Texas Law Review Online
Volume 97

Note

The Conformity Rule and Relationship Evidence in Texas Domestic Assault Trials

Alex Stamm*

I. Introduction

American criminal law has long prohibited prior-acts evidence used to prove action in conformity with character[1]—variously called conformity evidence, propensity evidence, or simply character evidence—for good reason. Character evidence creates a nullification risk: the risk that a jury might convict the defendant because they detest his uncharged actions despite having reasonable doubts about the charged conduct.[2] Character evidence also creates an inferential error risk: the risk that jurors will overvalue

*My thanks to Professor Steven Goode at The University of Texas School of Law, to whom I am grateful for our conversations about the nature of character evidence and for his guidance and comments on the research paper that became this Note. I am likewise grateful to Criminal Defense Clinic Director Chris Roberts and my colleague Laura Proske for their insights on this issue. The central concept of this Note began with their thinking on this topic and developed through our conversations about it.

1. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."); 1 MCCORMICK, EVIDENCE § 195 (7th ed. 2013) (defining character evidence as "a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness . . . . ").

2. *See* Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 720 (1998) ("Character evidence raises dangers of prejudice. The prejudice feared is of two types: inferential error prejudice and nullification prejudice. . . . The latter occurs if the trier decides to punish the defendant for acts other than those charged."); *Michelson*, 335 U.S. at 475–76 ("The [character-evidence] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

evidence—good or bad—in determining the defendant's guilt of the charged crime.[3] Character evidence creates risks of creating mini-trials about the truth of the prior-acts evidence, confusion of the issues, and delay.[4] For all of these reasons, every state and the federal government has a rule barring conformity evidence—commonly if not universally as Rule 404.[5]

But in Texas, the two different rules place the conformity rule at risk of vanishing from domestic assault trials. First is Texas Code of Criminal Procedure Article 38.371, a statute created in 2015 concerning the admissibility of evidence in domestic assault cases. Second is *Bass v. State*,[6] a 2008 ruling by the Court of Criminal Appeals involving prior-acts evidence. Although the scope of these rules is unclear, they are susceptible to broad readings under which otherwise inadmissible prior-acts evidence could be admitted in nearly every domestic assault trial.[7]

Two problems arise from the uncertainty about the reach of Article 38.371 and *Bass*. First, in trial courts where the broad readings of Article 38.371 and *Bass* hold sway, domestic assault trials lose the conformity rule's due process benefits.[8] That is, defendants in domestic assault trials risk being

3. *See* Park, *supra* note 2, at 720 ("[Inferential error prejudice] occurs if the trier overvalues the evidence in determining whether the defendant committed the crime charged."). The inferential error concern motivating the character rule leads many scholars to describe the character rule as a species of the Rule 403 balancing test. *See* STEVEN GOODE ET AL., TEX. PRAC., TEXAS RULES OF EVIDENCE § 404.2 ("Indeed, Rule 404(a) may be understood as a specific application of the Rule 403 balancing test.").

4. *See* Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1930 (2012) ("In addition to inferential error and nullification prejudice, the character evidence scheme has also been defended because it tends to prevent confusion of issues, unfair surprise and undue prejudice . . . [and] it wastes the court's time and resources trying side issues"); *Michelson*, 335 U.S. at 476 ("The overriding policy of excluding [character] evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.").

5. *E.g.*, TEX. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); TEX. 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.").

6. 270 S.W.3d 557 (Tex. Crim. App. 2008).

7. See *infra* Part III.A (Article 38.371) and Part III.B (*Bass*).

8. Many scholars and practitioners support the broad admission prior-acts evidence in domestic assault prosecution—for them, the benefits outweigh the costs. *See, e.g.*, Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1492 (1996) ("Currently, defendants claim that each battering is unique, thereby painting prior acts as evidence of general propensity. This argument reflects a completely unsophisticated view of domestic violence which flies in the face of the extensive literature discussing battering relationships. Although each abusive act is different, it typically plays a part in a scheme aimed at obtaining control over the victim. Thus, the unifying theme supporting the introduction of specific propensity in domestic femicides is the nature of the battering relationship. As a result, domestic violence evidence should be admissible, whenever relevant, subject only to rules regarding prejudice."); Andrew King-Ries, *True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence Prosecutions*, 23 ST. LOUIS U. PUB. L. REV. 313, 333 (2004) ("In the domestic violence context, the character evidence ban denies the nature of

convicted not for the charged offense, but rather on the basis of jurors' feelings about prior uncharged acts.

Second, uncertainty about the reach of Article 38.371 and *Bass* forces defendants and defense attorneys to guess about the strength of their case, the value of the plea offer on the table, and the best way to present their theory at trial. Ultimately, defendants cannot make informed decisions about trial strategy without clear answers to the following questions:

Will a Texas court treat prior acts involving the same complainant—so-called "relationship evidence"—differently than prior acts involving others?

To what extent does Article 38.371 allow in evidence that might otherwise be barred by the conformity rule?

Does Bass v. State *mean that prior acts are admissible as soon as the defendant contests the truth of the complainant's allegations?*

Without predictable answers to these questions, domestic assault trials involve considerable uncertainty. What is needed is a coherent, predictable framework that preserves the virtues of 404(b)'s conformity rule in appropriate cases and allows people to plan their defense in an informed and rational way. This Note tries to set out such a framework.[9]

In Part II, I argue that relationship evidence is similar enough to character evidence that it should be subject to the usual limitations of Rule 404. In Part III, I argue against the broadest reading of Article 38.371 and *Bass*—that is, against the reading that would admit prior acts in the maximum set of cases and effectively eliminate the conformity rule in domestic assault cases. In Part IV, I propose more careful readings of each rule that will increase predictability and limit the introduction of conformity evidence. Finally, I use Part V to discuss the virtues of the more careful readings I propose; provide some examples of how Rule 404(b), Article 38.371, and *Bass* should fit together in practice; and conclude.

II. Is "Relationship Evidence" Even Character Evidence?

At the outset of the puzzle over how Rule 404, Article 38.371, and *Bass* fit together is a threshold question: Should evidence of prior acts by a defendant involving the complainant be treated differently for character-evidence purposes than other sorts of prior acts by the defendant? That is, should the conformity rule even *apply* to prior acts used to prove the nature of the relationship between the defendant and the complainant? Answering this question first matters because if so-called "relationship evidence" is *not*

---

domestic violence, creates an unlevel playing field that reinforces negative and inaccurate stereotypes about women, and perpetuates violence against women.").

9. This Note does *not* address a related incursion on the predictability and reach of the conformity rule: broad and unpredictable interpretations of the 404(b)(2) exceptions. *See* Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 247 (2004) ("There are several exceptions to the general rule banning prior bad acts, and these exceptions have been expanding, the exceptions starting to swallow the rule itself.").

covered by the conformity rule, then the rest of this puzzle—which is about when the conformity rule will apply—is moot. I'll start by addressing the argument that relationship evidence is *not* covered by the conformity rule, and then I'll argue for why it should be.

A. Relationship Evidence Is Not Covered by the Conformity Rule

Maybe relationship evidence just simply isn't character evidence at all, and so the conformity rule just does not apply to prior acts by a domestic violence defendant involving the complainant. The argument is that relationship evidence is relevant without reasoning according to general character traits. Conformity reasoning proceeds in two steps: First, proof is offered of a person's character trait, perhaps in the form of a prior act consistent with a particular trait. Second, jurors then infer that because the person possessed the character trait, he or she is more likely to have committed the charged offense.[10] In other words, the inferential chain starts with a prior act, which is used to prove a general trait, which is used to prove the charged act. But if the prior act is legally relevant without the second premise (proving the general trait), then the conformity inference is not being used, and the conformity bar does not apply.

To use an example from popular culture, suppose that the son of *Breaking Bad* protagonist-villain Walter White is found dead,[11] and the Bernalillo County Attorney's Office[12] charges White with his son's murder. It's fair to describe White as a violent criminal who is responsible for multiple murders.[13] It's also fair to describe White as a father who cares about his son.[14]

Suppose that at trial, White wants to put on evidence of several prior acts of kindness toward his son in order to show that he loved his son and treated him kindly. Is this character evidence? White would likely argue that it's not. The prior acts aren't being used to show that White is a nice guy *generally*, who would thus be less likely to murder *someone*; rather, the prior acts are being used to show that White felt fondly about *his son*, and therefore

---

10. *See* Anderson, *supra* note 4, at 1926 ("Propensity reasoning works in a two-step process: proof of an individual's trait—either by reputation, opinion, or specific prior acts—suggests that the individual has that particular trait; then, from the existence of that trait, jurors are more likely to believe that the individual acted in conformity with it."); *see also* MCCORMICK, *supra* note 1, § 190 ("The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial.").

11. *Breaking Bad* (AMC Network 2008–13).

12. *Breaking Bad* is set in Albuquerque, New Mexico.

13. In the show, White is a chemistry teacher and devoted husband and father who turns to manufacturing and distributing methamphetamine after a terminal cancer diagnosis. *Breaking Bad, Plot*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0903747/plotsummary [https://perma.cc/8BNU-ADWJ].

14. *Id.*

was less likely to murder *his son*.[15] Because the inferential chain—White did kind things for his son, therefore he loved his son, therefore he didn't kill his son—doesn't include a premise about White's general character traits, the prior acts are not conformity evidence.

Proponents of this theory of relationship evidence are in good company. Professor Roger C. Park, for example, has stated that prior acts by a domestic violence defendant involving the complainant are simply not conformity evidence.[16] According to Professor Park, "the legal concept of 'character' does not exclude evidence of more narrowly defined propensities, such as the propensity to abuse a *particular* spouse [or] rob banks using poetic threats."[17] The key for Professor Park is, as discussed above, whether a piece of evidence is relevant only because of an intermediate premise about the defendant's general character trait:

> [I]f testimony leads to an inference that a person committed an act without any intermediate inference about general cross-situational propensity (character), then the character evidence ban does not apply. The ban does not apply even if the evidence shows "propensity" in the sense of showing a proclivity to repeat situation-specific conduct.[18]

In the domestic violence context, the state could articulate a theory of admissibility that appears not to rely on any premises about a defendant's general character traits. That is, the state could argue that prior acts of violence toward the complainant prove that the defendant had a violent relationship with the complainant, and that aggressors in violent relationships tend to continue to commit violence against victims, and that the defendant is therefore more likely to have committed the charged offense. Nothing in that inferential chain refers to the defendant's *general* character trait for violence. Under this theory, relationship evidence in the domestic violence context is not character evidence, and thus not subject to the conformity rule.

---

15. Arguably, this theory of admissibility could also be described as proving a lack of motive, thus putting the evidence within the enumerated list of 404(b) exceptions. The looming question outside the scope of this Paper is whether relationship evidence can in most, or all cases, be cast as motive evidence. *See, e.g.*, Goldsberry v. State, 821 N.E.2d 447, 456 (Ind. Ct. App. 2005) ("Accordingly, Iqbal's prior assault of the murder victim was relevant to show the nature of their relationship and his hostility towards her, . . . and therefore was highly relevant to show his motive to shoot her . . . .") (internal quotations omitted); State v. Taylor, 689 N.W.2d 116, 128 (Iowa 2004) ("The defendant's prior acts of violence toward his wife, while certainly illustrative of a propensity to use violence, also reflect his emotional relationship with his wife, which as our discussion shows, is a circumstance relevant to his motive and intent on the day in question."); State v. Bauer, 598 N.W.2d 352, 364 (Minn. 1999) ("Character evidence which tends to show the 'strained relationship' between the accused and the victim is relevant to establishing motive and intent and is therefore admissible.") (citations omitted). As mentioned in note 9, this Note sets aside the larger question of the extent to which the 404(b) exceptions (motive, intent, etc.) undermine the rule, both generally and in the context of relationship evidence specifically. *See supra* note 9.

16. Park, *supra* note 2, at 719.

17. *Id*.

18. *Id*.

Moreover, a number of state courts agree with Professor Park's approach to relationship evidence and treat prior acts of domestic violence by a defendant against the complainant as non-character evidence.[19] Nonetheless, in the next section, I argue that relationship evidence is character evidence that should be subject to the conformity rule.

B. Relationship Evidence Is Covered by the Conformity Rule

Notwithstanding compelling arguments to the contrary, Texas law should treat relationship evidence as character evidence subject to the conformity rule, both in domestic assault cases and otherwise, for two reasons. First, as a theoretical matter, relationship evidence relies on a sufficiently general level of cross-situational reasoning that it raises the normal character-evidence concerns and should therefore be treated as character evidence. Second, as a descriptive matter, Texas law as articulated by the legislature and the Texas Court of Criminal Appeals tends to treat relationship evidence as character evidence.[20] Were trial courts to treat relationship evidence in domestic assault cases as though it were not character evidence, they would be treating relationship evidence in a manner inconsistent with two sources of higher legal authority.

First, as a theoretical matter, relationship evidence is sufficiently cross-situational (to use Professor Park's framework) to warrant treatment as character evidence.[21] Professor Park conceptualizes the ban on character evidence as "prohibit[ing] evidence aimed at eliciting inferences based on attributions of broad cross-situational propensities."[22] Professor Park suggests that evidence that a person is "a liar," is "trustworthy," or is "careless" are "clear examples" of broad cross-situational propensities.[23] For Professor Park, even "somewhat more specific propensities"—such as being

19. Sometimes, relationship evidence is admitted under the theory that it provides necessary context. *E.g.*, State v. Connor, 19 A.3d 146, 148 (Vt. 2011) (Prior acts of domestic violence may be "relevant to provide context with respect to a charged offense that otherwise might not make sense when viewed in isolation."); State v. Bauer, 598 N.W.2d 352, 364 (Minn. 1999) ("Consistent with Rule 404(b), it is within the trial court's discretion to admit evidence of a defendant's prior acts 'for the purpose of illuminating the relationship of defendant and complainant and placing the incident with which defendant was charged in proper context.'") Other times, courts view relationship evidence as situation-specific propensity evidence. *E.g.*, People v. Platte, No. 307858, 2014 WL 2039996, at *6 (Mich. Ct. App. May 15, 2014) ("As the trial court found, the prior acts of abuse against Dianna tended to prove that he would abuse her again."); State v. Granger, 103 So. 3d 576, 592 (La. App. 2012) (The court held that prior acts of domestic abuse in a domestic assault case were "independently relevant to illustrate the volatile nature of [the defendant's] relationship with the victim. Specifically, we find that the evidence demonstrated a pattern of defendant's verbal, physical, and emotional abuse with respect to the victim, his ex-wife."). And often, courts hold that relationship evidence is admissible to prove motive. *See supra* note 15.

20. *See infra* notes 29–42 and accompanying text.

21. *See* Park, *supra* note 2, at 718–20.

22. *Id.* at 718.

23. *Id.*

"a kidnapper," "a spouse-abuser," or "a drunken driver"—are still sufficiently cross-situational that they also count as character evidence.[24]

As a contrast, Professor Park notes that highly situation-specific evidence—that is, evidence for which the cross-situational propensity involves an extremely narrow band of different situations—does not count as character evidence:

> The [character-evidence] ban does not apply even if the evidence shows "propensity" in the sense of showing a proclivity to repeat situation-specific conduct. Examples of propensity evidence that is not, in the eyes of the law, *character* evidence, include testimony about habit (e.g., plaintiff always signaled a left turn), modus operandi (e.g., defendant had previously robbed banks using the same disguise), or motive (e.g., defendant had gambling debts, and therefore had a motive to embezzle).[25]

In other words, the law *does* allow evidence that relies on cross-situational propensity inferential reasoning, but only where there is such a tight fit between the circumstances of the prior act and the charged act that that there is very little cross-situational reasoning involved. For example, the Texas Rules of Evidence allow juries to draw cross-situational propensity inferences from prior acts, but they narrowly circumscribe that inference by restricting cross-situational inferential reasoning to "habit" evidence.[26] Habit evidence allows for cross-situational inferential reasoning about prior behavior—"she consistently acted that way before, so she must have acted the same way this time"—but only when the prior behavior involves regular, repeated responses to regular, repeated situations.[27] Classic examples of habit evidence include evidence that someone always walks down stairs two at a time or always signals with their hand when making a left turn.[28]

---

24. *Id.* at 719.

25. *Id.* at 719–20.

26. TEX. R. EVID. 406 ("Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.").

27. In the Advisory Committee's Note on Federal Rule of Evidence 406, which mirrors the Texas rule, the committee distinguishes habit evidence from character evidence with an example: "'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's *regular response to a repeated specific situation*. If we speak of character for care, we think of the person's tendency to act prudently in *all the varying situations of life*, in business, *family life*, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a *particular kind of situation with a specific type of conduct*, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." FED. R. EVID. 406 advisory committee's note on proposed rule (emphasis added).

28. *Id.* For an example of how Texas appellate courts define habit evidence, see Anderson v. State, 15 S.W.3d 177, 183 (Tex. App.—Texarkana 2000, no pet.) (holding that a woman's lifelong practice of not opening the door for strangers constituted habit evidence, and stating that, "[i]n order to offer evidence of habit, the proponent must at least demonstrate a regular practice of meeting a particular kind of situation with a specific kind of conduct").

Contrast the intensely situation-specific nature of habit evidence with the vastly more cross-situational nature of relationship evidence. In the multiplicity of different situations and behavioral responses encompassed by a romantic or family relationship between two people, relationship evidence is much closer, in cross-situational terms, to "classic" examples of generic-trait based character reasoning (which is prohibited) than it is to habit evidence (which is permitted).

As a brief illustration, recall our *Breaking Bad* example. Walter White may love his son generally, but a wide variety of situations occur within the context of his relationship with his son, in which White might display a wide array of behavioral responses. For example, he may be perfectly nice to his son every morning at the breakfast table but become furious with his son when he gets into trouble at school. He may be really helpful with his son's science projects, but then lash out angrily at his son over little things when he's in financial distress. The point is that White's relationship with his son includes a vast range of situations, in which a wide variety of stimuli provoke a wide variety of responses.

The hallmark of character evidence is that it relies on reasoning according to a broad cross-situational trait—that is, according to a general disposition to act a certain way in the incredible variety of situations that encompass a person's life. Evidence that someone is a "liar" or is "trustworthy" is evidence that they are more likely to lie, or to be trustworthy, in any given situation. The conformity rule bars jurors from being presented with a specific prior act, being told the specific act is proof of a general cross-situational propensity, and asked to conclude that the person's general cross-situational propensity made them more likely to commit the charged offense.

Relationship evidence is fundamentally the same thing. Relationships between two people involve a wide variety of different situations, in which people may exhibit a wide variety of different behaviors. Accordingly, evidence that someone acts a certain way in the context of a given relationship in fact describes a generic disposition much more similar to classic trait-based character reasoning (which is prohibited) than it is to the extremely narrow forms of cross-situational evidence (such as habit evidence) that the rules of evidence permit.

Moreover, *as a descriptive matter*, it is also the case that Texas statutes and the Court of Criminal Appeals have repeatedly treated relationship evidence as character evidence.

For example, consider that the Texas Legislature has enacted three different statutes to allow relationship evidence in various contexts: Texas Code of Criminal Procedure Article 38.36(a) (murder cases);[29] Texas Code

29. "In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous

of Criminal Procedure Article 38.37 (sexual assault);[30] and Texas Code of Criminal Procedure Article 38.371 (domestic assault).[31]

First, the fact that the legislature thought it necessary to specifically provide for the admissibility of relationship evidence implies that lawmakers understood relationship evidence to be generally inadmissible under the bar against character evidence.[32]

Second, the three statutes contain clauses suggesting that lawmakers understand relationship evidence to be barred by the character-evidence rule. Article 38.37 allows relationship evidence to be admitted "[*n*]*otwithstanding* Rules 404 and 405."[33] Meanwhile, Article 38.371 allows relationship evidence only "*subject to* the Texas Rules of Evidence," and specifies that it "does not permit the presentation of character evidence that would otherwise be inadmissible."[34] Each of these statutes assumes that Rule 404 limits relationship evidence—that is, that at least *some* relationship evidence is barred by the conformity rule. Not only would the conditional clauses ("[n]otwithstanding Rules 404 and 405," "subject to the Texas Rules of Evidence") be unnecessary otherwise, it would make no sense to use contradictory clauses unless the legislature understood Rules 404 and 405 to apply to and limit the admission of relationship evidence.[35]

The descriptive case against excluding relationship evidence from the conformity rule is bolstered by the Court of Criminal Appeals' analysis in *Smith v. State*.[36] *Smith* is a murder case in which the defendant's girlfriend went mysteriously missing.[37] The trial court allowed the state to put on evidence that the defendant had physically abused the victim in the past, including testimony by neighbors that they saw her with bruises, and

relationship existing between the accused and the deceased . . . ." TEX. CODE CRIM. PROC. art. 38.36(a) (2017).

30. "[This article] applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code: (1) if committed against a child under 17 years of age: (A) Chapter 21 (Sexual Offenses); (B) Chapter 22 (Assaultive Offenses); or (C) Section 25.02 (Prohibited Sexual Conduct) . . . ." TEX. CODE CRIM. PROC. art. 38.37.

31. "This article applies to a proceeding in the prosecution of a defendant for an offense, or for an attempt or conspiracy to commit an offense, that is committed under: (1) Section 22.01, 22.02, or 22.04, Penal Code, [assault] against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code [household, family, or dating relationship] . . . ." TEX. CODE CRIM. PROC. art. 38.371(a)(1).

32. Although it is possible that the Texas legislature believes that relationship evidence is generally admissible despite Rule 404(b)(1) and was simply codifying that belief in only three contexts, a codification theory is unlikely given the specific language of the rules, as discussed in the next paragraph of this subsection.

33. TEX. CODE CRIM. PROC. art. 38.37, § (b)(1).

34. TEX. CODE CRIM. PROC. art. 38.371(b), (c) (emphasis added).

35. That is, the legislature would have just said "notwithstanding" in each statute if they had meant to codify an understanding that relationship evidence was distinct from conformity evidence.

36. 5 S.W.3d 673 (Tex. Crim. App. 1999).

37. *Id.* at 675.

testimony by police about their responses to earlier domestic dispute calls.[38] The intermediate court of appeals held that Article 38.36(a)'s relationship-evidence rule allowed the trial court to admit the defendant's prior acts involving the victim *notwithstanding* Rule 404(b).[39]

The Court of Criminal Appeals disagreed about the relationship between Article 38.36(a) and Rule 404(b). The court stated that 404(b) did not "automatically bar evidence admissible under Article 38.36(a)"; Rule 404(b) barred evidence introduced "for the sole purpose of showing the accused acted in conformity with his past bad character towards the victim," but permitted admission "for purposes other than character conformity" such as motive, opportunity, or intent.[40] Noting that the legislature failed to exempt Article 38.36(a) evidence from Rule 404(b)'s prohibition, the court held that evidence admissible under Article 38.36(a) could be excluded under Rule 404(b) and vacated the court of appeals' decision.[41]

The Court of Criminal Appeals' reasoning in *Smith* relies on the premise that relationship evidence may in many cases be character evidence. If relationship evidence generally fell outside of Rule 404(b), the court could have affirmed the lower courts' rulings on the grounds that there simply was no conflict between Article 38.36(a) and Rule 404(b), because the relationship evidence admissible under Article 38.36(a) would just not have been subject to Rule 404(b). Instead, because the court believed that relationship evidence may in many cases be used to prove conformity with character, the court said that the legislature would have had to explicitly abrogate Rule 404(b) in Article 38.36(a) to exempt relationship evidence from the conformity rule.[42]

Accordingly, both a theoretical analysis of relationship evidence and a descriptive analysis of authoritative interpreters of the Texas evidentiary rules support the same conclusion: relationship evidence should be treated as

38. *Id.*

39. *See id.* at 676 ("[T]he court reasoned Article 38.36(a) excuses the State from having to satisfy Rule 404(b) . . . . The court concluded Rule 404(b), which creates a general ban on character evidence, is inconsistent with Article 38.36(a) because it authorizes the State to proffer extraneous offense evidence in a murder case if it involves the relationship between the accused and the victim.") (citations omitted); *see also* Smith v. State, 968 S.W.2d 452, 459 (Tex. App.—Amarillo 1998), *vacated*, 5 S.W.3d 673 (Tex. Crim. App. 1999) ("Applying Article 38.36(a) to the instant case, appellant was the live-in boyfriend of a woman who suddenly vanished without a trace or plausible explanation, and the evidence of their relationship indicates an abundance of physical abuse. Because the evidence of physical abuse has a tendency, however slight, to make it more probable that appellant murdered the victim, than without it, the evidence was relevant. Because this evidence pertained to the prior relationship between the victim and appellant, and was relevant to a determination of whether appellant committed the murder, it was admissible under Article 38.36(a). In other words, when a defendant is accused of murder, and the extraneous offense evidence proffered by the State (assuming it is relevant), involves the former relationship between the accused and the victim, it is admissible notwithstanding Rule 404(b).").

40. *Smith*, 5 S.W.3d at 678.

41. *Id.* at 679.

42. *Id.*

character evidence. It should be subject to the conformity rule and excluded unless it is admissible for some other purpose, such as proving motive or intent.

Nonetheless, even if Rule 404(b) *should* operate to bar prior-acts relationship evidence if used to prove conformity with character, broad readings of Article 38.371 and the holding of *Bass* would nonetheless prevent the operation of Rule 404(b)(1) in nearly every domestic assault case. The next section critiques the broad readings of Article 38.371 and *Bass*.

III. Against the Broadest Interpretations of Article 38.371 and *Bass*

A. Texas Code of Criminal Procedure Article 38.371

Texas Code of Criminal Procedure Article 38.371 ("38.371") is the result of legislation proposed and passed in 2015.[43] In relevant part, it reads:

> In the prosecution of an offense [defined as family violence], subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense [defined as family violence], including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.[44]

Article 38.371 is susceptible to a broad reading. The statute refers to "*all* relevant facts and circumstances that would assist the trier of fact," which does not suggest any substantive limitation. The statute specifically identifies only one substantive example—"evidence regarding the nature of the relationship between the actor and the alleged victim"—which is itself a vaguely defined concept capable of broad interpretation. For example, evidence of prior violent actions by the defendant toward the complainant would be probative of the nature of their relationship and so too would be evidence that the defendant controlled the couple's finances. Even mundane facts about where the couple liked to eat or how often either of them did household chores could be cast as evidence of the nature of their relationship.

Supporters of the 2015 bill that created Article 38.371 hoped that the law would be read broadly, so that juries would hear evidence that the defendant and complainant's relationship was consistent with common patterns in abusive relationships. Senator Chuy Hinjosa, a sponsor of the bill, released a legislative update in which he described one motivation for the bill: "a jury is often prevented from hearing the full story of the nature of the relationship between the defendant and the alleged victim and how power

43. H.B. 2645, 84th Leg., Reg. Sess. (Tex. 2015) (enacted) https://capitol.texas.gov/tlodocs/84R/billtext/pdf/HB02645F.pdf#navpanes=0 [https://perma.cc/X6Q5-TH44].

44. TEX. CODE CRIM. PROC. art. 38.371(b).

and control, over time, can lead to a violent act."[45] Aaron Setliff, the policy director for the Texas Council on Family Violence, stated that H.B. 2645 would "allow[] juries to hear the full story when it comes to the relationship of the parties in an assault family violence prosecution."[46]

Under the broad theory of Article 38.371, the government is allowed to give the jury "the full story": any evidence of how the defendant acted toward the complainant in the past is admissible, so long as that evidence is relevant to the charged offense.

And for Texas trial courts, the broad theory of Article 38.371 is on the table. There are few published appellate decisions that describe or delimit the scope of Article 38.371,[47] and in the absence of appellate-court guidance, Texas trial courts are free to take wide-ranging views on what is allowed into evidence under the new law. There is anecdotal evidence that some Texas trial courts, prosecutors, and defense attorneys have adopted the broad reading in practice.[48] But the broadest reading all but abrogates the conformity rule despite strong textual and legislative-history evidence to the contrary.

First, the text of Article 38.371 subjects evidence admitted under the statute to the conformity rule. Article 38.371(b) states explicitly that evidence offered under the statute is only admissible "subject to the Texas Rules of

45. STATE SENATOR JUAN "CHUY" HINOJOSA, LEGISLATIVE REPORT OF THE 84TH TEXAS LEGISLATURE, A REVIEW OF LEGISLATIVE & FUNDING ACCOMPLISHMENTS 30 (2015), http://www.senate.texas.gov/members/d20/press/en/p20150626a.pdf [https://perma.cc/SJS6-Q7F6].

46. Aaron Setliff, FACEBOOK (June 8, 2015), https://www.facebook.com/AaronSetliffTcfvPolicyDirector/posts/463484317143585?match=YWFyb24gc2V0bGlmZiwyNjQ1 [https://perma.cc/PJ22-PJLF] (summarizing "the measures from [TCFV's] agenda" in the 2015 Texas legislative session).

47. Two appellate courts have considered the scope of Article 38.371: Gonzalez v. State, 541 S.W.3d 306 (Tex. App.—Houston [14th Dist.] 2017, no pet.) and McCleery v. State, No. 03-17-00154-CR, 2017 WL 4766722 (Tex. App.—Austin Oct. 20, 2017, no pet.). In each case, the court notes that it was unable to find any case law analyzing the scope of evidence that may be admissible under Article 38.371. *See Gonzalez*, 541 S.W.3d at 311; *McCreery*, 2017 WL 4766722, at *8.

48. In 2017, the author heard one county court judge tell a defense attorney that most defense attorneys "just roll over" when the state seeks to admit prior-acts evidence under Article 38.371, rather than seeking to limit the admission of prior-acts evidence through objection. The implication was that the local defense bar had tacitly accepted the broad reading of Article 38.371. As another example, a participant in a forum on the Texas District and County Attorneys Association (TDCAA) website argued that Article 38.371 made relationship evidence a species of 404(b)(2) evidence. *See* AEJMartin, Comment to *38.371 DV Statute*, TEX. DISTRICT & COUNTY ATTORNEYS ASS'N (Jan. 19, 2016), http://tdcaa.infopop.net/eve/forums/a/tpc/f/157098965/m/3307032516 [https://perma.cc/NL8F-JMKJ] ("While I haven't heard back about its actual implementation, the way I've interpreted it for the few people who have called TDCAA and asked me is as if 404(b) stated: 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or to show facts and circumstances that would assist a trier of fact in a family violence case, including the nature of the relationship, . . .'").

Evidence or other applicable law."[49] Section (c) reiterates that "[t]his article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law."[50] Whatever the aspirations of H.B. 2645's sponsors and advocates, Article 38.371's text demonstrates a clear intention to preserve the conformity rule for evidence offered under Article 38.371.

Moreover, the legislative history of Article 38.371 provides additional evidence of legislative intent to apply the conformity rule to evidence offered under the statute. The bill that created Article 38.371, H.B. 2645, made no mention of Article 38.371 when it was introduced by Rep. Cesar Blanco; it simply created a new Penal Code offense for people who violated a family-violence bond condition or protective order.[51] In fact, Article 38.371's evidentiary provisions did not appear in H.B. 2645 until the Senate Committee on Criminal Justice's substitute bill, which added the language in 38.371(a) and (b) to the bill.[52]

Article 38.371 didn't appear in the introduced version of H.B. 2645 because the article was originally proposed by a different House bill, H.B. 2777, which had failed to make it out of the House Criminal Jurisprudence Committee.[53] And when it was introduced by Rep. Abel Herrero, H.B. 2777 would have created an incredibly broad admissibility rule for prior acts in domestic violence cases. The introduced version of H.B. 2777 read, in relevant part:

> Art. 38.371. EVIDENCE IN PROSECUTIONS OF OFFENSES INVOLVING FAMILY VIOLENCE AND OTHER SIMILAR OFFENSES. . . . (b) *Notwithstanding Rules 404 and 405*, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the victim of the alleged offense shall be admitted for its bearing on relevant matters, including: (1) the state of mind of the defendant and the victim; (2) the previous and subsequent relationship between the defendant and the victim; and (3) the character of the defendant and *acts performed in conformity with the character of the defendant*.
>
> *Notwithstanding Rules 404 and 405*, Texas Rules of Evidence, in the trial of [one of an enumerated set of offenses], evidence that the defendant has committed a separate offense [listed in the enumerated set] against an individual other than the victim of the instant alleged

49. TEX. CODE CRIM. PROC. art. 38.371(b).

50. TEX. CODE CRIM. PROC. art. 38.371(c).

51. H.B. 2645, 84th Leg., Reg. Sess. (Tex. 2015) (as introduced), http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB02645I.pdf#navpanes=0 [https://perma.cc/USG5-BZYR].

52. H.B. 2645, 84th Leg., Reg. Sess. (Tex. 2015) (Senate Committee substitute), http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB02645S.pdf#navpanes=0 [https://perma.cc/WU6J-HGCT].

53. *See HB 2777 History*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=84R&Bill=HB2777 [https://perma.cc/3KW9-8G6P].

> offense may be admitted for any bearing the evidence has on relevant matters, including the character of the defendant *and acts performed in conformity with the character* of the defendant.[54]

In other words, the introduced version H.B. 2777 would have created a rule under 38.371 that *explicitly permitted* conformity evidence in domestic violence and other cases. Rather than letting Rules 404 and 405 limit what came in under Article 38.371, the initial version of H.B. 2777 would have completely set aside those rules so that juries in domestic assault cases could truly hear "the full story."

But H.B. 2777 died in committee, and its language about disregarding Rules 404 and 405 failed to make it into the Article 38.371 provisions that first appeared in the H.B. 2645 Senate Committee substitute bill.[55]

In fact, not only did the Texas Senate *reject* a version of Article 38.371 that disregards Rules 404 and 405, they later *added* Section (c), which states explicitly that Article 38.371 would *not* permit otherwise inadmissible character evidence.[56] In other words, the legislation that created Article 38.371's evidentiary rule progressed from a version that explicitly permitted character-conformity evidence to a version that explicitly barred conformity evidence. That progression demonstrates an unmistakable intent to apply Rules 404 and 405 to limit the scope of evidence admitted under Article 38.371. Part IV proposes a reading of Article 38.371 consistent with that intent.

B. The Bass *rule—rebutting a defensive theory of fabrication*

In addition to Article 38.371, the holdings in a pair of cases decided by the Texas Court of Criminal Appeals in the late 2000s appear to create a rule which, if read broadly, would functionally abrogate the conformity rule in domestic violence cases. In *Bass v. State*[57] and *De La Paz v. State*,[58] the Court of Criminal Appeals upheld trial courts' admission of prior-acts evidence used to rebut defensive theories of fabrication.[59] Broad readings of these holdings would have outsize implications for domestic assault cases, in which fabrication defenses are commonly raised or necessarily implied.

---

54. H.B. 2777, 84th Leg., Reg. Sess. (Tex. 2015) (as introduced) (emphasis added), http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/HB02777I.pdf#navpanes=0 [https://perma.cc/7H3B-THAU].

55. H.B. 2645, 84th Leg., Reg. Sess. (Tex. 2015) (as introduced), https://capitol.texas.gov/tlodocs/84R/billtext/pdf/HB02645I.pdf#navpanes=0 [https://perma.cc/5YL9-4XLP].

56. *See* H.B. 2645, 84th Leg., Reg. Sess. (Tex. 2015) (Conference Committee Report adding Section (c)), http://www.lrl.state.tx.us/scanned/84ccrs/hb2645.pdf#navpanes=0 [https://perma.cc/XG4C-2KN3].

57. 270 S.W.3d 557 (Tex. Crim. App. 2008).

58. 279 S.W.3d 336 (Tex. Crim. App. 2009).

59. *Bass*, 270 S.W.3d at 563; *De La Paz*, 279 S.W.3d at 346–50.

Bass involved a church pastor accused of sexually molesting a 16-year-old girl.[60] The defendant argued that the girl's allegations were false; in his opening statement, defense counsel called the girl's testimony "pure fantasy" and "pure fabrication."[61] Defense counsel also stated that the pastor was "the real deal and the genuine article. And that the things that [the complainant] said are so contrary to his character, [sic] not worthy of belief."[62]

The trial court allowed the state to introduce testimony from two witnesses who alleged that the pastor had also molested them when they were young girls at the church.[63] At issue on appeal was whether the trial court was allowed to admit the prior-acts evidence.[64] The Fourteenth District Court of Appeals held that the trial court abused its discretion by admitting the prior-acts testimony.[65] The Court of Criminal Appeals reversed, stating that prior acts could be admitted to rebut a defensive theory of fabrication.[66] In holding that the trial court had *not* abused its discretion, the court explained that:

> [I]t is at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for the [sic] noncharacter-conformity purpose of rebutting appellant's defensive theory that the complainant fabricated her allegations against him and of rebutting the defensive theory clearly suggesting that appellant, as a "real deal" and "genuine" pastor, would not engage in the type of conduct alleged in the indictment.[67]

De La Paz, decided a year after *Bass*, extended *Bass*'s holding to a case in which the fabrication defense was merely implied. In *De La Paz*, a Dallas narcotics detective was charged with lying in a police report and under oath.[68] The defendant had worked with three other officers to create 22 kilos of fake cocaine (using pool chalk), planted most of the fake cocaine in the car of a man named Juan Vega, and pretended to have bought two kilos of the fake cocaine from Vega.[69] De La Paz wrote in his police report and testified at trial that he witnessed a fellow officer come meet with Vega inside a garage where Vega worked.[70] His fellow officers would later testify that there was never any meeting with Vega and that De La Paz asked one of them to lie about having seen Vega meet the officer in the garage.[71]

---

60. *Bass*, 270 S.W.3d at 558.

61. *Id*. at 557.

62. *Id*. at 558.

63. *Id*.; *see also* Bass v. State, 222 S.W.3d 571, 575 (Tex. App.—Houston [14th Dist.] 2007, pet. granted), *rev'd*, 270 S.W.3d 557 (Tex. Crim. App. 2008) (describing the testimony).

64. *Bass*, 222 S.W.3d at 574.

65. *Id*. at 578.

66. *Bass*, 270 S.W.3d at 563.

67. *Id.*

68. De La Paz v. State, 279 S.W.3d 336, 338 (Tex. Crim. App. 2009).

69. *Id.* at 338–39.

70. *Id.* at 339.

71. *Id.*

De La Paz argued that he did not commit perjury because he testified truthfully about seeing Vega meet the officer in the garage.[72] After the defense rested, the state then put on evidence that De La Paz had lied in police reports in two other cases in which he and other officers planted fake drugs on people.[73] The state argued that the prior-acts evidence was being introduced to rebut the defensive theory that its witnesses lied in the Vega case.[74]

The intermediate court of appeals reversed De La Paz's conviction, holding that the trial court abused its discretion in admitting the prior-acts evidence.[75] The court reasoned that it "would be hard pressed to find a disputed criminal case in which the credibility of the State's witnesses was not somehow attacked."[76] Moreover, the court was concerned that "allowing such attacks to open the door to extraneous offense evidence would render rule 404(b) virtually meaningless."[77]

The Court of Criminal Appeals reversed, holding that the prior-acts evidence "was admissible to rebut the defense position that it was the State's witnesses who were lying about the Vega drug deal."[78] The court reasoned that although De La Paz did not accuse the state's witnesses of being generally untruthful people, he nevertheless opened the door by (a) *inferentially* accusing them of lying in this case by maintaining a contradictory position and (b) stating in the opening statement that the witnesses had a motive to fabricate (they wanted immunity in their own cases).[79]

Citing *Bass*, the court stated that "[i]n these circumstances, it is at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for the noncharacter-conformity purpose of rebutting appellant's defensive theory that Herrera and Vega were lying about these specific events and had fabricated their testimony to please the prosecution."[80]

The broadest reading of *Bass* and *De La Paz* is that if a defendant merely maintains a position that contradicts a state's witness, then a trial court is

72. *Id.*

73. *Id.* at 341–42.

74. *Id.* at 340.

75. Delapaz v. State, Nos. 05-06-00963-CR & 05-06-00964-CR, 2007 WL 4442990, at *1 (Tex. App.—Dallas Dec. 20, 2007, pet. granted), *rev'd sub nom*. De La Paz v. State, 279 S.W.3d 336 (Tex. Crim. App. 2009).

76. *Id.* at *4.

77. *Id.*

78. *De La Paz*, 279 S.W.3d at 347.

79. *Id.* at 345–47.

80. *Id.* at 346–47.

within its discretion to allow the state to put on prior-acts evidence to rebut an implied claim of fabrication.[81]

There are two problems with the broad reading. The first problem is that the broad reading creates an incurable prejudice when fabrication-rebuttal evidence is admitted. For many domestic assault cases, there is no difference between arguing that a prior act rebuts a fabrication theory and arguing the defendant acted in conformity with character. Because jurors must make the conformity inference to make the fabrication-rebuttal inference, there is no chance that a curative instruction will be effective. The second problem is practical: because a defensive theory of fabrication is nearly always implied by the assertion of innocence, the broad reading of *Bass* and *De La Paz* would all but abrogate the conformity rule in domestic assault cases.[82]

Let's start with the problem of incurable prejudice. *Bass* and *De La Paz* permit the state to rebut a fabrication theory by using prior-acts evidence to argue that because the defendant hit the complainant before, the complainant is more likely to be telling the truth when she says the defendant hit her this time. The Court of Criminal Appeals justified that approach by stating that 404(b) only excludes prior-acts evidence if used to show "action in conformity," but that prior-acts evidence may be admissible for purposes such as proving motive or intent, and that "[t]he exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive."[83] In other words, rebutting a fabrication defense is just another 404(b)(2) exception.

The conformity rule bars the state from using prior-acts evidence to argue simply that because the defendant hit the complainant before, he is more likely to have hit her this time. But to make the fabrication-rebuttal inference (because he did it before, the witness is telling the truth that he did it this time), a juror *is required to make* the conformity inference (because he

81. Following *Bass*, the Texas intermediate courts of appeals routinely allow extraneous-act evidence to rebut a defensive theory of fabrication. *See* Leal v. State, No. 04-15-00552-CR, 2016 WL 4013791, at *2 (Tex. App.—San Antonio July 27, 2016, no pet.) ("Extraneous offense evidence is admissible to rebut a defensive theory that the complainant fabricated the allegations against the defendant."); Martinez v. State, No. 03-14-00106-CR, 2016 WL 806718, at *4 (Tex. App.—Austin Feb. 24, 2016, no pet.) ("Appellant's counsel inferred [sic] that M.R. was lying because: (1) she resented appellant's discipline of her, (2) she was close with appellant's wife and wanted to assist her in the divorce proceedings against appellant, or (3) she sought attention from her neglectful drug-addicted parents. The fact that appellant's counsel did not explicitly state in his opening statement that M.R. was lying or more directly describe a motive for fabrication does not mean that he did not raise the defense of fabrication."); Gaytan v. State, 331 S.W.3d 218, 224 (Tex. App.—Austin 2011, pet. ref'd) (holding that the defense opened the door to prior-acts evidence by implying fabrication in its opening statement: "The defense in this case is real simple: this didn't happen. . . . What the evidence is going to show is that [C.R.] got mad at Frank because he wouldn't play with her anymore [sic]. She made this statement [alleging abuse] and there's no evidence to support it . . . the story changes and grows and cracks and there's no physical evidence.").

82. Of course, the problems that *Bass* and *De La Paz* create regarding prior-acts evidence apply more broadly than just to domestic assault cases, even if they create particularly acute problems for domestic assault cases.

83. *De La Paz*, 279 S.W.3d at 342–43.

did it before, he did it this time). Allowing prior-acts evidence to rebut a defensive theory smuggles in conformity evidence as a necessary component of the inferential chain.

This problem does not exist for the explicitly identified 404(b)(2) exceptions. To say that a prior act is relevant because it provides a motive for the defendant to commit the charged offense relies on a logical argument that does not necessarily rely on the conformity inference.[84] Motive evidence is relevant because the defendant's reason to commit the charged offense makes it more likely that he committed the offense. That inferential chain differs critically from the conformity inference because in many cases there is no intermediate premise about whether the defendant acted consistently with a general trait.

The relevance of fabrication-rebuttal evidence, one the other hand, depends necessarily and universally on the premise that the defendant's prior act makes it more likely that he later committed a similar act. The juror cannot make the truthfulness inference without making the conformity inference. If the conformity premise were missing, then the prior-act evidence would make it no more likely that the witness was being truthful about the charged offense.

The fact that fabrication-rebuttal evidence logically relies on the conformity evidence matters because it makes it impossible that a curative instruction will be effective. The curative instruction for fabrication-rebuttal evidence requires telling a jury that they *can* use the prior-act evidence to decide that the witness is being honest when he or she says that the defendant committed the charged offense. Of course, in order to decide that the witness is being truthful, the juror must also decide that the defendant committed the prior act *and* that a person who committed the prior act is more likely to repeat the prior conduct.

Which is to say, to follow the curative instruction the juror both *must* make the conformity inference and *must not* make the conformity inference. Research indicates that jurors struggle to understand and apply the court's instructions in the best of circumstances.[85] What do we expect jurors to do when faced with an unsolvable paradox? The result will be either to render pointless either the prior-acts evidence itself (for those jurors deeply committed to the conformity rule) or the conformity rule (for the others).

---

84. However, there will be cases in which evidence admissible to prove motive is also conformity evidence. The point here is that motive evidence does not *in all cases* require jurors to make the conformity inference, whereas jurors must make the conformity inference in all cases to make the fabrication-rebuttal inference.

85. *E.g.*, Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & HUM. BEHAV. 469, 487 (2006) (concluding, after a meta-analysis of dozens of studies collectively involving hundreds of subjects, that "it is clear that judicial instructions do not effectively eliminate jurors' use of inadmissible evidence").

As for the practical problem, there is a real concern that courts will read *Bass* to permit prior-acts evidence based on no more than a defendant's denial of a witness's allegations. Even if the defendant never claims he's "the real deal and genuine article," and even if he never points out the witness's motive to lie, the defendant will at least *imply* that the complainant is lying simply by denying that he assaulted the complainant. *De La Paz* gives trial courts the room to infer that implying a fabrication defense is all it takes to admit prior-acts evidence, in which case defendants open the door to conformity evidence by merely disputing a witness's accusations against them.[86]

A recent appellate decision exemplifies the practical problem. In *Gonzalez v. State*,[87] a man was charged with domestic assault for throwing his girlfriend to the ground, kicking her in the stomach, and trying to choke her.[88] She initially reported the assault to a responding officer but later insisted that the assault never happened and ultimately refused to testify at trial.[89] To prove that the assault actually occurred, the state asked to introduce at trial a 2014 charging document related to a prior conviction for domestic assault that identified the man's girlfriend as the complainant.[90] The state argued that the charging document was admissible both under Article 38.871 and to explain non-conformity fact issues, such as why the jury should credit the girlfriend's initial report over her recantation.[91] The trial court admitted the charging document.[92]

On appeal, the man argued that the trial court impermissibly admitted the charging document because it served no purpose other than to prove action in conformity with character.[93] The appellate court disagreed, finding that "[t]he trial court could have concluded that the evidence was admissible to refute [the man's] defensive theory that [his girlfriend] fabricated the assault or that no assault actually occurred."[94] During opening statements, the defense lawyer told the jury that the man never hit the complainant on the night in question.[95] Citing *Bass*, the court found that the lawyer's statement "opened the door for the State to prove that the assault happened as [the girlfriend] initially alleged, but that [she] recanted her allegations out of fear

86. "[A]ppellant's position was that the contact did occur, and he saw it. Herrera and Vega's position was that the contact did not occur, therefore no one could have seen it. One of these two versions cannot be true. All three of these witnesses were positive about their diametrically different versions; therefore someone committed perjury-knowingly made a false statement under oath with the intent to deceive." *De La Paz*, 279 S.W.3d at 346.

87. 541 S.W.3d 306 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

88. *Id.* at 308–09.

89. *Id.* at 309

90. *Id.* at 309–10.

91. *Id.* at 311.

92. *Id.* at 310.

93. *Id.* at 310–11.

94. *Id.* at 312.

95. *Id.*

for, or love for, the [man].'"[96] Like the court in *Bass*, the *Gonzalez* court found that it was "at least within the zone of reasonable disagreement" that the prior-acts evidence was admissible, and it upheld the trial court's admission of the charging document.[97]

Although a recantation was relevant to admissibility in *Gonzalez*, the court's holding suggests that the charging document would have been admissible on the basis of the defensive theory of fabrication alone.[98] If *Bass* and *De La Paz* allow a trial court to admit prior-acts evidence to rebut the implied fabrication claim, then a defendant's price for maintaining his or her innocence is abrogation of the conformity rule.

Because of both the theoretical and practical problems with reading *Bass* and *De La Paz* broadly to admit prior-acts evidence whenever a defendant denies a witness's allegations, they should be cabined to their facts. Part IV proposes a framework for applying a limited version of the *Bass* rule in domestic assault cases that provides defendants with predictability and preserves some of the conformity rule's force.

IV. A Coherent Framework That Promotes Predictability and Preserves Rule 404(b)(1)

A. What, Then, Is the Proper Scope of Article 38.371 Evidence?

The most reasonable interpretation of Article 38.371 in light of its text and history is that it simply codifies the law that existed before it was passed, in order to clarify the use of relationship evidence in domestic assault cases.

Before Article 38.371, relationship evidence *was already admissible*, so long as it was relevant.[99] For example, consider a domestic assault case in which the complainant had previously recanted, but then at trial testified consistent with her initial report to police. If the defense argued that the jury should disbelieve the complainant's trial testimony because she had previously recanted, then evidence of the relationship between the defendant

---

96. *Id.*

97. *Id.*

98. *Id.* "The complaint on which [the man's] prior assault conviction was based is relevant, and within the scope of evidence permitted by article 38.371, because it goes directly to [the man's] defensive theory that the offense never occurred." *Id.* That statement precisely captures the practical problem: as soon as a defendant denies the allegations against him, an overbroad reading of *Bass* would permit the admission of conformity evidence that would otherwise be inadmissible under Rule 404(b) and a proper reading of Article 38.371.

As discussed below, relationship evidence was admissible to explain a witness's recantation before Article 38.371 was enacted. If explaining the witness's recantation was the *Gonzalez* court's only basis for upholding the admission of the prior-acts evidence, neither Article 38.371 nor *Bass* would be necessary to support the court's decision, and the ruling would not fairly exemplify the practical problem created by the confluence of Article 38.371 and *Bass*.

99. Heard v. State, No. 08-02-00-CR, 2004 WL 759257, at *2 (Tex. App.—El Paso, 2004, pet. ref'd).

and the complainant might have been relevant to explain why her recantation should not cast doubt on her trial testimony. For example, evidence of physical abuse contemporaneous with the recantation would be relevant because the prior acts of abuse would make it unlikely that the recantation was voluntary and truthful. So, too, would evidence that the complainant was dependent financially on the defendant. Relationship evidence has always been admissible if it is relevant to assist the trier of fact in determining whether the defendant committed the charged offense.

And indeed, that's precisely what Article 38.371 says it allows into evidence: "each party may offer testimony or other evidence of *all relevant facts and circumstances that would assist the trier of fact* in determining whether the actor committed the offense."[100] Article 38.371 is actually much broader than just a relationship-evidence statute, insofar as it purports to admit *any* relevant evidence—not merely relationship evidence. Relationship evidence is mentioned as an example of a subset of the universe of relevant evidence admissible under Article 38.371.[101]

As a subset of the universe of evidence admissible under Article 38.371, relationship evidence is also subject to the limitations imposed on the full universe of evidence. As discussed in Part III, the key limitations are that Article 38.371 evidence is admissible "subject to the Texas Rules of Evidence or other applicable law,"[102] and that Article 38.371 "does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law."[103]

The proper scope of Article 38.371 evidence is thus the same as the scope of admissible evidence before Article 38.371: if the prior-acts evidence is relevant, and it's not being used to prove action in conformity with character, then it should be admitted subject to other evidentiary rules, such as Rule 403.

There are several virtues to this reading of Article 38.371. The first should be dispositive on its own: this is the reading most consistent with the statute's text and history.[104] This reading takes seriously the explicit limiting provisions in the law. This reading also recognizes that a more muscular relationship-evidence rule akin to the relationship-evidence provision of Article 38.37—which admits relationship evidence in certain cases involving

100. TEX. CODE CRIM. PROC. art. 38.371(b) (emphasis added).

101. After stating that any relevant evidence would be admissible (subject to the Texas Rules of Evidence), Article 38.371 mentions that "any" evidence includes relationship evidence. *See id.* ("Each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), *including* testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.") (emphasis added).

102. *Id.*

103. TEX. CODE CRIM. PROC. art. 38.371(c).

104. *See supra* note 56–59 and accompanying text.

minors *notwithstanding* Rules 404 and 405—was unable to pass out of committee.

Another virtue of this reading of Article 38.371 is that it preserves a role for conformity evidence in domestic assault trials. Rather than adopting a misreading of the statute that would admit any prior act between the defendant and the complainant—*even if its only relevance is to suggest that because the defendant was abusive before, he was abusive again*—this reading of the statute requires some other non-conformity relevance in order to admit relationship evidence. Preserving the conformity rule for certain defendants thus preserves some protection against inferential error risk and nullification risk—risks sufficiently important that American criminal law has sought to cabin them writ large.[105]

B. How Should Courts Limit Evidence Rebutting a Defensive Theory of Fabrication?

1. Texas intermediate courts of appeals—Limit Bass *and* De La Paz *to their facts*—Although the intermediate courts of appeals are bound by *Bass* and *De La Paz*, a close reading of each case provides them with room to overturn trial courts that admit conformity evidence simply to rebut a defensive theory of fabrication. That's because both *Bass* and *De La Paz* ultimately rely on more than simply the assertion of a fabrication defense to affirm the trial courts' decisions.

In *Bass*, for example, the court's holding that the trial court did not abuse its discretion was based on more than just the defendant's fabrication defense. Here is the key language from the court's decision again:

> In this case, *it is at least subject to reasonable disagreement* whether the extraneous-offense evidence was admissible for the noncharacter-conformity purpose of rebutting appellant's defensive theory that the complainant fabricated her allegations against him *and of rebutting the defensive theory clearly suggesting that appellant, as a "real deal" and "genuine" pastor, would not engage in the type of conduct alleged in the indictment.*[106]

The court's affirmation of the trial court's decision wasn't based on the fabrication defense alone—it was also based on the defense's broad assertion of the pastor's good character. And courts consistently hold that when defendants make blanket assertions of their good character, they open the door to prior-acts evidence that rebuts their good-character assertion.[107] In

105. Anderson, *supra* note 4, at 1928.

106. Bass v. State, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008) (emphasis added).

107. *See, e.g.*, Daggett v. State, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005) ("If a defendant testifies to a blanket statement of good conduct or character—*e.g.,* 'I would never have sex with a minor'—he may 'open the door' by leaving a false impression with the jury about a relevant act or character trait. Evidence of an extraneous act that tends to rebut such testimony may be admissible to impeach the defendant.").

Bass, the court made clear that its holding rested in part on the defense's assertion that he was a "real deal," "genuine" pastor who wouldn't have done what he had been accused of.

In *De La Paz*, the court did not even base its holding solely on the defendant's implied fabrication defense. The court also affirmed the trial court's decision on the basis of the doctrine of chances:

> In these circumstances, it is at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for the noncharacter-conformity purpose of rebutting appellant's defensive theory that Herrera and Vega were lying about these specific events and had fabricated their testimony to please the prosecution. Evidence of two other nearly identical acts of purported fabrication by appellant concerning "buy-bust" deals was admissible to rebut the defense position that it was the State's witnesses who were lying about the Vega drug deal.
>
> But appellant's primary defense was that he saw "the contact" between Alonso and Vega even though no one else who was there saw it. Therefore, what he wrote in his offense report was true, and what he testified to in the former trial was true. He had no intent to deceive and he did not deceive. Period. *And that raised a clear basis, rejected by the court of appeals in its denial of the State's motion for rehearing, to admit the extraneous offense evidence under the "doctrine of chances."*[108]

The court then went on to discuss why the prior-acts evidence was admissible under the doctrine of chances.[109] In other words, the court's discussion of fabrication-rebuttal admissibility in *De La Paz* is arguably dicta, since the court appears to rest its decision on other grounds.

These details matter because they provide intermediate courts of appeals with the room to decide many ordinary fabrication-rebuttal cases differently. Were Texas intermediate courts of appeals to consider a case in which a defendant merely denied a witness's testimony but did not either (a) make sweeping statements about his good character, or (b) suggest the repetition of highly unlikely events, they should not be bound by *Bass* or *De La Paz* to affirm the admission of prior-acts evidence simply to rebut an express or implied fabrication defense.

2. Texas intermediate courts of appeals—import the Wheeler *rule*—A second option available to the intermediate courts of appeals to limit fabrication-rebuttal evidence and preserve the conformity rule, in at least a

108. De La Paz v. State, 279 S.W.3d 336, 346–47 (Tex. Crim. App. 2009) (emphasis added).

109. *Id.* at 347–48 (stating, for example, that "[u]nder the 'doctrine of chances,' evidence of such a highly unlikely event being repeated three different times would allow jurors to conclude that it is objectively unlikely that appellant was correct in his Vega offense report or that he was truthful in his testimony that he saw contact between Alonso and Vega").

limited way, is to import a rule from sexual assault cases. The rule—call it the *Wheeler*[110] rule—allows prior-acts evidence to be admitted to rebut a defensive theory of fabrication or framing only if the prior acts are both (a) similar to the charged conduct and (b) not subject to the same alleged motive to fabricate.[111]

Wheeler v. Texas was a child sexual assault case in which a man was charged with molesting a nine-year-old friend of his daughter's.[112] One of the defendant's defensive theories was that the complaining child's parents "had filed a lawsuit against appellant and argued that [the child] made up (or was duped into making) these allegations for profit."[113] In its rebuttal case, the state put on the defendant's niece as a witness; the niece testified that the defendant had previously molested her in a similar way when she was six but that no charges were filed.[114] The court of appeals held that the trial court abused its discretion in admitting the prior-acts evidence.[115]

Reversing the appellate court, the Court of Criminal Appeals held that the prior-acts evidence was admissible to rebut the defendant's "frame-up" theory because the prior act involved a similar conduct without any similar financial motive to push a false allegation.[116] However, the court placed the following footnote at the end of its statement admitting the prior-acts evidence to rebut a "frame-up" theory:

> An extraneous offense may be admissible to rebut the defense in a child sexual assault case that the defendant is the innocent victim of a "frame-up" by the complainant or others. In such a situation, the extraneous misconduct must be at least similar to the charged one and an instance in which the "frame-up" motive does not apply.[117]

The Texas intermediate courts of appeals have adopted *Wheeler*'s rule in sexual assault cases, requiring that prior-acts evidence can be admitted to rebut a defensive theory of fabrication or framing only if the prior acts are both (a) similar to the charged conduct and (b) not subject to the same alleged motive to fabricate.[118]

---

110. Wheeler v. State, 67 S.W.3d 879 (Tex. Crim. App. 2002).

111. *Id.* at 886–89.

112. *Id.* at 880.

113. *Id.* at 887.

114. *Id.* at 886.

115. *Id.*

116. *Id.* at 887 ("[The child's] testimony further served to contradict appellant's "frame-up" theory by showing appellant's prior misconduct (very similar to that for which he was charged in the present case) in circumstances involving neither money nor revenge as possible motives.").

117. *Id.* at 887 n.22.

118. *See, e.g.*, Dennis v. State, 178 S.W.3d 172, 178–79 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) ("[A]n extraneous offense may be admitted to rebut the defense that the defendant is the innocent victim of a frame-up if the extraneous misconduct is '*similar to the charged one* and an instance in which the "frame-up" motive does not apply.'") (citing *Wheeler* and holding that a similar but not identical prior act of sexual assault was admissible); Sandoval v. State, 409 S.W.3d

For the similarity prong, Texas intermediate courts of appeals have interpreted *Wheeler*'s rule to require a less exacting degree of sameness than is required to admit *modus operandi* evidence. In *Dennis v. State*,[119] a man was charged with sexually assaulting his 14-year-old daughter.[120] While she was visiting him at his apartment and sleeping on his couch, the defendant came over to her in the middle of the night, told her he was going to "teach her about sex," and forced her to have intercourse.[121] The defendant argued that the girl fabricated the story because she was angry with the defendant for taking away her phone.[122] The trial court allowed the state to admit evidence that the defendant had previously sexually assaulted his underage niece while she was sleeping on the defendant's couch.[123]

Affirming the trial court's decision, the court of appeals held that the conduct was sufficiently similar to meet *Wheeler*'s requirements, since both the prior and the charged conduct involved teenage girls whom the defendant knew, both occurred in defendant's apartment on the living room couch, both occurred in the same summer, and defendant did not say much to either victim during the assault.[124] The court of appeals rejected the defendant's argument that the prior and the charged conduct need to be "one of exacting sameness."[125]

The chief virtue of the *Wheeler* rule is that the similarity requirement eliminates the more problematic cross-situational inference concerns raised by prior-acts evidence. A primary concern underlying the conformity rule is that juries will afford undue weight to conduct that has little cross-situational inferential value.[126] That concern is implicated most strongly when the prior act is completely dissimilar to the charged conduct. For example, the inference that a person who stole a purse from a stranger is more likely to sexually assault his child is incredibly weak, since it relies on the broadest

259, 301 (Tex. App.—Austin 2013, no pet.) ("To be admissible for rebuttal of a fabrication or 'frame-up' defense, 'the extraneous misconduct must be at least similar to the charged one.'") (citing *Wheeler* and holding that "[t]ouching the butt over the clothing is not sufficiently similar to penile penetration of the sexual organ" to admit the prior-acts evidence).

119. 178 S.W.3d 172 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

120. *Id.* at 175.

121. *Id.*

122. *Id.* at 178.

123. *Id.* at 176.

124. *Id.* at 179.

125. *Id.* ("We hold that it does not follow that an extraneous offense admitted to rebut the defensive theory of frame-up requires this same degree of exacting similarity between the extraneous and charged offenses [as is required to prove *modus operandi*].").

126. *See, e.g.*, Anderson, *supra* note 4, at 1929 ("The danger of inferential error is twofold: jurors could overestimate the effects of a character trait by giving it too much predictive value, or they could fill in gaps in their knowledge by postulating entire characters out of isolated traits. Inferential error prejudice concerns courts because propensity evidence might not be as predictive as it seems; indeed, it might not be predictive at all.").

sort of cross-situational inference.[127] On the other hand, the inference that a person who assaulted his spouse during an earlier argument about finances is more likely to then assault his spouse again during a subsequent argument about finances is much stronger, since it relies on far less cross-situational reasoning. In other words, a strong similarity requirement cures one of the two chief concerns with conformity evidence.[128]

A second virtue of the *Wheeler* rule is that it allows the defendant to more reliably predict what prior-acts evidence will be admitted. The degree of similarity between the prior act and the charged offense will dictate the likelihood of admissibility. Defendants would be able to focus their investigation and trial preparation on a more manageable universe of prior acts, and defense counsel could give defendants more reliable advice about the expected value of a trial when evaluating a plea offer.

Of course, the *Wheeler* rule is an imperfect tool for excluding conformity evidence. To illustrate the point, the prior-acts evidence at issue in both *Bass* and *De La Paz* would have almost certainly been admitted even under the *Wheeler* rule, given the close similarity between prior-acts evidence and the charged offenses in each case. And again, the prior-acts evidence in *Bass* and *De La Paz* are textbook examples of conformity evidence. In other words, the *Wheeler* rule only keeps out *some* conformity evidence—dissimilar conformity evidence.[129] But compared to a world in which *Bass* and *De La Paz* leave trial courts free to admit a wide range of prior acts so long as they tend to any degree to rebut a fabrication theory, the *Wheeler* rule at least gives litigants some increased measure of predictability, and defendants some relief from the prejudicial harms of conformity evidence.

3. The Texas Court of Criminal Appeals—cabin Bass *and* De La Paz*—* The Court of Criminal Appeals should explicitly cabin its decisions in *Bass* and *De La Paz* as discussed in Section IV.B.1,[130] and announce a rule that trial courts abuse their discretion by admitting conformity evidence that

127. Which is to say, it relies on the generic trait-driven inference that a person who would break the law in one context is more likely to later break the law in another unrelated context.

128. As for nullification risk, the similarity requirement does not ameliorate that concern. Jurors who hear about similar and abhorrent prior acts might be less likely to mistakenly overvalue the weight of the prior acts, but they are still susceptible to basing their judgment on their hatred of the prior acts rather than on the evidence of the charged offense.

129. And, frankly, the *Wheeler* rule only keeps out the *least damaging* conformity evidence. The most damaging prior-acts evidence will tend to be that which most closely resembles the charged offense.

130. *See supra* Part IV.B.1.

would be otherwise barred by 404(b)(1) if that evidence is offered solely to rebut a defensive theory of fabrication.[131]

Under this rule, for example, the sorts of prior-acts evidence in *Bass* and *De La Paz* would not be admissible without the extra ingredients present in those cases.[132] Evidence that the pastor molested two other children previously only makes it less likely that the complainant was lying if the pastor's prior molestations make it more likely that he molested the complainant. In other words, the truthfulness inference relies necessarily on the conformity inference. Under a revised rule from the Court of Criminal Appeals, in domestic assault trials, if the defendant argues that the complainant is not telling the truth, prior acts of violence, abuse, or control could not be introduced to rebut the defendant's fabrication theory without another independent basis for admission.

The benefits of cabining *Bass* and *De La Paz* relate to the concerns discussed in Part III. First, the revised rule would bar a set of evidence for which no sensible curative instruction can be given. Jurors would not be placed in the position of being told both that they *must* consider prior-acts evidence to determine whether the complainant is being truthful and also that they *must not* consider that same evidence for the necessary premise that the defendant acted in conformity with those prior acts.

Second, the new rule would allow defendants to assert their right to trial courts without automatically forfeiting the protection of the conformity rule. Defendants would not be penalized with a host of prejudicial prior acts simply because they denied the accuracy of the complainant's testimony or (as in *De La Paz*) presented a contradictory version of events.

Third, the new rule adds predictability to domestic assault trials. The holdings of *Bass* and *De La Paz* set forth merely permissive rules: they hold only that "it is at least subject to reasonable disagreement" whether prior-acts evidence that would otherwise be conformity evidence could be admitted to rebut a fabrication theory.[133] In other words, trial courts have the discretion to admit the prior-acts evidence—or not. Defendants will often not know in advance of trial whether damaging prior-acts evidence will be admitted simply on the basis of denying the complainant's testimony,[134] thus limiting

131. The Texas Legislature could also overrule *Bass* and *De La Paz* by statute. Although legislative reforms fall outside the scope of this Paper, the benefits of overruling *Bass* and *De La Paz*, as discussed in this subsection, would be the same whether reform comes at the hands of the CCA or the legislature.

132. That is, without either sweeping statements of good character (*Bass*) or repeated circumstances that are so unlikely that they implicate the doctrine of chances (*De La Paz*).

133. Bass v. State, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008); De La Paz v. State, 279 S.W.3d 336, 346–47 (Tex. Crim. App. 2009).

134. Trial courts may often be reluctant to decide the admissibility of *Bass* evidence before the trial because the admissibility of such evidence depends on the language that defense counsel uses during opening statements or cross examinations.

their ability to properly evaluate the value of a plea offer and plan a proper defensive theory.[135]

V. Combining Rule 404(b), Article 38.371, and the Fabrication-Rebuttal Rules in Practice

To see how the different sets of rules play out in practice, return to the hypothetical defendant in Part I. If the defendant plans to make the barest defense of simply denying the truth of the complainant's testimony, the rules proposed in this Paper afford the defendant significantly more predictability and protection against conformity evidence than the defendant has under current common readings of Article 38.371 and *Bass*.

A. The Unpredictability of Current Law

As the law is commonly interpreted now, the defendant should expect that any prior acts of domestic violence against either the complainant or others will likely be admitted. Moreover, prior-acts evidence relevant to showing an abusive or controlling relationship will likely also be admitted.[136]

If the defendant draws a trial judge who takes a broad view of Article 38.371, evidence of prior acts of violence or of power and control will be admitted because it is probative of the "nature of the relationship" between the defendant and the complainant. The state can argue that the prior-acts evidence is being offered for the nonconformity purpose of illustrating the nature of the defendant-complainant relationship under Article 38.371, and the jury will hear the evidence subject to a limiting instruction.

However, even if the defendant draws a judge who takes the view of Article 38.371 that I propose in Section IV.A, evidence of prior acts of violence against the complainant or others may nonetheless be admitted under *Bass*. The state can argue that the prior acts of violence are admissible because they would tend to show that the complainant is telling the truth about the charged offense: because the defendant has been previously violent against the complainant or others, it is more likely that the defendant was violent on the day in question. In other words, whether the trial court will admit prior-acts evidence depends on how the court uses the substantial discretion afforded to it by *Bass*, which is difficult to predict *ex ante*.

---

135. Defense counsel might reasonably opt for a different strategy at trial, and may use different language in arguing the case; if they expected prior-acts evidence to be admitted automatically, then they would if the admissibility of the prior-acts evidence depended on whether defense counsel opened the door through particular theories or statements.

136. Domestic violence often takes place in the context of a larger pattern of emotional, financial, and physical assertions of power and control. *See, e.g.*, *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/ [https://perma.cc/DLL6-R65G] (discussing the "Power and Control Wheel," a model for explaining common pattern of actions that abusive people use to control or dominate their intimate partners). The state may offer prior-act evidence under the theory that the prior-acts evidence proves that the defendant and complainant's relationship fit within those common patterns of abusive relationships.

In either case, there is no room for the conformity rule to protect the defendant. The broad reading of Article 38.371 would admit relevant relationship evidence no matter what the defendant does at trial. Similarly, trial courts are free to admit prior-acts evidence following *Bass* or *De La Paz* even if the defendant simply denies the complainant's version of events or presents a contradictory version of events.

B. Reading 38.371Correctly and Using the Wheeler *Rule*

If the Texas intermediate courts of appeals were to both (a) adopt the proper reading of Article 38.371 proposed in Section IV.A, and (b) import the *Wheeler* rule to domestic assault cases, the defendant could expect that only prior-acts offenses similar to the charged offense would be admitted. So, for example, evidence that the defendant has previously been physically violent with the complainant under circumstances similar to the charged offense would likely be admissible under the *Wheeler* rule. So, too, would evidence that the defendant had been physically violent with a previous spouse or dating partner under circumstances similar to the charged offense.

On the other hand, evidence that the defendant had been unkind, controlling, or emotionally abusive toward the complainant or a previous spouse or dating partner would not be admissible unless it had some relevance apart from the conformity inference. If the defendant simply denies that the complainant is telling the truth and points out flaws in her version of events, the defendant would not risk opening the door to a range of relationship evidence outside of similar acts of violence. Relationship evidence in general would only become relevant if it tended to prove some nonconformity fact in the case—for example, if it tended to show the jury why the complainant's recantation or delay in reporting should not undermine the credibility of her trial testimony.

Using the *Wheeler* rule, the defendant gains the conformity rule's protection for a broad range of relationship evidence, is able to predict which similar prior acts are likely to be admitted, and can structure his defensive theory and trial strategy so as to avoid opening the door to dissimilar prior acts.

C. Reading 38.371 Correctly and Limiting Bass *and* De La Paz *to Their Facts*

The Court of Criminal Appeals or the intermediate courts of appeals should both (a) adopt the proper reading of Article 38.371 proposed in Section IV.A, and (b) limit and supplant the holdings of *Bass* and *De La Paz* with a rule that precludes trial courts from admitting conformity evidence for the purpose of rebutting a fabrication defense. If they did, defendants could expect that prior-acts evidence would not be admitted unless the evidence had some relevance other than to prove conformity with character.

So, for example, evidence that the defendant has previously been physically violent with the complainant or others would be inadmissible if the defendant simply denies that the complainant is telling the truth or points out flaws in her testimony. Evidence that the defendant had been unkind, controlling, or emotionally abusive toward the complainant or a previous spouse or dating partner would likewise be inadmissible if the defense is simply to deny the allegations.

Of course, prior-acts evidence could be relevant if it tended to prove some nonconformity fact in the case, such as the weight of a recantation or delay in reporting. But the defendant could predict, based on the facts of the case, whether some nonconformity relevance exists. The defendant could also plan his trial strategy to avoid making claims that would open the door to prior-acts evidence. But the defendant would at least be assured that prior acts would not be automatically admissible based on his denial of the complainant's testimony.