

A NEW UNDERSTANDING OF SPECIFIC ACT EVIDENCE IN HOMICIDE CASES WHERE THE ACCUSED CLAIMS SELF-DEFENSE: STRIKING THE PROPER BALANCE BETWEEN COMPETING POLICY GOALS

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INTRODUCTION

Your client has been charged with murder and the state is seeking to execute her. Your client admits she killed the decedent, but claims she acted in self-defense because he was the initial aggressor. Because there are no eye-witnesses to the tragic occurrence, the issue of initial aggressor is in dispute. On the night of the incident, your client was by herself in her brother's house when a man, brandishing a gun, kicked in the door and entered the home. She did not recognize the man. Because the location is a high-crime area, her brother kept a gun under the sofa. Terrified, she reached for the gun, but the man pointed his gun at her and ordered her to sit down. She lunged for the gun and shot the intruder. Later, she learned he was a police officer looking for your client's brother because of a barking dog report.

At trial, you attempt to call witnesses to testify that the decedent had a violent and aggressive character based on specific acts they had witnessed. You also attempt to introduce his recent battery conviction. The witnesses would testify that the decedent randomly stopped cars to harass drivers; he carried a knife to threaten people; he routinely became violent when they tried to report him; and that on several occasions they saw him brutally assault people he was arresting. Two former girlfriends also would testify that he periodically beat them when he was drunk. This testimony is supported by his previous conviction and disciplinary records. You argue that the testimony and prior conviction should be admitted as character evidence. These specific violent acts are probative evidence that would allow the jury to infer that he likely was acting in accordance with his violent and aggressive character. Introduction of this evidence, you argue, supports the proposition that the decedent was in fact the initial aggressor. Nevertheless, the judge refuses to admit these specific violent acts to prove the decedent was the initial aggressor based on Federal Rules of Evidence ("FRE") 404(a)(2) and 405(a).¹ Without this relevant, specific act

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1. The general rule and its exceptions are stated in FRE 404, which provides:

(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:

* * *

(2) Character of victim. Evidence of a pertinent trait of character of the 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 victim offered by the prosecution in a homicide

evidence, it appears the state will execute your client.

While the fact pattern above is hypothetical, the basic predicament frequently arises for defense attorneys in many jurisdictions. The criminally accused, in self-defense cases where the decedent is the initial aggressor, are often denied their right to present a full and adequate defense by introducing specific act evidence that would help discover the truth. This Note shows that allowing specific act evidence is the most rational and equitable solution to the dilemma faced by a homicide defendant claiming self-defense under an initial aggressor theory. In establishing this proposition, the Note analyzes the current law in various jurisdictions. Parts I and II include an examination of character evidence and the form this proof may take. The Federal Rules approach is contrasted with other approaches allowing specific act evidence when the accused claims the decedent was the initial aggressor. To highlight the controversy, Part III addresses the policy debate. This Note demonstrates that many of the various policies advanced for disallowing specific act evidence are unfounded. Because this Note focuses on greater admissibility of specific act evidence when an accused claims the decedent was the initial aggressor, Part IV surveys and analyzes legislation and case law supporting the admissibility of specific act evidence. Various compromise solutions taken by a growing number of jurisdictions are discussed in detail. Part V argues that the Federal Rules have not struck the proper balance between competing policy considerations. The discussion focuses on a renewed awareness of an accused's liberty interests, her ability to present a defense, the truth-finding function of our adversarial system and the prejudice that results from the accused being unable to introduce such evidence. Finally, this Note proposes two solutions that include a broader use of specific act evidence to establish the decedent as the initial aggressor and concludes that FRE 405 should be amended to allow specific act evidence.

I. BACKGROUND

A. Character Evidence: Distinguishing the Purposes of Its Use in Self-Defense Cases

Character is defined as "the nature of a person, his disposition generally, or his disposition in respect to a particular trait such as peacefulness or truthfulness."² It is important to distinguish the purposes for which evidence of the decedent's violent character may be admitted to support the accused's claim of self-defense. When an accused claims self-defense in a homicide case and attempts to offer character evidence of the decedent's violence, aggression, or

case to rebut evidence that the victim was the first aggressor[.]

FED. R. EVID. 404. FRE 405(a) states: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." FED. R. EVID. 405.

2. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.1 (4th ed. 1996).

turbulence, she may attempt to offer the evidence under two distinct theories.

First, the accused may claim she was reasonably afraid of the decedent, and based on this reasonable belief, she was justified in using force in response to the attack by the decedent.³ Under a "reasonable belief" theory, the violent character evidence is offered to show the reasonableness of the accused's subjective belief that she was in danger of serious bodily injury or death, and not to show that the decedent acted in conformity with his character.⁴ The accused offers the character evidence to prove that the degree of force she used was reasonable under the circumstances based on her knowledge of the decedent's violent tendencies.⁵ If the decedent's violent character was known to the accused, this is clearly a factor to be considered in determining whether she was put in fear of serious bodily harm or death.⁶ Thus, when the claim involves the reasonableness of the accused's actions, and the accused has prior knowledge of the decedent's violent character, specific bad act evidence is admissible to prove that the decedent had a violent character and that the accused had reason to fear the decedent.⁷

The second self-defense theory under which an accused may offer character evidence of the decedent's violent or aggressive disposition is an "initial aggressor" theory. Under this theory, the accused uses character evidence to prove circumstantially that the decedent was the initial or first aggressor.⁸ The purpose of this theory is to help the fact-finder determine who the initial aggressor was in cases where a dispute arises as to whether the decedent, or the accused, initiated the attack.⁹ 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.¹⁰ The inference that the decedent's conduct conformed to his character for violence is an objective, factual determination based on the totality of the circumstances, which includes character evidence.¹¹ Knowledge of the decedent's violent character is

3. See James A. Adams, *Admissibility of Proof of an Assault Victim's Specific Instances of Conduct as an Essential Element of a Self-Defense Claim Under Iowa Rule of Evidence 405*, 39 DRAKE L. REV. 401, 406 (1990).

4. See *id.*

5. See Erica Hinkle MacDonald, *Victim or Villain?: A Case for Narrowing the Scope of Admissibility of a Victim's Prior Bad Acts in Illinois*, 46 DEPAUL L. REV. 183, 186 (1996).

6. See GRAHAM, *supra* note 2, § 404.4.

7. See Adams, *supra* note 3, at 418-19.

8. See MacDonald, *supra* note 5, at 186.

9. See *id.*

10. See GRAHAM LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.4 (2d ed. 1987).

11. See Adams, *supra* note 3, at 405. See also *State v. Miranda*, 405 A.2d 622 (Conn. 1978), where the court stated:

The case for admissibility of character evidence on the vital issue of who was the aggressor has been cogently stated by Professor Wigmore. When evidence of the deceased's violent character is offered to show the defendant's state of mind, "it is

irrelevant.

In contrast to the "reasonable belief" theory, the accused claiming self-defense under an "initial aggressor" theory must overcome several obstacles before character evidence is admissible. The main issues raised by an attempt to offer the decedent's character to circumstantially prove that he was the initial aggressor include: (1) whether the evidence is relevant¹² and not unduly prejudicial;¹³ and (2) what form the character evidence may take—reputation, opinion, or specific instances of conduct.¹⁴

B. Specific Act Evidence and the "Initial Aggressor" Theory Under the Federal Rules

Under the Federal Rules of Evidence, the accused is not allowed to prove the decedent was the initial aggressor by introducing character evidence in the form of specific act evidence to show that the decedent acted in conformity with his violent character trait during the incident.¹⁵ The following is, therefore, an

obvious that the deceased's character, as affecting the defendant'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 defendant; else it is irrelevant." But when evidence of the deceased's character is offered to show that he was the aggressor, "this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief."

Id. at 623 (citing 1 WIGMORE, EVIDENCE § 63 (3d ed.)).

12. FRE 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

FRE 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

13. FRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

14. The Advisory Committee's Note to FRE 404 provides:

Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

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

15. See GRAHAM, *supra* note 2, § 404.4; see also discussion *infra* Part II.

improper chain of inferences: introducing specific act evidence of the decedent's violent character to prove the decedent's violent and aggressive disposition (i.e., propensity for violence) to ultimately prove that the decedent acted in conformity with his character and was the initial aggressor.¹⁶ The proposition of fact the accused is trying to prove is forbidden under the Federal Rules because the specific inferential chain includes the decedent's propensity for violence or aggression to prove first aggressor.¹⁷ The accused is restricted to introducing character evidence in the form of reputation or opinion evidence to prove circumstantially that the decedent was the initial aggressor.¹⁸

However, it is incorrect to say that the accused cannot introduce specific act evidence of initial aggressor under the Federal Rules. The accused may in some cases introduce specific act evidence to prove first aggressor as long as it is not being used to prove the decedent's character. For instance, uncommunicated threats made by the decedent against the accused to a third party may be shown by specific act evidence.¹⁹ A defense witness can testify that the decedent told the witness that he intended to kill the defendant. The accused may introduce these threats to prove first aggressor because the decedent's intent to harm the accused is evidence that he carried through with the plan. This is relevant evidence to show initial aggressor, and is not being used to prove the character of the decedent. A communicated threat by the decedent against the accused may also be used to prove initial aggressor.²⁰ Here, the decedent actually communicated specific threats to the accused that are relevant to show the decedent was the initial aggressor. Finally, the conduct of the decedent as part of the sequence of events surrounding the murder may be proved by specific act evidence.²¹ In determining who attacked first, the issue is what the deceased probably did.²² An accused can testify, "He (the decedent) pointed a gun at me."

Yet, in many cases, the foregoing types of evidence are simply unavailable because the accused and the decedent were not acquainted and thus prior direct or indirect threats by the decedent are nonexistent. Moreover, even though the accused may testify as to the surrounding circumstances, her credibility is at issue and the jury may ultimately disbelieve her without the benefit of admitting other specific, prior violent acts by the decedent.²³

16. See LILLY, *supra* note 10, § 5.4, at 127.

17. See *id.*

18. See MacDonald, *supra* note 5, at 193-94; see also discussion *infra* Part II.B.

19. See 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 139, at 167 (1977); 1A JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 110 (Little Brown rev. ed. 1983).

20. See *id.*

21. See 6 JOHN HENRY WIGMORE, EVIDENCE § 1745 (James H. Chadbourn rev. ed. 1976).

22. See *id.*

23. Justice Gregory stated in dissent in *Lolley v. State*, 385 S.E.2d 285 (Ga. 1989):

At first blush, one might suppose that a defendant in these circumstances has an advantage because the only other eyewitness cannot testify, permitting the defendant to mold the "facts" at will. But experience suggests that fact-finders may tend to

C. *Framing the Debate: Alternatives to the Federal Rules Approach*

In contrast to the Federal Rules approach, some states permit the accused to prove the decedent was the initial aggressor by offering specific instances of conduct by the decedent.²⁴ In these jurisdictions, character evidence in the form of specific bad acts is used to prove that the decedent was the initial aggressor through the inference that his conduct conformed to his violent character, thus making more probable the accused's claim that he was the first aggressor.²⁵ A few jurisdictions totally reject the Federal Rules approach, while other jurisdictions have developed compromise solutions.²⁶ The jurisdictions adopting a compromise solution include those that allow prior bad act evidence by the

compensate (perhaps over-compensate) for this perceived advantage, by a skeptical approach to the defendant's veracity. Let us suppose the case of an innocent defendant who honestly acted in self-defense, and killed to avoid being killed or seriously injured. His proof comes only from his own words, suspect though they are.

Id. at 289.

24. See *infra* note 49 and accompanying text.

25. See discussion *infra* Part IV. The following example was given by Justices Weltner, Bell and Hunt, concurring in *Lolley v. State*, 385 S.E.2d 285 (Ga. 1989):

The town ruffian, in a drunken and enraged state, advances upon . . . a stranger, and is killed by him. There are no eyewitnesses to the homicide. The defendant relates that the decedent advanced upon him in a drunken and enraged state, threatening him with mayhem. The decedent had no weapon. At trial, the defendant, who had no knowledge of the decedent before the killing, offers evidence of his violent nature, through specific acts of violence against third persons. Here the principal question is the credibility of the defendant. Did it happen the way he related it? And why would the decedent make an unprovoked advance upon the defendant? In aid of this inquiry, evidence of the violent acts of the decedent would be of great relevance.

* * *

[I]n the past we have restricted evidence of specific acts of violence to those committed by the victim against the defendant. Yet, logic dictates no such distinction. Rather, the chain of reason proceeds as follows: A claims justification in that B committed acts of violence against A. A proves that B has committed prior acts of violence. B's prior violent acts are relevant to the question of whether A's account of violent acts by B against A is true. It is the act of violence that is relevant, and not the identity of the victim. That relevance is found in this summary of human experience: "It is more probable that a person will act in accordance with his character disposition than that he will act contrary to it." Thus, a decedent's violent acts against a third party can be as relevant as his violent acts against a defendant in weighing the truth of a defendant's claim of justification.

Id. at 288 (internal citations omitted). This reasoning was adopted by the majority in *Chandler v. State*, 405 S.E.2d 669 (Ga. 1991). See *infra* note 160 and accompanying text.

26. See discussion *infra* Parts IV.A., B., C.

decedent only in homicide cases,²⁷ and other jurisdictions that allow the decedent's prior conviction(s) for violent crimes to be admitted under an initial aggressor theory.²⁸ Finally, some states have fashioned a solution by reasoning that a decedent's aggressive or violent character is an "essential element" of the accused's self-defense claim, and thus allow the accused to introduce specific act evidence to prove the decedent's character.²⁹

Because strong policy arguments support both approaches to the admissibility and inadmissibility of specific act evidence, jurisdictions are divided on this issue.³⁰ By 1994, twenty-one jurisdictions had adopted an approach that allowed specific act evidence of the victims's violent character to be admitted when the accused claimed she acted in self-defense because the decedent was the initial aggressor.³¹ On the other hand, thirty jurisdictions followed the Federal Rules approach that specific act evidence of the decedent's violent nature is only admissible to show a defendant's state of mind under a "reasonable belief" theory, and not to show the decedent was the initial aggressor.³²

II. THE FEDERAL RULES FRAMEWORK

A. Meeting the Requirement of FRE 404

Under FRE 404(a), proof of a person's character, either the defendant's or the victim's, is inadmissible to prove that the person acted in a manner consistent with that character.³³ This is referred to as the "propensity rule," or the basic rule that character evidence cannot be introduced circumstantially to prove conduct.³⁴ The basic policy behind the rule is that "[e]vidence of the general character of a party or witness almost always has some probative value, but in many situations, the probative value is slight and the potential for prejudice is large."³⁵

27. See discussion *infra* Part IV.C.2.

28. See discussion *infra* Part IV.C.1.

29. See discussion *infra* Part IV.B.

30. See Mark R. Horton, *Whether a Defendant's Claim of Victim Aggressiveness is an "Essential Element" of the Defense of Self-Defense*: State v. Baca I & II, 24 N.M. L. REV. 449, 454-55 (1994).

31. See *id.*

32. See *id.*

33. See *supra* note 1.

34. See LOUISELL & MUELLER, *supra* note 19, § 136, at 124-25.

35. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 186 (Edward W. Cleary ed., 3d ed. 1984). Professor McCormick elaborates further that:

[E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how the individual acted . . . in the matter in question. By and large, persons reputed to be violent commit more assaults than persons known to be peaceable. Yet, evidence of character . . . generally will not be received to prove that a person engaged in certain conduct or did so with a

It is important to keep in mind that the Federal Rules are designed to protect the accused from prejudice resulting from the prosecution introducing specific prior bad acts of the accused, and not to stymie the accused from presenting relevant evidence that may raise a reasonable doubt as to her guilt.³⁶

When a defendant charged with murder or manslaughter admits killing the person, but claims she acted in self-defense, evidence of the violent or dangerous character or reputation of the decedent is relevant.³⁷ Thus, under FRE 404(a)(2), an exception to the propensity rule is made when the accused in a homicide case claims self-defense and attempts to offer character evidence of the decedent.³⁸ FRE 404(a)(2) permits the accused to introduce “[e]vidence of a pertinent trait of character of the victim of the crime”³⁹ This exception provides one of the few situations where character evidence is admissible to allow the jury to infer that a person indeed acted in conformity with his character on a specific occasion.⁴⁰ A risk of prejudice still exists, yet the probative value of the evidence usually outweighs this prejudice.⁴¹ Whether the decedent is a violent and

particular intent on a specific occasion, so-called circumstantial use of character. . . . Character evidence used for this purpose, while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise.

Id. § 188.

36. See Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651, 659-60 (1993). See also FRE 102, which states: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102.

37. The Advisory Committee’s Note to FRE 404 states: “The criminal rule [with respect to character evidence] is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.” FED. R. EVID. 404, Advisory Committee’s Note.

38. See LOUISELL & MUELLER, *supra* note 19, § 139. These authors note that: [The] reasons for exception created by [FRE] 404(a)(2) are that the evidence of character is considered relevant as proof of conduct, and that the risks of unfair prejudice which call for excluding evidence of the defendant’s character are absent in connection with the victim’s character. There is of course, a new risk—namely, that the jury will acquit if it believes the victim is a bad person who “had it coming;” such an acquittal would amount to a “decision on an improper basis,” and this idea lies at the heart of the “unfair prejudice” doctrine embodied in [FRE] 403. In criminal cases, however, the risk of unfair prejudice seems low enough to be entirely acceptable, and [FRE] 404(a)(2) expresses that judgment clearly.

Id.

39. See *supra* note 1.

40. See, e.g., *United States v. Keiser*, 57 F.3d 847, 854 (9th Cir. 1995).

41. See MCCORMICK, *supra* note 35, § 193. Professor McCormick further states that: The fact that the character of the victim is being proved renders inapposite the usual

aggressive individual is relevant to the claim by the accused that she was acting in defense of her own life. The decedent's violent character, as opposed to his peaceful character, makes it more probable that his actions at the time of the incident were also violent. This in turn supports the accused's claim that she acted in self-defense.

B. Meeting the Requirement of FRE 405 Under an Initial Aggressor Theory

Given that the character of the decedent will generally be relevant in a homicide case, the vital question of what form this evidence may take must next be considered by the defense attorney. This is the crux of the problem for the defense. Under FRE 405, three methods of proof are recognized: (1) reputation evidence, (2) opinion evidence, and (3) specific instance or specific act evidence.⁴² The Advisory Committee's Note to FRE 405 provides the following guideline:

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.⁴³

Therefore, under the Federal Rules framework, despite the relevance of the proffered specific act evidence, an accused may only prove a decedent's violent and aggressive character by introducing reputation or opinion evidence to prove

concern over the untoward impact of evidence of the defendant's poor character on the jury's assessment of the case against him. There is, however, a risk of a different form of prejudice. Learning of the victim's bad character could lead the jury to think that the victim merely "got what he deserved" and to acquit for that reason. Nevertheless, at least in murder and perhaps in battery cases as well, when the identity of the first aggressor is really in doubt, the probative value of the evidence ordinarily justifies taking this risk.

Id.

42. FRE 405 provides:

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

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

FED. R. EVID. 405.

43. FED. R. EVID. 405, Advisory Committee's Note.

he was the initial aggressor.⁴⁴ To lay a proper foundation for reputation evidence, the accused must establish that the witness is familiar with the decedent's reputation for violence in the relevant community or has heard of his reputation.⁴⁵ In many jurisdictions, the accused may also prove the decedent's violent character by introducing witnesses who testify as to their opinion of the decedent's violent tendencies.⁴⁶ Under this method of proof, the accused must show that the witness knew the decedent well enough or was acquainted with him in order to form an opinion as to his character.⁴⁷

Professor McCormick noted: "As one moves from the specific to the general in this fashion, the pungency and persuasiveness of the evidence declines, but so does its tendency to arouse undue prejudice, to confuse and distract, and to raise time-consuming side issues."⁴⁸ It is mainly for this reason that the Federal Rules limit the accused to proving character by reputation or opinion evidence when the accused claims the decedent was the initial aggressor. However, a growing minority of jurisdictions, including some that have adopted the Federal Rules, utilize some type of compromise solution that allow an accused to admit specific act evidence of the decedent's violent character to prove initial aggressor.⁴⁹

III. STRIKING THE PROPER BALANCE BETWEEN COMPETING POLICIES

In determining whether the Federal Rules framework or a compromise solution is the most preferable, the courts have listed a host of policy arguments and rationales. The evidentiary rules that have developed for character evidence represent an effort to strike the proper balance between the probative value of the evidence and the competing policy considerations.⁵⁰ The determination ultimately depends on how much emphasis is placed on either interpreting FRE 405 consistent with the drafters' intent or on considering the competing policy goals.⁵¹ "[C]ourts must weigh the constitutional imperative to preserve [an accused's] right to present a defense against the need to enforce" the law.⁵²

44. See MacDonald, *supra* note 5, at 188.

45. See MCCORMICK, *supra* note 35, § 191.

46. See *id.*

47. See *id.*

48. *Id.* § 186.

49. See Horton, *supra* note 30, at 454-55. Horton's 1994 compilation provided the following breakdown: Federal Rule Jurisdictions: Alaska, Connecticut, Hawaii, Iowa, Mississippi, Nebraska, New Hampshire, North Dakota, Oklahoma, Texas, Utah, and Wyoming. Non-Federal Rule Jurisdictions: Alabama, California, Washington, D.C., Georgia, Illinois, Kansas, Maryland, Pennsylvania, and Virginia. *Id.* at 461 n.34.

50. See LILLY, *supra* note 10, § 5.2 (citing MCCORMICK, § 186).

51. See Horton, *supra* note 30, at 457-58.

52. *Id.*

A. Policies Furthering the Inadmissibility of Specific Act Evidence to Prove the Decedents' Character for Violence

The following policy arguments have been advanced to support the position that an accused should be limited to proving the decedent's character by reputation or opinion evidence under an initial aggressor theory.⁵³

The first policy advanced by proponents of the Federal Rules framework is that a single act may have been exceptional and unusual.⁵⁴ Because the decedent's act on the particular occasion may have been wholly uncharacteristic, there is minimal probative value in the admission of specific act evidence.⁵⁵ Thus, it is argued that specific act evidence should be prohibited where its only relevance to the case is showing the decedent's propensity for violence.

The second policy argument for disallowing specific act evidence is that "permitting proof of specific acts would multiply the issues, prolong the trial and confuse the jury."⁵⁶ Since numerous collateral issues⁵⁷ may be raised, there is a systematic concern of wasting time and money by creating a trial within a trial.⁵⁸

Third, there is a concern that the collateral issues may cloud the real issues and confuse the jury.⁵⁹ Based on the prejudicial nature of specific act evidence, the jurors may acquit the defendant because "the victim was a violent person and deserved to die"⁶⁰ or because the jurors felt the victim "got what he deserved."⁶¹ Character evidence, it is claimed, has the potential of distracting the jury from the main issues in the case.⁶²

Another policy argument advanced is that "although the state is bound to foresee that the general character of the deceased may be put in issue, it cannot anticipate and prepare to rebut each and every specific act of violence."⁶³ It is argued that the state is put at an unfair disadvantage when the accused is allowed to admit such evidence.

The final policy advanced is that because the prosecution cannot introduce evidence of the accused's past acts of violence, the accused also should not be allowed to benefit from evidence of specific acts of the decedent.⁶⁴ According to proponents of this approach, allowing the accused to admit this evidence

53. See MacDonald, *supra* note 5, at 194-97; see also Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975); State v. Waller, 816 S.W.2d 212, 214-15 (Mo. 1991).

54. See Henderson, 218 S.E.2d at 615.

55. See MacDonald, *supra* note 5, at 194.

56. Henderson, 218 S.E.2d at 615.

57. See Waller, 816 S.W.2d at 214.

58. See LILLY, *supra* note 10, § 5.2; see also MacDonald, *supra* note 5, at 196.

59. See Waller, 816 S.W.2d at 214.

60. MacDonald, *supra* note 5, at 195 (citing Chandler v. State, 405 S.E.2d 669, 675 (Ga. 1991) (Benham, J., concurring)).

61. *Id.*

62. See LILLY, *supra* note 10, § 5.2.

63. Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975).

64. See Waller, 816 S.W.2d at 215.

“creates a double standard favorable to the defendant.”⁶⁵

B. Competing Policies Allowing the Introduction of Specific Act Evidence to Prove the Decedent's Character for Violence

Like the policies supporting the inadmissibility of specific act evidence to prove the decedent's violent character, the policies favoring the admissibility of such evidence similarly focus on the probative value of the specific act evidence, the prejudicial nature of this method of proof, and the systematic affects of this type of proof.⁶⁶ However, the policy arguments allowing specific bad act evidence to be introduced also focus on protecting the accused from unfair prejudice and protecting the accused's fundamental right to present an adequate defense while safeguarding the truth-finding function of the criminal justice system.

The Federal Rules were designed to protect the accused from prejudice resulting from the prosecution introducing specific, prior bad acts of the defendant, and not to stymie the accused from presenting relevant evidence that may help the jury determine the truth.⁶⁷ Evidence of the decedent's violent character is probative of the specific actions he took on the occasion in question.⁶⁸ Thus, it is nearly always relevant.⁶⁹ In the words of FRE 401, the admission of specific bad act evidence has a “tendency to make the existence of [a] fact . . . of consequence to the determination of the action more probable . . . than it would be without the evidence.”⁷⁰ Finally, lest it not be forgotten, three basic policies underlie our adversarial system: (1) the need to provide justice in individual cases, (2) the need to ensure equal justice among like cases, and (3) the need to perform both of these functions without so overloading the system that no justice is rendered at all.⁷¹

1. Highly Probative Nature of Specific Act Evidence.—The Federal Rules of Evidence Advisory Committee's Notes state that: “Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing”⁷² Specific act evidence has been deemed highly probative by a number of jurisdictions because a person's behavior on past occasions is very often the best indicator of the person's future behavior.⁷³

65. *Id.*

66. See MacDonald, *supra* note 5, at 197.

67. See Larsen, *supra* note 36, at 659-60.

68. See LILLY, *supra* note 10, § 5.2.

69. See *id.*

70. FED. R. EVID. 401.

71. See Larsen, *supra* note 36, at 680 (citing STEPHAN LANDMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 12-13 (1988)).

72. See *supra* note 43.

73. See Larsen, *supra* note 36, at 655 (citing MCCORMICK, *supra* note 35, at 550, stating that McCormick notes: “[O]f the three types of character evidence, proof of specific past acts is the most reliable predictor of future behavior.”).

Human experience suggests that it is more likely that a person will act in accordance with his character or disposition than he will act contrary to it.⁷⁴ “Thus, a decedent’s violent acts against a third party can be as relevant as his violent acts against a defendant in weighing the truth of a defendant’s claim of justification.”⁷⁵ Professor Wigmore stated that when self-defense is claimed in a homicide trial, and a controversy arises as to whether the decedent was the aggressor, “one’s persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased’s action.”⁷⁶ Moreover, “[i]t is foolish to exclude helpful evidence simply because it tends to prove the fact by proving predisposition to perform it. Relevant is relevant.”⁷⁷ People make judgments every day based on “predictive assumptions” about other peoples’ behavior.⁷⁸ We are all evaluated based on our past performance and behavior.⁷⁹

2. *Serving the Truth-Finding Function.*—Specific act evidence of the violent character of the decedent is often critically important to the discovery of the truth. In a homicide case, there is a fundamental need to uphold this truth-finding function. Courts should not “disregard the fundamental and pragmatic policy which recognizes that, in striking a balance between competing evidentiary rules, one must never lose sight of the fact that effective fact finding requires ‘utilizing all rational means for the ascertainment of truth.’”⁸⁰ Failure to give ample credence to this principle deprives the accused “of proof which [goes] to the heart of his guilt or innocence.”⁸¹ In the case of murder, where the only eyewitnesses are the parties to the occurrence, the credibility of the accused who claims the decedent was the initial aggressor is called into question.⁸² The ability

74. See *Lolley v. State*, 385 S.E.2d 285, 288 (Ga. 1989).

75. *Id.*

76. 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 63 (Tillers ed. 1983).

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

[T]he truth-seeker may consider certain facts for their value as predictors of behavior of events. The probity of this . . . category of evidence is based upon the common concurrence or predictable recurrence of certain events or behavioral patterns. . . . Thus, the governing assumption is something like this: habits persist, events recur in familiar form, and the peculiarity of individuality continues to identify the actor in successive transactions.

Id. at 890.

78. See *id.*

79. Professor Urviller states further: “The comment, ‘I’m sure he did it; it’s just the sort of thing he would do,’ is so common it passes without notice as a system of proof. . . . [W]e all believe that people act predictably according to their character.” *Id.*

80. *In re Robert S.*, 420 N.E.2d 390, 392 (N.Y. 1981) (Fuchsberg, J., dissenting) (quoting 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM (John Bowring ed., 1843)).

81. *Id.*

82. See, e.g., *Lolley v. State*, 385 S.E.2d 285, 289 (Ga. 1989) (Gregory, J., dissenting) (stating that in most cases of murder there are no eye-witnesses and the veracity of the accused

of the accused to exonerate herself depends on the jury believing her story.⁸³

3. *Presenting an Adequate Defense.*—The accused also should be allowed to introduce specific act evidence because there is a constitutional imperative to preserve an accused's right to present a defense.⁸⁴ A court should admit specific act evidence of the decedent's aggressive character when an accused claims self-defense in all cases, including assault and battery. However, homicide cases present an exceptional circumstance because the accused's liberty, and perhaps life, is at stake to an even greater degree. When the accused claims the decedent was the initial aggressor, there should be great leeway in admitting potentially exculpatory evidence that would tend to show the decedent was in fact the initial aggressor.⁸⁵ Proof that the decedent had a violent character supports the accused's claim that killing the decedent was necessary to prevent serious bodily injury to herself or to save her own life. A homicide defendant should have the ability to present the best evidence available to her when the stakes are the highest.⁸⁶ In many cases, the only way an accused can exonerate herself is to prove circumstantially that the decedent attacked first. Often, other evidence to support this defense is unavailable because there are no eye-witnesses and the accused and the decedent did not know one another. In such situations, without the benefit of specific character evidence, the accused can only tell her side of the story and hope that the jury believes her. Specific act evidence should be allowed to corroborate the accused's recollection of the events and enable her to present a full defense.

4. *Rebuttal to Proponents of Federal Rules Approach.*—The systemic concerns offered by proponents of the Federal Rules approach are unfounded. There is no basis or empirical evidence to support the argument that a jury may acquit a guilty person because it perceives the decedent, against whom the specific act evidence is introduced, as a bad person deserving of punishment.⁸⁷ The rule disallowing specific bad acts of the decedent "bases its exclusions on a fear that evidence of propensity will be misapplied by a jury to license criminal conduct against an unworthy victim."⁸⁸ This reasoning "proceeds from the mistaken and, indeed, entirely unempirical assumption that modern juries . . . are 'bereft of educated and intelligent persons who can be expected to apply their ordinary judgment and practical experience.'"⁸⁹

When specific act evidence is relevant to the case and a proper foundation

becomes "critical to the fact-finding process").

83. *See id.*

84. *See Horton, supra* note 30, at 457.

85. *See In re Robert S.*, 420 N.E.2d at 394. Admission of specific act evidence also accords "the deference due our basic philosophic belief that . . . in criminal cases there is to be greater latitude in admitting exculpatory evidence than in determining whether prejudicial potentialities in proof offered to show guilt should result in its exclusion." *Id.*

86. *See Horton, supra* note 30, at 458-59.

87. *See Larsen, supra* note 36, at 660.

88. *In re Robert S.*, 420 N.E.2d at 394.

89. *Id.* (quoting *Havas v. Victory Paper Stock Co.*, 402 N.E.2d 1136 (N.Y. 1980)).

has been laid, the possibility of the jury misunderstanding the purpose of the specific act evidence "is so outweighed by truth-finding considerations that concern for it is obviated."⁹⁰ There is no basis for concluding that the jury may acquit a guilty person because it believes the decedent deserved punishment.⁹¹ The accused, not the decedent, is on trial and the jury is not in the position to punish the decedent.⁹² However, the jury is in the position to consider evidence that may raise a reasonable doubt as to the accused's guilt.⁹³

The court in *State v. Miranda*⁹⁴ rejected the rationale that admitting specific act evidence on the issue of initial aggressor would unfairly prejudice the prosecution by tempting the jury "to measure the guilt of the accused by the deserts of the victim."⁹⁵ The court explained that when the deceased's violent character is introduced, the state has the right of rebuttal.⁹⁶ Although a risk exists that the jury will be unduly diverted and confused by collateral matters, the court has the ability to focus the jury's attention on the material issues in the trial.⁹⁷ Additionally, "unfair surprise" to the prosecution is not a ground for exclusion of relevant evidence in the majority of the states.⁹⁸ The fact that the decedent had a criminal history or a violent character should not come as a surprise to the prosecution.⁹⁹ This is especially true if the prosecution has diligently investigated its case. As will be discussed below, any possible prejudice to the prosecution can be overcome by requiring the defense to give notice of its intent to rely on particular prior bad acts or convictions.¹⁰⁰

Finally, the argument that the "playing field" must be leveled is similarly

90. *Id.*

91. *See* Larsen, *supra* note 36, at 659-60.

92. *See id.*

93. *See id.*

94. 405 A.2d 622 (Conn. 1978).

95. *Id.* at 624. The *Miranda* court went on to rebut the policies and rationales relied on by jurisdictions excluding specific act evidence. The court adopted the reasoning of the decisions in those jurisdictions allowing specific act evidence. The court stated:

[T]he nature of such evidence and the victim's absence from the trial warrant a narrow exception to the rule that conduct may not be used to prove character. That a homicide victim has a record of violent crime should not come as a surprise to the prosecution. Nor is introduction of the victim's criminal record likely to confuse the jury and waste time, since the fact of the convictions is beyond dispute and inquiry must necessarily be limited to the time the events occurred and the nature of the conduct for which the victim was convicted. Most important, such evidence can be highly relevant in helping the jury to determine whether the victim had a violent disposition and whether the defendant's story of self-defense is truthful.

Id. at 625 (citations omitted).

96. *Id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *See* discussion *infra* Part IV.C.3.

groundless. The rules on the admissibility of character evidence were designed not to protect victims or witnesses, but rather to protect defendants.¹⁰¹ The argument that the "playing field must be leveled" is tenuous at best because "tit-for-tat" is simply not a logical or reasonable basis for a legitimate legal argument. When the accused introduces evidence that the decedent was the first aggressor under FRE 404(a)(2), the prosecution may offer rebuttal testimony as to the character trait of peacefulness of the decedent.¹⁰² Because the deceased cannot testify to his peaceable character during the tragic occurrence, FRE 402(a)(2) provides that "whenever the accused claims self-defense and offers *any* type of evidence that the deceased was the first aggressor, the government may reply with evidence of the peaceable character of the deceased."¹⁰³ Thus, sufficient safeguards are built into the rule and the need for symmetry is not a valid argument.

The prosecution is also allowed to introduce specific act evidence of the accused under FRE 404(b) for "other purposes."¹⁰⁴ Although the jury is admonished not to consider the evidence for a forbidden purpose, the jury is left to infer that the prior bad acts of the accused are in conformity with his character. Justice Weltner, in concurrence with the majority in *Lolley v. State*,¹⁰⁵ noted that the reasons for the rule disallowing specific act evidence would also "militate against admission of evidence of similar crimes on the part of an accused, which is admissible to show 'identity, motive, plan, scheme, bent of mind and course of conduct.'"¹⁰⁶

IV. REJECTION OF THE FEDERAL RULES FRAMEWORK

Based on the compelling policy arguments for admitting specific act evidence of a decedent's violent character, a growing number of jurisdictions have either totally rejected the Federal Rules approach or have developed compromise solutions. These solutions recognize that specific act evidence should be admissible under certain circumstances or in certain types of cases. These jurisdictions have concluded that any potential prejudice to the decedent

101. See *supra* note 36 and accompanying text.

102. See GRAHAM, *supra* note 2, at § 5.8.

103. MCCORMICK, *supra* note 35, at § 193.

104. FRE 404(b) provides:

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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

105. 385 S.E.2d 285, 287 (Ga. 1989) (Weltner, J., concurring).

106. *Id.* at 287 n.1 (quoting *Wallace v. State*, 273 N.E.2d 143 (1980)).

or the state must bow to an accused's paramount interest in presenting a defense.¹⁰⁷

A. Total Rejection of Federal Rules Approach: Significant Legislation and Litigation Involving the Admission of Specific Act Evidence of the Decedent's Character for Violence

California and Wyoming have adopted legislation allowing specific act evidence to be admitted to circumstantially prove the decedent's character. Although California has not adopted the Federal Rules of Evidence, California's evidence code specifically provides that in criminal cases specific act evidence is admissible by an accused to prove conduct in conformity with the victim's character or trait of character.¹⁰⁸

By contrast, Wyoming has adopted the Federal Rules of Evidence, but has amended its language to allow specific act evidence. Wyoming Rule of Evidence 405(b) provides: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or is in issue under Rule 404(a)(2), proof may also be made of specific instances of his conduct."¹⁰⁹ In the Wyoming Supreme Court Note to the rules, the court stated that "[t]he purpose of the added language in subsection (b) is to insure that the accused in assault or homicide cases may introduce evidence of specific instances of the victim's conduct to prove that the victim was the first aggressor."¹¹⁰

In Illinois, the courts have reasoned that the victim's aggressive or violent character is relevant to establish the initial aggressor when the accused claims self-defense. Proof of character may include specific acts of violence for which the accused was unaware, including the victim's past convictions for crimes of violence.¹¹¹ Moreover, Illinois case law allows other types of specific bad act evidence not resulting in a conviction to be admitted, as well as applying the rule in cases other than homicide.¹¹² Illinois has not adopted the Federal Rules, but instead has followed an approach of almost total inclusion of specific act

107. See Larsen, *supra* note 36, at 692 (citing *United States v. Greschner*, 647 F.2d. 740, 742 n.1 (8th Cir. 1981), where the court allowed the accused to present evidence of a victim's violent character. The court stated that "[t]he reason that [evidence of] prior convictions are disfavored . . . is not that they are irrelevant, but that they may be extremely prejudicial. In the instant case, there was no issue of prejudice since [the victim] was neither a defendant nor a witness.").

108. CAL. EVID. CODE § 1103(a).

109. WYO. R. EVID. 405. The language allowing the admissibility of specific act evidence was added in 1977.

110. *Id.*, Supreme Court Note.

111. See *Lynch v. State*, 470 N.E.2d 1018, 1020-21 (Ill. 1984). A host of later decisions have applied and extended this rule. See MacDonald, *supra* note 5, at 207. After examining Illinois law in detail, MacDonald concludes that Illinois should abandon its current broad rule that allows specific act evidence to prove the decedent's violent character. *Id.* at 224.

112. See MacDonald, *supra* note 5, at 207-08.

evidence.¹¹³

B. Significant Litigation Allowing the Admissibility of Specific Act Evidence of the Decedent's Character for Violence Under FRE 405(b) as an "Essential Element"

Under FRE 405(b), "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may. . . be made of specific instances of that person's conduct."¹¹⁴ Some courts reason that a decedent's violent or aggressive character is an "essential element" of the accused's self-defense claim, and thus allow the accused to introduce specific act evidence to prove this character.¹¹⁵

Alaska courts have held that specific instances of a decedent's prior violent conduct are admissible to prove initial aggressor, and the accused's knowledge of the prior specific acts is immaterial. In *Byrd v. State*,¹¹⁶ the Alaska Supreme Court held in a homicide case that

[e]vidence of the victim's violent nature . . . may be relevant to a claim of self defense in two ways. First, it may be relevant to show whether the victim or the accused was the initial aggressor. Second, it may be probative on the question of the reasonableness of the accused's apprehension of being in imminent danger from the victim. . . . Under the Alaska Rules of Evidence[, Rule 405(b)] . . . the evidence is admissible for both purposes.¹¹⁷

113. *See id.* at 217.

114. FED. R. EVID. 405(b).

115. *See infra* notes 116-21; *see also* *Thompson v. State*, 813 S.W.2d 249, 251 (Ark. 1991); *State v. Dunson*, 433 N.W.2d 676, 680-81 (Iowa 1988); *People v. Boles* 339 N.W.2d 249, 252 (Mich. App. 1983) (admitting specific acts under theory that the victim's character is an essential element of self-defense, but limiting admissibility to those acts that the defendant had personal knowledge of at the time of the occurrence); *Green v. State*, 614 So.2d 926, 934 (Miss. 1992) (admitting specific violent acts as character evidence to demonstrate the accused's state of mind); *Heidel v. State*, 587 So.2d 835 (Miss. 1991) (admitting specific prior violent acts committed by the victim against the accused as an "essential element" of the accused's self-defense claim); *State v. Sims*, 331 N.W.2d 255 (Neb. 1983) (admitting specific acts of conduct where character is an essential element of the defense; and holding that when an accused claims the victim was the aggressor, the trial court will commit error in not admitting the testimony); *State v. Koon*, 440 S.E.2d 442, 450 (W. Va. 1983).

116. 626 P.2d 1057 (Alaska 1980).

117. *Id.* at 1058. *See also* *Amarok v. State*, 671 P.2d 882 (Alaska Ct. App. 1983) (admitting specific instances of the victim's prior conduct in an assault case under Alaska Evidence Rule 405(b) to show (1) who attacked first, in which case defendant's knowledge of the incident is immaterial; and (2) that the defendant acted reasonably in using the degree of force he did, in which case the defendant must know of the victim's past acts of violence).

In *Gottschalk v. State*,¹¹⁸ the Alaska Court of Appeals held that under Rule 405(b), the accused may admit evidence of specific instances of the victim's conduct when a character trait of the decedent is an "essential element" of a defense.

Texas law also allows homicide defendants to introduce a decedent's prior acts of violence and aggression to prove initial aggressor under the theory that the decedent's character is an "essential element" of the defendant's self-defense claim.¹¹⁹ In *Gonzales v. State*,¹²⁰ the court held that under 405(b) of the Texas Rules of Criminal Evidence specific bad acts are admissible in cases in which the character of a person is an "essential element" of a charge, claim, or defense and that a victim's aggressive character is an essential element of the claim of self-defense.¹²¹

This "essential element" approach has the advantage of protecting an accused from unfair prejudice by allowing probative evidence to be admitted. It also safeguards an accused's right to present a defense and upholds the truth finding function of our adversarial system. Allowing this evidence should also not be a surprise to prosecutors in these jurisdictions.

However, this approach has been criticized by courts and commentators¹²² as an improper reading of the Federal Rules because the decedent's prior violent acts are not an "essential element" of the self-defense claim, but instead are merely a circumstantial link in an accused's chain of proof.¹²³ In *United States*

118. 881 P.2d 1139, 1143 (Alaska Ct. App. 1994).

119. See *Gonzales v. State*, 838 S.W.2d 848, 859 (Tex. Ct. App. 1992).

120. 838 S.W.2d 848 (Tex. Ct. App. 1992).

121. *Id.* at 859.

122. See WIGMORE, *supra* note 19, at 1382-83 (1983). Professor Wigmore noted:

[C]onstrued literally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary act of aggression against the defendant, which is to say that the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue. . . . Nevertheless, . . . courts often fail to follow the logic of the distinction just described—though repeatedly chastised by scholars of evidence for failing to do so—and not infrequently courts have said . . . that character is "in issue" when such is not the case according to the logic described above.

Id.

123. See *Horton*, *supra* note 30, at 460; see also *Adams*, *supra* note 3, at 401-06. *Adams* discusses the Iowa Supreme Court's decision in *State v. Dunson*, 433 N.W.2d 676 (Iowa 1988), which held that specific act evidence of the decedent was admissible as an essential element of the defendant's self-defense claim under FRE 405(b), and such evidence was relevant under FRE 404(a)(2). *Id.* at 403. He disagrees with the holding and notes that prior cases had refused to extend the admission of specific act evidence for the purpose of establishing self-defense. *Id.* at 402.

v. Keiser,¹²⁴ the Ninth Circuit concluded that the language of FRE 405(b), the holdings from other circuits, and the theory supporting admission of victim character evidence led to the conclusion that victim character evidence admitted to support a claim of self-defense should be restricted to reputation or opinion evidence.¹²⁵ The court recognized that the lack of uniformity of decisions among the circuits stemmed largely from failure to read the rule and the advisory committee's notes in a straightforward manner.¹²⁶

Despite these criticisms, several state courts still adhere to the "essential element" approach. The manipulation of the text of 405(b) by these courts highlights the struggle some courts have with disallowing specific act evidence. This alternative also illustrates the length courts are willing to go to admit specific act evidence.

C. *Compromise Solutions*

Based largely on the compelling policies supporting the admissibility of specific act evidence, many jurisdictions have developed compromise solutions that recognize an exception to the general rule that the decedent's prior bad acts may not be used to prove his character. There are several approaches that courts, currently following the Federal Rules framework, could adopt that lie between the extremes of total exclusion and total inclusion.¹²⁷

1. *Connecticut/Utah Rule: Specific Act Evidence Admissible in the Form of Prior Convictions for Violent Crimes.*—One compromise solution adopted in several jurisdictions including Connecticut,¹²⁸ Utah,¹²⁹ Kansas,¹³⁰ and

124. 57 F.3d 847 (9th Cir. 1995).

125. *Id.* at 855.

126. *Id.* The court looked at the language of FRE 405(b) and strictly construed its terms. The court stated, "[t]he relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation." *Id.* at 856.

127. See MacDonald, *supra* note 5, at 218.

128. See *infra* notes 139-48 and accompanying text.

129. See *infra* note 147 and accompanying text.

130. See, e.g., *State v. Alderson*, 922 P.2d 435, 448 (Kan. 1996) (holding that specific act evidence shown by a conviction of a crime will be allowed, but the trial court must be aware of the surrounding circumstances of the prior conviction to be able to determine if it has any relevance to proving the defendant acted in conformity with this character trait); *State v. Deavers*, 843 P.2d 695 (Kan. 1992), *cert. denied*, 508 U.S. 978 (1993) (holding that when a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, to the limitation that evidence of specific instances of conduct shall only be proved by evidence of conviction of a crime); *State v. Mason*, 490 P.2d 418 (Kan. 1971) (holding that where self defense is an issue in a homicide case, evidence of the deceased's violent character is admissible; such evidence may consist of the general reputation of the deceased in the community, but specific instances of misconduct may be shown only by evidence of conviction of a crime).

Pennsylvania,¹³¹ involves restricting the type of proof of a decedent's prior specific acts of violence.¹³² In these jurisdictions, evidence of a decedent's prior violent or aggressive behavior is admissible only in the form of recent prior convictions for a violent criminal offense.¹³³ This is true regardless of whether the accused knew of the decedent's violent character. The value of this approach is that "juries are not exposed to inflammatory testimony of dubious substantive value, the express purpose of which is to justify the allegedly criminal action."¹³⁴ Moreover, past convictions for violent crimes are inherently more trustworthy, reliable and less unfairly prejudicial to either the accused or the state than testimony of eyewitnesses to other specific acts of violence.¹³⁵ In *Commonwealth v. Amos*,¹³⁶ the court held that an accused may introduce the criminal record of the deceased to show the violent propensities of the decedent to prove that he was in fact the aggressor.¹³⁷ The court reasoned that "the reasons usually marshalled in limiting proof of character as to a defendant—the possibilities of (1) arousing prejudice, (2) surprising the defendant, (3) confusing the jury, and (4) consuming time—do not obtain as to a victim."¹³⁸

In *State v. Miranda*,¹³⁹ the Connecticut Supreme Court held that in homicide cases where the accused claims self-defense, she may show that the decedent was the initial aggressor "by evidence of the deceased's convictions of crimes of violence, irrespective of whether the accused knew of the deceased's violent character or of the particular evidence adduced at the time of the death-dealing encounter."¹⁴⁰ The court limited the scope of the admissibility of this evidence by preventing the accused from introducing the entire criminal history of the decedent solely to disparage his general character.¹⁴¹ Thus, only convictions for violent crimes are admissible. Additionally, the accused is not permitted to introduce all convictions for violent crimes. They must not be remote in time or too dissimilar in nature from the current incident.¹⁴² The court admonished that "[i]n each case the probative value of the evidence of certain convictions rests in the sound discretion of the trial court."¹⁴³

In *State v. Smith*,¹⁴⁴ the Connecticut Supreme Court offered another advantage for the rule that specific violent acts resulting in a conviction may be

131. See *infra* notes 136-38 and accompanying text.

132. See Horton, *supra* note 30, at 458.

133. See *id.*

134. *Id.*

135. See *id.*

136. 284 A.2d 748, 751 (Pa. 1971).

137. *Id.*

138. *Id.* at 752.

139. 405 A.2d 622 (Conn. 1978).

140. *Id.* at 625.

141. *Id.*

142. See *id.*

143. *Id.*

144. 608 A.2d 63 (Conn. 1992).

used to prove the decedent's violent character. The rationale underlying this rule is that "the dangers of injecting collateral issues confusing to a jury and prolonging the trial are minimal when only convictions may be admitted."¹⁴⁵ The court reasoned that a conviction provides indisputable evidence of the commission of a violent act while an arrest or indictment "is a mere accusation, not a settled disposition, and, as such, would invite dispute over collateral issues at trial."¹⁴⁶ This approach eliminates the systemic concerns advanced by proponents of the Federal Rules approach because evidence of a prior conviction is not likely to be fabricated.¹⁴⁷ The accused is also not allowed to admit the facts underlying the decedent's convictions for the violent crime(s) because of the potential of prejudice or misleading the jury.¹⁴⁸ Thus, this rule eliminates the concerns of injecting prejudice into the proceedings and creating trials within trials.

2. *District of Columbia Rule: Specific Act Evidence Allowed Only in Homicide Cases.*—A second compromise solution involves limiting the types of cases in which proof of a decedent's prior violent acts may be introduced.¹⁴⁹ This rule allows specific act evidence, which is not limited to prior convictions for violent crimes, to be introduced in homicide cases.¹⁵⁰ The accused is allowed to admit any relevant prior violent acts of the decedent to establish that the decedent was the initial aggressor. In *Harris v. United States*,¹⁵¹ prior violent acts of the decedent were held to be admissible to prove who attacked first only in homicide cases.¹⁵² The court recognized this holding was an exception to the general rule precluding specific evidence of any prior wrongs to prove action in conformity with earlier conduct. But, it carved out the exception due to the absence of the

145. *Id.* at 72.

146. *Id.* at 73.

147. *See* MacDonald, *supra* note 5, at 220. *See also* *State v. Howell*, 649 P.2d 91, 96 (Utah 1982), where the court held that specific act evidence was admissible in the form of recent prior convictions for violence. The court stated that there were "many well-reasoned cases" holding that the accused in homicide cases claiming self-defense may prove specific incidents of prior violent conduct on the part of the victim to establish the character of the victim for turbulence and violence. Yet, the court said that Utah

has opted for a more limited type of evidence than can be used to prove specific instances of misconduct. To prevent the trial from being drawn off into pathways collateral to the central issue of guilt, Rules 46 and 47 of Utah Rules of Evidence do not permit evidence of specific acts of violence, short of criminal conviction, to prove the deceased's violent character.

Id.

148. *See* *State v. Maxwell*, 618 A.2d 43, 48-49 (Conn. App. Ct. 1992), *cert. denied*, 509 U.S. 930 (1993).

149. *See* Horton, *supra* note 30, at 458-59.

150. *See id.*

151. 618 A.2d 140 (D.C. 1992).

152. *Id.* at 144.

decedent's testimony at trial and the need to protect the accused.¹⁵³

This solution "maximally protects a defendant's due process rights to defend against criminal prosecution where the defendant stands to lose life or liberty."¹⁵⁴ The broadest protection is given to the accused in cases where the stakes and the stigma of a murder conviction are the highest.¹⁵⁵ Where these considerations are not present, for instance, in assault or battery cases, the accused is limited to using opinion or reputation testimony to establish that the victim was the probable aggressor.¹⁵⁶

A potential drawback to this solution is that specific evidence of prior violent acts is not limited to prior convictions for violent offenses. Thus, the systemic concerns that support the exclusion of specific act evidence are implicated, namely the potential for the jury being confused and misled by collateral issues.¹⁵⁷ Opponents also argue that such testimony may be open to fabrication. However, with careful judicial scrutiny, these concerns are eliminated.

3. *Georgia Rule: Specific Act Evidence Allowed Upon Proper Notice to Prosecution.*—This approach is similar to the above compromise solutions, however, it offers more protection to the state because the defense is required to give notice of its intent to use prior specific acts of violence. The Georgia rule allows the accused to introduce evidence of specific acts of violence by a victim against third persons when the accused claims self-defense. Yet, the Georgia Supreme Court in *Chandler v. State*¹⁵⁸ imposed the restriction that the defense must notify the trial court of its intent to admit specific violent acts by the decedent to prevent unfairness to the state.¹⁵⁹

In 1991, the *Chandler* court overturned the long-standing rule in Georgia prohibiting the admission of evidence by the accused of specific acts of violence by the victim to prove that the victim's bad character conformed to this violent trait.¹⁶⁰ The court was convinced that the former rule should be abolished and adopted the reasoning of Justice Weltner in his concurrence in *Lolley v. State*.¹⁶¹ The court stated: "In his special concurrence to *Lolley*, Justice Weltner cogently explained why this Court ought to change the rule. We now find his reasoning persuasive and hold that . . . evidence of specific acts of violence by a victim against third persons shall be admissible where the defendant claims justification."¹⁶²

The court placed strict limitations on the introduction of specific act evidence of violence by the decedent against third persons. Prosecutors are required to

153. *Id.*

154. Horton, *supra* note 30, at 458.

155. *See id.* at 459.

156. *See id.*

157. *See supra* notes 56-62 and accompanying text.

158. 405 S.E.2d 669 (Ga. 1991).

159. *Id.* at 673-74.

160. *Id.* at 673.

161. *Id.* (citing *Lolley v. State*, 385 S.E.2d 285 (Ga. 1989)). *See also supra* note 25.

162. *Id.* (citing *Lolley*, 385 S.E.2d at 288 (Weltner, J., concurring)).

give advance notice to the defense of their intention to use evidence of similar transactions or occurrences because of fundamental fairness to the accused, and the fact that it is difficult to rebut evidence of specific acts unless timely notice is given.¹⁶³ The court reasoned that permitting the defense to introduce evidence of specific acts of violence by the decedent without advance notice to the state would similarly result in unfairness to the state. Thus, "curative procedures" were necessary to "avoid a battle by surprise."¹⁶⁴

The primary benefit of this rule is protection of the accused's life and liberty interests and her ability to present a defense. Furthermore, the rule avoids any potential prejudice and surprise to the state by requiring advance notice of an intent to introduce prior violent acts. The state only has to prepare to rebut the prior bad acts to which it has been given notice. The systemic concerns are also lessened by this approach due to judicial scrutiny.

V. ANALYSIS: A NEW UNDERSTANDING OF SPECIFIC ACT EVIDENCE

No one would seriously argue that the victim should be put on trial. Nor would one advocate that the "victim got what he deserved." However, a defense attorney is often faced with these unfair criticisms, as well as the charge that she is using "dirty tactics" to get her clients off by even suggesting that the decedent may have been responsible for his own demise when the accused used reasonable force in defense of herself. Our adversarial system of justice is designed to ascertain the truth of a historical event. Although a defense attorney need not present any evidence because the burden of proof is on the state, a defense attorney faced with evidence of the truth has an obligation to bring this evidence before the jury. Because specific act evidence is inherently more credible and convincing to a jury than opinion or reputation evidence,¹⁶⁵ the failure to allow such evidence is improper. Ignoring the highly probative value that this type of evidence possesses does not further the truth-finding function of our adversarial system. It also fails to give the accused the freedom necessary to prepare an adequate defense.

Consider the following argument:

[S]omewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it You expect the trial to be a search for the truth; you find that it is a performance orchestrated by lawyers and the judge, with the jury hearing only half the facts The jury is never told that the *defendant* has two prior convictions for the same offense and has been to prison three times for other crimes.¹⁶⁶

163. *See id.*

164. *Id.* at 674.

165. *See supra* note 43 and accompanying text.

166. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, Gov. Doc. No. Pr 40.8: V66/F49, at vi, 9 (1983), *quoted in* Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful*

The word “decedent” could just as easily be substituted here. The argument cuts both ways. The truth-finding function of the criminal justice system is similarly undermined when an accused claims the decedent was the initial aggressor and is not allowed to tell the jury of the decedent’s character for violence and turbulence.

Moreover, fundamental unfairness can result by not allowing specific act evidence of the decedent’s violent character to be admitted when the accused claims the decedent was the initial aggressor. Currently, there are a range of approaches used by the states that result in an accused’s fate being determined largely on which jurisdiction she is brought to trial, and which evidentiary scheme prevails in that jurisdiction. Thus, two different cases with strikingly similar facts will be decided in different ways depending upon the approaches utilized in the particular jurisdictions. One defendant may be acquitted because of the introduction of specific act evidence and another defendant may be executed.

In light of the overwhelming interest afforded criminal defendants to fully present a defense, admissibility of prior specific violent acts by the decedent should be allowed. In a homicide case, the accused stands to lose both her life and her liberty interests. The punishment for homicide is severe—usually a life sentence or death. An innocent person has a fundamental right to be protected from having these interests violated. In view of the severe and punitive sanctions of life imprisonment or death that the state seeks against an accused charged with murder, this evidence should be admissible. The moral and community condemnation a person faces is also greater in homicide cases than in assault or battery cases. Thus, the strong social stigma attached to being convicted of murder justifies a rule allowing the admissibility of specific act evidence.

The following three basic policies underlie our adversarial system: (1) the need to provide justice in individual cases, (2) the need to ensure equal justice among like cases, and (3) the need to perform both of these functions without overloading the system so that no justice results at all.¹⁶⁷ These policies necessitate the admissibility of specific act evidence in homicide cases where the accused seeks to prove circumstantially that the decedent was the initial aggressor. However, under the current framework followed by a majority of the states it is questionable whether these policy goals are being advanced. In order to fully accommodate these fundamental policies, the states must take a hard look at their current framework and ask if it is striking the proper balance between competing policy considerations.

There is no sound reason why proof of a decedent’s character should not be admitted to establish expected and foreseeable conduct. Society’s experience leads us to expect characteristic conduct of individuals to be repeated.¹⁶⁸ Thus, there is no reason for failing to allow a prior similar action to be admitted as

Disposition Exception, 29 SUFFOLK UNIV. L. REV. 515, 515 (1995) (emphasis added).

167. See *supra* note 71 and accompanying text.

168. See Urviller, *supra* note 77, at 847-48.

evidence of the behavior in question.¹⁶⁹ "Proof, in court at least, is supposed to be a matter for the application of ordinary intelligence, and any rule in derogation of common sense requires special justification."¹⁷⁰ Ultimately, the Federal Rules of Evidence approach is an obstruction to justice and a fair trial when it should be seeking to promote justice and fairness in individual cases.

The argument that specific act evidence should not be admissible because it might mislead the jury, thereby resulting in an acquittal because the decedent "got what he deserved," is based on a deep distrust of the jury and on the assumption that the jury is ignorant.¹⁷¹ It assumes that the jury cannot properly use the character evidence for its intended purpose, namely to establish that it is more probable that the decedent was the initial aggressor. It further assumes that the jury has a spiteful motive against the decedent.

However, the rules on the admissibility of character evidence were designed not to protect victims, but rather to protect the accused. Because the decedent is not on trial and is not available to testify at trial as to his character for peacefulness, the specific act evidence of the decedent's violent character is admitted for the purpose of corroborating the accused's initial aggressor theory. In a homicide case where there are no eye-witnesses and the accused is not allowed to corroborate her claim with character evidence, many defendants in effect have no defense. Because the decedent is dead, he cannot take the stand to prove his peaceful character or explain what happened. The accused is deprived of the opportunity to cross examine the decedent as to his credibility and veracity. Although the accused may introduce opinion or reputation evidence, these methods of proof are not as convincing to a jury, and often not as reliable.¹⁷² It is illogical to allow a string of character witnesses to testify that the decedent was reputed to be, or in the witness' opinion was, a violent, dangerous, or aggressive person, but not to allow persons with first hand knowledge about the decedent's prior bad acts to testify. A person charged with homicide should have the ability to put on the best evidence available to her. In most cases, this will be specific act evidence. The jury's role is that of fact-finder. It weighs the credibility of witnesses and determines the truth of the facts. Where there are no eye-witnesses, the jury cannot ascertain the truth directly. It must determine the truth from other available facts. The best evidence available in these cases is specific act evidence of the decedent's violent character that tends to make it more probable to the jury that the decedent acted in conformity with this character.

There are sufficient safeguards in the rules to protect the decedent and prevent unfair prejudice to the prosecution. When the accused introduces evidence that the decedent was the initial aggressor, under the rules, the prosecution may offer rebuttal testimony as to the character trait of peacefulness

169. *See id.* at 848.

170. *Id.*

171. *See supra* notes 88-89 and accompanying text.

172. *See supra* note 43 and accompanying text.

of the decedent.¹⁷³ This is true regardless of whether the accused used reputation, opinion or specific instance evidence of the victim's propensity for violence.¹⁷⁴

Additionally, the judge has the discretion under FRE 403¹⁷⁵ to balance the prejudicial nature of the evidence against its probative value.¹⁷⁶ If the accused attempts to introduce specific act evidence that is remote in time or unrelated to the determination of initial aggressor, the judge may exclude the evidence as raising too many collateral issues. The judge may similarly conclude that the defense is presenting the specific act evidence with too many witnesses. In these cases, the judge may find that the evidence would confuse or mislead the jury or result in "undue delay, waste of time, or needless presentation of cumulative evidence."¹⁷⁷ A *per se* rule prohibiting specific act evidence in such cases is unnecessary because the judge has the discretion to prevent the trial from becoming a circus. Therefore, the question presented by these cases simply is an ordinary relevancy issue.

VI. RECOMMENDATION

A. Amend FRE 405 and Allow All Types of Specific Act Evidence

Ultimately, the best approach to guard against prejudice to the accused would be for states to amend their evidence rules to allow any relevant prior specific acts of violence by the decedent in homicide cases where the accused claims the deceased was the initial aggressor. States that are troubled by the current Federal Rules framework should follow the lead of the District of Columbia that allows any type of specific instances of violent conduct by the decedent in homicide cases.¹⁷⁸ Such evidence is relevant under FRE 401 regardless of whether the evidence is used to prove character.¹⁷⁹ Under this approach, the judge is free to determine in individual cases whether the prejudicial nature of the evidence outweighs its probative value under FRE 403.¹⁸⁰

To accomplish this result however, FRE 405(a)¹⁸¹ must be amended to allow admission of specific act evidence. Currently, the rule excludes this form of evidence even though courts and commentators agree that the victim's character

173. See GRAHAM, *supra* note 2.

174. See *id.*

175. See *supra* note 13.

176. FED. R. EVID. 403.

177. *Id.*

178. This recommendation is, in effect, the rule followed by the District of Columbia that allows specific act evidence under an initial aggressor theory in homicide cases. Yet, the District of Columbia Rule is followed without an amendment to FRE 405. See discussion *supra* Part IV.C.2.

179. See *supra* notes 37-41 and accompanying text.

180. See *supra* note 13.

181. See *supra* note 42.

is relevant evidence.¹⁸² The rule allows only reputation or opinion evidence to prove character. Under FRE 405(b), specific act evidence is limited to cases where "character . . . is an essential element of a charge, claim, or defense."¹⁸³ States can be guided by the direction of Wyoming that has amended its evidence rules to allow specific act evidence to prove that the victim acted in accordance with his violent nature at the time of the occurrence.¹⁸⁴ FRE 405 should similarly be amended to allow specific act evidence when character is relevant to establishing a proposition of fact in the case.

This recommendation strikes the proper balance between competing policy considerations. The idea of allowing specific act evidence of the decedent's violent character only in homicide cases has a legitimate policy basis because it affords the accused the greatest protection where the stakes are the highest and when she has the most to lose. The gravity and stigma of a conviction for homicide, as well as the right of an accused to present an adequate defense, justifies such an approach. A potential disadvantage of this recommendation is that evidence of prior violent acts is not limited to prior convictions of the decedent, which may cause collateral issues to be raised. However, the compelling policies of ascertaining the truth and protecting an accused's life and liberty interests, mandate that equity be exalted over efficiency. Moreover, because the judge has the discretion to carefully scrutinize the probative value of the evidence, the potential prejudice to the prosecution and the number of collateral issues being raised will be minimized. This alternative eliminates the concerns of introducing prejudice into the proceedings and creating trials within trials. Finally, if this approach is combined with the Georgia rule,¹⁸⁵ which requires notice by the defense to the prosecution of its intent to rely on specific act evidence, then a proper balance between the competing policies and interests would also be struck. The prosecution would not suffer any prejudice nor be caught off guard because it only has to prepare to rebut the prior bad acts to which it has been given notice.

*B. Adopt Compromise Solution of Limiting Specific Act Evidence
to Prior Convictions*

A less drastic step than amending FRE 405 to allow any prior bad act evidence would be for the states to adopt the Connecticut/Utah rule¹⁸⁶ which limits specific act evidence to prior convictions for violent crimes. This approach has been embraced by a number of jurisdictions and offers greater protection to the accused than the current Federal Rules framework. Although the Connecticut/Utah rule has the benefit of preventing fabrication as well as reducing the potential for raising numerous collateral issues that may mislead a

182. See *supra* notes 35-38 and accompanying text.

183. FED. R. EVID. 405(b).

184. See *supra* notes 109-10 and accompanying text.

185. See discussion *supra* Part IV.C.3.

186. See discussion *supra* Part IV.C.1.

jury and lengthen a trial, this solution does not go far enough in some cases to protect the accused. For instance, the decedent may be an extremely violent and aggressive person but have no prior convictions for such acts. In such cases, it is preferable to allow the accused to introduce prior violent acts by the decedent against third persons where no conviction resulted. Nevertheless, the Connecticut/Utah rule is an equitable approach because it properly weighs the competing policies and strikes a fair balance. Thus, if states are reluctant to amend their evidence rules to allow any specific bad act evidence, this solution is an equally good alternative to adopt.

CONCLUSION

The apparent lack of balancing of competing policies by the framers of the Federal Rules of Evidence works a significant hardship on the accused who claims that the decedent was the initial aggressor. The proponents simply provide a list of interests that must be adhered to in dealing with character evidence of the decedent. Yet, these interests are stated in a conclusory manner and are seemingly not balanced against other compelling policy goals. For instance, the courts and commentators list the following concerns as reasons for excluding specific act evidence: time consumption, misleading and distracting the jury, and unfair surprise to the prosecution. But, they fail to follow a balancing approach. It is not enough to merely give a list of interests supporting one side. Rather, there must be a balance between competing policies. This is especially true in homicide cases where the stakes are highest. Additionally, many of the concerns expressed by proponents of the Federal Rules approach are simply unfounded.

The lack of balance between competing interests works a significant hardship on the ability of an accused to present a defense. The *per se* rule adopted by the Federal Rules prejudices the accused by preventing her from introducing specific act evidence when she claims the decedent was the initial aggressor. Deprived of the best evidence available to defend herself, the accused's paramount life and liberty interests are relinquished in favor of a rule placing more emphasis on efficiency. The truth-finding function of the criminal justice system is eroded by prohibiting the accused from introducing specific act evidence that would promote the pursuit of truth. A growing minority of jurisdictions refuse to allow the result reached under the Federal Rules approach. To varying degrees, these courts have rejected the Federal Rules approach by admitting specific act evidence when the accused claims the decedent attacked first. They have struck the proper balance. Other states should follow their lead.

