

Exclusive Admissibility of Specific Act Evidence in Initial-Aggressor Self-Defense Cases: Ensuring Equity Within the Adjutant Framework

*“[T]he inadequate guidance provided to judges by the court today . . . is certain to lead to inconsistent application of the new rule, protracted proceedings, and lengthy appeals [O]ur case law will soon reflect the uncertainty and inconsistency of the case-by-case assessments encouraged by the court today.”*¹

I. INTRODUCTION

The admissibility of character evidence by defendants in self-defense cases to prove that the victim was the first aggressor varies among jurisdictions. All federal courts allow such evidence, but its admissible form is confined to reputation or opinion evidence.² The majority of states also allow some form of victim character evidence in self-defense cases.³ Among these states, the form in which such evidence is admissible varies considerably, as some states have adopted the Federal Rules of Evidence, others have not, and still others have adopted portions of the federal rules.⁴ Two states that have not adopted

1. Commonwealth v. Adjutant, 824 N.E.2d 1, 22 (Mass. 2005) (Cowan, J., dissenting) (predicting negative consequences of inadequate instruction regarding new common-law evidentiary rule).

2. FED. R. EVID. 404. Federal Rule of Evidence (FRE) 404 states in pertinent part:

(a) Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (2) Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor

Id.

Federal circuit courts have unanimously held that contemporaneous knowledge is not required under FRE 404(a)(2). See United States v. Keiser, 57 F.3d 847, 855 (9th Cir. 1995) (summarizing personal knowledge not required for admissibility of character evidence in federal courts under Rule 404(a)(2)). FRE 405(a) states: “In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.” FED. R. EVID. 404(a).

3. See, e.g., White v. State, 314 So. 2d 857, 864 (Ala. 1975) (allowing general reputation evidence of victim to prove first aggression); People v. Wright, 703 P.2d 1106, 1113 (Cal. 1985) (allowing specific acts of victim on third persons as well as general reputation evidence); State v. Smith, 608 A.2d 63, 72 (Conn. 1992) (allowing general reputation evidence and victim’s convictions for crimes of violence).

4. See White, 314 So. 2d at 864 (holding only reputation evidence admissible); Wright, 703 P.2d at 1113 (holding reputation and specific act evidence admissible); Smith, 608 A.2d at 72 (reaffirming reputation,

the Federal Rules of Evidence are Illinois and Massachusetts.⁵

In the recent case of *Commonwealth v. Adjutant*,⁶ the Massachusetts Supreme Judicial Court created a new common-law rule of evidence allowing defendants asserting self-defense claims to offer specific act evidence of past violent acts initiated by the victim and unknown to the defendant at the time of the incident.⁷ The court's approach is unique in its exclusive adoption of specific act evidence and its non-requirement of contemporaneous knowledge.⁸ The court's decision, however, lacked complete instructions to trial courts as to the application of the new rule.⁹ Most notably, the court failed to state whether the prosecution is permitted to offer specific act evidence against the defendant if the defendant chooses to offer such evidence against the alleged victim.¹⁰ The court also failed to specify whether admissible prior instances of conduct must be of a certain nature, have resulted in a criminal conviction, or have occurred within a certain period of time with respect to the current indictment.¹¹ As a result, the dissenting justice exhorted that the majority's decision will result in unfair prejudice to victims with violent pasts, jury distraction, confusion, delay, and inconsistency within the jurisdiction's case law.¹²

In *People v. Lynch*,¹³ the Illinois Supreme Court reached a similar decision to that of the *Adjutant* court, based on similar facts. In *Lynch*, the court held that a decedent's prior convictions for battery were admissible to support the defendant's allegation that the decedent was the initial aggressor, even though the defendant lacked contemporaneous knowledge of the convictions.¹⁴ Absent specific instructions on how to apply its holding, and what types of specific act evidence are admissible, lower Illinois courts have broadly and inconsistently

opinion, or specific act evidence resulting in criminal conviction admissible); *State v. Dunson*, 433 N.W.2d 676, 680 (Iowa 1988) (declaring victim's character "essential element" of defendant's self-defense claim); *State v. Johns*, 34 S.W.3d 93, 111 (Mo. 2000) (noting contemporaneous knowledge requirement).

5. See generally MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE (8th ed. 2003); PAUL J. LIACOS, MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE (7th ed. 1999). But see Faust M. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271, 1275 (1995) (noting common law evidence jurisdictions moving toward partial adoption of Federal Rules of Evidence).

6. 824 N.E.2d 1 (Mass. 2005).

7. *Id.* at 15 (announcing opinion adopts new common-law rule of evidence).

8. *Id.* at 21 (Cowin, J., dissenting) (noting novelty of court's exclusive admissibility approach to specific act evidence in self-defense cases).

9. *Id.* at 22 (Cowin, J., dissenting) (exhorting inadequate instruction for application of new rule of evidence).

10. *Adjutant*, 824 N.E.2d at 18 (Cowin, J., dissenting) (noting clear instruction not provided).

11. *Id.* at 17-18 (Cowin, J., dissenting) (posing hypotheticals illustrating inadequate application instructions).

12. *Id.* at 18-20, 22 (Cowin, J., dissenting) (noting potential negative consequences of inadequate application instructions).

13. 470 N.E.2d 1018 (Ill. 1984).

14. *Id.* at 1120-21 (explaining case holding).

applied the *Lynch* holding.¹⁵ Given the common-law jurisdictional similarities between Massachusetts and Illinois, it may be wise for Massachusetts courts to note the experience of Illinois in the aftermath of *Lynch* and act accordingly.

This Note will analyze Massachusetts' new and unique approach to the initial aggressor issue in self-defense cases. Part II will examine the different approaches to the admissibility of character evidence and the form such evidence may take. Included will be an examination of the policy rationales for the admissibility and exclusion of character evidence to prove that the victim was the initial aggressor. Part III will detail the evolution of the admissibility of such evidence in the common law jurisdictions of Illinois and Massachusetts, and will consider potential problems with the *Adjutant* decision in light of the aftermath of *Lynch*. Finally, in light of the background provided in Part II, Part IV will offer suggestions to ensure equity within the new *Adjutant* framework.

II. APPROACHES TO CHARACTER EVIDENCE ADMISSIBILITY

A. Uses of Character Evidence in Self-Defense Cases

Character may be defined as “the nature of a person, his disposition generally, or his disposition in respect to a particular trait such as peacefulness or truthfulness.”¹⁶ A defendant asserting a self-defense claim may offer character evidence under two distinct theories.

First, the defendant may offer character evidence pertaining to the alleged victim to prove that at the time of the incident, the defendant reasonably feared for his safety and used a reasonable degree of force in light of his fear.¹⁷ Because this “reasonable belief” theory is predicated upon the defendant’s subjective state of mind at the time of the incident, the defendant is required to

15. Compare *People v. Davidson*, 601 N.E.2d 1146, 1150 (Ill. App. Ct. 1992) (admitting specific act evidence of victim’s prior convictions to prove defendant’s subjective fear of victim); *People v. Keefe*, 567 N.E.2d 1052, 1059 (Ill. App. Ct. 1991) (applying *Lynch* holding in battery context); *People v. Devine*, 557 N.E.2d 953, 956 (Ill. App. Ct. 1990) (allowing non-conviction prior specific act evidence), with *People v. Lovings*, 655 N.E.2d 1152, 1156 (Ill. App. Ct. 1995) (holding specific acts inadmissible in armed robbery context); *People v. Ciavirelli*, 635 N.E.2d 610, 614-15 (Ill. App. Ct. 1994) (holding prior specific acts irrelevant to defendant’s subjective belief); *People v. Loggins*, 629 N.E.2d 137, 143-44 (Ill. App. Ct. 1993) (deciding non-conviction prior acts did not constitute prior specific acts).

16. 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.1, at 584 (6th ed. 2006) (providing general definition).

17. See generally James A. Adams, *Admissibility of Proof of an Assault Victim’s Specific Instances of Conduct as an Essential Element of a Self-Defense Claim Under Iowa Rule of Evidence 405*, 39 DRAKE L. REV. 401 (1990) (identifying theories under which character evidence may be used in self-defense cases); Erica Hinkle MacDonald, *Victim or Villain?: A Case For Narrowing the Scope of Admissibility of a Victim’s Prior Bad Acts in Illinois*, 46 DEPAUL L. REV. 183 (1996) (explaining two theories of character evidence admission in self-defense context); Mary Kay Kleiss, Note, *A New Understanding of Specific Act Evidence in Homicide Cases Where the Accused Claims Self-Defense: Striking the Proper Balance Between Competing Policy Goals*, 32 IND. L. REV. 1437 (1999) (delineating differences between character admission theories in self-defense context).

have had contemporaneous knowledge of the alleged victim's character.¹⁸ Character evidence under this theory is admitted to prove the reasonableness of the defendant's actions, not whether the accused victim acted in conformity with his character for violence.¹⁹

Second, a defendant may offer character evidence of the alleged victim to prove that the victim was the initial aggressor.²⁰ Unlike the "reasonable belief" theory, the purpose of offering character evidence of the alleged victim under the "initial aggressor" theory is to support the inference that the alleged victim acted in conformity with his character for violence during the incident in question.²¹ Some jurisdictions require contemporaneous knowledge, others do not.²²

B. Federal Approach to Initial Aggressor Character Evidence Admissibility

Under the Federal Rules of Evidence (FRE), parties at trial are generally prohibited from introducing character evidence to prove that the person against whom the character evidence is offered acted in conformity with that character.²³ The rationale behind this so-called "propensity rule" is not that such evidence lacks relevance, but rather that its probative value is usually outweighed by unfair prejudice.²⁴ Nevertheless, several exceptions to the

18. See GRAHAM, *supra* note 16, § 404.4, at 584 (explaining reason for requirement of contemporaneous knowledge).

19. See Adams, *supra* note 17, at 406 (distinguishing "reasonableness" theory from "initial aggressor" theory); Kleiss, *supra* note 17, at 1439 (explaining purpose of "reasonableness" theory).

20. See *supra* note 17 (explaining two theories of character evidence admissibility in self-defense cases).

21. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.4, at 136 (3d ed. 1996) (explaining circumstantial use of character evidence in initial aggressor context); MacDonald, *supra* note 17, at 187 (stating "initial aggressor" theory permits using character evidence to prove conformity therewith); Kleiss, *supra* note 17, at 1439 (noting purpose of offering character evidence under "initial aggressor" theory).

22. Compare United States v. Keiser, 57 F.3d 847, 855 (9th Cir. 1995) (holding contemporaneous knowledge not required in federal courts under FRE 404(a)(2)), with State v. Johns, 34 S.W.3d 93, 111 (Mo. 2000) (requiring contemporaneous knowledge). Professor Wigmore suggests that a defendant's contemporaneous knowledge of the accused victim's character for violence is unnecessary. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 63, at 1369 (Tillers ed. 1983). In making his case, Wigmore contrasts the lack of need for personal knowledge under the "initial aggressor" theory with the need for that knowledge under the "reasonable belief" theory. *Id.* With respect to the "reasonable belief" theory, Wigmore states that "it is obvious that the [alleged victim's] character, as affecting the accused's apprehensions, must have become known to him . . . else it is irrelevant." *Id.* Contrarily, with respect to the "initial aggressor" theory, Wigmore states that "this additional element of communication is unnecessary; for the question is what the [alleged victim] probably did, not what the defendant probably thought the [victim] was going to do. The inquiry is one of objective occurrence, not of subjective belief." *Id.*

23. See *supra* note 2 and accompanying text (stating federal rule). See generally Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001) (discussing rationales for character evidence admissibility and inadmissibility).

24. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (summarizing common-law doctrinal opposition to propensity evidence); 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 186, at 681 (Strong ed., 5th ed. 1999) (suggesting propensity evidence invites jury to conclude victim "got what he deserved"). In *Michelson*, the Supreme Court noted that the common-law tradition opposed propensity evidence, especially as offered by the prosecution against a defendant, but not because such character is not

propensity rule exist.

The defendant may offer character evidence relating to himself under FRE 404(a)(1).²⁵ If he chooses to do so, the prosecution may rebut such evidence with similar character evidence regarding the defendant.²⁶ Similarly, the defendant may offer character evidence relating to the alleged victim to prove that the victim was the initial aggressor under FRE 404(a)(2).²⁷ If he chooses to do so, the prosecution is then permitted to rebut such evidence either by offering similar evidence pertaining to the defendant, the peacefulness of the alleged victim, or both.²⁸ The fundamental rationale behind these exceptions is

relevant. *Michelson*, 335 U.S. at 475-76. On the contrary, the Court stated that propensity evidence possesses the potential to weigh too much with the jury so as to persuade them to prejudge the defendant and so deny the defendant a fair opportunity to defend the particular charge at hand. *Id.* But see Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 786-89 (1975) (discussing low probative value of character evidence); Miguel Angel Mendez, *California's New Law on Character Evidence: Having Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1005, 1050-59 (1984) (arguing psychological perspective that character evidence possesses little or no probative value).

25. FED. R. EVID. 404. FRE 404 states in pertinent part:

(a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution . . .

Id.

26. See *supra* note 25 and accompanying text (noting prosecution's opportunity to rebut character evidence offered by defendant). While fundamental, it is worth repeating that the government may not introduce negative character evidence pertaining to the defendant unless the defendant first introduces evidence of his own good character. FED. R. EVID. 404 advisory committee's note.

27. See *supra* note 2 and accompanying text (stating rule allowing defendant to offer character evidence of alleged victim to prove first aggressor); see also WIGMORE, *supra* note 22, at 1382 (suggesting character evidence regarding alleged victim often probative). But see 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 139, at 161-62 (highlighting potential dangers of allowing propensity inference). Louisell and Mueller suggest that the reason for the propensity rule exception with respect to the initial aggressor issue is that the risk of unfair prejudice, which mandates a ban on evidence of the defendant's character, are lesser or non-existent for the victim, as the victim is not on trial. *Id.* They stress, however, that a new risk arises when allowing such evidence, namely the potential for the jury to acquit the defendant on the belief that the alleged victim was a bad person who "had it coming." *Id.* They conclude, however, that the rule's existence suggests that the framers of the rule believe such a risk to be low enough to be acceptable. *Id.* Professor McCormick likewise believes that the risk of the jury acquitting on grounds that the alleged victim "got what he deserved" does not outweigh the probative value of determining the initial aggressor in a self-defense case. MCCORMICK, *supra* note 24, § 193, at 681. In a similar vein, while some commentators have theorized, especially in self-defense cases where the alleged victim is deceased and there were no other eyewitnesses, that the defendant has the advantage of being able to recreate the "facts" to his favor, others have noted through experience that factfinders tend to compensate for this advantage by recognizing the importance and determinativeness of the defendant's testimony and, as a result, exercising increased skepticism. *Lolley v. State*, 385 S.E.2d 285, 289 (Ga. 1989) (Gregory, J., dissenting).

28. See *supra* note 2 and accompanying text (outlining prosecution's possible methods for rebutting admission of character evidence of victim). FRE 404 was amended in 2000 to provide that when the defendant attacks the character of the alleged victim, the prosecution is then entitled to attack on the same character trait

to provide the fact finder with the most complete and informed picture of the incident in question while still protecting the rights of the accused.²⁹

Assuming a defendant offers character evidence under one of these exceptions to the propensity rule, the next issue is what form such evidence may take. Under the federal rules, the defendant may only use reputation or opinion evidence to prove the alleged victim was the initial aggressor.³⁰ The main rationale for allowing only reputation or opinion evidence and not specific acts evidence is that the latter form, while more convincing and often times more reliable, is also more likely to arouse unfair prejudice in the jury toward the alleged victim.³¹

of the defendant. FED. R. EVID. 404 advisory committee's note. Prior to this amendment, a defendant was able to attack the character of the alleged victim without fear of rebuttal on his own potentially similar character traits. *Id.*

29. FED. R. EVID. 404 advisory committee's note. FRE 404 Advisory Committee's Note states in pertinent part:

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused . . . If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor . . . Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

Id. See generally Faust F. Rossi, 1999-2000 Survey of New York Law: Evidence, 51 SYRACUSE L. REV. 489 (2001) (suggesting cross-examination compensates for liberalization of evidentiary rules).

30. FED. R. EVID. 405(a). FRE 405(a) states:

(a) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Id.

A majority of state jurisdictions also utilize this approach. See Mark R. Horton, Note, *Whether a Defendant's Claim of Victim Aggressiveness is an "Essential Element" of the Defense of Self-Defense*: State v. Baca I & II, 24 N.M. L. REV. 449, 454-59 (1994) (listing state jurisdictions following federal approach). In most jurisdictions, a defendant who produces a witness who will testify to his opinion of the alleged victim's character for violence must prove that the witness was sufficiently acquainted with the alleged victim to form a reasonable opinion or be aware of the alleged victim's general reputation. See MCCORMICK, *supra* note 24, §191, at 675.

31. FED. R. EVID. 405 advisory committee's note. The Advisory Committee's Note to FRE 405 explains that:

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation or opinion.

Id. It is fundamental yet imperative to note that, even after the 2000 amendment to FRE 404, just as a

Specific act evidence is admissible, however, if offered not to prove the alleged victim's propensity for violence but for a variety of other purposes.³² Regardless of the form the admissible evidence takes, it must be relevant and its probative value must not be substantially outweighed by danger of unfair prejudice, confusion of the issues, or undue delay.³³

defendant may not introduce specific act evidence against an alleged victim for propensity purposes, the prosecution is likewise prohibited from introducing specific act evidence against the defendant. FED. R. EVID. 405. This prohibition reflects the almost unanimous common-law principle that allowing such evidence unfairly prejudices the defendant and is contrary to the basic values of American jurisprudence. Joan L. Larsen, Note, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 670 (1993) (noting traditional common-law disfavor for specific act evidence against defendants codified in federal rules); *see also, e.g.*, *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (citing and supporting common-law tradition of disallowing specific act evidence against criminal defendants); *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985) (reiterating "fundamental sense" that defendants should not be convicted of crime based on previous misdeeds); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) (affirming fundamental policy that defendant "tried for what he did, not for who he is"); *United States v. Wiley*, 534 F.2d 659, 663 (6th Cir. 1976) (concluding prejudice of specific act evidence against defendant too great); *State v. Waller*, 816 S.W.2d 212, 214-215 (Mo. 1991) (listing arguments in support of excluding specific act evidence); Josephine Ross, "He Looks Guilty": *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 243 (2004) (noting admissibility of prior arrests undercuts defendants' presumption of innocence). In *Waller*, the court cited five reasons why it chose to retain its rule to exclude specific act evidence in the self-defense context. *Waller*, 816 S.W.2d at 214-15. Those reasons were:

(1) [a] single act may have been exceptional, unusual and uncharacteristic . . . ; (2) [n]umerous collateral issues could be raised, resulting in a lengthy trial; (3) [c]ollateral issues might cloud the real issues and confuse the jury . . . ; (4) [t]he state cannot anticipate and prepare to rebut every specific prior act of violence of a deceased victim; [and] (5) [s]ince the state cannot introduce evidence of the defendant's past acts of violence, the defendant should not be permitted to benefit from evidence of specific acts of the victim.

Id. Professor Wigmore concurred with the common-law tradition, which was later codified in the Federal Rules of Evidence, concluding that the accused's presumption of innocence warranted the exclusion of otherwise probative evidence. WIGMORE, *supra* note 22, at 1180-81.

32. FED. R. EVID. 404(b). FRE 404(b) states in pertinent part:

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 . . .

Id. Specific acts are also admissible in cases where the character trait in question is an "essential element" of a charge, claim, or defense. FED. R. EVID. 405(b). Similarly, specific acts in the form of convictions are admissible to impeach the credibility of a witness, though they must have occurred within the past ten years absent compelling circumstances. FED. R. EVID. 609(b). In creating this time limit, the Advisory Committee stated that "practical considerations of fairness and relevancy demand that some boundary be recognized." FED. R. EVID. 609 advisory committee's note. *But see* Andrew J. Morris, *Federal Rules of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (1998) (arguing FRE 404(b) involves forbidden propensity reasoning); Ross, *supra* note 31, at 251 (arguing FRE 404(b) exceptions invite and allow prohibited propensity inferences).

33. FED. R. EVID. 401. FRE 401 defines relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* The Advisory Committee has stated that character propensity

C. Hybrid Approaches

A number of jurisdictions—either common-law jurisdictions or those which have adopted the Federal Rules of Evidence in part—take different approaches to the admissibility of character evidence in initial-aggressor self-defense cases.³⁴ In doing so, they recognize the existence of competing policy goals favoring the admissibility of specific act evidence,³⁵ while striving to honor the fundamental policy goals of the American adversarial system.³⁶

California and Wyoming are among the states that have adopted evidence rules allowing specific act evidence against the alleged victim on the initial aggressor issue.³⁷ California's evidence statute also explicitly permits the prosecution to admit specific act evidence against the defendant if the

evidence admissible under FRE 404(a)(1) and 404(a)(2) is "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." FED. R. EVID. 404 advisory committee's note. FRE 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

34. See *infra* notes 35-50 and accompanying text (discussing hybrid approaches).

35. See, e.g., FED. R. EVID. 405 advisory committee's note (affirming convincing nature of specific act evidence); MCCORMICK, *supra* note 24, § 186, at 650 (stating specific act evidence most persuasive type available); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) (arguing foolishness of excluding helpful evidence simply because predisposition involved). Proponents argue that specific act evidence serves the truth-finding function of trial. See *In re Robert S.*, 420 N.E.2d 390, 392 (N.Y. 1981) (Fuchsberg, J., dissenting) (quoting 4 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* (John Bowring ed. 1962)) (arguing for utilization of "all rational means for the ascertainment of truth"). Allowing specific act evidence may also help ensure the defendant's ability to present an adequate defense. See Horton, *supra* note 30, at 454-59 (highlighting constitutional imperative of adequate defense, especially in capital cases where stakes highest). More directly, many of the general concerns underlying and influencing the prohibition of specific act evidence, such as the potential for jury confusion, have been alleged groundless. See generally Kleiss, *supra* note 17 (citing numerous authorities arguing against concerns underlying federal approach).

36. See generally STEPHAN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988) (discussing policy goals of American adversarial system). Landsman suggests that the three fundamental policies of the American adversarial system are to provide justice in individual cases, to ensure equal justice among like cases, and to perform both of the first two functions without so overloading the system that no justice is rendered at all. *Id.*

37. See CAL. EVID. CODE § 1103(a) (1995); WYO. R. EVID. 405 (1995). California Evidence Code § 1103(a) states:

In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

CAL. EVID. CODE § 1103(a) (1995). Wyoming Rule of Evidence 405 states: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or is in issue under Rule 404(a)(2), proof may also be made of specific instances of his conduct." WYO. R. EVID. 405(b) (1995).

defendant has already offered specific act evidence against the alleged victim.³⁸ Neither state's statute, however, requires that parties offer specific act evidence to the exclusion of reputation or opinion character evidence.³⁹ In this sense, both statutes are permissive.

Other jurisdictions have concluded that the alleged victim's prior bad acts are an "essential element" of the self-defense claim.⁴⁰ Among these states, contemporaneous knowledge requirements vary.⁴¹ While some observers laud the adaptation, others critically argue that it is an erroneous interpretation of FRE 405(b).⁴²

Several jurisdictions restrict specific act admissibility to prior convictions for violent crimes.⁴³ Known as the Connecticut rule, the main rationale behind this approach is that convictions are the product of trials imbued with standards and burdens of proof, all of which are subject to judicial scrutiny.⁴⁴ As a result, juries are exposed to fewer collateral issues which lessens the probability of

38. CAL. EVID. CODE § 1103(b) (1995). California Evidence Code § 1103(b) states:

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

Id. Under this statute, a defendant's decision to offer specific act evidence against the alleged victim exposes him to admission of similar evidence against him. *Id.*

39. *See supra* note 37 and accompanying text (citing California and Wyoming statutes allowing admissibility of specific act evidence against defendants). Both statutes consistently use the word "may." *Id.* Thus, defendants in self-defense cases may opt to offer reputation or opinion evidence instead of specific act evidence if they so choose. *Id.*

40. *See, e.g.,* State v. Dunson, 433 N.W.2d 676, 680-81 (Iowa 1988) (determining admission of prior specific bad acts an "essential element" of defendant's defense); Heidelberg v. State, 587 So.2d 835, 846 (Miss. 1991) (admitting prior specific acts as "essential element" of self-defense defense); State v. Sims, 331 N.W.2d 255, 258 (Neb. 1983) (allowing specific act evidence as "essential element" of defense).

41. *Compare Dunson*, 433 N.W.2d at 680-81 (requiring contemporaneous knowledge), with Byrd v. State, 626 P.2d 1057, 1059 (Alaska 1980) (suggesting contemporaneous knowledge immaterial).

42. *See WIGMORE, supra* note 22, § 63.1, at 1382 n.1 (expounding on misunderstanding of declaring prior acts as "essential element" of self-defense claim). Professor Wigmore suggests that the confusion lies primarily in the fact that allowing specific act evidence under an "essential element" theory treats the act of the victim, rather than a trait of the alleged victim's character, as the material issue. *Id.*

43. *See, e.g.,* State v. Miranda, 405 A.2d 622, 625 (Conn. 1978) (limiting specific act evidence admissibility to alleged victim's convictions of crimes of violence); State v. Alderson, 922 P.2d 435, 448 (Kan. 1996) (allowing criminal convictions as specific act evidence but with strict relevance standards); State v. Howell, 649 P.2d 91, 96 (Utah 1982) (limiting specific act evidence to violent criminal convictions). Contemporaneous knowledge by the defendant of the prior acts is not required in Connecticut, but the courts must exclude convictions for violent crimes too remote or dissimilar to the charge at hand. *Miranda*, 405 A.2d at 625. Thus, while the conviction-only approach creates a bright-line test in that it automatically excludes non-convictions, the trial courts are still entrusted with substantial latitude to exercise judicial discretion amongst convictions. *See id.*

44. *See Horton, supra* note 30, at 458 (discussing reasons why using convictions more trustworthy); MacDonald, *supra* note 17, at 219 (noting evidence of prior conviction not open to fabrication).

“mini-trials.”⁴⁵

Yet another approach to specific act admissibility is to allow it only in homicide cases.⁴⁶ Known as the District of Columbia rule, its rationale is to allow the defendant in a homicide case access to admissible evidence commensurate to his risk of loss of life or liberty.⁴⁷ Despite its upside, this approach has been criticized as still susceptible to exposing juries to fabricated evidence and collateral issues.⁴⁸

Lastly, some jurisdictions employ an approach which allows the defendant in a self-defense case to admit specific act evidence against the alleged victim, but only if the defendant provides advance notice to the government of his or her intent to do so.⁴⁹ Known as the Georgia rule, this approach eases concerns of unfairness to the party who faces the difficult task of attempting to refute potentially numerous and varied specific acts.⁵⁰

III. COMMON LAW APPROACHES: ILLINOIS AND MASSACHUSETTS

Illinois and Massachusetts have neither adopted the Federal Rules of Evidence nor adopted legislation codifying rules of evidence.⁵¹ Rather, both are common-law jurisdictions whose evidentiary law has evolved over time, and is capable of continued evolution through judicial decision.⁵²

A. Illinois

1. Evolution of Illinois Law Leading to Lynch

Prior to the *Lynch* decision in 1984, specific act evidence was inadmissible in self-defense cases to prove that the alleged victim was the aggressor.⁵³

45. See MacDonald, *supra* note 17, at 219-20 (discussing advantages of conviction-only approach).

46. See *Harris v. United States*, 618 A.2d 140, 144 (D.C. 1992) (allowing specific act evidence of alleged victim's violent conduct but only in homicide cases); *Klaes v. Scholl*, 375 N.W.2d 671, 674-75 (Iowa 1985) (refusing admissibility of specific act evidence in civil assault case).

47. See *Horton*, *supra* note 30, at 458-59 (stating District of Columbia rule provides broadest protection where stakes highest).

48. See *supra* note 24 and accompanying text (discussing implicit disadvantages of reputation and opinion evidence).

49. See *Chandler v. State*, 405 S.E.2d 669, 673-74 (Ga. 1991) (allowing specific acts of alleged victim but requiring notice). The prosecution must also give notice to the defendant if it intends to rebut by offering similar specific act evidence against the defendant. *Id.*

50. See *supra* note 31 and accompanying text (citing inability of state to rebut specific acts as reason to wholly exclude such evidence).

51. See *supra* note 5 and accompanying text (noting Illinois and Massachusetts as common law jurisdictions with respect to rules of evidence).

52. See *supra* note 5 (identifying Illinois' and Massachusetts' status as common-law evidentiary jurisdictions).

53. See *People v. Popovich*, 129 N.E. 161, 163 (Ill. 1920) (establishing rule prohibiting specific act evidence to prove violent propensity of alleged victim); *People v. Peeler*, 299 N.E.2d 382, 386 (Ill. App. Ct. 1973) (declaring “fundamental” rule prohibiting specific act evidence elicited to prove reputation testimony by

Instead, like the majority of state jurisdictions at that time, defendants were limited to offering reputation or opinion evidence to prove the issue.⁵⁴

Several cases illustrate the evolution of Illinois law on the subject. The general rule, which stood for more than sixty years, was promulgated in *People v. Popovich*.⁵⁵ In *Popovich*, the Illinois Supreme Court affirmed the exclusion of specific act evidence offered by a third-party witness, while at the same time affirming copious reputation testimony offered against the alleged victim.⁵⁶

In *People v. Robinson*,⁵⁷ the Illinois Appellate Court faced an appeal in which the appellant claimed that the trial court erroneously excluded prior instances of conduct where the alleged victim, a police officer, had used excessive force.⁵⁸ The court reaffirmed that defendants were only allowed to admit specific act evidence if such acts were directed toward the defendant.⁵⁹ The court concluded that if the rule limiting evidence of violent disposition to reputation was to be changed, it should be changed by the Illinois Supreme Court.⁶⁰

2. *People v. Lynch*

In *People v. Lynch*,⁶¹ the Illinois Supreme Court considered whether the lower courts erred in excluding evidence of the alleged victim's previous battery convictions, offered by the defendant to prove the victim was the initial aggressor.⁶² The court concluded that the prior convictions were reliable evidence of the alleged victim's violent character, thus they were relevant, probative, and should be admissible to prove the issue of who was the initial aggressor.⁶³ The court went on to explicitly state that contemporaneous knowledge is not required under the "initial aggressor" theory, because, unlike the "reasonable belief" theory, which requires such knowledge to prove the

witness); *People v. Simpson*, 222 N.E.2d 102, 105-06 (Ill. App. Ct. 1966) (reaffirming rule prohibiting specific act evidence to prove alleged victim was first aggressor).

54. See *supra* note 53 and accompanying text (noting only reputation or opinion evidence admissible to prove initial aggressor issue).

55. *Popovich*, 129 N.E. at 163 (establishing general rule prohibiting specific act evidence to prove alleged victim's violent propensity).

56. See *id.*

57. 371 N.E.2d 1170 (Ill. App. Ct. 1977).

58. *Id.* at 1172 (stating grounds for appeal).

59. *Id.* at 1175 (reaffirming use of specific acts to prove subjective reasonableness). The *Robinson* court, while not explicitly saying so, appears to be affirming the use of specific acts, contemporaneously known, to prove the reasonableness of the defendant's subjective fear at the time of the incident. *Id.*

60. *Id.* at 1176 (acknowledging inability of intermediate appellate courts to change evidentiary law).

61. 470 N.E.2d 1018 (Ill. 1984).

62. *Id.* at 1019 (stating issue of appeal).

63. *Id.* at 1020-21 (stating reasoning for admissibility). The court acknowledged that specific act evidence is not normally admissible against a defendant because of the danger of extreme prejudice and the high stakes involved, but concluded that when the identity of the initial aggressor is in dispute, the greater danger lies in refusing the defendant the ability to offer such evidence. *Id.* at 1021. But see *Lynch*, 470 N.E.2d at 1023 (Ryan, J., dissenting) (noting lack of causal link between battery conviction and violent disposition).

defendant's subjective state of mind and the subsequent reasonableness of his actions in self-defense, the issue is not whether the defendant knew of the alleged victim's prior acts, but whether evidence of such prior acts tends to prove the defendant's version of the facts when those facts are in dispute.⁶⁴ As further support for their decision, the court concluded that in self-defense cases, where the incidents usually occur at great speed and with great confusion, the jury should have access to all reliable sources of information, specific acts included, in coming to a verdict.⁶⁵

The *Lynch* court explicitly limited the scope of its decision in two ways. The court stressed that specific acts are inadmissible unless a defendant raises a self-defense defense.⁶⁶ The court also noted the reliability of convictions as opposed to other forms of specific act evidence, though it did not declare a bright-line rule as with the first limitation.⁶⁷ Yet, as subsequent Illinois case law illustrates, the *Lynch* court was not specific or comprehensive enough in its instructions to the lower courts in how to apply the new rule.

3. *Inconsistent Application of the Lynch Decision*

Lacking clear direction, Illinois Appellate Courts have interpreted *Lynch* broadly and inconsistently in several ways. First, at least one appellate court has applied the *Lynch* holding to a self-defense case where the defendant intended to prove his subjective fear of the alleged victim and the subsequent reasonableness of his actions based on specific acts contemporaneously unknown to him.⁶⁸ In so doing, the court erroneously applied the *Lynch* rule's non-requirement of contemporaneous knowledge in "initial aggressor" cases to "reasonable belief" cases.⁶⁹

Second, appellate courts have reached inconsistent decisions on the issue of whether *Lynch* applies only to homicide cases.⁷⁰ Third, appellate courts have reached inconsistent decisions on the issue of whether specific act evidence in "initial aggressor" cases must be in the form of a criminal conviction.⁷¹ As a

64. *Lynch*, 470 N.E.2d at 1020-21 (delineating differences in contemporaneous knowledge requirements between two self-defense theories).

65. *Id.* at 1020 (summarizing difficulties of self-defense cases and juries' need for comprehensive information).

66. *Id.* at 1022 (noting self-defense claim as prerequisite to specific act admissibility).

67. *Id.* at 1021-22 (defending reliability of convictions).

68. *See* *People v. Davidson*, 601 N.E.2d 1146, 1150 (Ill. App. Ct. 1992) (admitting specific act evidence of victim's prior convictions to prove defendant's subjective fear of victim).

69. *See id.* at 1150 (applying *Lynch* to "reasonable belief" self-defense case); *supra* notes 57-59 and accompanying text (highlighting traditional acceptance of contemporaneously known specific acts in "reasonable belief" cases).

70. *Compare* *People v. Keefe*, 567 N.E.2d 1052, 1059 (Ill. App. Ct. 1991) (applying *Lynch* holding to battery context), *with* *People v. Lovings*, 655 N.E.2d 1152, 1156 (Ill. App. Ct. 1995) (holding specific acts inadmissible in armed robbery context).

71. *Compare* *People v. Devine*, 557 N.E.2d 953, 956 (Ill. App. Ct. 1990) (allowing non-conviction prior specific acts), *with* *People v. Loggins*, 629 N.E.2d 137, 143-44 (Ill. App. Ct. 1993) (deciding non-conviction

result, defendants in cases involving similar facts have experienced different outcomes.⁷² Merits of the *Lynch* decision aside, the court's lack of instruction has created what one commentator termed a "prosecutor's nightmare."⁷³

B. Massachusetts

1. Evolution of Massachusetts Law Leading to *Adjutant*

Massachusetts has long upheld the admissibility of character evidence offered by defendants against alleged victims for the purpose of proving that the defendant subjectively feared the alleged victim and acted reasonably in self-defense.⁷⁴ Under this "reasonable belief" theory, Massachusetts law allows defendants to offer either reputation or specific act evidence.⁷⁵ Because this "reasonable belief" defense turns on the defendant's subjective belief, contemporaneous knowledge has always been required.⁷⁶

Prior to 2005, however, Massachusetts had not considered the admissibility of character evidence, whether by reputation testimony or specific acts, to prove that the alleged victim was the initial aggressor.⁷⁷ That issue would be decided in a novel way in *Adjutant*.

prior acts did not constitute prior specific acts).

72. See *supra* note 71 and accompanying text (noting inconsistency among appellate cases). See generally LANDSMAN, *supra* note 36 (discussing jurisprudential goal of consistency of outcomes in cases with like facts).

73. See MacDonald, *supra* note 17, at 213 (citing Memorandum from Peter Fischer, Deputy Supervisor of the Cook County State's Attorney's Office, to Randall E. Roberts, Executive Assistant of the Cook County State's Attorney's Office (July 10, 1995) (on file with MacDonald)).

74. See, e.g., *Commonwealth v. Graham*, 727 N.E.2d 51, 58 (Mass. 2000) (affirming admissibility of alleged victim's violent character in self-defense cases); *Commonwealth v. Fontes*, 488 N.E.2d 760, 762-63 (Mass. 1986) (allowing specific instances of conduct to prove defendant's subjective belief); *Commonwealth v. Edmonds*, 313 N.E.2d 429, 431-32 (Mass. 1974) (holding victim's reputation for violence or communicated threats admissible to prove subjective fear). The *Edmonds* court also determined that specific acts, in particular threats whether communicated or not, are admissible to prove intent or purpose. *Edmonds*, 313 N.E.2d at 431-32. Thus, *Edmonds* is an illustration of Massachusetts' equivalent to FRE 404(b). See FED. R. EVID. 404(b) (allowing admissibility of specific acts for purposes other than to prove propensity).

75. See *supra* note 74 and accompanying text (discussing admissibility of both reputation and specific act evidence in "reasonable belief" cases).

76. See *Graham*, 727 N.E.2d at 58 (affirming contemporaneous knowledge requirement); *Edmonds*, 313 N.E.2d at 431 (stating contemporaneous knowledge required to prove defendant's subjective fear).

77. See *Commonwealth v. Adjutant*, 824 N.E.2d 1, 11-12 (Mass. 2005) (noting novelty of issue); *Fontes*, 488 N.E.2d at 763 n.1 (explaining issue of character evidence to prove initial aggressor not being considered). The *Fontes* court explicitly stated, "[i]t should be recognized that we are not considering here the admission of evidence of general reputation or of specific incidents of violence to show that the victim was, or was likely to have been, the aggressor." *Fontes*, 488 N.E.2d at 763 n.1. The *Fontes* court stated in dicta that should such evidence be admissible, trial courts should be sure to advise the jury of its limited purpose by way of a limiting instruction. *Id.* But see *Commonwealth v. Helfant*, 496 N.E.2d 433, 441 (Mass. 1986) (reiterating long-standing rule prohibiting prosecution from offering propensity evidence against defendants).

2. *Commonwealth v. Adjutant*

Commonwealth v. Adjutant involved a woman, working as an escort, charged with voluntary manslaughter for the killing of one of her customers.⁷⁸ Once the defendant arrived at the alleged victim's residence, an altercation ensued over the services the defendant would provide.⁷⁹ The parties presented conflicting evidence as to how the altercation began and escalated.⁸⁰ The defendant sought to admit evidence of the alleged victim's violent reputation and past conduct, contemporaneously unknown to her, to prove that the alleged victim was the initial aggressor.⁸¹ The trial court, relying on precedent with respect to "reasonable belief" self-defense cases, and recognizing a lack of precedent regarding "initial aggressor" cases, declared it lacked the discretion to admit such evidence.⁸² The jury found the defendant guilty, and the defendant appealed on the grounds that the suppressed evidence was relevant and necessary to her self-defense claim.⁸³ An appellate court affirmed the conviction,⁸⁴ and the Supreme Judicial Court granted certiorari on the limited issue of whether the lower courts properly excluded the evidence in question.⁸⁵

a. *Majority Opinion*

The majority first noted that all federal jurisdictions and a vast majority of states allow evidence of an alleged victim's violent character to prove that the victim was the initial aggressor.⁸⁶ The court stated that the rationale behind this significant trend in the law is that such evidence, issues of admissible form aside, is substantially probative and helpful to the jury when the issue of the initial aggressor is in dispute.⁸⁷ The court also noted that, similar to the federal standard, the relevance threshold for the admission of any evidence is low.⁸⁸

The majority refuted concerns that allowing such evidence in the "initial aggressor" context would cause jury confusion by analogizing its proposed admissibility with the already established admissibility of identical evidence in

78. *Adjutant*, 824 N.E.2d at 3 (stating preliminary facts of case).

79. *Id.* at 4.

80. *Id.* at 3-5 (discussing facts from record).

81. *Id.*

82. *Adjutant*, 824 N.E.2d at 3.

83. *Id.*

84. 800 N.E.2d 346 (Mass. App. Ct. 2003).

85. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 6 (Mass. 2005).

86. *Id.* at 6-7.

87. *Id.* at 8. This reasoning comports with Professor Wigmore's argument that such evidence may be highly probative. WIGMORE, *supra* note 22, § 63.1, at 1382 (noting character evidence regarding alleged victim often probative).

88. *Adjutant*, 824 N.E.2d at 9 (discussing relevance standard). Evidence in Massachusetts is relevant if it has a rational tendency to prove an issue in the case or render a desired inference more probable than it would be otherwise. *See generally* *Commonwealth v. Fayerweather*, 546 N.E.2d 345 (Mass. 1989); *Commonwealth v. LaCorte*, 369 N.E.2d 1006 (Mass. 1977). As such, it is nearly identical with the federal standard. *See* FED. R. EVID. 401 (defining federal standard for relevance).

the “reasonable belief” context.⁸⁹ The court reasoned that if juries are capable of handling such evidence in one context, they are just as capable of doing so in another.⁹⁰ Moreover, the majority reasoned that any potential jury misunderstanding is outweighed in “initial aggressor” cases because, given the high stakes, the greater danger in excluding such evidence is prejudice to the defendant’s case.⁹¹ Citing *Lynch* as support, the court opined that the jury should have “as complete a picture of the (often fatal) altercation as possible before deciding on the defendant’s guilt.”⁹² As a result, the court concluded that “the trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated, to support the defendant’s claim of self-defense.”⁹³

Having concluded that character evidence of the victim is admissible in initial aggressor cases, the court then considered the form such evidence may take.⁹⁴ The holding in *Adjutant* is novel with respect to this issue.⁹⁵ Citing the heightened reliability of specific act evidence over reputation evidence, the court stated unequivocally that it preferred the “concrete and relevant evidence of specific acts over more general evidence of the victim’s reputation for violence”, and that it preferred it exclusively.⁹⁶

To mitigate the potential dangers of the new ruling, the court stressed that in each respective case, a judge must weigh the probative value of all relevant specific act evidence against its prejudicial effect to determine if it is admissible or unfairly prejudicial and therefore inadmissible.⁹⁷ The court

89. *Adjutant*, 824 N.E.2d at 9 (analogizing character evidence of alleged victim in both self-defense contexts).

90. *Id.*

91. *Id.* In this way the court’s reasoning is nearly identical to the *Lynch* court. *See supra* note 63 (discussing rationale for allowing character evidence against victim despite rationale against same evidence against defendant). This point, while logically valid, still begs the question whether the prosecution will be allowed to rebut any such evidence offered by the defendant against the alleged victim with similar evidence against the defendant. *See infra* note 103 (discussing *Adjutant* court’s failure to provide instruction on prosecution’s rebuttal latitude). The *Adjutant* court supported this argument by stating that admission of evidence showing the victim’s prior violent acts on the first aggressor issue reflects the principle that in criminal cases there is to be greater latitude in admitting exculpatory evidence than in determining whether prejudicial potentialities in proof offered to show guilt should result in exclusion. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 10 (Mass. 2005) (citing in part *In re Robert S.*, 420 N.E.2d 390, 392 (N.Y. 1981)). The court also cited as support the well-established right of criminal defendants to offer their own character traits to create a reasonable doubt of guilt. *Id.* at 10 n.13 (citing *Commonwealth v. Walker*, 812 N.E.2d 262 (Mass. 2004)).

92. *Adjutant*, 824 N.E.2d at 9.

93. *Id.* at 13.

94. *Id.* at 11.

95. *See supra* notes 7-8 and accompanying text (noting novelty of holding).

96. *Adjutant*, 824 N.E.2d at 14. The court cited numerous authorities in making its decision, including the Federal Rules of Evidence, federal and state cases nationwide, and treatises from scholars such as Wigmore and McCormick. *Id.* at 11-15; *see also supra* notes 24-31 and accompanying text (discussing pros and cons of specific act evidence versus reputation evidence).

97. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 12-13 (Mass. 2005) (discussing benefits of required

stated that it was “persuaded that the sound discretion of trial judges to exclude marginally relevant or grossly prejudicial evidence can prevent the undue exploration of collateral issues.”⁹⁸

The court also implemented two significant safeguards to limit its new holding of exclusive specific act admissibility. First, the court limited specific acts admissibility to self-defense cases.⁹⁹ Second, the court created the requirement that defendants intending to introduce specific act evidence against alleged victims must provide notice to the court and to the prosecution of such intent, and of the specific evidence they intend to offer.¹⁰⁰

Despite these safeguards, the court did not address all potential issues that are bound to arise in subsequent cases at the trial level, including whether its holding applies only in homicide cases or to lesser offenses as well.¹⁰¹ Similarly, while the court discussed the different approaches of other jurisdictions that allow specific act evidence—for example, whether specific act evidence must be in the form of criminal convictions—it did not provide any bright-line rule.¹⁰² Lastly, while the majority addressed the issue in its holding, it chose not to decide whether the prosecution, when rebutting specific act evidence offered by the defendant against the alleged victim, is either able or required to use specific evidence against the defendant.¹⁰³

b. *Dissenting Opinion*

The dissent in *Adjutant* opposed the majority opinion first on the ideological premise of admitting propensity evidence of any kind.¹⁰⁴ It argued that the

process of judicial discretion).

98. *Id.* at 13. *But see* Robert P. Burns, *Notes on the Future of Evidence Law*, 74 TEMP. L. REV. 69, 75 (2001) (noting human error inherent in exercise of judicial discretion). While Professor Burns notes the trend of increased emphasis on judicial discretion in trials, he also points out that such a trend runs contrary to traditional American suspicion of government power. *Id.*

99. *Adjutant*, 824 N.E.2d at 10-11.

100. *Id.* at 14.

101. *Id.* at 10-11, 14 (declaring limited purpose and safeguards for character evidence admissibility).

102. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 11 (Mass. 2005) (discussing different approaches to specific act admissibility); *see also supra* notes 37-50 and accompanying text (discussing hybrid approaches to specific act admissibility). The court specifically mentioned the “essential element” approach and the Connecticut rule. *Adjutant*, 824 N.E.2d at 11.

103. *Adjutant*, 824 N.E.2d at 14 n.19 (discussing prosecution’s rebuttal latitude). The court specifically referenced the 2000 amendment to FRE 404(a)(1), which enables prosecutors in federal courts and state jurisdictions which have adopted the federal rules to use propensity evidence against the defendant if the defendant “opens the door” by offering such evidence against the alleged victim. *Id.* It stated that it “need not decide” the issue, stating instead that “[a]t a minimum, once evidence of the victim’s violent conduct is admitted, the prosecutor may introduce evidence of the victim’s peaceful propensities.” *Id.*

104. *Id.* at 15-16 (Cowin, J., dissenting) (citing traditional opposition to propensity evidence in Massachusetts common law). Justice Cowin states that “[a] guiding principle of our legal system is that we try cases and controversies, not people or their characters.” *Id.* at 16. Cowin continues on to reason “[b]ecause we understand that good people sometimes do bad things, that bad people do not always do bad things, and that circumstances greatly influence behavior, it follows that . . . a person’s prior actions, no matter how vile, should not be considered in judging their action at any other particular time.” *Id.* at 16-17. Cowin cites Wigmore as

majority confused the purposes of traditionally allowing specific act evidence in “reasonable belief” cases with allowing the same evidence in “initial aggressor” cases, suggesting that the former helps a jury consider whether the defendant’s subjective fear and acts were reasonable, whereas the latter invites the jury to ask “[w]as the victim the sort of person who might have been a first aggressor?”¹⁰⁵ It also opined that “it would not be surprising if, after today, we find an increasing number of trials where defendants assert such disputes.”¹⁰⁶ The dissent also disagreed with the premise that a victim’s prior violent acts are probative of his action on any other particular occasion.¹⁰⁷

Ideological matters aside, the dissent rejected the majority’s safeguards as incomplete.¹⁰⁸ In particular, it cited the fact that the majority’s ruling would only be equitable if alleged victims were able to explore the violent pasts of defendants.¹⁰⁹ Because the majority chose not to address this issue, given the relevant precedent, prosecutors may very well not be able to offer specific act evidence against defendants even if they have offered similar evidence against alleged victims.¹¹⁰ The dissent further suggested that even if prosecutors are allowed to rebut with similar evidence, an even greater problem is created in that allowing specific act evidence against defendants potentially conflicts with the constitutional imperative of protecting criminal defendants from being reconvicted of their prior acts.¹¹¹

The dissent predicted that, as written, the majority opinion will have several

support:

It cannot be argued, “Because A did an act X last year, therefore he probably did the act X as now charged.” Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once and may never do it again: and not only may he not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies that may intervene are too numerous.

Id. at 17 (quoting WIGMORE, *supra* note 22 at 1160).

105. *Id.* at 16 n.2. See generally David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998) (impugning character evidence ban).

106. *Adjutant*, 824 N.E.2d at 15 n.1. Cowin suggests that the majority’s use of the word “identity” is misplaced. *Id.* at 18. He argues that the word’s ordinary understanding in the evidentiary context is one that “distinguishes one’s behavior from others because of its uniqueness or distinctiveness.” *Id.* The majority, Cowin suggests, uses the word contrarily in a way that asks if one of the parties “is the violent ‘type’.” *Id.*

107. *Adjutant*, 824 N.E.2d at 16 (Cowin, J., dissenting) (stating general theoretical objection).

108. See *infra* notes 109-111 and accompanying text (discussing incompleteness of safeguards).

109. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 18 (Mass. 2005) (Cowin, J., dissenting). Cowin cogently reasons, “if character evidence is, as the court proclaims today, highly relevant as to victims, it must be similarly so for defendants.” *Id.* at 17.

110. *Id.* at 18; see also *Commonwealth v. Helfant*, 496 N.E.2d 433, 441 (Mass. 1986) (reiterating long-standing rule prohibiting prosecution from offering propensity evidence against defendants).

111. *Adjutant*, 824 N.E.2d at 18 (Cowin, J., dissenting) (citing due process concerns with specific act admissibility against criminal defendants). This problem is not as acutely implicated under the federal system because only milder, less inflammatory reputation or opinion evidence may be used by either party. See *supra* notes 24-31 and accompanying text (discussing qualities of different forms of admissible evidence).

undesirable consequences. First, the decision will unduly prejudice juries against alleged victims with violent pasts.¹¹² In particular, the dissent rejected the idea that propensity evidence is less dangerous when offered against a victim instead of a defendant, suggesting, especially in homicide cases, that “[i]f we find it unacceptable to imprison people for their prior bad acts, how is it any more acceptable to punish people for their prior bad acts by sanctioning their deaths?”¹¹³ The dissent also disagreed with the majority in that it believed limiting instructions to be inadequate on the initial aggressor issue.¹¹⁴

Second, the dissent predicted that the majority opinion will result in jury distraction and confusion, as well as delay and increased litigation costs for defendants and the Commonwealth.¹¹⁵ It suggested that a jury’s task of coming to an accurate understanding of what occurred is difficult enough as it is, and that having to consider prior specific acts, about which they will arguably have less information, will make that task even more difficult.¹¹⁶

Third, the dissent predicted that the majority opinion will result in “inconsistent application of the new rule, protracted proceedings, and lengthy appeals.”¹¹⁷ The dissent’s rationale for this prediction is that while the majority relies heavily on individual judicial discretion to ensure equity within its new approach, it also explicitly declared specific act evidence highly probative and stated that the risk of its exclusion is the greater danger to defendants.¹¹⁸

3. *Implications of Adjutant to Date*

The most notable case to date in Massachusetts involving the new evidentiary rule set out in *Adjutant* is *Commonwealth v. Pring-Wilson*.¹¹⁹ In that case, the defendant was charged with first-degree murder following a street fight in which the victim was killed.¹²⁰ The defendant, Alexander Pring-Wilson, was a twenty-five-year-old Harvard University graduate student, fluent

112. *Adjutant*, 824 N.E.2d 1, 18 (2005) (Cowin, J., dissenting).

113. *Id.* at 19.

114. *Id.* at 19 n.3 (suggesting inadequacy of limiting instructions regarding specific act evidence in initial aggressor cases). Justice Cowin is not alone in his belief that limiting instructions are inadequate not only in this context, but in others as well. See *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (suggesting idea of limiting instructions eliminating jury prejudice as “unmitigated fiction”); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (likening limiting instructions under certain circumstances to “a mental gymnastic” beyond juries’ powers). See generally Robert D. Dodson, *What Went Wrong With Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 *DRAKE L. REV.* 1 (1999) (citing empirical studies suggesting jury misuse of prior conviction evidence).

115. *Commonwealth v. Adjutant*, 824 N.E.2d 1, 19 (Mass. 2005).

116. *Id.* at 19 (Cowin, J., dissenting).

117. *Id.* at 22.

118. *Id.*

119. No. 89368, 2005 Mass. Super. LEXIS 414 (Mass. Super. June 24, 2005).

120. *Id.* at *1. The altercation involved the defendant, Pring-Wilson, the alleged victim, Michael Colono, and Colono’s cousin, Samuel Rodriguez. *Id.* at *4.

in multiple languages, and the son of considerably affluent parents.¹²¹ The victim, Michael Colono, was a high school dropout, a father at age fifteen, and on probation for disorderly conduct and possession with intent to distribute cocaine.¹²² At trial, the parties presented conflicting evidence as to who initiated the altercation.¹²³ Several times during the trial, the judge prevented the defendant from introducing specific act evidence regarding the alleged victim.¹²⁴ The defendant was convicted of voluntary manslaughter and filed an appeal.¹²⁵

While the record was being assembled for the appeal, the Supreme Judicial Court issued the *Adjutant* decision.¹²⁶ In response, the trial court, acting sua sponte, scheduled a hearing to determine whether the defendant should be granted a new trial on the grounds that the *Adjutant* decision had rendered suspect the integrity of the evidence at trial.¹²⁷ The court concluded that the excluded evidence went to the heart of the case's central dispute, and therefore fairness required that the defendant be granted a new trial.¹²⁸

Pring-Wilson received widespread media attention, both during and after the

121. See Margery Eagan, *In Cambridge, Defendant's Rights So Wrong*, BOSTON HERALD, June 28, 2005, at 8 (noting defendant Pring-Wilson's extensive education and global personal contacts); Jonathan Saltzman, *Class Divisions Evident in Fatal Stabbing Case*, BOSTON GLOBE, Sept. 19, 2004, at B1 (discussing Pring-Wilson's background).

122. See Kevin Cullen, *Past of Slay Victim, Friend a Key to Retrial: Pring-Wilson's Defense to Paint Pair as Aggressors*, BOSTON GLOBE, June 27, 2005, at B2 (discussing alleged victim Colono's background). Despite Colono's spotty past, his relatives noted that he was turning his life around just prior to his killing. Saltzman, *supra* note 121.

123. *Pring-Wilson*, 2005 Mass. Super. LEXIS 414, at *4-8 (describing conflicting accounts of altercation).

124. *Id.* at *8-12. Colono had been arrested for malicious destruction of property in 2001 arising from an incident in which he threw money in the face of a pizzeria cashier and kicked the front door, shattering it. *Id.* at *9 n.3. Colono had also been involved in a trespass charge in which he was allegedly belligerent with police officers, allegedly threatening to have gang members take the police "out." *Id.* Colono also allegedly became violent when using alcohol. *Id.* Colono's companion, Rodriguez, whom the defendant alleged joined Colono in beating the defendant, had a lengthy record of violent incidents. *Id.* at *9 n.4. He had been arrested thrice for assault and battery, and once for unlawful possession of a firearm in which he allegedly attempted to pull the gun and point it at pursuing police officers. *Id.* at *9 n.4. The trial court, much like the trial court in *Adjutant*, relied on the only precedent available in self-defense cases and concluded that the specific act evidence must be excluded because the defendant "could not establish the condition precedent to its admission, i.e. that he knew of the propensity for violence of either or both men at the time of the incident in issue." *Id.* at *13. The prosecution stated that, even if prior specific acts were admissible in theory, the alleged victim's instances of conduct would not have been admissible because they were too factually dissimilar and remote in time to the homicide. See Cullen, *supra* note 122.

125. Commonwealth v. Pring-Wilson, No. 89368, 2005 Mass. Super. LEXIS 414, at *1 (Mass. Super. June 24, 2005).

126. *Id.* at *1-2.

127. *Id.* at *3 n.1. The court noted that the *Adjutant* decision did not otherwise destroy the legal sufficiency of the evidence that supported Pring-Wilson's conviction, but rather that the disallowed specific act evidence may have been crucial to the outcome of the case. *Id.*

128. *Id.* at *31. The court made its decision despite the fact that the *Adjutant* court declared that its new rule would be applied prospectively. *Id.* at *15. In doing so, the court noted that the *Adjutant* rule was directed at the "fundamental truth-finding function[.]" and therefore the outcome of the case should not depend on a "race to the courthouse." *Id.* at *23-24, *30.

court's decision to grant a new trial.¹²⁹ The sensational circumstances surrounding the case created a platform for commentators both within and outside the legal profession to scrutinize more closely the merits of the *Adjutant* rule.¹³⁰

IV. SUGGESTIONS FOR ENSURING FAIRNESS WITHIN THE *ADJUTANT* FRAMEWORK

Similar to the *Lynch* court in Illinois, the *Adjutant* court failed to provide comprehensive bright-line rules as to the application of its holding.¹³¹ Without a proactive approach to clarify its decision in future cases, *Adjutant* stands to be inconsistently applied in Massachusetts.¹³² Regardless of one's ideological opinion of the *Adjutant* holding, certain steps should be taken to ensure equity and fairness within its framework.¹³³

To date, there are no published cases in Massachusetts where *Adjutant* has been applied to a "reasonable belief" self-defense claim. Though this void may be a result of the newness of *Adjutant*, it is just as likely that the clarity of the "reasonable belief" doctrine in Massachusetts is responsible.¹³⁴ Nevertheless,

129. See *supra* notes 121-128 and accompanying text (describing public interest in trial). The incident and trial both took place in Cambridge, Massachusetts, a community which reserves seventeen percent of its housing stock to government-subsidized residents but also contains the highest concentration of million-dollar homes of any large city in the United States. Saltzman, *supra* note 121. The case has stoked class tensions, as the greatly disparate socioeconomic statuses of the parties at trial metaphorically reflects the makeup of the community. *Id.*

130. See *supra* notes 120-129 and accompanying text (discussing circumstances and responses to *Pring-Wilson* case). One victim's rights advocate cautioned the *Adjutant* rule opens the door to putting the victim on trial as in sex cases. Eagan, *supra* note 121. "The message to a victim who's had a troubled life . . . and is brutally beaten tomorrow? That the system may not work for you . . . [o]r that the prosecutor is [going to] say, 'well, before we decide whether you deserve the protection of the law, let's check out your record.'" *Id.* One layperson, likely representing the thoughts of many, opined that *Pring-Wilson*'s new trial, and ability to post \$400,000 cash bond in the interim, is "all about money and class, not about justice." Patsy Williams, *Be Careful About Labels Assigned to Defendant*, BOSTON GLOBE (letters), June 29, 2005, at 18. Yet not all observers believe a new trial guarantees *Pring-Wilson* an eventual acquittal. The jury's forewoman in the original case stated that in an informal poll conducted by herself amongst the former jurors, eight out of nine would still have reached the same verdict had they known of *Colono*'s prior specific acts. Jonathan Saltzman & Heather Allen, *Ex-Student's Conviction in Killing is Thrown Out*, BOSTON GLOBE, June 25, 2005, at A1. An attorney close to the case emphasized that, given the discretion granted judges and juries, "even with this new evidence coming in . . . who knows? He could get hooked again." Eagan, *supra* note 121.

131. See *supra* notes 9-11 and accompanying text (discussing inadequate instruction for application of new rule of evidence). The court did create explicit safeguards in limiting specific act evidence to self-defense cases and requiring that notice be provided to the party against whom such evidence is to be offered. *Supra* notes 99-100 and accompanying text. Thus, with respect to the latter safeguard, the court, whether knowingly or not, adopted the Georgia rule. See *supra* note 49 and accompanying text (defining Georgia rule).

132. See *supra* note 15 (surveying inconsistent application of *Lynch* decision in Illinois).

133. See generally LANDSMAN, *supra* note 36 (outlining fundamental policies of American adversarial system).

134. See *supra* notes 74, 76 and accompanying text (discussing well-established "reasonable belief" self-defense doctrine in Massachusetts). Indeed, both of the lower courts in *Adjutant* and *Pring-Wilson* ruled the proffered specific act evidence inadmissible because neither defendant possessed contemporaneous knowledge.

lower courts should be careful not to confuse the two self-defense theories and their respective contemporaneous knowledge requirements.¹³⁵

Adjutant relies heavily on judicial discretion to ensure equity on a case-by-case basis.¹³⁶ Judicial discretion, however, involves human judgment and is therefore inherently flawed, thus the Supreme Judicial Court should implement several explicit parameters to supplement the wisdom and experience of the trial courts.¹³⁷

First, the Supreme Judicial Court should only apply *Adjutant* in homicide cases.¹³⁸ This approach furthers the constitutional imperative of an adequate defense by allowing defendants access to evidence commensurate to their risk of loss of life or liberty.¹³⁹ It also acknowledges the potential for jury mishandling of specific act evidence, reserving its admissibility to only the most serious cases.¹⁴⁰

Second, the Supreme Judicial Court should only allow specific act evidence in the form of convictions for violent offenses.¹⁴¹ This approach recognizes that specific act evidence, even that which a person is “reasonably alleged to have initiated,” is still susceptible to fabrication and inaccuracy.¹⁴² Specific acts in the form of criminal convictions have, by definition, satisfied the “beyond a reasonable doubt” standard, making them more reliable and less likely to cause jury distraction and “mini-trials.”¹⁴³

Third, the Supreme Judicial Court should impose time limits on admissible criminal convictions.¹⁴⁴ Although general judicial discretion at the trial court

See supra notes 82, 124 and accompanying text (denying specific act admissibility under then-existing precedent for want of contemporaneous knowledge).

135. *See supra* notes 68-71 and accompanying text (noting confusion among Illinois courts in differentiating between self-defense theories).

136. *See supra* notes 97-98 and accompanying text (discussing majority’s reliance upon judicial discretion to ensure fairness in future cases).

137. *See Burns, supra* note 98 (noting human error inherent in exercise of judicial discretion). Taking greater steps to refine the role of judicial discretion appeases the *Adjutant* dissent’s legitimate concern that to not do so will invite inconsistent application. *See supra* notes 117-118 and accompanying text.

138. *See supra* note 47 and accompanying text (defining District of Columbia rule).

139. *See Horton, supra* note 30, at 458-59 (stating District of Columbia rule provides broadest protection where stakes highest).

140. *See supra* notes 24, 27, 31 and accompanying text (cautioning against dangers of specific act admissibility). *See generally* Dodson, *supra* note 114 (citing empirical studies suggesting jury misuse of prior conviction evidence).

141. *See supra* notes 43-45 and accompanying text (discussing Connecticut rule).

142. *See supra* note 93 and accompanying text (stating evidentiary threshold set forth in *Adjutant*); Horton, *supra* note 30, at 458 (discussing reasons why using convictions more trustworthy); MacDonald, *supra* note 17, at 220 (noting evidence of prior conviction not open to fabrication).

143. *See supra* notes 44-45 and accompanying text (suggesting increased reliability of convictions decreases risk of jury distraction and collateral issues). Adopting the Connecticut rule would satisfy the dissenting justice’s concerns in *Adjutant* by reducing jury distraction, confusion, delay, and increased litigation costs, and would better ensure the accuracy of information juries receive. *See supra* notes 115-116 and accompanying text.

144. *See* FED. R. EVID. 609(b); *supra* note 32 (employing time limit to ensure fairness).

level already serves this function to some extent, consistency among cases would nevertheless be improved if the Supreme Judicial Court articulated a bright-line rule.¹⁴⁵ Imposing such a limit would not altogether eliminate judicial discretion, as courts could still exercise discretion under compelling circumstances.¹⁴⁶ Thus this parameter would foster consistency among cases with similar facts while preventing unnecessary and unfair prejudice against those who have criminal records but have made genuine changes in their lives.¹⁴⁷

Lastly, the Supreme Judicial Court should allow prosecutors to offer the same type of specific act evidence against the defendant as the defendant has offered against the alleged victim.¹⁴⁸ The equitable reasoning behind this approach was embraced in the 2000 amendment to FRE 404, in which the Advisory Committee stated that “the accused cannot attack the alleged victim’s character and yet remain shielded from the disclosure of equally relevant evidence.”¹⁴⁹ The federal rules, however, do not permit specific act evidence for propensity purposes, and thus the controversial aspect of this recommendation lies in allowing specific act evidence against the defendant.¹⁵⁰ But the novelty of *Adjutant*’s exclusive specific act admissibility requires novel safeguards to ensure its equitable application.¹⁵¹ The implementation of the other safeguards suggested above should alleviate traditional concerns

145. See *supra* note 32 and accompanying text (discussing consistency created by time limit on admissible criminal convictions in federal impeachment context).

146. See FED. R. EVID. 609(b), *supra* note 32 (allowing federal judges to exercise discretion under compelling circumstances).

147. See FED. R. EVID. 609 advisory committee’s notes; *supra* note 32 (identifying fairness as rationale for time limits on admissible criminal convictions); *supra* note 36 and accompanying text (citing equal justice among like cases as goal of American adversarial system); *supra* notes 112-113 and accompanying text (arguing *Adjutant* unduly prejudices victims with violent pasts). Though, as an example, FRE 609(b) sets a ten-year time limit on criminal conviction admissibility, such a period of time may be unreasonably long, especially for younger persons who tend to mature more rapidly over a shorter span of time. See Saltzman, *supra* note 121 (noting relatives of young alleged victim in *Pring-Wilson* case claim life change).

148. See *supra* note 38 and accompanying text (describing California statute permitting prosecution to admit specific act evidence against defendant); *supra* notes 109-110 (noting unfairness of likely interpretation of current *Adjutant* rule).

149. FED. R. EVID. 404 advisory committee’s note; see also *supra* notes 28-29 and accompanying text (explaining content and reasoning supporting 2000 amendment to FRE 404).

150. See *supra* notes 30-31 and accompanying text (explaining federal inadmissibility of specific act evidence for propensity purposes in initial aggressor context); *supra* note 31 and accompanying text (discussing traditional belief that specific act evidence hostile to defendant’s presumption of innocence); *Commonwealth v. Helfant*, 496 N.E.2d 433, 441 (Mass. 1986) (reiterating long-standing rule prohibiting prosecution from offering propensity evidence against defendants).

151. See *supra* notes 7-8 and accompanying text (noting novelty of *Adjutant* holding). Were Massachusetts courts to allow specific acts against the defendant in “initial aggressor” cases, it would not be wholly novel. See *supra* note 38 and accompanying text (outlining California statute permitting specific act evidence against defendant in initial aggressor cases). But because the *Adjutant* holding explicitly allows *only* specific act evidence in “initial aggressor” cases, it would be novel in its mandatory exclusion of reputation or opinion evidence. See *supra* note 96 and accompanying text (proclaiming exclusive specific act admissibility in initial aggressor cases).

regarding defendant rights.¹⁵²

V. CONCLUSION

Courts and legislatures have agonized over the paradoxical merits of specific act admissibility in the initial aggressor context, recognizing its greater reliability over reputation or opinion evidence while simultaneously acknowledging its unquestionable potential to unfairly prejudice the party against whom it is offered. More specifically, courts and legislatures have recognized the potential constitutional issues involved in allowing specific act evidence against a criminal defendant. Consequently, jurisdictions that have decided to allow specific act evidence have attempted to mitigate its potential dangers by implementing a variety of safeguards.

In *Commonwealth v. Adjutant*, the Supreme Judicial Court of Massachusetts recently adopted a new common-law rule of evidence uniquely mandating exclusive specific act admissibility in initial-aggressor cases. While the court set two notable limitations regarding application of the new rule, it decided not to set forth comprehensive parameters. As a result, especially considering other jurisdictions' experience in similar circumstances, the court's holding may likely be inconsistently and unfairly applied in the lower courts.

The Massachusetts Supreme Judicial Court has the ability to minimize inconsistent application while ensuring maximum equity and fairness by implementing the following safeguards as soon as expeditiously possible. First, specific act evidence should be admissible only in homicide cases, allowing defendants access to evidence commensurate to their risk of loss of life or liberty while minimizing the potential contexts in which juries may misuse such evidence. Second, specific act evidence should be admissible only in the form of criminal convictions, maximizing reliability while minimizing risks of jury distraction and wasted time on collateral issues. Third, time limits should be imposed on admissible criminal convictions, promoting consistency among cases with similar facts while recognizing the possibility of personal change among defendants and alleged victims. Lastly, with constitutional concerns reasonably mitigated by the implementation of the above-mentioned recommendations, prosecutors should be allowed to offer the same type of specific act evidence against the defendant as the defendant has offered against the alleged victim. By implementing these safeguards, Massachusetts will serve as a model jurisdiction that effectively balances the rights of both criminal defendants and alleged victims.

Andrew G. Scott

152. See *supra* notes 138-151 and accompanying text (suggesting additional parameters to ensure equity in *Adjutant* framework). Implementing these safeguards would also reduce the need for limiting instructions, the insufficiency of which are well documented. See *supra* note 114 and accompanying text (noting empirical and experiential evidence suggesting the limited effectiveness of limiting instructions).