Sticks and Stones May Break My Bones, But Words Will Always Hurt Me: Why California Should Expand the Admissibility of Prior Acts of Child Abuse

I. INTRODUCTION

"Childhood should be carefree, playing in the sun; not living a nightmare in the darkness of the soul."[1] Child abuse is an undeniably prevalent problem throughout the United States, and studies show that instances of abuse are occurring at a rampant pace.[2] While physical child abuse has been recognized in this country for decades, psychological child abuse has just recently begun to receive legal, medical, and social attention.[3] Despite growing recognition and concern, victims of child abuse whose injuries are psychological, are emotional, or do not result in a "traumatic condition," do not have the same legal protections in a courtroom as a child who was strangled or physically beaten.[4] Because of the remaining ambiguities regarding psychological abuse and neglect and the difficulties in prosecuting these cases, victims of emotional trauma often do not receive the justice that society has declared they deserve.[5]

Under current California law, the admission of character evidence—evidence that is introduced to demonstrate a person's character or character traits—is typically inadmissible.[6] Several states, including California, have carved out reasonable exceptions that allow for the admission of prior bad acts evidence to show, among other reasons, that a defendant had the propensity to commit the crime in question.[7] Recently, California courts

1. DAVE PELZER, A CHILD CALLED "IT": ONE CHILD'S COURAGE TO SURVIVE 98 (1995).

2. *See Child Abuse and Neglect Statistics*, AM. HUMANE ASS'N, http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-abuse-and-neglect-statistics.html (last visited Oct. 17, 2015). In 2005, an estimated 3.3 million children were referred to Child Protective Services or like agencies as victims of child abuse and neglect. *Id*.

3. *See infra* notes 26–29 and accompanying text.

4. *See infra* Part II.C.2.

5. *See* Lee Fannon, *Can the Emotional Abuse of Children be Prosecuted?*, JORDANS SOLIC. (Oct. 14, 2013), http://www.jordanssolicitors.co.uk/child-abuse/2013/10/can-the-emotional-abuse-of-children-be-prosecuted/. Factors such as the nature and extent of the child's injuries, the range of available sentences that a court could impose, and the availability of convicting evidence will weigh heavily in the decision of whether to prosecute a child abuse case. *Id*. While the prosecution of emotional abuse and the consequential trauma caused to a child is possible, it is much more difficult than physical abuse cases because of the natural lack of evidence. *Id*.

6. CAL. EVID. CODE § 1101 (West 2015). This statute prohibits the introduction of evidence to prove that a person acted in a particular way on the occasion in question by offering proof of his character or character traits. CAL. EVID. CODE § 1101 law revision commission cmt. (1965). However, character evidence may be used to prove the defendant's character if it is directly at issue or if it is being offered for witness credibility purposes. *Id*.

7. *See infra* Part II.D.

have wholly expanded the admissibility of defendants' prior acts of domestic violence, most famously with the O.J. Simpson case.[8] The admission of prior domestic violence acts has been essential for the prosecution of these horrific cases and has helped many domestic violence victims receive some form of justice after experiencing a heinous assault.[9]

While this expansion has greatly assisted in the successful prosecution of many domestic violence cases, the area of child abuse has not yet received as much constructive attention. As the law presently stands in California, only prior acts of child abuse resulting in a "traumatic condition" are admissible in a subsequent child abuse trial.[10] While this is a step in the right direction, the extremely narrow limitations of this statute leave thousands of psychologically abused children behind without the same legal recourse as other victims.[11] Unfortunately, this means that even if these children are brave enough to report their abuse and miraculously receive the outside support necessary to prosecute their case, their chances of receiving any form of justice, or even seeing their perpetrator prosecuted, are horribly low.[12]

This Comment seeks to explore the effect that the admissibility of prior bad acts evidence would have on child maltreatment cases and the benefits that would be afforded to child abuse victims if they were provided the same legal protections as victims of other crimes.[13] This Comment argues that expanding the California Evidence Code to allow the admission of prior acts of psychological and emotional child maltreatment would make great progress for the protection of child abuse victims and the prosecution of

8. *See infra* Part III.B.1.

9. *See infra* note 203 and accompanying text.

10. CAL. PENAL CODE § 273d(a) (West 2011) (defining child abuse as the willful infliction of "corporal punishment or an injury resulting in a traumatic condition"); EVID. § 1109 (limiting the definition of child abuse to acts described in section 273d of the California Penal Code).

11. *See* PENAL § 273d(a) (limiting the relevant punishment to child abuse that results in a "traumatic condition"); *see also id.* § 273.5(d) (defining "traumatic condition" as "a condition of the body . . . caused by a physical force"). The combination of these statutes illustrates that child victims of emotional or psychological abuse or neglect are left without legal recourse in the area of the admission of prior acts evidence. *Id*.

12. *See* Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children*, 26 J. LEGAL MED. 311, 322 (2005). "[R]elatively few children are removed from their homes and relatively few adults are prosecuted for the emotional abuse of or injury to children." *Id.* The difficulty in prosecution can partially be attributed to definitional confusion and lack of legal clarity surrounding emotional and psychological abuse. *Id.* at 313.

13. *See infra* Parts III–IV.

their (often losing) cases.[14] Part II discusses the evolution of child abuse law and the admission of character evidence under the Federal Rules of Evidence and the California Evidence Code.[15] Part III explains the use of character evidence in showing a defendant's propensity to commit a crime and how the expansion of California's law would assist in the uphill prosecution of child abuse cases.[16] Part III also shows how this expansion would deter perpetrators from committing similar crimes in the future and discusses the critical topic of preserving defendants' right to a fair trial and the effect that such an expansion would have on this right.[17] Part IV examines the impact that the expansion of section 1109 would have on future child abuse cases.[18] Part V concludes.

II. BACKGROUND

A. History of Child Abuse

Child abuse is by no means a new issue in America, but the relevant laws that serve to protect children are certainly a result of our modern culture's disapproval of abuse and plea for punishment.[19] Around 1874, a horrific case involving a nine-year-old orphan named Mary Ellen Wilson sparked America's attention and inspired a nationwide concern for abused children.[20] Mary Ellen testified in her trial that she was whipped and beaten daily by her adoptive mother.[21] The unrelenting abuse escalated and became so severe that it caught her neighbor's attention.[22] When the neighbor

14. *See infra* Part III.A.

15. *See infra* notes 19–122 and accompanying text.

16. *See infra* notes 129–79 and accompanying text.

17. *See infra* notes 180–231 and accompanying text.

18. *See infra* notes 232–64 and accompanying text.

19. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 456 (2008) (discussing the recent formation and expansion of child abuse reporting laws and stating that such laws were not present in every state until 1967).

20. *Id.* at 451; s*ee also* Howard Markel, *Case Shined First Light on Abuse of Children*, N.Y. TIMES (Dec. 14, 2009), http://www.nytimes.com/2009/12/15/health/15abus.html?_r=0. Thousands of battered children have been rescued from abusive environments since this case brought great attention to child abuse in general. *Id.* Shelters and similar agencies have also been formed and laws have been implemented in an effort to combat child abuse. *Id.*

21. *See* Myers, *supra* note 19, at 451. These beatings were a routine part of Mary Ellen's life. *Id.*

22. *Id.* The neighbor who intervened was a religious missionary who became determined to

reached out to local police in an attempt to save Mary Ellen, the authorities declined to even investigate the abuse.[23] Thankfully, charges were eventually brought through the American Society for the Prevention of Cruelty to Animals (ASPCA), and Mary Ellen was rescued from the persistent abuse and neglect she had long suffered.[24] Following Mary Ellen's case, animal protection advocates became passionate and enraged about the absence of organizations dedicated to safeguarding children from abuse.[25]

Children had little to no legal protection from violence and maltreatment until the world's first child protection-centered organization, the New York Society for the Prevention of Cruelty to Children (NYSPCC), came into existence in 1875.[26] Prior to the establishment of the NYSPCC, child abusers were only punished for the most plainly egregious crimes, such as killing or ruthlessly assaulting a child.[27] As child protection organizations began to form, the nation expressed a rapidly growing interest in preventing child abuse and medical professionals began addressing such abuse in the

rescue Mary Ellen once she learned of the abuse. *Id*. Her efforts were extremely stunted at first because of the lack of recognition child abuse had previously received. *Id*.

23. *Id*. This same neighbor also contacted charities that focused on the protection of children, but they did not have enough authority to intervene in the well-respected family dynamics of the household. *Id*. Because Child Protective Services and similar organizations did not exist at the time, she sought help from Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals (ASPCA). *Id.*

24. *Id*. Laws to protect children from their abusers were wholly absent at the time of this case. *Id*. Although there has never been a time in which killing or severely beating a child was legally acceptable, many children experiencing other forms of trauma were without recourse partially because Child Protective Services and like organizations simply did not exist. *Id*. at 449–51.

25. *Id*. at 451–52. Enraged by the fact that there were no governmental or private organizations dedicated solely to the issue of child abuse, Henry Bergh and Eldridge Gerry came together, with their experience from the ASPCA, to form the first charitable society, existing for the purpose of rescuing children from abuse. *Id*.

26. *Id.* at 449. The NYSPCC was the first program solely devoted to child protection. *Id*. at 451–52. Eldridge Gerry, one of the animal rights advocates, originally ran the organization after he became enthralled with the prevention of child abuse before the topic had even received national attention. *Id*.

27. *Id*. at 449. Some of the earliest convictions involving child abuse included a New York man convicted of "sadistically assaulting" his slave and three-year-old daughter in 1809; a woman who was charged but acquitted for murdering her newborn child in 1810; and a father who imprisoned his son in a cold cellar in the winter of 1869. *Id*. at 449–50. The first rape conviction reached the California Supreme Court in 1856, and a slew of convictions and appeals followed in California. *Id*. at 450. The victim from the first California rape case was only thirteen years old. *Id*.

1960s and 1970s.[28] Child abuse reporting laws were gradually put in place and, by 1967, existed in every state in America.[29] These laws have continued to develop as the conditions of child abuse have achieved vast awareness, so much so that, today, "child protective services are available across America, billions of dollars are devoted to child welfare, and thousands of professionals do their best to help struggling parents and vulnerable children."[30]

While horrific physical abuse has increasingly become a prevalent and recognized concern in our society, emotional abuse against children has also been a long-lasting problem.[31] Although crucial steps were being taken to hold batterers responsible for physical abuse and vindicate those child victims at the turn of the twentieth century, the medical profession did not recognize emotional child abuse until the middle of the twentieth century.[32] According to studies from the Third National Incidence Study on Child Abuse and Neglect (NIS-3), emotional abuse grew at a rate more rapidly

28. *Id*. at 454–55. Most of the medical community at the time was simply uninformed about the severity and definition of child abuse and received little or no training in the area. *Id*. at 454. As the medical community became aware of the frequency and consequences of such abuse and began to advocate for child abuse victims, the media also began to recognize a larger issue. *Id*. at 455. The media coverage was subsequently followed by an extreme increase in professional research and writings dealing with issues of child abuse. *Id*. The initial medical recognition of abuse was monumental, as only the most egregious cases had been publicly addressed before this time. *Id*. at 455–56.

29. *Id*. at 456. These early laws helped to illustrate the gravity and frequency of child abuse. *Id*. By 1974, just seven years after the implementation of nationwide reporting laws, about 60,000 cases of abuse were reported and this number either increased or remained consistently high over the next few decades. *Id*.

30. *Id*. at 462. Although the victories in the realm of child abuse are often not publicly discussed unless the situation is uncommonly horrible, the child protection systems currently in place have saved the lives and futures of countless victims. *Id*. at 462–63.

31. *See* J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change*, 51 STAN. L. REV. 1665, 1669 (1999) (suggesting that we have sufficient knowledge about emotional abuse partially through reporting, which showed that 7.9 of every 1,000 children suffered from emotional abuse in 1993); *see also* Loue, *supra* note 12, at 312–13 ("[A]nalysis of the second National Family Violence Survey [showed] that approximately 63% of the parents reported using some form of psychological abuse in their interactions with their children during the previous year.").

32. G. Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 698–99 (2000). This delay in recognition is thought to be a result of two crippling uncertainties. *Id.* The legal profession was attempting to balance protecting children with maintaining family autonomy, and the medical profession was late to identify the problem because it was so caught up with the newly discovered physical abuse problem. *Id*.

than physical or sexual abuse between 1986 and 1993.[33] Despite this drastic increase in emotional abuse, as well as evidence of resulting lifelong emotional and psychological trauma, recognition and intervention by third parties prove to be extremely difficult without obvious physical injuries.[34] This reality leads to frequent underreporting[35] and the problematic prosecution of the minority of cases that actually receive legal attention.[36] The most significant and appropriate way for our society to respond to this abuse is to assess the current laws and modify them in a way that provides child victims with proper protection.

B. History of the Area of Law

1. The Ban on Character Evidence

Federal Rule of Evidence 404 controls character evidence and its admission into court.[37] When a defendant's character is directly at issue because it is itself an element of the crime, evidence of the defendant's character is admissible.[38] This type of consideration is relevant in a case, for example, in which the defendant was accused of "negligently entrusting a

33. Shull, *supra* note 31, at 1669. During this time period, the number of emotionally abused children increased by 183%, which is viewed as a legitimate increase in abuse, not just an increase in reporting. *Id*. The incident rate of emotional abuse per 1,000 children also increased during this time by 163%. *Id.*

34. *See* Loue, *supra* note 12, at 336. Unfortunately, "child protection agencies and courts rarely attend to situations involving emotional or psychological abuse that do not also involve sexual or physical abuse." *Id*. Also, even though emotional abuse is often visible to people outside the household, there is typically not an immediate impulse to isolate the child from further abuse, as typically exists in sexual or physical abuse cases. *Id*. at 316.

35. *Id.* at 311; *see also* Debra Niehoff, *Invisible Scars: The Neurobiological Consequences of Child Abuse*, 56 DEPAUL L. REV. 847, 847 (2007). The U.S. Department of Health and Human Services report shows that "906,000 children were . . . abuse[d] or neglect[ed] in 2003." *Id.* Further, "[s]ome community-based surveys suggest that the actual number of victims may be three times higher when cases that were never reported to authorities are included." *Id*.

36. *See infra* Part III.A.2.

37. FED. R. EVID. 404 advisory committee's notes.

38. *Id*. Most jurisdictions today have carved out three exceptions to this general rule: (1) a defendant may introduce circumstantial evidence of good character, which allows "the prosecution [to] rebut with evidence of bad character"; (2) a defendant may introduce evidence of the victim's character to support claims of self-defense or consent in a rape case, and the prosecution may rebut with similar character evidence; and (3) character evidence of a witness may be admissible if it bears on the witness's credibility. *Id*.

motor vehicle to an incompetent driver."[39] In such a case, the driver's competency is a specific element of the crime, and evidence to prove this element—the driver's competency—would thus be admissible under the Federal Rules of Evidence.[40] However, if a party seeks to admit character evidence to suggest that the defendant acted in a certain manner that is consistent with his character, this is viewed as "circumstantial" evidence and its use is prohibited by the Federal Rules.[41] For instance, one party might attempt to use circumstantial evidence to show that the defendant, as part of his character, has violent tendencies and that he was in fact the aggressor in the specific fight or incident at issue during trial.[42]

One of the main arguments in favor of the admission of character evidence originates from the ideas that character traits often guide people's actions and that these traits are generally stable.[43] The concern, on the other hand, is that character evidence might allow the jury to infer that if the defendant possessed the traits and capacity to commit a crime once, then it is more likely that the same defendant committed the same crime on a second occasion.[44] The soundness of this type of inference by the jury has been doubted, and the result has been a widespread ban on the admission of character evidence to prove a defendant's conduct.[45] While exceptions have been carved out of this rule over the years, most jurisdictions enforce some form of ban that makes circumstantial character evidence almost always

39. *Id.* This evidence would be admissible to prove "an element of a crime . . . or defense" because it does not violate the original justification for the ban on character evidence, which is that evidence of prior acts should not be admitted at trial to prove that the defendant acted in accordance with the prior acts on the specified occasion. *Id*.

40. *Id*.

41. David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1165 (1998) ("Generally speaking, the prosecution in a criminal case and all parties in civil cases are prohibited from offering evidence of a person's character as circumstantial evidence of that person's conduct.").

42. FED. R. EVID. 404 advisory committee's notes. The circumstantial use of character evidence is generally questionable because it requires the trier of fact to make an inference that the defendant acted in accordance with that character at the time in question. *Id*. Rule 404 attempts to ensure that a finding of guilt is not premised on the defendant's past behavior. *See id*.

43. *See* Leonard, *supra* note 41, at 1167. It is argued that this evidence concerning the defendant's character or character traits can help the jury make a better determination about the likelihood of the defendant's alleged commission of the charged crime. *Id*.

44. *Id*.

45. *Id*. Both psychology and legal scholars have questioned the validity of such an inference over the decades following the adoption of the general rule. *Id*.

inadmissible.[46] The overarching ban on character evidence holds true today, and character evidence is only admissible if it is offered on some other basis that the trial judge deems relevant.[47]

The motivation behind the ban on character evidence stems from a predominant fear that its admission would unduly prejudice defendants and hinder their fundamental right to a fair trial.[48] While this is an important concern, exceptions to the Federal Rules have highlighted the significance of balancing defendants' rights against victims' rights.[49] California Evidence Code sections 1108 and 1109 make evidence of a defendant's prior bad acts not inadmissible for sexual abuse and domestic violence cases.[50] Based on relevant legislative history, the unique justification behind adopting sections 1108 and 1109 was related to the complexity associated with sex crimes—often due to a lack of witnesses, scarcity of evidence, and the difficulty of credibility determinations.[51] Courts felt that section 1108 allowed "the trier of fact in a sex offense case [whether a judge or jury] the opportunity to learn of the defendant's possible disposition to commit sex crimes."[52] Sections 1108 and 1109 have since proven to be instrumental in the areas of sexual abuse and domestic violence.[53] The admission of prior domestic violence acts has assisted in successful prosecution of such crimes because of the particularly high rates of recidivism and patterns of abuse.[54]

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46. *Id*. (stating that some form of the common law character rule has been established throughout the United States); *see also* FED. R. EVID. 404 advisory committee's notes.

47. Leonard, *supra* note 41, at 1166–67. Character evidence may generally be deemed admissible if it is offered for a non-character purpose, meaning that it does not seek to prove how the defendant would typically react to a situation because of his personality traits. *Id*.

48. *See infra* Part III.B.1.

49. *See* CAL. EVID. CODE §§ 1108–09 (West 2015).

50. *Id*.

51. *See* People v. Falsetta, 986 P.2d 182, 188 (Cal. 1999).

52. *Id*.

53. *See* Pamela Vartabedian, Comment, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 182 (2007) (describing how evidence of prior acts has helped avoid defendants' fabrication of testimony and aid juries in assessing the credibility of victim witnesses).

54. 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, 998–99 (2000). Further, prior acts of domestic violence are thought to be exceptionally probative because domestic abuse is often used as a means of controlling another person and is usually not an isolated incident. *Id*. When such a pattern exists, evidence of prior bad acts would help establish the presence of an overall abusive relationship, rather than an abusive incident. *Id*.

2. The O.J. Simpson Case

In the famous "trial of the century,"[55] the narrow issue of the admissibility of prior acts evidence was directly at issue.[56] In attempting to prove the murder charges that had been filed against Mr. Simpson, the prosecutors sought to admit evidence of Mr. Simpson's prior beatings of Ms. Brown Simpson, which were documented by photographs, hospital records, and a phone call to 911.[57] The presiding judge decided that only some of the evidence would be admitted in the trial for the narrow purpose of "establishing motive, intent, plan, and identity of the killer."[58]

The evidence that the prosecution sought to admit included, among other things: numerous physical beatings of Ms. Brown Simpson, some of which were detailed by photographs of her resulting injuries; a no contest plea from Mr. Simpson for a previous assault that placed Ms. Brown Simpson in the hospital; a 911 call related to domestic violence; repeated threats that Mr. Simpson would kill Ms. Brown Simpson; and evidence that Ms. Brown Simpson had previously contacted battered women's shelters.[59] Although this was considered an overall win for the prosecution, confusion arose when the court allowed the admission of certain pieces of evidence and ordered the exclusion of others.[60] The most pervasive question was: if the evidence of these prior acts is probative and vital to the prosecution of

55. *See The* Simpson *Verdict*, N.Y. TIMES (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/opinion/the-simpson-verdict.html.

56. Benjamin Z. Rice, Note and Comment, *A Voice from* People v. Simpson*: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939, 960–61 (1996). Through a motion in which the prosecution sought to introduce evidence of "domestic discord" between O.J. and Nicole Brown Simpson, the court allowed several incidents of prior domestic abuse to be introduced "relating to motive, intent, plan, and identity." *Id.* The court concluded that the evidence should be admitted at trial to show O.J.'s attempt to control Nicole Brown Simpson prior to her death. *Id*. at 961.

57. Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73, 74 (1995).

58. *Id.* Although this was widely viewed as a significant win for the prosecution, it was only a small feat in the overall case. *Id*. at 74–75. The Los Angeles District Attorney at the time credited the court's ruling about the prior bad acts evidence as the "most critical ruling" in the case. *Id*. at 74.

59. *Id*.

60. *Id*. at 75; s*ee also* Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond*, 69 S. CAL. L. REV. 1463, 1475–76 (1996) (describing the presentation of past domestic violence incidents at trial as "uneven and fragmentary" and concluding that the fact that Ms. Brown was a battered woman who was at severe risk of injury or death from Mr. Simpson at the time of her death was never accurately portrayed to the jury).

the case, why is its admission even subject to legal arguments and the discretion of the court?[61] On October 3, 1995, over 150 million people watched as the jury's verdict acquitted O.J. Simpson of all criminal charges against him.[62] The massive media coverage of this case led to immense outrage upon the announcement of the acquittal.[63] This moment initiated a nationwide debate about how certain evidence of Mr. Simpson's prior acts shaped the jury's decision and an analysis of what could have happened if the jury had been given all of the evidence of his prior domestic violence acts.[64] California Evidence Code section 1109 eventually became known as the "Nicole Brown Simpson Law" because of the startling effect that it had on the murder case that captured the nation's attention.[65]

C. The Current Admissibility of Character Evidence Under the Law

1. Federal Rules of Evidence

Federal Rule of Evidence 404 currently bans the admission of character evidence.[66] The first part of Rule 404(b) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[67] This fairly straightforward language seems to reaffirm the traditional exclusionary rule of evidence.[68] The second part of Rule 404(b),

61. Linksy, *supra* note 57, at 75. Questions were also raised about why the admissibility of these prior acts had not been subjected to legislative mandate. *Id*.

62. Christina Ng & Colleen Curry, *O.J. Simpson Trial: Where Are They Now?*, ABC NEWS (June 12, 2014), http://abcnews.go.com/US/oj-simpson-trial-now/story?id=17377772.

63. Karen Grigsby Bates, *The Jury Is Still Out on Why O.J. Simpson Was Acquitted*, NAT'L PUB. RADIO (June 12, 2014, 4:01 PM), http://www.npr.org/blogs/codeswitch/2014/06/12/321392845/the-jury-is-still-out-on-why-o-j-simpson-was-acquitted. After the verdict was announced, people speculated to various reasons why Mr. Simpson would not be held accountable for the murder of Ms. Brown. *Id*.; *see also* Raeder, *supra* note 60, at 1472–76 (discussing the conflicting themes surrounding the decision of the O.J. Simpson case and stating that, because of the inherent flaws, focusing on the acquittal will always be troublesome).

64. Linsky, *supra* note 57, at 75. There were questions about the common sense implications of desiring a fair trial with an accurate verdict and doubts regarding the admission of only some character evidence if the final goal was truly to paint a complete picture for the jury. *Id*.

65. *See* Vartabedian, *supra* note 53, at 168.

66. FED. R. EVID. 404.

67. FED. R. EVID. 404(b)(1).

68. FED. R. EVID. 404 advisory committee's notes.

however, allows admission of evidence of other crimes or acts for different purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[69] Rule 404(b)(2) does not provide a bright line standard regarding the admission of such evidence and, as such, has generated debates about the preservation of defendants' right to a fair trial and right to present a meaningful defense when confronted with such evidence.[70] Rule 403 attempts to safeguard defendants' rights by allowing judges to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[71] However, scholars have criticized Rule 403, accusing it of being unworkably broad and providing no formalistic approach or definition for judges to follow in their determination of what constitutes "unfairly prejudicial evidence."[72] Despite this widely shared skepticism, the overall purpose of Rule 403—to admit any probative evidence that will lead to a factually accurate decision in the case—has been generally recognized and accepted.[73]

Furthermore, Federal Rules of Evidence 413, 414, and 415, enacted in 1994, allow the admission of "prior convictions, similar specific instances[,] or even testimony of previous allegations or uncharged actions" when a defendant is accused of sexual assault or molestation.[74] These rules were essentially adopted in response to a public concern regarding the lack of

69. FED. R. EVID. 404(b)(2).

70. Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 115, 163–68 (1984).

71. FED. R. EVID. 403; *see also* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (calling Rule 403 the "cornerstone" of the Federal Rules of Evidence and emphasizing its "importance as a device to control the flow of evidence in a system otherwise biased in favor of increasing the flow").

72. Gold, *supra* note at 71, at 498. Judges have succumbed to using an "I know it when I see it" approach where findings are mostly based on the precise facts of each case, rather than broad understandings of what the specific standards should be applied. *Id*.

73. D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 315 (1989). Some critics even think that the exclusion of character evidence tends to lead to a more accurate decision, while the inclusion of such evidence actually negates truthful fact-finding. *See id*. at 327.

74. Victoria B. Lutz, *Balanced Evidence: Discretion of the Gatekeeper to Admit Prior Convictions and Acts*, 77 DENV. U. L. REV. 507, 518–19 (2000). These rules generally allow the admission of evidence of the defendant's past sexual abuse, molestation, and misconduct if offered for a relevant purpose. *Id*. at 518.

prosecution of sex offenders and out of a commonly held belief that sex offenders tend to display a pattern in the commission of such acts.[75] Rule 413 states that when a defendant is accused of sexual assault, evidence of the commission of any other sexual assault "may be considered on *any matter* to which it is relevant."[76] This rule liberally allows prosecutors to introduce evidence of previous acts of sexual assault in a subsequent trial, but only in sexual assault cases being prosecuted under federal law.[77] Because most child sexual abuse cases are prosecuted under state law, rather than federal law, state prosecutors are underhandedly barred from using the Federal Rules to admit such evidence to establish a pattern or prove the defendant's propensity to commit the crime in question.[78]

Federal Rules 413, 414, and 415, in a similar fashion to Rule 403, raise predictable concerns regarding defendants' due process rights.[79] The main argument is that allowing the jury to make an inference about a defendant's guilt, and possibly depriving him of life, liberty, or property as a consequence, is impermissible and inconsistent with American jurisprudence.[80] Although the overall fairness of the use of character evidence to prove a defendant's propensity to commit a crime is still not universally resolved, many opponents to these rules assert that character evidence improperly influences a jury by removing the essential presumption of innocence.[81] These challengers advocate that the evidence

75. *Id*. at 518–19. These rules were also thought to solve some of the inherent problems with the exclusion of character evidence in sexual abuse cases, such as witness credibility. *Id*. at 519.

76. FED. R. EVID. 413(a) (emphasis added) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.").

77. Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 961 (1998).

78. *Citizen's Guide to U.S. Federal Law on Child Sexual Abuse*, U.S. DEP'T JUSTICE, http://www.justice.gov/criminal/ceos/citizensguide/citizensguide_sexualabuse.html (last updated July 6, 2015). Most child abuse cases are state, not federal, crimes because the abuse typically only happens in one state. *Id*. Such a case would be handled by local authorities and would not require federal intervention unless the crime occurred on federal lands or crossed state lines. *Id*.

79. *See generally* Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 702–14 (1997) (arguing that admission of such "emotionally-charged evidence" may violate the Due Process Clause due to the high "risk of jury misdecision"). The Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

80. *See* McCandless, *supra* note 79, at 706.

81. *Id*. at 702–03.

could be misleading, irrelevant to the situation at hand, and prejudicial against the accused.[82] One of the main concerns that has surfaced from the application of these rules is the fear that juries will be so outraged by a defendant's past commission, or alleged commission, of a sexual wrongdoing or sexual child abuse that they will ignore the requirements of the law and convict the defendant based on emotion and personal disapproval.[83] While the thought of juries convicting defendants based on their personal opinions and judgments should be appalling to any attorney, the justifications of these arguments must be weighed against the probative value of the evidence and the possible benefit to the victim from its admission.[84]

2. California Evidence Code

California has also been active in the area of law surrounding character evidence and has continually adapted its application.[85] Over the past several years, as domestic violence has become a more prominent and recognized issue in our country, California has expanded the admissibility of prior acts through case law.[86] California, in line with the Federal Rules of Evidence, currently bans the admission of character evidence in criminal trials to prove a defendant's character or traits.[87] However, if the party seeks to admit the character evidence for any other purpose, it will generally be allowed at the

82. *Id*. The original ban on prior specific acts evidence began in England, where relevant rules to limit the introduction of character evidence that might be prejudicial or misleading did not exist. *Id*. Parliament eventually amended these proceedings and banned "the prosecution from proving any alleged crimes of the defendant that were not listed in the indictment." *Id*. at 703. This change effectively prohibited character evidence in England, and opponents of the Federal Rules of Evidence argue that this was a sound decision that the United States should consider following. *See id*. at 704–06.

83. *Id*. at 714. A study with the Chicago Jury Project tested this very theory and found that, when confronted with sex offense cases, jurors were at a heightened risk to convict the defendant because of their emotional state rather than the relevant legal requirements. *Id*.

84. *See infra* Part III.B.1.

85. *See infra* notes 87–100 and accompanying text.

86. *See infra* notes 101–21 and accompanying text.

87. CAL. EVID. CODE § 1101(a) (West 2015) ("[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.").

court's discretion.[88] The California Legislature has taken the initiative to add several exceptions to the general ban on character evidence over the past few decades.[89] California law now recognizes four exceptions to this general character evidence rule.[90] First, section 1102 states that character evidence is not inadmissible if "[o]ffered by the defendant to prove his conduct [is] in conformity with [his] character" or character traits, or if "[o]ffered by the prosecution to rebut [such] evidence" provided by the defendant.[91] Second, section 1103 recognizes the same type of exception with regard to the victim's character and provides that character evidence is not inadmissible if the defendant introduces it to prove that the victim's conduct was in conformity with his character or character trait or as a rebuttal of such evidence offered by the prosecution.[92] Third, section 1108

88. *Id.* § 1101(b) (providing that this section does not prohibit evidence used for other purposes, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident").

89. *See* Vartabedian, *supra* note 53, at 168–71.

90. EVID. §§ 1102–03, 1108–09.

91. In full, § 1102 provides that:

> In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
>
> (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
>
> (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

Id. § 1102.

92. In relevant part, § 1103 states that:

> (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:
>
> (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
>
> (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).
>
> (b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

Id. § 1103.

classifies evidence of a defendant's commission of a separate sexual offense as admissible when a defendant is accused of a subsequent sexual offense.[93]

Finally, California Evidence Code section 1109 provides exceptions to the character evidence rule that governs cases in which the defendant has been accused of an offense concerning domestic violence, elder abuse, or child abuse.[94] While this may seem like a win for the victims at first glance, the child abuse exception is detrimentally narrow.[95] Section 1109(a)(3) states, in relevant part, that "in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by section 1101."[96] For further guidance regarding what is potentially admissible, section 1109(d)(2) states that child abuse, for purposes of this section, is any "act proscribed by section 273d of the Penal Code."[97] Section 273d(a), to finally complete the statutory meaning, defines child abuse as "willfully inflict[ing] upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition."[98] The words "traumatic condition" in the California Penal Code limit the admission of prior acts of abuse to those that result in "a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force."[99] As California law currently stands, prior acts of emotional and psychological child abuse would not be admissible to prove a defendant's character or character trait in a subsequent child abuse trial.[100]

93. Section 1108(a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." *Id.* § 1108(a). A trier of fact may consider evidence introduced under section 1108 "*for any purpose.*" J. RICHARD COUZENS & TRICIA A. BIGELOW, SEX CRIMES: CALIFORNIA LAW AND PROCEDURE § 12:9 (2015). Due to this lax standard of admission, prosecutors will often rely on this statute to introduce uncharged misconduct in sex offense cases. *See id.*

94. EVID. § 1109(a) (providing that evidence of such prior acts are not made inadmissible by section 1101, pursuant to the court's discretion under section 352).

95. *See infra* notes 96–97 and accompanying text.

96. EVID. § 1109(a)(3).

97. *Id.* § 1109(d)(2).

98. CAL. PENAL CODE § 273d (West 2011).

99. *Id.* § 273.5(d).

100. EVID. § 1109; *see also* PENAL § 273.5(d) (allowing the admission of prior acts evidence in a child abuse case solely if the prior act resulted in a "traumatic condition" of the body "caused by physical force").

D. California's Expansion of the Admissibility of Prior Domestic Violence Acts

Over the past several years, California has expanded the admissibility of prior acts of domestic violence through case law.[101] This evolution generally started with the 1995 O.J. Simpson case,[102] and it continues to flourish, allowing relevant prior acts of domestic violence (character evidence) into the courtroom when justifiably admitted to prove a fact other than the defendant's character or character traits.[103]

One of the most recent California opinions regarding this expansion comes from *People v. Kovacich*, in which the defendant was charged with his wife's murder.[104] The defendant's wife had previously stated that she was afraid to leave him, in part because he had kicked their family dog to death.[105] During the investigation, the defendant made statements to the police admitting to kicking the family dog but denying causing the animal's death.[106] The court allowed statements relating to the dog-kicking incident to be admitted during the defendant's trial as propensity evidence because it reasoned that this episode constituted "abuse" and "domestic violence" against the "wife and children, who witnessed the violent assault."[107] The California Court of Appeal for the Third District subsequently concluded that evidence of prior domestic violence acts, including the statements describing the dog-kicking incident, was "highly probative of [the defendant's] motive and identity" and was properly introduced into evidence.[108]

Another California case that has recently illustrated the expansion of the admission of prior acts of domestic violence is *People v. Brown*.[109] In

101. Vartabedian, *supra* note 53, at 168–69.

102. *See* Rice, *supra* note 56, at 960–61.

103. Vartabedian, *supra* note 53, at 168–69. This evidence is always subjected to the court's discretion under California Evidence Code section 352 and can be excluded from the trial if the risk of prejudice substantially outweighs the probative value. *Id.*; *see also* EVID. § 352.

104. 133 Cal. Rptr. 3d 924, 929 (Ct. App. 2011).

105. *Id*. at 943.

106. *Id*. at 947.

107. *Id*. at 951. The court determined that subjecting the wife and children to this act constituted "abuse" under Family Code section 6320, and "domestic violence" under Family Code section 6211. *Id*.

108. *Id*.

109. 121 Cal. Rptr. 3d 828, 841 (Ct. App. 2011).

Brown, the defendant was charged with first-degree murder after claiming that he accidentally killed his ex-girlfriend in an act of self-defense when she attacked him with a hammer.[110] The court determined that evidence of past domestic violence acts was "indicative of [the] defendant's 'larger scheme of dominance and control[,]' which he attempted to exercise over [his ex-girlfriend]."[111] The court ultimately allowed evidence to be admitted that illustrated domestic violence involving four other women that the defendant had previously dated and abuse of the ex-girlfriend that occurred before the charged murder.[112] The California Court of Appeal for the Fifth District concluded that the "defendant's propensity to commit domestic violence against" several women is "relevant and probative" to his "intentional doing of an act with malice aforethought."[113] The domestic abuse evidence that was admitted at trial described violence that the defendant had not been charged with, but that consisted of kicking, beating, choking, and threatening his ex-girlfriends.[114] These judicial decisions, which ultimately determined that the probative value of such evidence outweighed the exclusion, show a clear and intentional broadening of the admissibility of character evidence in California.[115]

People v. James is also at the forefront of the expansion of the admissibility of prior domestic violence acts.[116] In *James*, the court admitted evidence of a burglary under section 1109 that involved domestic violence.[117] The defendant broke into the house of a woman with whom he had a dating relationship, threw her to the ground and hurt her, poked holes in her car tires, and threatened her several times.[118] The court recognized that although burglary does not inherently involve domestic violence, the

110. *Id*. at 829. The defendant had admitted to his half-sister that he strangled his girlfriend, "but claimed he had to defend himself because she attacked him with a hammer." *Id*.

111. *Id*. at 838.

112. *Id*. at 829. The court concluded that these prior acts of domestic violence were especially probative in this case, and such probative value outweighed any prejudice to the defendant. *Id*.

113. *Id*. at 839.

114. *Id*. at 834.

115. *See supra* notes 104–14 and accompanying text.

116. 119 Cal. Rptr. 3d 362, 362 (Ct. App. 2010).

117. *Id*. at 364.

118. *Id*. at 363. When the victim was assessing the damage to the tires of her car, the defendant drove by and said, "I could have just as easily put those holes in your head." *Id*. He also hit her several times, unplugged the telephone when she tried to call someone, and sent her to the hospital with injuries. *Id*. at 364.

facts of the particular case indicated that this time it did, thus warranting the admissibility of the incident.[119] By allowing this evidence to be admitted at trial to show the defendant's propensity to commit domestic violence—evidence offered for character purposes—the court implicitly eased the admissibility standards in California.[120] These cases only begin to illustrate the recent effort made by California courts to expand the admissibility of prior acts into court.[121]

III. ANALYSIS

A. Argument for Expansion

California should adopt a rule expanding the admission of prior acts of child abuse and should allow those acts defined under California Penal Code section 273a to be introduced at a subsequent trial under section 1109. Section 273a encompasses not only acts that cause physical harm to a child, but mental pain and suffering as well.[122] Section 273a addresses willful harm or injury to a child as well as the endangerment of a child's person or health, and penalizes

> [a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a

119. *Id*. at 364–65.

120. *Id*. at 366.

121. *See* People v. Cabrera, 61 Cal. Rptr. 3d 373 (Ct. App. 2007) (deciding that evidence of prior acts of domestic violence was admissible in connection with instances of assault on the defendant's ex-girlfriend); *see also* People v. Falsetta, 986 P.2d 182 (Cal. 1999) (holding that the statute permitting prior acts evidence did not violate the defendant's due process rights); People v. Jennings, 97 Cal. Rptr. 2d 727 (Cal. Ct. App. 2000) (holding that the defendant's prior domestic violence acts were properly admitted into evidence, and such a decision did not violate his Equal Protection rights); People v. Hoover, 92 Cal. Rptr. 2d 208 (Ct. App. 2000) (holding that the admission of prior acts evidence was constitutional); People v. Johnson, 91 Cal. Rptr. 2d 596 (Ct. App. 2000) (finding that evidence of prior domestic violence acts did not violate defendant's due process rights).

122. CAL. PENAL CODE § 273a (West 2011).

situation where his or her person or health is endangered.[123]

The inclusion of this Penal Code section would more appropriately encompass the different types of child abuse that have been formally recognized around the world, especially in California.[124] Such an expansion of California law would allow the admission of probative evidence to show that a defendant likely committed the alleged crime,[125] it would assist with the difficult prosecution of child abuse cases,[126] and it would also act as a deterrent for current and future offenders.[127]

1. Prior Acts of Child Abuse are Probative in Showing a Defendant's Propensity to Commit the Crime

As mentioned above, courts have begun to recognize that prior acts of domestic abuse are extremely probative in showing that a particular defendant had the propensity to commit a subsequently charged crime.[128] The admissibility of "collateral act evidence," or evidence of prior acts, has been a controversial issue around the world for numerous years.[129] Over several generations, courts have wrestled with this concept and reasoned that this type of evidence should be admissible to prove a defendant's propensity to commit a crime, as long as it is not used to establish that the defendant *actually* committed the charged offense.[130] This widely accepted codification has been applied to child sexual abuse cases and is now valid in

123. *Id.* § 273a(a).

124. A study from 1993 showed that California had the highest rate of reported child abuse among the ten largest states in the country, with seventy-six reported cases for every 1000 children. *Child Abuse and Neglect in California Part I*, LEGIS. ANALYST'S OFF. (Jan. 1996), http://www.lao.ca.gov/1996/010596_child_abuse/cw11096a.html. This illustrates that such abuse was recognized, reported, and brought to the public's attention at least by the late twentieth century. *Id.*

125. *See infra* Part III.A.1.

126. *See infra* Part III.A.2.

127. *See infra* Part III.A.3.

128. *See supra* Part II.D.

129. Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 331–32 (2012) (detailing the history of similar fact evidence and its admissibility).

130. *Id.* at 332–33. This exception has been codified in the Federal Rules of Evidence. *Id.*; *see also* FED. R. EVID. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

every state in the United States through the adoption of either Federal Rule of Evidence 404 or a similar rule.[131]

Prior bad acts evidence was originally admissible in sexual abuse cases through the "lustful disposition" exception, which allows the prosecution to admit evidence of prior sexual acts to prove that the defendant had the propensity to commit the sexual offense.[132] The lustful disposition exception's "exclusive purpose is to allow for the admissibility of relevant evidence regarding the defendant's propensity to engage in sexually abusive behavior."[133] The original proponents of this addition into the Federal Rules of Evidence argued that it was not only critical to ensure the proper prosecution of these offenders, but it was vital to the public's safety.[134] Advocates of this exception correctly identified that if they could not properly and efficiently prosecute sex offenders, the result would be "unsafe streets, a condition adverse to public safety and public interest."[135] Similar to sexual abuse incidents, evidence of prior child abuse can be especially probative in child psychological abuse cases because perpetrators of such crimes usually have a close relationship with the child[136] and are extremely unlikely to commit the abuse just once.[137] Furthermore, psychological child

131. Tchividjian, *supra* note 129, at 335–36 ("[I]n one way or another, all fifty states allow the prosecution to introduce prior bad act evidence against a defendant charged with a sexual abuse offense."). In *People v. Molineux*, the Court of Appeals of New York reaffirmed this concept, but also held that "similar fact evidence could be admissible if" offered to prove other factors such as absence of mistake or accident, identity, and common scheme or plan. *Id*. at 333; *see* People v. Molineux, 61 N.E. 286, 294 (N.Y. 1901). The court reasoned that admission for these purposes did not classify such prior acts as impermissible character evidence. Tchividjian, *supra* note 129, at 333. The rule allowing the admissibility of prior sexual acts evidence to establish a common scheme or plan to commit similar acts was thereafter referred to as the "*Molineux* rule." *Id*. at 334.

132. Tchividjian, *supra* note 129, at 336–40. This exception has also been called "bent of mind." *Id*. at 336.

133. *Id.* at 337.

134. 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, 537 (1995). Other policy considerations that prompted this addition to the Federal Rules included the probative nature of the evidence in prosecuting sexual abuse cases, more accurate fact-finding, and corroboration of a sensitive victim's testimony. *Id*. at 535–37.

135. *Id.* at 537.

136. *See Child Abuse and Neglect Statistics*, *supra* note 2. In 2005, a study found that 79.4% of perpetrators in child abuse and neglect cases were the child's parents and another 6.8% were relatives. *Id*. Other offenders include a family member's significant other or, in less than 1% of the known cases, someone more removed such as a neighbor, friend, or daycare provider. *Id*.

137. Mary Christine Hutton, *Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604, 623 (1989) (explaining that "a single incident of child sexual abuse is rare" and

maltreatment usually takes the form of an overall abusive environment, rather than an isolated event.[138] While one instance of neglect or emotional harm to a child is less likely to cause long-lasting injurious effects, "the cumulative effects of this form of abuse are insidious."[139] Most children can handle and justify rare mood swings from their parents, but "what most children typically cannot handle is a pervasive pattern of destructive emotions or extreme outbursts that threaten their world."[140] These devastating truths concerning psychological child abuse dictate that intervention is undeniably socially favorable because the public is typically hesitant to interfere with family dynamics.[141]

The most prominent propensity justifications for the initial admission of any character evidence in child sexual abuse cases remain true, yet unrecognized, for psychological, mental, and emotional child abuse.[142] This same type of expansion was made in the context of child sexual abuse cases when social workers and mental health professionals "concluded that [such abuse] was widespread, that recidivism was commonplace, and that certain characteristics were present in most abusers."[143] Child abuse cases that do not result in visible, physical injuries are particularly difficult to prosecute because the child victim is typically the only witness that can testify to the

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that the measures of recidivism rates could even be higher than reported because of the low number of child abuse cases that actually proceed to the arrest or conviction stages of the criminal justice system); Judith G. McCullen, *The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children*, 41 DRAKE L. REV. 483, 495 (1992) (stating that it is uncommon to find one instance of this type of maltreatment within a household because there are usually several instances of abuse, either at the same time or over a period of time).

138. McCullen, *supra* note 137, at 496; *see also* Shull, *supra* note 31, at 1671 ("[D]efiners tend to agree that persistence, pattern, and repetition, rather than single acts, are the hallmark of true psychological abuse.").

139. CINDY L. MILLER-PERRIN & ROBIN D. PERRIN, CHILD MALTREATMENT: AN INTRODUCTION 203 (2d ed. 2007).

140. Shull, *supra* note 31, at 1671.

141. *See* Hutton, *supra* note 137, at 624 (explaining that the same types of considerations influenced the admission of prior sexual child abuse incidents).

142. *See* Tchividjian, *supra* note 129, at 336–40. The "lustful disposition" exception allows the admission of prior bad act evidence to show that the defendant had a "tendency to commit the sexual offense." *Id*. Similarly, the admission of prior acts evidence in emotional and psychological child abuse cases would help prove that the perpetrator had the tendency to neglect or abuse the child. *See* Sherry L. Scott, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1735–36 (1999).

143. Hutton, *supra* note 137, at 624.

abuse.[144] If California Evidence Code section 1109 was expanded to include the types of child abuse codified in Penal Code section 273a, child victims who were subjected to psychological or emotional abuse would be protected, and the chances of a successful prosecution in their case would greatly increase.[145] This type of expansion is a necessary step for California to declare that all victims of child abuse are going to be treated, cared for, and legally protected in an equal manner.

2. Child Abuse Cases Are Exceptionally Difficult to Prosecute

Many of the primary justifications to include Penal Code section 273a and the emotional harm and suffering that it encompasses into the category of admissible evidence stem from the well-known reality that, despite public outcry and concern, child abuse cases are exceptionally difficult to prosecute.[146] Child abuse cases are typically more of an uphill battle for the prosecution because there are issues with the victim's credibility, including their unwillingness to relive the traumatic experience and the possibility that they will confuse reality with fiction.[147] The admission of prior acts can help strengthen the credibility of victim witnesses when they are reluctant to testify or under extreme emotional distress as a result of the situation.[148]

When a child is a testifying witness in a criminal trial, it is most commonly because the child is being asked to recount and describe an

144. *See infra* Part III.A.2; *see also* Segal, *supra* note 134, at 538 (noting that young child victims who testify are likely to provide "testimony and credibility the defense can easily assail").

145. *See* Tchividjian, *supra* note 129, at 337–38 (stating that the admission of prior bad act evidence under the lustful disposition exception was meant to assist in the prosecution of child abuse cases by establishing the defendant's propensity to commit the crime or by substantiating the victim's account of the incident).

146. *See* STEPHEN J. CECI & MAGGIE BUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 36 (1995) (noting child abuse cases are particularly difficult to prosecute because of several concerns: stringent evidentiary procedures, apprehensions about defendants' rights, and the typical lack of physical evidence); Livia L. Gilstrap & Michael P. McHenry, *Using Experts to Aid Jurors in Assessing Child Witness Credibility*, 35 COLO. LAW. 65, 65 (2006) (stating that a "battle of the experts often ensues" when issues such as witness credibility become prevalent in a child sexual abuse case).

147. CECI & BUCK, *supra* note 146, at 36; *see also* Vartabedian, *supra* note 53, at 181.

148. Vartabedian, *supra* note 53, at 181 ("[T]he admission of acts of prior abuse will help eliminate juror bias and allow jurors to view evidence from an unbiased perspective."). *See generally* Gilstrap & McHenry, *supra* note 146, at 65–68 (discussing the issues related to child testimony in the courtroom).

alleged wrongdoing that was committed against that child.[149] These alleged offenses are often sexual, which makes the entire environment even more complex and requires additional sensitivity and understanding from all parties involved.[150] Child victims are typically under enormous pressure when testifying because they were likely the only eyewitnesses and there may not be any physical evidence to corroborate their depiction of the event.[151] Additionally, jurors are known to have preconceived notions about the reliability of child witnesses' memory.[152] Studies have found that jurors' views of child witnesses can be affected by the characteristics of the particular case, whether it is a civil or criminal case, and whether the child's "emotional expression is congruent with the testimony—for example, when displaying emotional reactions when testifying."[153] These general stereotypes are refuted by evidence showing that children as young as two and one-half years old are capable of remembering and delivering reasonable, accurate depictions of past events over somewhat long periods of

149. Gilstrap & McHenry, *supra* note 146, at 65. Adult witnesses and physical evidence are typically preferred over child witnesses because the possibility for complications increases when dealing with children. *Id*. at 66. Children may witness other crimes almost as often as adults, but if the prosecution has the choice, it will likely rely on adult witnesses or physical evidence because of child credibility issues. *Id*. In child abuse cases, however, the lack of other witnesses and physical evidence often eliminates the prosecution's ability to choose. *Id*. at 65–66.

150. *Id*. at 65.

151. CECI & BUCK, *supra* note 146, at 269. This typically leads to the use of expert witnesses, who may provide the jury with reasons why they should believe or doubt the child's testimony. *Id*. at 270.

152. Gilstrap & McHenry, *supra* note 146, at 65. "In addition to misconceptions about eyewitnesses generally, jurors have stereotypes about child witnesses and sexual assault." *Id.* at 66. It has been suggested that the use of expert witnesses would be beneficial because they could testify whether a child seems to be telling the truth, a child seems to be too traumatized to remember, or any other number of incidents occurred in a case. *Id*.

153. *Id*. Several studies have been conducted regarding children's memory and their accounts of traumatic events that they experienced. CECI & BUCK, *supra* note 146, at 39–40. The main purpose of these studies was to assess children's memory, measure how reliable their testimony is when recounting the occurrence of traumatic events, and find out how susceptible they are to suggestibility in such situations. *Id.* These studies focused on stressful events such as witnessing natural disasters and medical procedures. *Id*. The findings indicated a few important concepts about child memory and recalling of events: (1) inconsistency in a child's story does not necessarily make the child unreliable; (2) children are *generally* reliable when interviewed by neutral, unbiased adults who do not ask leading questions; and (3) to obtain a reliable report from a child's memory, those involved should be highly concerned with the conditions under which the questioning takes place. *Id*. at 235–36. These results suggest that children can typically provide trustworthy narratives when they are referencing traumatic experiences in which they directly participated, such as being the victim of abuse. *Id*. at 236.

time.[154] Despite this conclusion, the fact that child witnesses and victims are overall less credible and accurate than their adult counterparts has been widely accepted.[155]

Certain jurisdictions have developed techniques and methods in an attempt to solve these credibility issues.[156] One method is to use a child's behavioral tendencies after the alleged abuse as evidence of the occurrence of a traumatic event.[157] Several behavioral signs have been recognized as being the likely result of abuse, including post-traumatic stress disorder stemming from an event "usually experienced with intense fear, terror, or helplessness."[158] Symptoms of post-traumatic stress disorder may be identified in children if they engage in activities such as recollecting the event or expressing repetitive play of the trauma, suffering hallucinations and nightmares, or experiencing psychological fear and distress during events that resemble some aspect of the event that triggered the emotions in the first place.[159] Furthermore, studies have linked clinical depression and functional enuresis—the technical name for involuntary urinating in one's bed or clothes—to sexual abuse in children.[160]

154. CECI & BUCK, *supra* note 146, at 68. Evidence shows that older children and adults tend to provide more detailed accounts of events that they recall. *Id*. The reliability of an interview with a young child can depend greatly on the surrounding circumstances and the neutrality of the person asking the questions. *Id*.

155. *Id.* at 66. Many jurors are influenced by a perception that children are often incapable of remembering or accurately recalling past events. *Id*.

156. *See* Jeffry H. Gallet & Maureen M. Finn, *Corroborations of a Child's Sexual Abuse Allegation with Behavioral Evidence*, *in* 25 AMERICAN JURISPRUDENCE PROOF OF FACTS 189, § 1 (3d ed. 1994 & Supp. 2015).

157. *See generally id*. §§ 4–8 (discussing the various behavioral indicators in cases of sexual abuse).

158. *See generally id*. § 4 (defining post-traumatic stress disorder and providing a list of its symptoms in children).

159. *Id*. The threshold for a diagnosis of post-traumatic stress disorder is set very high, and children must experience several identifiable symptoms for at least one month before they receive a diagnosis. *Id*. Three types of behaviors must be displayed before a child receives a diagnosis of post-traumatic stress disorder: (1) the child must relive the trauma through dreams or recollections; (2) the child must demonstrate "persistent avoidance" of activities or situations that are associated with the trauma; and (3) the child must show forms of arousal through startled responses, sleep disorders, or the like. *Id*. If these symptoms first appear more than six months after the traumatic event, the child could be diagnosed with "delayed-onset post-traumatic stress disorder." *Id*.

160. *Id*. §§ 5–6. Other physical possibilities for these symptoms must be ruled out before it will be determined that a child's symptoms were caused by sexual abuse. *Id.* Health problems such as diabetes, urinary tract infections, and seizure disorders are critical to rule out before attributing sexual abuse as the cause. *Id*.

Additionally, a child's symptoms will often be a significant factor in a child sexual abuse case in determining whether the abuse actually happened when all other evidence is lacking.[161] This approach attempts to ease concerns about the admission of expert testimony by trying to ensure that evidence is admitted during a child abuse trial solely because of its scientific trustworthiness.[162] Supporters of this approach advocate that it can be determined whether a child's symptoms were likely to have actually resulted from the alleged abuse.[163] This is done by weighing the amount of child abuse cases in which the symptom is present against the amount of non-abuse cases in which the symptom is present.[164] Understandably, if a child victim was experiencing a symptom that is common in most children of that age, including those who were not abused, the symptom itself would carry little weight in attempting to prove the existence of child abuse.[165] Conversely, the fact that a child victim experienced a symptom that other abused children also regularly faced is not dispositive.[166] For example, a child experiencing nightmares may not mean that the child was abused because nightmares are quite common among young children in general.[167] However, symptoms such as sexual problems or sexual play at a young age are relatively less common in children who have not been abused and should be considered a warning sign.[168] The probative value of symptoms that an alleged child abuse victim is experiencing depends on the ratio of abused and non-abused children who are also experiencing the same symptoms.[169]

161. Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43, 46 (1996) ("In a child abuse case, evidence that a child suffered a particular symptom is relevant for proving abuse if the presence of the symptom increases the chance that abuse actually occurred.").

162. *Id.* at 45.

163. *Id*. This comparison is referred to as the "relevance ratio" because it seeks to determine which symptoms are relevant in the abuse case and which are extraneous. *Id*. at 46.

164. *Id*. Through this relevance ratio, prosecutors and investigators will ideally be able to determine whether a symptom is probative in showing that the child has likely experienced abuse. *Id*. at 47. While this is admittedly not a perfect science, it alleviates some of the worries about "normal" personality traits of children being mistaken for signs of an abusive environment. *Id*.

165. *Id*. at 47–48.

166. *Id.* at 47. Neither conclusion can be determinative regarding the existence or lack of abuse, but the relevance ratio tends to shed light on the meaning of certain symptoms and the weight that they should be afforded when abuse is being investigated. *Id*.

167. *Id*. at 59.

168. *Id*.

169. *Id*. at 46. The results of this ratio will simply determine "whether the presence of symptoms

Expert witnesses have also been commonly used as a tool to combat the issues presented by doubted child witnesses.[170] Experts can be especially useful when a child is too young to be sworn in to testify or when there are concerns about the child's comprehension of the oath being administered, and experts can offer insight about what they believe happened based on the evidence they have reviewed.[171] For example, psychologists may be permitted to take the stand in a trial and state that they believe, to the best of their knowledge, that the child victim was sexually abused and that the post-traumatic stress disorder or other psychological symptoms that the child is experiencing most likely stem from that abuse.[172]

Even if skeptics of child witnesses were to temporarily put aside the question of whether sexually abused children are competent and have the requisite memory to testify in their own trials, the question becomes whether these types of child victims *should* be put on the stand.[173] Not only could the outcome of the trial be affected by the versions of the abuse that the child might recount or the evidence that the child may or may not bring to light, but the child is also likely to be deeply affected by having to relive the abuse and detail the experience in front of the alleged perpetrator.[174] This type of emotional trauma could either worsen the child's existing disturbance or create an entirely new trauma for the child to cope with moving forward.[175] Such an experience would set the child back emotionally, instead of facilitating the healing process.[176] The child may also end up feeling "intimidated or embarrassed under cross-examination where the veracity of his testimony is questioned," which could logically lead to a change in the recollection of events or a complete shut down by the child—the very reasons that people doubt child witness testimony in the first place.[177]

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increases the chance that abuse occurred." *Id*.

170. *Id*.; *see also* Gilstrap & McHenry, *supra* note 146, at 65–67.

171. *See generally* Gallet & Finn, *supra* note 156, § 4 (providing examples of both permissible and impermissible expert testimony regarding post-traumatic stress disorder in cases of child abuse).

172. *See id*.

173. Jessica Liebergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 L. & PSYCHOL. REV. 139, 140 (1997).

174. *Id*. Experts believe that testifying in such a trial can cause additional emotional distress in children and have extremely negative consequences on the child. *Id*.

175. *Id*. at 140–41.

176. *Id*.

177. *Id*.

However, some have argued that allowing a child to appear in court can give him a sense of power and control over the situation when he would otherwise have only been a victim.[178] Because of these implications, the value that each child witness could bring to a case needs to be adequately balanced on a case-by-case basis against the potential harm that it could cause to the child.[179]

Regardless of which questioning methods are employed with child abuse victims or which tools are used in court to corroborate their testimony, evidence of prior bad acts would irrefutably help verify the victims' recollection of the events and would therefore take some pressure off of these vulnerable and afraid child victim witnesses.[180]

3. The Admission of Prior Acts Evidence Would Serve as a Deterrent to Dissuade Perpetrators from Committing Future Crimes

Expanding section 1109 to include prior psychological and emotional child abuse acts under California Penal Code section 273a would deter perpetrators from harming more children because some prior acts would be admissible in future trials.[181] This expansion would not only positively affect the prosecution of atrocious child abuse crimes by acting as corroborating evidence, but it would also dissuade criminals from committing subsequent acts of abuse, whether with the same child or a

178. *Id*. at 141. The decision regarding whether the child should testify or not should be based on a balance of two factors: how advantageous the testimony is to the case outcome and the psychological impact it is likely to have on the child. *Id*. at 140. "The importance of a child's testimony" should also be heavily considered, and, if there is other evidence, the prosecution can balance how crucial the child's testimony will be for the case. *Id*. at 141.

179. *Id*. The child's testimony could be absolutely necessary to prosecute the defendant if the prosecution does not have physical evidence or other eyewitnesses. *Id*. In such a case, this balancing test will lead to a simple answer that the child needs to testify. *Id*. When this is the case, the likelihood and severity of the psychological harm of testifying must be weighed against the chances of successful prosecution. *Id*.

180. *See* WENDY A. WALSH, LISA M. JONES, THEODORE P. CROSS & TONYA LIPPERT, PROSECUTING CHILD SEXUAL ABUSE: THE IMPORTANCE OF EVIDENCE TYPE 4 (2008). The experience of testifying in court could be made much less stressful for the victims through the admission of corroborating evidence. *Id*. Not only could such evidence lead to a more successful prosecution, but it could also encourage a plea bargain. *Id*. Prior acts evidence, as a form of corroborating evidence, could also help soften the blow of cross-examination against the child victim. *Id*.

181. Vartabedian, *supra* note 53, at 182–83 (describing how this same theory has been applied to domestic violence cases in an effort to deter perpetrators from engaging in such crimes in the future).

different victim.[182]

The United States is known for having the world's highest incarceration rates, with about 2.2 million people in prison or jail as of 2014.[183] Because the topic of incarceration has long been debated and strongly opposed, several theories of punishment have surfaced in an attempt to determine which methods will ultimately benefit society in the long term.[184] Despite the level of overall attention that criminal punishment receives, "the search continues for proven programs and policies that work."[185] Up through the 1930s, most of the country seemed to generally support the punishment of criminals and the use of such punishment as a deterrence mechanism to prevent future crime.[186] Between the 1930s and the 1970s, there was a prominent shift away from strict punishment and toward the rehabilitation of criminals.[187] It is becoming clearer that, in present time, deterrence and criminal punishment have taken center stage again in the ongoing search for a moral justification of criminal punishment.[188]

The theory of deterrence focuses on the prevention of future crimes and protecting potential victims through the process of righting past wrongs and making the punishments for offenses widely known.[189] The motivations

182. *Id*. Such character evidence is essential in showing that the defendant has the propensity to commit the alleged crime and holding perpetrators responsible for their abusive actions against others. *Id*. at 183. It is also crucial in stopping the "cycle of violence" that often perpetuates in a household until legal or other intervention takes place. *Id*.

183. *Incarceration*, SENT'G PROJECT, http://www.sentencingproject.org/template/page.cfm?id=107 (last visited Oct. 19, 2015); *see* Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 PENN ST. L. REV. 487, 515 (2004).

184. *See* Todd, *supra* note 183, at 515 ("Alternative explanations of crime and their attendant solutions (e.g., imprisonment or rehabilitation) have been debated for centuries . . . .").

185. *Id*. at 515; *see also* HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 375–85 (1979) (explaining the need for justification of criminal punishment as a social practice because there is no widespread agreement on its underlying purpose and reasoning).

186. Todd, *supra* note 183, at 517.

187. *Id.* The theory of rehabilitation is aimed at understanding the underlying reasons behind the commissions of crime and fixing those issues, instead of simply punishing the offender with disregard to his motivations. *Id.* at 516. Proponents of a rehabilitation theory of punishment argue that we, as a country, have never fully committed to this theory, and it needs to be implemented at a universal level to be effective. *Id*. at 518.

188. *Id.* at 517 (stating that the country's main focus seems to be on incarceration again, not rehabilitation); *see also* GROSS, *supra* note 185, at 394 ("Deterrence is the purpose most frequently invoked in support of a system of criminal punishment.").

189. *See* Markus Dirk Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A*

behind the general theory of deterrence rely on the notion that an actor will weigh the costs and benefits of committing a crime before choosing to act and, hopefully, decide that the punishment is too costly.[190] The idea behind this concept is to make the specific legal consequences for certain actions publicly known so that the threatened punishment will be considered severe enough to discourage potential criminals from carrying through with their contemplated crimes.[191] Throughout the study of punishment, two separate theories of deterrence have been established: specific deterrence and general deterrence.[192] Specific deterrence is a narrow theory that attempts to dissuade a specific offender from committing further criminal acts in the future.[193] General deterrence has the same underlying purpose, but it targets all other potential criminals and aims to use one offender as an example of what will happen in the future for committing specific offenses.[194]

California law currently only allows the admission of prior acts of child abuse in a subsequent child abuse case if the alleged abuse caused a "traumatic condition," which leaves victims of psychological abuse and maltreatment without recourse in this area.[195] While the current law in California might discourage defendants who were previously charged with sexual or physical child abuse from re-offending, overlooking emotional abuse and maltreatment leaves a detrimental gap in this deterrence theory.[196] Many factors that initially lead to child maltreatment from a parent or

Critique of California's Habitual Criminal Statute, 43 STAN. L. REV. 193, 210–11 (1990).

190. Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008) (stating that the deterrence theory views "potential criminals as rational, econometrically grounded actors who weigh the qualities and probabilities of punishment before acting"); *see also* Dubber, *supra* note 189, at 211–12 (stating that a potential criminal will balance the benefits of committing the crime against the costs of the known punishment for that crime, and make a decision accordingly).

191. *See* GROSS, *supra* note 185, at 394 (describing how this threat of punishment is meant to stop criminal actors from engaging in such behavior).

192. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC'Y REV. 545, 545 n.1 (1986).

193. Dubber, *supra* note 189, at 210–11; *see* Rosalind K. Kelley, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 92 DICK. L. REV. 759, 780 (1989). The purpose is to choose a punishment that is so unfavorable that it will discourage the defendant from committing the same act in the future. *Id.*

194. Dubber, *supra* note 189, at 210–13.

195. CAL. PENAL CODE § 273d (West 2011) (punishing "[a]ny person who willfully inflicts upon a child cruel or inhuman corporal punishment or an injury resulting in a traumatic condition").

196. *See supra* notes 93–97 and accompanying text.

caregiver are also important in exhibiting the recidivism, or repeat maltreatment rate, of such abuse.[197] Recidivism rates for child abuse cases involving neglect, one of the main types of child maltreatment, are over fifty percent in some instances.[198] There is an immediate demand for intervention because over half of the caregivers who neglect, mistreat, and psychologically abuse children will repeat that same offense after the first time.[199] Including California Penal Code section 273a into California Evidence Code section 1109 would combat this recidivism rate.[200] It follows logically that if a defendant knows that any prior acts of mistreatment, so long as they do not cause a "traumatic condition," will not be admissible in a subsequent child maltreatment case, the deterrence aspect of our criminal justice system will not have the intended effect.[201] California needs to take a stand and make it clear that every case of child abuse will be treated with the same weight and, even if the maltreatment of a child does not result in a physical injury or condition, the full force of the law will be applied to any person who causes emotional, psychological, or mental harm to a child.[202]

Surveys and interviews with prosecutors in California have shown that California Evidence Code section 1108, which allows the admission of prior acts of domestic violence in a subsequent domestic violence case, has been "invaluable in convicting recidivist batterers" and has thus proven to be an extremely effective deterrence method.[203] The admission of such prior acts has also been critical for the corroboration of domestic violence victims'

197. David Travis Solomon, Effectiveness of Child Protective Services Interventions as Indicated by Rates of Recidivism 23 (May 2012) (unpublished M.A. thesis, Western Carolina University) (on file with the Graduate School of Western Carolina University). Factors such as parental stress, parental age, drug and alcohol abuse, and poverty are prone to lead to child maltreatment. *Id*.

198. *See id.* at 31 (stating that in this particular study, the recidivism rate for neglect cases was 53.2%).

199. *Id*. Over half of the reported child abuse cases involved at least one recidivism instance after the first sign of abuse. *Id*.

200. *See* PENAL § 273a (encompassing psychological and emotional forms of child abuse).

201. *See id*; *see also id.* § 273d (providing sentencing guidelines for individuals found guilty of child abuse).

202. *See generally* Vartabedian, *supra* note 53, at 182–83 (discussing the importance of holding batterers accountable in domestic violence cases to deter future criminal activity and advocating that proper interference can lead to counseling and treatment).

203. *Id*. at 182. Prior acts evidence under section 1109 has assisted in the prosecution of defendants who have past domestic violence accusations by corroborating the victim's testimony, preventing untruth in the defendant's testimony, and showing the defendant's propensity to commit such a crime. *Id*.

testimony.[204] Witness credibility issues are similarly prominent in psychological child abuse cases because the child is often the main, or only, witness to the abuse.[205] Just as section 1108 has been instrumental in combating recidivism rates with defendants prone to committing domestic violence, expanding section 1109 would have the same constructive effect for child abuse cases.[206] Similarly, such an expansion would assist in the corroboration of child victim witnesses who may be subjected to severe doubt while testifying at the trial concerning their abuse.[207] Without this addition, child victims of psychological, mental, and emotional abuse are left facing an enormous legal disadvantage, even if they find the courage and necessary support to report their abuse.[208]

B. Argument Against Expansion: Defendants' Right to a Fair Trial

The most compelling argument against the expansion of section 1109 and the admissibility of prior child maltreatment acts is the same argument that has opposed the overall admission of character evidence for years: it would impair defendants' fundamental right to a fair trial.[209] Advocates of this point of view argue that admitting evidence of the defendant's character, used as propensity evidence, would defy the long-standing exclusion of such evidence.[210] The primary concerns are that prior acts evidence would be so prejudicial that it would improperly influence the jury, and the admission of such evidence violates the defendant's right to a fair trial by leading to a conviction of the currently alleged crime based solely on evidence of past

204. *Id*. The admission of prior acts can corroborate the victim's story so that the defendant cannot easily manufacture testimony to avoid criminal prosecution. *Id*. Prior acts evidence can also ease the jurors' doubts about the witness, which are likely to arise in cases dealing with sensitive crimes such as child abuse or sexual abuse. *Id*.

205. *See supra* notes 151–53 and accompanying text.

206. *See generally* Vartabedian, *supra* note 53, at 182. The admission of prior acts for domestic violence and child abuse cases can support the victim's credibility, which is often questioned and probed during such trials. *Id*.

207. *See supra* notes 151–57 and accompanying text.

208. *See supra* Part III.A.2 (describing the difficulties that arise when prosecuting child abuse cases).

209. Scott, *supra* note 142, at 1735–36. Propensity or character evidence has not historically been banned because it was irrelevant or considered to be a waste of time. *Id*. Rather, courts were wary of the prejudicial effect that knowledge about prior acts would have on a jury. *Id*.

210. Ellis, *supra* note 77, at 961.

involvement with similar abuse.[211] However, this view completely discredits juries and undermines jurors' ability to evaluate evidence in a reasonable manner as the court instructs them to.[212] Prior bad acts evidence can help illustrate a defendant's tendency to commit an act or crime without being unfairly prejudicial.[213] If a defendant has a history of mistreating, neglecting, or abusing a child, it tends to make it more likely that the defendant would have acted in such a way in a subsequent incident.[214]

In addition, one of the most important justifications for allowing the admission of prior acts for sexual crimes, despite the implications regarding defendants' rights, are the undeniable facts that sexual crimes are highly underreported and that victims have an imperative implied right to justice.[215] Unfortunately, because child maltreatment cases are extremely underreported, they require the same legal securities to ensure that any reporting will actually lead to more successful prosecution.[216] The NIS-3 found that there was an unprecedented amount of unreported child maltreatment cases when it uniquely included unreported cases in its examination of child abuse cases.[217] The results showed that less than twenty-five percent of the cases that involved emotional abuse or neglect

211. *See* Scott, *supra* note 142, at 1735–36 (describing that the same concerns surfaced with the addition of Federal Rules of Evidence 413 and 414, which allowed the admission of prior acts in sexual abuse cases); *see also* Jeffrey A. Palumbo, *Ensuring Fairness and Justice Through Consistency: Application of the Rule 403 Balancing Test to Determine Admissibility of Evidence of a Criminal Defendant's Prior Sexual Misconduct Under the Federal Rules*, 9 SETON HALL CIR. REV. 1, 1–3 (2013). Another argument that supports the exclusion of character evidence is that it is irrelevant to the conduct in the current trial. *Id*. It would not be fair to prove a crime by proving that the defendant is a "bad man." *Id*. at 2; *see* Ellis, *supra* note 77, at 978 ("The general policy underlying the exclusion of character evidence is the expectation that a defendant will be tried for what he did and not for who he is.").

212. *See* Scott, *supra* note 142, at 1738–39.

213. *Id*.

214. *Id*. While evidence of a prior bad act does not prove a subsequent crime, it does have value in conjunction with other evidence to prove that the defendant has the capability to act in such a manner. *Id*. at 1741.

215. *Id.* at 1741–42.

216. Enrique Gracia, *Visible but Unreported: A Case for the "Not Serious Enough" Cases of Child Maltreatment*, 19 CHILD ABUSE & NEGLECT 1083, 1083 (1995). Numerous cases of child abuse, neglect, and child maltreatment are unreported or, even when they are identified as abuse by Child Protective Services or similar authorities, do not lead to any professional intervention because they are "not serious enough." *Id.*

217. *Id*. at 1084.

were reported.[218] People who are not directly involved in the situation are often afraid to intervene or report abuse in fear that there will be repercussions on them, they will interfere with sacred family privacy, or they will not have enough support from authorities or the community to actually make a difference in the situation.[219] Child maltreatment cases also mirror sexual abuse cases in the sense that, even in the few cases that do get reported, the victims are unlikely to testify in their own trial.[220] Victims of either type of crime may not report their abuse because they are ashamed of what has happened, they are afraid of their abuser and the consequences of seeking help, or they are too traumatized and upset to press charges and pursue prosecution.[221] Further, the abuser is typically a person with a close relationship with, or authority over, the child.[222] These unfortunate realities further demand that additional legal attention and care be provided when dealing with such sensitive types of crimes in an effort to vindicate the victims of child abuse and make their rights a priority.[223]

When the Federal Rules of Evidence began to allow the admission of bad prior acts evidence, critics had these same apprehensions concerning the protection of defendants' rights.[224] However, a balancing analysis under Federal Rule 403 has somewhat abated this fear by giving judges the

218. *Id*. This study identified that the two main factors that caused cases to be identified as potential or actual abuse but not reported for intervention were the age of the child and the type of maltreatment. *Id*. The results further indicated that about 60% of the cases involving abused children under the age of six were reported, while only about 78% percent of the cases involving children between the ages of twelve and seventeen were reported. *Id*.

219. *Id*. For example, school officials may refrain from reporting suspected abuse because they do not feel they have the backing of the school board or the community. *Id*.

220. *See* Scott, *supra* note 142, at 1741–42 (stating that the "sensitive and secretive nature" of sex crimes prevents many victims from seeking help or from pursuing a trial); *see also supra* Part III.A.2 (discussing the difficulties that arise when child victims act as witnesses).

221. *See* Scott, *supra* note 142, at 1741 (explaining that these justifications have prevented sexual abuse victims from seeking help from authorities and others outside of the situation).

222. *See Child Abuse and Neglect Statistics*, *supra* note 2.

223. *See* Scott, *supra* note 142, at 1741. In theory, the admission of prior acts evidence would cumulatively show that the defendant is capable of committing the crime and also assist prosecutors in extremely underreported cases, such as sexual abuse crimes. *Id*. This same logic can be extended to psychological child abuse cases, which are also horribly underreported. *See supra* note 210 and accompanying text.

224. *See* Scott, *supra* note 142, at 1735; *see also* Palumbo, *supra* note 211, at 27–29. One main worry was that the jury would convict the defendant solely based on his propensity to commit the crime, which was displayed through prior acts evidence and not based on the evidence of the particular case. *Id*.

discretion to exclude evidence of prior bad acts "if its probative value is substantially outweighed" by any prejudice it would cause to the defendant.[225] Protecting defendants' constitutional right to a fair trial is an absolutely essential and proper part of our criminal justice system codified in the Sixth Amendment;[226] fortunately, the expansion of the admissibility of prior acts of child abuse would not hinder this right.[227] Just as the Federal Rules have successfully done, the California Evidence Code provides that courts have discretionary power to exclude *any* evidence that is extremely prejudicial to the defendant, and the trial judge is granted tremendous deference in such situations.[228] If section 1109 were expanded to include child maltreatment that did not result in "traumatic conditions," a safeguard would remain in place to protect defendants. If the probative value of the evidence offered against a defendant is substantially outweighed by the probability that its admission will create undue prejudice, the court may deny its admission.[229] With this protection unchanged, the argument that defendants' right to a fair trial would be obstructed dissipates.[230]

There are irrefutable similarities between sexual abuse cases and psychological maltreatment cases that sustain victims' rights, and the recent remarkable and undeniable improvement in sexual abuse cases concerning victims' rights lead to only one justifiable conclusion: child maltreatment victims must be afforded the same legal protections in order to prevent these crimes in the future.[231]

225. FED. R. EVID. 403. The probative value of the evidence is weighed against "a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

226. U.S. CONST. amend. VI (stating, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

227. *See supra* notes 91–92, 98–101 and accompanying text.

228. Section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 2015).

229. *Id.*

230. *Id.*

231. *See supra* notes 203–22 and accompanying text.

IV. SIGNIFICANCE OF THE PROPOSED EXPANSION

A. Defining Child Maltreatment and Emotional/Psychological Child Abuse

Since the 1960s and 1970s, child abuse has continued to earn more attention and recognition through newly enacted laws, ongoing research, and the general aspiration of legal and medical communities to defend child abuse victims.[232] In accordance with this trend, as psychological child abuse and neglect have specifically begun to receive much more public attention, it is being revealed that these types of maltreatment are occurring at an alarming rate.[233] Accompanying this exploration of child abuse and the relevant law, however, are uncertainties about what should be considered "abuse," particularly in an emotional or psychological sense.[234] One court accepted a definition of emotional abuse that stated it was "[t]he continual scapegoating and rejecting of a child resulting in behavior indicative of pathologically disturbed emotional adjustment or behavior. . . . Conversely and just as significant is the near to complete absence of appropriate loving, touching, holding, and reassuring verbal behavior necessary for emotional health."[235] Another definition, which generally encompasses the ordinary understanding of emotional child abuse, states that it is "a pattern or behavior . . . that can seriously interfere with a child's cognitive, emotional, psychological[,] or social development."[236]

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232. *See supra* Part II.A.

233. *See Child Abuse and Neglect Statistics*, *supra* note 2. Studies from the National Child Abuse and Neglect Data System reported that, in 2005, "an estimated 3.3 million referrals of child abuse or neglect" were received by Child Protective Services or like organizations. *Id*. Out of these 3.3 million referrals, about 62.8% were neglect cases and 7.1% were psychological or emotional abuse cases. *Id*. Another subsection titled "other" includes abandonment, threats, and various other forms of abuse. *Id*. Physical and sexual abuse only accounted for a combined 25.9%. *Id*.

234. MILLER-PERRIN & PERRIN, *supra* note 139, at 206 (asserting that some of the difficulties of defining psychological abuse stem from the various needs for such a definition, including the criminality of this behavior, interactions with the victims, and gathering data about the frequency of psychological abuse); Neeley, *supra* note 32, at 691; Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247, 256–62 (2011) (describing some of the various definitions of psychological child abuse that are widely used).

235. RM v. Dep't of Family Servs., 953 P.2d 477, 480 (Wyo. 1998). The court adopted this definition from portions of the "Rules and Regulations Governing Child Protective Services, Department of Family Services." *Id*. at 479–80.

236. *Emotional Abuse*, AM. HUMANE ASS'N, http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/emotional-abuse.html (last visited Oct. 19, 2015). This article asserts that

Although various definitions have been proposed and utilized in an attempt to define emotional child abuse, one thing remains constant: this type of abuse and neglect refers "to a relationship, rather than an event or series of events."[237] The continuous nature of psychological and emotional abuse often stems from a close relationship between a child and the perpetrator, making intervention from outsiders naturally uncomfortable but even more crucial for the child's well being.[238] Regardless of which definition of psychological child abuse is selected in a particular case, statistics consistently show that it is the most prevalent and pervasive form of child abuse and that instances of such maltreatment are only increasing.[239]

A 2001 case about the seemingly normal Machnick family illustrates the difficulty society experiences when defining and understanding emotional and psychological child abuse.[240] "[Mr.] Machnick was a sergeant with the Los Angeles County Sheriff's Department, and [his wife] was an elementary school principal."[241] They were raising three children in a safe neighborhood in Orange County when they were charged with child abuse.[242] Mr. and Mrs. Machnick denied any maltreatment of their fourteen-year-old son and stated, through their attorney, that any action taken was an appropriate disciplinary response to defiant teenager behavior.[243] During the trial, allegations of abuse surfaced that included forcing the boy to sleep outside on a dog mat as punishment for not finishing his homework; pouring water on their son to wake him up; "sen[ding] the [boy] to school with dog feces in his backpack as punishment for not cleaning up after the family dog"; and being stripped naked and photographed.[244] The Machnick parents

emotional child abuse incorporates acts such as ignoring, rejecting, isolating, exploiting or corrupting, verbally assaulting, terrorizing, and neglecting the child. *Id*.

237. Loue, *supra* note 12, at 315–16; *see also* Neeley, *supra* note 32, at 693 (describing the psychological maltreatment of a child as "a continuing pattern of inappropriate and injurious interaction" and stating that it is very rare to find an isolated incident of maltreatment).

238. *See* Loue, *supra* note 12, at 316 (stating that there remains a "general unwillingness of observers to impose their judgment on witnessed behavior").

239. Weaver, *supra* note 234, at 262–63. One study showed that "approximately 14% of children in the United States experience some form of maltreatment, and 75% of these were victims of emotional abuse." *Id*.

240. MILLER-PERRIN & PERRIN, *supra* note 139, at 202–03.

241. *Id*. at 202.

242. *Id*.

243. *Id*.

244. *Id*. Other allegations included waking the teenager up at 3:30 AM to accompany his parents as they went out, withholding his lunch money, and confiscating his clothes that he later had to earn

testified at trial that all of these incidents were in response to the teenager's subpar grades in school, refusal to help with household chores, and instances of lying or stealing.[245] In 2002, the jury acquitted Mr. and Mrs. Machnick of conspiring to abuse their child.[246] The jury made it known that they found this parental behavior to be entirely inappropriate, and one juror publicly recognized the presence of psychological abuse in an interview: "Breaking someone down mentally, that's what they tried to do. There were no bruises, but the whole behavior of [Mr.] and [Mrs. Machnick] was to break him down mentally."[247] Despite strong moral conviction that these parents were inappropriately raising and caring for their child, the jury disagreed about the criminality of their acts and was hesitant to intrude on their family practices.[248] The Machnick case clearly illuminates the hesitation our society is facing with the prosecution and criminalization of psychological child abusers.[249] While we continue to hesitate and allow children to remain in these abusive environments, the likelihood that the consequences will be permanent and detrimental to the child's adult life is rapidly increasing.[250]

B. The Impact of Psychological Child Abuse on the Victim

From a policy-oriented standpoint, our society needs to afford the same weight in a court of law for emotional and psychological child abuse as we do for physical child abuse.[251] The effects of the emotional abuse can be just as harmful, and sometimes significantly worse, than those associated with physical abuse.[252] In illustration of this, studies have shown that:

> [E]xposure to stress early in life—specifically, to inadequate or

back through "good behavior." *Id.*

245. *Id*.

246. *Id*. at 203. The trial judge made a ruling in favor of retrying Mr. and Mrs. Machnick on the lesser misdemeanor charge of child abuse, but such a case has not yet come to fruition. *Id*.

247. *Id*.

248. *Id.*

249. *See id*.

250. *See* Niehoff, *supra* note 35, at 875.

251. *See* Loue, *supra* note 12, at 311–12. Studies that show the emotional abuse of children is a growing problem, and because of the remaining difficulties in defining and confirming such abuse, it is likely very underreported. *Id.*

252. Niehoff, *supra* note 35, at 861–62. Emotional abuse and neglect that may lead to psychological trauma, although no physical marks, can affect various parts of the brain and have negative effects on the child's early development. *Id.*

> abusive parenting—changes the emotional circuitry of the brain and the neuroendocrine mechanisms underlying allostasis in enduring and often compromising ways. Such stress-related aberrations are independent of any direct injury to the brain and have been documented even in the absence of overt clinical symptoms.[253]

Studies further show that psychological abuse and neglect to children causes as much, or likely more, long-term damage to children than physical beatings, which can affect children for the rest of their lives.[254] Though psychological maltreatment of a child may not always cause visible physical injuries that can be easily established through photographs or eyewitness testimony, it has been shown to cause extreme damage to a child's development and natural progression through various stages of life.[255] The long-lasting consequences of emotional abuse include social incompetence issues that pose problems for the child's interactions with peers; intellectual shortfalls in areas such as problem solving and cognitive skills; and overall behavioral problems that are often evidenced by "aggression, self-abusive behavior, anxiety, anger, and dependency."[256] Child abuse victims have been known to exhibit low self-esteem, slow social development with others, distorted perceptions of social situations, and overall emotional responsiveness.[257] Although these consequences are unseen, not physical, and more difficult to detect than a bruise or a broken bone, they still produce unrelenting effects on children and permanently alter the course of their lives.[258]

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253. *Id*. at 861.

254. Neeley, *supra* note 32, at 691; *see also* MILLER-PERRIN & PERRIN, *supra* note 139, at 203 ("Research has shown that child psychological maltreatment is associated with negative consequences for victims that are just as serious, if not more so, than those related to physical and sexual abuse.").

255. *See* Loue, *supra* note 12, at 311–12.

256. *Id.* at 318. There is a link between psychological abuse and neglect and a child's outcome later in life as an adult. *Id*. Studies have shown that incidents such as being rejected by birth parents or not receiving necessary protection from a caregiver could be predictive of behavioral and intellectual problems in the victim's adult life. *Id*. at 311–12.

257. *See* Neeley, *supra* note 32, at 695; MILLER-PERRIN & PERRIN, *supra* note 139, at 220 tbl.6.3 (illustrating the negative effects of psychological child abuse, which include lack of impulse control, pessimism, dependency issues, juvenile delinquency, disruptive classroom behavior, sexual problems, and eating disorders).

258. *See* Neeley, *supra* note 32, at 693 ("[I]t is the serious *psychological damage* which results from any form of abuse which poses the 'most disruptive effect on the child's short-and-long term

Additionally, emotional abuse is known to lead to physical conditions and ailments that are not readily apparent by just looking at the child.[259] Some examples of physical weaknesses that could result from emotional or psychological child abuse are the slight flattening of the head of an infant who has been neglected and laying too long, diaper rashes, and tooth decay.[260] While documentation of these physical effects on the child could possibly be admissible through California Evidence Code section 1109, other consequences of the same abuse could be excluded from a trial.[261] For example, a child may suffer from extreme anxiety and persistent pain or illness from long-term exposure to emotional abuse.[262] Child maltreatment can also cause long-term health problems, such as obesity and heart disease, which will be prevalent throughout adulthood.[263]

Child victims of psychological abuse have a particularly urgent need for public and legal intervention because "[t]he longer a child remains in an abusive environment, the greater the probability that stress will leave an enduring impression on the brain."[264] By expanding section 1109 to include psychological maltreatment of a child, California can send a message to the victims that they are not alone and that their abuse is considered "traumatic" as well.

V. CONCLUSION: WE CAN DO BETTER

There is no question that child abuse is a continually growing problem in the United States and that there is a widespread concern for the safety and welfare of our children. In response, California should expand section 1109 to allow the admission of prior acts of psychological and mental maltreatment in subsequent child abuse trials.[265] The present practice of allowing judges to make decisions regarding the admission of prior acts

functioning.'" (quoting JAMES GARBARINO & GWEN GILLIAM, UNDERSTANDING ABUSIVE FAMILIES 8–10 (1980)).

259. *Id.*

260. *Id.* at 694.

261. *See* CAL. PENAL CODE § 273.5 (West 2015) (defining "traumatic condition" as a condition of the body or a wound and leaving no recourse for victims of verbal or emotional abuse that does not result in such a physical defect).

262. *See* Neeley, *supra* note 32, at 694.

263. Niehoff, *supra* note 35, at 847.

264. *Id.* at 875.

265. *See supra* Part IV.B.

evidence, on their own discretion by weighing the probative value of such evidence against any prejudice, has already significantly assisted in the prosecution of some of the most heinous crimes committed.[266] The probative value of prior acts evidence, the difficult nature of child abuse prosecution, and the deterrence implications that would arise from this expansion all demand that child abuse victims be afforded this additional legal protection.[267] "How much our society values its children can be measured by how well they are treated and protected."[268] The victims of psychological child abuse are calling for help, and the expansion of section 1109 would empathetically answer that call.

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266. *See supra* notes 203–04 and accompanying text.

267. *See supra* Part III.A.

268. Markel, *supra* note 20.

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