Boston College Law Review

Volume 43
Issue 2 *Number 2*

Article 3

3-1-2002

The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse

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THE ADMISSIBILITY OF EVIDENCE OF ANIMAL ABUSE IN CRIMINAL TRIALS FOR CHILD AND DOMESTIC ABUSE

Abstract: Household violence is a serious problem throughout the country. When household violence cases reach the court system they present unique evidentiary problems. Courts have begun to address these evidentiary problems by allowing evidence of prior abuse of other household victims into criminal trials for child and domestic abuse. The courts that have allowed such evidence, and the scholars who support such admissions, do so under auspices of "specific propensity evidence" to commit a certain type of crime, as opposed to "general propensity evidence" which is barred from admission by the federal and state rules of evidence. Since studies have linked animal abuse with other forms of domestic abuse, it is a logical extension to consider evidence of animal abuse as specific propensity evidence to commit other forms of domestic abuse. Therefore, evidence of animal abuse should be admissible in criminal trials for child and domestic abuse.

INTRODUCTION

One of the goals in family law is the *prevention*, rather than the *punishment*, of household violence and chronic abuse.[1] Criminal law, on the other hand, focuses on punishment for specific acts, rather than the prevention of future violence, making the federal and state rules of evidence a challenge for advocates of preventing family violence.[2] Domestic, child, and animal abuse can be used to help prevent future violence, without changing the way the criminal system works, by using pre-established rules of evidence to identify and prevent future sources of family violence.

Sociological and statistical studies show that all types of abuse within a home are highly related to other types of abuse in the same home.[3] This Note outlines how these sociological and statistical stud-

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[1] *See, e.g.*, Susan Crowell, *Animal Cruelty as it Relates to Child Abuse: Shedding Light on a "Hidden" Problem*, 20 J. JUV. L. 38, 51 (1999); Myrna Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1463 (1996).

[2] *See* Crowell, *supra* note 1, at 51; Raeder, *supra* note 1, at 1463.

[3] *See, e.g.*, DORIS DAY ANIMAL FOUNDATION, THE VIOLENCE CONNECTION 3 (1997) [hereinafter DORIS DAY]; Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 6 (1998).

ies support the way animal, child, and domestic abuse can be used by the legal, sociological, and legislative communities to prevent violence. Already, animal and child welfare officers work together to identify and prevent domestic, child, and animal abuse by cross-reporting abusive households and admitting evidence of child and animal abuse in custody, divorce, and some criminal proceedings.[4]

This Note takes these advancements one step further to show that based on the recognized evidentiary exceptions and their supporting rationales, animal abuse is an indicator of a specific propensity to commit abuse against a family member.[5] Thus, this Note argues that prior animal abuse should be admissible under Federal Rule of Evidence 404(b) in criminal trials for child and domestic abuse, subject only to the Federal Rule of Evidence 403 balancing test and, potentially, a limiting instruction.[6]

Part I examines the correlation among the various types of household violence—domestic abuse, child abuse, and animal abuse.[7] Part II examines the Federal Rules of Evidence and the history and rationale behind Rule 404(b).[8] Part III outlines the admissibility of prior abuse in domestic, child, and animal abuse cases.[9] Finally, Part IV shows how prosecutors can admit evidence of animal abuse in criminal trials for child and domestic abuse under the current judicial regime.[10]

I. Correlations of Household Violence

Numerous sociological and statistical studies show a close connection between abuse of animals and abuse of children and spouses.[11] A breakthrough study in 1983 showed that in homes where

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[4] Care and Protection of Martha, 553 N.E.2d 902, 906 (Mass. 1990); Doris Day, *supra* note 3, at 3; Lacroix, *supra* note 3, at 3; A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals*, Prosecutor, Jan./Feb., 1996, at 31.

[5] *See infra* notes 11–54 and accompanying text.

[6] *See infra* notes 201–212 and accompanying text. Beyond the scope of this article is the necessity of expert testimony in this sort of abuse trial. If evidence of animal abuse is offered by a witness, an expert may also have to testify to studies that show the link between animal and domestic abuse, subject to Federal Rule of Evidence 702. *See* Daubert v. Merrill Dow Pharm., 509 U.S. 579 (1993).

[7] *See infra* notes 11–55.

[8] *See infra* notes 56–83.

[9] *See infra* notes 85–156.

[10] *See infra* notes 157–218.

[11] *See, e.g.*, Doris Day, *supra* note 3, at 3–4 (citing S. Kellert and A. Feldhous, *Childhood Cruelty to Animals among Criminals and Noncriminals*, 38 Hum. Rel. 1113, 1127–29 (1985)); Lacroix, *supra* note 3, at 3.

children were abused, at least eighty-eight percent of the pets in the home were also abused.[12] Essentially, a person who abuses his child or spouse is more likely to abuse his pet.[13] Arguably, therefore, the reverse could also be true—a person who abuses pets could be more likely to abuse his spouse and children.

Study after study shows a link between child abuse, domestic abuse, and animal abuse.[14] Almost all of these studies illustrate correlations linking the types of abuse at higher than seventy percent.[15] Thus, animal abuse can be used to uncover or predict other forms of abuse.[16]

Society has often focused on the differences among the victims of violence in the home, resulting in felony charges for abuse against humans in the home and misdemeanors, or no penalty at all, for abuse against animals.[17] However, violence against one family member, including the family pet, rarely involves a single act of abuse against one type of victim.[18] The victims of family violence share common traits.[19] Historically, women, children, and animals have all been considered property, whose legal rights have been superseded by the conflicting rights of their "owners."[20] Further, women, children, and family pets have all been subjected to their abuser's misuse of power and control because many of these relationships are often characterized by economic dependence, strong emotional bonds, and an enduring sense of loyalty.[21]

People who abuse animals often commit acts of violence against other people.[22] This correlation is even stronger when the abused

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[12] *See* DORIS DAY, *supra* note 3, at 4 (citing Elizabeth Deviney et al., *The Care of Pets Within Child Abusing Families*, 4 INT'L J. FOR THE STUDY OF ANIMAL PROBLEMS 321 (1983)); Crowell, *supra* note 1, at 40.

[13] *See* Crowell, *supra* note 1, at 40; Deviney, *supra* note 12, at 321; Lacroix, *supra* note 3, at 4.

[14] *See, e.g.*, DORIS DAY, *supra* note 3, at 4; PAMELA FRASCH ET AL., ANIMAL LAW, 696 (2000); Crowell, *supra* note 1, at 47–48.

[15] *See* FRASCH, *supra* note 14, at 696; Crowell, *supra* note 1, at 48.

[16] FRASCH, *supra* note 14, at 695.

[17] *See* Lacroix, *supra* note 3, at 2.

[18] FRASCH, *supra* note 14, at 695; Lacroix, *supra* note 3, at 4.

[19] *See* Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights, in* HUMANS AND OTHER ANIMALS 145 (Arien Mack ed., 1995); Lacroix, *supra* note 3, at 6.

[20] *See* Tannenbaum, *supra* note 19, at 145; Lacroix, *supra* note 3, at 6; STEVEN WISE, RATTLING THE CAGE 9 (2000).

[21] *See* Lacroix, *supra* note 3, at 7; Raeder, *supra* note 1, at 1472.

[22] *See* DORIS DAY, *supra* note 3, at 4; FRASCH, *supra* note 14, at 695; Lacroix, *supra* note 3, at 8.

animals and people reside in the same household.[23] Animal cruelty is often not aimed at the animal per se, but is used as a coercive technique to induce fear in other family victims to prevent them from publicly disclosing family violence occurring in the home.[24] Thus, some animal abuse may be intended as a form of psychological child or domestic abuse itself.[25] In fact, many abusive situations remain abusive solely because the threats and actual violence against companion animals further isolate an abused victim from any source of comfort or love.[26]

Children who are victims of abuse often become abusers themselves.[27] Thus, in protecting the victims of abuse, the legal system helps prevent the re-occurrence of the same pattern of violence in the future.[28] Animal abuse in a household is not simply the result of a personality flaw in the abuser, but a symptom of a deeply disturbed family, both in the past and the future.[29]

Animal abuse is, therefore, one step in a cycle of violence.[30] Children who live in abusive homes commit cruel acts upon animals as a way of exercising their anger at being abused.[31] This anger grows, and the abuse continues, until the child lashes out against humans.[32] When the child becomes a parent, the anger is often vented upon his children, and continues the cycle of violence.[33]

If animal abuse is allowed to continue in a home, the children in the home learn from the violent acts and imitate them later in life.[34] As Margaret Mead, a social anthropologist, declared, "One of the most dangerous things that can happen to a child is to kill or torture an animal and get away with it."[35]

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[23] *See* Lacroix, *supra* note 3, at 8.

[24] *See* Doris Day, *supra* note 3, at 6; Crowell, *supra* note 1, at 41; Ritter, *supra* note 4, at 32.

[25] *See* Doris Day, *supra* note 3, at 6; Crowell, *supra* note 1, at 41; Ritter, *supra* note 4, at 32.

[26] Doris Day, *supra* note 3, at 6; Ritter, *supra* note 4, at 32.

[27] *See* Crowell, *supra* note 1, at 39.

[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See* Crowell, *supra* note 1, at 39.

[33] *See id.*

[34] *See id.* at 43.

[35] *See id.*

Some of the most well-known serial killers in American history began their criminal histories by abusing animals.[36] As one social worker said, "How do you make a serial killer? Practice, practice, practice—on animals."[37] Notorious animal abusers turned serial killer include: Albert DeSalvo (shot arrows into boxes of trapped cats and dogs); David "Son of Sam" Berkowitz (shot the neighbor's dog); Jeffrey Dahmer (killed neighborhood pets and impaled dog's head on a stick); Ted Bundy (grandfather tortured animals in front of him during childhood); Edmund Emil Kemper III (abused cats and dogs); and Richard Allen Davis (doused cats with gasoline and set them on fire).[38]

Against this backdrop, in 1987, the American Psychiatric Association (APA) added physical cruelty to animals to the diagnostic criterion for Conduct Disorder.[39] The APA defines "Conduct Disorder" as a "persistent pattern of conduct in which the basic rights of others and major age-appropriate societal norms or rules are violated."[40] Children and adults with Conduct Disorder generally lack feelings of guilt or remorse for actions that cause "others" pain.[41] The APA considers "animals" as members of the group "others" when determining when a patient suffers from this disorder.[42]

While no state requires the admission of animal abuse in criminal trials, some do recognize that animal cruelty is a signal that a person has violent tendencies that may eventually turn on people.[43] For example, California's animal cruelty statutes require counseling when a defendant is convicted of animal abuse and released on parole.[44] The purpose of the counseling is to evaluate and treat behavior or conduct disorders.[45] Thirteen other states give judges discretionary authority to order animal abusers to undergo psychiatric counseling.[46] Several

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[36] *See id.*; DORIS DAY, *supra* note 3, at 4–5.

[37] *See* Crowell, *supra* note 1, at 49 (quoting Pamela Martineau, *Animal Cruelty Often Tied to Human Abuse*, SACRAMENTO BEE, June 15, 1998, at A1).

[38] *See* FRASCH, *supra* note 14, at 695–96; Crowell, *supra* note 1, at 43–44; Ritter, *supra* note 4, at 32.

[39] *See* Crowell, *supra* note 1, at 48.

[40] *See id.*

[41] *See id.*

[42] *See id.*

[43] *Id.* at 55.

[44] Crowell, *supra* note 1, at 55.

[45] *Id.*

[46] *See* DORIS DAY, *supra* note 3, at 10; Crowell, *supra* note 1, at 56. The fourteen states that notify judges and prosecutors about counseling are California, Colorado, Illinois,

other states have sharply increased the maximum penalties for certain violations of their animal welfare acts.[47]

At the federal level, the Federal Bureau of Investigation (FBI) incorporates animal cruelty into its "threat assessment" technique during background checks.[48] The FBI does so to determine the level of threat a suspect poses to society because, as it says, "Something we believe is prominently displayed in the histories of people who are habitually violent is animal abuse . . . . You can look at cruelty to animals and cruelty to humans as a continuum."[49]

The American Humane Association and the Law Enforcement Training Institute at the University of Missouri have joined together in an initiative to help break the cycle of violence.[50] The two organizations run the National Cruelty Investigations School, a training program tailored to the needs of cruelty investigators, sheriffs, and police officers.[51] The program offers training for professionals who enforce anti-cruelty statutes, including courses in animal law, animal evidence, and the relationship of animal cruelty to family violence.[52]

Finally, the *AniCare* Model of Treatment for Animal Abuse debuted in 1999, to help treat animal abusers.[53] The program was developed by Psychologists for the Ethical Treatment of Animals (PSYETA) and the Doris Day Animal Foundation, and was adapted from a program originally created for clinical interventions of perpetrators of domestic violence.[54] This program, and the others cited above, show that academic, social, and some legal institutions officially recognize the intrinsic link between all forms of household abuse.[55]

Maine, Maryland, Michigan, Minnesota, New Mexico, Nevada, Oregon, Vermont, Virginia, Washington, and West Virginia.

[47] *See* Crowell, *supra* note 1, at 56.

[48] Doris Day, *supra* note 3, at 7.

[49] *Id.* (quoting Supervisory Special Agent Alan Brantley of the FBI's Investigative Support Unit).

[50] Doris Day, *supra* note 3, at 6.

[51] *Id.*

[52] National Cruelty Investigations School, The Law Enforcement Institute & Humane Society of the U.S., *at* http://web.missouri.edu/~letiwww/animal3.htm (last visited Feb. 2, 2001).

[53] Doris Day, *supra* note 3, at 11.

[54] *Id.*

[55] Doris Day, *supra* note 3, at 7, 11; Crowell, *supra* note 1, at 48, 55.

II. EVIDENTIARY RULES

The Federal Rules of Evidence, particularly Rule 404(b), and similar state rules,[56] prevent the admission of character evidence—evidence of other crimes, wrongs, or acts used to show the likelihood that the defendant committed the crime in question.[57] The motivation behind the Rule is that, as then-Judge Breyer explained, "[a]lthough . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."[58]

While the purpose of excluding propensity evidence is admirable in some respects, both the courts and Congress recognize the potentially harmful effects this rule can create.[59] Thus, Congress and the U.S. Supreme Court emphasize admissibility of propensity evidence when the evidence serves both a proper and relevant purpose for admission and is more peobative than prejudicial.[60]

Trial judges considering propensity evidence first determine whether the evidence serves another proper purpose of Rule 404(b).[61] Proper purposes include proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[62] These exceptions to propensity evidence in Rule 404(b) are illustrative, rather than exclusionary, and evidence of prior wrongs may be admitted unless it is introduced *solely* to prove a defendant's criminal disposition.[63] After the trial judge, in her discretion, determines if the specific prior bad acts are relevant to an issue other than

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[56] Although most criminal actions are brought in state courts, I refer to the Federal Rules of Evidence in an effort to address all similar state rules of evidence simultaneously.

[57] FED. R. EVID. *404(b)*.

[58] United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982).

[59] EDWARD IMWINKELRIED, EVIDENTIARY FOUNDATIONS 173, 188 (4th ed. 1998), *see* H.R. REP. NO. 93-650, at 7 (1973); United States v. Naranjo, 710 F.2d 1465, 1467 (10th Cir. 1983).

[60] H.R. REP. NO. 93-650, at 7; *Naranjo*, 710 F.2d at 1467; IMWINKELRIED, supra note 59, at 174, 188.

[61] FED. R. EVID. 404(b).

[62] *Id.* Evidence found to be an exception to FRE 404(b) must still meet the requirements of Rule 403, where a court must evaluate evidence to determine if the probative value of the evidence is substantially outweighed by the potential for prejudice. FED. R. EVID 403. If such a danger of prejudice exists, the trial court may either exclude the evidence or provide a cautionary instruction to the jury. *Id.*

[63] United States v. Percy, 765 F.2d 1199, 1203 (4th Cir. 1985); *Naranjo*, 710 F.2d at 1467; IMWINKELRIED, supra note 59, at 188.

character, prosecutors must show that the evidence specifically relates to the alternative purpose, is reliable, and is sufficiently related to the charged offense to surpass the prejudicial balancing test of Rule 403.[64]

Such evidence becomes admissible not because it is not propensity evidence, but because it is so specific that it is relevant for purposes other than trying to show the defendant is a bad person.[65] For example, if the prosecution wants to offer propensity evidence to prove identity and the accused denies committing the crime, the judge will most likely admit the evidence.[66] At this point, in order to avoid the bad act from being presented in full to the jury, the defendant may be able to stipulate to its occurrence or accept its admittance with a limiting instruction to the jury.[67]

Congress also addressed concerns about limiting propensity evidence by passing the Violent Crime Control and Law Enforcement Act of 1994 (now Federal Rules of Evidence 413, 414, and 415).[68] The Act made it possible for prosecutors to admit evidence of prior sexual assaults and child molestations against defendants accused of the same crime again.[69] The Act's provisions override the admissibility restrictions imposed by Rules 404(a) and 404(b).[70] While somewhat unpopular with scholars,[71] and intended to address the mounting fear of sexual predators, this statutory exception to Rule 404(b) helps feed

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[64] H.R. REP. No. 93-650, at 7; United States v. Rawle, 845 F.2d 1244, 1247 & n.4 (4th Cir. 1988); IMWINKELRIED, supra note 59, at 188, 191.

[65] IMWINKELRIED, supra note 59, at 188.

[66] *See* United States v. Harris, 661 F.2d 138, 142 (10th Cir. 1981); IMWINKELRIED, supra note 59, at 188.

[67] *See* Old Chief v. United States, 519 U.S. 172, 177–78 (1997); IMWINKELRIED, supra note 59, at 188–89.

[68] VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, Pub. L. No. 103-22, §320935(a) (1994). The Judicial Conference recommended different rules than the amendments made by § 320935, but Congress did not follow the recommendations of the Judicial Conference. Accordingly, Rules 413, 414, and 415 became effective on July 9, 1995. *See also* United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998).

[69] *See* FED. R. EVID. 413–15; *Mound*, 149 F.3d at 801; IMWINKELRIED, supra note 59, at 174; *see also supra* note 68.

[70] *See* FED. R. EVID. 413–15; *Mound*, 149 F.3d at 801; IMWINKELRIED, supra note 59, at 174.

[71] "The overwhelming majority of judges, lawyers, law professors and legal organizations who responded to the Federal Advisory Committee's call for public response opposed the enactment of Rules 413 through 415 without equivocation." UNIF. R. EVID. prefatory note (1999) (explaining why the Uniform Rules of Evidence were not including Rules 413 through 415 from the Federal Rules of Evidence).

the debate over what types of evidence should be admitted over Rule 404(b) exclusions.[72]

Used in this way, history of sexual predation is unquestionably propensity evidence.[73] Rules 413–415 indicate that Congress is willing to accept the proposition that propensity evidence should be admissible in these circumstances, regardless of the Rule 404(b) exceptions.[74]

For similar reasons, some argue, and a few courts accept that, prior evidence of domestic assault and child abuse should be admitted in criminal trials.[75] The basic premise is the same: an abuser does not abuse only once, just as a child molester does not molest only once.[76] The theory for differentiating these kinds of crimes from other propensity crimes is based on the idea that "specific" propensity evidence to commit a certain crime is admissible, while "general" propensity evidence to commit crime is prohibited by Rule 404(b).[77] For example, a defendant who has abused his child in the past has a specific propensity to commit abuse against that same victim again.[78] This is especially relevant in child and domestic abuse cases where the spectrum of potential aggressors is extremely small—usually the abuser must be a member of, or close to, the victim's family.[79] Thus, evidence showing prior abuse of a specific victim is not prohibited in some jurisdictions and, according to some scholars, should not be prohibited by Rule 404(b).[80]

Absent a statutory extension allowing abuse to be considered analogous to sexual predation, however, courts have begun to use 404(b) to admit propensity evidence in trials when the prior abusive act was against a different member of the family.[81] The argument is only slightly extended from the arguments made to support Rules 413–415: a defendant who has committed abuse against a member of his family has a specific propensity to abuse another dependent per-

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[72] *See* Thomas Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 219 (1994).

[73] FED. R. EVID. 413–15; *Mound*, 149 F.3d at 801; Reed, *supra* note 72, at 203.

[74] *Mound*, 149 F.3d at 801.

[75] *See* Raeder, *supra* note 1, at 1504 (quoting People's Response to Defendant's Motion to Exclude Evidence of Domestic Violence, People v. Simpson, No. BA097211, 1994 WL 737964, at *2 (Cal. Super. Ct. 1994)); *see also* United States v. Powers, 59 F.3d 1460, 1464 (4th Cir. 1995); Commonwealth v. Barrett, 641 N.E.2d 1302, 1307 (Mass. 1994).

[76] Raeder, *supra* note 1, at 1504; *see Powers*, 59 F.3d at 1464; *Barrett*, 641 N.E.2d at 1302.

[77] *See* Raeder, *supra* note 1, at 1504.

[78] *See Powers*, 59 F.3d at 1464; Raeder, *supra* note 1, at 1504.

[79] *See Harris*, 661 F.2d at 141.

[80] *See* Raeder, *supra* note 1, at 1504.

[81] *See* State v. Crossman, 624 P.2d 461 (Kan. 1981); *Barrett*, 641 N.E.2d at 1307.

son who is a member of that family.[82] Thus, evidence of prior abuse of a family member is not prohibited by Rule 404(b) in a trial for abuse of another family member and is sufficiently probative to pass a Rule 403 balancing test.[83]

III. Admissibility of Prior Abuse

A. *Admissibility of Domestic Abuse in Criminal Trials*

Scholars have proposed a domestic abuse character evidence exception for legislative action.[84] Absent specific legislation, however, courts still admit prior domestic abuse evidence under the exceptions in Rule 404(b).[85] The most well-known case is *People v. Simpson* (*People*), and its civil counterpart, *Rufo v. Simpson* (*Rufo*), which made domestic abuse a nationwide conversation piece.[86] In this dispute, with the country watching, both the criminal and civil courts recognized that domestic abuse is not usually a one-time occurrence.[87] The trial courts admitted evidence of prior instances when O.J. Simpson had abused his wife, Nicole Brown, to help prove that he was the one who murdered her.[88]

The California Court of Appeals recently upheld the admission of this evidence of prior abuse, finding that it was an exception to the propensity rule as a means of determining motive, intent, and identity.[89] The court concluded that when a defendant has a previous relationship with a victim, prior assaults upon that victim are admissible solely upon the consideration of identical perpetrator and victim without looking for a distinctive modus operandi.[90] The court also concluded that the prior abuse was relevant and probative to support

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[82] *See* Raeder, *supra* note 1, at 1504.

[83] *See Harris*, 661 F.2d at 142; Raeder, *supra* note 1, at 1504.

[84] *See* Raeder, *supra* note 1, at 1505 (proposing FRE 404(a)(4)).

[85] Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 499–500 (2001); People v. Simpson, No. BA097211, 1994 WL 737964, at *2 (Cal. Super. Ct. 1994).

[86] *See Rufo*, 103 Cal. Rptr. 2d at 492; *Simpson*, 1994 WL 737964, at *2; *see also* Raeder, *supra* note 1, at 1465. This case was made well known by the fame of the defendant—O.J. Simpson. Mr. Simpson was acquitted of the charges in the criminal trial, but found liable in the civil trial.

[87] *See* Raeder, *supra* note 1, at 1472.

[88] *Rufo*, 103 Cal. Rptr. 2d at 492; *Simpson*, 1994 WL 737964, at *2.

[89] *Rufo*, 103 Cal. Rptr. 2d at 499. While *Rufo* was decided under California's evidence rules, these rules mimic the Federal Rules of Evidence.

[90] *Id.* at 500.

admission, and that the number of years between the prior abuse and the femicide was irrelevant.[91]

Domestic abusers use violence to maintain power and control over their spouse.[92] Domestic femicide is often what triggers many criminal domestic abuse cases, and the resulting murder trials often focus on either identifying the murderer or the murderer's motive, malice, preparation, or intent at the time of the killing.[93] Evidence of prior domestic abuse by a partner can help answer these questions without violating the purpose of Rule 404(b), since they are admissible as independently relevant evidence.[94] In particular, prior abuse can help show intent, motive, lack of accident in killing the abused, or the identity of the killer.[95]

Evidence of prior spousal abuse is admitted on the premise that domestic violence evidence is situational—a repeated response in a specific relationship.[96] Nonetheless, some legal scholars and judges continue to focus on one incident at a time, preventing prior abuse from being considered by the jury.[97]

Evidence of prior abuse can prove identity by showing that the abuser had a specific propensity to commit violence against the specific victim.[98] The conduct is narrow enough that it is no longer general propensity reasoning focusing on the defendant as a bad person.[99] Instead, the prior pattern of abuse can help prove identity by showing that the type of violence in the past and the type of current injuries sustained by the victim are similar.[100] When the repetitive nature of the abuser's response is informative about the conduct on the occasion in question, prior domestic violence history can be intro-

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[91] *Id.* at 501.

[92] *See* Lacroix, *supra* note 3, at 7; Raeder, *supra* note 1, at 1472.

[93] Raeder, *supra* note 1, at 1472; *see* Ortega v. State, 669 P.2d 935, 940 (Wyo. 1983) (overruled on other grounds).

[94] *See Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1472.

[95] *See* United States v. Naranjo, 710 F.2d 1465, 1468 (10th Cir. 1983); *Ortega*, 669 P.2d at 945; *see also* Roger Park, *Character Evidence Issues in the O.J. Simpson Case*, 67 U. COLO. L. REV. 747, 753 (1996).

[96] *See* Raeder, *supra* note 1, at 1472.

[97] Ritter, *supra* note 4, at 31. Judicial decisions preventing the admission of such evidence are difficult to find as these decisions cannot be appealed by the state and thus do not show up in any judicial record.

[98] State v. Green, 652 P.2d 697, 701 (Kan. 1982) (not only finding prior bad acts admissible to show intent as an exception to the evidence rule, but also independent of the rule, allowing trial judge to refuse to give a limiting instruction); *see* Raeder, *supra* note 1, at 1472.

[99] Raeder, *supra* note 1, at 1491.

[100] *See id.*

duced to establish that the defendant committed the murder in accordance with his prior actions.[101] Finally, it can help prove identity if evidence is available showing a downward spiral of the relationship, triggering the final act of control over the victim—murder.[102]

Evidence of prior abuse can also help prove intent or motive and disprove an asserted defense of accident or mistake.[103] First degree murder requires premeditation or deliberation as well as malice, and domestic abuse can show both a plan and the requisite malice for many domestic femicides.[104] Many femicides result from a plan gone wrong.[105] When the abuser loses control over the victim, either by divorce or separation, the result can often be the death of the abused at the hand of the abuser.[106] Additionally, a defendant finds himself in a much more difficult position to argue that the incident was an accident or a suicide if there is evidence of chronic abuse.[107]

When courts admit evidence of prior abuse under the exceptions in Rule 404(b), the remaining hurdle for domestic abuse prosecutors is showing that the prejudicial effect of the evidence does not outweigh the probative value of the evidence, pursuant to Rule 403.[108] This balance generally favors admission in most cases because it brings to light the control and/or cycle of violence that is central to proving that the murder was intentional and part of a pattern.[109]

Some scholars do not see a need to limit admissibility of prior domestic abuse to domestic femicide cases.[110] Even absent the death of the victim, they argue, the balancing test of Rule 404(b) still tips in favor of admitting the evidence of prior abuse to protect the victim who is still alive.[111] This evidence can help determine many relevant issues, like why the abuse should be considered a felony (rather than

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[101] *Green*, 652 P.2d at 701; *see* Raeder, *supra* note 1, at 1491–92.

[102] *See Green*, 652 P.2d at 701; Raeder, *supra* note 1, at 1492.

[103] *See Naranjo*, 710 F.2d at 1468 (evidence of prior spousal abuse admissible to discredit defendant's claim that he shot his wife accidentally); *Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1473.

[104] *See Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1495.

[105] *See* Raeder, *supra* note 1, at 1495.

[106] *See* Park, *supra* note 95, at 749; Raeder, *supra* note 1, at 1495.

[107] *See Naranjo*, 710 F.2d at 1468; United States v. Colvin, 614 F.2d 44, 45 (5th Cir. 1980) ("Evidence of prior injuries showing a 'pattern of abuse' was (properly) admitted to prove the malice aforethought required to support a conviction for second degree murder."); *Ortega*, 669 P.2d at 945; *see also* Raeder, *supra* note 1, at 1495.

[108] *See* FED. R. EVID. 403; *Ortega*, 669 P.2d at 945; *see* Raeder, *supra* note 1, at 1503.

[109] *See Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1503. *But see Ortega*, 669 P.2d at 947 (Rose, J., dissenting).

[110] *See* Raeder, *supra* note 1, at 1504.

[111] *See id.*

a misdemeanor) and why the abuser should be either locked up or sent for psychiatric evaluation and assistance.[112]

The single victim–single perpetrator prior relationship approach is not just found in domestic abuse cases, but is also found in child abuse cases.[113] Multi-victim–single perpetrator challenges emerge as a prosecutor attempts to combine domestic and child abuse of multiple victims with one defendant.

B. *Child Abuse*

Witnessing domestic violence in the home and experiencing abuse themselves often predisposes children to violent, anti-social behavior.[114] Violence, abuse, and neglect lead to inadequate bonding, inadequate brain stimulation, and potential future incarceration of children.[115] Children begin to imitate violent behavior at the age of three or four.[116] Thus, not only do abused children often become abusers later in life, they also start exhibiting signs of violence and abuse at an early age.[117] At this age, however, children are often at the bottom of the "pecking order" when it comes to violence, and, therefore, seek out potential absorbers of their aggression—often the family pet.[118]

Witnessing violence against another family member or an animal may be just as damaging to a child as being beaten herself.[119] Thus, acts of violence in the presence of a child may be considered a form of child abuse itself, even absent any visible injuries or scars.[120]

State custody and adoption proceedings often consider child abuse.[121] In such proceedings, fitness of a parent or guardian is in issue and historically the hearings have not been governed by criminal rules of evidence, and, thus, the parent's character may be brought

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[112] *See id.*

[113] *See infra* Part IIIB.

[114] John D. Burrington, *We Learn What We Live: The Effects of Domestic Violence on Children*, COLO. LAW., Oct. 1999, at 29.

[115] *Id.*

[116] *Id.* at 30.

[117] *Id.*

[118] *Id.*

[119] Burrington, *supra* note 114, at 32.

[120] *Id.*

[121] Care & Protection of Martha, 553 N.E.2d 902, 906 (Mass. 1990); Lacroix, *supra* note 3, at 29.

into a hearing.[122] In contrast, in criminal cases of child abuse and murder cases when the child is suspected of being abused, the character of the defendant is not put into issue as in a custody or adoption proceeding. Additionally, these trials are bound by the applicable criminal rules of evidence.[123] Still, the legal community in recent years has exhibited flexibility in handling criminal child abuse cases, relaxing some of the rules regarding child witnesses and admissibility of evidence, for example.[124] Like instances of prior spousal abuse, courts admit evidence of prior abuse of a child killed by the abuser.[125] In fact, some courts espouse that "such extrinsic evidence may be especially necessary in child abuse cases . . . due to the youth of the victims . . . ."[126]

Not only do courts allow evidence of prior abuse of the same child, but they also admit evidence of abuse of other children.[127] Such evidence is often restricted to instances related in time, place, and form to be logically probative and to show a common course of conduct by the defendant; nevertheless, it remains standard propensity evidence.[128]

Some states that have adopted the Federal Rules of Evidence for their courts are liberal in allowing evidence from other household victims in child abuse cases. These courts have not limited their evidentiary rulings to cases where the child victim died. For example, in 1989, in the case of *State v. Bates*, the defendant was charged with raping his daughter and the Utah Supreme Court upheld the admission of evidence of the defendant's specific act of violence against the vic-

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[122] MASS. ANN. LAWS, ch. 119, § 26 (1999); Custody of Jennifer, 517 N.E.2d 187 (Mass. 1988) (evidence of father's conviction for indecent assault and battery on the children's fourteen year old babysitter admissible to show father's fitness); Custody of Minor, 393 N.E.2d 379 (Mass. 1979) (neither clear and convincing evidence nor showing of least restrictive means required before removing custody of child from natural parents); Lacroix, *supra* note 3, at 27–29.

[123] *Martha*, 553 N.E.2d at 906.

[124] JOHN EVARTS TRACY, HANDBOOK OF THE LAW OF EVIDENCE 120–33 (1952), *reprinted in* JOHN WALTZ & ROGER PARK, EVIDENCE CASES & MATERIALS 683 (9th ed. 1999) (outlining the difficulties inherent with child witnesses); *see* United States v. Harris, 661 F.2d 138, 141 (10th Cir. 1981) (admitting evidence of prior child abuse).

[125] *Harris*, 661 F.2d at 141–42.

[126] *Naranjo*, 710 F.2d at 1468 (discussing *Colvin*, 614 F.2d at 45 and *Harris*, 661 F.2d at 142).

[127] State v. Crossman, 624 P.2d 461, 464–65 (Kan. 1981); Commonwealth v. Barrett, 641 N.E.2d 1302, 1307 (Mass. 1994).

[128] *See* United States v. Hogue, 827 F.2d 660, 662–63 (10th Cir. 1987); *Crossman*, 624 P.2d at 461; *Barrett*, 641 N.E. 2d at 1302.

tim's mother.[129] The court rejected the defendant's Rule 404(b) objection, stating that the testimony was not offered to show the defendant's propensity for violence, but to describe the state of mind of the victim at the time of the abuse and why she delayed reporting it.[130] Similarly, in *State v. Wilson*, the Washington Court of Appeals in 1991 upheld the admission of prior physical assaults of the victim in a rape case to show why she delayed reporting the abuse, rejecting the argument that it was prohibited propensity evidence.[131]

In an important federal criminal case, the United States Court of Appeals for the Fourth Circuit upheld the admission of evidence of prior abuse of the entire family in a case where the defendant had raped his daughter.[132] The court concluded that the prior acts of violence against the entire family were admissible to explain the daughter's submission to the acts and her delay in reporting the sexual abuse.[133] The court stated:

> Given the essentially violent character of both rape and physical abuse, we conclude that, for the purposes of this case, the sexual abuse to which Brandi was subjected and the beatings imposed upon the entire family are sufficiently related to satisfy the requirements of 404(b) . . . these events, when taken as a whole with the earlier physical mistreatment, show that Powers' abuse that he inflicted upon his family was, in reality, one continuous pattern of activity that existed whenever he was present in the home.[134]

The court stressed the importance of putting the abuse in context with prior acts against both the victim and her family.[135] After determining that it satisfied Rule 404(b), the court determined that all that was then necessary was Rule 403's balancing, which it found favored admitting the evidence of prior abuse.[136]

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[129] 784 P.2d 1126, 1127 (Utah 1989).
[130] *Id.*
[131] 808 P.2d 754, 757 (Wash. Ct. App. 1991).
[132] United States v. Powers, 59 F.3d 1460, 1464 (4th Cir. 1995).
[133] *Id.*
[134] *Id.* at 1465–66.
[135] *Id.* at 1466.
[136] *Id.* at 1467–68.

C. *Animal Abuse*

Animal abuse, like child and domestic abuse, is often about power and control.[137] Many reasons exist for abusing animals, but often these reasons are directly linked to other humans. Abuse of an animal may occur to intimidate another person, to silence a human victim of abuse from revealing the situation, to exert power over another weaker being, to manipulate the actions of another person, or to practice future crimes of violence towards humans.[138]

Despite the despicable nature of this conduct, courts often view incidents of animal abuse as less serious than other forms of abuse.[139] One reason for this is the underlying fact that animals are considered property and, until the passage of animal cruelty legislation, American courts were willing to let property owners do whatever they wished with their property.[140]

Still, animal cruelty laws existed before child cruelty laws.[141] The first modern animal cruelty law was enacted in New York in 1828.[142] In 1866, Henry Bergh founded the American Society for the Prevention of Cruelty to Animals (ASPCA).[143] Using New York's animal cruelty statute, the ASPCA brought the first child abuse case into the New York courts, classifying the child as an "animal" deserving protection under the statute.[144] Soon, these protections, both for animals and children, spread to other states.[145] These advances signaled a recognition that animals had rights which, like those of humans, deserved protection and which were often related to protections of children.[146] As one Louisiana court recognized, "A horse, under its master's hands, stands in the relation of the master analogous to that of the child to the parent."[147]

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[137] DORIS DAY, *supra* note 3, at 5.

[138] *Id.*

[139] Ritter, *supra* note 4, at 32–33.

[140] WISE, *supra* note 20, at 1–7.

[141] Lela Costin, *Unraveling the Mary Ellen Legend: Origins of the "Cruelty" Movement*, 1992 SOC. SER. REV. 203 (1991).

[142] Tannenbaum, *supra* note 19, at 151.

[143] *Id.* at 152.

[144] Costin, *supra* note 141, at 203.

[145] *Id.*

[146] *Id.* at 205; Tannenbaum, *supra* note 19, at 167 (quoting State v. Karstendiek, 22 So. 845 (La. 1897)).

[147] *Karstendiek*, 22 So. at 845.

Animal abuse has become increasingly recognized as a serious crime, as well as an indicator of human-directed violence.[148] Twenty-seven states currently have felony animal cruelty laws—a dramatic increase from the four states supporting such laws in 1990.[149] Despite these progressive changes in the law and a growing recognition of the gravity of cruelty to animals, charges of animal abuse are still viewed as secondary offenses in many jurisdictions.[150] Cases rarely reach the courts because overloaded prosecutors often do not consider animal cruelty cases a priority.[151]

Animal abuse, however, is occasionally admitted in criminal trials for other sorts of violence. For example, in *State v. Cagle*, the Supreme Court of North Carolina in 1997 upheld the admission of animal violence in a murder trial when the defendant killed a cat prior to the murder.[152] The court admitted the evidence because the defendant "opened the door" by asserting that the murder plans were all supposed to be a joke.[153] The brutal killing of the cat before the murder occurred contradicted the defendant's testimony.[154] The court also performed Rule 403's balancing test and found that even though the evidence was prejudicial in nature, its probative value outweighed that prejudice.[155] The evidence was admitted with an instruction to the jury to consider the evidence to the extent it bore on the defendant's state of mind, intent, or malice.[156]

IV. Analysis

A. *What This Means for Abuse Evidence*

The solution to a violent home lies in the characterization of the offender as an abuser, rather than each individual victim as an

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[148] Doris Day, *supra* note 3, at 6.

[149] *Id.* at 8. Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington, and Wisconsin all have laws making certain types of animal cruelty a felony offense. *Id.*

[150] Doris Day, *supra* note 3, at 8.

[151] *Id.* at 8–9.

[152] 488 S.E.2d 535, 547–48 (N.C. 1997).

[153] *Id.* at 507.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 506.

abused.[157] Scholars have argued for a model that prevents animal abuse as a means to prevent and discover child and domestic abuse.[158]

There are often huge evidentiary hurdles to proving child abuse without using evidence of prior similar acts.[159] Direct evidence of child abuse is often lacking because child abusers typically commit their acts of violence within the privacy of their own homes, ensuring that there are no witnesses to the abuse, other than the traumatized victim.[160] Thus, there is usually only circumstantial evidence in the form of medical testimony, social workers' reports, proof of prior abuse or neglect of siblings, and hearsay statements.[161] This evidence, even when admitted, is often not enough to prove beyond a reasonable doubt that the injury was intentional and caused by the accused.[162]

Because of the challenge of providing enough evidence in child abuse cases, all relevant evidence of prior instances of abuse is helpful.[163] The rules of evidence can help facilitate this accumulation of circumstantial, yet admissible, evidence.[164] Evidence of abuse against a sibling and the other parent has already been used to prove abuse against the victim in some jurisdictions.[165] These jurisdictions recognize the benefits of a "multi-victim" approach to solving family violence.[166]

Admitting evidence of prior acts and convictions of animal abuse in child custody proceedings is arguably "instrumental in protecting abused children."[167] Even if the evidence does not result in changing the placement of the child, the judge would at least be able to decide if the violent parent needed counseling to help him deal with his anger issues, *before* the child gets hurt (again).[168]

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[157] *See* Lacroix, *supra* note 3, at 2.

[158] *See id.* at 12.

[159] *See id.* at 23.

[160] *See id.* at 27.

[161] *See id.*

[162] *See* Lacroix, *supra* note 3, at 27.

[163] *See id.*

[164] *See* United States v. Powers, 59 F.3d 1460, 1464 (4th Cir. 1995); Lacroix, *supra* note 3, at 27.

[165] *See* Lacroix, *supra* note 3, at 27; *see also Powers*, 59 F.3d at 64; State v. Bates, 784 P.2d 1126, 1127 (Utah 1989).

[166] *See* Lacroix, *supra* note 3, at 28.

[167] *See id.*

[168] *See id.* at 29.

Scholars refer to this method of admitting all relevant evidence as the "best interests of the child" standard.[169] One form of this evidence which is already considered in child custody hearings is evidence of domestic abuse.[170] The argument is that when a child observes acts of violence from one parent against the other, the child is harmed emotionally, and may even become an abuser (or an abused) himself.[171] Using this same logic, it follows that acts of violence witnessed by the child against a pet can also be emotionally damaging and possibly result in desensitizing the child to acts of violence against an innocent animal.[172] Thus, evidence of abuse against animals is relevant to determine which custodian would be in the best interest of the child.[173]

The evidentiary value of acts of animal abuse may actually have advantages over the use of prior acts of family violence in both these custody cases, and in criminal situations.[174] Animal abuse is easier to detect because animals commonly go outdoors and are left unattended; neglected or hurt animals have a tendency to become a neighborhood nuisance, prompting a report to animal control officers.[175] In contrast, family violence usually occurs in the home and victims are often afraid of drawing attention to themselves.[176] Additionally, human family members can be verbally persuaded not to let another person know they are hurt, or are being hurt by the abuser.[177] Animals can not be so dissuaded and are not subject to verbal threats.[178] Another factor is the possibility that neighbors, family members, and even the abused themselves may be more comfortable reporting incidents of animal abuse rather than "interfering" in a domestic or child abuse situation.[179]

It is important to realize that no matter whether abuse is targeted at an animal or a person, the issue is still the same: power, control, and preying on the vulnerable.[180] Oftentimes, the type of abuse that

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[169] *See id.*
[170] *See id.*
[171] *See* Lacroix, *supra* note 3, at 30.
[172] *See id.*
[173] *See id.*
[174] *See id.* at 31.
[175] *See id.*
[176] *See* Lacroix, *supra* note 3, at 31.
[177] *See id.*
[178] *See id.*
[179] DORIS DAY, *supra* note 3, at 3.
[180] *See* Crowell, *supra* note 1, at 50.

happens in a family, regardless of the victim, is similar.[181] Thus, if the legal system is interested in preventing child abuse, it must use multiple disciplines to also prevent animal and domestic abuse from occurring in the household.[182]

A permanent criminal record could prevent animal abusers (and thus many child and domestic abusers) from obtaining jobs with children and obtaining a gun that could be used in future crimes.[183] In some severe instances, this record could help prevent any future contact with children, reducing the likelihood of future abuse by that person.[184]

There are many difficulties in admitting much of this evidence. Case law ruling in favor of the defendant and excluding evidence is often not available because it is decided at the trial court level and not reported in digests. Also, a "not guilty" verdict is not usually appealable by the prosecutor, resulting in sparse appellate law on the issue. These factors make it difficult to determine the rationale behind these character evidence exclusions. Several key cases exist, however, in which animal abuse evidence has been admissible as evidence of a common plan or scheme to exploit and sexually abuse the victims.[185] In both *State v. Foster* and *State v. Pugsley*, the defendant had used animal abuse as a threat to the children he had abused in order to control them and prevent them from telling anyone about the abuse.[186] The judges in both cases admitted the evidence, in part because the events provided a complete picture of the charges of abuse by explaining how and when the abuse started and why the victims delayed disclosing it.[187]

Limited cases have recognized the link between animal abuse and human violence.[188] Most of these were custody battles where the standard required for a conviction is much lower than in a criminal abuse trial.[189] Allowing evidence of animal abuse as a means of showing parental fitness is also easier for many courts to justify, by com-

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[181] *See id.*

[182] *See id.* at 51.

[183] *See id.* at 58.

[184] Lacroix, *supra* note 3, at 20.

[185] *See* State v. Pugsley, 911 P.2d 761, 765 (Idaho Ct. App. 1995); State v. Foster, 915 P.2d 567, 571 (Wash. Ct. App. 1996); Crowell, *supra* note 1, at 41.

[186] *See* Crowell, *supra* note 1, at 41.

[187] *Pugsley*, 911 P.2d at 765; *Foster*, 915 P.2d at 567.

[188] *See* Crowell, *supra* note 1, at 52. *But see* State v. Cagle, 488 S.E.2d 535, 547–48 (N.C. 1997).

[189] *See* Crowell, *supra* note 1, at 52.

parison to the allowance of evidence of animal abuse as a means of proving the abuse occurred or who committed the abuse in question.[190] Even if the evidence is not admitted at trial, however, the fact remains that evidence of animal abuse often leads to the discovery of child and domestic abuse.[191]

The legal profession should become increasingly aware of animal abuse—as aware as it is of child abuse—as a means of discovering and preventing serial abusers.[192] The connection between domestic, child, and animal abuse is not surprising, since most Americans view pets as members of their family.[193] The question then surfaces whether all forms of abuse should be looked at the same. Sociologically and statistically the answer is now yes, because abusers abuse their families; still, the legal community has been slow to officially recognize this connection.[194]

One can see the sociological reasons for admitting evidence of prior animal abuse in criminal trials for child and domestic abuse.[195] Additionally, when one looks at the legal system and the Federal Rules of Evidence, one can see the appropriateness of admitting this evidence in criminal trials.[196] First, studies link animal abuse to child and domestic abuse.[197] These studies show the importance of recognizing and addressing animal abuse in our society as a means of discovering and addressing chronic child and domestic abuse.[198] To punish or stop the abuser effectively, courts must link all of the abused victims.[199]

Second, there are compelling reasons for admitting evidence of specific propensity, as opposed to general propensity, in domestic abuse trials.[200] This debate is far from resolved, but courts are starting to lean toward admissibility because of the harm domestic violence

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[190] *See id.*

[191] *See id.*.

[192] *See id.* at 49.

[193] DORIS DAY, *supra* note 3, at 6; HUMANE SOC'Y OF THE U.S., NATIONAL PUBLIC OPINION SURVEY (1997) (quoted in FRASCH, *supra* note 14, 625–26).

[194] Ritter, *supra* note 4, at 32.

[195] *See supra* notes 11–156 and accompanying text.

[196] *See supra* notes 11–156 and accompanying text.

[197] *See* Crowell, *supra* note 1, at 47–48; Lacroix, *supra* note 3, at 8.

[198] *See* Crowell, *supra* note 1, at 47–48; Lacroix, *supra* note 3, at 8.

[199] *See* Crowell, *supra* note 1, at 47–48; Lacroix, *supra* note 3, at 8.

[200] *See* People v. Simpson, No. BA097211, 1994 WL 737964, at *2 (Cal. Super. Ct. 1994); Raeder, *supra* note 1, at 1472.

has wreaked upon homes in the United States and the inherent value of the prior abuse evidence.[201]

The final—and central—argument of this Note is that statistical studies linking all forms of domestic abuse should be merged with the rationale for admitting specific propensity evidence in criminal trials. To do so, the legal system must accept evidence of animal abuse as an indicator of a specific propensity to commit other forms of abuse, especially within the home.[202] Thus, courts need to admit evidence of prior animal abuse in criminal trials for child and domestic abuse.

The next challenge, absent legislation changing the rules of evidence, is to justify admission of animal abuse evidence into one of the exceptions of Rule 404(b). With the current status of admissibility of multiple victim abuse evidence, this is not an impossible feat.[203] There are several options for the admissibility of animal abuse in criminal trials for child and domestic abuse.[204] Rule 404(b) allows admission of prior bad acts in order to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[205] Also, once the defendant brings his character into the case, the prosecution may then bring in prior bad acts evidence in rebuttal.[206] While Rule 404(b) does not limit the reasons for admitting prior bad act evidence, the next section addresses those explicitly stated in the Rule that may be the most helpful rationalizations—identity, intent, motive, and absence of mistake or accident.

B. *Rule 404(b) Exceptions*

1. Identity

In criminal abuse cases, especially where the victim dies, the defendant often claims that he was not the killer, but someone else close to the victim was.[207] However, since at least thirty percent of female homicide victims are killed by husbands or boyfriends, it is relevant to know if the defendant was previously violent to members of the

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[201] *See* Raeder, *supra* note 1, at 1503.

[202] *See supra* notes 11–55 and accompanying text.

[203] *See* State v. Crossman, 624 P.2d 461, 461 (Kan. 1981); Commonwealth v. Barrett, 641 N.E.2d 1302, 1302 (Mass. 1994).

[204] *See* FED. R. EVID. 404(b).

[205] *Id.*

[206] FED. R. EVID. 404(a)(1).

[207] *Simpson*, No. BA097211, 1994 WL 737964 at *2; Ortega v. State, 669 P.2d 935, 945 (Wyo. 1983) (overruled on other grounds).

household.[208] If the prosecutor is able to admit evidence that the defendant repeatedly beat his family, including the family pet, this evidence becomes probative of who could have been the perpetrator by showing that the defendant had a specific propensity to commit violence against the members of his household.[209] This is especially true if the type of violence in the past toward the other members of the family and the type of injuries sustained by the victim were similar.[210]

2. Intent and Motive

In criminal child abuse and domestic abuse cases (especially when the victim dies), prosecutors are often called upon to show that the defendant intended to kill, or at least hurt, the victim.[211] First degree murder requires premeditation, and abuse of family members can show that the abuser intended to control and harm those in his household.[212] Malice and forethought can also be demonstrated by a pattern of abuse to support a conviction for second degree murder.[213]

Even when the victims do not die, malice and intent can help convict defendants of more severe crimes.[214] Further, an abuser who maintains a continuous pattern of abuse whenever he is home exhibits a deeply rooted psychological problem that a judge or jury can take into account when determining an appropriate sentence.[215] The motive can be characterized as jealousy, animosity, or a desire to control and dominate the family.[216]

3. Absence of Mistake or Accident

One of the most commonly asserted defenses in child abuse cases, even when the victim does not die, is that the injury in question occurred accidentally.[217] When the defendant has a history of cruelty

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[208] *See* Jane O'Reilly, *Wife Beating: The Silent Crime*, TIME MAGAZINE, Sept. 5, 1983 (page unavailable).

[209] *See id.*

[210] *See* State v. Green, 652 P.2d 697, 701 (Kan. 1982); Raeder, *supra* note 1, at 1491–92.

[211] *See* United States v. Naranjo, 710 F.2d 1465, 1468 (10th Cir. 1983); *Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1473.

[212] *See Naranjo*, 710 F.2d at 1468; *Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1473.

[213] United States v. Colvin, 614 F.2d 44, 45 (5th Cir. 1980).

[214] *Powers*, 59 F.3d at 1460.

[215] *See id.*

[216] *See* Park, *supra* note 95, at 753.

[217] *See, e.g.*, Estelle v. McGuire, 502 U.S. 62, 65 (1991) (admitting evidence of prior abuse to show that injury was not an accident as the father claimed); Landeros v. Flood, 551 P.2d 389, 409 (Cal. 1976); People v. Jackson, 18 Cal. App. 3d 504, 506 (Cal. Ct. App.

towards his pets, children, or spouse, this evidence places the defendant in a difficult position to maintain that he regularly abused those in his household, but on this specific occasion, the harm occurred accidentally.[218]

Conclusion

An intrinsic link exists between animal abuse and child abuse and domestic abuse. This connection should be considered more seriously by judges, attorneys, and social workers. The relevance of this evidence should be taken even further in order to prevent all three types of abuse. The evidence of prior acts of violence towards subjugated members of a family, whether it be a child, a spouse, or a pet, should be admissible not only in civil trials determining child custody or adoption, but also in criminal trials attempting to prove identity, intent, motive, or lack of accident by the abuser.

Abusing a weaker, dependent family member is the sign of a psychological disorder that needs to be recognized and addressed by the criminal system. A person does not perform *one* cruel act toward *one* animal, just as a person does not beat his child or spouse only *once.* Therefore, evidence of prior acts of abuse should be admissible under Rule 404(b), subject only to the balancing test of Rule 403. The probative nature of prior acts of these forms of household abuse far outweigh the prejudicial nature of such evidence and should be admissible in a criminal trial in order to *prevent* rather than simply *punish* all forms of abuse.

Angela Campbell

1971). For discussion of the *Estelle* decision, see David Doyle, *Supreme Court Review: Fourteenth Amendment—Admitting Evidence of Battered Child Syndrome to Prove Intent:* Estelle v. McGuire, 83 J. Crim. L. & Criminology 894, 901 (1993).

[218] *See Naranjo*, 710 F.2d at 1498; *Colvin*, 614 F.2d at 45; *Ortega*, 669 P.2d at 945; Raeder, *supra* note 1, at 1495.