

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

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This symposium celebrates the work of Myrna Raeder,¹ a story about her. For years we argued about who applied for a Georgetown Law School Prettyman Fellowship first. I had an awful experience and she had a wonderful experience. It finally occurred to me to ask her what year she graduated. She graduated two years after me. When I applied for a Prettyman and went to Washington in 1969 to meet with the people running the program, it clearly had never occurred to them that a woman might want
thought the name Marina was

interview on record. But their heads connected woman = woman, and they

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My prior articles on abuse of women and girls are: Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV.

sent me over to talk to Barbara Babcock who was then the head of the stem for the District of Columbia. I congratulated Barbara

Prettyman people must have discussed the matter and realized they would get them well. When Myrna showed up, she was treated like visiting royalty.

Myrna, because of her experience with the Prettyman Program, decided that her career should be in criminal law and evidence. I made many of the ad the same feeling I did in those early

and

graduate program run by Anthony Amsterdam at the University of

Association. I spent a year trying cases, writing appellate briefs, and arguing appellate cases in the Pennsylvania courts. I also handled a few jury trials in federal court. Then I asked to be assigned to juvenile court. My male colleagues in the same program could not understand why anybody would give up the glamor and excitement of state and federal criminal jury trials to

future of our society and their treatment by the judicial system was critical in determining that future.

We both knew woman abuse was important.² The problem was brought invented the term Battered Woman Syndrome (BWS).

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

and judges, but it failed to obtain legitimate medical status. The Merck

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

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

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

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

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

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

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

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

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

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

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

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

life and to understand why she reacted as she did.

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

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

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

28. She also wrote three articles on the admissibility of prior acts and BWS: Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert Social Framework Background in Cases Implicating Domestic Violence*, 68 U. COLO. L.

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

In 1996, partly in response to the O.J. Simpson trial, the California state legislature reacted to the ban on propensity evidence in prosecutions dealing with domestic violence.³³

³⁴ Alaska followed in 1997.³⁵

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

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

. . . .

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

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

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

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

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

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

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

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

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

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

A majority of states have adopted evidence codes based on Federal Rule

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

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

Definitions

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

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

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

....

Evidence and Expert Testimony

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

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

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

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

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