MEMORANDUM

TO: Law Review, Executive Board
    Meghan Cooper, Executive Comment and Note Editor
    Geoffrey C. Westbrook, Comment and Note Editor
    Andrew Sabino, “Satellite” Comment and Note Editor

FROM: [Name], Associate Member

DATE: August 12, 2010

RE: Topic Proposal #1

Handling domestic violence has been a significant challenge in the criminal justice system. The problem is the difficulty in successfully prosecuting domestic violence cases because of the many procedural and evidentiary issues that prosecutors face. For example, in Massachusetts, the Supreme Judicial Court has authorized the drafting of the Massachusetts Guide to Evidence. Though not a rulebook, the Guide was created to “advance justice” and make the rules of evidence easier to understand, teach, and present. Within this Guide is Section 404(b), which prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show conformity therewith. MASSACHUSETTS GUIDE TO EVIDENCE 404(b). The text of this section practically mirrors the text of Federal Rule of Evidence 404(b), which traditionally and intentional seeks to prohibit propensity evidence. It is presumed that this type of evidence has low probative value and carries the distinct risk of undue prejudice. See MASSACHUSETTS GUIDE TO EVIDENCE 404(b). However, in the context of domestic violence cases, the propensity to commit crimes of violence against a partner or family member has been shown to repeat itself over time. “The Cycle of Violence” can happen hundreds of times in an abusive relationship. A prosecutor may attempt to admit these incidents
as proof of intent, however it is likely inadmissible since the clear, unstated, underlying theory behind this evidence is to show proof of the defendant’s character “to show action in conformity therewith.”

The second problem prosecutors face in handling domestic violence cases is the unwillingness of the victim to testify or the retraction of accusations. Often the victim depends on the defendant for financial support or housing, the defendant has promised to “never do it again,” or there is the risk the defendant threatened the victim into not testifying. Whatever the reason, prosecutors, particularly after Crawford and Davis and their Massachusetts counterparts Commonwealth v. Gonsalves and Commonwealth v. Galicia, face an uphill battle in obtaining enough evidence to convict a defendant accused of domestic violence when the evidence becomes unavailable or inadmissible for any number of reasons.

Facing the inadmissibility of proof of prior instances of violence and lack of evidence in the current charge, a prosecutor of domestic violence cases may have no option than to dismiss the case. This may prove to be a fatal choice; it only takes one more opportunity for a defendant to kill a victim he or she has been consistently abusing in the past. I would like to propose a remedy for the Massachusetts criminal justice system in the prosecution of domestic violence cases. If Massachusetts were to adopt the Doctrine of Chances as an complement to Section 404(b)’s prohibition of character evidence, it would provide a “non-character theory of logical relevance” that would allow prosecutors to prosecute domestic cases using evidence of prior instances of domestic violence to demonstrate the likelihood that the crime presently charged actually occurred and is grounded in the truth.

The Doctrine of Chances simply suggests that it is unlikely that a defendant would be repeatedly, innocently involved in similar, suspicious circumstances. United States v. Matthews.
The Doctrine is usually intermingled with evidentiary issues regarding admissibility of character evidence during trial. The Doctrine of Chances reflects the use of common sense; if a person has a history of conduct that results in repeated arrests, convictions, or allegations for the same type of violence—partner violence—it is likely that that person committed at least one or a few of those crimes. The Doctrine relies on statistics and probability. It is not logical to assume that a defendant is plagued with bad luck. The Doctrine could explain away the probability of all the incidents being wrongful accusations, increasing the probability that one or more of the incidents were not accidents or false accusations—including the current charge. This evidence would have to be in conjunction with additional evidence; it would not sustain the burden of proof on its own.

Proponents of the Doctrine of Chances explain that the Doctrine has nothing to do with character. In operation, the inferences would follow as such: defendant’s other misdeeds → the objective improbability of so many accidents → One or some of the incidents were not accidents. The conclusion the factfinder would be entitled to make is not one of the character of the defendant, but rather that it is an extraordinary coincidence that the defendant is involved in the charged crime. Introducing evidence of prior incidents would alleviate the need for the victim to testify. This evidence would help assess the plausibility of a defendant’s claim of an alternative theory of how the victim was injured.

The argument against the Doctrine of Chances is that it is inherently propensity based. Opponents claim that if the probability of random chance is eliminated, logic requires an inference that it was the defendant’s propensity that caused the crime. The counterargument is that people are autonomous, and can make a choice contrary to character trait. Using probability
would allow the factfinder to disregard character inferences, adhering to Section 404(b)’s character evidence prohibition.

I plan to draft a framework of how the Doctrine of Chances would work in the context of domestic violence cases. There would have to be limits to its usage; one prior act of domestic violence may not be enough (depending on the circumstances), and a balancing of the probative value and its prejudicial effect would be necessary, among other requirements. I would like to suggest that recognition and adoption of the Doctrine of Chances in the context of domestic violence prosecutions would continue to shield defendants from improper use of character evidence and could save the lives of domestic violence victims who are stuck in the “Cycle of Violence.”

**Preliminary Resources:**

1. **Massachusetts Guide to Evidence** 404(b).


**Preemption Check:**

A combination of many search terms has not revealed any articles tying the Doctrine of Chances to domestic violence. A run through JLR and Texts & Periodicals (Massachusetts /p domestic violence & atleast5(gonsalves); Massachusetts /p “domestic violence”; Massachusetts /p (domestic violence) & confrontation) produced nothing relating to the Doctrine of Chances. A run through ILP, LRI and CILP (“doctrine of chances”; “violence” & “doctrine of chances”) produced articles written on arson and the Doctrine, but none relating to domestic violence. A second run through JLR (domestic /1 violence & probabil!) produced Gia E. Barboza, *Making Numbers Count: The Psychology Behind Probabilistic Assessments of Guilt in Criminal Law Cases*, 4 CRIM. L. BULL. ART 8 (2009), which discusses the use of probability evidence to convict defendants. This article talks about how probability is inherently unreliable because
juries may not use it correctly, or understand it enough. It focuses more on match evidence, although it does mention the O.J. Simpson case and how some men who engage in domestic violence go on to kill. This article actually loosely discusses my probability theory but with an opposite view. JLR also produced additional resources relating to domestic violence and the Confrontation Clause, but nothing that states my thesis. Additional JLR, ILP, LRI, and CILP searches (Domestic /1 violence & chance!; domestic /1 violence & probabil!; violence & chances & domestic; violence & chances) produced nothing similar to my idea.