HARD CASES MAKE BAD LAW: *COMMONWEALTH V. ADJUTANT* AND EVIDENCE OF THE DECEASED'S PROPENSITY FOR VIOLENCE IN SELF-DEFENSE CASES IN MASSACHUSETTS

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INTRODUCTION

Rhonda Adjutant was a paid escort employed by the Newbury Cosmopolitan Escort Service.[1] In the early morning hours of September 25, 1999, she received a call from the escort service instructing her to go to the apartment of Stephen Whiting in Revere, Massachusetts.[2] Apparently either Adjutant or Whiting misunderstood the terms of their agreement: Whiting believed that Adjutant would provide "full service," including sexual intercourse, for the

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[1] Commonwealth v. Adjutant, 824 N.E.2d 1, 3 (Mass. 2005).

[2] *Id.* at 3-4.

$175 he had agreed to pay, whereas Adjutant understood that that amount would pay only for a full body massage and an hour of her company.[3] When Whiting learned that Adjutant would not perform sexual intercourse for $175, he demanded his money back.[4] Adjutant called her dispatcher to report this demand, and the dispatcher informed Whiting that Adjutant would refund only $75 because she had already been in his apartment for twenty minutes.[5] Whiting was not satisfied with that arrangement and continued to demand a full refund.[6]

The confrontation between Whiting and Adjutant became violent. While Whiting was on the phone with the dispatcher, Adjutant could be heard in the background, shouting that she would not refund his money.[7] When she tried to leave the apartment, Whiting said, "You're not leaving with my money," and pushed her onto the bed.[8] At some point, Whiting picked up a crowbar, and Adjutant picked up a knife.[9] Because there was no one else in the room with Whiting and Adjutant at that time, it remains unclear who first picked up a weapon.[10] While Whiting was on the phone with the dispatcher, he told her that Adjutant had picked up a knife; a few moments later, Adjutant took the phone and reported that Whiting had a crowbar.[11] The dispatcher alerted Adjutant's drivers to return to Whiting's apartment.[12]

[3] *Id.* at 4. Whiting did not speak directly to Adjutant in arranging the transaction; he spoke instead to a dispatcher, Sheila Hogrell, who pretended to be Adjutant during their phone conversation. *See* Brief and Record Appendix for the Defendant at 5, *Adjutant*, 824 N.E.2d 1 (No. SJC-09299). Adjutant testified at trial that she did have sexual intercourse with clients, but that she charged an additional $500 for that service. *See* Brief and Supplemental Appendix for the Commonwealth at 10, *Adjutant*, 824 NE.2d 1 (No. SJC-09299). There was testimony at trial that the service's owner would "say anything to a client to ensure a sale." Brief and Record Appendix for the Defendant, *supra*, at 5 n.2. Adjutant's implication seems to be that the dispatcher, with the explicit or implicit consent of the owner, led Whiting to believe that he was entitled to more than a massage for his $175.

[4] *Adjutant*, 824 N.E.2d at 4.

[5] Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 4.

[6] *Id.*

[7] *Id.* at 5.

[8] *Id.* at 11.

[9] *Adjutant*, 824 N.E.2d at 4.

[10] *Id.*

[11] *Id.* Adjutant testified that Whiting picked up the crowbar before she picked up the knife. *See* Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 11. The dispatcher, however, testified that Whiting told her, "Now [Adjutant] has a knife," suggesting that Adjutant picked up the knife first. Brief and Record Appendix for the Defendant, *supra* note 3, at 9 n.4. The driver testified that the dispatcher told him, "[H]urry, the man has a crowbar," but that the dispatcher did not mention that Adjutant had a knife. *Id*.

[12] *Adjutant*, 824 N.E.2d at 4.

The confrontation became fatal moments after one of the drivers kicked down Whiting's door; the trial testimonies conflict, however, as to who attacked first. According to Adjutant, the moment one of the drivers kicked in the door, Whiting lunged at her with his crowbar, at which point she stabbed him in the neck, inflicting the fatal wound.[13] According to the driver, however, it was Adjutant who advanced on Whiting, stabbed him first in the chest with the knife, retreated, advanced again, and finally stabbed him in the neck.[14] In both testimonies, Adjutant and her driver fled after Whiting dropped the crowbar and moved away from the door.[15] A neighbor found Whiting's body a few hours later.[16]

Adjutant was indicted for murder in the second degree.[17] At her trial, Adjutant asserted a claim of self-defense, arguing that the deceased had trapped her in his apartment and attacked her with a crowbar and that she had stabbed him out of fear for her own safety.[18] Adjutant sought to introduce testimony that Whiting had a reputation for violence, and that he had been violent on other occasions when, as on the night in question, he had been under the influence of cocaine and alcohol.[19] Adjutant offered this evidence in a "Motion to Allow Defendant to Impeach the Testimony of Decedent Stephen Whiting"; that is, she moved to discredit the victim even though the victim (for obvious reasons) had not testified.[20] The trial judge denied the motion[21] and

[13] *Id.*

[14] *Id.* at 4-5; *see* Brief and Record Appendix for the Defendant, *supra* note 3, at 12-13.

[15] *Adjutant*, 824 N.E.2d at 4; Brief and Record Appendix for the Defendant, *supra* note 3, at 13-14.

[16] *Adjutant*, 824 N.E.2d at 4 n.3.

[17] *Id.* at 6 n.6.

[18] *Id.* at 5; *see also* Brief and Record Appendix for the Defendant, *supra* note 3, at 14-15.

[19] *See* Brief and Record Appendix for the Defendant, *supra* note 3, at 15. The defense sought to ask one of Whiting's neighbors about what Whiting had told him about a confrontation with a prostitute over money, as well as about violent incidents that the neighbor himself had witnessed. *See id.* The autopsy revealed that at the time of his death Whiting had a blood alcohol level of 0.154, and that he had consumed cocaine. Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 9. Whiting's neighbors testified that he was intoxicated that night. *Id.* Adjutant testified that Whiting sniffed two lines of cocaine while she was in the apartment. *See* Brief and Supplemental Appendix for the Defendant, *supra* note 3, at 7.

[20] *See* Brief and Record Appendix for the Defendant, *supra* note 3, at 15-16; *see also* Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 14. In its decision, the Supreme Judicial Court (SJC) cast this motion as a response to trial testimony, elicited by the Commonwealth, that Whiting had sounded "calm" and "like a nice person" during his telephone conversation with Sheila Hoggrell. *See Adjutant*, 824 N.E.2d at 5. The motion would therefore have been intended to rebut (not impeach) Hoggrell's testimony (not Whiting's).

In Massachusetts, when a statement is introduced under an exception to the hearsay rule, the opposing party may offer evidence to impeach the declarant as though the declarant had

excluded evidence of both Whiting's general reputation for violence and specific violent incidents, ruling that such evidence was admissible only to show the defendant's state of mind, and therefore could not be introduced unless the defendant could show she had personal knowledge of the decedent's violent tendencies.[22] Following the trial, the jury convicted Adjutant of voluntary manslaughter.[23]

On appeal, Adjutant argued that she should have been allowed to introduce evidence of Whiting's prior acts of violence in order to corroborate her testimony that he was the initial aggressor in the altercation.[24] Adjutant asserted that Massachusetts should abandon its previous rule – that evidence of a victim's propensity for violence is admissible only if the defendant knew of those tendencies – and follow the majority of other jurisdictions in allowing evidence of the victim's reputation or specific acts of violence involving the victim where the accused claims self-defense.[25]

Oral arguments were held on November 2, 2004.[26] On March 14, 2005, the Supreme Judicial Court (SJC) vacated Adjutant's conviction and remanded the case for a new trial, holding that the trial judge had erred in ruling that she had no discretion to admit the evidence.[27] The court ruled that in the future, a defendant may offer evidence of the victim's violent propensity to show who

testified at trial. *See* Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 14-15 (citing Commonwealth v. Mahar, 722 N.E.2d 461, 466-67 (Mass. 2000) (citing Proposed Mass. R. Evid. 806 to this effect)). In *Adjutant* it is unclear how evidence of Whiting's violent history and reputation would impeach his "credibility." Defense counsel explained that he wanted to "impeach . . . the entire scene" presented by the Commonwealth's evidence. *Id*.

[21] *Adjutant*, 824 N.E.2d at 5.

[22] *Id.*

[23] *Id.* at 6.

[24] *See* Brief and Record Appendix for the Defendant, *supra* note 3, at 19 ("Ms. Adjutant argued that the trial judge committed reversible error when she excluded evidence of the decedent's history of violence and intoxication to establish that he was the first aggressor in their altercation, where Ms. Adjutant had argued at trial that she had acted in self-defense.").

[25] *See id.* at 18 (arguing that "the public interest warrants, indeed demands, a reexamination of the position adopted by this Court in [Commonwealth v. Graham, 727 N.E.2d 51 (2000)]").

[26] *Adjutant*, 824 N.E.2d at 1.

[27] *Id*. at 3. Significantly, the SJC did not find that the evidence should have been admitted, only that the trial judge should have considered admitting it. *See id.* at 15 ("Although the judge might properly have excluded the evidence within her discretion after weighing its probative value against its prejudicial effect, we do not speculate as to what the judge would have done had she recognized her discretion."). The language of the *Adjutant* decision suggests that trial judges have had the discretion to admit this evidence all along, which is difficult to reconcile with the SJC's unequivocal language in prior decisions. *See, e.g.*, *Graham*, 727 N.E.2d at 58 ("Under Massachusetts law, in cases involving self-defense, evidence of a victim's violent character is *only admissible if the defendant shows that he knew of the victim's violent nature prior to the incident.*") (emphasis added).

was the first aggressor.[28] That evidence is limited to specific incidents in which the victim is "reasonably alleged" to have been the aggressor, and trial judges have discretion to exclude evidence if it is overly prejudicial.[29] One justice dissented, maintaining that such evidence has limited probative value and that admitting it creates evidentiary imbalances that have the potential to erode the safeguards that prevent character evidence from being used against defendants.[30]

The rule announced in *Commonwealth v. Adjutant* has, except in Rhonda Adjutant's case, only prospective application.[31] Its repercussions, however, are already being felt. The defendant in a recent high-profile Massachusetts homicide case, a Harvard University graduate student who was convicted of voluntary manslaughter after unsuccessfully arguing self-defense, announced within days of the *Adjutant* decision that he would seek a new trial on the basis of the new rule.[32] A hearing in that case was held on April 15, 2005,[33] and on June 24, 2005, the judge granted the defendant a new trial, stating that "the jury did not have the benefit of relevant evidence critical to the issue" of whether the victim initiated the altercation.[34]

At the time of the *Adjutant* decision, Massachusetts was one of only four jurisdictions that prohibited a defendant from introducing any form of evidence of the victim's propensity for violence to show that the victim was the first aggressor in a conflict where the defendant was unaware of that propensity.[35]

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[28] *Adjutant*, 824 N.E.2d at 3.

[29] *Id.* (stating that evidence may be admitted if its "probative value . . . outweighs its prejudicial effect").

[30] *See generally id.* at 15-23 (Cowin, J., dissenting).

[31] *Id.* at 15. ("Because the defendant alleged the error and argued for the rule on direct appeal, she should have the benefit of this decision. Otherwise, it shall apply only prospectively."). I have been informed by the Assistant District Attorney who argued the case before the SJC that, rather than undergo a new trial, Adjutant elected to plead guilty to the manslaughter charge and accept a sentence of time served.

[32] Jonathan Saltzman, *SJC Ruling May Bring Retrial in Stabbing*, BOSTON GLOBE, Mar. 23, 2005, at B1; Jonathan Saltzman, *Harvard Student's Lawyer Cites SJC Self-Defense Ruling*, BOSTON GLOBE, Mar. 17, 2005, at B1.

[33] *See Pring-Wilson Hearing Set for April 15*, BOSTON GLOBE, Mar. 24, 2005, at B2.

[34] Commonwealth v. Pring-Wilson, 2005 Mass. Super. Ct. LEXIS 414, at *31 (Mass. Dist. Ct. June 24, 2005); *see* Jonathan Saltzman, *Ex-Student's Conviction in Killing is Thrown Out*, BOSTON GLOBE, June 25, 2005, at A1.

[35] *See, e.g.*, Commonwealth v. Graham, 727 N.E.2d 51, 58 (Mass. 2000) ("Under Massachusetts law, in cases involving self-defense, evidence of a victim's violent character is only admissible if the defendant shows that he knew of the victim's violent nature prior to the incident.") (citing additional cases). Maine, Missouri, and New York are the other jurisdictions that bar such evidence. *See* State v. Leone, 581 A.2d 394, 400 (Me. 1990) (affirming trial court's exclusion, in assault case, of evidence of victim police officer's alleged aggressive behavior under Me. R. Evid. 404(a), which, unlike the Federal rule, has no exception for evidence of the victim's character); State v. Johns, 34 S.W.3d 93, 111 (Mo.

This Note argues that Massachusetts should have retained its rule on the admissibility of evidence of a deceased's propensity to violence. Even though the tide was clearly against the Commonwealth, the minority rule is truer to the principles of fairness that underlie the rules of evidence than the approaches of other jurisdictions, where concerns for efficiency (and, perhaps, more cynical political impulses) have allowed increasing opportunities for defendants to put their victims on trial. The Note examines the substantial danger of unfair prejudice in its various forms and the fact that most of the arguments for expanding the use of character evidence (against both defendants and victims) fail to address these dangers.

Part I examines the reasons for the general prohibition on propensity evidence, whether offered against a defendant or another person. Part II examines the special justifications for the admission of evidence of the victim's violent propensity in cases where self-defense is claimed, and attempts to refute some of the assumptions that underlie those justifications. Part III discusses the state of evidence law generally in Massachusetts, and the treatment of self-defense in homicide cases. Finally, Part IV closely examines the *Adjutant* decision itself, attempting to show where it falls short in terms of logic and policy.

I. AN OVERVIEW: REASONS FOR THE CHARACTER EVIDENCE BAN

In virtually all criminal prosecutions, evidence of a *defendant's* character may not be admitted for the purpose of proving that the defendant acted in conformity with that character. The bar against such character evidence, whether in the form of reputation or of prior bad acts, was firmly rooted in common law before its codification in the Federal Rules of Evidence and the various state rules of evidence patterned on the Federal Rules.[36]

2000) ("[T]he defendant must show that he was aware of the victim's violent reputation. . . ."); People v. Miller, 349 N.E.2d 841, 845-46 (N.Y. 1976) (discussing the rule in New York). In *Williams v. Lord*, the Second Circuit upheld the New York rule against a habeas corpus challenge. 996 F.2d 1481, 1483-84 (2d Cir. 1993) (holding that the exclusion of evidence of victim's violent history did not violate defendant's constitutional right to present a defense).

On the other hand, forty-five states admit some form of evidence of a victim's propensity for violence, whether it relates to general reputation or specific incidents. *See Adjutant*, 824 N.E.2d at 7, n.8 (listing cases from each jurisdiction).

[36] *See* FED. R. EVID. 404(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. . . ."); Commonwealth v. Doherty, 504 N.E.2d 681, 683-84 (Mass. App. Ct. 1987) ("'[E]vidence of character in any form, whether reputation, opinion from observation, or specific acts will not generally be received to prove that the person whose character is sought to be shown, engaged in certain conduct, or did so with a given intent, on a particular occasion.'") (quoting MCCORMICK ON EVIDENCE § 188 (3d ed. 1984)); PAUL J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.4.1, at 130 (7th ed. 1999):

> As a general rule, evidence of a person's character is not admissible to prove that he

The policies supporting the prohibition on character evidence have been rehearsed time and again. Character evidence, whether in the form of reputation or of specific acts, is barred not because it is irrelevant but because it is in a sense *too* relevant.[37] Wigmore in particular asserts confidently:

> A defendant's character . . . as indicating the probability of his doing or not doing the act charged[] is *essentially* relevant. In point of human nature in daily experience, this is *not to be doubted*. The character or disposition – i.e., a fixed trait or the sum of traits – of the persons we deal with is in daily life always more or less considered by us in estimating the probability of their future conduct. In point of legal theory and practice, the case is no different.[38]

The prohibition is based primarily on the prejudicial effect of character evidence, and it seeks to prevent convictions based on prior bad acts rather

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acted in conformity with that character on a particular occasion. . . .

Moreover, it generally is not permissible for purposes of proving that A did a particular act to show that he did a similar act at a prior or subsequent time.

(citations omitted). It should be noted that Federal Rule of Evidence 404(a) does not restrict the prohibition on character evidence to its use against a defendant; similarly, Liacos states only that evidence of a *person's* character is not generally admissible. *See* FED. R. EVID. 404(a); LIACOS, *supra*. Thus, evidence of a *victim's* character or propensity is within the scope of the general rule; its admissibility is an exception to the rule.

For a discussion of the common-law history of the character evidence ban, see David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1167-72 (1998).

[37] *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("The 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.") (footnote omitted); LIACOS, *supra* note 36, § 4.4.1, at 131:

> It should be noted that this category of evidence is not disfavored strictly on relevance grounds . . . . Rather, the rule of exclusion is premised on the high risk that such evidence will have a prejudicial impact on the jury and will result in a decision motivated by something other than the particular facts of the incident before the court.

[38] IA WIGMORE ON EVIDENCE § 55 (rev. by Peter Tillers 1983) (emphasis added); *see also* 1 MCCORMICK ON EVIDENCE § 188 (5th ed. 1999) ("[E]vidence that an individual is the kind of person who behaves in certain ways almost always has some value as circumstantial evidence of how this individual acted . . . in the matter in question.").

Wigmore calls the character evidence prohibition "one of the great enigmas of the law of evidence." IA WIGMORE, *supra*, § 54.1. He reasons that "the windings and twistings of the character evidence rule and its various exceptions are largely without rational explanation because those windings and twistings reflect a half-hearted and unprincipled compromise between an interest in truthseeking and a belief that we should not judge people or their acts by their character." *Id.* It is the central contention of this Note that "truthseeking" and "a belief that we should not judge people or their acts by their character" are not opposing principles that require reconciliation, but are instead complementary principles that should work together in the pursuit of truth and justice.

than the actual acts constituting the alleged crime.[39] Finders of fact are thought to give excessive weight to propensity evidence, either because the finder of fact may erroneously conclude that evidence of past bad acts or bad character is proof of guilt for the crime charged, or because the finder of fact takes the character evidence as proof that the defendant is a bad person who should be punished regardless of his guilt or innocence of the present charge.[40]

Thus in Massachusetts, the prosecution may not introduce evidence of a defendant's previous bad behavior, whether or not such behavior constitutes an indictable offense, in order to show either the defendant's bad character or his propensity to commit the crime with which he is charged.[41]

II. THE SPECIAL CASE OF SELF-DEFENSE: RATIONALES FOR ALLOWING EVIDENCE OF THE VICTIM'S CHARACTER WHERE SELF-DEFENSE IS RAISED

A. *Probative Value of Character Evidence*

Proponents of a relaxation or repeal of the character evidence ban argue that in some circumstances (for example, where a defendant seeks to introduce evidence of a victim's violent character to support a self-defense claim) the evidence is sufficiently "relevant" that its probative value outweighs the risk of prejudice.[42] This approach emphasizes the purported probative value of evidence of the victim's character to show that he was the first aggressor in the altercation.[43]

Proponents of this approach seem simply to assume that evidence of a reputation for violence, or evidence of specific violent incidents, actually tends to establish the fact at issue, i.e., whether the victim was the first aggressor on the occasion at bar.[44] This assumption is appealing on its face, as it seems to

[39] *See* 1 MCCORMICK, *supra* note 38, § 188.

[40] *See* IA WIGMORE, *supra* note 38, § 58.2 (making this point with reference to evidence of specific acts).

[41] *See, e.g.*, Commonwealth v. Trapp, 485 N.E.2d 162, 170 (1985) (overturning a murder conviction because prosecution introduced evidence of threats and violent acts by defendant that occurred years before the crime charged and did not involve the decedent).

[42] *See, e.g.*, Commonwealth v. Adjutant, 824 N.E.2d 1, 3 (Mass. 2005).

[43] *See id.*

[44] *See, e.g.*, IA WIGMORE, *supra* note 38, § 55 ("A defendant's character, then, as indicating the probability of his doing or not doing the act charged, is essentially relevant. In point of human nature in daily experience, this is not to be doubted."); Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345, 356 (1997) (conceding that "the psychological community is unable to agree generally on a precise standard of predictability of future human behavior" but asserting nonetheless that "knowing the personality structure of an individual actor should lead to knowing the probability that the actor behaved in a particular way at a particular time"); *see also* Lolley v. State, 385 S.E.2d 285, 288 (Ga. 1989) (Weltner, J., concurring) (characterizing as a

follow our intuitive sense of human behavior.[45] However, it may not be supported in reality, for several reasons. First, evidence that a person has a history of violence may or may not be probative of whether he attacked *first* on a given occasion.[46] Second, and perhaps more crucial, past behavior is not necessarily a reliable predictor of actions on a single occasion.[47] While it may be correct to say that human personality is made up of relatively stable "traits,"[48] it is also true that "behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior."[49]

Proponents of broader admissibility for character evidence often argue that lay jurors can use such information responsibly because they have experience using character evidence in their everyday lives.[50] Even supporters of the character evidence ban concede that in everyday life, people use past behavior to assess the likelihood of future trouble. For example, it would be difficult to fault a parent for taking into account what she has heard about a person before hiring that person to care for her children.[51] No one would reasonably choose to hire a babysitter who had recently (or even not so recently) been accused of child abuse.[52] (Conversely, a parent who hired a babysitter who had been so accused, thinking that "fairness" required her to do so, would rightly be

"summary of human experience" the notion that people tend to act in conformity with their characters).

[45] *See* Joan L. Larsen, Comment, *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, 655 (1993) (asserting that the probative value of character evidence is "ingrained in our collective intuition and common sense").

[46] The Supreme Judicial Court in *Adjutant* has sought to mitigate this problem by admitting only evidence of specific instances where the victim is alleged to have *initiated* the altercation. *See* Commonwealth v. Adjutant, 824 N.E.2d 1, 13 (Mass. 2005) ("[W]e hold 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. . . ."). I have found no other cases where a court has sought to limit the evidence to incidents that the victim is alleged to have initiated or to a victim's propensity for *unprovoked* violence. Surely if the issue is whether the *defendant* was the first aggressor, this would be the truly relevant evidence.

[47] *See* Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 110 (1993) (arguing that for lay people "there is good reason to worry about jurors[] overvaluing character evidence").

[48] *See, e.g.*, Reed, *supra* note 44, at 354 (asserting that personality is relatively stable and predictable, and that "[a] 'trait' is apparently some form of innate predisposition").

[49] Miguel A. Méndez, *Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters."*, 49 HASTINGS L.J. 871, 878 (1998).

[50] *See, e.g.*, Roger C. Park, *Character at the Crossroads*, 49 Hastings L.J. 717, 721 (1998).

[51] *See* David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 838 (1998).

[52] *See* Méndez, *supra* note 49, at 873.

condemned as irresponsible and reckless of her children's safety.) In our everyday lives, we all make judgments based on "associative or predictive assumptions,"[53] and where we see the safety of our loved ones at stake, the fairness – and accuracy – of those assessments necessarily takes second place.[54]

Viewed from this perspective, character evidence of a defendant or victim should easily pass the minimal standard of relevance set forth in Federal Rule of Evidence 401: "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."[55]

There is an imperfect logic to this approach to character evidence, however, for whether "assumptions"[56] or "collective intuition and common sense"[57] can constitute a "system of proof"[58] is debatable. The Advisory Committee Note to Federal Rule of Evidence 401 states that the "assessment of the probative value of evidence . . . is a matter of *analysis and reasoning*."[59] Such an assessment should not be left to unexamined assumptions about what is "probative."

The problem may be that reputation and previous-acts evidence is *persuasive* without actually being *probative*.[60] However much we may wish to credit them, intuition and assumption are not the same as analysis and reasoning. Furthermore, the way in which people use character evidence –

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[53] H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 848 (1982).

[54] The philosopher Harry Frankfurt posits that our love for our children or our spouses in and of itself trumps other considerations, such that a man who sees two people – his wife and a stranger – drowning and can save only one of them, does not think *at all* about whom he should save: "In the circumstances that the example describes, any thought whatever is one thought too many." HARRY G. FRANKFURT, THE REASONS OF LOVE 36 n.2 (2004). Frankfurt goes on to state:

> Just in itself, the fact that he loves her entails that he takes her distress as a more powerful reason for going to her aid than for going to the aid of someone about whom he knows nothing. The need of his beloved for help provides him with this reason, without requiring that he think of any additional considerations and without the interposition of any general rules.

Id. at 37.

[55] FED. R. EVID. 401 (emphasis added); *see also* 1 MCCORMICK, *supra* note 38, § 185 n.15 ("That *substantial* probative value is required for evidence to be relevant is not apparent from the wording of Federal and Uniform Rule 401, but it is a pragmatic response. . . .").

[56] Uviller, *supra* note 53, at 848.

[57] Larsen, *supra* note 45, at 655.

[58] Uviller, *supra* note 53, at 848.

[59] FED. R. EVID. 401 advisory committee's note (emphasis added).

[60] *See* Miguel Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1042 (1984) (distinguishing between "persuasive" and "probative" effects of evidence).

indeed, many other forms of evidence as well – in everyday life is not, and *should not be*, the way evidence is used in a courtroom.[61] After all, "trials are not natural events."[62] Trials deliberately include a great deal of ritual, even theater, as befits their symbolic function in the social order:

> They are highly stylized presentations conducted pursuant to strict procedural rules and designed to answer specific questions of fact fixed by discrete legal standards. . . . Trials are also a representation of self-government in its most public sense, brought down from the level of the general and abstract to that of the individual. What happens in courts reflects both our commitment to the rule of law and our most basic values about *how* disputes *should be* resolved.[63]

The setting (and atmosphere) of a trial is markedly removed from everyday life; furthermore, the purposes and mechanisms for using character evidence are also different. Deciding against hiring a baby-sitter because of a bad reputation or an accusation of child abuse is manifestly different from using that information to decide whether the person committed a specific incident of abuse in the past.[64] The consequences of the judgment are also far different: in the former case, a person loses a baby-sitting job, perhaps unfairly; in the latter, a possibly innocent person goes to prison. The stakes for the person being judged, and the potential cost of error if the judgment is made too harshly, are simply not the same.[65]

Therefore, the fact that people's common sense and intuition leads them to assume that evidence of past behavior is relevant to the prediction of future behavior does not necessarily mean that such evidence is relevant in a legal sense. In fact, its very persuasiveness is the source of its potential for unfair prejudice.[66] Because people are accustomed to using past behavior as a guide

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[61] *See, e.g.*, Méndez, *supra* note 49, at 873 (asserting that deciding against hiring a person as a baby-sitter is quite a different matter from convicting that person of a crime); Leonard, *supra* note 51, at 838 (distinguishing between "natural" judgments about character and judgments made by a factfinder in a courtroom or jury room).

[62] Leonard, *supra* note 51, at 838.

[63] *Id.* at 838-39.

[64] *See* Méndez, *supra* note 49, at 873 (making this point and suggesting that personal decisions, based primarily on securing one's safety or personal interests, are different in kind as well as degree from decisions made by a jury as representatives of "the people"); *see also* Leonard, *supra* note 36, at 1191 (suggesting that everyday character judgments are different from courtroom determinations in that the former "look[] forward, not back" and that because the primary intent is limiting risk, the accuracy of the character judgment and the truth of the allegations on which it is based are far less important than in a trial).

[65] Of course, the fact that the stakes are higher for defendants in a criminal trial tends to support the admission of character evidence by the defendant. *See* discussion *infra* Part II.C.

[66] *See* Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 208 (arguing that when character evidence is admitted for propensity purposes, normal balancing under Federal

to future actions in their everyday lives, when confronted with such information in a trial setting, they may be tempted to overvalue it and thus to give less careful attention to the facts and circumstances of the incident at issue in the case.[67] In extreme cases, reliance on character evidence as probative of conduct might lead a factfinder to infer a statistical inevitability that the behavior was repeated in the case at issue.[68]

This danger may have been present in the *Adjutant* case. During oral arguments, it became clear that the identity of the first aggressor was not the only issue in the case. Regardless of who armed himself or herself first, or who took the first swing, the proportionality of the defendant's lethal response was very much a live issue. Both parties agreed that the victim said, "You're not leaving *with my money*," and that the defendant apparently did not offer to give the money back.[69] The defendant's brief states that she offered to "start over" and that she pleaded with him to let her go, but did not indicate that she tried to return the money.[70] Therefore, emphasis on the violent character of the victim would likely have obscured a genuine question regarding an essential element of self-defense.[71]

Rule 403 is impossible, because "the unfairly prejudicial impact of this evidence – recognized as such for centuries – *becomes* its probative value").

[67] *See* 1 MCCORMICK, *supra* note 38, § 185 (stating that a juror influenced by evidence of a defendant's past crimes "may be satisfied with a somewhat less compelling demonstration of guilt than should be required").

[68] *See, e.g.*, Taslitz, *supra* note 47, at 26-27 ("[E]xplicit probabilistic evidence raises concerns about overawing the jury with numbers so that it convicts based upon some perceived notion of the statistical likelihood of guilt instead of the evidence of what happened on the specific occasion in question."). This danger is especially acute where expert testimony is concerned; however, it may be present at least dimly any time a factfinder tries to calculate the odds of a particular behavior's recurrence. McCormick provides a formula for "calculating" probative value:

> If we denote the reputation evidence as E and the hypothesis that the defendant committed the assault as H, then we can say that the probability of the hypothesis H given the evidence E is less than the probability of H without considering E. In symbols, P(H|E) < P(H). (The vertical bar is read as 'given' or 'conditioned on,' and '<' means 'is less than.')

1 MCCORMICK, *supra* note 38, § 185. But without numerical values to plug into this formula – and, more importantly, without a meaningful correspondence between the numerical values and reality – what is the value of such a formula except to mislead about the value of certain evidence by the creation of a quasi-mathematical certainty?

[69] Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 11 (emphasis added); *see* Brief and Record Appendix for the Defendant, *supra* note 3, at 9.

[70] Brief and Record Appendix for the Defendant, *supra* note 3, at 9-10.

[71] In order properly to raise self-defense,

> [t]here must be evidence warranting at least a reasonable doubt that the defendant: (1) had reasonable ground to believe and actually did believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force, (2) had availed himself of all proper means to avoid physical combat before resorting to the use of deadly force, and (3) used no more force that [sic]

B. *Character Evidence Is Frequently Admissible for Other Purposes*

Federal Rule of Evidence 404 includes a well-known series of exceptions to the general prohibition on character evidence. This non-exhaustive list includes such permissible uses of character evidence as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[72] So long as the evidence of character is not offered to show that the person acted in conformity with that character, the evidence may be admissible subject to the usual balancing test provided in Rule 403.[73]

It might be argued that since so many putatively "non-propensity" uses of character evidence are permitted, further expansion of admissibility does no real harm. In this case, however, what is proposed is not a new "non-propensity" use of character evidence, but one that depends on an inference that the factfinder may or may not draw against a defendant. Evidence of a person's violent character – whether in the form of reputation or of specific acts – to prove that the person was the first aggressor on a specific occasion requires pure propensity logic.[74] The finder of fact is asked to infer from the evidence presented that the person acted in conformity with the trait demonstrated by the evidence. That is precisely the reason character evidence is generally inadmissible.[75] The fact that there are "back door" possibilities for introducing what would otherwise be considered character evidence is an argument for careful scrutiny of those uses of the evidence. It is not a principled argument for opening the front door as well.[76]

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was reasonably necessary in all the circumstances of the case.

Commonwealth v. Harrington, 399 N.E.2d 475, 479 (Mass. 1980).

[72] FED. R. EVID. 404(b).

[73] *See* FED. R. EVID. 404 advisory committee's note:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose . . . . The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence . . . ."

[74] *See, e.g.*, Commonwealth v. Adjutant, 824 N.E.2d 1, 6 (Mass. 2005) (recognizing that when evidence of the victim's violent history is introduced to show the defendant's state of mind, it is not "admitted for the purpose of showing that the victim acted in conformance with his character for violence," but that when evidence is introduced to show who was the first aggressor, it is admitted to show the victim's behavior was in conformity with his violent character).

[75] *Cf.* FED. R. EVID. 404(a).

[76] *Cf.* 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, 1452 (1999) (mentioning, without expressing concern, that "[a]lthough the jury is admonished not to consider the evidence for a forbidden purpose," in cases where character evidence is admitted for non-propensity purposes, "the jury is left to infer that the prior bad acts . . . are in conformity with his character").

C. *Reduced Risk of Prejudice Where Character Evidence Is Not Offered Against the Defendant; Greater Latitude Given to Defendants*

Admitting evidence of the victim's character to show that he was the aggressor in the altercation invites the finder of fact to draw an inference – that the person whose character is shown acted in conformity with that character on a given occasion – that the factfinder would not be permitted to draw about a defendant.[77] An important rationale for admitting evidence against a victim that would not be admissible against the defendant is that the stakes are lower where evidence of a victim's propensities are concerned.[78] Under this reasoning, there is less danger in a jury's drawing the wrong inference about a person's reputation or past actions because the resulting prejudice does not harm the defendant.[79] In addition, a defendant, it is argued, should have greater latitude in presenting exculpatory evidence than the prosecution has in introducing inculpatory evidence.[80]

A risk of prejudice nevertheless exists where this evidence is offered by a defendant against a victim. First, the actual probative value of propensity evidence may be far less than our intuition and "common sense" suggest.[81] Therefore, permitting defendants to offer propensity evidence against victims may result in defendants' proffering evidence of dubious probative value and certain prejudicial effect. To do so stretches the meaning of "latitude," perhaps farther than it should be stretched.[82]

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[77] *Compare* FED. R. EVID. 404(a) (generally disallowing propensity evidence) *with id.* at 404(a)(2) (allowing such propensity evidence in relation to the alleged victim).

[78] *See* 1 MCCORMICK, *supra* note 38, § 193 ("That the character of the *victim* is being proved renders inapposite the usual concern over the untoward impact of evidence of the defendant's poor character on the jury's assessment of the case against the defendant."); *see also* Kleiss, *supra* note 76, at 1451 (arguing that "[t]he accused, not the decedent, is on trial and the jury is not in the position to punish the decedent").

[79] *Cf.* Kleiss, *supra* note 76, at 1451.

[80] *See* Commonwealth v. Adjutant, 824 N.E.2d 1, 10 (Mass. 2005) (recognizing that "in criminal cases there is to be greater latitude in admitting exculpatory evidence" (quoting *In re* Robert S., 420 N.E.2d 390, 394 (N.Y. 1981) (Fuchsberg, J., dissenting)); *see also* Kleiss, *supra* note 76, at 1438 (asserting that defendants "are often denied their right to present a full and adequate defense by introducing specific act evidence" in self-defense cases); Erica Hinkle MacDonald, Comment, *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, 197-98 (1996) (citing a "constitutional imperative" to allow defendants to present an adequate defense and acknowledging the argument that the danger of prejudice against the defendant's case by excluding the evidence is greater than the prejudice risked by admitting it). Adjutant apparently did not argue that the error was of constitutional dimensions. *See* Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 25-27 ("The defendant makes no argument that the current rule is unconstitutional.").

[81] *See supra* notes 56-68 and accompanying text.

[82] *See* Commonwealth v. Fontes, 488 N.E.2d 760, 763 (Mass. 1986) (adopting rule permitting specific acts known to the defendant but conceding that "the fact of the victim's

Second, admitting evidence of the victim's propensity for violence poses the same risk of distraction as would admitting similar evidence against a defendant.[83] If evidence of the victim's propensity, but not the defendant's, were to be put before a finder of fact, the greater quantity of information on propensity might district the finder of fact's attention from what should be the central inquiry: the reasonableness and proportionality of the *defendant's* actions.[84] The *Adjutant* court expressly declined to rule on whether its new rule would result in propensity evidence being admissible against a defendant who "opened the door" by offering propensity evidence against the victim.[85] The SJC noted, however, that a 2000 amendment to Rule 404(a)(1) of the Federal Rules of Evidence has already made this evidence admissible, and suggested that the court might follow suit when the question arose.[86] The Advisory Committee Note to the 2000 revision states:

> 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.[87]

It appears that one expansion of the character evidence rule, intended to help defendants, also carries a hidden risk making possible a further expansion that could harm defendants.[88]

Finally, the jury may be tempted to acquit the defendant not because it believes he acted legitimately in self-defense but because it believes the victim

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former violent conduct may have no warranted bearing on the defendant's state of mind at the time of the homicide").

[83] *See id.* (conceding that admitting specific incidents, known to the defendant, of the victim's violent behavior created a danger that "[t]he trial could be extended unreasonably by consideration of collateral points" or that "[n]egative information about the victim may divert the jury from focusing on [its] basic task").

[84] *See supra* notes 68-71 and accompanying text.

[85] *See Adjutant*, 824 N.E.2d at 14 n.19 (noting that "[w]e need not decide in this case whether the Commonwealth may introduce evidence of prior violent incidents initiated by the defendant once the defendant has done so with respect to the victim, for the purpose of proving who was the first aggressor").

[86] *Id.*; *see* FED. R. EVID. 404(a)(1) (allowing evidence of the accused's character "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)").

[87] FED. R. EVID. 404 advisory committee note to 2000 amendment.

[88] *See Adjutant*, 824 N.E.2d at 18 (Cowin, J., dissenting) (arguing that the Federal approach as embodied in the 2000 amendment to Rule 404, "while equitable, would greatly diminish our traditional evidentiary protections that prevent defendants from being 'reconvicted' of their prior acts. . . . [this decision] sets us on precisely this dangerous course toward the erosion of long-held evidentiary safeguards for defendants").

was a bad person who "got what he deserved."[89] Although it may be true that acquitting a guilty defendant is ultimately a lesser social evil than convicting an innocent one, neither outcome serves the cause of justice.[90] As Justice Cowin, dissenting in *Adjutant*, asked, "If 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?"[91]

Defendants in criminal cases already receive protection in the form of structural and procedural safeguards, such as the presumption of innocence and a high burden of proof for the prosecution.[92] In Massachusetts, as in many other jurisdictions, a defendant who claims he acted in self-defense needs only to produce some evidence of self-defense; once he has done so, the prosecution must prove beyond a reasonable doubt that he did *not* act in self-defense.[93] Allowing prejudicial and irrelevant evidence that invites the jury to acquit on the wrong grounds does not advance justice, and threatens to erode the safeguards already in place to protect criminal defendants.

III. SELF-DEFENSE IN MASSACHUSETTS

A. *Common Law vs. Rules of Evidence*

In contrast to the federal system and the majority of state jurisdictions, Massachusetts has never codified its rules of evidence.[94] The Supreme Judicial Court rejected Proposed Rules of Evidence in 1982.[95] In declining to adopt rules of evidence, the SJC asserted a preference for the evolution associated with the common law over the comparatively static nature of codified rules: "A majority of the Justices conclude that promulgation of rules of evidence would tend to restrict the development of common law principles pertaining to the admissibility of evidence."[96] Nevertheless, the SJC acknowledged the value of the Proposed Rules as guidelines and as a "comparative standard," and invited

[89] *See id.* at 11 (majority opinion) (acknowledging the "worry that jurors will be invited to acquit the defendant on the improper ground that the victim deserved to die"); *see also* Kleiss, *supra* note 76, at 1447 (same); MacDonald, *supra* note 80, at 195 (same).

[90] *See* Henderson v. State, 218 S.E.2d 612, 614 (Ga. 1975) (warning that "[i]t is unlawful to murder a violent and ferocious person, just as it is unlawful to murder a nonviolent and inoffensive person")

[91] *Adjutant*, 824 N.E.2d at 19 (Cowin, J., dissenting).

[92] *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970).

[93] *See, e.g.*, Commonwealth v. Rodriguez, 352 N.E.2d 203, 205-06 (Mass. 1976) ("[W]hen the issue of self-defense is properly before the trier of fact, the Commonwealth must, as matter of due process, prove beyond a reasonable doubt that the defendant did not act in self-defense.") (footnote omitted); *see also infra* notes 108-113 and accompanying text.

[94] *See* LIACOS, *supra* note 36, § 1.1, at 1.

[95] *Id.*

[96] *See id.* at 2.

parties to cite to those rules wherever appropriate.[97] Significantly, by refusing to adopt codified rules of evidence, the Massachusetts judiciary retains control over evidentiary matters. While it is possible for the Massachusetts legislature to pass laws that affect the admissibility of evidence,[98] the primary vehicle for such change is still the SJC and not the legislature.[99] Moreover, Massachusetts judges are appointed rather than elected; therefore, they are presumably protected from the political pressure that the legislature must endure.[100] Consequently, evidence law in Massachusetts is far less susceptible to the vagaries of public and political opinion than it is in jurisdictions where a legislative body is responsible for creating and amending evidence rules.

At the opposite extreme, evidence law in California can be, and has been, changed by amendment to the state constitution, a process that involves a referendum – essentially putting changes in courtroom procedure to a popular vote by the general public.[101] In 1982, California voters approved Proposition 8, which effected "the almost total abolition of the common law rules of character evidence and the replacement of those rules with a grant of broad judicial discretion to admit or exclude character evidence."[102] The bill was referred to by its supporters as the "Victims' Bill of Rights"[103] and contained provisions with titles like "Right to Truth-in-Evidence,"[104] and thus was arguably designed to appeal to popular anger over procedural rules that allow "criminals" (i.e., defendants) to "get off" (i.e., be acquitted because the charges could not be proven) on "technicalities" (i.e., procedural and evidentiary rules that exist to safeguard the presumption of innocence and ensure that defendants are convicted of the crimes with which they are charged, rather than of prior bad acts or of bad character).[105] While determinations of admissibility may

[97] *Id.* Unlike the Federal Rules, the Proposed Massachusetts Rules of Evidence contained no provision allowing for admission of evidence of a victim's history of violence. *See* Commonwealth v. Dilone, 431 N.E.2d 576, 579 n.1 (Mass. 1982).

[98] For example, Massachusetts, like many other jurisdictions, has a rape shield statute that prohibits defendants in rape cases from introducing evidence of the alleged victim's sexual history. *See* MASS. GEN. LAWS ch. 233, § 21B (2004).

[99] *See, e.g.*, Commonwealth v. King, 834 N.E.2d 1175, 1181 (Mass. 2005).

[100] *See* MASS. CONST. pt. 2, ch. 2, § 1, art. 9 (providing that "[a]ll judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council").

[101] *See* Méndez, *supra* note 60, at 1003.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 1004.

[105] "Truth in evidence," for example, suggests that the existing evidentiary rules generate "falsehood in evidence," rather than that they require exclusion of certain types of evidence where the evidence's prejudicial effect is thought generally to outweigh its probative value. *See id.* at 1008-09 (recounting that objections to the introduction of character evidence are "largely ignored" when a case is tried before a judge rather than a jury, which suggests that lay people's intuition and common sense may be "at odds with the presumptions of the

still ultimately be up to trial judges even under the California system, the rules by which those determinations are to be made – in which judges are presumed to have more expertise than the general public – are not.[106] Massachusetts, in refusing to adopt rules of evidence, has arguably shown special concern for this problem.[107]

B. *Burden of Proof in Self-Defense Cases*

In Massachusetts, self-defense is not an affirmative defense. Once the defendant has raised the issue of self-defense, the defendant need not prove he acted in self-defense; rather, the Commonwealth must prove beyond a reasonable doubt that the defendant did *not* act in self-defense.[108] The defendant's burden is at most to raise reasonable doubt as to the absence of self-defense.[109]

In the leading case of *Commonwealth v. Rodriguez*, the SJC overturned a murder conviction on the basis of an erroneous jury instruction.[110] The trial court had instructed the jury that the defendant had "sought '*to justify his action* on the ground of self-defense,'" and the court had gone on to instruct, inter alia:

> [I]f *on the facts you were to find* that the shooting of the deceased was done in self-defense, the defendant would be entitled to an acquittal . . . .

law"); *see also* Jeff Brown, *A Misnamed Mandate: The Victim's Bill of Rights Turned Back Years of Enlightened Jurisprudence, Eroding Defendants' Rights But Doing Little Else to Control Crime or Assist Victims*, THE RECORDER, June 8, 1992, at 8 (arguing, on the tenth anniversary of Proposition 8's passage, that the measure had effectively dismantled legal protections for defendants, sacrificing important rights and safeguards "in satisfaction of public opinion"); Editorial, *Strong on the Law*, L.A. TIMES, Nov. 1, 1985, pt. 2, at 4 (condemning California Governor Deukmejian's attacks on California Supreme Court as "soft on criminals" for the court's judicial interpretation of Proposition 8 provisions).

[106] *See* Méndez, *supra* note 60, at 1039:

> Even if appellate judges find all or some of the legislative judgments [underlying rules of evidence, including character evidence, abolished by Proposition 8] convincing, the voters' intent as expressed in Proposition 8 will hardly encourage them to cite the repealed Evidence Code sections as authority for their treatment of character evidence. California judges are elected, after all.

[107] *See* LIACOS, *supra* note 36, § 1.1, at 1-2. On the other hand, had the SJC adopted rules of evidence, it might have been less likely to change the rule at issue in *Adjutant*. Proposed Rule 404 did not contain an exception for evidence of the victim's violent character. *See supra* note 97.

[108] *See, e.g.*, Commonwealth v. Rodriguez, 352 N.E.2d 203, 205-06 (Mass. 1976).

[109] Although it might appear that "raising reasonable doubt" amounts to a burden of proof, in practice, the fact that the prosecution has failed to prove an element beyond a reasonable doubt amounts to the same thing. *See* Jeffrey F. Ghent, Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R. 3d 221, 224-25 (asserting that the two formulations of the rule are "logically equivalent" and suggesting that any conflict between them is "verbal rather than actual").

[110] 352 N.E.2d at 207.

> [You are to] *determine whether or not* [the killing] was done in self-defense. . . . Now, *if you find* that the defendant had a reasonable apprehension of death or grave bodily harm to himself . . . then you must be warranted to finding the defendant not guilty. . . . [T]he defendant could be found not guilty *if you are satisfied on the evidence* and the reasonable inferences that you draw from these facts as you find them, that the defendant acted within the permissible limits of self-defense.[111]

The SJC held that the trial court's instructions "were likely to have confused the jury and to have suggested to them that the defendant had an affirmative burden to prove self-defense, *despite the fact that the instructions did not expressly state that the defendant had such a burden*."[112]

The SJC proposed the following "appropriate" instruction:

> "If evidence of self-defense is present, the [Commonwealth] must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the [Commonwealth] has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty."[113]

At least in principle, then, the prosecution in a self-defense homicide case has the burden not only of proving its facts, but also of proving a negative – that circumstances did not justify the killing as self-defense.

C. *Knowledge Requirement*

In Massachusetts, a showing of self-defense rebuts the element of malice, which is necessary to prove murder. In *Commonwealth v. Kendrick*, the SJC wrote:

> When the killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought . . . . The circumstances which attended the killing may . . . be shown to rebut the presumption of malice. This may be done by a showing that the homicide was committed in self-defence and was therefore excusable, or by a showing of circumstances which although they would not excuse or justify the act would mitigate the crime from murder to manslaughter.[114]

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[111] *Id.* (footnote omitted).

[112] *Id.* at 208 (emphasis added).

[113] *Id.* at 208 n.10 (quoting 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 43.19, at 548 (2d ed. 1970)).

[114] Commonwealth v. Kendrick, 218 N.E.2d 408, 413 (Mass. 1966). Alternatively, self-defense negates the element of "unlawfulness" by justifying the killing, thus making it lawful. *See Rodriguez*, 352 N.E.2d at 206 (citing Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 304 (1850)).

Kendrick, it should be noted, was a murder case in which the defendant, armed with a knife, confronted an angry man who was armed with a fireplace poker and stabbed him to death – circumstances similar to the *Adjutant* case.[115] The court held that if the deceased had initiated the assault while the defendant was cornered, so that the defendant reasonably feared that he was in danger of being killed or sustaining grievous bodily harm, then he had "the right to use whatever means were reasonably necessary to avert the threatened harm."[116]

Before 1986, a defendant who claimed self-defense could offer evidence that the deceased had a reputation as a violent person for the limited purpose of showing that the defendant's fear for his safety was reasonable.[117] This evidence could be offered through the testimony of a witness other than the defendant; however, evidence was required to establish that the defendant knew of the reputation.[118] In 1986, the SJC adopted a new rule that would allow a defendant to offer evidence of the deceased's specific violent acts, again for the limited purpose of showing the reasonableness of the defendant's fear of the deceased.[119] The knowledge requirement, however, was not altered by the new rule: the defendant was required to show that he knew of the violent incidents.[120]

Because the evidence goes only to prove the defendant's state of mind, and not what the victim did or did not do, there is arguably no principled difference between offering reputation evidence and specific acts evidence for this purpose. In fact, specific incidents, if known to the defendant, would likely have *more* bearing on the defendant's state of mind.[121] Because all that

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[115] *Kendrick*, 218 N.E.2d at 410-12. Compare the facts of *Kendrick* with those of Commonwealth v. Adjutant, 824 N.E.2d 1, 3-5 (Mass. 2005).

[116] *Kendrick*, 218 N.E.2d at 413-14. In considering the proportionality of the force used by the defendant, the jury should consider

> the relative physical capabilities of the combatants, the characteristics of the weapons used, and the availability of maneuver room in, or means of escape from, the doorway area [where the confrontation allegedly took place]. In addition, the distance from the doorway to the spot where the deceased's body was found could be a significant factor in determining who was doing the attacking when the deceased was felled.

Id. at 414. All of these factors would have been relevant in *Adjutant* as well. *Cf. Adjutant*, 824 N.E.2d at 3-5.

[117] *See, e.g.*, Commonwealth v. Edmonds, 313 N.E.2d 429, 432 (Mass. 1974) (citing Commonwealth v. Connolly, 255 N.E.2d 191 (Mass. 1970), Commonwealth v. Rubin, 63 N.E.2d 344, 345 (Mass. 1945), and Commonwealth v. Tircinski, 75 N.E. 261 (Mass. 1905)).

[118] *See id.* (holding that the trial court erred by excluding testimony of victim's reputation by a witness other than the defendant, where the witness's testimony established that the defendant knew about the victim's reputation).

[119] *See* Commonwealth v. Fontes, 488 N.E.2d 760, 761 (Mass. 1986).

[120] *See id.*

[121] *See id.* at 763 (reasoning that "[k]nowledge that the victim recently had engaged in specific acts of violence is likely to have more of an effect on a defendant's state of mind than is knowledge of the victim's general reputation for violence").

matters is whether the defendant reasonably believed that she was in danger, the jury will only consider the effect on the defendant of her knowledge, whether of reputation or of specific acts.

D. *Uncommunicated Threats*

Before the *Adjutant* decision, Massachusetts recognized a single exception to the knowledge requirement: evidence of threats made by a victim against a defendant might be admitted even if the defendant was unaware of such threats.[122] Threats communicated to the defendant could, of course, be admitted to show the reasonableness of the defendant's fear for his safety.[123] The admissibility of uncommunicated threats, however, was predicated on another, less subjective ground:

> It is true that the fact that a person's habits or character are such that he would be apt to do an act is not competent evidence that he did the act. But threats stand differently. A threat is a declaration of purpose, and like other declarations of purpose is evidence that an occurrence that might be in execution of that purpose was in fact in execution thereof.[124]

In other words, a threat, whether or not communicated to the defendant, provided an *objective* ground for the inference that the victim had attacked the defendant. The threat made it more probable that the victim was the aggressor and that the defendant reasonably feared death or serious injury. [125]

While the admission of uncommunicated threats might appear analogous to the admission of other propensity evidence unknown to the defendant, the analogy is imperfect. In both cases, the evidence is admitted to prove something other than the defendant's state of mind; however, the parallel stops there. Although in the case of uncommunicated threats evidence of a past action by the victim (the threat) is introduced because it makes it more likely that a subsequent action (the attack) took place, the inferential step required to get from the past action to the action at issue is not that the victim acted in conformity with his character but that he had shown an intent to do an act that he is alleged to have done.[126] The relevance of uncommunicated threats, unlike other evidence of violent character, therefore does not depend on propensity logic.

IV. THE *ADJUTANT* DECISION

In one sense, the Supreme Judicial Court's decision in *Commonwealth v. Adjutant* brought Massachusetts law on evidence of the victim's propensity for

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[122] *See Edmonds*, 313 N.E.2d at 431-32 (quoting *Rubin*, 63 N.E.2d at 345).

[123] *Id.*

[124] *Rubin*, 63 N.E.2d at 345 (citations and internal quotation marks omitted).

[125] *See id.* Massachusetts also requires that there be some evidence, other than the threat, to support the defendant's self-defense claim. *See id.* at 346.

[126] *Id.* at 345.

violence into line with the majority of jurisdictions, in that Massachusetts now allows a defendant to show the victim's propensity for violence, even if the defendant was unaware of that propensity, in order to show that the victim was the first aggressor in the altercation.[127] In another sense, however, Massachusetts remains an anomaly after *Adjutant*. In contrast to every other jurisdiction that has considered the question, Massachusetts now stands alone in admitting *only* specific incidents of violence by the victim.[128] This Part examines the *Adjutant* decision in detail, arguing that the SJC's decision to admit only specific-acts evidence, while well-intentioned, may not adequately address the dangers of irrelevance and prejudice inherent in the use of character evidence, whether against a defendant or a victim.

A. *Relevance of the Evidence*

In deciding that evidence of the deceased's propensity for violence should be admitted in self-defense cases, the court used essentially the logic and the assumptions discussed in Part II above.[129] The court assumed that the evidence was probative: "There can be no doubt," it stated, "that at least some of the proffered evidence in this case was relevant to Adjutant's self-defense claim."[130] Further, the court acknowledged that when evidence of a deceased's violent history is offered to show that the deceased was the first aggressor in the altercation, its probative value depends on pure propensity logic.[131] In fact, the court stated explicitly that the value of the evidence at issue was to support the inference "that Whiting, with a history of violent and aggressive behavior while intoxicated, *probably acted in conformity with that history* by attacking Adjutant, and that the defendant's story of self-defense was truthful."[132] The court did not explain, however, why that logic is permissible when offered to exculpate a defendant but impermissible when offered against a defendant, except to state that the evidence met the (concededly low) definition of "relevant" under Massachusetts law.[133]

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[127] *See* Commonwealth v. Adjutant, 824 N.E.2d 1, 3 (Mass. 2005).

[128] *Id.* at 11 (stating that "[*a*]*ll* other State jurisdictions that admit character evidence in these circumstances admit reputation evidence") (emphasis added); *see id.* at 21 (Cowin, J., dissenting) (pointing out that "[n]one [of the jurisdictions admitting this evidence] takes the novel approach adopted by the court today of limiting such victim character evidence to those specific acts of violence initiated by the victim and unknown to the defendant").

[129] *See supra* Part II.

[130] *Adjutant*, 824 N.E.2d at 8-9.

[131] *See id.* at 6.

[132] *Id.* at 9 (emphasis added) (citing State v. Miranda, 405 A.2d 622, 625 (Conn. 1978)).

[133] *See id.* at 9 n.11 (citing several cases for the general proposition that the "relevance threshold" for admission is "low" and that evidence is "relevant" if it has any rational tendency to prove an issue, and stating that the evidence is "probative, but certainly not determinative, of whether the victim was the first aggressor"); *see also* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any

B. *Jurors' Ability to Make Proper Use of the Evidence*

The *Adjutant* court acknowledged the risk that "juries may misunderstand the purpose for which the evidence is offered."[134] The court did not elaborate on what precisely the jury's "misunderstanding" might be. Using the evidence to draw the inference that the victim behaved in conformity with his character would be no misunderstanding, for that is precisely the basis for admitting the evidence. That inference is apparently no longer "impermissible," at least where it is drawn about someone other than the defendant.[135]

C. *Greater Latitude Offered to Defendants*

The court further reasoned that the "greater latitude" offered to defendants in the admission of exculpatory evidence justifies the admission in favor of the defendant of a type of evidence that could not be admitted against her.[136] However, as noted, the court left open the possibility that this greater latitude could be used against a defendant, as Massachusetts may now follow the Federal Rules and admit propensity evidence against a defendant where the defendant has "opened the door" by offering the same against the decedent.[137]

D. *Restriction to Specific Incidents*

In the *Adjutant* case, the Commonwealth argued in its brief and at oral argument that if the SJC decided to change its rule barring evidence of the decedent's violent propensity unknown to the defendant, it should restrict the evidence made admissible to specific acts.[138] Ultimately, this is the rule the SJC adopted,[139] and as the dissent pointed out, by doing so it made Massachusetts the only jurisdiction to admit *only* specific acts for this purpose.[140]

The court's reasoning on the choice between reputation evidence and specific acts illustrates the flaws in the use of victim character evidence generally. The court decided against the admission of reputation evidence on

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

[134] *Adjutant*, 824 N.E.2d at 9.

[135] *See* Commonwealth v. Fontes, 488 N.E.2d 760, 763 (Mass. 1986) (citing as one of the dangers of admitting evidence of victim's specific acts known to the defendant that the jury might "draw the *impermissible inference* that the victim acted in conformity with his prior behavior.") (emphasis added).

[136] *Adjutant*, 824 N.E.2d at 10 (quoting *In re* Robert S., 420 N.E. 2d 390, 394 (N.Y. 1981) (Fuchsberg, J., dissenting)).

[137] *See supra* notes 85-88 and accompanying text.

[138] *See* Brief and Supplemental Appendix for the Commonwealth, *supra* note 3, at 32-37, *Adjutant*, 824 N.E.2d 1 (No. SJC-09299).

[139] *Adjutant*, 824 N.E.2d at 3.

[140] *See id.* at 20-21 (Cowin, J., dissenting) (commenting that the majority adopted "an approach that differs significantly from [the] trend" in other jurisdictions).

the grounds that it is unreliable because too vague, and in favor of specific incident evidence, despite the danger that it may be insufficiently probative because too specific. The court correctly concluded that evidence of a person's reputation, or of other individuals' opinions about that person, is unreliable when that person's probable actions are at issue, because reputation may be based on conjecture, rumor, or other unreliable grounds.[141] Because reputation is the collective result of inferences drawn from evidence of conduct, introducing reputation evidence may also invade the jury's fact-finding function.[142]

Having correctly rejected evidence in the form of reputation or opinion, the court nevertheless endorsed specific incident evidence, despite the fact that specific incident evidence carries its own risks of distraction and prejudice. The Advisory Committee note to Federal Rule of Evidence 405 makes this risk clear: "Of the three methods of proving character [i.e. opinion, reputation, and specific acts] 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."[143]

The distracting effect of introducing and rebutting evidence of collateral issues, causing proceedings to deteriorate into a series of "mini-trials" on extraneous incidents, is one danger.[144] Some jurisdictions have sought to counter this danger of wasting time by admitting only certified convictions of violent behavior, reasoning that because a conviction represents a factual determination, it does not invite the exaggerated testimony or the "swearing contest" – dueling witnesses presenting different versions of the same event – that might occur with other specific-act evidence.[145] The use of convictions, however, risks further prejudice against the deceased: because convictions carry the imprimatur of the criminal justice system and the implied social disapproval of the deceased's conduct, they increase the risk of undue condemnation of the deceased, the sense that he got what he deserved.[146]

More importantly, admitting specific incidents raises the problem of quantity: how many incidents should be admitted? An isolated incident may be just that – a single violent episode that has little value in demonstrating a

[141] *Id.* at 13-14 (citing Advisory Committee Note to FRE 405, which describes reputation evidence as a "secondhand, irresponsible product of multiplied guesses and gossip").

[142] *See id.* at 14.

[143] FED. R. EVID. 405 advisory committee's note.

[144] *See, e.g.*, MacDonald, *supra* note 80, at 196.

[145] *See, e.g.*, State v. Smith, 608 A.2d 63, 72-73 (Conn. 1992).

[146] For a contrary view, see Mark R. Horton, *Criminal Law – Whether a Defendant's Claim of Victim Aggressiveness is an "Essential Element" of the Defense of Self-Defense*, 24 N.M. L. REV. 449, 458 (1994) (arguing that convictions are less prejudicial because they are based on careful scrutiny of facts according to rules of evidence); Kleiss, *supra* note 76, at 1457 (asserting that "convictions . . . are inherently more trustworthy, reliable[,] and less unfairly prejudicial to either the accused or the state than testimony of eyewitnesses to other specific acts of violence").

general propensity to violent behavior.[147] Conversely, admitting too many incidents might create unfair prejudice against the victim; a long catalog of bad acts might cause a jury to think that the victim was a bad person of whom society was well rid.[148] In addition, the predictive value of specific incidents is uncertain, because the circumstances of the confrontation at issue are unlikely to be sufficiently similar to the incident about which evidence is offered for the jury to draw a reliable inference that the deceased would have behaved in the same way on this occasion.[149] The court therefore rejected one unreliable form of evidence in favor of another form, which is unreliable in a different way.

E. *Safeguards*

In adopting its new common-law rule of evidence, the SJC took two eminently reasonable steps to guard against prejudice to the prosecution's case. First, a defendant who intends to offer such evidence must provide notice to the court and the prosecution both of her intent to offer such evidence and of the specific evidence to be offered.[150] Second, trial judges are to have broad discretion in deciding whether to admit or exclude such evidence after

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[147] *See, e.g.*, People v. Fischer, 426 N.E.2d 965, 971 (Ill. App. Ct. 1981) (Rizzi, J., concurring) (asserting that "a single prior act of the decedent may have been exceptional, unusual and not characteristic"); State v. Waller, 816 S.W.2d 212, 214 (Mo. 1991) (arguing that "character should be judged by the general tenor and current of a life, not by a mere episode in it . . . an isolated episode does not provide a true picture of the character of a person"). The dissenting justice in *Adjutant* asked, "How many fights must a person initiate before being considered a 'violent' person? One? Ten? Does the person who tends to pick fights as a young adult necessarily grow to be a fifty year old initial aggressor?" *Adjutant*, 824 N.E.2d at 16 (Cowin, J., dissenting).

[148] Courts that admit specific act evidence have shown a concern for this problem, if only indirectly, by urging trial courts to guard against admission of evidence that is merely cumulative. *See, e.g.*, State v. Miranda, 405 A.2d 622, 625 (Conn. 1978) (admitting specific acts but cautioning "that the accused is not permitted to introduce the deceased's entire criminal record into evidence in an effort to disparage his character"); State v. Basque, 666 P.2d 599, 602 (Haw. 1983) (stating that prejudice of specific acts evidence can be limited by, inter alia, control on the number of incidents admitted (citing 1 WIGMORE ON EVIDENCE § 198 (3d ed. 1940)));. State v. Baca, 845 P.2d 762, 766-67 (N.M. 1992) (upholding lower court's exclusion of specific act evidence on the grounds that it would have been cumulative, given that defendant was allowed to introduce other reputation and opinion evidence about the victim's character).

[149] *But cf.* Perrin v. Anderson, 784 F.2d 1040, 1045-46 (10th Cir. 1986) (allowing prior incidents where defendant made "extraordinary" showing that deceased's violent reactions to police officers were so invariable as to qualify as reflexive response).

[150] *Adjutant*, 824 N.E.2d at 14 ("This notice must come sufficiently prior to trial to permit the Commonwealth to investigate and prepare a rebuttal."). Similarly, "[t]he prosecutor, in turn, must provide notice to the court and the defendant of whatever rebuttal evidence he or she intends to offer at trial." *Id.*

balancing its probative value against the potential for prejudice.[151] The court concluded that these safeguards would be sufficient to prevent the distraction, prejudice, and waste of time that can come with the admission of propensity evidence and especially with evidence of specific acts.[152] Certainly they are better than no safeguards at all. Will they be sufficient? Only time will tell.

CONCLUSION

This Note has argued that the Supreme Judicial Court's decision in *Commonwealth v. Adjutant*, to change its rule on the admissibility of evidence of a deceased's propensity for violence to support a defendant's claim of self-defense, was not supported by logic or law. By allowing the defendant to introduce specific act evidence that the victim was a violent person who acted in conformity with his violent character on the occasion in question, Massachusetts now allows homicide defendants to put their victims on trial by offering evidence of doubtful probative value and great prejudicial effect. Furthermore, the evidence now admissible will both create the danger of unfair prejudice to the prosecution's case and potentially erode defendants' ability to keep out similar evidence of their own propensities. Rhonda Adjutant's was clearly a hard case. It may have been just the sort of hard case that makes bad law.

[151] *Id.* at 13 (commenting that the "sound discretion of trial judges to exclude marginally relevant or grossly prejudicial evidence can prevent the undue exploration of collateral issues" and that trial judges should admit "so much of that evidence as is noncumulative and relevant to the defendant's self-defense claim"). The majority and the dissent disagreed on the extent to which trial judges' decisions to admit or exclude this evidence would be scrutinized by appellate courts. The dissent warned that trial judges would in fact have little discretion, since the majority's decision had made the evidence *per se* relevant: "the court has already made these determinations . . . for judges, in effect leaving little discretion to be exercised." *Id.* at 22 (Cowin, J., dissenting). The majority dismissed that fear, observing that trial judges' evidentiary decisions are not disturbed absent abuse of discretion. *Id.* at 13, n.18. The dissent also argued that the majority decision gave insufficient guidance for trial judges and that inconsistency of application of the new rule would inevitably result. *Id.* at 22.

[152] *Id.* at 13-14.