losing cases because this bill is not law."[39] Research for the present article has not discovered any scholarship indicating that the restrictions of the current federal impeachment rules are preventing prosecutors from winning convictions in VAWA cases. The U.S. Department of Justice has not sought a change in impeachment rules for prosecutions of violence against women: in fact, there are only two acquittals per year among the hundreds of VAWA cases prosecuted in federal court.[40] Prior sex crimes are already admitted freely pursuant to FRE 413 in federal prosecutions for sexual offenses, and prior misdemeanor crimes of domestic violence can already be admitted under FRE 404(b) to show motive, intent, absence of mistake, and common plan or scheme. In VAWA prosecutions where the defendant denies that he has committed domestic violence before, prosecutors can invoke FRE 801 to impeach the defendant with his prior statements, including guilty pleas[41] or out-of-court threats of violence.[42] There simply has been no showing of a sufficiently urgent reason to discard the time-honored approach to impeachment under FRE 609.

II. PRIOR ACTS OF DOMESTIC VIOLENCE AS PROOF OF PROPENSITY

Another area in which states have innovated special rules for domestic violence cases is the use of propensity evidence. In federal court, FRE 404(b) provides that evidence of prior crimes, wrongs, or acts cannot be introduced to prove the character of a person in order to show action in conformity therewith.

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39. Comments of Representative Robert Ackerman during hearing of Criminal Justice Subcommittee of Oregon House Judiciary Committee, Apr. 24, 2001. *Admissibility of Prior Domestic Violence Charges as Evidence of Current Domestic Violence Charge: Hearing on H.R. 3680 Before the Criminal Justice Subcomm. of the Oregon House Judiciary Comm.*, 71st Leg., Reg. Sess. 72A (Or. 2001) (statement of Rep. Robert Ackerman).

40. According to data supplied to the author in a fax from the Executive Office of U.S. Attorneys on January 16, 2003, the average number of defendants acquitted in VAWA cases between 1996 and 2002 was two per year. Zero defendants were acquitted in 1995; zero in 1996; zero in 1997; two in 1998; one in 1999; four in 2000; five in 2001; and three in 2002 (based on extrapolation of statistics compiled through June of 2002). A facsimile from the Executive Office of U.S. Attorneys to author (Jan. 16, 2003) [hereinafter Executive Office of U.S. Attorneys fax] (on file with author).

41. Prior guilty pleas to crimes of domestic violence would be admissible under FRE 801(d)(1)(A) to impeach the defendant's testimony that he has not committed domestic violence in the past.

42. Such threats would not be admissible under FRE 801(d)(1)(A) because they were not made in court, but they might nonetheless be admissible to impeach the defendant's assertion that he has not previously committed domestic violence. The statements would overcome a hearsay objection because they are admissions by a party opponent under FRE 801(d)(2)(A), and they could be categorized as non-hearsay under FRE 801(c) in that they are verbal acts rather than statements offered for the truth of the matter asserted.

The purpose of this rule is to prevent the jury from drawing an inference of propensity—"once a criminal, always a criminal."[43] While most states have adopted this rule in one form or another, a growing number of states have created exceptions for prosecutions of domestic violence, permitting the introduction of evidence concerning prior abuse to prove that the defendant committed the presently charged offense.[44]

The California State Assembly was at the forefront of this movement, passing a law in 1996 that essentially waived the ban on propensity evidence in prosecutions of domestic violence. Senate Bill 1876, later codified in Section 1109 of the California Evidence Code,[45] was known as the "Nicole Brown

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43. For an excellent discussion of the theory underlying FRE 404(b), see EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:03 (Callaghan 1984); *see also* David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439 (2001); David J. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998).

44. Several states have created what is in effect a domestic violence exception to the ban on propensity evidence. *See* ALASKA R. EVID. 404(b)(4) (admitting evidence of prior domestic violence against same victim, or evidence of prior interference with a report of a crime involving domestic violence); CAL. EVID. CODE § 1109 (admitting evidence of prior domestic violence to show propensity); 725 ILL. COMP. STAT. 5/115-20 (admitting evidence of prior domestic violence against same victim); LA. R. EVID. 404(b)(2) (allowing evidence of prior domestic violence to show violent propensity of abuser where victim is prosecuted for attacking abuser, and victim raises claim of self-defense); *see also* ARIZ. R. EVID. 404(c) (admitting evidence of prior sexual assault to show propensity, where defendant is now charged with sexual assault); FLA. R. EVID. 404(2)(b) (admitting evidence of prior child molestation to show propensity, where defendant is now charged with child molestation). At least three states have considered and rejected such proposals.

In 2002, the Michigan Legislature considered, but did not ultimately adopt, a bill that would have admitted evidence of prior domestic violence to prove propensity in a prosecution of domestic violence. S.B. 733, 2002 Leg. (Mich. 2002), *available at* http://www.bar.org/legislative.positions.htm (the Michigan State Bar opposed this proposal). In 2001, the Oregon Legislature refused to adopt a bill that would have emulated CAL. EVID. CODE § 1109. *See supra* note 29 and accompanying text. In 1999, the New York Legislature refused to adopt a provision of Governor Pataki's proposed Sexual Assault Reform Act that would have freely admitted propensity evidence in sexual assault cases. Brooks Holland, *Section 60.41 of the New York Criminal Procedure Law: The Sexual Assault Reform Act of 1999 Challenges* Molineux *and Due Process*, 27 FORDHAM URB. L.J. 435, 479 (1999).

45. CAL EVID. CODE § 1109(a) provides that, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 [the general bar against propensity evidence] if the evidence is not inadmissible pursuant to Section 352 [California's analog to FRE 403, giving the court general discretion to exclude prejudicial evidence]." CAL. EVID. CODE § 1109(e) provides that, "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." CAL. EVID. CODE § 1109(f) provides that, "[e]vidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed

Simpson Law," because its sponsors were outraged by the exclusion of prior acts evidence in the murder trial of O.J. Simpson.[46] The explicit purpose of this bill was to strengthen the government's hand in prosecuting defendants accused of domestic violence.[47] The Committee Report on Senate Bill 1876 argued that if this bill did not become law, "we will continue to see cases where perpetrators of this violence 'will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner.'"[48]

Should Congress import California's rule into the Federal Rules of Evidence? To some extent, Congress already has. FRE 413 provides that, in prosecutions for sexual assault, the government may introduce evidence of prior acts involving sexual assault, and may offer this evidence to show the defendant's propensity for committing such offenses. FRE 414 sets forth a similar rule for prosecutions of child molestation. Congress passed the legislation establishing both of these rules in 1995, over the strong objection of the Advisory Committee that typically plays a role in drafting revisions of the Federal Rules of Evidence.[49] Some commentators have justified these rules on a number of grounds: 1) the difficulty of prosecuting charges of sexual assault and child molestation because victims are often unwilling or unable to testify; 2) the unique tendency of sex offenders and child molesters to commit these offenses over and over again; and 3) the need to hold past offenders "accountable" for their crimes.[50] On the other hand, many commentators have

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under Section 1520 of the Health and Safety Code is inadmissible under this section."

46. For a discussion of the Simpson trial and how it affected the debate over the admission of propensity evidence in prosecutions of violence against women, see Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463 (1996); *see also* B.J. Palermo, *A Rush to Reform: Critics Fear Some Simpson-Inspired Changes Are Misguided*, 83 A.B.A.J. 20, 20 (1997).

47. Lisa Marie De Sanctis, a Deputy District Attorney in Ventura County, California, and a co-author of Senate Bill 1876, stated her belief that "the propensity argument is a common-sense, reasonable argument." Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996). She offered the following practical justifications for the new law:

> [T]here are several problems that arise in prosecuting domestic violence cases. The hurdles that occur prior to trial include the uncooperative or recanting victim, few or no witnesses, and a lack of any documented physical evidence. The problems during a trial include juror mind-block, gender bias, victim credibility, and the generally prejudicial views about domestic violence held by the general population and therefore by most jurors. Evidence of uncharged domestic violence can overcome many, if not most of these prosecution problems.

Id. at 397.

48. Andrew J. Glendon, *Battling Domestic Violence Through the Admission of Character Evidence*, 28 PAC. L.J. 789, 791 n.14 (1997) (quoting Assembly Committee on Public Safety, Committee Analysis of S.B. 1876, at 4 (June 25, 1996)).

49. *See supra* note 7.

50. The following authors have, to varying degrees, supported the approach taken by

criticized FRE 413 and FRE 414 on the following grounds, among others: 1) the prejudicial effect of propensity evidence in a criminal trial; 2) the theoretical inconsistency of these rules with FRE 404(b); 3) the lack of empirical evidence demonstrating a higher rate of recidivism among sex offenders and child molesters than among other offenders; and 4) the disproportionate effect of these rules on Native Americans.[51] Whatever the merit of the approach embodied in

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Congress in FRE 413 and FRE 414, although some of these authors have expressed reservations about certain aspects of the rules. David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offender Cases*, 78 MINN. L. REV. 529 (1994); Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145 (1998); David M. De La Paz, *Sacrificing the Whole Truth: Florida's Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, 15 N.Y.L. SCH. J. HUM. RTS. 449 (1999); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 388 (1996); Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501 (1996); Jill C. Legg, *South Dakota Supreme Court:* State v. Ondricek*: Admission of Prior Bad Acts—The Exception or the Rule?*, 42 S.D. L. REV. 165 (1997); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 through 415*, 44 CLEV. ST. L. REV. 169 (1996); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663 (1998*)*; William C. Robinson, Jr., Comment, *Go West Florida! Adopt Recent Federal Exceptions to Inadmissible Character Evidence and Follow the Modifications in Both California and Arizona*, 29 STETSON L. REV. 1363 (2000); Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing "the Credibility Quotient,"* 57 U. PITT. L. REV. 107 (1995); Jeffrey Waller, Comment, *Federal Rules of Evidence 413-415: "Laws are Like Medicine; They Generally Cure an Evil by a Lesser . . . Evil,"* 30 TEX. TECH. L. REV. 1503 (1999); Mary Katherine Danna, Note, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS L.J. 277(1996); Ellen H. Meilaender, Note, *Revising Indiana's Rule of Evidence 404(b) and the Lannan Decision in Light of Federal Rules of Evidence 413-415*, 75 IND. L.J. 1103 (2000); Erik D. Ojala, Note, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L. Q. 947 (1999); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995).

51. The following authors have criticized FRE 413 and 414. Holland, *supra* note 44, at 435; Edward J. Imwinkelried, *Perspectives on Proposed Federal Rules of Evidence 413-415: 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 (1995); R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection From Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather Than Guilt?*, 33 TEX. TECH. L. REV. 1167 (2002); David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439 (2001); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998); David P. Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995); James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and*

FRE 413 and 414, some in Congress have already proposed that the approach be extended to all categories of violence against women, along the lines of California's model.[52]

Congress should reject this proposal for several reasons. First, there is no practical necessity for Congress to adopt a federal version of California's section 1109. The existing Federal Rules of Evidence do not significantly impede the admission of propensity evidence in federal prosecutions of violence against women. Approximately one-half of such cases involve charges of sexual assault on Indian reservations,[53] and propensity evidence is already freely admissible in these cases pursuant to FRE 413 and 414. Among the other half of federal cases involving violence against women, a significant number are prosecutions brought under the VAWA. Many of the VAWA offenses require proof of specific intent (e.g., crossing state lines with the intent to commit domestic violence,[54] violate a restraining order,[55] or stalk the victim[56]); in prosecutions of these charges, the existing version of FRE 404(b) would allow evidence of prior domestic violence to prove intent, or common plan or scheme.[57]

Recommendations, 20 U. DAYTON L. REV. 753 (1995); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547 (1998); Joelle Anne Moreno, *"Whoever Fights Monsters Should See to it That in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415 and a Stake Through the Heart*—Kansas v. Hendricks, 49 FLA. L. REV. 505 (1997); Joseph A. Aluise, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J. L. & POL. 153 (1998); Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963 (1999); Heather E. Marsden, Note and Comment, State v. Hopkins*: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders*, 3 ROGER WILLIAMS L. REV. 333 (1998); Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL OF RTS. J. 689 (1997); Daniel L. Overbey, Note, *Federal Rule of Evidence 415 and* Paula Corbin Jones v. William Jefferson Clinton*: The Use of Propensity Evidence in Sexual Harassment Suits*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y 343 (1998); Jeffrey G. Pickett, Note and Comment, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-15 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883 (1995).

52. *See supra* note 8.

53. *See supra* notes 4-5.

54. 18 U.S.C. § 2261 (1994).

55. *Id.* § 2262.

56. *Id.* § 2261A.

57. FRE 404(b) allows the introduction of evidence concerning prior crimes, wrongs or acts when the evidence is introduced for some purpose other than supporting a propensity inference. This evidence may be used to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). FRE 404(b) probably would not allow evidence of prior domestic violence in a prosecution under the gun ban for convicted domestic abusers (18 U.S.C. §§ 922(g)(8) and 922(g)(9) (1994)), which is generally considered to be part of the Violence Against Women Act. However, evidence of prior domestic violence might

A recent search in the Westlaw database discovered no VAWA case in which 404(b) evidence offered by the prosecution has been excluded. In fact, federal courts have admitted this evidence with virtually no reservations. In prosecutions for interstate travel to violate a restraining order, courts have admitted evidence of prior violations to show intent under FRE 404(b).[58] In prosecutions for interstate travel to commit domestic violence, courts have admitted evidence of prior abuse to show the defendant's state of mind pursuant to FRE 404(b).[59] Prior acts of domestic violence have also been admitted under FRE 404(b) in prosecutions for interstate travel to commit stalking.[60] A total of five circuit courts have upheld convictions in VAWA cases where the prosecution introduced 404(b) evidence concerning prior domestic abuse.[61] As one court of appeals noted, all three of the VAWA offenses involving interstate travel "put [the defendant's] intent directly at issue," so the admission of 404(b) evidence proving prior acts of domestic violence is "clearly correct."[62]

By contrast, state prosecutions of violence against women often involve general intent crimes such as battery, for which the traditional version of Rule

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be admissible under a separate evidentiary theory in these gun prosecutions: the evidence could be used to prove the predicate offense or restraining order that is the basis for the firearms disability, subject to the limitations set forth in *United States v. Old Chief*, 519 U.S. 172 (1997) (plurality opinion) (requiring the prosecution to accept defendant's offer to stipulate on predicate offense). In any event, even if section 1109 of the California Evidence Code were imported into the FRE, the prosecutions under the gun ban would not count as prosecutions of domestic violence, so federal prosecutors could not avail themselves of the more lenient rules for admission of propensity evidence. Thus, when one considers the universe of federal prosecutions of violence against women (sexual assaults on Indian reservations, the VAWA offenses involving interstate travel, and the VAWA offenses involving unlawful possession of firearms), there would be very little difference in the admissibility of propensity evidence if the California rule were adopted in federal court.

58. United States v. Hermundson, No. 97-10497, slip op. (9th Cir. Jan. 14, 2000) (affirming admission of prior violations of restraining order admissible to show that defendant crossed state lines with intent to violate restraining order again); United States v. Ruggles, No. 98-5477 (6th Cir. Mar. 24, 2000) (affirming admission of "other acts" evidence); United States v. Von Foelkel, 136 F.3d 339, 341 (2d Cir. 1998) (upholding admission of defendant's prior bad acts).

59. United States v. Jacobs, 244 F.3d 503, 507 (6th Cir. 2001) (admitting evidence of other domestic violence to show common scheme or plan); *Ruggles*, No. 98-5477 (prior acts of domestic violence admissible to show intent, which is element of offense of interstate travel to commit domestic violence); *see also* United States v. Lankford, 196 F.3d 563, 568 (5th Cir. 1999) (noting, but not reviewing, trial court's admission of extensive evidence concerning prior domestic violence).

60. United States v. Young, 248 F.3d 260, 271-72 (4th Cir. 2001) (evidence that defendant had assaulted victim's mother was admissible under FRE 404(b) to show defendant's state of mind); *Ruggles*, No. 98-5477.

61. *See supra* notes 58-59.

62. *Ruggles*, No. 98-5477.

404(b) would be less useful.[63] Moreover, state law enforcement agents do not have the tremendous investigative resources that are available to federal law enforcement agents. The limited resources and time available in state investigations creates a greater need for evidence of prior domestic violence. In sum, the practical justifications for admitting propensity evidence in prosecutions of violence against women are not as strong in federal court as they are in state court.

Even if a federal version of California's section 1109 might help to secure more convictions, these convictions would come at too great a price. The abrogation of FRE 404(b) in VAWA cases would cause significant prejudice to criminal defendants. In fact, the social opprobrium that has led publicity-seeking politicians to pass special laws for domestic violence cases is the very reason why the government's introduction of prior abuse to show propensity could so inflame the jury that the defendant might never receive a fair trial.[64] In another context, Chief Justice Earl Warren of the U.S. Supreme Court explained the potentially devastating effect of propensity evidence:

> Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. . . . Recognition to the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. . . . Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where

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63. Some state courts have reasoned that because battery is a general intent crime, evidence of prior bad acts should not be admissible under the state's version of FRE 404(b) in a prosecution for battery. State v. Kennedy, 803 So.2d 916, 923 (La. 2001) (in a prosecution of a general intent crime, "evidence of extraneous crimes is inadmissible for the ostensible purpose of showing such intent"); People v. Sabin, 614 N.W.2d 888, 902 (Mich. 2000) ("the evidence [of prior sexual misconduct] was not relevant to prove defendant's general intent"); Curtis v. State, 89 S.W.3d 163, 175 (Tex. App. 2002) (where intent was obvious from nature of assault, "the offer of other crimes is unjustified due to lack of relevancy"). The issue of intent is not as important in these prosecutions as it is in federal VAWA prosecutions, so FRE 404(b)'s exception for evidence offered to show intent is less helpful to state prosecutors. This difference may explain why state prosecutors have advocated more strenuously than federal prosecutors for changes in the rules barring propensity evidence in prosecutions of domestic violence.

64. Many authors have noted the prejudicial effect of prior crimes evidence admitted under FRE 413 and FRE 414. *E.g.*, Pickett, *supra* note 51, at 899-902. *See supra* note 51 for a long list of other articles making the same argument.

it tends to prove something other than general criminal disposition.[65]

Although this danger arguably does not rise to the level of a Due Process violation,[66] it is at least a serious policy concern that should dissuade Congress from adopting California's rule.

The admission of evidence concerning prior acts of domestic violence could cause additional problems in federal trials. Proving these acts (especially uncharged acts) could require a great deal of time and might necessitate a "mini-trial" in the midst of the prosecution in which the evidence is offered. Although the prior act need not be proven beyond a reasonable doubt, the prosecution must offer sufficient proof from which a rational jury could conclude that the prior act occurred.[67] The reluctance of victims to cooperate[68] might necessitate the introduction of testimony by police officers, crime scene investigators, criminalists who processed scientific evidence, neighbors who heard the victim's statements, etc. Although courts might be solicitous of such wide-ranging evidence when offered as direct proof of the presently charged offense, a long

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65. Spencer v. Texas, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) (citations omitted); *accord* United States v. Old Chief, 519 U.S. 172, 180, 182, 185 (1997) (holding that introduction of prior assault conviction caused impermissible prejudice when defendant was presently charged with assault, among other offenses).

66. The following cases upheld Section 1109 of the California Evidence Code against constitutional challenges: People v. Johnson, 478 P.2d 26, 32 (Cal. Ct. App. 2000); People v. Hoover, 92 Cal. Rptr. 2d 208, 210-11 (Ct. App. 2000). Federal courts have also upheld the constitutionality of FRE 413 and FRE 414. *E.g.*, United States v. LeMay, 260 F.3d 1018, 1026-27 (9th Cir. 2001) (FED. R. EVID. 414); United States v. McHorse, 179 F.3d 889, 896-98 (10th Cir. 1999) (FED. R. EVID. 414); United States v. Mound, 149 F.3d 799, 800-01 (8th Cir. 1998) (FED. R. EVID. 413); United States v. Castillo, 140 F.3d 874, 880 (10th Cir. 1998) (FED. R. EVID. 414) (does not on its face violate the Due Process Clause of the Federal Constitution); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (FED. R. EVID. 413).

67. Huddleston v. United States, 485 U.S. 681, 685 (1988). A prosecutor will strive for a higher quantum of proof if the evidence is to have any persuasive value.

68. It is well documented that victims of domestic violence sometimes recant or refuse to cooperate after filing complaints against their assailants. People v. Gomez, 85 Cal. Rptr. 2d. 101, 105 (Ct. App. 1999) (psychologist testified that "about 80 percent of the time a woman who has been sexually assaulted by a boyfriend, husband or lover will recant, change or minimize the story"); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854-55 (1994) ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court"); *see also* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1883-84 (1996) (describing the complexity of victim's role in abusive relationship). Victims of domestic violence may refuse to cooperate for a number of reasons, including financial concerns, fear of retaliation, low self-esteem, and sympathy for the assailant. Thomas I. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 392-99 (2001).

diversion to prove a prior act may be a game that is not worth the candle.

A final reason to eschew California's section 1109 in federal court is the need to preserve theoretical cohesion within the Federal Rules of Evidence. Inconsistency in the rules makes them less predictable, creates the appearance of unequal treatment, and erodes the legitimacy of the entire justice system. It would be difficult to present a principled argument that prior crimes of domestic violence should be admissible to show propensity in VAWA prosecutions, but that prior hate crimes should not be admissible to show propensity in prosecutions of hate crimes or that prior acts of terrorism should not be admissible to show propensity in prosecutions for terrorism, etc.

In the end, California's section 1109 seems an ill fit for the federal courts. Its justification is greater, and its harms less difficult to reconcile, in state prosecutions of general intent crimes, as opposed to federal prosecutions of specific intent crimes in VAWA.

III. HEARSAY STATEMENTS BY VICTIMS OF DOMESTIC VIOLENCE

Some states have created special hearsay exceptions for statements by victims of domestic violence. Most of these exceptions are solely available for child victims,[69] but a few states have created exceptions for adult victims. [70] The

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69. *E.g.*, ALASKA STAT. § 12.40.110 (Michie 2002); ARK. R. EVID. 803(25) (West 2002); ARIZ. STAT. § 13-1416 (West 2002); CAL. EVID. CODE § 1228; COLO. REV. STAT. ANN. § 13.25-129 (West 2002); DEL CODE. tit. 11, § 3513 (2002); FLA. STAT. ANN. § 90.803(23) (West 2002); GA. CODE ANN. § 24-3-16 (2002); IDAHO CODE § 19-3024 (Michie 2002); ILL. COMP. STAT. ANN. 725 § 5/115-10 (West 2002); MICH. R. EVID. 803(A); MINN. STAT. ANN. § 595.02(3) (2002); MISS. R. EVID. 803(25); OR. EVID. CODE 803(18) & 803(24); PA. STAT. ANN. tit. 42 § 5986; TEX. CODE CRIM. PROC. ANN. § 38.072 (Vernon 2002); UTAH CODE ANN. § 76-5-411 (2002); WASH. REV. CODE ANN. § 9A.44.120 (West 2002). As Judge Gersten has explained, "[t]ypical statutes permitting statements regarding child abuse require the court to conduct an in-camera hearing, determine the statement reliable, establish corroboration, and require the child (usually around 10 years old) to testify, if the child is not unavailable." Gersten, *supra* note 10, at 66 n.24.

70. CAL. EVID. CODE § 1370(a)(c) (allowing the admission of hearsay statements by victims of domestic violence who are now unavailable to testify); OR. EVID. CODE 803(26) (admitting hearsay statements made by victim of domestic violence within twenty-four hours of incident, whether or not victim is presently available as a witness). The Supreme Court of Kansas has ruled that in marital homicide cases, prior threats against the victim are admissible as non-hearsay, if offered to prove identity, motive, or intent. Christine Arguello, *The Marital Discord Exception to Hearsay: Fact or Judicially Legislated Fiction?*, 46 U. KAN. L. REV. 63, 64, 76-77 (1997) (arguing that the Supreme Court of Kansas has in effect legislated a new hearsay exception for domestic violence cases). The General Assembly of Illinois is now considering a bill, S.B. 2120, which was proposed in the Spring 2002 session, that would allow for the admission of out-of-court statements by a victim of domestic violence whose failure to testify is due to intimidation by the defendant. More information about this bill is available on the website of the bill's chief sponsor, Senator Lisa Madigan, http://www.lisamadigan.org/issues/domestic_violence.htm (June 2002) and http://www.lisamadigan.org/press_pages/domestic_violence.htm (Feb. 12, 2002). The Michigan

purpose of these exceptions is to provide an avenue for the admission of victims' statements that would not be admissible under the traditional hearsay exceptions for victims of violent crime,[71] such as the exception for excited utterances,[72] the exception for statements in aid of medical treatment or diagnosis,[73] the "catch-all exception,"[74] and the exception for prior inconsistent statements by the witness.[75] Proponents of a special hearsay exception for domestic violence cases cite the tendency of the victim to recant or change her testimony in favor of her assailant,[76] leaving the prosecution with little evidence of the abuse other than the

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Legislature considered a similar bill in its 2001-2002 session, HB 4765, that would admit a statement by a victim of domestic violence at or near the time of the incident, if the statement was made in writing, was electronically recorded, or was made to a law enforcement official. More information about this bill is available at the website of the Michigan State Bar, http://www.michbar.org/legislative.positions.html (Nov. 6, 2001).

71. The following commentators have argued that the traditional hearsay exceptions are inadequate for prosecutions of domestic violence: Beloof & Shapiro, *supra* note 9, at 6-10 (arguing that traditional exceptions are not broad enough); Hudders, *supra* note 9, at 1052-59 (arguing that expansion of traditional hearsay exceptions in domestic violence cases is objectionable because of implications for other cases and concluding that a new hearsay exception would be appropriate). On the other hand, the following authors have noted that the traditional hearsay exceptions have been stretched in certain jurisdictions to allow the liberal admission of out-of-court statements in prosecutions of domestic violence. Gersten, *supra* note 10, at 65-66 (noting "creative application of hearsay exceptions" in domestic violence cases across the nation); Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN'S L.J. 171, 172-73 (2002) (arguing that excited utterance exception can be used expansively in cases involving domestic violence); Siegel, *supra* note 10, at 1243, 1275-76 (same).

72. FED. R. EVID. 803(2).

73. FED. R. EVID. 803(4).

74. FED. R. EVID. 807.

75. FED. R. EVID. 801(d)(1)(A). Strictly speaking, this rule does not set forth a hearsay exception, but an exclusion from the definition of hearsay.

76. *See supra* note 68. Beloof & Shapiro, *supra* note 9, at 3, cited this problem as the principal justification for a new hearsay exception in domestic violence cases.

> Non-cooperation by recantation or failure to appear at trial is an epidemic in domestic violence cases. Persons qualified to give expert testimony at trial on domestic violence, including psychologists, counselors, police detectives, directors of battered women's shelters, and victim advocates, consistently testify that, in their experience, it is commonplace for domestic violence victims to recant or minimize initial reports of abuse. The head of the Family Violence Division of the Los Angeles District Attorney's Office estimates that ninety percent of domestic violence victims recant. A psychologist specializing in the treatment of battered women has estimated the non-cooperation rate to be eighty percent. Similarly, one judge reports that in as many as eighty percent of domestic violence prosecutions the victim refuses to cooperate at trial. Increasingly, courts have taken judicial notice of the unreliability of the domestic violence victim's recantations. Thus, recantation is the norm rather than the exception in domestic

victim's hearsay statement shortly after the incident.[77]

Among the new state hearsay exceptions for adult victims of domestic violence, Oregon's Rule 803(26) is the most expansive.[78] This rule allows the admission of out-of-court statements made by the victim within 24 hours of the incident. It is not necessary for the prosecution to show that the victim was "excited" at the time of the statements. Instead, Oregon's Rule 803(26) imposes two requirements. First, the statement must have been made under specified circumstances: the victim must have given an oral statement to a police officer

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> violence cases. This is hardly surprising. Batterers put hydraulic pressures on domestic violence victims to recant, drop the case, or fail to appear at trial.

Id. (citations omitted).

77. *See id.* at 1 ("[T]he [traditional] hearsay rule promotes the failure of the criminal case by excluding the initial report of abuse. As the hearsay rule excludes out of court statements of abuse, recantation or no-show by the victim results in no charge, dismissal, or acquittal."). *See also* Hudders, *supra* note 9, at 1060-61.

> Although the victim, immediately after the incident, may make statements to police investigators or others about what has happened, she is often unavailable, or unwilling, to testify at trial. Thus, her story is often left untold. In many situations, the prosecution of domestic violence cases can only be effective if the hearsay statements of the victim are admissible at trial. A new hearsay exception, covering these situations would allow the full story to be told.

Id. (citations omitted).

78. OR. EVID. CODE 803(26) (West 2002) provides in pertinent part

> The following statements are not excluded by [OR. EVID. CODE 803], even though the declarant is available as a witness:
>
> 26(a) A statement that purports to narrate, describe, report or explain an incident of domestic violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after the incident occurred, if the statement:
>
> (A) was recorded, either electronically or in writing, or was made to a peace officer as defined in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency medical technician or firefighter; and
>
> (B) Has sufficient indicia of reliability.
>
> (b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:
>
> (A) The personal knowledge of the declarant.
>
> (B) Whether the statement is corroborated by evidence other than statements that are subject to admission only pursuant to this subsection.
>
> (C) The timing of the statement.
>
> (D) Whether the statement was elicited by leading questions.
>
> (E) Subsequent statements by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability.

or similar authority, or the victim must have recorded the statement in writing or electronically.[79] Second, the statement must have sufficient indicia of reliability, based on considerations such as the declarant's personal knowledge, the availability of corroborating evidence, the timing of the statement, the manner of questioning that elicited the statement, and the inconsistency of other statements by the same victim (although recantation is not dispositive).

During the hearings on Oregon House Bill 3395 (which was ultimately codified as Oregon's Rule 803(26)), Joel Shapiro, the principal author of the bill, offered this explanation of its purpose:

> [T]he bill recognizes that recantation by victims of domestic violence is commonplace. This phenomenon is typically motivated by reasons unrelated to the veracity of the initial report [of abuse]. By admitting at trial the statements of domestic violence victims covered by HB 3395, Oregon will be better able to protect the women and children of this state by successfully prosecuting domestic assailants.[80]

House Bill 3395 also drew criticism from some legislators and criminal justice experts on the following grounds, among others: 1) there was no showing that the existing residuary hearsay exception was inadequate in Oregon;[81] 2) the new hearsay exception might lead to the admission of false statements that the declarant could not recant;[82] 3) the new law would limit the confrontation rights

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79. If the victim recorded the statement in writing or electronically, it is not necessary that she actually presented the statement to a police officer or similar authority. OR. EVID. CODE § 803(26)(a)(A) (West 2002); LAIRD C. KIRKPATRICK, OREGON EVIDENCE § 803.28[3] (2002) (questioning the wisdom of imputing the same reliability to a victim's written statements as to the victim's statements to law enforcement officers) ("An official report to police (which could subject the complainant to liability if fabricated) would be far more reliable than a personally recorded note (made within 24 hours but perhaps not brought to the attention of the police until much later."). The language in OR. EVID. CODE 803(26)(a)(A) appears to derive from CAL. EVID. CODE § 1370 (2002) (California's hearsay exception for physical abuse cases), which provides in subsection (a)(5) that the statement is inadmissible unless it "was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official." The Michigan Legislature has considered, but not yet adopted, a proposal with a requirement similar to OR. EVID. CODE 803(26)(a)(A). That bill, HB 4765, would admit a hearsay statement by a domestic violence victim if the statement "was made in writing, was electronically recorded, or was made to a law enforcement official." More information about this bill is available at the website from the Michigan State Bar, http://www.michbar.org/legislative.positions.htm (last visited Jan. 30, 2003) (the Michigan State Bar supports in principle HB 4765).

80. Hearing on H.B. 3395 Before the House Judiciary Comm. on Criminal Law, 1999 Leg., 70th Sess. (Or. 1999) (written testimony of Joel Shapiro (exhibit U, law student, Northwestern School of Law and Clark College)), *quoted in* Dworkin, *supra* note 10, at 304.

81. Dworkin, *supra* note 10, at 304-05 (citing testimony of Ingrid Swenson, Oregon Criminal Defense Lawyer's Association, at Apr. 23, 1999 hearing).

82. *Id.* (citing testimony of Kathie Osborne, Oregon Juvenile Rights Project, at Apr. 23, 1999 hearing).

of defendants;[83] and 4) the law would facilitate the "mandatory prosecution policy" in domestic violence cases, which some commentators believe is objectionable.[84]

Recent scholarship has suggested that Oregon's Rule 803(26)—or a similar hearsay exception for domestic violence cases—would be a salutary addition to the Federal Rules of Evidence.[85] Yet there are many reasons why this rule would be inappropriate for the federal system. First, it is doubtful that federal law enforcement agents could take advantage of Oregon's unique exception due to the temporal restrictions in that rule. Virtually all federal prosecutions of violence against women arise from investigations that are begun by local officers, not federal officers. A federal law enforcement agency typically does not receive a referral until the case is several days old. The local officers who investigate domestic violence cases know that the vast majority of such cases will be prosecuted in state court under traditional state hearsay rules, so these officers generally follow state protocols in their investigations. Because 47 states have not adopted a hearsay exception along the lines of Oregon's Rule 803(26), the normal investigative protocol in these states often will not suit the particular requirements of this rule, and it is unlikely that federal agents will have a chance to take a qualifying statement within the first 24 hours after the incident.

A second reason why Oregon's Rule 803(26) would be less useful in federal court than in state court is the distinctive nature of the statutes under which violence against women is prosecuted in federal court. Prosecutors enforcing these federal laws need not rely as heavily on the victim's hearsay statements as do state prosecutors enforcing the traditional domestic violence laws. Approximately half of the federal VAWA cases are brought under 18 U.S.C. § 922(g)(8) (which prohibits possession of a firearm by a person against whom a restraining order is pending) and 18 U.S.C. § 922(g)(9) (which prohibits possession of a firearm by a person who has been convicted of a misdemeanor

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83. *Id.* at 306 (citing comments of Senator Neal Bryant, Chair, Senate Judiciary Committee, at June 16, 1999 hearing).

84. *See* Beloof & Shapiro, *supra* note 9, at 31-36 (summarizing debate over mandatory prosecution policies). *But cf.* Hanna, *supra* note 68, at 1909 (defending mandatory prosecution policies on the ground that they vindicate society's overall interest in curbing violence, even if individual victims are reluctant to cooperate). *Also cf.* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (2000) (suggesting that mandatory prosecution is harmful to victims and is an affront to their autonomy).

85. Beloof & Shapiro, *supra* note 9, at 14 (suggesting that FRE 803 be amended to admit out-of-court statements by a victim to police or other similar officials within twenty-four hours of alleged domestic violence, following OR. EVID. CODE § 803(26)); *see also* Hudders, *supra* note 9, at 1060 (arguing that after Congress has created special evidentiary rules for prosecution of sexual assault and child molestation, a new hearsay exception for domestic violence cases would be appropriate); *see also* Donna M. Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 160-64 (1997) (urging that FRE 804 be amended to admit out-of-court statement by deceased victim of domestic violence).

crime involving domestic violence).[86] The act at issue in these cases is the defendant's possession of a firearm, which usually can be established without relying on the hearsay statement of an abused partner.[87] In addition, a substantial number of federal cases involving violence against women are rape cases arising in Indian Country.[88] Given modern technology, rape cases are not so dependent on a victim's hearsay statements: the presence of the defendant's bodily fluid or other biological evidence on the victim's person, coupled with bruises or other evidence that the victim withheld consent, would be a strong basis on which to prosecute a rape case even without the admission of the victim's hearsay statements. By contrast, a typical prosecution of domestic violence in state court depends more heavily on hearsay statements, either because the offender's identity is not readily apparent from the physical evidence, or because the offender may try to ascribe the defendant's injuries to a fall or some other "innocent" case.[89] Even in federal cases where hearsay statements would be just as important as in state cases, federal investigators have far greater investigative resources and are better able to find alternative evidence if hearsay cannot be admitted.

Third, it appears that hearsay is already admitted liberally in federal prosecutions of violence against women. The exception for excited utterances is used extensively in federal cases,[90] as is the exception for statements in aid of

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86. *See supra* note 4 (showing that in the last few years, approximately half of the VAWA cases filed by federal prosecutors have involved firearms charges under 18 U.S.C. §§ 922(g)(8) and 922(g)(9)).

87. *See., e.g.*, United States v. Smith, 964 F. Supp. 286 (N.D. Ia. 1997) (prosecuting the first case in the country under 18 U.S.C. § 922(g)(9) without heavy reliance on assistance from the defendant's reluctant girlfriend). I will describe this case in more detail in the introduction of an article entitled *A Better Way to Disarm Batters*, forthcoming in March 2003 issue of the *Hastings Law Journal*.

88. *See supra* note 5 and accompanying text.

89. Even the small number of prosecutions brought under VAWA statutes that are somewhat analogous to state domestic violence statutes (e.g., 18 U.S.C. § 2262 (1994), which prohibits crossing state lines to violate a restraining order) will not rise and fall based on the admissibility of the victims' hearsay statements. The defendant's act of crossing state lines, and his motive for doing so, is likely to be a more significant piece of the puzzle than is the victim's out-of-court statements.

90. FED. R. EVID. 803(2). In cases involving domestic violence, federal courts have permitted a fairly long interim period between the violent act and the declarant's statement. United States v. Hefferon, 314 F.3d 211(5th Cir. 2002) (two-hour delay permissible in sexual assault case involving minor victim); United States v. King, No. 99-2363, slip op., at *4-5 (10th Cir. July 26, 2000) (seven-hour delay permissible in rape case involving minor victim); United States v. Cruz, 156 F.3d 22, 30 (1st Cir. 1998) (statement by battered woman four hours after beating was excited utterance); Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1998) (statement by minor victim admissible even though it was made three hours after departure from abusive father's home); United States v. Farley, 992 F.2d 1122, 1123 (10th Cir. 1993) (excited utterance exception applied to statement by minor one day after alleged molestation); *see also* United States v. Tocco, 135 F.3d 116, 127-28 (2d Cir.

medical treatment,[91] the exception for prior inconsistent statements,[92] and the residual hearsay exception.[93] The fact that the U.S. Department of Justice has not sought a new hearsay exception is telling: existing hearsay exceptions are sufficient to keep the acquittal rate at approximately 1-2% in VAWA cases.[94]

There is a fourth reason why Oregon's Rule 803(26) should not be adopted in the federal courts. This rule would be theoretically inconsistent with the other rules in the Federal Rules of Evidence. Indeed, it appears that Oregon's Rule 803(26) is grounded in expediency rather than sound evidentiary theory. Proponents of the rule emphasized the practical necessity for the new exception, rather than the reliability of the evidence it would admit.[95] There was little attempt to show the inherent trustworthiness of this subcategory of evidence.

1998) (three-hour delay did not thwart application of excited utterance exception to statement by adult declarant); Webb v. Lane, 922 F.2d 390, 395 (7th Cir. 1991) (victim of shooting gave statement two hours after incident).

91. FED. R. EVID. 803(4). In sexual abuse cases, many federal courts have held that statements to physicians by child victims identifying their abusers are "reasonably pertinent to diagnosis or treatment" because the physicians cannot adequately treat these patients without knowing the extent of their emotional and psychological injuries, and without knowing whether these victims can safely be returned to their homes. United States v. Yellow, 18 F.3d 1438, 1442 (8th Cir. 1994); *see also* United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993); United States v. Belfany, 965 F.2d 575, 579 (8th Cir. 1992); United States v. George, 960 F.3d 97, 99-100 (9th Cir. 1992); *Morgan*, 846 F.3d at 949. Some courts have extended this reasoning to statements by adult victims of domestic violence. As the Tenth Circuit reasoned in *Joe*, "the domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes 'reasonably pertinent' to the victim's proper treatment." *Joe*, 8 F.3d at 1495 (admitting statement of adult victim).

92. FED. R. EVID. 801(d)(1)(A). As noted previously, this rule is not an "exception" to the hearsay rule, but rather an exclusion of certain evidence from the definition of hearsay. This rule is invoked occasionally in federal prosecutions of violence against women. For example, in *United States v. Young*, 316 F.3d 649, 659 (7th Cir. 2002), the defendant was charged with interstate travel to commit domestic violence, and the victim testified about the crime before the grand jury. By the time of trial, she had recanted her testimony and was a "turncoat witness." *Id.* The district court allowed the prosecution to impeach the witness with her testimony before the grand jury pursuant to FRE 801(d)(1)(A), and the Seventh Circuit upheld this ruling. *Id.* at 660.

93. FED. R. EVID. 807. *E.g.*, United States v. Harrison, 296 F.3d 994, 1004 (10th Cir. 2002) (admitting statements of child victim regarding abuse that occurred many years before under FRE 807); United States v. McKinney, No. 98-30250 slip op., at *2-3 (9th Cir. July 14, 1999) (admitting under FRE 807 statements by adult victim of domestic violence that occurred four or five hours before statements); *see* 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 7.49, at 319 (3d ed. 1997) ("courts regularly employ the residual exception in child abuse litigation").

94. *See* Executive Office of U.S. Attorneys fax, *supra* note 40 (well over 100 VAWA cases are filed per year, but only an average of two defendants per year are acquitted in these prosecutions).

95. *See supra* note 80 and accompanying text.

The new exception seems most akin to the excited utterance rule, and is, in effect, a *per se* rule of excitement, treating virtually all statements by a victim of domestic violence as excited utterances if the statements are made within 24 hours of the incident.[96] Like the excited utterance rule, Oregon's Rule 803(26) seems to rest on the theory that declarants are more likely to tell the truth when they are excited, because they have less opportunity for the detached reflection that is necessary for fabrication. Yet Oregon's Rule 803(26) permits not only the admission of oral statements, but also statements that the declarant has recorded electronically or in writing. This latter provision is perplexing in that the act of recording a statement suggests the declarant's excitement has dissipated, and the declarant is now calm enough to write down her thoughts, a circumstance that erodes the primary theoretical basis for the new hearsay exception. The credence that Oregon Rule 803(26) accords to a declarant's writings in a private setting finds no precedent in the current Federal Rules of Evidence.[97] At bottom, the justification for Oregon's Rule 803(26) lies not in its fealty to time-honored principles in the rules of evidence, but rather in the belief that domestic violence cases are urgently important and the prosecution's burden should be eased in this subset of cases. Some commentators seem willing to look past the theoretical inconsistencies for the sake of expediency, [98] but this approach has led to unduly politicized rulemaking in the past,[99] and the long-term effect of such a strategy could be to compromise the integrity of the rules.

Perhaps the most significant hurdle for the proponents of the new hearsay exception is the Confrontation Clause of the Sixth Amendment.[100] While the Sixth Amendment poses virtually no impediment for "firmly rooted" hearsay

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96. During the hearings on HB 3395, this bill was promoted as an "expansion" of the excited utterance exception. Dworkin, *supra* note 10, at 307.

97. *See, e.g.*, FED. R. EVID. 612 (prior writings by testifying witness can be used to refresh memory but must then be withdrawn before testimony resumes); FED. R. EVID. 803(4) (prior writings by witness can be used as evidence only when witness has exhausted memory on the stand, and threshold requirements are met to establish reliability of writing; even then, writing can only be read to jury, not submitted as an exhibit). Professor Kirkpatrick has suggested that the great credence accorded to writings under Oregon's Rule 803(26) may be misplaced. *See* MUELLER & KIRKPATRICK, *supra* note 12.

98. *E.g.*, Hudders, *supra* note 9, at 1060 ("[E]ven though a proposed hearsay exception for domestic violence is driven by policy and does not fit fully within the evidence rules' theoretical framework, it would be a suitable candidate for legislative action.").

99. Examples of highly politicized rules of evidence include FRE 413 (admitting propensity evidence in prosecutions of sexual assault), FRE 414 (admitting propensity evidence in prosecutions of child molestation), and FRE 704(b) (the so-called "Hinkley Rule," prohibiting experts from opinion as to whether a criminal defendant could form the mens rea necessary to commit the charge offense). For a further discussion of the "politicization" of the FRE, see Capra, *supra* note 7.

100. The Sixth Amendment to the U.S. Constitution provides, in pertinent part, as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . ." U.S. CONST. amend. VI.

exceptions,[101] a new federal version of Oregon's Rule 803(26) would probably not qualify as "firmly rooted."[102] As a consequence, the admission of hearsay under this exception would need to withstand scrutiny under the Supreme Court's rulings interpreting the Confrontation Clause in criminal prosecutions. The government would need to show that the hearsay declarant has been subject to cross-examination by the defendant,[103] or that the declarant is unavailable for cross-examination.[104] In addition, the government would need to show that the evidence admitted under the new hearsay exception is sufficiently reliable.[105] The difficulty of satisfying these confrontation requirements would vary with each case, but for the reasons discussed above,[106] the reliability of evidence that meets the requirements of Oregon's Rule 803(26) should not be taken for granted, and a federal version of this rule might run afoul of the Confrontation Clause on a number of occasions.[107]

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101. In a series of cases—most notably *White v. Illinois*, 502 U.S. 346 (1992), *Bourjaily v. United States*, 483 U.S. 171 (1987), and *United States v. Inadi*, 475 U.S. 387 (1985)—the Supreme Court has ruled that a firmly rooted hearsay exception ensures the reliability of evidence admitted under the exception, and diminishes the need for cross-examination of the hearsay declarant.

102. In *Idaho v. Wright*, 497 U.S. 805 (1990), the Supreme Court considered whether Idaho's residual hearsay exception was "firmly rooted." The Court held that a hearsay exception is not firmly rooted if it lacks "the imprimatur of longstanding judicial and legislative experience." Idaho's residual hearsay exception could not be considered firmly rooted because "hearsay statements admitted under the residual exception, almost by definition, . . . do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." *Id.* at 817.

103. In *United States v. Owens*, 484 U.S. 554 (1988), and *California v. Green*, 339 U.S. 149 (1970), the U.S. Supreme Court made clear that the federal confrontation requirements are satisfied when the hearsay declarant is actually subject to cross-examination by the defendant.

104. The Confrontation Clause does not require that the hearsay declarant be subject to cross-examination where the government shows the declarant is actually unavailable despite the government's good faith efforts to secure the declarant's testimony. Ohio v. Roberts, 448 U.S. 561 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968).

105. The government must show that the evidence has "partiicularized guarantees of trustworthiness," i.e., circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." Idaho v. Wright, 497 U.S. 805 (1990).

106. *See supra* notes 96-97 and accompanying text.

107. For example, in *State v. Moore*, 334 Or. 328 (2002), the Oregon Supreme Court found that Oregon's own confrontation clause required the exclusion of a hearsay statement by a domestic violence victim. Oregon has chosen not to follow the U.S. Supreme Court's confrontation cases subsequent to *Ohio v. Roberts*, so Oregon still requires the government to prove that a hearsay declarant is actually available for cross-examination or is unavailable for permissible reasons. 334 Or. at 335-40. Oregon imposes this requirement for all hearsay exceptions, whether or not they are "firmly rooted." *Id.* In *Moore*, the Oregon Supreme Court considered whether the trial court had properly admitted an excited utterance by a domestic violence victim who was not present during the defendant's trial, and whose unavailability had not been demonstrated by the prosecution. The Oregon Supreme Court held that admission of such a statement violated the defendant's

CONCLUSION

This short essay has studied three innovative approaches taken by states to facilitate the admission of certain evidence that is useful in the prosecution of domestic violence. These approaches may make sense under the circumstances presented in state court, but they should not be imported into the Federal Rules of Evidence. In the federal system, such rules would cause theoretical inconsistencies, would cause undue prejudice to defendants, would impose burdens on victims of domestic violence, and would create double standards for Native Americans. The practical need for these reforms is dubious, because federal prosecutors are already achieving high conviction rates in cases involving violence against women. Reform of the federal evidentiary rules to assist prosecutions of domestic violence may be politically popular, but in reality, it's a solution in search of a problem.

The conclusion of this article should not be construed as a criticism of the attorneys who authored the three primary pieces of legislation reviewed herein.[108] One cannot help but admire these attorneys' commitment to eradicating domestic violence, and their careful approach to crafting legislation that addresses the unique needs of their states. The purpose of the present article is not to criticize these pathbreaking approaches in state court, but rather to urge caution in adopting such approaches in federal court.

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confrontation rights, even though the statement was otherwise admissible under Oregon's hearsay exception for excited utterances. *Id.* at 341. Similar analysis would be likely in federal court if the new hearsay exception were not deemed to be "firmly rooted."

108. One common denominator of the three principal statutes examined in this article, OR. EVID. CODE § 609(2); CAL. EVID. CODE § 1109, and OR. EVID. CODE § 803(26), is that they were drafted in large part by recently admitted (or not-yet-admitted) lawyers. Gina Skinner authored Oregon House Bill 3680 (later codified as OR. EVID. CODE § 609(2)) within four years of her admission to the Oregon State Bar, according to biographical data available at www.martindale.com. Lisa Marie De Sanctis co-wrote Senate Bill 1876 (codified as CAL. EVID. CODE § 1109) one year after graduating from law school. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 359 n.dd (1996). Joel Shapiro wrote Oregon House Bill 3395 (later codified as OR. EVID. CODE 803(26)) while he was a third-year law student. *See* Peter R. Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299, 304 (2001).