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When Turnabout Is Fair Play:
Character Evidence and Self-
Defense in Homicide and Assault
Cases

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INTRODUCTION

Debbie, a call girl, agrees to meet a new customer, Victor, at the Shady Acres Motel for dancing and a massage.¹ They retire to a motel room, but once there, Victor demands an entirely different act from Debbie, one in which she does not want to participate. Debbie gathers her belongings and tries to leave, but Victor escalates his demands by becoming aggressive. He blocks the doorway, grabs Debbie's blouse, and attempts to pull her towards him. She slaps him and scratches his cheek, causing him to break his grip on her blouse. He threatens to break her neck. She screams and retreats from him. He grabs a chair and swings it at her, barely missing her head. Debbie retreats again, this time to a corner of the room, across the bed from Victor. In a panic, she rummages through her purse and finds the switchblade she carries for self-defense. She pulls it out, waves it at him, and warns him to stay away. Threatening to crush her skull, Victor lunges across the bed towards her, chair in hand. As he raises the chair overhead, she plunges the knife into his neck, severing his carotid artery. The chair slips from his grasp onto the floor. Victor bleeds to death on the bed, right in front of Debbie. When the police arrive, Debbie, shaken, has just one thing to say: "I killed him. I can't believe I killed him."

Victor's body shows signs of a struggle: a slap mark, scratches on his face, and a fatal knife wound to the neck. Debbie, in contrast, has no visible marks or injuries. The disordered condition of the room yields few clues about the nature of the struggle between Debbie and Victor. The authorities do not believe Debbie's subsequent claim of self-defense, and she is charged with second-degree murder and felony possession of a dangerous weapon.

Debbie and Victor both have reputations "for violence" within their respective communities. Debbie has a hot temper and has committed a number of petty assaults (kicking, scratching, etc.) against co-workers and members of her household. She once kicked a police officer in the kneecap while being arrested. In contrast, Victor's violence has been severe and always directed against women. Each violent act was

¹ The facts of this hypothetical are loosely based on facts from two cases: *Commonwealth v. Adjutant*, 824 N.E.2d 1 (Mass. 2005) and *Williams v. Lord*, 996 F.2d 1481 (2d Cir. 1993).

preceded by a rejected demand for a particular type of sexual activity. Debbie's defense attorney learns about these incidents while preparing for trial. The attorney wants to use the incidents as evidence of Victor's violent character to support a claim that Victor was the first aggressor in his fatal encounter with Debbie.

Debbie's only hope at trial is for the jury to believe she acted in self-defense. Without eyewitnesses or supporting forensic evidence, however, her proof options are limited; it is her word against the undeniable reality of a dead victim. Her ability to present an effective defense depends to a great extent on the jurisdiction's approach to character evidence rules. Unfortunately for Debbie, if she is in either federal court or the majority of American criminal jurisdictions, character evidence rules will hinder the effective presentation of her self-defense claim at trial.

In homicide and assault cases, many American criminal jurisdictions permit a defendant to introduce evidence that the alleged victim had a violent character.² The purpose of this evidence is to establish the probability that the alleged victim was the first aggressor, which triggers the defendant's right of self-defense.³ While character evidence is a potentially useful tool to assist the jury in determining the probable first aggressor in a homicide or assault case, its value has traditionally been limited by two evidentiary doctrines. The first is the required use of reputation or opinion testimony, rather than specific instances of conduct, to prove character.⁴ The second is a

² Throughout this Article, I will use the term "alleged victim" to describe the other party in homicide and assault cases. This is consistent with usage in the Federal Rules of Evidence. See FED. R. EVID. 404(a)(1) (using the words "alleged victim" throughout the text of the rule).

³ See *infra* Part I.A; see also FED. R. EVID. 404(a)(2) (permitting the accused to offer "[e]vidence of a pertinent trait of character of the alleged victim of the crime").

⁴ This requirement became Federal Rule of Evidence 405, which provides 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

doctrine that allows a defendant of violent character to attack the alleged victim's character for violence, yet prohibits the prosecution from introducing evidence regarding the defendant's own character for violence.⁵

These rules paint artificial, stilted character portraits of both the defendant and the alleged victim.⁶ On the one hand, the jury is deprived of knowledge concerning the specific violent acts of either party that might provide a more accurate character portrait than reputation or opinion testimony.⁷ On the other hand, if the defendant can attack the alleged victim's character for violence with impunity, knowing that the prosecution is prohibited from introducing evidence of the defendant's character for violence, the potential exists to mislead the jury into believing that the victim was violent but the defendant was peaceful.⁸ The ironic effect of these two character rules in self-defense cases is to deny the jury the very evidence that would help it best weigh the probabilities of aggression and make an accurate determination.

In 2000, the Federal Rules of Evidence Advisory Committee partially resolved the proof problems in self-defense cases by amending Federal Rule of Evidence 404(a)(1) ("Rule 404(a)(1)"). Under the amended rule, if the defendant attacks the character of an alleged crime victim, the prosecution may attack the character of the accused for the same trait.⁹ Rule

defense, proof may also be made of specific instances of that person's conduct.

FED. R. EVID. 405.

⁵ See FED. R. EVID. 404 Advisory Committee's Note on 2000 Amendment (noting that the evidentiary rules prior to the 2000 amendment did not permit the government to introduce negative character evidence against the accused unless the accused had first placed his good character at issue).

⁶ See *infra* notes 86–94 and accompanying text.

⁷ See generally *infra* Part I.B.3. The character evidence rules at issue in this Article are Federal Rules of Evidence 404 and 405. The two are inextricably linked. As the Advisory Committee observed in its notes to Rule 404, "Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof." FED. R. EVID. 404 Advisory Committee's Note.

⁸ See FED. R. EVID. 404 Advisory Committee's Note on 2000 Amendment ("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.").

⁹ FED. R. EVID. 404 Advisory Committee's Note on 2000 Amendment.

404(a) was further amended in 2006 to resolve a “long-standing conflict in the circuits over whether character evidence can be offered to prove conduct in civil cases.”¹⁰ The 2006 amendment made Rule 404(a) exclusively applicable to criminal cases, but made no other changes.¹¹

In this Article, I suggest that the 2000 amendment to Rule 404(a)(1) did not go far enough in enhancing the jury’s ability to determine the probable first aggressor in a homicide or assault case. I propose a further amendment to Rule 404 that does two things: (1) permits the defendant to introduce evidence of the alleged victim’s relevant, specific acts of violence to demonstrate the probability that the defendant was the first aggressor; and (2) permits the prosecution to reply in kind, subject to a specific balancing test and the defendant’s constitutional right to present a defense. Regardless of whether the Advisory Committee adopts my proposed amendment, other American jurisdictions should consider amending their character evidence rules to enhance the fact-finding function of the jury in self-defense cases.

¹⁰ Report from Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 2–3 (May 16, 2005), *available at* http://www.uscourts.gov/rules/supct1105/Combined_EV_Report_Rules.pdf.

¹¹ *See id.* The complete text of Rule 404(a), incorporating both the 2000 and 2006 amendments, is as follows:

(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. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, 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;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

Part I of this Article examines the defense of self-defense, the nexus between self-defense and character evidence, and the historical development of the self-defense-related character evidence rules, culminating in the 2000 amendment to Rule 404(a)(1). Part II introduces a proposed amendment to Rule 404. Part III suggests a test for evaluating character evidence rules in self-defense cases and applies this test to several hypothetical situations, comparing the proposed rule with the current rules.

I

SELF-DEFENSE AND CHARACTER EVIDENCE

A. Raising Self-Defense

The law has long recognized the right of a criminal defendant to claim self-defense when charged with assault or homicide. If the defendant can demonstrate that he was unlawfully attacked by the alleged victim and had no recourse to the law for his defense, he is justified in taking reasonable steps to defend himself from physical harm.¹² As Sir William Blackstone put it, “the law, in this case, respects the passions of the human mind; and . . . makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain.”¹³

Self-defense is a classic justification defense¹⁴ that permits an individual to preserve his own personal autonomy at the expense of another’s under certain conditions.¹⁵ In the words of Joshua

¹² WAYNE R. LAFAVE, *CRIMINAL LAW* 539 (4th ed. 2003).

¹³ SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 619 (George Chase ed., New York, Banks & Brothers 1894) (1877).

¹⁴ A justification defense is one in which:

The harm caused by justified behavior remains a legally recognized harm that is to be avoided whenever possible by other actors in the future. Under the special justifying circumstances, however, that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.

PAUL H. ROBINSON, *CRIMINAL LAW* § 8.1, at 401 (1997).

¹⁵ The noted criminal law scholar George Fletcher has nicely summarized the philosophical basis of the traditional view of self-defense as a justification defense:

If a person’s autonomy is compromised by the intrusion, then the defender has the right to expel the intruder and restore the integrity of his domain. The underlying image is that of a state of warfare. An aggressor’s violation

Dressler, “a non-aggressor is justified in using force upon another if he reasonably believes that such force is necessary to protect himself from imminent use of unlawful force by the other person.”¹⁶

There are several triggering conditions that must exist before the use of force against another can be justified. First, the defendant must have clean hands; in other words, he cannot be the first aggressor.¹⁷ Second, self-defense must be necessary under the circumstances: if the defendant could reasonably have retreated (unless he was in his home or at the workplace), the defense will be unavailable to him.¹⁸ Third, the amount of force used by the defendant must be reasonable and proportional to the amount of force used against him. A defendant who escalates the level of force by using deadly force in response to nondeadly force, for example, loses the ability to claim self-defense.¹⁹ A defendant who establishes all the triggering conditions of self-defense has a complete defense to the charge of assault or homicide.²⁰

From an evidentiary standpoint, there are four primary methods to raise self-defense at trial: eyewitness testimony, forensic evidence, a swearing contest between the defendant and the victim, and character evidence. These methods can be used individually or in concert with each other. Each method offers different strengths and weaknesses in the task of determining which party was the first aggressor in a self-defense case.

Perhaps the most obvious evidentiary tool in a self-defense case is eyewitness testimony. Subject to cross-examination, witnesses can testify in court about who threw the first punch, who drew the knife, or who unholstered the handgun. The fact

of our rights is akin to an intrusion of foreign troops on our soil. As we are inclined to believe that any community has the absolute right to expel foreign invaders, any person attacked by another should have the absolute right to counteract aggression against his vital interests.

GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 10.5.3, at 860 (1978).

¹⁶ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 237 (4th ed. 2006).

¹⁷ *Id.* at 240–41. As Dressler points out, the “clean hands” characterization can be something of an overstatement; there are circumstances in which a person may be justified in using deadly force, even if he was not free from fault in creating the situation. *Id.*

¹⁸ *Id.* 243–46.

¹⁹ *Id.* 238.

²⁰ 22 C.J.S. *Criminal Law* § 60 (2007).

finder can evaluate the credibility of witnesses and decide whether the facts justify the defense. Eyewitness testimony, however, is notoriously unreliable,²¹ particularly in homicide or assault cases. In a fast-moving, violent encounter between two or more parties, there is little likelihood of reliable eyewitness testimony on the issue of self-defense, especially if the eyewitness's attention was drawn to the confrontation after it had already started.²² Nevertheless, eyewitness testimony, if available, is a crucial component of a self-defense case.

Forensic evidence may also play a role in self-defense cases, particularly if there are obvious indicators such as defensive wounds.²³ When combined with supportive eyewitness

²¹ It is far beyond the scope of this Article to expound at length on the numerous deficiencies of eyewitness testimony in criminal trials. As one recent article documented, there have been more than 400 articles in psychological literature and more than 500 articles in legal literature on “[t]he dangerous inaccuracy of eyewitnesses and the inordinate credence given to them by jurors.” Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Payer, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 3 (2007).

²² See, e.g., Henry J. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 1, 12–14 (June 2006), available at <http://www.fclr.org/2006fedctsrev1.htm>. Fradella notes that when people do not know a significant event is occurring, their attention is not focused on the event, which can lead to poor perception and memory of the event. On the other hand, violence has a negative effect on witness perception and memory, in particular the “weapons effect,” a phenomenon that occurs when “witnesses spend more time and psychic energy focusing on the weapon rather than on other aspects of the event,” and which “results in incomplete or inaccurate information about the crime scene and the perpetrator.” *Id.* at 14.

²³ In a stabbing case, for example, a victim may have defensive wounds “on the palms of the hands and outer surfaces of the forearms.” CHARLES E. O’HARA & GREGORY L. O’HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 541 (5th ed. 1980). The victim’s defensive wounds, or the lack thereof, can provide valuable clues in identifying whether an unidentified assailant was a stranger to the victim. For example, in an article on motives for serving as a public defender, Charles Ogletree discusses the murder of his sister, a police officer, in California. Noting the absence of “defensive wounds of the type that would be expected if [she] . . . had been confronted in her home by an intruder,” he surmised that she had been killed by someone who knew her. Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1261 (1993). In an article on the usefulness of criminal psychological profiles at trial, another author uses a case study in which a woman was bludgeoned to death by someone with a hammer. Among other things, the absence of defensive wounds suggested that she had been killed by someone she knew well. Her husband later confessed to the crime. See Scott Ingram, *If the Profile Fits: Admitting Criminal Psychological Profiles into Evidence in Criminal Trials*, 54 WASH. U. J. URB. & CONTEMP. L. 239, 266 (1998).

testimony, forensic evidence is a powerful tool at trial for identifying the first aggressor. Standing alone, however, forensic evidence may not be sufficiently conclusive to identify the first aggressor in a case.²⁴ For example, in a case where both parties bear defensive wounds and the eyewitnesses are not entirely sure what happened, forensic evidence may be of limited value. Similarly, in a case without eyewitnesses where the available forensic evidence is inconclusive, the jury will have to look to other sources of information to resolve competing claims in a self-defense case.

Of course, the defendant always has the right to take the stand in his own defense to tell his story.²⁵ If the alleged victim is still alive and can testify, the trial could become a swearing contest to determine which of two competing versions of events are true.²⁶ As previously mentioned, forensic evidence, eyewitness testimony, or both could be employed to buttress either or both versions of events.²⁷ If the alleged victim is deceased, the possibility of a swearing contest between the parties is diminished,²⁸ and the defendant is left with the unpleasant prospect of claiming self-defense against a dead man.

²⁴ Cf. O'HARA & O'HARA, *supra* note 23, at 545 ("In the absence of eyewitnesses it is not always a simple matter to determine whether a death from gunshot wounds is an accident, suicide, or murder.").

²⁵ In some instances, this will be the only viable method available for raising self-defense. Cf. Keith A. Swisher, *The Limits of Rule 408 After Hernandez*, 35 ARIZ. ST. L.J. 1437, 1458 (2003) (noting that in civil assault cases, a party might have a critical need to testify "where the party's testimony is solely dispositive—e.g., where the party is the only witness, save the defendant, in a civil assault case, and the defendant claims self-defense."). This same principle would apply to the defendant who wants to claim self-defense in a criminal assault case; in order to sustain his theory, he might have a "critical need to testify."

²⁶ Cf. Sherry F. Colb, "Whodunit" Versus "What Was Done": *When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939, 988 (2001) (suggesting that in cases where "what was done" is at issue, such as who started a fight in an assault case, the defendant and victim essentially become locked in a swearing contest in which the jury must decide who is telling the truth).

²⁷ Cf. *id.* (asserting that even in cases involving "an abundance of physical evidence, juries must decide which witnesses' explanations for the physical evidence are the most compelling.").

²⁸ Under the Federal Rules of Evidence, it is possible to have a swearing contest of sorts even if the alleged victim is deceased. For example, if the alleged victim lived long enough to make a dying declaration concerning the cause of death, evidence of the declaration could be admitted. See FED. R. EVID. 804(b)(2) (permitting admission, in a homicide case, of "a statement made by a declarant

Under any circumstances, the jury's task of weighing probabilities of aggression is a difficult one indeed. The common law developed two character evidence rules to assist the jury in evaluating the claim of self-defense. The first rule allows the defendant to introduce evidence of the victim's violent character *known to the defendant at the time of the incident* to prove that the defendant suffered a reasonable fear of death or grievous bodily injury at the hands of the victim.²⁹ The second rule allows the defendant to introduce evidence of the victim's violent character *whether or not known to the defendant at the time of the incident* to suggest that the victim was the first aggressor.³⁰ This Article focuses exclusively on the second rule, the use of character evidence for the purpose of portraying the victim as the first aggressor.

B. Character Evidence and Self-Defense

1. Logical Structure

The logic behind the use of character evidence to prove propensity is straightforward. The first step is proving that an

while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death").

²⁹ This rule applied primarily in homicide cases. The key to this use of character evidence is the defendant's prior knowledge of the victim's character:

As the purpose . . . is to show the accused's state of mind, it is obvious that the deceased's character, as affecting the accused's apprehensions, must have become known to him, i.e., proof of the character must indispensably be accompanied by proof of its communication to the accused; else it is irrelevant.

1A WIGMORE ON EVIDENCE § 63, at 1369 (Tillers rev. 1983) [hereinafter WIGMORE (Tillers rev.)]. The defendant's state of mind with respect to the victim's character for violence "at the time of the killing becomes material; and an important element in determining his justification is his *belief in an impending attack* by the deceased." 2 WIGMORE ON EVIDENCE § 246, at 50 (Chadborn rev. 1979) [hereinafter WIGMORE (Chadborn rev.)].

³⁰ According to Benjamin Tillers:

It is now generally the rule that the accused may show a pertinent trait of the character of the alleged victim that bears on the question of whether or not the victim committed a particular act on a particular occasion in conformity with that trait of character. For this purpose, it is immaterial whether the defendant knew of that character trait before the time of the commission of the alleged crime.

WIGMORE (Tillers rev.), *supra* note 29, § 63, at 1350.

individual has a particular character trait.³¹ A character trait is established either by specific acts or by testimony in the form of reputation or opinion evidence.³² This leads to the second step, the inference that the character trait is evidence of the individual's propensity to behave in a particular manner.³³ The third inferential step is the conclusion that the propensity or character trait has predictive value in determining how an individual acted on a particular occasion.³⁴

In a self-defense case in which the victim's character for violence is at issue, the character rules would work as follows: (1) victim John has committed specific acts of violence or has a reputation in the community for violence; (2) John therefore has a character trait, i.e., a propensity, towards violence; (3) on this particular occasion, we can conclude that John probably behaved in accordance with his propensity for violence and was likely the first aggressor in the encounter with the defendant.

2. *Character Evidence in the Courtroom*

Although propensity evidence is a valuable part of everyday decision making,³⁵ its use at trial has traditionally been prohibited in common law courtrooms.³⁶ Among other things,³⁷

³¹ Cf. Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U. RICH. L. REV. 419, 426 (2006). Imwinkelreid discusses the logic behind the general prohibition on character evidence, using a three-part structure: part one is the item of evidence that shows the defendant's other misdeeds; part two is the intermediate inference that the defendant has subjectively bad character; part three is the conclusion that on the charged occasion, the defendant acted in accordance with his bad character. *Id.*

³² See FED. R. EVID. 405 (listing reputation, opinion, and specific instances of conduct as the three methods of proving character).

³³ Cf. Imwinkelreid, *supra* note 31, at 426.

³⁴ Cf. *id.*

³⁵ As several scholars and commentators have pointed out, people tend to rely on character evidence on a daily basis to make important decisions, because “[p]ast conduct or performance is usually thought to be one of the best predictors of future behavior.” CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.11, at 183 (3d ed. 2003); accord Imwinkelreid, *supra* note 31, at 425–26 (noting the value of character as predictive of behavior in everyday life and using the example of a parent being able to discern which child made a household mess based on past performance).

³⁶ David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1164–65 (1998) (“For at least two centuries, both English and American courts have

this prohibition is grounded in a historical mistrust of the jury's ability to properly understand and use character evidence.³⁸ Conventional wisdom is that improperly used character evidence can have an almost talismanic effect on a jury, raising the specter that the jury will convict for past conduct or other improper reasons,³⁹ or that it will disregard the constitutional standard of proof beyond a reasonable doubt.⁴⁰ A further criticism of character evidence is that while it may be "a useful gauge of likely behavior patterns over a period of time, [it is] less accurate when used to decide what happened on one particular occasion because people do not always act in accordance with their propensities."⁴¹

The traditional common law prohibition against character evidence was adopted by the Federal Rules of Evidence upon their promulgation in 1975. Reflecting the common law's general prohibition on character evidence, Rule 404(a) states that "[e]vidence of a person's character or a trait of character is

generally prohibited the use of character evidence as circumstantial proof that a person engaged in particular conduct at issue in the case.").

³⁷ For example, David Leonard lists several historical legal rationales for the character evidence prohibition: (1) a consideration for the rights of the accused that differentiated the common law from the civil law; (2) the danger of unfair prejudice; (3) the danger of unfairly surprising the criminal accused with such evidence; and (4) overcomplication of the issues and potential for confusion. *See id.* at 1180–86.

³⁸ In *Michelson v. United States*, 335 U.S. 469 (1948), Justice Jackson explained the historic rationale for prohibiting prosecutorial use of character evidence at trial: "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." *Id.* at 475–76.

³⁹ According to Simon Greenleaf, an evidence scholar of the nineteenth century, the reason the prosecution in a criminal case is not allowed to use character evidence as proof of the accused's guilt is that "such evidence is too likely to move the jury to condemnation irrespective of his actual guilt of the offense charged." 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 14b(1), at 39 (Boston, Little, Brown, & Co. 16th ed. 1899); *see also* Imwinkelreid, *supra* note 31, at 427 ("There is a grave risk that the jury may decide to punish the defendant for being a criminal rather than because the jurors are convinced beyond a reasonable doubt that the defendant committed the charged crime.").

⁴⁰ Imwinkelreid points out that if jurors believe a defendant's uncharged misconduct is heinous or repulsive, they may on a conscious level decide to nullify the requirement to convict beyond a reasonable doubt in order to protect society. Imwinkelreid, *supra* note 31, at 427.

⁴¹ MUELLER & KIRKPATRICK, *supra* note 35, § 4.11, at 183–84.

not admissible for the purpose of proving action in conformity therewith on a particular occasion.”⁴²

3. *Character Evidence and Self-Defense Under the Common Law*

a. *The Decision to Introduce Character Evidence*

Under the common law, the criminal defendant held the key to the admission of character evidence pertaining to his own character.⁴³ According to the so-called “mercy rule,” a criminal accused could introduce evidence of his own good character to suggest reasonable doubt as to the charges against him.⁴⁴ The prosecution could rebut the defendant’s character evidence either by calling character witnesses of its own, or by cross-examining the defendant’s character witnesses with specific instances of the defendant’s conduct to test their knowledge.⁴⁵ If the defendant elected to say nothing about his character, the subject was off-limits to the prosecution. In *Michelson v. United States*, a famous character evidence case from the mid-twentieth century, the Supreme Court explained that the law does not “invest[] the defendant with a presumption of good character, but it simply closes the whole matter of character . . . disposition and reputation on the prosecution’s case-in-chief.”⁴⁶

⁴² FED. R. EVID. 404(a).

⁴³ See, e.g., GREENLEAF, *supra* note 39, § 14b(1), at 39 (explaining that the accused may always invoke his good character in his defense, following which the prosecution could introduce evidence of his bad character in reply).

⁴⁴ See MUELLER & KIRKPATRICK, *supra* note 35, § 4.12, at 185 (defining the “mercy rule” as an exception to the historic character prohibition in which “an accused may offer evidence of a pertinent trait of his character to support an inference that he was unlikely to have committed the charged offense”); see also WIGMORE (Tillers rev.), *supra* note 29, § 56, at 1162 (referring to the ability of a defendant to introduce good character evidence in his defense and stating, “But it is now well understood to be always admissible and that character is admissible upon charges of all grades, even mere misdemeanors”).

⁴⁵ WIGMORE (Tillers rev.), *supra* note 29, § 58, at 1198 (“After a defendant has attempted to show his good character in his own aid, prosecution may in rebuttal offer as evidence his bad character.”). The forms of evidence available to the prosecution in rebuttal included reputation or opinion testimony, but not affirmative evidence of the defendant’s specific acts. See *id.* § 58.1, at 1210–11. Although evidence of specific acts was inadmissible on its own, the prosecution could test the testimony of the defendant’s witnesses “by asking whether the witness has heard of specific misconduct.” GREENLEAF, *supra* note 39, § 14f, at 48; see also FED. R. EVID. 405(a) (permitting cross-examination on specific relevant instances of conduct).

⁴⁶ *Michelson v. United States*, 335 U.S. 469, 475 (1948) (citation omitted).

There appear to be two broad historical justifications for placing the decision to use character evidence in the hands of the defendant, rather than the prosecutor. First, the common law had a well-documented mistrust of the jury's ability to use character evidence properly. If affirmatively introduced by the prosecution, character evidence could influence the jury to make decisions for improper reasons, possibly relieving the prosecution of the burden to prove guilt on the particular charge beyond a reasonable doubt.⁴⁷ Prosecutorial introduction of character evidence would also flout a foundational principle of Anglo-American law, the concept that a criminal defendant should be tried on the charges against him rather than for his life's character.⁴⁸

The second primary reason for placing the character decision in the hands of the defendant was to preserve balance. "There is reason to believe," wrote a nineteenth-century American court, "that this exception [the exclusion of character evidence against the defendant] originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation."⁴⁹ In other words, giving the defendant exclusive control over character evidence was intended to serve as a shield against the power of the state.

One scholar has referred to the policy of letting the defendant use character evidence in his defense as "the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure."⁵⁰ The policy, which provides that a man on trial for his life or liberty ought to have a sporting chance to defend himself, permits the

⁴⁷ See *supra* Part I.B.2.

⁴⁸ Cf. Major Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases*, *ARMY LAW*, March 1996, at 82, 86 ("American jurisprudence is grounded in the theory that courts try cases rather than persons.").

⁴⁹ *Darling v. Westmoreland*, 52 N.H. 401, 406 (N.H. 1872). It should be noted that the *Darling* court was not in favor of what it found to be "a plain departure from the general principle which admits relevant and material evidence." *Id.* As the *Darling* court also observed, however, faced with a criminal code that included 160 capital offenses, "courts were exposed to a temptation, greater than they were able to resist, to strain the law, and moderate its barbarity by the introduction of anomalies and logical deformities, *in favorem vitae*, in the interest of humanity." *Id.* at 407.

⁵⁰ WIGMORE (Tillers rev.), *supra* note 29, § 57, at 1185.

accused to enjoy a small advantage over the government in matters related to character evidence. Its significance does not rest on its utility to the accused or on its handicapping effect on the prosecution. Rather, the policy is important because of its implied message that criminal justice is concerned not only with convicting the guilty, but also with ensuring that the innocent are not improperly found guilty using inappropriate evidence.⁵¹

If the decision to introduce character evidence rests with the state, the potential prejudice to the defendant and the interests of justice is considerable: not only might the defendant suffer an unjust conviction, but the values at the bedrock of the criminal justice system suffer if juries are permitted to make decisions for the wrong reasons, and using the wrong evidence.⁵² On the other hand, the state suffers relatively little prejudice when the character evidence decision rests with the accused: if the accused is convicted in the absence of negative character evidence against him, the likelihood is higher that the jury reached its decision for the proper reasons. In the final analysis, leaving the character evidence decision up to the defendant may lead to verdicts that are more just than they would otherwise be.⁵³

b. Victim Character Evidence

No one would seriously argue with the proposition that a criminal justice system should provide fairness and due process to the defendant. There is a legitimate question, however, whether that should occur at the expense of an alleged crime victim. As Richard Uviller has observed, permitting the

⁵¹ See *id.* § 58.2, at 1216. Other examples of the law giving a criminal a sporting chance are the entrapment and insanity defenses. Interview with Professor William A. Schroeder, Professor of Law, S. Ill. Univ. Carbondale Sch. of Law, in Carbondale, Ill. (June 21, 2007).

⁵² Relying on Supreme Court precedent, two scholars have identified three “bedrock due process principles” that are threatened by the prosecutorial introduction of pure propensity evidence against criminal defendants: (1) the presumption of innocence; (2) the standard of proof beyond a reasonable doubt; and (3) the prohibition against status crimes. Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 191–96 (2001).

⁵³ See WIGMORE (Tillers rev.), *supra* note 29, § 57, at 1185 (“But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts.”).

defendant to offer proof of the victim's bad character could damage a person (the victim) who has not placed his or her character in issue at trial.⁵⁴ Nevertheless, evidence of the victim's character can play a valuable role at trial, particularly in homicide or assault cases, in helping the jury determine what happened in the incident at bar.⁵⁵ As with the rules governing evidence of the defendant's character, the hallmark of the common law rules was a balancing of the relative interests of the defendant and the victim at trial.⁵⁶ In the words of Benjamin Tillers, "It should not be forgotten that the accused is on trial, whereas in a criminal prosecution the victim, except in a metaphorical and literal sense, is not."⁵⁷

Thus, the common law gave the criminal defendant the ability to introduce evidence pertaining to the victim's bad character in certain instances, primarily homicide, assault, and rape cases.⁵⁸ These attacks could be rebutted with evidence of the victim's good character.⁵⁹ Taking this concept further, Dean John Henry Wigmore believed that if the defendant was permitted to attack the victim's character for violence, "the same principle would then justify the prosecution (or plaintiff) in introducing the defendant's character for violence."⁶⁰ Significantly, however, the

⁵⁴ H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 855 (1982).

⁵⁵ *Id.* at 856 ("This evidence might support the inference that the defendant had reason to be fearful of the victim or that the victim might have been the first aggressor in the disputed incident."); see also Mary Kay Kleiss, *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, 1439 (1999) ("The accused introduces evidence of the decedent's violent character to establish that it was more probable that the decedent was the initial aggressor based on the inference that, at the time of the act, the decedent's conduct was in conformity with his character for violence.").

⁵⁶ See, e.g., FED. R. EVID. 404 Advisory Committee Note ("While its basis lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations.").

⁵⁷ WIGMORE (Tillers rev.), *supra* note 29, § 63, at 1379 n.7.

⁵⁸ Although the common law rules were broadly written to include all types of victim character evidence, experience has shown that the primary use of victim character evidence at common law was in homicide/assault cases and rape cases. See H. Richard Uviller, *supra* note 54, at 856 n.34.

⁵⁹ WIGMORE (Tillers rev.), *supra* note 29, § 63, at 1369 ("The state may of course offer a relevant trait of the victim's character, such as the deceased's peaceable character, in response to an attack on the character of the victim by the accused.").

⁶⁰ See *id.* at 1378-79.

majority of American jurisdictions have not historically permitted the prosecution to rebut an attack on the victim's character with a counterattack on the defendant's character.⁶¹

Although the majority approach in Anglo-American evidentiary law permitted the defendant to attack the victim's character with impunity, a small minority of American jurisdictions has experimented with making the defendant pay a price for attacking the victim's character.⁶² In a 1926 Kentucky case, the court reasoned that if the defendant could introduce evidence of the deceased victim's bad character for "peace and quietude," the defendant's own bad character for the same trait should also be received in evidence; somewhat reluctantly, however, the court concluded that the law clearly prohibited such an innovation.⁶³ Missouri, in contrast, a common law evidence jurisdiction, has long permitted the prosecution to rebut defense attacks on the victim's character by attacks on the defendant's character for the same trait.⁶⁴ Illinois, another common law evidence jurisdiction, likewise permits the prosecution, under limited circumstances, to rebut evidence of the victim's poor character with evidence of the defendant's

⁶¹ See generally *id.* at 1379 n.7 (collecting and digesting cases from several jurisdictions on the issue of using evidence of the defendant's character to rebut attacks on the victim's character).

⁶² See, e.g., *State v. Winstead*, 15 So. 2d 793, 798 (La. 1943). According to the *Winstead* court:

Evidence of previous quarrels or previous threats on the part of the defendant is always admissible, not only as tending to show that he was the aggressor in the final difficulty, in cases where he pleads self-defense, but also as tending to show that the defendant committed the crime, in a case where he denies that he is the one who committed the crime.

Id.; see also *Carr v. State*, 227 S.W. 776, 776 (Ark. 1921) (stating in dicta that because a plea of self-defense was interposed, the general reputation for peace and quiet both of the accused and of the deceased victim were admissible to show who was the first aggressor).

⁶³ *Strong v. Commonwealth*, 287 S.W. 235, 238 (Ky. 1926) (holding that the trial court improperly admitted evidence of the defendant's turbulent reputation when he had not introduced evidence of his good reputation).

⁶⁴ Missouri is a common law evidence jurisdiction whose Supreme Court adopted the rule in 1939. See *State v. Robinson*, 130 S.W.2d 530, 532 (Mo. 1939) (holding that "where an accused tenders the factual issue of the bad character of the victim of his assault to substantiate his plea of self-defense he thereby . . . opens up for inquiry all evidence of like quality having probative value on the merits of said ultimate factual issue").

poor character.⁶⁵ In 1991, California amended its evidence code to permit the prosecution to rebut defense attacks on the victim's character for violence with attacks on the defendant's character for violence.⁶⁶

4. *Self-Defense and Character Evidence Under the Federal Rules*

When the Federal Rules of Evidence were promulgated, the common law character evidence system was adopted without significant change.⁶⁷ In fact, as will be discussed later in this section, the methods of proving character and the purposes for which character evidence may be introduced at trial were virtually the same under the common law and the Federal Rules of Evidence until the Advisory Committee's 2000 amendment to Rule 404(a)(1).

a. *Methods of Proof*

There are three ways to prove character at trial: specific acts, reputation testimony, and opinion testimony.⁶⁸ Of these, the

⁶⁵ According to William Schroeder:

It also appears that the prosecution can rebut evidence of the *victim's* poor character with evidence of the *defendant's* poor character, including evidence of specific instances of conduct. . . . However, the prosecution cannot rebut evidence of the defendant's peaceful character with evidence that the deceased was also peaceful. . . . Moreover, the state may not respond to evidence of specific instances of the defendant's *non-violent* behavior with evidence of the defendant's violent character.

11 WILLIAM A. SCHROEDER, ILLINOIS PRACTICE SERIES: COURTROOM HANDBOOK ON ILLINOIS EVIDENCE 165 (2006) (internal citations omitted).

⁶⁶ See CAL. EVID. CODE § 1103 (West 2007) (noting in the legislative history that the statute was amended in 1991 pertaining to the admissibility of the defendant's character for violence).

⁶⁷ See FED. R. EVID. 404 Advisory Committee's Note (observing that the character evidence pattern existing in most jurisdictions at the time the rules were promulgated "is incorporated in the rule" and that the criminal rule "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence").

⁶⁸ Compare FED. R. EVID. 405 (listing reputation, opinion and specific instances of conduct as methods of proving character), with GREENLEAF, *supra* note 39, § 14e, at 48 (stating that the "three conceivable ways of evidencing the character of a human being" are the testimony of those who know him, his reputation in the community, and particular instances of conduct).

strongest form of proof is specific acts.⁶⁹ Opinion testimony is the second-strongest form of proof.⁷⁰ Reputation is considered the weakest.⁷¹

Specific acts are relevant to character because of the prevailing belief that past acts define one's character and serve as a predictor of future acts.⁷² The logic is simple: X commits an act; the act is proof of X's character; X's future acts will be in accordance with his character.⁷³ In everyday life, most decisions regarding character are made on the basis of reports of specific acts.⁷⁴

At trial, however, the use of specific acts to prove character presents some difficulties.⁷⁵ First, the person against whom the character evidence is offered may not agree that the specific acts ever occurred in the first place. This could create trials within a trial, spawning myriad issues that might tend to confuse the jury and divert them from the task of deciding the actual case in controversy before them.⁷⁶ Second, there is no settled formula for how many specific acts it takes to develop a particular propensity or character trait.⁷⁷ The cumulative presentation of

⁶⁹ See FED. R. EVID. 405 Advisory Committee's Note ("Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing."); MUELLER & KIRKPATRICK, *supra* note 35, § 4.19, at 217.

⁷⁰ See Uviller, *supra* note 54, at 851.

⁷¹ MUELLER & KIRKPATRICK, *supra* note 35, § 4.19, at 215 (stating that reputation is the most well-established, but weakest, method for proving character).

⁷² Imwinkelreid, *supra* note 31, at 426.

⁷³ See *id.*

⁷⁴ *Id.*

⁷⁵ See Uviller, *supra* note 54, at 850 ("Although the probative value of evidence of specific acts exhibiting the trait in question is probably superior to proof by either of the other two modes, it is also thought to be most distracting and time consuming.").

⁷⁶ Cf. Kleiss, *supra* note 55, at 1447 (noting that allowing proof of specific acts could increase the issues and prolong the trial).

⁷⁷ Compare *id.* (discussing the argument that a single act might have been uncharacteristic of the defendant's life), with Imwinkelreid, *supra* note 31, at 429 (although relatively confident predictions of a person's behavior can be made when there is a large sample of that person's conduct in similar situations, more generalized character traits are poor predictors of behavior on a particular occasion), and Charles H. Rose III, *Should the Tail Wag the Dog? The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. REV. 341, 366-67 (2006) (asserting that many of the legal theories underlying the use of character evidence at trial are not in sync with current psychological research on character and personality).

specific-acts witnesses can be judicially inefficient and could potentially waste a great deal of the fact finder's time; conversely, the failure to present enough evidence of specific acts could result in the jury reaching critical character conclusions without enough supporting information.⁷⁸

Reputation testimony is a form of hearsay in which the witness testifies concerning what the members of a particular community are saying about another person.⁷⁹ The reputation that a person earns is, in essence, a form of shorthand, a summary, based on the specific acts, omissions, and words of the person in that particular community over a given period of time.⁸⁰ The jury does not, however, get to hear about the specific words or events that led to the community's conclusion. On cross-examination, the examiner is permitted to test the witness's knowledge by asking about specific instances of conduct that might be contrary to the reputation.⁸¹ For example, if a defense witness testifies that the criminal defendant has a reputation as a peaceful man, the prosecutor on cross-

⁷⁸ Imwinkelreid cites research that refers to this phenomenon as the "halo effect," the tendency of people to judge one another on the basis of one outstanding good or bad characteristic. Imwinkelreid, *supra* note 31, at 428.

⁷⁹ See GREENLEAF, *supra* note 39, § 461d, at 586–87. According to Greenleaf, "[I]t must be remembered that reputation is used only by way of an exception to the Hearsay rule." *Id.* at 586; see also FED. R. EVID. 803(19), 803(20), 803(21) (codifying hearsay exceptions involving reputation for, respectively, personal or family history, boundaries or general history, and character).

⁸⁰ The Supreme Court has aptly described reputation evidence as follows:

The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as "the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion."

Michelson v. United States, 335 U.S. 469, 477 (1948) (quoting *Badger v. Badger*, 88 N.Y. 546, 552 (N.Y. 1882)) (omission in original).

⁸¹ According to Rule 405, "On cross-examination, inquiry is allowable into relevant specific instances of conduct." FED. R. EVID. 405(a). The purpose of this cross-examination is to "expose the untrustworthiness of [the witness's] testimony if he admits that such rumors of misconduct are known to him; for the knowledge of such rumors may well be inconsistent with his assertion that the person's reputation is good." GREENLEAF, *supra* note 39, § 461d(4), at 588.

examination can ask, “Have you heard that the defendant stabbed a stranger in a bar fight?”

Opinion testimony permits a witness to testify concerning his opinion of a particular character trait of the subject.⁸² As with reputation testimony, opinion testimony is based on observation of the subject’s acts, omissions, or words during a particular time period.⁸³ The jury is, however, denied knowledge of the specific incidents upon which the witness based her opinion. Opinion testimony can be tested through cross-examination into the witness’s knowledge of specific instances of conduct.⁸⁴

Federal Rule of Evidence 405, which controls the methods of proving character at trial, limits proof of character to reputation and opinion testimony.⁸⁵ While this avoids some of the conceptual and philosophical problems associated with specific-acts testimony, it also deprives the jury of the strongest evidence regarding the character of criminal defendants and alleged crime victims. As will be discussed later, in certain cases it may not only interfere with the jury’s truth-finding function, but also make it nearly impossible for the defendant to present a meaningful and viable defense.

Reputation and opinion testimony, while relatively simple in concept and efficient in application, are crude tools for determining character at trial.⁸⁶ Reputation evidence is nothing more than filtered hearsay,⁸⁷ of dubious probative value under the best of circumstances.⁸⁸ Because it is limited to one person’s observations, opinion testimony is more tightly focused and

⁸² Uviller, *supra* note 54, at 851 n.18.

⁸³ *Id.*

⁸⁴ FED. R. EVID. 405(a).

⁸⁵ *See id.*

⁸⁶ *See Commonwealth v. Adjutant*, 824 N.E.2d 1, 13 (Mass. 2005), in which the Supreme Judicial Court of Massachusetts recently precluded the use of reputation or opinion testimony to prove the identity of the first aggressor in self-defense cases, claiming that “[r]eputations or opinions are often formed based on rumor or other unreliable hearsay sources, without any personal knowledge on the part of the person holding that opinion.” *Id.* Prior to the *Adjutant* opinion, Massachusetts had only permitted the use of victim character known to the defendant, including reputation and specific acts, “as it bears on the defendant’s state of mind and the reasonableness of his actions in claiming to have acted in self-defense.” *Id.* at 6 (citations omitted).

⁸⁷ *See GREENLEAF, supra* note 39, § 461d, at 586–87.

⁸⁸ *See MUELLER & KIRKPATRICK, supra* note 35, § 4.19, at 215 (stating that reputation is the “least reliable” method of proof).

therefore more valuable than reputation testimony in determining character at trial.⁸⁹ Nonetheless, opinion testimony is still nothing more than a filter through which the witness is permitted to interpret another person's specific acts.⁹⁰

The formulaic recitation of reputation or opinion testimony also limits its usefulness by conflating various types of behavior under broad character categories such as "chaste, peaceable, truthful, honest," and so forth.⁹¹ The problem with these "linguistic boxes," as Richard Uviller has called them, is that they "have lost their integrity. A term thought to describe a discrete and persistent element of personality, such as 'law-abiding' or 'cautious,' may arise from a wide range of behavioral events or attitudes, and affords only the crudest index for the prediction of a given act consistent with it."⁹² In other words, both reputation and opinion testimony sweep with a broad, conclusory brush that significantly limits their actual value.⁹³

⁸⁹ Uviller notes that both Wigmore and Greenleaf favored the use of opinion testimony at trial in preference to reputation testimony, and that both men regretted that American law had adopted a preference for reputation testimony. Uviller, *supra* note 54, at 851 n.18.

⁹⁰ As the common law developed, there was some controversy about the appropriate form of opinion evidence. In the beginning, witnesses were permitted to answer very particular questions about another person's character, but in time, only general questions were permitted. See WIGMORE (Chadbourn rev.), *supra* note 29, § 1981, at 207–09. "General character" meant, "the general or abstract trait as distinguished from particular instances of it." *Id.* at 209.

⁹¹ *Cf.* FED. R. EVID. 405 Advisory Committee's Note ("Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest.").

⁹² Uviller, *supra* note 54, at 849.

⁹³ This is because as a foundational matter for reputation testimony, the examiner must ask the witness whether the witness whose character is being discussed has a reputation in the community for a particular character trait. See MUELLER & KIRKPATRICK, *supra* note 35, § 4.19, at 215 (discussing foundation for reputation testimony). For opinion testimony, the examiner must ask whether the witness has formed an opinion of the person's character for a particular trait. See *id.* at 216–17 (discussing foundation for opinion testimony).

Character traits tend to be broadly categorized. Charles McCormick defined character as "a generalized description of one's disposition, or of one's disposition in respect to a *general trait*, such as honesty, temperance, or peacefulness." CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 162, at 340–41 (1st ed. 1954) (emphasis added), *quoted in* FED. R. EVID. 406 Advisory Committee's Note. Broadly categorized character traits, however, may not be particularly helpful in predicting behavior. *Cf.* Imwinkelreid, *supra* note 31, at 428 ("However, there is a good deal of research indicating that more generalized character traits are relatively poor predictors of conduct on a specific occasion.").

The noted evidence scholar Charles McCormick observed that, “[a]s one moves from the specific to the general in this fashion [from specific acts to opinion to reputation], the pungency and persuasiveness of the evidence declines.”⁹⁴

For example, suppose that Arnold and Bart were involved in a bar fight against each other. Both claim self-defense; both claim the other man was the first aggressor. Both men have a reputation in the community for violence and aggression. Arnold gained his reputation from regularly starting bar fights with total strangers. Bart, in contrast, earned his reputation by committing acts of physical abuse against his wife and children. In this case, reputation or opinion testimony alone will be of little value to the jury in determining which of the two men started the fight. This is because the foundational questions for either reputation or opinion testimony will provide the jury with no more information than that Arnold and Bart are “violent” or “aggressive.”

Theoretically, the jury might get to hear information about the specific acts underlying Arnold and Bart’s reputations. This is because Rule 405 permits cross-examination concerning specific acts or instances of conduct as a method of testing the basis for a character witness’s testimony.⁹⁵ There are, however, two significant limitations to cross-examination under Rule 405. First, the specific acts revealed on cross-examination are not admissible for their truth (that is, no extrinsic evidence of their factual basis is permitted); their only use is to test the basis for the witness’s testimony.⁹⁶ Second, cross-examination on specific acts is heavily influenced by trial incentives; in other words, a party will never cross-examine on specific acts unless it can benefit at trial from doing so.

Using the above hypothetical, suppose that Bart (whose history of aggression and violence includes domestic abuse) is charged with assaulting Arnold (whose history of aggression and violence includes regularly starting bar fights). If Bart attacks Arnold’s character for violence, he is limited by current rules to the use of reputation or opinion testimony. The prosecutor is

⁹⁴ 1 MCCORMICK ON EVIDENCE § 186, at 744 (6th ed. 2006).

⁹⁵ See FED. R. EVID. 405 (“On cross-examination, inquiry is allowable into relevant specific instances of conduct.”).

⁹⁶ See MUELLER & KIRKPATRICK, *supra* note 35, § 4.19, at 218–19.

unlikely to cross-examine defense witnesses to determine whether they are aware that Arnold gained his reputation for violence by starting fights in bars; there would be no advantage in doing it. Likewise, if the prosecution attacks Bart's character for violence, Bart gains no advantage by cross-examining prosecution character witnesses to determine whether they are aware that his reputation for violence came not from bar fights, but from domestic abuse. He gains no advantage from letting the jury know that he is a domestic abuser. The ability to cross-examine on specific acts under Rule 405 does not compensate for the shortcomings of proof inherent in reputation and opinion testimony.

b. Character Evidence Rules Prior to 2000

Federal Rule of Evidence 404 provides that “[e]vidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.”⁹⁷ Prior to the 2000 amendment, there were two exceptions to this rule: (1) the accused could offer evidence of a pertinent trait of his own character (which could be rebutted by the prosecution);⁹⁸ and (2) the accused could offer evidence of a pertinent character trait of the victim (which could be rebutted by the prosecution).⁹⁹ What is noteworthy about both of these exceptions is that the criminal accused had complete control over the introduction of character propensity evidence at trial and could selectively use it to bolster his own character or attack that of the victim. There was only one minor (and highly particularized) exception to this rule. When the defense introduced factual evidence that the alleged victim of a homicide was the first aggressor—for instance, a witness who testified that the victim threw the first punch—the prosecution could introduce propensity evidence of the victim’s peaceful character

⁹⁷ FED. R. EVID. 404.

⁹⁸ Rule 404(a)(1) pertains to the character of the accused, and it permits, as an exception to the general character prohibition, “[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.” FED. R. EVID. 404(a)(1).

⁹⁹ Rule 404(a)(2) pertains to the character of the victim, and it permits, as an exception to the general character prohibition, “[e]vidence 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.” FED. R. EVID. 404(a)(2).

to rebut the factual implication that the victim was the aggressor.¹⁰⁰

Prior to the 2000 amendment, Rule 404 employed a character evidence formula that relied on strict compartmentalization of character evidence by category of witness: the criminal defendant, the alleged crime victim, and other witnesses. Those categories, particularly the criminal defendant and the alleged crime victim, were akin to apples and oranges. An attack on an apple had to be met with a defense of the apple, but oranges were kept strictly out of the picture. For example, an attack on the victim's character could only be rebutted by defending the *victim's* character; the prosecution was not permitted to attack the *defendant's* character for the same pertinent trait.¹⁰¹

¹⁰⁰ This exception permits the prosecution to offer "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.* The exception, which lets the prosecution introduce victim character evidence even if the defense has not, apparently exists "for the special reason that in such cases, the dead victim is not available to attest to his own peaceable *behavior* during the encounter in question." Uviller, *supra* note 54, at 857 (emphasis added).

¹⁰¹ See FED. R. EVID. 404(a)(2) (pre-2000 version); see also FED. R. EVID. 404 Advisory Committee's Note accompanying the Dec. 1, 2000 amendment to Rule 404(a)(1) ("Current law [(that is, law prior to the 2000 amendment)] does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character.").

TABLE 1
OPERATION OF SELF-DEFENSE CHARACTER EVIDENCE
UNDER THE PRE-2000 RULES 404 AND 405¹⁰²

Rule	Defendant Action	Prosecution Response
404(a)(1) & 405	Introduce evidence (reputation or opinion) of defendant's character for peacefulness.	Rebut with evidence (reputation or opinion) of defendant's character for violence.
404(a)(2) & 405	Introduce evidence (reputation or opinion) of victim's character for violence.	Rebut with evidence (reputation or opinion) of victim's character for peacefulness.
404(a)(2) & 405	Introduce factual evidence that the victim was the first aggressor.	Rebut with counter-factual evidence. Rebut with evidence (reputation or opinion) of victim's peaceful character.

If there was a competitive edge to one side, it was slight, and belonged to the defense. The rule expressly permitted the defendant to attack the victim's character in a self-defense case without fear of prosecutorial retaliation against his own character. Indeed, conventional wisdom held that a defendant did not put his whole character at issue merely by claiming self-

¹⁰² Compare TABLE 1, with FED. R. EVID. 404, and FED. R. EVID. 405.

defense, because “that would make mincemeat of the limitations in Rule 404(a) on the use of character evidence.”¹⁰³

c. Post-2000 Character Evidence Rules

In 2000, the Advisory Committee made mincemeat of Rule 404(a)’s limitations by partially removing them. In response to a proposal by the Justice Department to link the character of the defendant and the alleged victim, the Committee amended the rule.¹⁰⁴ Mixing apples and oranges for the first time, the new rule permits the prosecution to respond to defense attacks on the alleged victim’s character by attacking the *defendant’s* character for the same trait.

¹⁰³ *United States v. Fountain*, 768 F.2d 790, 795 (7th Cir. 1985).

¹⁰⁴ 1 STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* § 404.02[9], at 404-16–404-17 (8th ed. 2002).

TABLE 2
OPERATION OF SELF-DEFENSE CHARACTER EVIDENCE
UNDER THE POST-2000 RULES 404 AND 405¹⁰⁵

Rule	Defendant Action	Prosecution Response
404(a)(1) & 405	Introduce evidence (reputation or opinion) of defendant's character for peacefulness.	Rebut with evidence (reputation or opinion) of defendant's character for violence.
404(a)(2) & 405	Introduce evidence (reputation or opinion) of victim's character for violence.	Rebut with evidence (reputation or opinion) of victim's character for peacefulness. Rebut with evidence (reputation or opinion) of the defendant's character for violence.
404(a)(2) & 405	Introduce factual evidence that the victim was the first aggressor.	Rebut with counter-factual evidence. Rebut with evidence (reputation or opinion) of victim's peaceful character.

¹⁰⁵ Compare FED. R. EVID. 404, with FED. R. EVID. 405.

C. Historical and Philosophical Background of Amended Rule 404(a)

1. Historical Background of Amended Rule 404(a)

The amended Rule 404(a)(1) is predicated on the concept that the defense should not receive unfair evidentiary advantages over the prosecution at trial.¹⁰⁶ A proposed revision of Rule 404(a) first appeared in the Omnibus Crime Control Act of 1997, a bill that was never enacted.¹⁰⁷ As originally proposed, the amendment would have permitted the government to introduce evidence of *any* pertinent trait of the accused's character in response to a character attack on the victim.¹⁰⁸

The Advisory Committee on Evidence Rules considered amending Rule 404 in 1997.¹⁰⁹ It published the rule as contained in the Omnibus Crime Control Act for public comment in 1998.¹¹⁰ Public comment suggested that permitting the prosecution to attack *any* character trait of the accused could result in a potentially overbroad prosecutorial use of character evidence.¹¹¹ Accordingly, the Committee revised the rule to limit prosecution counterattacks to the *same* character trait.¹¹² In addition, although the Rule itself was not further amended to say this, the Committee notes make clear that attacks on the

¹⁰⁶ According to the authors of the Federal Rules of Evidence Manual, Department of Justice members on the Advisory Committee "convinced a majority of Committee members that the government is often prejudiced by a one-way presentation of character evidence. They argued that all too often a defendant attacks the character of the victim and the prosecution is not allowed to attack the character of the defendant in kind." SALTZBURG ET AL., *supra* note 104, § 404.02[9], at 404-17.

¹⁰⁷ Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 503 (1997). With respect to Rule 404(a), the bill provided as follows:

Rule 404(a)(1) of the Federal Rules of Evidence is amended by inserting before the semicolon the following: " , or, if an accused offers evidence of a *pertinent trait of character of the victim* of the crime, evidence of a *pertinent trait of character of the accused* offered by the prosecution."

Id. (emphasis added).

¹⁰⁸ *See id.*

¹⁰⁹ *See* Advisory Committee on Evidence Rules, Evidence Rules Docket, Document No. 1945, Rule 404 (June 23, 2006), available at http://www.uscourts.gov/rules/Evidence_Docket.pdf.

¹¹⁰ *Id.*

¹¹¹ *See* REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 4 (May 1, 1999), available at <http://www.uscourts.gov/rules/Reports/EV05-1999.pdf>.

¹¹² *Id.*

victim's truthfulness and veracity as a witness under Rule 608 would not be included within the ambit of Rule 404(a).¹¹³ The Judicial Conference approved the rule in 1999, the Supreme Court approved it in 2000, and it became effective in December of 2000.¹¹⁴

2. *Arguments in Favor of Amended Rule 404(a)(1)*

There are powerful arguments both for and against the amended rule. Perhaps the strongest argument in favor of the amendment is based in the philosophical heart of the Federal Rules of Evidence, which is that relevant evidence, to the greatest extent possible, should be admissible at trial.¹¹⁵ If the fact finder is provided with relevant evidence to weigh the probability of who was the first aggressor in a violent encounter, it should not be presented with evidence from only one side.¹¹⁶ When a criminal defendant is permitted to attack the character of an alleged crime victim, with the law shielding from inquiry his own character, the jury at best is presented with an incomplete picture of the violent encounter; it is deprived of critical evidence that would help it make a better decision concerning who started the fight.¹¹⁷

¹¹³ See FED. R. EVID. 404 Advisory Committee's Note.

¹¹⁴ See Advisory Committee on Evidence Rules, *supra* note 109.

¹¹⁵ According to Rule 402, "All relevant evidence is admissible, except as otherwise provided . . ." FED. R. EVID. 402. On the subject of relevance, Weinstein has written, "The basic rule of evidence is that evidence must be relevant to be admissible. Much of the rest is detail. . . . The concept defined is, however, fundamental to the law of evidence; it is the cornerstone on which any rational system of evidence rests." 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 401.02, at 401-5 (Joseph M. McLaughlin ed., 2d ed. 1997).

¹¹⁶ See FED. R. EVID. 404 Advisory Committee's Note. According to the Committee:

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. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. 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.

Id.

¹¹⁷ *Id.*

Another argument for the amendment concerns the integrity of the defendant's presentation to the jury. In advocating for the rule, the Justice Department argued that the former version of Rule 404(a) permitted the defendant to mislead the jury by attacking the victim's character without retaliation in kind.¹¹⁸ According to this argument, such an un rebutted attack sends an implicit message that the defendant's own character is peaceful because nothing has been said about it to the jury.¹¹⁹ If the jury believes this implicit message, then the rule has disrupted the integrity of the judicial process. The defendant has, in essence, been permitted to pull the wool over the jury's eyes about his own character.

A final argument in favor of the amended rule is that no criminal defendant has an absolute right to attack the character of any other party at trial. This is the reasoning underlying the statutory English character evidence rules that have been in place for well over a century.¹²⁰ The current English rules permit a criminal defendant to attack anyone else's character if necessary for his defense, either by agreement between the parties or with leave of the court.¹²¹ Whenever the defendant

¹¹⁸ See SALTZBURG ET AL., *supra* note 104, § 404.02[9], at 404-17 ("What follows, according to the DOJ, is that jurors are misled; they think that the defendant must have a great character if the government says nothing about it.").

¹¹⁹ *Id.* A worthwhile comparison can be made to the English Criminal Evidence Act of 2003, which permits the prosecution to attack a defendant's character in order to correct a "false impression given by the defendant" either at trial or in pretrial investigations or proceedings. Criminal Justice Act, 2003, c. 44, § 101(1)(f) (Eng.). A "false impression" is defined as "an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant." c. 44, § 105(1)(a). A defendant can make a misleading impression through his own testimony, the testimony of a witness, his conduct, or his dress. See c. 44, § 105.

¹²⁰ Wigmore characterized the English rule as "embodying a kind of English 'fair play' principle." WIGMORE (Tillers rev.), *supra* note 29, § 63, at 1379 n.7. The original English rule was codified in the Criminal Evidence Act of 1898. It provided that evidence of the criminal accused's prior criminal offenses could be admitted if "the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1 (Eng.), *quoted in* WIGMORE (Tillers rev.), *supra* note 29, § 63, at 1379 n.7.

¹²¹ Criminal Justice Act, 2003, c. 44, § 100 (Eng.), which states:

- (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
 - (a) it is important explanatory evidence,
 - (b) it has substantial probative value in relation to a matter which—
 - (i) is a matter in issue in the proceedings, and

attacks a prosecution witness or suggests prosecutorial misconduct, however, the prosecution is allowed to counterattack by presenting evidence of the defendant's bad character.¹²² Significantly, the English counterattack rule also

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- (ii) is of substantial importance in the context of the case as a whole, or
 - (c) all parties to the proceedings agree to the evidence being admissible.
- (2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—
- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
 - (b) its value for understanding the case as a whole is substantial.
- (3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—
- (a) the nature and number of the events, or other things, to which the evidence relates;
 - (b) when those events or things are alleged to have happened or existed;
 - (c) where—
 - (i) the evidence is evidence of a person's misconduct, and
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
 - (d) where—
 - (i) the evidence is evidence of a person's misconduct,
 - (ii) it is suggested that that person is also responsible for the misconduct charged, and
 - (iii) the identity of the person responsible for the misconduct charged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time.
- (4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

¹²² See Philip Plowden, *Making Sense of Character Evidence*, 155 NEW L.J., No. 7159, at 47–50 (Jan. 14, 2005). The primary applicable character evidence provision pertaining to defendants is contained in section 101 of the Criminal Justice Act of 2003. *See id.* It states as follows:

- (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
 - (a) all parties to the proceedings agree to the evidence being admissible,
 - (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
 - (c) it is important explanatory evidence,

applies to attacks that occur *outside* the courtroom, such as when a criminal defendant attacks the character of another person during a police interrogation.¹²³ In short, the English rule imposes a price on the defendant's conduct but does not prevent it.

Similarly, one can argue that the amended Rule 404(a) takes nothing away from a criminal defendant. If the defendant believes he needs to introduce negative character evidence against the alleged crime victim, he may do so. He must, however, be prepared to pay the price. According to this argument, the amended Rule 404(a) does nothing more or less than alter the cost-benefit analysis for the accused.¹²⁴ The question is whether this is an acceptable price to impose on a criminal defendant.

3. *Arguments Against Amended Rule 404(a)(1)*

In the face of arguments for the amended rule, there are also strong arguments against it. First, in the federal system, the empirical necessity for the amended Rule 404(a) is questionable.¹²⁵ Homicide and assault cases are the primary

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

Criminal Justice Act, 2003, c. 44, § 101 (Eng.).

¹²³ Plowden, *supra* note 122, at 47–50.

¹²⁴ *Cf.* SALTZBURG ET AL., *supra* note 104, § 404.02[8], at 404-16 (“Now, defense counsel must think harder about whether to attack the victim's character—the risk to the defendant is greater than before.”).

¹²⁵ *See id.* (“So it is questionable whether the amendment was needed to ‘protect’ the government from negative inferences in what is probably a small number of cases.”).

concern of state courts,¹²⁶ not federal district courts.¹²⁷ The likelihood is small indeed that federal prosecutors faced significant or insurmountable problems with the previous version of the rule.¹²⁸

Not only is the rule of dubious empirical necessity in a federal system largely unconcerned with common law crimes against the person, but it may also be superfluous within the context of Rule 404 itself. In amending the rule, the Committee minimized a tremendous advantage already available under the rules to the prosecution at trial: the introduction of specific acts under Rule 404(b) for noncharacter purposes such as motive, opportunity, absence of mistake, intent, and so forth.¹²⁹

In the hands of an experienced and knowledgeable prosecutor, Rule 404(b) takes away much of the protection that Rule 404(a) grants to a criminal accused. Rule 404(b) is powerful for three reasons. First, the jury is likely to draw impermissible character inferences from specific-acts evidence

¹²⁶ For example, according to U.S. Department of Justice Statistics, there were 590,300 arrests for violent crime in 2004. See U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Key Facts at a Glance, Four Measures of Serious Violent Crime, <http://www.ojp.usdoj.gov/bjs/glance/tables/4meastab.htm> (last visited Apr. 8, 2008). However, only 2962 federal district court cases that year involved violent crimes. U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Defendants in Cases Concluded in U.S. District Court, <http://www.ojp.usdoj.gov/bjs/glance/tables/fedtyptab.htm> (last visited Apr. 8, 2008).

¹²⁷ Cf. 1 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.2(b), at 10–14 (2d ed. 1999) (noting that the federal system is responsible for less than two percent of the total criminal prosecutions in the United States and less than four percent of felony prosecutions).

¹²⁸ See SALTZBURG ET AL., *supra* note 104, § 404.02[9], at 404-19.

¹²⁹ According to Rule 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

FED. R. EVID. 404(b).

The Advisory Committee briefly addressed the introduction of specific-acts evidence under Rule 404(b) in its notes to the 2000 amendment to Rule 404(a)(1), asserting that without the amendment, the government would be subjected to an evidentiary disadvantage, “even if evidence of the accused’s prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused’s character on a specific occasion.” FED. R. EVID. 404 Advisory Committee’s Note. This brief discussion, however, minimizes the impact of Rule 404(b) evidence at trial.

offered under Rule 404(b) for noncharacter purposes.¹³⁰ Second, Rule 404(b) operates independently of Rule 404(a); a prosecutor does not have to wait for the defendant to bring his character into play in order to introduce evidence under 404(b).¹³¹ Third, Rule 404(b) permits prosecutorial evidence of specific acts, even as the criminal defendant is confined to presenting reputation or opinion evidence within the constraints of Rule 405.¹³² When one considers the prosecutorial advantages, flexibility, and power of Rule 404(b), it becomes apparent that the class of cases is narrow indeed in which the previous version of Rule 404(a) presented an actual problem for prosecutors.

The amendment's problems extend beyond its questionable justifications to its impact on the rights of criminal defendants at trial. In attempting to achieve balance, the amendment as written actually tips the evidentiary scales against some criminal defendants in a way that interferes with the defendant's ability to present a meaningful defense.

The amendment did away with a workable, predictable rule that represented a rough balance between the interests of the prosecution and the needs of the defense. While it is true that the character evidence rules have not historically been models of logical clarity or internal consistency, experience has proved their value. Justice Robert Jackson's famous statement in *Michelson v. United States* still rings true today:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance¹³³ between adverse interests than to establish a rational edifice.

Predictability and workability are evidentiary qualities not lightly to be gainsaid. In the absence of a compelling reason to do so, it makes little sense to pull "one misshapen stone" out of

¹³⁰ See SALTZBURG ET AL., *supra* note 104, § 404.02[9], at 404-19.

¹³¹ See FED. R. EVID. 404(b).

¹³² Compare FED. R. EVID. 404(b), with FED. R. EVID. 405.

¹³³ *Michelson v. United States*, 335 U.S. 469, 486 (1948).

the evidentiary edifice, particularly when imbalance or even injustice to a particular group of defendants is likely to result.

Not only did the pre-2000 version of Rule 404 represent the collective wisdom of the common law, but it also had constitutional dimensions. The principle that a criminal defendant should be able to enhance his defense by attacking the character of the alleged victim was “so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.”¹³⁴

Admittedly, the amended Rule 404(a)(1) negatively impacts only a narrow class of defendants in a small number of cases: defendants of violent character who have a legitimate claim of self-defense against aggressor-victims of violent character, where there are no eyewitnesses or supporting forensic evidence.¹³⁵ The effect on those defendants, however, is to effectually deprive them of a defense tactic—the ability to attack the character of the alleged crime victim without bringing the defendant’s own character into question—that has been available to the majority of criminal defendants throughout the entire history of American jurisprudence.¹³⁶

The bigger question, however, is whether the amended rule actually deprives defendants of a meaningful defense at trial. The Supreme Court has made clear that while state and federal rule makers have broad authority to create exclusionary rules of evidence at criminal trials,¹³⁷ they may not do so by creating rules that deprive a defendant of a meaningful opportunity to present a complete defense, infringe upon a weighty interest of the accused, or are arbitrary or disproportionate to the purpose they are designed to serve.¹³⁸

The likelihood of the Supreme Court declaring amended Rule 404(a) unconstitutional is slim.¹³⁹ The rule does not prevent the

¹³⁴ See FED. R. EVID. 404 Advisory Committee’s Note.

¹³⁵ For a more thorough discussion of this, see *infra* Part III.B.2.

¹³⁶ See *supra* note 61 and accompanying text.

¹³⁷ *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

¹³⁸ See *id.* (citing *United States v. Sheffer*, 523 U.S. 303, 308 (1998); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

¹³⁹ See *Williams v. Lord*, 996 F.2d 1481 (2d Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994). In *Williams*, the appellant, a prostitute, was convicted of murder for stabbing a customer to death. She claimed self-defense. During trial, she learned that the alleged victim was the subject of a prior rape investigation. She attempted

defendant from testifying in his own defense,¹⁴⁰ introducing exculpatory evidence,¹⁴¹ or even attacking the victim's character in his own defense; the rule simply imposes an unpalatable cost-benefit balance on the criminal defendant.

Nevertheless, the amended rule presents the violent criminal defendant who has a meritorious claim to self-defense with a Hobson's choice: he can attack the alleged victim's character and expose himself to certain counterattack and a probable conviction, or he can remain silent on the issue of the alleged victim's character and face a likely conviction.¹⁴² Neither of these choices is likely to be found unconstitutional by the Supreme Court, which historically has displayed little sympathy for the "hard choices" the adversarial system imposes on criminal defendants.¹⁴³ While the character choices raised by the

to introduce evidence of the rape investigation, but the judge denied the motion, because New York evidentiary law only permitted evidence of the alleged victim's violent character if it was known to the defendant at the time of the incident. Williams challenged a district court's denial of her habeas corpus petition, and the court affirmed, holding that New York's evidentiary rule limiting admission of relevant proof where state interests outweighed the defendant's right to present exculpatory evidence was neither arbitrary nor disproportionate to New York's legitimate state interests. *Id.* at 1483–84. The Advisory Committee's stated purposes for amending Rule 404(a)(1) would probably be enough to satisfy the Court. *See also Sheffer*, 523 U.S. at 309 n.5, in which the Court used the drafter's notes of Military Rule of Evidence 707 (citing interests similar to those stated in FED. R. EVID. 404 Advisory Committee's Note) to hold that the rule allowing exclusion of certain relevant evidence was not arbitrary or disproportionate in achieving its goals, even though it precluded a criminal accused from introducing exculpatory polygraph evidence at trial.

¹⁴⁰ *See, e.g., Rock v. Arkansas*, 483 U.S. 44 (1987) (holding that a criminal accused has the right to testify on his own behalf at trial under the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's guarantee against compulsory self-incrimination).

¹⁴¹ *See, e.g., California v. Trombetta*, 467 U.S. 479 (1984) (noting that due process requires that criminal defendants be afforded a meaningful opportunity to present a complete defense and observing that "this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system").

¹⁴² *See infra* Part III.B.

¹⁴³ *See, e.g., Halbert v. Michigan*, 545 U.S. 605 (2005) (a criminal defendant may waive constitutional rights as part of the plea bargaining process); *McKune v. Lile*, 536 U.S. 24 (2002) (a criminal defendant has the right to participate or refuse to participate in proceedings before a clemency board, where testimony could incriminate him or silence be held against him); *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (a criminal defendant may waive the right to bring a civil suit

federal character evidence rules may not rise to constitutional dimensions, they nonetheless represent, in their impact, a de facto exclusionary rule for certain defendants that cries out for corrective action.

II

A PROPOSAL FOR CHANGE

The previous section of this Article has demonstrated some deficiencies of the amended Rule 404(a)(1). Additionally, the combination of the amended Rule 404(a)(1) and the method of proof constraints of Rule 405 may interfere not only with the defendant's ability to present a defense, but also with the jury's duty to decide the probable first aggressor in a self-defense case.¹⁴⁴

I propose further amending Rule 404 in order to recognize that the jury is entitled to the most complete picture possible in a self-defense case where the identity of the first aggressor is at issue. The proposed amendment, Rule 404(c), would apply exclusively to self-defense cases. Rule 404(c) is an amalgam of character evidence rules from three states: Missouri, Massachusetts, and California. Although there are several jurisdiction-specific approaches to character evidence, I have focused on Missouri, Massachusetts, and California because of the doctrinal clarity of their positions and their combined utility in forming a new character rule.¹⁴⁵ This section begins by

against the government in return for a dismissal of charges); *Williams v. Florida*, 399 U.S. 78 (1970) (a state may require a criminal defendant to provide advance notice of alibi witnesses); *Spencer v. Texas*, 385 U.S. 554 (1967) (a criminal defendant who testifies on his own behalf may face impeachment for a prior criminal record); *Brown v. Walker*, 161 U.S. 591 (1896) (a criminal defendant may elect to testify and therefore waive his privilege against self-incrimination).

¹⁴⁴ See discussion *infra* Part III.B.

¹⁴⁵ For an excellent discussion of the various approaches employed by United States jurisdictions, see Kleiss, *supra* note 55, at 1452–60, and 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, 244–50 (2006). Some states have adopted more permissive evidence rules that allow for proof establishing the initial aggressor's identity. Wyoming, for example, has legislatively altered its Rule 405 to provide that in cases involving the defense attacking the victim's character under Rule 404(a)(2), the defense is entitled to present evidence of specific acts. See WYO. R. EVID. 405(b) ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or is in issue under Rule 404(a)(2), proof may also be

discussing the character evidence rules of these three states, extracting elements from each that help accomplish two objectives: (1) assisting the jury in determining the identity of the first aggressor; and (2) preserving the defendant's ability to present an effective defense. The section concludes by proposing an amended rule based on those elements.

A. Character Evidence and Self-Defense in Missouri, California, and Massachusetts

Long before the Rules Advisory Committee amended Rule 404, Missouri (a common law evidence jurisdiction) and California (a code evidence jurisdiction) already had evidentiary schemes that precluded the defendant from attacking an alleged crime victim's character with impunity.¹⁴⁶ In 2005, Massachusetts judicially adopted a rule permitting the defendant to introduce specific acts of character evidence in self-defense cases to support a claim that the victim was the first aggressor.¹⁴⁷ The approaches taken by these jurisdictions regarding the use of character evidence in self-defense cases are valuable in formulating a proposed rule that would enhance the search for truth in self-defense cases while preserving the defendant's right to present an effective defense.

made of specific instances of his conduct.”). It should be noted, however, that Wyoming has not yet adopted a version of the 2000 amendment to Federal Rule of Evidence 404(a)(1), so there currently is no opportunity for prosecutorial counterattack. *See* WYO. R. EVID. 404(a)(1). Illinois has a common law rule very similar to Massachusetts's newly adopted rule in the *Adjutant* case, allowing evidence of the alleged victim's specific acts of prior violence of which the defendant was unaware at the time of the accident. *See* Scott, *supra*, at 246–49. Some states have declared that specific-acts evidence is an “essential element” of a self-defense claim and have permitted specific acts under their versions of Rule 405. *See id.* at 245–46. Other jurisdictions restrict evidence of the alleged victim's specific acts to prior convictions for violent crimes, an approach known as the Connecticut rule. *See id.* Another approach, termed the District of Columbia Rule, limits specific-acts evidence to homicide cases. *Id.* at 246; *see also* Kleiss, *supra* note 55, at 1463–64 (proposing an amendment to FED. R. EVID. 405 that would permit evidence of all relevant prior specific acts in homicide cases). The final approach permits the defendant's use of specific-acts evidence, but only after notice to the prosecution. *See* Scott, *supra*, at 246.

¹⁴⁶ *See, e.g.*, State v. Waller, 816 S.W.2d 212, 214 (Mo. 1991).

¹⁴⁷ Commonwealth v. Adjutant, 824 N.E.2d 1 (Mass. 2005).

1. *Missouri*

Missouri has traditionally adhered to the position that a criminal defendant is entitled to present evidence of the victim's violent or turbulent character to support a claim of self-defense at trial.¹⁴⁸ This position is consistent with the common law and the pre-2000 Federal Rules. In cases where the violent or turbulent character of the alleged victim is not known to the defendant at the time of the violent encounter, Missouri evidentiary law permits the defendant to introduce general reputation testimony, but not specific acts, in proof of the victim's character.¹⁴⁹

The Missouri rule, however, differs in one critical aspect from the majority of common law jurisdictions and the pre-2000 Federal Rules of Evidence: in Missouri, the defendant cannot attack the alleged victim's character with impunity. In 1939, the Missouri Supreme Court held that when a criminal accused "tenders the factual issue of the bad character of the victim of his assault to substantiate his plea of self-defense, he thereby . . . opens up for inquiry all evidence of like quality having probative value on the merits of said ultimate factual issue."¹⁵⁰ The court reached this conclusion for several reasons: (1) in determining the probability of a first aggressor in a homicide or assault case, the same reasoning should apply not only to evidence offered by the accused, but also to evidence offered by the prosecution in rebuttal; (2) both the defendant and the state are entitled to a fair trial; and (3) impartial justice could not be dispensed when one side is allowed "to present a given type of evidence bearing

¹⁴⁸ *Waller*, 816 S.W.2d at 214 (discussing Missouri precedent and stating, "On the issue of self-defense there can be no doubt of the rule that evidence of the deceased's reputation for turbulence and violence is admissible as relevant to show who was the aggressor and whether a reasonable apprehension of danger existed; but such evidence must be proved by general reputation testimony, not specific acts of violence . . .").

¹⁴⁹ *See id.* at 214–15. According to the *Waller* court, there are a number of reasons for excluding specific acts at trial: (1) a single act may have been exceptional, unusual, and uncharacteristic; (2) numerous collateral issues could be raised; (3) collateral issues might cloud the real issues and confuse the jury; (4) the state cannot anticipate and prepare to rebut every specific prior act of violence of a deceased victim; and (5) since the state cannot introduce evidence of the defendant's past acts of violence, the defendant should not be permitted to benefit from evidence of specific acts of the victim. *Id.* at 215.

¹⁵⁰ *State v. Robinson*, 130 S.W.2d 530, 532 (Mo. 1939).

upon an ultimate factual issue while at the same time denying to his adversary the right to present his version of said issue by evidence of equal inherent quality.”¹⁵¹

Thus, in Missouri, the criminal accused holds the key to the introduction of evidence pertaining both to his own and to the victim’s character. In cases where the character of the victim was not known to the accused prior to the violent encounter, the accused is limited to general reputation testimony of character.¹⁵² If the accused decides to attack the victim’s character for turbulence or violence, the state may respond with general reputation evidence pertaining to the accused’s character for turbulence or violence.¹⁵³ Missouri maintains the historic common law antipathy towards evidence of specific acts to prove character at trial.¹⁵⁴

2. *California*

California’s evidence code provides maximum opportunity for a criminal defendant to present evidence pertaining to the alleged victim’s character in a self-defense case, while at the same time ensuring the prosecution can present a balanced view of the probabilities. The general character evidence provision of the California code is quite similar to the general character evidence prohibition of the common law and the Federal Rules of Evidence: unless it meets an exception, evidence of a person’s character or trait of character (whether proved by reputation, opinion, or specific acts) is inadmissible to prove conduct on a specific occasion.¹⁵⁵

¹⁵¹ *Id.* at 531.

¹⁵² *Waller*, 816 S.W.2d at 214.

¹⁵³ *Robinson*, 130 S.W.2d at 532.

¹⁵⁴ *Waller*, 816 S.W.2d at 214. There does appear to be some authority in Missouri for the proposition that specific acts can be used to prove character. See William A. Schroeder, *Evidence Issues in Assault and Homicide Cases Where Self-Defense Is Claimed*, 58 J. MO. B. 70, 73 (Mar.–Apr. 2002) (construing the case of *State v. Oates*, 12 S.W.3d 307 (Mo. 2002), in which the defendant elicited evidence of the alleged victim’s specific acts on direct examination to support the inference that the victim was the first aggressor). However, as a more recent appellate case demonstrates, the general rule in Missouri remains that reputation evidence is the appropriate method to prove character. See *Kuehne v. State*, 107 S.W.3d 285 (Mo. Ct. App. 2003).

¹⁵⁵ See CAL. EVID. CODE § 1101 (West 2007).

One such exception is found in section 1103 of the California Evidence Code, which provides that in a criminal case, the defendant can introduce evidence of the victim's character or trait of character to prove the victim's conduct in conformity with the character trait.¹⁵⁶ Although this provision of the Code originally limited the defendant to offering reputation or opinion testimony, the Code was eventually amended to permit the defendant to offer evidence of the victim's specific acts as well.¹⁵⁷ Prior to 1991, the prosecution could defend against such an attack only by bolstering the victim's character with opinion testimony, reputation evidence, or specific instances of conduct.

In 1991, section 1103 was amended to permit a prosecution counterattack in cases involving the character trait of violence.¹⁵⁸ If the defendant attacks the victim's character for violence, section 1103 allows the prosecution to introduce evidence of the defendant's character for violence or trait of character for violence tending to show that the violence was adduced by the defendant.¹⁵⁹ The prosecution, like the defendant, may use evidence of reputation, opinion, or specific acts.¹⁶⁰ The amended section 1103 has survived a challenge under the California

¹⁵⁶ *Id.* § 1103(a). This provision provides as follows:

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

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

Id.

¹⁵⁷ See CAL. EVID. CODE § 1103(a) Historical and Statutory Notes.

¹⁵⁸ See *id.*

¹⁵⁹ Section 1103(b) of the California Evidence Code states:

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

Id. § 1103(b).

¹⁶⁰ See *id.*

constitution and remains a viable, if seldom-used, provision of the evidentiary code.¹⁶¹

Under the California Code, the defendant still holds the traditional key to character evidence. Significantly, he has access to all three methods of character evidence to prove the alleged victim's character for violence.¹⁶² Once the defendant attacks the victim's character for violence, the California Code gives the prosecution considerable flexibility in response: the prosecution can use the same types of evidence against the defendant to prove that the defendant instigated the violent encounter.¹⁶³

3. *Massachusetts*

The Supreme Judicial Court of Massachusetts recently held that in self-defense cases where the identity of the first aggressor is at issue, the defendant is entitled to attack the alleged victim's character for violence by using evidence of specific instances of conduct.¹⁶⁴ In a thorough opinion that closely examines the various common law and code approaches to self-defense and character evidence, the Massachusetts court reasoned that because specific-acts evidence is the most convincing method of proving character, it is the best method for determining the probable first aggressor in a homicide or assault case.¹⁶⁵ In a fascinating reversal of the traditional common law and federal approach to the problem, the court specifically rejected the use of reputation evidence for this purpose because it is frequently based on rumor or unreliable hearsay sources.¹⁶⁶ Likewise, the court rejected the use of opinion testimony for similar reasons. According to the court, "Juries should have the ability to draw their own inferences in assessing the bearing of the victim's prior

¹⁶¹ See *People v. Blanco*, 13 Cal. Rptr. 2d 176 (Cal. Ct. App. 1992) (holding that provision of CAL. EVID. CODE § 1103(b) that permitted prosecution to rebut defendant's character attack on victim with a character attack on the defendant did not violate defendant's due process rights).

¹⁶² See CAL. EVID. CODE § 1103(a).

¹⁶³ *Id.* § 1103(b).

¹⁶⁴ *Commonwealth v. Adjutant*, 824 N.E.2d 1 (Mass. 2005).

¹⁶⁵ See *id.* at 13–14.

¹⁶⁶ See *id.*

violent conduct on the probability that he was the first aggressor.”¹⁶⁷

The court recognized the traditional arguments against using evidence of the victim’s specific acts, essentially reducing them to two major issues: the potential to confuse the jury with collateral issues, and the potential to prejudice the jury against the victim through the suggestion that the victim received his just deserts because of his bad character.¹⁶⁸ Noting that the evidence could be offered only on the narrow issue of determining whether the victim was the first aggressor, the court expressed confidence in the ability of trial judges to craft appropriate instructions and the ability of juries to understand the appropriate use of the evidence.¹⁶⁹ To provide further protection to the prosecution’s case, the court mandated the use of timely, specific pretrial notice to the court and prosecutor and required the prosecution, in turn, to provide notice to the defendant of rebuttal evidence.¹⁷⁰

On the issue of whether the prosecution would be entitled to counterattack with evidence of the defendant’s prior specific acts of violence, the court declined to rule.¹⁷¹ It did, however, favorably note the 2000 amendment to Federal Rule of Evidence 404(a)(1) and its purpose of “making clear that the accused cannot simultaneously attack the alleged victim’s character and yet remain shielded from the disclosure of equally relevant evidence concerning his own same character trait.”¹⁷² It seems likely that the court would permit the prosecution to introduce specific instances of the defendant’s conduct to rebut an attack on the victim’s character in a self-defense case.

The Massachusetts rule, in summary, represents a radical departure from the traditional character evidence rules pertaining to self-defense cases.¹⁷³ Rejecting the traditional

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *See id.* at 11–12.

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.* at 14.

¹⁷¹ *Id.* at 14 n.19.

¹⁷² *Id.*

¹⁷³ This departure from traditional evidentiary standards in Massachusetts has been a cause of concern for scholarly commentators. *See, e.g.,* Scott, *supra* note 145 (identifying the prospective difficulties at trial posed by the court’s lack of guidance in the *Adjutant* case); Hallie White Speight, Note, *Hard Cases Make Bad Law:*

requirement for reputation or opinion testimony, the court instead held that the defendant must use specific-acts evidence to prove the alleged victim's character and, in turn, the probability that the victim was the first aggressor. The court also mandated the use of specific, timely pretrial notice to the prosecution and the court.

B. Comparison, Synthesis, and Proposal

1. Comparison

The three jurisdictions discussed in the preceding section provide a useful roadmap for a proposed rule amendment. Each of the jurisdictional approaches offers unique characteristics from which to synthesize a new approach.

There are two primary strengths of the Massachusetts rule. The first is the recognition not only of the essential reliability and validity of specific-acts evidence in a self-defense case, but also the ability of judges and juries to use the evidence properly at trial.¹⁷⁴ The second is the procedural mandate for specific, timely notice to the prosecution and the court of the evidence intended for use at trial.¹⁷⁵ This notice permits the trial judge to sift through the collateral issues and marginally relevant specific acts that might otherwise confuse the jury at trial and consume its time. A reciprocal obligation to the prosecution ensures the absence of surprise to the defendant at trial.¹⁷⁶

There are also two major drawbacks to the Massachusetts rule. The first is its total exclusion of reputation and opinion testimony.¹⁷⁷ Although these are weaker forms of proof than evidence of specific conduct, they are, nonetheless, not without value.¹⁷⁸ In some circumstances, reputation or opinion testimony may be the only available methods to prove the character of an alleged crime victim in a self-defense case. Because reputation

Commonwealth v. Adjutant and Evidence of the Deceased's Propensity for Violence in Self-Defense Cases in Massachusetts, 86 B.U. L. REV. 793 (2006) (arguing that the Massachusetts rule now permits the defendant to put the victim on trial).

¹⁷⁴ See *supra* note 169 and accompanying text.

¹⁷⁵ See *supra* note 170 and accompanying text.

¹⁷⁶ See *supra* note 170 and accompanying text.

¹⁷⁷ See *supra* notes 164–67 and accompanying text.

¹⁷⁸ See generally *supra* Part I.B.4.a. (discussing methods of proving character at trial).

and opinion are a less precise form of proof than specific acts,¹⁷⁹ a criminal defendant may well decide it is in his best interest to present a fuzzier picture of the alleged victim to the jury. Strict exclusion of reputation and opinion testimony deprives the defendant of an important tactical choice at trial.

The second weakness of the Massachusetts rule is the uncertainty as to prosecution options in rebuttal when the defense has attacked the character of the alleged crime victim.¹⁸⁰ This weakness could lead to confusion at trial and, eventually, contradictory guidance from lower appellate courts.¹⁸¹

The Missouri rule emphasizes the traditional common law value that the defendant holds the key to the use of character evidence at trial: his own, and that of the victim.¹⁸² This permits the defendant a great deal of flexibility in his defense and precludes the prosecution from trying the defendant for his life's character in its case in chief. Another advantage of the Missouri approach is its deeply rooted adherence to the principle of balance in determining the identity of the first aggressor in a homicide or assault case. The Missouri rule does not permit the defendant to present a one-sided view of the character probabilities with impunity; if evidence of the defendant's violent or turbulent character is available, the prosecution can introduce it in rebuttal to paint a more complete picture for the jury.¹⁸³

Like the Massachusetts rule, the Missouri rule suffers from the forced preclusion of other valuable methods of proving character. Although some case law appears to have permitted the use of specific-acts evidence to prove character in a self-defense case,¹⁸⁴ prevailing Missouri practice is that reputation evidence is required to prove character in self-defense cases when the identity of the first aggressor is at issue.¹⁸⁵

¹⁷⁹ See *supra* notes 86–94 and accompanying text.

¹⁸⁰ See Scott, *supra* note 145, at 258–59.

¹⁸¹ Cf. *id.* at 248–49 (discussing some of the subsequent difficulties with the Illinois Supreme Court's failure to provide clear guidance concerning the introduction of specific-acts evidence in self-defense cases in *People v. Lynch*, 470 N.E.2d 1018 (Ill. 1984)).

¹⁸² See *supra* notes 152–154 and accompanying text.

¹⁸³ See *supra* notes 150–151 and accompanying text.

¹⁸⁴ See *supra* note 154.

¹⁸⁵ See *supra* note 154.

Perhaps the most complete rule is section 1103 of the California Evidence Code. It preserves the common law tradition that the defendant holds the key to the introduction of character evidence.¹⁸⁶ Unlike the common law, however, section 1103 lets the defendant choose from all three methods of proving character: reputation, opinion, or specific acts of conduct.¹⁸⁷ The 1991 amendment to section 1103 grants reciprocal rights to the prosecution in cases involving violence, provided that the defendant has first attacked the character of the crime victim.¹⁸⁸

Section 1103 does not, however, contain a notice requirement, nor does it mandate a pretrial hearing to determine the relevance or reliability of the evidence.¹⁸⁹ Although the evidence is subject to a balancing test similar to that found in Federal Rule of Evidence 403,¹⁹⁰ there are no procedural guarantees within section 1103 itself that would avoid unnecessary collateral litigation or the confusion of issues that might arise from the presentation of specific-acts evidence that has not been screened by a judge.¹⁹¹ Furthermore, neither the rule nor interpretative case law speaks to the issue of symmetry in the presentation of rebuttal evidence by the prosecution.¹⁹² In

¹⁸⁶ See *supra* note 156 and accompanying text.

¹⁸⁷ See *supra* note 160 and accompanying text.

¹⁸⁸ See *supra* note 159 and accompanying text.

¹⁸⁹ See generally CAL. EVID. CODE § 1103 (West 2007).

¹⁹⁰ Compare *id.* § 352 (permitting the trial court to exclude evidence if “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury”), with FED. R. EVID. 403 (permitting the trial court to exclude evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

¹⁹¹ See generally CAL. EVID. CODE § 1103.

¹⁹² Section 1103 of the California Evidence Code says nothing about requiring the prosecution and defense to use the same method (i.e., reputation, opinion, or specific acts) to prove character that the other side used. See generally *id.* In the relatively few reported cases construing the 1991 amendment to section 1103, it appears that the prosecution and defense used the same method to prove character. See, e.g., *People v. Koontz*, 46 P.3d 335, 362–63 (Cal. 2002) (defendant offered specific-acts and reputation evidence concerning the violent character of the victim, and the prosecution rebutted with specific-acts evidence (conviction for armed robbery) and reputation evidence concerning defendant’s character for violence); *People v. Myers*, 56 Cal. Rptr. 3d 27, 30 (Cal. Ct. App. 2007) (defendant offered specific-acts evidence regarding character of the arresting police officer and the State countered with specific-acts evidence pertaining to defendant’s character). In

other words, if the defendant introduces reputation evidence pertaining to the victim, it is not clear whether the prosecution is limited to the reputation evidence pertaining to the defendant, or whether the prosecution can use any of the three methods of proving character in rebuttal.

2. *Synthesis*

My proposed amendment to Rule 404 synthesizes ideas from the Federal Rules of Evidence and the unique approaches taken by Missouri, Massachusetts, and California. Accordingly, I suggest the following components as necessary to an amended Rule 404.

First, the rule should preserve the historic right of the defendant to hold the keys of character evidence at trial, both for himself and for the victim.¹⁹³ The choice to raise character evidence in a self-defense case must belong to the criminal defendant, and the consequences of doing so, i.e., prosecutorial counterattack on the defendant's character, must be clear.

Second, the rule should ensure that the jury has the optimal opportunity to determine the truth in a self-defense case where the identity of the first aggressor is at issue.¹⁹⁴ If the defendant is entitled to attack the victim's character for violence or turbulence, the prosecution should not suffer from compelled silence if the defendant shares the same character traits. The purpose of the evidence is to help the jury determine what happened, not to confer an unfair advantage on either side.

Third, the rule should provide both sides with maximum flexibility in methods of proof.¹⁹⁵ The defendant should be able to introduce evidence of specific acts, reputation, or opinion: whichever would most benefit his case. Conversely, the prosecution should be able to rebut with any available method of proof and should not be limited to a symmetrical method of proof that limits its presentation to what the defendant has chosen.

another case, it is unclear exactly what type of character evidence the defendant offered to prove the victim's violent character, although the prosecution responded with specific-acts and reputation evidence to prove the defendant's character. *See People v. Blanco*, 13 Cal. Rptr. 2d 176 (Cal. App. 1992).

¹⁹³ *See generally supra* Part I.B.3.a.

¹⁹⁴ *See supra* Part I.C.2.

¹⁹⁵ *See supra* Part I.B.4.a.

Fourth, because of the potential problems associated with using character evidence to establish the identity of the first aggressor, the rule should require timely, specific notice to the court and opposing counsel of any such evidence at trial.¹⁹⁶ Regardless of the method of proof counsel intend to use, the court should conduct a pretrial hearing to determine whether the evidence is relevant, reliable, and conducive to the search for truth at trial. A workable and familiar procedure already exists in Rule 412 to provide for the admission of specific instances of prior sexual conduct in sexual assault cases,¹⁹⁷ and I recommend tailoring it to fit the proposed Rule 404(c).

Fifth, in recognition of the relative positions of the defendant and the prosecution at trial,¹⁹⁸ the rule should provide for the exclusion of evidence against the defendant that is not more probative than unfairly prejudicial to the defendant. This provision, similar to that used in Rule 609 to weigh the admission of convictions against the accused,¹⁹⁹ recognizes that

¹⁹⁶ See *Commonwealth v. Adjutant*, 824 N.E.2d 1, 14 (Mass. 2005) (requiring notice before using specific-acts character evidence at trial).

¹⁹⁷ The procedure in Rule 412 provides as follows:

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412(c).

¹⁹⁸ See *supra* notes 49–53 and accompanying text.

¹⁹⁹ Rule 609's balancing provision provides that "evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." FED. R. EVID. 609(a)(1). This balancing test differs from the typical admissibility standards found in Rule 403, which provides for the presumptive admissibility of evidence unless its probative value is significantly outweighed by the risk of unfair prejudice. See FED. R. EVID. 403. The different balancing test for the criminal accused in Rule 609 exists because:

Part of the problem for the accused is that using prior convictions to impeach him is likely to have a spillover effect, suggesting to factfinders that he likely committed the charged crime or is a bad person unworthy of

the stakes are always higher for a criminal defendant than for the prosecution at trial. It provides a more stringent balancing test for judges than would otherwise be available under a Rule 403 analysis.²⁰⁰

3. *Proposal*

I propose adding a third section, 404(c), to Rule 404. This section would be entitled, “Character Evidence to Determine First Aggressor in Self-Defense Cases.” The proposed rule would not amend any of the language currently in Rule 404(a)(1) or 405; Rule 404(c) would serve as an exception to those rules in self-defense cases only, not a replacement for them under all circumstances. The proposed text is as follows:

(c) Character Evidence to Determine First Aggressor in Self-Defense Cases

(1) Where character evidence would be probative in determining the identity of the first aggressor in a homicide or assault case where the defense of self-defense has been raised, evidence of factually relevant, reliable evidence of the alleged victim’s character for turbulence, aggression, or violence may be admitted by the accused, and may be considered for its bearing on any matter to which it is relevant. The accused may use opinion testimony, reputation testimony, or specific instances of conduct to prove the alleged victim’s character. If the accused admits evidence under this section, evidence tending to show the same character trait of the accused shall be admissible if offered by the prosecution, provided that the evidence is (i) relevant to determining the identity of the first aggressor, and (ii) more probative than unfairly prejudicial to the accused. The prosecution may use opinion testimony, reputation testimony, or specific instances of conduct and is not limited by the method of proof chosen by the defendant.

(2) A party intending to offer evidence under subdivision (1) must

(A) file a written motion at least 14 days before trial specifically describing the specific acts and stating the purpose for which they will be admitted, unless the court, for good cause requires a different time for filing

sympathy, which raises the possibility of angry or emotional reaction or misuse of the conviction as evidence of guilt.

MUELLER & KIRKPATRICK, *supra* note 35, § 6.31, at 496.

²⁰⁰ Compare FED. R. EVID. 609(a), with FED. R. EVID. 403.

or permits filing during the trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, representatives of the alleged victim's estate.

(3) Before admitting evidence under this rule the court must conduct a hearing to determine the probative value of the evidence in determining the identity of the first aggressor, whether the evidence is factually relevant and reliable, and whether, in the case of evidence intended to be offered against the accused, the evidence is more probative than unfairly prejudicial to the defendant.

I suggest that this amendment to the rule strikes a better balance between the interests of the prosecution and the defense. While maintaining the defendant's traditional hold on the key to character evidence at trial, the new rule requires pretrial notice and a hearing to eliminate surprise, avoid unnecessary collateral issues, and ensure that character evidence issues do not turn the trial into a circus. The new rule also maximizes the jury's ability to identify the probable first aggressor in a self-defense case by permitting the introduction of specific-acts character evidence.

III

EVALUATING CHARACTER EVIDENCE ALTERNATIVES IN SELF-DEFENSE CASES: A COMPARATIVE ANALYSIS OF RULE 404(a)(1) AND PROPOSED RULE 404(c)

In this section, I propose a two-part test for evaluating character evidence rules in self-defense cases where the identity of the first aggressor is at issue. I then apply the test to three hypothetical case studies, evaluating in turn Rule 404(a)(1) and the proposed Rule 404(c). I conclude that Rule 404(c) best balances the interests of the jury, the prosecution, and the defense in most cases.

A. Proposed Methodology for Testing Character Rules in Self-Defense Cases

Character evidence rules in self-defense cases should meet two criteria. First, the rule should assist the jury in identifying the probable first aggressor in a violent encounter. Second, the rule should permit the criminal defendant to mount a

meaningful defense. I will discuss each element of the test in turn.

The first criteria is that the rule assists the jury in identifying the probable first aggressor. It is important to remember that self-defense cases typically involve a fast-moving situation, confusing facts, and the absence of clear-cut evidence as to who started the fight.²⁰¹ The underlying philosophy of the Federal Rules of Evidence is that in most circumstances, the jury is entitled to hear as much relevant evidence as possible in a case.²⁰² As mentioned previously, traditional evidentiary sources such as eyewitness testimony or forensic evidence may be of limited value to the jury in identifying the first aggressor in a self-defense case.²⁰³ Properly used, character evidence can help a jury overcome the limitations of other forms of evidence.²⁰⁴ The key aspect of this element is the method of proof permitted to show character. In descending order of significance, available methods of proof include specific acts of conduct, reputation testimony, and opinion testimony.²⁰⁵ A rule that precludes a particular method of proof may deprive the jury of significant information that would enable it to make the best possible decision.

The second criteria is that the rule permits the defendant to mount a meaningful defense.²⁰⁶ Character evidence is a slender reed indeed upon which to support a defense, but in some circumstances, it may be the only method available to a defendant. If supported by the facts, even the defendant of violent character is entitled to claim self-defense. A rule that effectively precludes defendants from raising a meritorious, meaningful defense is problematic.

The next section will use this two-part test to evaluate character evidence rules as applied to three hypothetical case studies. Although hypothetical case studies can never capture the nuances and factual possibilities of actual cases, they can,

²⁰¹ See generally *supra* Part I.A.

²⁰² See FED. R. EVID. 401; FED. R. EVID. 402; see also *supra* notes 115–17 and accompanying text.

²⁰³ See *supra* notes 21–27 and accompanying text.

²⁰⁴ See *supra* notes 29–30 and accompanying text.

²⁰⁵ See *supra* Part. I.B.4.a.

²⁰⁶ Cf. *supra* notes 133–142 and accompanying text.

nonetheless, prove useful in examining the extreme limits of a rule's application.

B. Assessing the Character Evidence Rules: Three Hypothetical Case Studies

1. Peaceful Defendant, Violent Victim

Paul is a clergyman who enjoys a reputation in the community as a peaceful person. During a walk through the bad side of town, Paul becomes involved in a doctrinal argument with Terry, a local hoodlum, drug dealer, and self-anointed sidewalk preacher. Terry has a reputation for violence in his neighborhood, although Paul does not know this at the time of their encounter. Angry at Terry's interpretation of the Sermon on the Mount, Paul draws his .44 magnum handgun and shoots Terry, killing him. There are no eyewitnesses. Several weeks after the incident, Paul learns for the first time about Terry's reputation for violence in his neighborhood. Terry earned this reputation by slapping around a series of his live-in girlfriends while intoxicated. Paul is charged with second-degree murder. At trial, he wants to raise the defense of self-defense.

a. Current Federal Character Rules

The current federal character rules permit Paul to mount a virtually unimpeachable defense. First, the common law mercy rule, embodied in Rule 404(a)(1), allows Paul to introduce evidence of his peaceful character to raise reasonable doubt that he would be the first aggressor.²⁰⁷ Second, Rules 404(a)(2) and 405 permit Paul to introduce evidence of Terry's reputation for violence to suggest that Terry was the first aggressor in the case.²⁰⁸ With no real opportunity for rebuttal by the prosecution, the jury is likely to take note that a peaceful man had to defend himself against a bad man. Weighing the probabilities based solely on character evidence, the jury may conclude that Terry was the first aggressor and acquit Paul.

²⁰⁷ See FED. R. EVID. 404(a)(1).

²⁰⁸ See FED. R. EVID. 404(a)(2) (permitting the defendant to attack the victim's character); FED. R. EVID. 405 (requiring the use of reputation or opinion testimony).

The current rules permit the defendant to raise an effective defense at trial, but they do so at the cost of the truth. The unimpeachable combination of the defendant's peaceful character and the victim's violent character ensure that the character evidence rules will actually inhibit the jury's ability to determine the truth. By oversimplifying Terry's aggressive tendencies through the lens of reputation evidence,²⁰⁹ Paul is able to gloss over the differences between the type of violence that fueled Terry's reputation (alcohol-induced abuse of household members) and the type of aggression that would cause one man to initiate a violent encounter with a stranger.

While it is true that Rule 405 would allow the prosecutor to cross-examine witnesses concerning Terry's specific violent acts to establish that they are different in nature from the case at hand,²¹⁰ the incentives for such an examination are low. First, the prosecution risks buttressing the defendant's claim of self-defense by emphasizing Terry's violent character; the jury may not understand the subtle differences in aggression between picking a fight with a total stranger and using violence in domestic altercations. Second, the cross-examination could convince the jury that Terry, regardless of whether he started the altercation with Paul, is a bad man who got what he deserved in the end.

b. Proposed Rule 404(c)

At trial, Rule 404(c) would work in concert with the existing character evidence rules as follows. First, Pastor Paul would be entitled under Rule 404(a)(1) to raise his reputation for peacefulness in his own defense.²¹¹ Because his character in this respect is unimpeachable, the prosecution will have no rebuttal. This is where Rule 404(c) would come into play. If Pastor Paul wants to suggest the probability of Tough Terry as the first aggressor, Rule 404(c) requires him to provide notice to the court and the prosecution.²¹² His evidence must survive a

²⁰⁹ *Cf. supra* notes 86–94 and accompanying text.

²¹⁰ *See* FED. R. EVID. 405 (“On cross-examination, inquiry is allowable into relevant specific instances of conduct.”).

²¹¹ *See id.*

²¹² *See supra* Part II.B.3.

hearing to determine its relevance and reliability.²¹³ The likelihood of Pastor Paul's evidence surviving the hearing is quite low. While marginally relevant, the evidence tends to prove only that Terry is violent towards weak members of his immediate household, not towards strangers on the street.

In this scenario, Rule 404(c) meets both elements of the test: it assists the jury in making a more accurate determination of the probable first aggressor in the case, and it preserves the ability of the defendant to present a meaningful defense. Rule 404(c) permits the jury to more accurately determine the probable first aggressor in this case by shielding them from misleading evidence about Terry's character. The requirement for notice and a hearing precludes Pastor Paul from introducing potentially misleading evidence about the defendant's character.

Pastor Paul is still able to present a meaningful defense. He can testify in his own case and has the significant benefit of being able to raise his own good character under Rule 404(a)(1).

2. *Equally Violent Defendant and Victim*

Dan and Vinny are members of rival street gangs in their city. In their long careers of crime, both of them have committed an astonishing variety of violent acts: robberies, assaults, attacks on other gang members, and the like. Although the two men are strangers to each other, they meet by chance in an isolated section of a public park while walking their dogs. No one else is in the area. Vinny identifies Dan as a rival gang member by his clothing. Bound by oath to extinguish all members of the rival gang, Vinny raises his TEC-9 submachine gun and fires a burst at Dan. Luckily for Dan, Vinny misses. Before Vinny can fire a second burst, Dan, a much better shot, fires a burst from his own automatic weapon and cuts Vinny down. Vinny's dying act is to fire another wild burst in Dan's direction that hits and kills Dan's dog. The sound of gunfire draws the police to the area, where they find Dan cradling his dead dog in his arms, with Vinny lying in a pool of blood not far away. Dan is charged with the murder of Vinny. Dan wants to claim self-defense at trial, but his task is complicated by the presence of a dead victim and the absence of eyewitnesses.

²¹³ See *supra* Part II.B.3.

a. Current Federal Character Rules

Before Dan ever gets to raise a defense of any sort, the prosecution will be able to present specific-acts evidence against him under Rule 404(b).²¹⁴ Under the facts of this case, the prosecution will most likely be able to introduce evidence of prior assaults against other members of the rival gang to prove motive or intent.²¹⁵ There is some danger to Dan that the jury will misuse this evidence to conclude that Dan has character traits of violence and aggression, in spite of the judge's limiting instructions to the contrary.²¹⁶

The rules permit Dan to introduce reputation or opinion testimony of Vinny's reputation for violence to establish the likelihood that Vinny was the first aggressor under Rule 404(a)(2).²¹⁷ The prosecution is unlikely to cross-examine the defense witnesses regarding Vinny's specific acts because those acts are violent and would likely support Dan's contention that Vinny was the aggressor.²¹⁸ Once Dan introduces reputation or opinion evidence of Vinny's violent behavior, Rule 404(a)(1) allows the prosecution to rebut with reputation or opinion evidence of Dan's violent behavior.²¹⁹ As far as the jury is concerned, the reputation or opinion evidence will probably be a wash, telling them nothing more than that two violent people fired assault weapons at each other and one of them died.

The current federal character rules fail both elements of the two-part test. First, the character evidence rules interfere with the jury's task to decide the probable first aggressor in this case; in fact, the rules suggest the wrong answer. We know the first aggressor was Vinny. The combination of specific-acts evidence under 404(b) and character evidence under 404(a)(1) may convince the jury, however, that Dan was the first aggressor.

²¹⁴ See FED. R. EVID. 404(b) (permitting the introduction of other crimes, wrongs, or acts in order to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

²¹⁵ See *id.*

²¹⁶ See *supra* notes 129–132 and accompanying text.

²¹⁷ See FED. R. EVID. 404(a)(2).

²¹⁸ This is because cross-examination based on specific acts depends heavily on the party's incentives. See *supra* notes 95–96 and accompanying text.

²¹⁹ See FED. R. EVID. 404(a)(1).

Second, the current character evidence rules interfere with Dan's ability to raise an effective defense. Dan's inability to present *specific-acts* evidence against Vinny places him at a severe disadvantage to the prosecution, which is able to use Rule 404(b) to introduce evidence of defendant Dan's specific acts of violence. After weighing the costs of attacking Vinny's character under Rule 404(a)(2)—a prosecutorial counterattack emphasizing Dan's bad character—Dan may well decide to forego introducing evidence that Vinny has a character for violence.

b. Proposed Rule 404(c)

Rule 404(c), by providing additional flexibility in methods of proof to the defendant, potentially equalizes the advantages that Rule 404(b) confers on the prosecution in this case. Upon notice and a hearing, Rule 404(c) would permit Dan to introduce specific instances of Vinny's prior gang-related acts of violence.²²⁰ Although a Rule 404(c) hearing would most likely find Dan's violent character relevant and reliable at trial, the rule's enhanced balancing test grants a trial judge the flexibility to preclude the introduction of character evidence pertaining to Dan unless it would be more probative than prejudicial to Dan.²²¹ In other words, a judge could preclude the prosecution from attacking Dan's character for violence based on the tendency of that evidence to prejudice Dan's ability to mount an effective defense.

In this hypothetical scenario, Rule 404(c) enhances the jury's ability to determine the probable first aggressor even as it allows the defendant to present a meaningful defense. The jury will likely make a better decision regarding the probable first aggressor because it will be able to consider specific-acts evidence pertaining to *both* the defendant and the victim.²²²

Of course, Rule 404(c) cannot guarantee a correct outcome in this case. Given that both parties have violent pasts, there is an equal likelihood that either Dan or Vinny could be the first aggressor based on character evidence alone. Nonetheless, Rule 404(c) gives the jury access to specific-acts evidence about the

²²⁰ See *supra* Part II.B.3.

²²¹ See *supra* notes 199–200 and accompanying text.

²²² See *supra* Part I.B.4.a.

victim that would not have been available to it under the current version of the Federal Rules of Evidence. The jury's ability to reach a factually correct decision in this case is greater under Rule 404(c) than under the current character evidence rules.

Dan is able to present a meaningful defense in this case. There are two primary reasons for this. First, he is able to choose which type of character evidence to present at trial, rather than being hamstrung by the reputation and opinion constraints of Rule 405. Second, Dan can potentially persuade a judge that the prosecution's introduction of character evidence against him would be more prejudicial than probative.²²³

3. Factually Distinct Bases for Violent Character of Defendant and Victim

To illustrate this application of the character evidence rules, we return to the hypothetical situation used in the introduction to this Article.²²⁴ In this hypothetical, Debbie, a call girl, defends herself against the violent advances of Victor, a customer. She stabs Victor to death as he is lunging across the bed to attack her with a chair.

Debbie and Victor both have reputations "for violence" within their respective communities. Debbie has a hot temper and has committed a number of petty assaults against co-workers and members of her household. She once kicked a police officer in the kneecap while being arrested. Victor, in contrast, has committed several acts of sex-related violence against women. Specifically, each of Victor's violent acts was preceded by a rejected demand for a particular type of sexual activity. Debbie's defense attorney learns about these incidents while preparing for trial and seeks to use them as evidence of Victor's propensity for violence to suggest that Victor was the aggressor in his fatal encounter with Debbie.

a. Current Federal Character Rules

Under Rule 404(a)(2), Debbie can introduce reputation and opinion testimony regarding Victor's violence if it is available,²²⁵

²²³ See *supra* notes 199–200 and accompanying text.

²²⁴ See *generally supra* Introduction (pp. 735–36).

²²⁵ See FED. R. EVID. 404(a)(2).

but Rule 405 precludes her from using specific-acts evidence.²²⁶ The prosecution is permitted to respond to Debbie's attack on Victor under Rule 404(a)(1) by introducing reputation and opinion testimony to the effect that Debbie "is violent."²²⁷ Debbie's attorney can cross-examine the prosecution witnesses under Rule 405 regarding the specific acts of violence Debbie committed,²²⁸ attempting to differentiate them from the stabbing. This cross-examination is likely to be risky and ineffective, eliciting only that Debbie started several physical fights against coworkers but did not use weapons.²²⁹ In the end, the false equivalence created by the combination of Rules 404(a)(1) and 405 may suggest to the jury that Debbie and Victor are equally violent.²³⁰ Faced with the unfortunate reality of a dead victim, Debbie can only hope to prevail at trial if she testifies and the jury believes her story.

Under this hypothetical scenario, the current federal character rules again fail both prongs of the test. First, the rules are not particularly helpful to the jury in determining the truth. Unless the jury is inclined to believe Debbie's testimony, the rules create a nearly insurmountable obstacle to discovering the truth. This is because under Rule 405, Debbie is unable to use the highly probative evidence of Victor's specific acts to suggest the likelihood that he initiated the violent encounter. In fact, because Rule 404(a)(1) allows the prosecution to respond to Debbie's evidence by introducing broadly categorized reputation and opinion testimony that essentially equalizes her petty violence with Victor's specific acts of sexually oriented violence, the rules interfere with the search for the first aggressor. The rules do not permit Debbie to mislead the jury regarding her own character, but they do allow the prosecution to create a misleading equivalence between her character and Victor's by countering his "reputation for violence" with her "reputation for violence."²³¹ The distinct factual differences that led to the two reputations will never be heard by the jury.²³² Those factual

²²⁶ See FED. R. EVID. 405.

²²⁷ See FED. R. EVID. 404(a)(1).

²²⁸ See FED. R. EVID. 405(a).

²²⁹ See *supra* notes 95–96 and accompanying text.

²³⁰ Cf. *supra* notes 86–94 and accompanying text.

²³¹ See FED. R. EVID. 404(a), 404(a)(1).

²³² Cf. *id.*

distinctions could make all the difference in a close self-defense case.

Second, the rules effectively prevent Debbie from presenting a meaningful defense at trial. Knowing she will pay a very personal price for bringing Victor's character into question, she may opt not to mention it at all and hope the jury simply believes her side of the story. In an instance where character evidence, properly characterized and accurately presented, would be particularly useful in helping the jury determine the first aggressor, she is, in essence, denied its use.

b. Proposed Rule 404(c)

Rule 404(c) would permit Debbie to introduce specific instances of conduct to prove Victor's violent character. In order to respond with evidence of Debbie's violent character, the prosecution would have to prove that its evidence is (1) factually relevant, (2) reliable, and (3) more probative than prejudicial. This effort is likely to fail, because Debbie's reputation for violence stems from petty assaults against co-workers, a far cry from Victor's sexually oriented, serious acts of violence against women.²³³ Thus, the prosecution will not be able to present a false equivalence of "reputation for violence" versus "reputation for violence" in this case.

In this scenario, Rule 404(c) assists the jury in identifying the probable first aggressor in several ways. First, the rule permits the jury to hear evidence of Victor's specific acts of violent conduct, the strongest available character evidence. Second, the rule eliminates Debbie's unrelated prior acts of violence at trial, thereby enhancing the ability of the jury to determine the first aggressor in this case. Third, the rule prohibits either side from misleading the jury.

The rule also supports the defendant's ability to present a meaningful defense. Debbie is able to affirmatively introduce evidence of the victim's specific acts to prove his character, yet preclude the introduction of evidence of her unrelated but potentially prejudicial reputation for violence and aggression. The current rules' perverse incentive to remain silent in order to avoid a misleading character counterattack disappears.

²³³ See *supra* Part II.B.3.

C. Summary

Rule 404(c) offers an improvement over current character evidence rules in a variety of self-defense cases. When the defendant of good or neutral character for violence seeks to make a character attack on the victim for unrelated types of violence, Rule 404(c)'s notice and hearing requirement will prohibit the introduction of the evidence. When a defendant and victim of approximately equal violent character encounter each other, Rule 404(c)'s allowance of specific-acts character evidence permits the defendant to equalize the prosecutorial advantage conferred by Rule 404(b). The rule also enhances the jury's ability to find the truth by ensuring the jury receives more of the information that will be most valuable to it in making its decision.

Rule 404(c)'s greatest benefit comes in cases where a defendant's past acts of violence are unrelated to the case at hand, but the alleged victim's past acts of violence are very similar to the case at hand. The current rules mandate an artificial presentation of character traits that prevents the defendant from showing the jury why the victim was the likely first aggressor in *this* encounter. In essence, the current rules conflate different types of violence under broad categories, creating the potential for injustice in application. Rule 404(c) eliminates the problem of false equivalence of character traits posed by the current rules. First, Rule 404(c) requires a hearing to determine the relevance and reliability of character evidence in self-defense cases; this hearing gives the judge the opportunity to filter out violence that is unrelated to the case at hand. Second, Rule 404(c) allows the parties to use evidence of specific instances of conduct, a stronger and more accurate method of proving character.

CONCLUSION

Character evidence can play a critical role in helping the jury determine the probable first aggressor in homicide and assault cases. In the absence of eyewitness testimony or supporting forensic evidence, character evidence can make or break a defendant's ability to claim self-defense at trial.

Current character evidence rules may interfere both with the jury's ability to determine the probable first aggressor and with

the defendant's opportunity to present a meaningful defense. By prohibiting the introduction of specific instances of conduct, current character rules deprive the jury of the strongest and clearest tool for determining character. The exclusive use of reputation and opinion testimony also interferes with the defendant's ability to distinguish his own character for violence from that of the victim; reputation and opinion testimony lump past acts of violence into broad character categories that have the potential to create misleading equivalencies for very different types of underlying violence. Finally, the majority of American jurisdictions permit the defendant to introduce evidence of the alleged victim's character for violence, yet prohibit the prosecution from rebutting with evidence of the defendant's character for violence. This one-sided presentation of character evidence has the potential to mislead the jury into believing that the victim was violent, but the defendant was peaceful.

The 2000 amendment to Federal Rule of Evidence 404(a)(1) eliminated the defendant's ability to attack the victim's character with impunity. The amendment did not, however, solve the problems created in self-defense cases by the exclusive use of reputation or opinion testimony. Furthermore, the amendment degraded the defendant's ability to claim self-defense at trial.

The proposed Rule 404(c) will help solve the shortcomings of the federal character evidence rules and those rules currently used by the majority of American jurisdictions. The proposed rule, which applies exclusively to self-defense cases, has several key elements: (1) it preserves the defendant's historic control over the introduction of character evidence; (2) it permits the use of evidence of specific instances of conduct to prove character; (3) it allows the prosecution to rebut defense attacks on the victim's character, provided that the evidence is more probative than prejudicial to the defendant; and (4) by requiring notice and a hearing, it ensures that only reliable evidence that is relevant to a self-defense case is introduced at trial. Adoption of the rule will help the jury in its task of determining the probable first aggressor in a self-defense case, even as it preserves the ability of the defendant to mount an effective defense.

