

SPECIFIC ACT PROPENSITY EVIDENCE IN SELF-DEFENSE CASES: A TWO-WAY STREET OR A DEAD END?

Abstract: In 2005, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Adjutant* announced a new rule of evidence that allows a defendant raising self-defense to introduce evidence of specific acts of violent conduct that the victim is reasonably alleged to have initiated, when the identity of the first aggressor is in dispute. Left undecided, however, was whether a defendant's choice to take advantage of this new option would open the door to similar evidence of his or her own violent character. This Note argues that Massachusetts should adopt such a two-way street approach, similar to the treatment of character evidence under the Federal Rules of Evidence. Such a rule would allow for a more complete and balanced presentation of evidence to the jury and prevent the prosecution from being placed at an unfair disadvantage, while still maintaining important safeguards for the defendant.

INTRODUCTION

In 2005, the Supreme Judicial Court of Massachusetts (the "SJC") in *Commonwealth v. Adjutant* held that when a defendant claims self-defense and the identity of the first aggressor is in dispute, the trial judge has the discretion to admit evidence of prior specific acts of violent conduct that the victim is reasonably alleged to have initiated, to support the defendant's claim of self-defense.¹ This marks a substantial change in the common law rules of evidence in Massachusetts.² Prior to *Adjutant*, character evidence was inadmissible for the purpose of showing that the victim was likely to have been the first aggressor.³ Rather, the victim's prior violent acts were only admissible if the defendant was aware of such acts at the time of the incident, for the purpose of showing that the defendant was reasonably apprehensive for his or her

¹ 824 N.E.2d 1, 13 (Mass. 2005).

² See *id.* at 3.

³ See *Commonwealth v. Graham*, 727 N.E.2d 51, 58 (Mass. 2000); *Commonwealth v. Lapointe*, 522 N.E.2d 937, 939 (Mass. 1988); *Commonwealth v. Fontes*, 488 N.E.2d 760, 762 (Mass. 1986); *Commonwealth v. Edmonds*, 313 N.E.2d 429, 432-33 (Mass. 1974); PAUL J. LIACOS ET AL., *HANDBOOK OF MASSACHUSETTS EVIDENCE* 137 (7th ed. 1999).

safety.⁴ The court in *Adjutant* found, however, that evidence of a victim's prior violent conduct may be probative of whether the victim was the first aggressor, and therefore such evidence may be admissible without regard to the defendant's knowledge of that conduct at the time.⁵

In deciding to allow evidence of the victim's character on the issue of first aggressor, the SJC reasoned that this evidence was important for the jury to hear so that they may have as complete a picture of the altercation as possible before deciding on the defendant's guilt.⁶ The SJC noted the traditional hesitancy in Massachusetts to admit character evidence to prove conduct ("propensity" evidence) because of its potential for prejudice that might cause the jury to convict a defendant for prior bad acts rather than the crime charged.⁷ The SJC reasoned, however, that this traditional hesitancy is not applicable to evidence of the *victim's* character because the victim is not on trial, and criminal defendants are given greater latitude in admitting exculpatory evidence than prosecutors offering evidence to prove guilt.⁸

The admission of evidence in accordance with *Adjutant* presents a problematic situation in which the jury may hear an incomplete and imbalanced story, with evidence of the victim's, but not the defendant's, prior violent conduct.⁹ The SJC expressly declined to decide whether the prosecution may introduce evidence of prior violent conduct initiated by the defendant once the defendant has done so with respect to the victim.¹⁰ The SJC noted that, at a minimum, the prosecution can rebut evidence of the victim's prior violent conduct with evidence of the victim's peacefulness; but the court also pointed out that Federal Rule of Evidence 404(a)(1) was amended in 2000 to allow for the admission of evidence of the defendant's character once the defendant has attacked the victim's character.¹¹

This Note argues that the SJC should follow an approach similar to the Federal Rules and allow the prosecution to introduce evidence of the defendant's prior violent conduct on the issue of who was the first aggressor, once the defendant has done so with respect to the

⁴ See *Adjutant*, 824 N.E.2d at 6; *Fontes*, 488 N.E.2d at 762; *LIACOS ET AL.*, *supra* note 3, at 138.

⁵ 824 N.E.2d at 3.

⁶ See *id.* at 9.

⁷ See *id.* at 10 n.14.

⁸ See *id.* at 10 & n.14.

⁹ See *id.* at 14 n.19.

¹⁰ See *Adjutant*, 824 N.E.2d at 14 n.19.

¹¹ See FED. R. EVID. 404(a)(1); *id.* advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 14 n.19.

victim.¹² Part I of this Note examines the SJC's decision in *Adjutant*, explaining its history and reasoning, including some discussion of character evidence and how it is treated in other states and in federal court.¹³ Part II focuses on how *Adjutant* should be applied in future cases, specifically the open issue of whether the prosecution should be permitted to introduce evidence of the defendant's prior violent conduct once the defendant has done so with respect to the victim.¹⁴ Finally, Part III argues that in order to present a complete and/or balanced picture of the altercation to the jury and to level the playing field for the prosecution, the SJC should adopt a two-way street rule that provides that the defendant opens the door to an attack on his or her own character by introducing evidence of the victim's violent character, and that this can be accomplished without sacrificing traditional and crucial safeguards for defendants.¹⁵

I. CHARACTER EVIDENCE USED TO PROVE FIRST AGGRESSOR

The SJC's decision in *Commonwealth v. Adjutant* changed the common law rules of evidence in Massachusetts to allow a defendant claiming self-defense to introduce evidence of the victim's violent character, from which the jury can infer that the victim was the first aggressor.¹⁶ Because character evidence is generally inadmissible for the purpose of proving conduct in conformity with one's character, this creates an exception to the rule.¹⁷ In creating this new exception in Massachusetts, the SJC had to consider whether such evidence carries enough probative value on the issue of first aggressor to justify the potential prejudice inherent in character evidence.¹⁸ The SJC also had to determine whether to admit this evidence in the form of specific acts and/or reputation.¹⁹ The defendant in *Adjutant* had attempted unsuccessfully at trial to introduce evidence of the victim's prior acts of violence, and thus the SJC's ultimate decision to allow evidence of prior specific acts

¹² See FED. R. EVID. 404(a)(1); *id.* advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 14 n.19. The Federal Rules differ from *Adjutant* in that they allow the introduction of reputation evidence, and do not allow specific act evidence unless character or a trait of character is an essential element of a charge, claim, or defense. See FED. R. EVID. 405; 824 N.E.2d at 13–14.

¹³ See *infra* notes 16–124 and accompanying text.

¹⁴ See *infra* notes 125–149 and accompanying text.

¹⁵ See *infra* notes 150–225 and accompanying text.

¹⁶ See 824 N.E.2d 1, 13 (Mass. 2005).

¹⁷ See *id.* at 10 & n.14; *infra* notes 51–68 and accompanying text.

¹⁸ See *Adjutant*, 824 N.E.2d at 8–11; *infra* notes 69–89 and accompanying text.

¹⁹ See *Adjutant*, 824 N.E.2d at 11–14; *infra* notes 90–121 and accompanying text.

of violent conduct that the victim is reasonably alleged to have initiated resulted in both a new trial for the defendant and substantial change in the law of evidence in Massachusetts.²⁰

A. *The Facts of Commonwealth v. Adjutant*

The story behind the *Adjutant* decision begins with Rhonda Adjutant, an escort for the Newbury Cosmopolitan International Escort Service.²¹ In the early morning of September 25, 1999, she went to the home of Stephen Whiting under the arrangement that he would pay \$175 for a full-body massage and one hour of her company.²² When Adjutant arrived at Whiting's house, he snorted two lines of cocaine and told her that he wanted intercourse and believed he had paid for it.²³ Adjutant then telephoned the dispatcher for the escort service to inform her that Whiting wanted more than a massage, and then put Whiting on the phone so that the dispatcher could remind him that the agreement was only for a massage.²⁴ Displeased, Whiting demanded a refund, which was refused.²⁵

After this point, the testimony conflicted.²⁶ Adjutant testified at trial that she tried to leave but that Whiting pushed her onto his bed, and that she picked up a knife after Whiting grabbed a crowbar from the kitchen.²⁷ The dispatcher, however, who was still on the phone line, testified that Adjutant had picked up the knife first.²⁸ The dispatcher testified that when she had been on the phone with Whiting, he said that Adjutant had a knife, and that subsequently, when she got back on the phone with Adjutant, Adjutant told her that Whiting had picked up the crowbar.²⁹

Whiting then hit Adjutant in the leg with the crowbar, and Adjutant responded by nicking Whiting in the face with the knife.³⁰ Adjutant testified that she then tried to avert further violence by offering to begin a massage again, but Whiting refused.³¹ She testified that she

²⁰ See *Adjutant*, 824 N.E.2d at 5 & n.4, 14-15.

²¹ *Id.* at 3.

²² *Id.* at 4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Adjutant*, 824 N.E.2d at 4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Adjutant*, 824 N.E.2d at 4.

³¹ *Id.*

tried to run to the door, but was tackled by Whiting, and in the ensuing struggle stabbed Whiting in the shoulder with the knife and backed away, as Whiting continued to block her exit.³²

At this point, Adjutant's drivers returned to the house at the behest of the dispatcher.³³ They heard her screams and kicked open the door to Whiting's apartment, after which their testimony differed markedly from Adjutant's.³⁴ Adjutant claimed that at the moment one of the drivers kicked in the door, Whiting advanced towards her with the crowbar raised, prompting her to stab him in the neck fatally.³⁵ One of the drivers, however, testified that Whiting turned to face the driver when the door was kicked open, at which point Adjutant moved towards Whiting and stabbed him in the neck.³⁶

At trial, the jury was required to determine whether Adjutant acted in self-defense, and, in doing so, had to weigh the credibility of Adjutant as well as of the dispatcher and driver, to determine who the first aggressor actually was during the final moment of this altercation.³⁷ Adjutant presented evidence that Whiting had cocaine in his bloodstream, and that his blood alcohol content indicated his consumption of approximately six ounces of beer or five ounces of whiskey.³⁸ Whiting's neighbors testified that he had appeared intoxicated earlier that evening, and had made unsuccessful sexual advances toward women near the apartment.³⁹ Adjutant sought to cross-examine Whiting's neighbors with regard to his previous violent behavior and his reputation for violence, but the judge sustained the prosecutor's objection, ruling that Whiting's violent past or reputation for violence were only relevant if Adjutant had been aware of them at the time of the incident, consistent with the law in Massachusetts at the time.⁴⁰ The evidence was excluded, and the jury ultimately convicted Adjutant of voluntary manslaughter.⁴¹

The evidence that Adjutant unsuccessfully attempted to present at trial included three violent acts Whiting had committed while intoxi-

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4-5.

³⁵ *Adjutant*, 824 N.E.2d at 4-5.

³⁶ *Id.* at 5.

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Adjutant*, 824 N.E.2d at 5; *see* *Commonwealth v. Graham*, 727 N.E.2d 51, 58 (Mass. 2000); *Commonwealth v. Lapointe*, 522 N.E.2d 937, 939 (Mass. 1988); *Commonwealth v. Fontes*, 488 N.E.2d 760, 762 (Mass. 1986); *Commonwealth v. Edmonds*, 313 N.E.2d 429, 432-33 (Mass. 1974); *LIACOS ET AL.*, *supra* note 3, at 137.

⁴¹ *Adjutant*, 824 N.E.2d at 6.

cated within three months of his death.⁴² On one occasion, Whiting chased after his neighbor "like a raging bull," while on cocaine after being confronted about vandalizing the common yard.⁴³ On another, he allegedly threatened two neighbors with a butcher knife.⁴⁴ On a third occasion, Whiting allegedly threw boiling water on a friend during an argument.⁴⁵

Adjutant highlights a basic predicament in this type of self-defense case: the accused, if unable to present evidence of the victim's propensity for violence, is prevented from introducing highly relevant exculpatory evidence that would greatly help the jury uncover the truth about what happened during the crucial moments of the incident in question.⁴⁶ In Massachusetts, a defendant is not entitled to act in self-defense if he is the aggressor and did not withdraw from the affray.⁴⁷ Thus, the issue of first aggressor is crucial in a self-defense case, and evidence affecting this determination is important for the jury to consider.⁴⁸ The SJC noted that "such evidence may be the jury's only means of assessing the likelihood of the defendant's account of the incident in a homicide case."⁴⁹ Accordingly, the SJC held that in such a situation

⁴² *Id.* at 5 n.4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See 824 N.E.2d at 4-6; 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, 1438 (1998-99) (advocating the admission of specific act evidence rather than reputation evidence to prove first aggressor).

⁴⁷ See *Commonwealth v. Brum*, 808 N.E.2d 902, 909 (Mass. 2004); *Commonwealth v. Fisher*, 742 N.E.2d 61, 71 (Mass. 2001) (quoting *Commonwealth v. Naylor*, 553 N.E.2d 542 (Mass. 1990) (stating that the right of self-defense is not available to aggressor unless aggressor "withdraws in good faith" and "announces his intention to retire")); *Commonwealth v. Pring-Wilson*, 19 Mass. L. Rptr. 624, 626-27 (Super. Ct. 2005). In Massachusetts, self-defense is treated as a failure of proof, such that once it is successfully raised by the defendant, the prosecution must disprove it beyond a reasonable doubt. *Commonwealth v. Mejia*, 554 N.E.2d 1186, 1187-88 (Mass. 1990); *Lapointe*, 522 N.E.2d at 941; *Commonwealth v. Rodriguez*, 352 N.E.2d 203, 208 & n.10 (Mass. 1976); *Commonwealth v. Vidito*, 487 N.E.2d 206, 209-10 (Mass. App. Ct. 1985); see *infra* text accompanying notes 206-214.

⁴⁸ See *Adjutant*, 824 N.E.2d at 3 n.1.

⁴⁹ *Id.* The SJC did not expressly limit its holding to homicide cases, although *Adjutant* was itself a homicide case, and much of the reasoning and discussion is most applicable to such cases. See *id.* at 3 n.1, 8-10. That such a limitation is implied is an arguable reading of *Adjutant*, but even without such a limitation, a trial judge may attribute much less probative value to the evidence of the victim's violent character when the victim could be called to testify. See *id.* With a live victim, evidence of the victim's violent character no longer would be "the jury's only means of assessing the likelihood of the defendant's account of the incident." See *id.* Accordingly, this Note focuses on the implications of *Adjutant* in homicide cases.

the defendant may introduce evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated.⁵⁰

B. Exceptions to the General Bar on Propensity Evidence

The SJC's decision in *Adjutant* to allow evidence of the victim's prior specific acts of violence, though unknown to the defendant, on the issue of first aggressor creates an exception to the general bar against the use of character evidence to prove conduct.⁵¹ The common law rules of evidence in Massachusetts hold that, in general, evidence is admissible if it is relevant, but the trial judge has the discretion to exclude it if its probative value is outweighed by the risk of prejudice.⁵² Character evidence is generally not admissible to show that someone acted in conformity with that character on a particular occasion—that is, that because someone has a propensity to act in a certain manner, he or she did act in such a manner on the occasion in question.⁵³ This “propensity doctrine” exists not because character evidence lacks relevance, but rather because of the risk of unfair prejudice resulting from the admission of such evidence.⁵⁴

Generally, there are three possible forms that character evidence may take: specific acts, reputation, or opinion.⁵⁵ Specific act evidence is self-explanatory: a witness testifies as to the details of a specific event—in this context, an incident of violence initiated by one of the parties, such as Mr. Whiting's prior threats to his neighbors with a butcher knife.⁵⁶ With reputation evidence, the witness testifies as to the composite opinion of the person in question held by those likely to have observed a representative sample of his conduct.⁵⁷ With opinion evidence, the witness testifies as to her individual opinion of the person in question.⁵⁸

There are two purposes for which evidence of violent character is useful when the defendant claims to have acted in self-defense.⁵⁹ First, evidence of the victim's violent character is admissible to show the

⁵⁰ See *id.* at 13.

⁵¹ See *id.* at 10; LIACOS ET AL., *supra* note 3, at 130.

⁵² See *Adjutant*, 824 N.E.2d at 12; LIACOS ET AL., *supra* note 3, at 126.

⁵³ See *Commonwealth v. Kozek*, 505 N.E.2d 519, 526 (Mass. 1987); LIACOS ET AL., *supra* note 3, at 130.

⁵⁴ See LIACOS ET AL., *supra* note 3, at 131.

⁵⁵ See FED. R. EVID. 405; LIACOS ET AL., *supra* note 3, at 149–50.

⁵⁶ See *Adjutant*, 824 N.E.2d at 6.

⁵⁷ LIACOS ET AL., *supra* note 3, at 150.

⁵⁸ See *id.*

⁵⁹ See *Adjutant*, 824 N.E.2d at 6.

defendant's state of mind at the time of the incident.⁶⁰ The defendant may introduce this evidence to show that he was reasonably apprehensive for his safety, and that the degree of force used was reasonable in light of the victim's violent tendencies.⁶¹

To use character evidence for this first purpose, the defendant must have had knowledge of the victim's violent character at the time of the incident.⁶² In 1986, the SJC held in *Commonwealth v. Fontes* that evidence of a victim's prior specific acts of violence that are known to the defendant are admissible.⁶³ The court held that, although this evidence also may lead the jury to draw inferences with regard to the victim's propensities, this information is important in assessing the reasonableness of the defendant's reaction to the events leading to the incident, and that the jury, in fairness, should have this information.⁶⁴ The *Fontes* court expanded the exception to the general rule barring character evidence, but prior to *Adjutant*, defendants who did not have knowledge of the victim's violent character were unable to support a claim of self-defense with much besides their own accounts of the events.⁶⁵

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*; *Graham*, 727 N.E.2d at 58; *Fontes*, 488 N.E.2d at 762; *Edmonds*, 313 N.E.2d at 432; *LIACOS ET AL.*, *supra* note 3, at 137.

⁶³ See 488 N.E.2d at 761; *LIACOS ET AL.*, *supra* note 3, at 138. The court in *Fontes* avoided the issue of whether character evidence is admissible to prove first aggressor. See *Adjutant*, 824 N.E.2d at 6; *Fontes*, 488 N.E.2d at 763 n.1. The court in *Fontes* noted that "[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." 488 N.E.2d at 763 n.1.

⁶⁴ See *Fontes*, 488 N.E.2d at 763.

⁶⁵ See *Adjutant*, 824 N.E.2d at 6; *Fontes*, 488 N.E.2d at 763; *Pring-Wilson*, 19 Mass. L. Rptr. at 626. This was evident in the widely publicized recent case of Alexander Pring-Wilson, a Harvard graduate student convicted of voluntary manslaughter after an early-morning violent encounter with a stranger, where the issue of first aggressor was hotly disputed. See *Pring-Wilson*, 19 Mass. L. Rptr. at 626. The only eye-witnesses to testify at trial besides Pring-Wilson were two friends of the victim. *Id.* at 625. The jury was presented with two completely different stories as to who was the initial aggressor. See *id.* at 625-26. Pring-Wilson sought to introduce evidence of prior violent conduct of the victim as well as one of the eye-witnesses, but was denied this opportunity because, consistent with the law at the time, these prior acts were not known to Pring-Wilson at the time of the altercation. See *id.* at 626. The SJC, however, decided *Adjutant* while the record in Pring-Wilson's case was still being assembled, holding that where the identity of the first aggressor is in dispute, the trial judge may 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. *Id.* Although the SJC in *Adjutant* adopted this new rule only prospectively, Judge Quinlan, the trial judge in *Pring-Wilson*, ruled that Pring-Wilson could claim the benefit of *Adjutant* because defense counsel preserved the issue at trial and Pring-Wilson was deprived of evi-

The second purpose for which character evidence is useful when the defendant claims self-defense, and on which this Note focuses, is to show that the victim was likely to have been the first aggressor.⁶⁶ This does not involve the defendant's state of mind at the time, but rather the victim's propensity for violence, so the defendant's knowledge of this character is not required.⁶⁷ Propensity evidence on the issue of first aggressor is admissible in some form in federal court and in the majority of states, but was not in Massachusetts until *Adjutant*.⁶⁸

The court in *Adjutant* reasoned that evidence of the victim's propensity for violence has substantial probative value, and will help the jury identify the first aggressor when it is in dispute.⁶⁹ In *Adjutant*, whether Whiting was prone to aggression when under the influence of drugs and/or alcohol would have thrown light on the crucial issue of who was the first aggressor.⁷⁰ Had the evidence of Whiting's violent behavior in the past been admitted, it would have supported the inference that Whiting was the first aggressor and lent credibility to *Adjutant*'s version of the incident.⁷¹

In allowing evidence of the victim's prior violent acts, the SJC in *Adjutant* looked to how the state of Illinois handled the same issue in *People v. Lynch* in 1984.⁷² In *Lynch*, the defendant fatally shot the victim in the head but claimed he shot in self-defense.⁷³ The trial court ex-

dence that went to the heart of the case's central dispute. See *id.* at 629–30. Accordingly, Judge Quinlan vacated the conviction and ordered a new trial, within her discretion to do so under Massachusetts Rule of Criminal Procedure 25(b)(2) on the ground that the integrity of the evidence was suspect. See *id.* The SJC heard oral arguments regarding whether a new trial was proper on January 2, 2007. Video of Oral Argument, Commonwealth v. Pring-Wilson, No. SJC-09843, available at http://www.suffolk.edu/sjc/archive/2007/SJC_09843.html.

⁶⁶ See *Adjutant*, 824 N.E.2d at 6.

⁶⁷ See *id.*

⁶⁸ See FED. R. EVID. 404(a)(2); *Adjutant*, 824 N.E.2d at 7 n.8. Character evidence on the issue of first aggressor is admissible in federal court in the form of reputation or opinion. See FED. R. EVID. 404(a)(2); *United States v. Emerson Taken Alive*, 262 F.3d 711, 714 (8th Cir. 2001); *United States v. Smith*, 230 F.3d 300, 307 (7th Cir. 2000); *United States v. Burks*, 470 F.2d 432, 434–35 (D.C. Cir. 1972). The majority of states also allow character evidence in some form. See *Adjutant*, 824 N.E.2d at 7 n.8; see also, e.g., *White v. State*, 314 So. 2d 857, 864 (Ala. 1975); *McCracken v. State*, 914 P.2d 893, 898 (Alaska Ct. App. 1996); *State v. Santanna*, 735 P.2d 757, 759 (Ariz. 1987). *Adjutant* allows character evidence in Massachusetts in the form of specific act evidence. See 824 N.E.2d at 13.

⁶⁹ 824 N.E.2d at 8; see also *Burks*, 470 F.2d at 434–35; *State v. Griffin*, 406 P.2d 397, 400 (Ariz. 1965); *People v. Lynch*, 470 N.E.2d 1018, 1020 (Ill. 1984).

⁷⁰ 824 N.E.2d at 9.

⁷¹ *Id.*

⁷² See *Lynch*, 470 N.E.2d at 1020; *Adjutant*, 824 N.E.2d at 9–10.

⁷³ 470 N.E.2d at 1019.

cluded evidence of the victim's convictions for battery because the defendant was unaware of them at the time.⁷⁴ The Supreme Judicial Court of Illinois found, however, that these convictions were important to the defendant's case, as they might affect the jury's judgment of the credibility of the various accounts of the incident, and would help complete the picture provided by the testimony.⁷⁵ The *Lynch* court noted that the evidence was both incomplete and conflicting, as is often true where self-defense is raised in a homicide case, and therefore the jury needed all of the available facts to determine what really occurred, including evidence of the victim's prior convictions for battery.⁷⁶ Thus, the court held that when the defendant asserts self-defense, the victim's aggressive and violent character is relevant to show who was the first aggressor, regardless of whether the defendant was aware of it at the time.⁷⁷

In addition to the *Lynch* decision from Illinois, the SJC in *Adjutant* relied heavily on the treatment of propensity evidence in federal court.⁷⁸ The Federal Rules of Evidence also allow for the admission of victim character evidence when the issue of first aggressor is in dispute.⁷⁹ Rule 404(a) states the general rule barring evidence of a person's character or a trait of character for the purpose of proving action in conformity therewith on a particular occasion.⁸⁰ Rule 404(a) (2) is an

⁷⁴ See *id.*

⁷⁵ *Id.* at 1020.

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ See *Adjutant*, 824 N.E.2d at 6.

⁷⁹ FED. R. EVID. 404(a) (2). Rule 404(a) reads:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. 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) Character of accused. 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 or character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a) (2), evidence of the same trait or character of the accused offered by the prosecution;

(2) Character of the alleged victim. 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. 404(a).

⁸⁰ *Id.* 404(a).

exception to this general rule, and allows for the admission of evidence of the alleged victim's character on the issue of first aggressor.⁸¹

The SJC in *Adjutant* reached the same conclusion as the Federal Rules—that victim character evidence on the issue of first aggressor should be admitted—for a few reasons.⁸² The SJC noted that if juries are capable of hearing evidence of a victim's violent history that is known to a defendant for the limited purpose of considering the reasonableness of the defendant's fear, as the court held in *Fontes*, then the jury is likewise capable of weighing similar evidence with respect to the first aggressor issue.⁸³ The court found that excluding such evidence posed a danger of prejudice to the defendant's case, and that the jury should have as complete a picture of the altercation as possible before rendering a verdict.⁸⁴

The SJC did note, however, the traditional hesitation to allow the admission of character evidence to prove conduct because of concerns about its great potential for prejudice.⁸⁵ Evidence of a defendant's character has been traditionally of concern in Massachusetts because it can be highly prejudicial, can raise collateral issues that divert the attention of the jury from the issue immediately before it, and may lead the jury to convict the defendant because of his poor character.⁸⁶ The SJC, however, reasoned that although these concerns are applicable to evidence of the defendant's character, they do not apply with the same force to evidence of the victim's character, as the victim is not on trial, and criminal defendants are given greater latitude in presenting exculpatory evidence.⁸⁷ Therefore, because evidence of the victim's violent character is highly probative on the issue of first aggressor and does not pose a high risk of prejudice, the court found that some form of this

⁸¹ *Id.* 404(a)(2); see *Emerson Taken Alive*, 262 F.3d at 714; *Smith*, 230 F.3d at 307; *United States v. Greschner*, 647 F.2d 740, 741–42 (7th Cir. 1981). Rule 404(a)(1) is also an exception to this general bar against character evidence. See FED. R. EVID. 404(a)(1). Rule 404(a)(1) allows the accused to introduce evidence of his or her own character—for example, by presenting witnesses to testify to a pertinent character trait such as peacefulness—but at the price of allowing the prosecution to rebut this with evidence to the contrary. See *id.* Rule 404(a)(1) also allows the prosecution to attack the defendant's character once the defendant has done so with respect to the victim under Rule 404(a)(2). See *id.*

⁸² See FED. R. EVID. 404(a)(2); 824 N.E.2d at 9–10.

⁸³ See *Adjutant*, 824 N.E.2d at 9; *Fontes*, 488 N.E.2d at 763.

⁸⁴ See *Adjutant*, 824 N.E.2d at 9; *Lynch*, 470 N.E.2d at 1020.

⁸⁵ See *Adjutant*, 824 N.E.2d at 10 & n.14.

⁸⁶ See *id.* at 10 n.14; *Commonwealth v. Helfant*, 496 N.E.2d 433, 441 (Mass. 1986); *Commonwealth v. Jackson*, 132 Mass. 16, 20–21 (1882).

⁸⁷ *Adjutant*, 824 N.E.2d at 10 & n.14.

evidence should be admissible.⁸⁸ In doing so, Massachusetts joined the federal courts and forty-five of the forty-eight state jurisdictions that had considered the issue and found that some form of character evidence is admissible on the first aggressor issue.⁸⁹

C. *What Form—Specific Act or Reputation Evidence?*

Although the SJC chose to agree with the substantial weight of persuasive authority in support of admitting evidence of the victim's character, it chose to take a different path than these jurisdictions as to the form such evidence may take.⁹⁰ The SJC held that character evidence would be admissible in the form of specific acts, but not reputation.⁹¹ In contrast, the federal courts and all other state jurisdictions that allow character evidence allow reputation evidence.⁹²

Federal Rule of Evidence 405 governs the form of character evidence that may be admitted in federal court.⁹³ Character evidence is only admissible in the form of reputation or opinion.⁹⁴ Specific instances of conduct are only admissible if the character or a trait of character of a person is an essential element of a charge, claim, or defense.⁹⁵ The Advisory Committee's Note to Rule 405 explains that of the three methods of proving character, evidence of specific instances of conduct is the most convincing, but also possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.⁹⁶ Thus, specific act evidence is only allowable in cases in which character is an element and hence deserving of a searching inquiry.⁹⁷ When

⁸⁸ See *id.* at 11.

⁸⁹ See *id.* at 7.

⁹⁰ See *id.* at 13.

⁹¹ See *id.*

⁹² *Adjutant*, 824 N.E.2d at 11; see FED. R. EVID. 405.

⁹³ FED. R. EVID. 405. Rule 405 reads as follows:

Rule 405. Methods of Proving Character

(a) Reputation or opinion. 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.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Id.

⁹⁴ *Id.* 405(a).

⁹⁵ *Id.* 405(b).

⁹⁶ *Id.* 405 advisory committee's note.

⁹⁷ *Id.*

character evidence is used only circumstantially, for its propensity purpose, it occupies a lesser status and, as a result, the Federal Rules limit evidence of the victim's violent character in a self-defense case to reputation or opinion evidence.⁹⁸

The SJC noted that many states have adopted rules of evidence that are identical to the Federal Rules of Evidence, and the dominant interpretation of these rules is the same as the federal interpretation.⁹⁹ Some states, however, use the federal rules framework but allow specific act evidence under the state equivalent of Federal Rule of Evidence 405, finding that the victim's character is an essential element of a defendant's self-defense claim.¹⁰⁰ Some other states that have versions of the Federal Rules of Evidence have crafted a compromise rule that allows specific act evidence, but only in the form of convictions.¹⁰¹ States that have not adopted the Federal Rules at all are split on the issue.¹⁰²

The SJC in *Adjutant* considered this treatment by the Federal Rules and other states, and acknowledged the various arguments against the admission of specific act evidence.¹⁰³ Such arguments include: (1) the danger of ascribing character traits to a victim with proof of isolated incidents, (2) the worry that jurors will be invited to acquit the defendant on the improper ground that the victim deserved to die, (3) the potential for wasting time trying collateral questions surrounding the victim's past conduct, (4) the unfair difficulty of rebuttal by the prosecution, and (5) the strategic imbalance that flows from the inability of prosecutors to introduce similar evidence of the defendant's prior bad acts.¹⁰⁴

⁹⁸ See FED. R. EVID. 405 advisory committee's note; see also, e.g., *United States v. Keiser*, 57 F.3d 847, 855 (9th Cir. 1995); *United States v. Piche*, 981 F.2d 706, 713 (4th Cir. 1992).

⁹⁹ *Adjutant*, 824 N.E.2d at 11 n.15; see *State v. McIntyre*, 488 N.W.2d 612, 616-17 (N.D. 1992).

¹⁰⁰ *Adjutant*, 824 N.E.2d at 11 n.15; see *State v. Dunson*, 433 N.W.2d 676, 680-81 (Iowa 1998).

¹⁰¹ *Adjutant*, 824 N.E.2d at 11 n.15; see, e.g., *State v. Miranda*, 405 A.2d 622, 625 (Conn. 1978); *State v. Baca*, 845 P.2d 762, 766 (N.M. 1992); *State v. Howell*, 649 P.2d 91, 96 (Utah 1982).

¹⁰² *Adjutant*, 824 N.E.2d at 11; see *Lynch*, 470 N.E.2d at 1020.

¹⁰³ See 824 N.E.2d at 11-12.

¹⁰⁴ *Id.* at 11; Kleiss, *supra* note 46, at 1447-48; see also Hallie White Speight, Note, *Hard Cases Make Bad Law: Commonwealth v. Adjutant and Evidence of the Deceased's Propensity for Violence in Self-Defense Cases in Massachusetts*, 86 B.U. L. REV. 793, 818 (2006) (arguing that the SJC's decision to allow specific act evidence was a mistake that will allow defendants to put their victims on trial by offering evidence of doubtful probative value and great prejudicial effect).

The SJC in *Adjutant*, however, found that these concerns with specific act evidence do not require an unbending rule of exclusion.¹⁰⁵ The court disagreed with the argument that juries are incapable of receiving such evidence and considering it for its proper purpose.¹⁰⁶ Confidence, or lack thereof, in juries is a major factor in considering whether to admit specific act evidence.¹⁰⁷ If one believes that a jury is capable of hearing evidence of occasions when the victim was violent and then considering this evidence for the limited purpose of determining who was the first aggressor without becoming prejudiced against the victim, then specific act evidence is appropriate.¹⁰⁸ On the other hand, if one takes the view that juries are incapable of hearing such evidence for this limited purpose, and will instead be likely to acquit the defendant because the victim got what he deserved, then specific act evidence poses a risk of prejudice that far outweighs its probative value.¹⁰⁹

Justice Cowan's dissent in *Adjutant* took the latter of these views, and argued that the admission of character evidence against victims will unduly prejudice juries against victims with violent pasts.¹¹⁰ Justice Cowan contended that the new rule propounded in *Adjutant* invites the jury to evaluate the relative worth of the deceased victim, and noted the tendency of human nature to want to punish someone for her bad acts.¹¹¹ Justice Cowan cautioned that just as it is unacceptable to punish a defendant for his prior bad acts, it is equally unacceptable to punish a victim for prior bad acts by sanctioning her death.¹¹² She also predicted that the new rule will confuse juries, diverting their attention from the case at hand by distracting them with collateral issues.¹¹³ Justice Cowan argued that the new rule announced by the majority in *Adjutant* will make it more difficult for juries to assess comprehensively the circumstances attending myriad prior incidents of violence involving victims.¹¹⁴

The majority in *Adjutant* found that the trial judge's discretion in allowing or excluding such evidence lessens the potential for prejudice

¹⁰⁵ 824 N.E.2d at 12.

¹⁰⁶ See *id.* at 12 n.17.

¹⁰⁷ See *id.* at 19 (Cowan, J., dissenting); Kleiss, *supra* note 46, at 1450-51.

¹⁰⁸ See *Adjutant*, 824 N.E.2d at 13 (majority opinion); Kleiss, *supra* note 46, at 1450-51.

¹⁰⁹ See *Adjutant*, 824 N.E.2d at 13; Kleiss, *supra* note 46, at 1450-51.

¹¹⁰ See 824 N.E.2d at 18 (Cowan, J., dissenting).

¹¹¹ *Id.* at 19.

¹¹² *Id.*

¹¹³ See *id.*

¹¹⁴ *Id.*

when evidence of the victim's violent acts is admitted.¹¹⁵ Evidence of prior bad acts, although not generally admissible for character purposes, is admissible for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or a particular way of doing an act or a particular skill, unless the trial judge finds that the probative value of the evidence is outweighed by the potential for prejudice.¹¹⁶ The trial judge also uses similar discretion when the prosecution seeks to impeach a defendant's testimony with his prior convictions—the trial judge may admit those convictions if they are noncumulative and probative of the defendant's truthfulness.¹¹⁷

Given that trial judges are already trusted with great discretion in weighing the probative and prejudicial value of specific act evidence in these various circumstances, the SJC in *Adjutant* was satisfied that the sound discretion of trial judges to exclude marginally relevant or grossly prejudicial evidence could prevent the undue exploration of collateral issues.¹¹⁸ Trial judges also are able to mitigate the potential dangers of prejudice and confusion by instructing the jury on the precise and limited purpose for which the specific act evidence is admitted.¹¹⁹

Additionally, the SJC noted that juries should have the ability to draw *their own* inferences in assessing how the victim's prior violent conduct bears on the likelihood that the victim was the first aggressor, and therefore specific act evidence is preferable to reputation evidence.¹²⁰ Thus, the SJC concluded that the trial judge has 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.¹²¹

To cure the potential unfairness to the prosecutor faced with rebutting this evidence against the victim, the SJC held that a defendant

¹¹⁵ See 824 N.E.2d at 12–13 (majority opinion).

¹¹⁶ *Id.* at 12; LIACOS ET AL., *supra* note 3, at 154.

¹¹⁷ See *Adjutant*, 824 N.E.2d at 13; Commonwealth v. Leftwich, 724 N.E.2d 691, 696 (Mass. 2000).

¹¹⁸ See 824 N.E.2d at 13.

¹¹⁹ See *id.*

¹²⁰ *Id.* at 14.

¹²¹ *Id.* The SJC also held that reputation evidence is not admissible, reasoning that it is less reliable than specific act evidence. See *id.* The SJC noted that reputation evidence is often opinion in disguise, which is not admissible in Massachusetts, and is often formed based on rumor or other unreliable hearsay sources, without any personal knowledge on the part of the person holding the opinion. *Id.* at 13; see FED. R. EVID. 405 advisory committee's note.

who intends to introduce such evidence must provide notice to the court and to the prosecutor of such intent, and of the specific evidence she intends to offer.¹²² The court found that the evidence Adjutant sought to offer at trial went directly to the heart of the central dispute—whether Whiting was the first aggressor—and that the evidence may have been enough to create reasonable doubt.¹²³ The court therefore set aside Adjutant's conviction and remanded the case for a new trial in accordance with the new rule.¹²⁴

II. APPLYING *ADJUTANT*—IS IT A TWO-WAY STREET?

Although the SJC made it clear in its 2005 *Commonwealth v. Adjutant* decision that a defendant who claims self-defense may present specific act character evidence about the victim, the court left open the question of whether the prosecution may counter such evidence with similar evidence regarding the defendant.¹²⁵ The court stated that, at a minimum, once evidence of the victim's violent conduct is admitted, the prosecutor may introduce evidence of the victim's peaceful propensities.¹²⁶ Thus, in the wake of *Adjutant*, when a trial judge allows the defense to introduce evidence of the victim's violent character, it is unclear whether the judge should admit or exclude similar evidence showing the defendant's violent character.¹²⁷

A. Federal Treatment as a Two-Way Street

The SJC noted that Federal Rule of Evidence 404(a)(1) was amended in 2000 to allow the prosecution to introduce evidence of the defendant's violent character once the defendant attacks the character of the victim.¹²⁸ Rule 404(a) provides the general rule barring the admissibility of character evidence, but provides exceptions to this rule in 404(a)(1) for the accused's character, and 404(a)(2) for the victim's character.¹²⁹ Rule 404(a)(1) allows:

¹²² See *Adjutant*, 824 N.E.2d at 14.

¹²³ *Id.* at 15.

¹²⁴ See *id.* The SJC held that because *Adjutant* argued for the rule on appeal, she should have the benefit of this decision, but that otherwise it shall apply only prospectively. *Id.*

¹²⁵ See *Commonwealth v. Adjutant*, 824 N.E.2d 1, 14 n.19 (Mass. 2005).

¹²⁶ See *id.*; *Commonwealth v. Lapointe*, 522 N.E.2d 937, 939 (Mass. 1988).

¹²⁷ See 824 N.E.2d at 14 n.19.

¹²⁸ See FED. R. EVID. 404 advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 14 n.19.

¹²⁹ FED. R. EVID. 404(a).

[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait or 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.¹³⁰

The Advisory Committee's Notes explain that Rule 404(a)(1) was amended to make clear that the accused cannot attack the victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused.¹³¹ Thus, when the defendant attacks the character of an alleged victim under Rule 404(a)(2), the door is opened for the prosecution to make such an attack on the accused.¹³² The 2000 amendment was designed to yield a more balanced presentation of character evidence on the issue of first aggressor.¹³³ Evidence of the defendant's character admitted under Rule 404(a)(1) is limited to reputation evidence because it is subject to the same requirements of Rule 405 as evidence of the victim's character.¹³⁴

B. How Should Trial Courts in Massachusetts Rule When the Accused Attacks the Victim's Character Under Adjutant and the Prosecution Seeks to Do the Same with the Accused?

The Advisory Committee's Note to Federal Rule of Evidence 404 highlights the importance of a balanced presentation of character evidence, and Justice Cowan's dissent in *Adjutant* discussed the imbalance of admitting character evidence against one party in a case and not the other.¹³⁵ Justice Cowan noted that the rule created by *Adjutant* would be fair only if victims or the prosecution were able equally to explore defendants' violent histories, but instead the majority created a one-sided rule that is prejudicial to victims.¹³⁶ She described this as a "lopsided

¹³⁰ *Id.* 404(a)(1).

¹³¹ *Id.* 404 advisory committee's note to 2000 amendment.

¹³² *See id.*

¹³³ *Id.*

¹³⁴ *See* FED. R. EVID. 405; *id.* 404 advisory committee's note to 2000 amendment.

¹³⁵ *See id.* 404 advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 17-18 (Cowan, J., dissenting). Justice Cowan argued that character evidence should not be introduced against either party. *See Adjutant*, 824 N.E.2d at 17-18 (Cowan, J., dissenting).

¹³⁶ 824 N.E.2d at 18 (Cowan, J., dissenting). Although Justice Cowan noted that the majority created a one-sided rule, this is not clear from the majority opinion, which explicitly declined to decide whether the prosecution may introduce evidence of the defendant's

rule," which presents the jury with only the defendant's side of the story, giving the jury an incomplete picture of the incident and promoting a biased view of the parties.¹³⁷ Justice Cowan argued that the fix for this imbalance (the Federal Rules' two-way street approach) only makes matters worse: allowing the prosecution to introduce evidence of the accused's violent character would cast aside a long-held evidentiary safeguard for defendants.¹³⁸

Massachusetts traditionally has been reluctant to admit evidence of a defendant's prior bad acts for the purpose of showing bad character.¹³⁹ In *Commonwealth v. Jackson* in 1882, the SJC, in an often-cited passage, described the problems associated with evidence of the defendant's prior bad acts:

Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well-settled rule of the criminal law, that the general character of a defendant cannot be shown to be bad, unless he shall first himself attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description.¹⁴⁰

In addition, in *Commonwealth v. Stone* in 1947, the SJC noted that such evidence presents a danger that because the accused appears to be a bad person, capable of and likely to commit such a crime as that

violent character once the defense has done so with respect to the victim. *See id.* at 14 n.19 (majority opinion).

¹³⁷ *Id.* at 18 (Cowan, J., dissenting).

¹³⁸ *See id.*

¹³⁹ *See Commonwealth v. Baker*, 800 N.E.2d 267, 276-77 (Mass. 2003); *Commonwealth v. Triplett*, 500 N.E.2d 261, 263-64; (Mass. 1986); *Commonwealth v. Helfant*, 496 N.E.2d 433, 441 (Mass. 1986); *Commonwealth v. Trapp*, 485 N.E.2d 162, 165-66 (Mass. 1985); *Commonwealth v. Stone*, 73 N.E.2d 896, 897-98 (Mass. 1947); *Commonwealth v. Jackson*, 132 Mass. 16, 20-21 (1882).

¹⁴⁰ 132 Mass. at 20-21. In *Jackson*, the defendant-seller was indicted for falsely pretending and asserting to the buyer of a horse that the horse was sound and kind, with the knowledge that such assertion was false and with intent to defraud the buyer. *Id.* at 16. The prosecution was allowed to introduce evidence of the circumstances and details of three other sales made by the defendant in which the defendant sold horses under similar false pretenses for the purpose of showing the intent with which the defendant made the sale of the horse to the buyer, as charged in the indictment. *Id.* at 17.

charged, the jury might be led to dispense with proof beyond a reasonable doubt that he actually did commit the crime charged.¹⁴¹ Furthermore, the court in *Commonwealth v. Trapp* in 1985 noted that it is a fundamental rule that the prosecution may not introduce evidence that a defendant previously misbehaved for the purpose of showing his bad character or propensity to commit the crime charged.¹⁴²

These safeguards for the defendant were reiterated in *Commonwealth v. Baker* in 2003, when the SJC ordered a new trial because, in the defendant's trial for the murder of his seven-month-old son, the admission of evidence of the defendant's prior bad acts was prejudicial.¹⁴³ The prosecution had introduced evidence that the defendant had a history of striking or throwing objects against walls when he became angry, and that the defendant was responsible for three indentations in the wallboard of the home: one in his son's bedroom, made when he punched the wall while wearing boxing gloves; a second in the hallway, made when he punched the wall with his bare fist after an argument; and a third in the living room, made when he threw a bottle at the wall.¹⁴⁴ The court found that none of this evidence should have been admitted, and that the trial judge compounded this error by failing to instruct the jury that they could not consider the prior incidents as evidence that the defendant was inclined to commit the offense charged.¹⁴⁵

In *Adjutant*, the SJC acknowledged these longstanding concerns with admitting character evidence to prove conduct in conformity therewith.¹⁴⁶ In ruling that such evidence could be admitted with regard to the victim, however, the SJC was able to sidestep these concerns because the victim is not on trial and criminal defendants are given greater latitude in presenting exculpatory evidence.¹⁴⁷ A two-way street rule that allows the prosecution to counter victim character evidence with similar evidence of the accused's violent character would be inconsistent with this reasoning.¹⁴⁸ Despite this inconsistency, the SJC at least hinted at the possibility of creating a two-way street by pointing out that

¹⁴¹ 73 N.E.2d at 898.

¹⁴² 485 N.E.2d at 165; see *Commonwealth v. Welcome*, 201 N.E.2d 827, 828 (Mass. 1964); *Stone*, 73 N.E.2d at 897-98; *Jackson*, 132 Mass. at 20-21.

¹⁴³ See 800 N.E.2d at 276-77, 280.

¹⁴⁴ *Id.* at 271. The prosecution's theory of the case was that the defendant had slammed his son's head into the wall repeatedly. See *id.*

¹⁴⁵ See *id.* at 277-78.

¹⁴⁶ See 824 N.E.2d at 10 n.14.

¹⁴⁷ See *id.* at 10 & n.14.

¹⁴⁸ See *id.*

the Federal Rules of Evidence allow it and expressly declining to decide this point.¹⁴⁹

III. A TWO-WAY STREET AS A FAIR AND BALANCED SOLUTION

The SJC decided in *Commonwealth v. Adjutant* to allow a defendant to present evidence of the victim's prior violent conduct to support her claim of self-defense.¹⁵⁰ The next logical step is to allow this choice to open the door to an attack on the defendant's propensity for violence.¹⁵¹ This approach allows the jury to get a more complete picture of the parties and incident involved, and is a fair price for the defendant to pay for the option of attacking the victim's character.¹⁵²

A. Collateral Issues and Jury Confusion?

The arguments against a two-way street rule that would allow the prosecution to counter evidence of the victim's specific acts of violence with similar evidence of the accused essentially mirror some of the arguments against admission of specific act evidence against the victim.¹⁵³ Just as admission of evidence of the victim's specific acts of violence has the potential to create collateral issues that may lead to a trial within a trial, confuse the jury, and waste time, so too would the admission of similar evidence of the defendant's specific acts of violence.¹⁵⁴

The potential for these problematic consequences of admitting character evidence is likely greater in Massachusetts than in federal court, given the SJC's choice of allowing specific act evidence rather than reputation evidence as the Federal Rules of Evidence allow.¹⁵⁵ In federal court, the character evidence inquiry would involve testimony that the victim or defendant had—and in rebuttal that he or she did not have—a reputation as a violent and aggressive person.¹⁵⁶ Reputation evidence is unlikely to distract the jury's attention from the ultimate inquiry in the case: who the first aggressor was in the incident at

¹⁴⁹ See *id.* at 14 n.19.

¹⁵⁰ See 824 N.E.2d 1, 11 (Mass. 2005).

¹⁵¹ See *id.* at 14 n.19.

¹⁵² See FED. R. EVID. 404 advisory committee's note to 2000 amendment.

¹⁵³ See *Adjutant*, 824 N.E.2d at 11; Kleiss, *supra* note 46, at 1447–48. These criticisms of specific act evidence are discussed *supra* notes 103–124 and accompanying text.

¹⁵⁴ See *Adjutant*, 824 N.E.2d at 11; Kleiss, *supra* note 46, at 1447–48.

¹⁵⁵ See FED. R. EVID. 405; *id.* advisory committee's note; *Adjutant*, 824 N.E.2d at 13.

¹⁵⁶ See FED. R. EVID. 404, 405; *id.* 405 advisory committee's note.

issue.¹⁵⁷ The jury is capable of understanding that the reputation evidence is offered for the purpose of considering who was more likely to have been the first aggressor on the occasion in question, and does not face confusion and distraction from past incidents.¹⁵⁸

This inquiry likely will create greater confusion in Massachusetts because the SJC's preference for specific act evidence means that the jury will be presented with another such event to consider.¹⁵⁹ Justice Cowan noted in her dissent in *Adjutant* that the jury will have to "wade through multiple incidents of violence" about which they have little information before turning to the actual basis for the charge against the accused.¹⁶⁰ The SJC did not limit the specific act evidence to convictions, instead allowing evidence of specific acts of prior violent conduct that the victim is "reasonably alleged to have initiated."¹⁶¹ The presentation of such evidence therefore will require the jury to make the same determination that they ultimately must make with regard to the crime actually charged: they must weigh the credibility of the various (and likely conflicting) accounts of an altercation and come to a conclusion about what actually happened.¹⁶² Although the trial judge's instructions should explain sufficiently to the jury the relationship between the specific act evidence and the jury's ultimate task of deciding whether the defendant acted in self-defense, there is certainly a greater possibility of confusion of these functions than with reputation evidence due to this similarity of determinations.¹⁶³

In holding that specific act evidence may be admissible, the SJC noted that trial judges, through their instructions, "should mitigate the dangers of prejudice and confusion inherent in introducing evidence of the victim's specific acts of violence by delineating the precise purpose for which the evidence is offered."¹⁶⁴ This reasoning, offered by the SJC for the purpose of admitting victim character evidence, likewise should be applicable to the rebuttal evidence of the defendant's character.¹⁶⁵ The trial judge can explain carefully to the jury that the evidence offered by the prosecution of the defendant's violent conduct is to be considered only for the limited purpose of

¹⁵⁷ See FED. R. EVID. 404, 405; *id.* 405 advisory committee's note.

¹⁵⁸ See FED. R. EVID. 404, 405; *id.* 405 advisory committee's note.

¹⁵⁹ See *Adjutant*, 824 N.E.2d at 13.

¹⁶⁰ *Id.* at 19 (Cowan, J., dissenting).

¹⁶¹ See *id.* at 13 (majority opinion) (emphasis added).

¹⁶² See *id.*

¹⁶³ See FED. R. EVID. 405 advisory committee's note; *Adjutant*, 824 N.E.2d at 13.

¹⁶⁴ *Adjutant*, 824 N.E.2d at 13.

¹⁶⁵ See *id.*

considering her propensity for violence as it bears on the issue of first aggressor, and is given to them along with the evidence of the victim's violent conduct to present the jury with a more balanced picture of the incident in question.¹⁶⁶

Additionally, the SJC reasoned that the potential problem with collateral issues and specific act evidence can be alleviated by the sound discretion of the trial judge to exclude evidence that is only marginally relevant or is highly prejudicial.¹⁶⁷ In Massachusetts, relevant evidence is admissible unless unduly prejudicial, and in weighing the probative value against the prejudicial effect it might have on a jury, trial judges are afforded great latitude and discretion.¹⁶⁸ The SJC noted in *Adjutant* that trial judges already have wide latitude to conduct this balancing when the prosecution seeks to admit evidence of the defendant's prior bad acts for nonpropensity purposes, such as to show a common scheme, modus operandi, or motive, among other things.¹⁶⁹ Additionally, the SJC noted that the trial judge has discretion to admit a defendant's prior convictions when the prosecution seeks to impeach the defendant's testimony if they are noncumulative and probative of the defendant's truthfulness.¹⁷⁰ Just as the trial judge's discretion can prevent the undue exploration of collateral issues with regard to victim character evidence, the trial judge's discretion should provide a similar safeguard should the prosecution be permitted to counter this evidence with evidence of the defendant's violent conduct.¹⁷¹

The SJC took the position in *Adjutant* that a well-instructed jury can be trusted to consider properly evidence about the victim's prior acts of violence and it expressed great faith in the jury.¹⁷² This trust in the jury also supports permitting the prosecution to introduce evidence of the accused's violent conduct once the door has been opened by her use of victim character evidence.¹⁷³

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at 12.

¹⁶⁹ See 824 N.E.2d at 12. The trial judge has the discretion to admit evidence of the defendant's prior bad acts, unless unduly prejudicial, to show a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive. See *id.*; Commonwealth v. Marshall, 749 N.E.2d 147, 155 (Mass. 2001).

¹⁷⁰ *Adjutant*, 824 N.E.2d at 13; Commonwealth v. Leftwich, 724 N.E.2d 691, 696 (Mass. 2000).

¹⁷¹ See *Adjutant*, 824 N.E.2d at 12-13.

¹⁷² See *id.* at 12 n.17.

¹⁷³ See *id.*; see also Thomas Leach, *How Do Jurors React to "Propensity" Evidence?*, 27 AM. J. TRIAL ADVOC. 559, 560, 572 (2004) (arguing that jurors are better able to assess the probative value of character evidence than the law of evidence gives them credit for, although

B. A Complete, or at Least a Balanced, Picture of the Violent
Propensities of the Parties

In addition to the ability of the jury to consider properly evidence of both the victim's and the accused's specific acts of violent conduct on the issue of first aggressor, the jury's need for a complete and/or balanced view of the evidence counsels in favor of a two-way street.¹⁷⁴ In *Adjutant*, the SJC expressed its belief that "the jury should have as complete a picture of the (often fatal) altercation as possible before deciding the defendant's guilt."¹⁷⁵ If the jury hears only of the victim's prior violent conduct, this presents an incomplete and imbalanced picture to the jury.¹⁷⁶ If both the defendant and the victim have histories of violent conduct, yet the jury only hears evidence of the victim's, this unfairly tips the scales towards the defendant.¹⁷⁷ It requires a jury to decide who the first aggressor was while considering only the victim's propensity for violence, even when the defendant may have a similar or even greater propensity for violence of which the jury is unaware.¹⁷⁸

This incomplete and imbalanced picture creates a risk that the jury might find that, because the victim was violent on a prior occasion, he or she likely was the first aggressor, when if given evidence of the defendant's violent character, the jury may have found otherwise.¹⁷⁹ To get a more complete picture, the jury needs to hear evidence of the defendant's violent character as well.¹⁸⁰ This is especially the case be-

this limited study of law student mock trials with mock juries tended to show that such evidence weighs heavily with jurors).

¹⁷⁴ See FED. R. EVID. 404 advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 18 (Cowan, J., dissenting). Justice Cowan argued in dissent in *Adjutant* that the majority's decision to allow the defense to introduce victim character evidence creates "a lopsided rule that permits consideration of only one side of the story," "does little to paint a 'complete' picture for the jury and much to promote a biased view of the parties," and "would be fair only if the victims were equally able to explore defendants' violent histories." *Id.* Justice Cowan also argued, however, that fixing this imbalance by allowing the prosecution to counter with similar evidence of the accused's violent conduct is even more troublesome and puts us on a "dangerous course toward the erosion of long-held evidentiary safeguards for defendants." See *id.*

¹⁷⁵ 824 N.E.2d at 9 (majority opinion).

¹⁷⁶ See *id.* at 18 (Cowan, J., dissenting).

¹⁷⁷ See FED. R. EVID. 404 advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 18 (Cowan, J., dissenting).

¹⁷⁸ See FED. R. EVID. 404 advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 18 (Cowan, J., dissenting).

¹⁷⁹ See FED. R. EVID. 404 advisory committee's note to 2000 amendment; *Adjutant*, 824 N.E.2d at 18 (Cowan, J., dissenting).

¹⁸⁰ See FED. R. EVID. 404 advisory committee's note to 2000 amendment; Reagan Wm. Simpson & Warren S. Huang, *Procedural Rules Governing the Admissibility of Evidence*, 54

cause victim and defendant prior act evidence carry very similar predictive value; as Justice Cowan pointed out in her *Adjutant* dissent:

If we accept, as we have historically, that a defendant's prior behavior is insufficiently predictive of her actions years later to outweigh the potential for prejudice, it follows that a victim's prior acts are also inappropriate for consideration. Conversely, if character evidence is, as the court proclaims today, highly relevant as to victims, it must be similarly so for defendants.¹⁸¹

If the jury is unable to get a complete and balanced picture of both the defendant's and the victim's prior violent conduct, the next best thing is for the jury at least to hear a balanced, albeit incomplete, presentation by hearing no character evidence at all.¹⁸² This was the rule in existence before *Adjutant*: character evidence on the issue of first aggressor was only admissible in self-defense cases if the defendant knew of the victim's violent character.¹⁸³ Although this unbending bar against character evidence on the issue of first aggressor is one way to ensure a balanced presentation of this evidence, by not allowing any of it, balance also may be achieved through the practical ramifications of a two-way street rule by which the defendant's attack on the victim's character opens the defendant's character to attack by the prosecution.¹⁸⁴

Faced with this risk, the accused must think harder about whether to attack the victim's character and whether this is worth opening the door to an attack on his or her own character.¹⁸⁵ First, if the accused has no history of violent conduct, then any specific acts of violence initiated by the victim will be introduced, and the two-way

OKLA. L. REV. 513, 534 (2001) (discussing the 2000 amendment to Federal Rule of Evidence 404(a) and explaining that the rationale for permitting the prosecution to counter victim character evidence with evidence of that same character trait of the accused is to provide a balanced presentation of the evidence).

¹⁸¹ 824 N.E.2d at 17 (Cowan, J., dissenting).

¹⁸² See *id.* Justice Cowan argued that the jury should not hear any character evidence at all on the issue of first aggressor, and disagreed with the majority's view that evidence of prior conduct is probative of a person's actions on any particular occasion. See *id.* at 16-18. Justice Cowan argued that such evidence often is not adequately probative and therefore of questionable value, given that it carries such a risk of prejudice. See *id.*

¹⁸³ See *Commonwealth v. Graham*, 727 N.E.2d 51, 58 (Mass. 2000); *Commonwealth v. Lapointe*, 522 N.E.2d 937, 939 (Mass. 1988); *Commonwealth v. Fontes*, 488 N.E.2d 760, 762 (Mass. 1986); *Commonwealth v. Edmonds*, 313 N.E.2d 429, 432-33 (Mass. 1974); LACOS ET AL., *supra* note 3, at 137.

¹⁸⁴ See FED. R. EVID. 404 advisory committee's note to 2000 amendment.

¹⁸⁵ STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* § 404.02[8], at 404-16 (8th ed. 2002).

street rule will lead to the same result as the rule that currently exists following *Adjutant*.¹⁸⁶ Second, if both the accused and the victim have histories of initiating violent conduct, then the defendant may choose whether to present the jury with a complete picture of each party's violent conduct, or no picture at all.¹⁸⁷ Either one of these options affords an even playing field.¹⁸⁸ Third, if the victim has no history of initiating violent conduct, but the defendant does, the defendant is still safeguarded and the jury will not hear any character evidence on the issue of first aggressor.¹⁸⁹ This third outcome would be identical to that under *Adjutant*, as well as under the law prior to *Adjutant*, which completely barred the admission of character evidence on the issue of first aggressor.¹⁹⁰

C. Safeguards for Defendants

In addition to assuring a more complete, or at least balanced, presentation of evidence to the jury, this strategic choice to be made by the defendant under a two-way street rule—whether to attack the victim's character and open the door to evidence of his or her own character—provides an essential safeguard for the defendant against prejudicial evidence.¹⁹¹ This safeguard is necessary to ensure that the jury does not convict the defendant for his prior bad acts, which are unrelated to the crime at issue in the case.¹⁹² Although a two-way street rule

¹⁸⁶ See 824 N.E.2d at 14 n.19. Following *Adjutant*, it is clear that the defendant can introduce evidence of the specific acts of violent conduct initiated by the accused, but the SJC explicitly left unclear whether the prosecution may then introduce evidence of prior violent conduct initiated by the defendant. See *id.*

¹⁸⁷ See FED. R. EVID. 404(a).

¹⁸⁸ See *id.* advisory committee's note to 2000 amendment; see also Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 183–84 (2001) (comparing Federal Rule of Evidence 404 with Alaska Rule of Evidence 404 which provides that the accused opens the door to character evidence by asserting self-defense, rather than by introducing victim character evidence as under Federal Rule of Evidence 404, and arguing that the Federal Rules provide a more sensible framework for this situation).

¹⁸⁹ See *Adjutant*, 824 N.E.2d at 3, 13.

¹⁹⁰ See *id.*; *Graham*, 727 N.E.2d at 58; *Lapointe*, 522 N.E.2d at 939; *Fontes*, 488 N.E.2d at 762; *Edmonds*, 313 N.E.2d at 432–33; *LIACOS ET AL.*, *supra* note 3, at 137.

¹⁹¹ See Dropkin & McComas, *supra* note 188, at 183–84. Dropkin & McComas note the lack of this safeguard in Alaska, which opens the door to evidence of the defendant's character when the defendant asserts self-defense, and thus does not allow the defendant to plead self-defense and then subsequently make the meaningful strategic choice of whether to attack the victim's character or not as under the Federal Rules of Evidence. See *id.*

¹⁹² See *Adjutant*, 824 N.E.2d at 10 n.14; *Commonwealth v. Helfant*, 496 N.E.2d 433, 441 (Mass. 1986); *Commonwealth v. Jackson*, 132 Mass. 16, 20–21 (1882).

might result in the admission of such evidence, this evidence is highly probative on the issue of first aggressor in a self-defense case and its admissibility remains in the control of the defendant, who is protected unless he decides to attack the victim's character.¹⁹³ This is a reasonable price for the defendant to pay for the advantage of attacking the victim's character.¹⁹⁴

This choice is already in place as a sufficient safeguard as to the defendant introducing evidence of her own good character.¹⁹⁵ An exception to the general bar against character evidence allows the defendant to present witnesses to testify to her good reputation, but balances this advantage by providing that this allowance opens the otherwise closed door to the prosecution attacking the defendant's character, either by questioning the witness as to his knowledge of the defendant's specific acts or by presenting its own reputation witnesses.¹⁹⁶ This is essentially a mercy rule, as its logical underpinnings are suspect: reputation evidence is essentially opinion-based-on-hearsay testimony that is allowed for practical convenience and because it possibly may be enough to raise a reasonable doubt of guilt, not because it carries much probative value.¹⁹⁷ It calls for the witness to compact reputation hearsay into "the brief phrase of a verdict" and is a rare instance in which a witness is allowed to state a conclusion on a subject in which he is not an expert.¹⁹⁸ Therefore, it is fair that the defendant's election to introduce her good character evidence opens the door to specific act evidence of her bad character.¹⁹⁹ The U.S. Supreme Court explained in *Michelson v. United States* in 1948:

[T]he law extends helpful but illogical options to a defendant. Experience taught a necessity that they be counterweighted with equally illogical conditions to keep the advantage from

¹⁹³ See *Adjutant*, 824 N.E.2d at 11; SALTZBURG ET AL., *supra* note 185, § 404.02[8], at 404-16. Saltzburg notes that the intent of the drafters of the 2000 amendment to Federal Rule of Evidence 404, providing for a two-way street rule, was to up the ante for attacking an alleged victim. Stephen A. Saltzburg, *Self-Defense and the Rules of Evidence*, 14 CRIM. JUST. 46, 46 (2000).

¹⁹⁴ See FED. R. EVID. 404 advisory committee's note to 2000 amendment.

¹⁹⁵ See *id.* 404; *id.* advisory committee's note; *Commonwealth v. Maddocks*, 93 N.E. 253, 253-54 (Mass. 1910); LIACOS ET AL., *supra* note 3, at 136.

¹⁹⁶ See FED. R. EVID. 404; *id.* advisory committee's note; *Commonwealth v. Piedra*, 478 N.E.2d 1284, 1288-89; *Maddocks*, 93 N.E. at 253-54; LIACOS ET AL., *supra* note 3, at 136.

¹⁹⁷ See *Michelson v. United States*, 335 U.S. 469, 477-78 (1948); *Adjutant*, 824 N.E.2d at 13-14.

¹⁹⁸ *Michelson*, 335 U.S. at 477-78.

¹⁹⁹ See *id.*

becoming an unfair and unreasonable one. The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.²⁰⁰

Likewise, in the self-defense context, the defendant's choice would provide an adequate safeguard against otherwise inadmissible character evidence of her propensity for violence to prove who was the first aggressor.²⁰¹ In *Adjutant*, the SJC placed great emphasis on the substantial probative value of this evidence, and opening the door to the defendant's character in this context is therefore more justifiable than doing so when the defendant attempts to prove her good character.²⁰² Importantly, the trial judge's decision whether to admit the prosecution's evidence of the defendant's violent conduct would be made at a pretrial hearing.²⁰³ This would give the defendant the benefit of making a fully informed decision and not opening the door to character evidence accidentally.²⁰⁴ Furthermore, the trial judge's discretion to exclude the evidence if it is unduly prejudicial also operates as a significant safeguard for defendants.²⁰⁵

D. Self-Defense as a Failure of Proof

Perhaps the strongest of the defendant's safeguards is Massachusetts's treatment of self-defense as a failure-of-proof issue rather than as an affirmative defense.²⁰⁶ In jurisdictions where self-defense is an affirmative defense, the defendant must prove by a preponderance of the evidence that he acted in self-defense.²⁰⁷ In Massachusetts, however,

²⁰⁰ *Id.*

²⁰¹ See FED. R. EVID. 404; *id.* advisory committee's note.

²⁰² See 824 N.E.2d at 8.

²⁰³ See *id.* at 14. The requirement that the defense provide the court and prosecution notice of its intent to introduce victim character evidence presumably also would apply to the prosecution's intent to introduce similar evidence of the defendant, should the SJC decide to adopt a two-way street rule. See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.* at 12-13; *supra* text accompanying notes 153-173 (discussing the trial judge's discretion to exclude irrelevant or unduly prejudicial evidence).

²⁰⁶ See *Commonwealth v. Mejia*, 554 N.E.2d 1186, 1187-88 (Mass. 1990); *Lapointe*, 522 N.E.2d at 941; *Commonwealth v. Rodriguez*, 352 N.E.2d 203, 208 & n.10 (Mass. 1976); *Commonwealth v. Vidito*, 487 N.E.2d 206, 209-10 (Mass. App. Ct. 1985).

²⁰⁷ See *Martin v. Ohio*, 480 U.S. 228, 229 (1987). In *Martin*, the U.S. Supreme Court held that states may treat self-defense as an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. See *id.* at 230, 236.

once self-defense is successfully raised, the burden is on the prosecution to prove beyond a reasonable doubt that the defendant did not act in self-defense.²⁰⁸

Jurisdictions that take the failure-of-proof approach such as Massachusetts should be more willing to admit evidence of the defendant's specific acts of violence on the issue of first aggressor because the prosecution must meet this higher burden.²⁰⁹ The two-way street rule possibly would increase the advantage gained by the defendant in attacking the victim's character: even evidence that showed both parties to be very violent might create a reasonable doubt as to the prosecution's claim that the defendant did not act in self-defense in failure-of-proof jurisdictions.²¹⁰ Such evidence would be less likely to establish that the defendant did act in self-defense by a preponderance of the evidence in affirmative defense jurisdictions.²¹¹ The U.S. Supreme Court pointed out the difference between these burdens in 1987 in *Martin v. Ohio*, stating that "[e]vidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence."²¹²

At the same time, defendants in failure-of-proof jurisdictions who claim self-defense would feel less pressure to attack the victim's character and open the door to a counterattack on their own character than would defendants in an affirmative defense jurisdiction because the threshold of evidence they must introduce to prevail on the issue of self-defense is much lower.²¹³ These considerations strongly support allowing the prosecution to respond to an attack on the victim's character with similar evidence with regard to the defendant's character.²¹⁴

E. Fairness to the Prosecution

In addition to maintaining valuable safeguards for defendants, a two-way street rule would cure the unfairness that the prosecution faces if only able to rebut evidence of the victim's prior violent conduct with

²⁰⁸ See *Mejia*, 554 N.E.2d at 1187-88; *Lapointe*, 522 N.E.2d at 941; *Rodriguez*, 352 N.E.2d at 208 & n.10; *Vidito*, 487 N.E.2d at 209-10.

²⁰⁹ See *Mejia*, 554 N.E.2d at 1187-88; *Lapointe*, 522 N.E.2d at 941; *Rodriguez*, 352 N.E.2d at 208 & n.10; *Vidito*, 487 N.E.2d at 209-10.

²¹⁰ See *Martin*, 480 U.S. at 234.

²¹¹ See *id.*

²¹² *Id.*

²¹³ See *id.*

²¹⁴ See *Adjutant*, 824 N.E.2d at 14 n.19.

evidence of the victim's reputation for peacefulness.²¹⁵ First, the prosecution is at a disadvantage because evidence of the victim's peaceful propensity is far less persuasive than the evidence of specific acts of violence for which it is offered to rebut.²¹⁶ The ability to rebut with evidence of the victim's peacefulness is of little use: although the SJC itself has said that evidence of one's violent reputation is of little probative value on the first aggressor issue, evidence of one's peaceful reputation is even less probative.²¹⁷ Even the most violent person is peaceful some of the time, and any character witness who honestly believes the victim had a reputation for being peaceful could not possibly have knowledge of the specific acts of violence for which their testimony is offered to rebut.²¹⁸ Second, in self-defense homicide cases, the victim is necessarily deceased, and thus the best source of information with which the prosecution can rebut evidence of the victim's prior violent conduct is unavailable.²¹⁹

This unfairness is compounded by the holding in *Adjutant* that victim character evidence is not limited to prior convictions, but rather to "specific acts of prior violent conduct that the victim is *reasonably alleged to have initiated*."²²⁰ The defendant may introduce evidence of a prior incident that may be poorly documented, if at all.²²¹ The prosecution may find it difficult gathering other witnesses to this incident, if there are any, and even if the prosecution can find them, the victim is deceased and is thus unable to explain the incident or point to any po-

²¹⁵ See *id.* The SJC noted in *Adjutant* that, at a minimum, once evidence of the victim's violent conduct is admitted, the prosecutor may introduce evidence of the victim's peaceful propensities. *Id.*; see *Lapointe*, 522 N.E.2d at 939.

²¹⁶ See FED. R. EVID. 405 advisory committee's note; *Adjutant*, 824 N.E.2d at 18 (Cowan, J., dissenting). Justice Cowan argued in *Adjutant* that allowing the defendant to present evidence of the victim's specific acts of violence while the prosecution remains powerless to introduce similar evidence of the defendant's is lopsided and grossly imbalanced. See 824 N.E.2d at 18 (Cowan, J., dissenting). The Advisory Committee's Note to Federal Rule of Evidence 405 explains that specific act evidence is the most convincing type of evidence, and also has the greatest capacity to arouse prejudice. See FED. R. EVID. 405 advisory committee's note.

²¹⁷ See *Michelson*, 335 U.S. at 478-79; *Adjutant*, 824 N.E.2d at 13-14 (majority opinion).

²¹⁸ See *Michelson*, 335 U.S. at 478-79.

²¹⁹ See *Adjutant*, 824 N.E.2d at 11; Kleiss, *supra* note 46, at 1447-48.

²²⁰ See 824 N.E.2d at 13 (emphasis added). The meaning of "reasonably alleged" is another interesting issue left open by *Adjutant*, but is beyond the scope of this Note. See *id.*; see also Andrew G. Scott, Note, *Exclusive Admissibility of Specific Act Evidence in Initial-Aggressor Self-Defense Cases: Ensuring Equity Within the Adjutant Framework*, 40 SUFFOLK U. L. REV. 237, 257-58 (2006) (arguing that the application of *Adjutant* should be restricted to homicide cases, and limited to evidence of prior convictions within a time limit, and that prosecutors should be allowed to counter this evidence with evidence of the defendant's character).

²²¹ See *Adjutant*, 824 N.E.2d at 13.

tential witnesses.²²² The prosecution is aided by the requirement in *Adjutant* that the defense give the prosecution and the court notice of its intent to introduce evidence of the victim's specific acts of violence sufficiently prior to trial to permit the prosecution to investigate and prepare a rebuttal.²²³ No matter how far in advance of trial this notice is given, however, it never will be sufficient to bring the prosecution's best and possibly only source of rebuttal information back to life.²²⁴ Therefore, a two-way street rule that allows the prosecution to counter victim character evidence with similar evidence about the defendant would help level the playing field.²²⁵

CONCLUSION

The SJC should adopt a common law rule of evidence in Massachusetts providing that when a defendant supports an assertion of self-defense by introducing evidence of specific acts of violent conduct initiated by the victim in accordance with the new rule set out in *Commonwealth v. Adjutant*, the prosecution may then introduce evidence of specific acts of violent conduct initiated by the defendant. This two-way street rule would allow for a fair and balanced presentation of this highly probative evidence at a minimum, and possibly a more complete picture of the altercation for the jury. Given the SJC's reasoning that character evidence in the form of specific acts of violent conduct initiated by the victim is highly probative on the issue of first aggressor, the next logical step is to allow the jury also to hear similarly probative evidence with regard to the defendant. Massachusetts should be more inclined to follow this two-way street rule than other jurisdictions because self-defense is treated as a failure of proof rather than as a true affirmative defense. Because it would remain the defendant's choice whether to open this door to character evidence, and because the trial judge would retain the usual discretion to exclude unduly prejudicial or irrelevant evidence, perfectly viable and valuable safeguards for the defendant would remain in place.

DAVID M. SCHEFFLER

²²² See *id.* at 14 n.19.

²²³ See *id.* at 14.

²²⁴ See *id.*

²²⁵ See FED. R. EVID. 404 advisory committee's note to 2000 amendment.