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Victim or Villain?: A Case for Narrowing the Scope of Admissibility of a Victim's Prior Bad Acts in Illinois

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VICTIM OR VILLAIN?: A CASE FOR NARROWING THE SCOPE OF ADMISSIBILITY OF A VICTIM'S PRIOR BAD ACTS IN ILLINOIS

INTRODUCTION*

Imagine that you are at the trial of the man who stabbed your sister to death. The details of the incident in which your sister was killed are unclear; however, you are aware that the man who stabbed your sister, the defendant, claims that your sister attacked him and that he had stabbed her three times in the ribs in an act of self-defense. The defendant is six feet tall and weighs approximately two hundred pounds. Your sister was five feet tall and weighed a mere one hundred pounds. The defendant's lawyer is questioning one of your sister's former friends about an incident that had allegedly occurred between your sister and the friend in a bar approximately three years ago. According to the friend, your sister had threatened her with a knife because she had started dating your sister's boyfriend behind your sister's back. Your sister's lawyer objects to the line of questioning and the defendant's lawyer argues that the incident is "undeniably relevant to the defendant's self-defense claim." The judge overrules the objection and the defendant's lawyer continues to elicit the details surrounding the alleged incident. You look at the jury members who are shaking their heads in disgust. You ask yourself, "How can this be happening? My sister was a victim, but now the defendant's lawyer is turning her into a villain in an attempt to get his client off."

The above scenario, while fictional, could happen. In Illinois,[1] a defendant who is charged with a violent crime and who asserts self-de-

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1. Illinois has never adopted a version of the Federal Rules of Evidence, nor has Illinois codified its evidence rules according to any other system; rather, Illinois' rules of evidence are a product of common law. *See* MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE (5th ed. 1990); Judge John P. Crowley, *Illinois Evidence—The Question of Codification*, 10 LOY. U. CHI. L.J. 297 (1979) (arguing for the codification of an Illinois Code of Evidence); *cf.* Faust F. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271, 1275 (1995) (noting that "[e]ven the few recalcitrant states that resist codification—like Illinois . . . are slowly moving by court decision toward piecemeal adoption of [the Federal] Rules").

fense may offer evidence of the victim's prior bad acts (i.e., specific act evidence) to prove one of two distinct evidentiary propositions: (1) that the defendant was reasonably afraid of the victim at the time of the incident in question; or (2) that the victim had been the aggressor during the incident in question. Prior to 1984, Illinois courts, with few exceptions, routinely ruled that evidence of a victim's prior bad acts of which the defendant was aware at the time of the incident in question is admissible to prove the former but not the latter.[2]

In 1984, however, the Illinois Supreme Court created an exception to the above rule in the case of *People v. Lynch*.[3] In that case, the court held that evidence of the decedent's three prior convictions for battery was admissible to support the defendant's contention that the decedent was the aggressor, notwithstanding the fact that the defendant was unaware of the prior convictions at the time of the killing.[4] Based on the holding of *Lynch*, one might believe that the exception created is confined to cases where the three following conditions are met: (1) where the evidence is offered to prove that the victim was the aggressor; (2) where the defendant is charged with homicide; and (3) where the prior bad acts are in the form of a conviction for a violent offense. Some Illinois appellate courts, however, have not confined *Lynch* to such a limited application. Rather, some courts have read *Lynch* as allowing in all types of specific act evidence, not just convictions, when self-defense is at issue, regardless of whether the defendant is charged with something less than homicide and regardless of which of the two evidentiary propositions the evidence is offered to prove.[5]

This Comment will analyze this broad reading of *Lynch* and will determine whether this reading is appropriate. The questions for consideration in making this determination are: (1) whether this reading and application of *Lynch* is jurisprudentially sound; (2) whether the pre-*Lynch* rule of admissibility is a more reasoned approach; or (3) whether the Illinois courts should adopt a middle-ground approach that would admit certain types of specific act evidence in certain factual contexts and preclude such evidence in other contexts.

To begin to answer these questions, it is necessary to examine specific act evidence in relation to the self-defense claim, Illinois' histori-

2. *See, e.g.*, People v. Popovich, 129 N.E. 161, 163 (Ill. 1920) (enforcing the established rule that a victim's violent propensity may not be proven by specific acts); People v. Peeler, 299 N.E.2d 382, 386 (Ill. App. Ct. 1973) (stating that it is "fundamental" that specific act evidence is inadmissible to prove a victim's violent character).

3. 470 N.E.2d 1018 (Ill. 1984).

4. *Id.* at 1020-21.

5. *See infra* part II.D (discussing the Illinois appellate courts' interpretation of *Lynch*).

cal treatment concerning the admissibility of such evidence, and alternative approaches to the current Illinois rule. Accordingly, this Comment will first focus on character evidence generally and the different methods a party may use to prove an individual's character,[6] including specific act evidence. The author will examine the primary rationales for either excluding or admitting specific act evidence that is offered to prove that the victim was the aggressor.[7] This Comment will then focus on the evolution of the admissibility of this type of evidence in Illinois self-defense cases when it is offered to prove that the victim was the aggressor, from the strict exclusionary rule of pre-*Lynch* case law to the broad rule of admissibility established by the post-*Lynch* cases.[8] Next, this Comment will highlight alternative rules that Illinois could adopt by first discussing the Cook County State's Attorney's Office's proposed change to the current Illinois rule[9] and then discussing different rules adopted by other jurisdictions.[10] The Comment will then identify the problems with the current Illinois rule[11] and the advantages and disadvantages of the alternative rules.[12] After examining the current and alternative rules, the author will conclude that Illinois should narrow its rule on the admissibility of specific act evidence offered to prove that the victim was the aggressor.[13] The author will propose that Illinois should adopt a statute that limits the admissibility of such evidence to include only evidence of a prior conviction for a violent offense that is offered in a homicide case and that is in the form of a certified letter of conviction.[14]

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6. *See* discussion *infra* part I.A (discussing the two evidentiary propositions of a self-defense claim that a defendant may offer character evidence to prove and the two different methods that a defendant can use to prove a victim's character).

7. *See* discussion *infra* part I.A.2 (examining the policy arguments for admitting and for excluding specific act evidence in this context).

8. *See* discussion *infra* parts I.B-D (discussing pre-*Lynch* cases, the *Lynch* case and post-*Lynch* cases).

9. *See* discussion *infra* part I.E (discussing the statute proposed by the Cook County State's Attorney's Office which would return the Illinois rule to the strict exclusionary rule of pre-*Lynch*).

10. *See* discussion *infra* part I.F (examining the admissibility of specific act evidence when a defendant asserts self-defense in other jurisdictions).

11. *See* discussion *infra* part II.A (identifying the three most significant problems with Illinois' current approach to this issue).

12. *See* discussion *infra* part II.B (considering the advantages and disadvantages of the alternative rules that Illinois could adopt).

13. *See* discussion *infra* parts II.C, III (concluding that Illinois needs to narrow its overly broad rule on admissibility with respect to this type of evidence).

14. *See* discussion *infra* part II.C (discussing this Comment's proposed statute).

I. BACKGROUND

A. Character Evidence and the Claim of Self-Defense

Character can be defined as the "nature of a person, his disposition generally, or his disposition in respect to a particular trait such as honesty, peacefulness or truthfulness."[15] A defendant charged with a violent crime who asserts self-defense[16] may offer evidence of a victim's violent character to prove two separate and distinct evidentiary propositions.[17]

First, the defendant may offer evidence of the victim's violent character to prove the defendant's state of mind, i.e., that he was afraid of the victim,[18] during the incident in question. By proving that he was afraid of the victim, the defendant can establish that the degree of force used was reasonable.[19] Evidence of the victim's violent character is relevant because the defendant's knowledge of the victim's violent tendencies affects his "perceptions of and reactions to the victim's behavior."[20] The defendant offers this evidence to prove that the degree of force used was reasonable under the circumstances even though such force may have been unreasonable if used against an ordinarily peaceful person.[21]

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15. GRAHAM, *supra* note 1, § 404.

16. In Illinois, the affirmative defense of self-defense is governed by section 5/7-1 of the Criminal Code of 1961. 720 ILCS 5/7-1 (1994). In *People v. Booker*, the court explained:

> The use of deadly force in self-defense is justified when the defendant is not the aggressor and the defendant reasonably believes that he is threatened with force which will cause death or great bodily harm and the danger of harm is imminent. The amount of forced used must be necessary to avert the danger.

People v. Booker, 653 N.E.2d 952, 954 (Ill. App. Ct. 1995) (citations omitted).

17. People v. Lynch, 470 N.E.2d 1018, 1020 (Ill. 1984); People v. Ciavirelli, 635 N.E.2d 610, 614-15 (Ill. App. Ct. 1994); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 1989); People v. Berry, 529 N.E.2d 1001, 1006 (Ill. App. Ct. 1988); People v. Johnson, 526 N.E.2d 611, 615 (Ill. App. Ct. 1988); People v. Gossett, 451 N.E.2d 280, 286 (Ill. App. Ct. 1983); People v. Buchanan, 414 N.E.2d 262, 264 (Ill. App. Ct. 1980); People v. Meares, 403 N.E.2d 547, 553 (Ill. App. Ct. 1980); *accord* State v. Miranda, 405 A.2d 622, 623 (Conn. 1978); Hemingway v. State, 543 A.2d 879, 881 (Md. Ct. Spec. App. 1988); State v. Howell, 649 P.2d 91, 96 (Utah 1982).

18. *Lynch*, 470 N.E.2d at 1020; *Ciavirelli*, 635 N.E.2d at 614-15; *Berry*, 529 N.E.2d at 1006; *Crum*, 539 N.E.2d at 203; *Johnson*, 526 N.E.2d at 615; *Gossett*, 451 N.E.2d at 286; *Buchanan*, 414 N.E.2d at 264; *Meares*, 403 N.E.2d at 553; People v. Adams, 388 N.E.2d 1326, 1329-30 (Ill. App. Ct. 1979); *accord Miranda*, 405 A.2d at 623; *Hemingway*, 543 A.2d at 881; *Howell*, 649 P.2d at 96.

Specifically, the *Lynch* court stated that "the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior." *Lynch*, 470 N.E.2d at 1020.

19. *E.g.*, *Lynch*, 470 N.E.2d at 1020.

20. *Id.*

21. *Id.*

The second purpose for which a defendant may offer evidence of the victim's violent character is to prove circumstantially that the victim was the aggressor where there is a factual dispute as to whether the defendant or the victim was the aggressor.[22] Proof of the victim's violent character permits the inference that the victim acted in conformity with his own character on the particular occasion in question.[23] Arguably, this evidence is relevant because it tends to support the defendant's version of the facts.[24]

1. Methods for Proving a Victim's Violent Character

In Illinois, a defendant may attempt to prove a victim's violent character by using two distinct methods: (1) evidence of the victim's reputation, or (2) evidence of specific acts of violence committed by the victim.[25]

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22. People v. Lynch, 470 N.E.2d 1018, 1020 (Ill. 1984); People v. Ciavirelli, 635 N.E.2d 610, 614-15 (Ill. App. Ct. 1994); People v. Lovelace, 622 N.E.2d 859, 869 (Ill. App. Ct. 1993); People v. Agee, 562 N.E.2d 545, 547-48 (Ill. App. Ct. 1990); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 1989); People v. Berry, 529 N.E.2d 1001, 1006 (Ill. App. Ct. 1988); People v. Castiglione, 501 N.E.2d 923, 930 (Ill. App. Ct. 1986), *cert. denied*, 508 N.E.2d 731 (Ill. 1987); People v. Gossett, 451 N.E.2d 280, 286 (Ill. App. Ct. 1983); People v. Johnson, 526 N.E.2d 611, 615 (Ill. App. Ct. 1988); People v. Buchanan, 414 N.E.2d 262, 264 (Ill. App. Ct. 1980); People v. Meares, 403 N.E.2d 547, 553 (Ill. App. Ct. 1980); People v. Montgomery, 366 N.E.2d 623, 628 (Ill. App. Ct. 1977); People v. Baer, 342 N.E.2d 177, 181 (Ill. App. Ct. 1976); *accord* State v. Miranda, 405 A.2d 622, 623 (Conn. 1978); Hemingway v. State, 543 A.2d 879, 881 (Md. Ct. Spec. App. 1988); State v. Howell, 649 P.2d 91, 96 (Utah 1982); *cf.* Meyer v. City & County of Honolulu, 731 P.2d 149, 150 (Haw. 1986) (allowing the defendant to introduce evidence of the plaintiff's prior acts of violence in a civil assault and battery case where there was an issue as to who the aggressor was); People v. Harris, 587 N.E.2d 47, 49 (Ill. App. Ct. 1992) (holding that "it is well-settled that when a theory of self-defense is raised in a battery case, evidence of the peaceful or violent character of either the *victim or the accused* may be relevant as circumstantial evidence to show which party was the initial aggressor) (emphasis added). *See generally* JOHN H. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW 1395 (Tillers rev. 1983) (stating that "the most frequent use of character evidence against a victim is when a violent crime is charged, to show that the victim was the first aggressor").

23. WIGMORE, *supra* note 22, at 1350.

24. GRAHAM, *supra* note 1, § 404.4.

25. *Id.* In addition, the Federal Rules of Evidence provides for a third method of proving an individual's character, namely, by offering the opinion of a witness. FED. R. EVID. 405(a). This method represents a departure from the traditional methods of proving character established at common law. GRAHAM, *supra* note 1, § 405.2 (quoting Federal Advisory Committee's Note, 56 F.R.D. 183, 222 (1973)). However, Illinois does not permit character to be proved by opinion evidence. *Id.* Further discussion of the use of opinion evidence in this context is beyond the scope of this article.

a. Reputation Evidence

A defendant may attempt to prove a victim's violent character by offering evidence of the victim's reputation for violence.[26] A person's reputation can be defined as the "community estimate of him."[27] The relevant community may be where the individual works, studies, or performs some other type of community activity.[28] The testifying character witness need not personally know the individual in question; rather, the witness need only be familiar with the individual's reputation in the relevant community.[29]

Reputation evidence is the most well-established method of proving an individual's character.[30] It is also generally regarded as less reliable than other methods.[31] Nevertheless, the courts have traditionally favored reputation evidence over specific act evidence because reputation evidence "takes little time to present and (in contrast to specific instances) is unlikely to divert the trial to disputes over collateral matters."[32]

In Illinois, evidence of a victim's reputation for violence is admissible to prove that the defendant reasonably feared the victim, provided that the defendant knew of the victim's reputation at the time of the altercation.[33] However, regardless of whether the defendant knew of

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26. GRAHAM, *supra* note 1, § 405.1; *e.g.*, *Crum*, 539 N.E.2d at 203 (admitting evidence that the victim "had a violent nature" in order to prove the victim's violent character); *Buchanan*, 414 N.E.2d at 264 (stating that the defendant may offer evidence of the victim's reputation for violence in order to prove that the victim was the aggressor); *Meares*, 403 N.E.2d at 553 (stating that where character is at issue, the individual's character can only be proven by reputation evidence).

27. GRAHAM, *supra* note 1, § 404.1.

28. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 249 (Little, Brown & Co. 1995); *accord* GRAHAM *supra* note 1, § 405.1.

29. GRAHAM, *supra* note 1, § 405.1; MUELLER & KIRKPATRICK, *supra* note 28, at 249.

30. MUELLER & KIRKPATRICK, *supra* note 28, at 249.

31. *Id.* (citing H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 885 (1982) (arguing that reputation evidence should be disallowed because it is the least trustworthy and least testable form of character evidence)); *see infra* note 37 and accompanying text (noting that specific act evidence is more reliable than reputation evidence because it is "more objective and fact oriented" than reputation evidence).

32. MUELLER & KIRKPATRICK, *supra* note 28, at 249.

33. *See, e.g.*, People v. McGee, 572 N.E.2d 1046, 1053-54 (Ill. App. Ct.), *cert. denied*, 580 N.E.2d 127 (Ill. 1991) (holding that evidence that the victim, unknown to the defendant, was a violent person was irrelevant to the defendant's claim that the degree of force he used was reasonable); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 1989) (admitting evidence that proved that the defendant knew that the victim "had a violent nature" because the evidence was "relevant to show defendant's state of mind"); People v. Ware, 536 N.E.2d 713, 717 (Ill. App. Ct. 1988) (stating that the defendant must have had knowledge of the victim's character and reputation in order to prove "the reasonableness of the defendant's state of mind in acting in self-defense"); People v. Johnson, 526 N.E.2d 611, 615 (Ill. App. Ct.

the victim's reputation, reputation evidence is admissible to prove circumstantially that the victim, acting in conformity with his character, was the aggressor during the incident in question.[34]

b. Specific Act Evidence

A defendant also may attempt to prove a victim's violent character by offering evidence of a specific act of violence committed by the victim.[35] Specific act evidence ranges from prior felony convictions to general bad acts committed by the victim.[36]

1988) (holding that the trial court properly excluded a witness' testimony that the victim "was known as a 'bully'" which was offered to prove the defendant's state of mind because there was no evidence that the defendant was aware of the victim's reputation); People v. Buchanan, 414 N.E.2d 262, 264 (Ill. App. Ct. 1980) (noting that if the defendant offers evidence of the victim's character or reputation to prove that the defendant was afraid of the victim, the defendant must have been aware of the substance of the evidence at the time of the incident in question); *see* People v. Vega, 437 N.E.2d 919, 921 (Ill. App. Ct. 1982) (finding that the trial court properly excluded evidence of the victim's arrest record where the defendant had claimed knowledge of the victim's trouble with the police, but not of his arrest record).

34. *See, e.g.*, *Ware*, 536 N.E.2d at 717 ("A requirement that the defendant knew of the deceased's propensity for violence is unrelated" to his "assertion that the victim was the initial aggressor where there are conflicting accounts of the incident."); *Buchanan*, 414 N.E.2d at 264 (noting that if the defendant offers evidence of the victim's character of reputation to prove that the victim was the aggressor, there is no requirement that the defendant must have been aware of the evidence at the time of the incident in question).

35. GRAHAM, *supra* note 1, § 404.4; *e.g.*, People v. Lynch, 470 N.E.2d 1018 (Ill. 1984) (holding that three prior convictions for battery are relevant); People v. Devine, 557 N.E.2d 953, 956 (Ill. App. Ct.), *cert. denied*, 575 N.E.2d 918 (Ill. 1991) (noting that the trial court had allowed the defendant to attempt to prove that the victim was the aggressor by introducing evidence of the victim's prior misdemeanor conviction, testimony that the victim had carried a gun on occasion, that the victim became violent when on cocaine, and that the victim had once shot an old boyfriend); *Crum*, 539 N.E.2d at 203 (admitting evidence that proved that the victim "always carried a gun" because the evidence was relevant to show the defendant's state of mind); People v. Adams, 388 N.E.2d 1326, 1329-30 (Ill. App. Ct. 1979) (concluding that "specific acts of violence on the part of the [victim], if known to the defendant, are admissible to show the reasonableness of the defendant's apprehension of danger"); People v. Baer, 342 N.E.2d 177, 181 (Ill. App. Ct. 1976) (stating that specific prior incidents of violent aggression by the victim may be admissible as tending to show that he was the aggressor in the incident); People v. Stombaugh, 284 N.E.2d 640, 645 (Ill. 1972) (noting that in a homicide case, where the defendant asserts self-defense and presents evidence that the victim was the assailant, the defendant must be given substantial latitude in introducing evidence of the victim's propensity for violence because the evidence tends to show the defendant's state of mind at the time of the incident in question); *cf.* People v. Robinson, 516 N.E.2d 1292, 1306 (Ill. App. Ct. 1987), *cert. denied*, 522 N.E.2d 1292 (Ill. 1988) ("[E]vidence of [an uncommunicated] threat by a third person is admissible as tending to show that the victim or the third person was the aggressor, and that the defendant acted in self-defense, where it is shown that the victim and the third person conspired or acted together against the defendant.").

36. *See, e.g.*, *Lynch*, 470 N.E.2d at 1020-21 (discussing specific act evidence in the form of three prior battery convictions); People v. Clarke, 612 N.E.2d 1351, 1354-55 (Ill. App. Ct.), *cert. denied*, 622 N.E.2d 1213 (Ill. 1993) (discussing specific act evidence in the form of evidence that the victim had once bumped another's car three times from behind); *Devine*, 557 N.E.2d at 956-57 (noting that the trial court had allowed the defendant to attempt to prove that the victim was

Arguably, specific act evidence is more reliable than reputation evidence to establish the victim's violent character because specific act evidence is "more objective and fact-oriented."[37] However, specific act evidence also "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time."[38] Thus, due to prejudicial and systemic concerns, Illinois courts generally follow the rule that specific act evidence is not admissible to prove an individual's character.[39] An exception to this general rule is that, when a defendant asserts self-defense, specific act evidence that is probative of the victim's violent character might be admissible to prove either that the defendant was acting out of fear of the victim or that the victim was the aggressor.[40]

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the aggressor by introducing evidence of the victim's prior misdemeanor conviction, and testimony that the victim had carried a gun on occasion, that the victim became a violent person when on cocaine, and that the victim had once shot at an old boyfriend); *Crum*, 539 N.E.2d at 203 (holding that the trial court improperly excluded evidence that the victim had pulled a gun on one or more individuals which the defendant offered to prove that the victim was the aggressor in the incident in question); People v. Hanson, 485 N.E.2d 1144, 1149-50 (Ill. App. Ct. 1985) (holding that the trial court committed prejudicial error when it prevented the defendant from presenting two witnesses who would have testified that the victim had threatened a person with a knife at a tavern and another witness who would have testified that the victim threatened "him and his wife when [the victim] felt the witness had run his car off the road" because this evidence was "relevant to who was the aggressor"). *Contra* People v. Loggins, 629 N.E.2d 137, 143-44 (Ill. App. Ct. 1993) (finding that the trial court properly precluded the defendant from asking whether the victim had been "seen to get aggressive" because the question did not properly identify any specific prior act of violence); People v. Costillo, 608 N.E.2d 100, 107 (Ill. App. Ct. 1992) (holding that the victim's arrest for unlawful possession of a weapon without evidence that the victim brandished the weapon or used it in any way does not indicate that the victim was a violent person); People v. Ellis, 543 N.E.2d 196, 200 (Ill. App. Ct. 1989), *cert. denied*, 553 N.E.2d 398 (Ill.), *and cert. denied*, 498 U.S. 942 (1990) (holding that the trial court properly excluded evidence of the victim's prior arrests because "evidence of a victim's mere arrest" is inadmissible since it does not indicate whether the victim actually performed any of the acts charged); People v. Ware, 536 N.E.2d 713, 717-18 (Ill. App. Ct. 1988) (holding that evidence of a psychiatric report taken of the victim twelve days after the incident in question was not relevant to prove that the victim had been the aggressor); People v. Huddleston, 530 N.E.2d 1015, 1022 (Ill. App. Ct. 1988) (holding that the trial court properly excluded testimony that the victim had once been arrested for battery since the "testimony could not establish that the decedent had a violent character").

37. MUELLER & KIRKPATRICK, *supra* note 28, at 251; *see also* FED. R. EVID. 405 advisory committee's note (explaining that "[o]f the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing").

38. FED. R. EVID. 405 advisory committee's note.

39. *See* GRAHAM, *supra* note 1, § 404.4 (citing People v. Allen, 124 N.E. 329 (Ill. 1919); People v. Jiminez, 452 N.E.2d 40 (Ill. App. Ct. 1983)).

40. People v. Lynch, 470 N.E.2d 1018, 1020 (Ill. 1984); People v. Ciavirelli, 635 N.E.2d 610, 614-15 (Ill. App. Ct. 1994); People v. Lovelace, 622 N.E.2d 859, 869 (Ill. App. Ct. 1993); People v. Harris, 587 N.E.2d 47, 49 (Ill. App. Ct. 1992); People v. Agee, 562 N.E.2d 545, 547-48 (Ill. App. Ct. 1990); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 989); People v. Berry, 529 N.E.2d 1001, 1006 (Ill. App. Ct. 1988); People v. Johnson, 526 N.E.2d 611, 615 (Ill. App. Ct. 1988); People v. Gossett, 451 N.E.2d 280, 286 (Ill. App. Ct. 1983); People v. Buchanan, 414 N.E.2d 262, 264 (Ill. App. Ct. 1980); People v. Meares, 403 N.E.2d 547,

First, a defendant may attempt to present evidence of specific acts of violence committed by the victim to prove that the defendant was afraid of the victim and, consequently, that the degree of force used was reasonable.[41] In order to use specific act evidence for this purpose, most courts hold that the defendant must have had knowledge of these instances at the time of the incident in question.[42] Without such knowledge, the victim's violent character could not have affected

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553 (Ill. App. Ct. 1980); People v. Montgomery, 366 N.E.2d 623, 628 (Ill. App. Ct. 1977); People v. Baer, 342 N.E.2d 177, 181 (Ill. App. Ct. 1976); *accord* State v. Miranda, 405 A.2d 622, 623 (Conn. 1978); Meyer v. City & County of Honolulu, 731 P.2d 149, 150 (Haw. 1986) (allowing the defendant to introduce evidence of the plaintiff's prior acts of violence in a civil assault and battery case where there was an issue as to who the aggressor was); Hemingway v. State, 543 A.2d 879, 881 (Md. Ct. Spec. App. 1988); State v. Howell, 649 P.2d 91, 96 (Utah 1982); *cf.* People v. Harris, 587 N.E.2d 47, 49 (Ill. App. Ct. 1992) (holding that "it is well-settled that when a theory of self-defense is raised in a battery case, evidence of the peaceful or violent character of either the *victim or the accused* may be relevant as circumstantial evidence to show which party was the initial aggressor") (emphasis added); People v. Castiglione, 501 N.E.2d 923, 930 (Ill. App. Ct. 1986), *cert. denied*, 508 N.E.2d 731 (Ill. 1987) (holding that the defendant was not allowed to offer in evidence of the victim's prior convictions because the evidence showed that another individual, who was not the victim or the defendant, was the aggressor). *See generally* WIGMORE, *supra* note 22, at 1395 (stating that "the most frequent use of character evidence against a victim is when a violent crime is charged, to show that the victim was the first aggressor").

41. *E.g.*, *Lynch*, 470 N.E.2d at 1020 (stating that "[t]he same deadly force that would be unreasonable in an altercation with a presumably peaceful citizen may be reasonable in response to similar behavior by a man of known violent and aggressive tendencies").

42. *Id.* ("One can only consider facts one knows, however, and evidence of the victim's character is irrelevant to this theory of self-defense unless the defendant knew of the victim's violent nature); *Ciavirelli*, 635 N.E.2d at 615 (noting that the defendant must have been aware of the victim's prior acts of violence in order for those acts to have affected the defendant's state of mind); *Crum*, 539 N.E.2d at 203 (admitting evidence that proved that the defendant knew that the victim "always carried a gun" because the evidence was "relevant to show the defendant's state of mind"); People v. Adams, 388 N.E.2d 1326, 1329-30 (Ill. App. Ct. 1979) (concluding that "specific acts of violence on the part of the [victim], if known to the defendant, are admissible to show the reasonableness of the defendant's apprehension of danger"); *cf.* People v. McGee, 572 N.E.2d 1046, 1053-54 (Ill. App. Ct.), *cert. denied*, 580 N.E.2d 127 (Ill. 1991) (holding that evidence that the victim, unknown to the defendant, was a violent person was irrelevant to the defendant's claim that the degree of force he used was reasonable); People v. Smith, 491 N.E.2d 128, 131 (Ill. App. Ct. 1986) (finding that evidence that the victim had repeatedly raped the defendant's daughter at gunpoint did not support the defendant's self-defense claim because the rape occurred after the offenses for which the defendant was charged); People v. Vega, 437 N.E.2d 919, 921 (Ill. App. Ct. 1982) (finding that the trial court properly excluded evidence of the victim's arrest record (criminal damage to property, burglary, fighting, reckless driving, unlawful possession of cannabis, battery, and aggravated battery) where the defendant had claimed knowledge of the victim's trouble with the police, but not his arrest record). *But see* People v. Davidson, 601 N.E.2d 1146, 1149-50 (Ill. App. Ct. 1992) (stating that specific act evidence is admissible to prove that the defendant used reasonable force regardless of whether the defendant knew of the acts at the time of the incident in question); *Hemingway*, 543 A.2d at 881 (stating that the defendant must have been aware of the victim's past acts in order for those acts to have affected the defendant's state of mind).

the defendant's state of mind.[43] If, however, a defendant knows at the time of the incident in question that the victim has a violent disposition, this knowledge would go directly to the defendant's state of mind and, correspondingly, to the reasonableness of his actions.[44]

Illinois courts have consistently held that evidence of specific violent acts committed by the victim, of which the defendant was aware at the time of the altercation, is admissible to prove that the defendant was afraid of the victim.[45] The commonly cited purpose behind admitting such evidence is "to show the circumstances confronting the defendant, the extent of his apparent danger, and the motive by which he was influenced, as such factors show the defendant's state of mind at the time of the occurrence."[46]

Alternatively, the defendant may offer specific act evidence in an effort to prove that the victim was the initial aggressor.[47] Evidence admitted for this purpose attempts to prove circumstantially that the victim was the aggressor through the inference that the victim was acting in accordance with his violent character during the incident in

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43. *See, e.g., Vega*, 437 N.E.2d at 921 (holding that the trial court properly excluded evidence of the victim's arrest record where the defendant had no knowledge of its contents and the defendant was attempting to prove that he was afraid of the victim).

44. *See, e.g.*, People v. Stombaugh, 284 N.E.2d 640, 645 (Ill. 1972) (stating that the defendant should be given "substantial latitude" in presenting state-of-mind evidence); *Adams*, 388 N.E.2d at 1329-30 ("We conclude that specific acts of violence on the part of the deceased, if known to the defendant, are admissible to show the reasonableness of the defendant's apprehension of danger."). *But see* People v. Wood, 471 N.E.2d 1060, 1062 (Ill. App. Ct. 1984) (holding that evidence of an earlier, unrelated beating suffered by the defendant that arguably affected his state of mind at the time of the offense at issue was properly excluded on grounds that the evidence was irrelevant and would serve to distract the jury).

45. *See, e.g., Ciavirelli*, 635 N.E.2d at 614-15 (explaining that the defendant must have been aware of the victim's prior violent acts in order for those acts to have affected the defendant's state of mind); People v. Fischer, 426 N.E.2d 965, 968 (Ill. App. Ct. 1981) (stating that "[i]n Illinois, evidence of specific acts of violence, if known to the defendant are admissible to show the reasonableness of defendant's apprehension of danger and therefore are admissible to establish self defense" (citing People v. Gall, 398 N.E.2d 1118 (Ill. App. Ct. 1979))).

46. *Fischer*, 426 N.E.2d at 968; *accord Stombaugh*, 284 N.E.2d at 645; *Gall*, 398 N.E.2d at 1121-22; People v. Peeler, 299 N.E.2d 382, 386 (Ill. App. Ct. 1973).

47. GRAHAM, *supra* note 1, § 404.4; *cf.* People v. Robinson, 516 N.E.2d 1292, 1306 (Ill. App. Ct. 1987), *cert. denied*, 522 N.E.2d 1292 (Ill. 1988) ("[E]vidence of [an uncommunicated] threat by a third person is admissible as tending to show that the victim or the third person was the aggressor, and that the defendant acted in self-defense, where it is shown that the victim and the third person conspired or acted together against the defendant."); People v. Castiglione, 501 N.E.2d 923, 930 (Ill. App. Ct. 1986), *cert. denied*, 508 N.E.2d 731 (Ill. 1987) (holding that the defendant was not allowed to offer in evidence of the victim's prior convictions because the evidence showed that another individual who was not the victim or the defendant, was the aggressor).

question.[48] Admissibility for this purpose is not dependent upon whether the defendant was aware of the instances at the time of the altercation.[49]

In contrast to Illinois, the Federal Rules of Evidence prohibits the defendant from using specific act evidence to prove that the victim was the aggressor;[50] rather, the Federal Rules limit the defendant to the use of reputation and opinion testimony.[51] The majority of state jurisdictions follow this approach.[52] Illinois and a minority of jurisdictions, however, permit the accused to prove that the victim was the aggressor by specific act evidence.[53] The different treatment between

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48. *See* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 147 (3d ed. 1995) ("The logical relevance is that if the alleged victim has a violent personality, that personality increases the probability that the alleged victim threw the first punch and was the aggressor.").

49. People v. Lynch, 470 N.E.2d 1018, 1020 (Ill. 1984); People v. Ciavirelli, 635 N.E.2d 610, 615 (Ill. App. Ct. 1994) (stating that a victim's prior incidents of violence, including those which postdated the event in question, may still be relevant to support the defendant's contentions as to who was the aggressor where there are conflicting accounts of what happened); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 1989) (holding that the trial court improperly excluded evidence that the victim had pulled a gun on one or more individuals which the defendant offered to prove that the victim was the aggressor in the incident in question); People v. Gossett, 451 N.E.2d 280, 284-86 (Ill. App. Ct. 1983) (holding that the trial court erred in excluding evidence of specific acts of violence committed by the homicide victim "which were not directed at the defendant and of which the defendant had no knowledge at the time of the incident"); People v. Buchanan, 414 N.E.2d 262, 264 (Ill. App. Ct. 1980) (noting that if the defendant offers evidence of the victim's character or reputation to prove that the victim was the aggressor, there is no requirement that the defendant must have been aware of the information at the time of the incident in question); *cf.* People v. Lovelace, 622 N.E.2d 859, 869 (Ill. App. Ct. 1993) (stating that the evidence which is offered must "make the proposition that the victim was the aggressor more probable").

50. Rule 405(a) of the Federal Rules of Evidence provides:

> In all cases in which evidence of character or 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(a).

51. *Id.*

52. *See infra* note 222 and accompanying text (discussing the approach in the majority of jurisdictions).

53. *See infra* notes 217-21 and accompanying text (discussing the approach in the minority of jurisdictions). The jurisdictions that have adopted the Federal Rules of Evidence and allow in specific act evidence to prove that the victim was the aggressor usually admit such evidence under their counterpart to Rule 405(b). *See, e.g.*, 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, 411-17 (1990) (discussing Iowa's statutory and judicial interpretation of Federal Rule 405(b)); Mark R. Horton, Note, *Whether a Defendant's Claim of Victim Aggressiveness Is an "Essential Element" of the Defense of Self-Defense:* State v. Baca I & II, 24 N.M. L. REV. 449, 451-53 (1994) (discussing the application of New Mexico's interpretation of Evidence Rule 405(b)). Federal Rule 405(b) provides: "In cases in which character or a trait of character of a person is an essential element of a . . . defense, proof may also be made of specific instances of that person's conduct." FED. R. EVID. 405(b).

the majority and minority positions is attributable to the strong policy arguments that support both positions.[54]

2. *Specific Act Evidence: Policies For and Against Admissibility*

Courts and commentators have articulated five general arguments that support limiting the method of establishing a victim's violent character to proof of reputation.[55] These arguments focus on the probative value of such evidence, the prejudicial effects of admitting specific act evidence, and the systemic concerns involved in admitting such evidence.[56]

The first of the five policy arguments focuses on the minimal probative value of such evidence. The argument is that the probative value of specific act evidence is minimal because "a single prior act of the decedent may have been exceptional, unusual and not characteristic, i.e., a specific prior act would not show a character trait to commit an act or to react in a certain way."[57]

In *Hirschman v. People*,[58] the Illinois Supreme Court argued that the method of establishing character for the purpose of proving that the victim was the aggressor should be limited to reputation evidence due to the weak probative value of specific act evidence.[59] The court stated,

> [I]t is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not begin to act an

54. *See* discussion *infra* part I.A.2 (discussing the policy arguments in favor of both admitting and excluding specific act evidence in this context).

55. *See, e.g.*, People v. Fischer, 426 N.E.2d 965, 971-72 (Ill. App. Ct. 1981) (Rizzi, J., concurring) (discussing the arguments for excluding such evidence); State v. Jacoby, 260 N.W.2d 828, 838 (Iowa 1977); State v. Waller, 816 S.W.2d 212, 214-15 (Mo. 1991) (en banc) (discussing the five key policy reasons for prohibiting the admission of specific act evidence); State v. Duncan, 467 S.W.2d 866, 867-68 (Mo. 1971); State v. Tribble, 428 A.2d 1079, 1084 (R.I. 1981) (citing the most common arguments in support of excluding such evidence); WIGMORE, *supra* note 22, § 54.1; James L. Kainen, *Character Evidence*, 11 TOURO L. REV. 11, 17-18 (1994); Horton, *supra* note 53, at 456-57.

56. *See, e.g.*, *Fischer*, 426 N.E.2d at 971-72 (Rizzi, J., concurring) ("[I]t has been stated that proving a character trait by evidence of specific instances of conduct 'possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.'" (quoting State v. Jacoby, 260 N.W.2d 828, 838 (Iowa 1977))).

57. *Id.* at 971; *accord* Henderson v. State, 218 S.E.2d 612, 615 (Ga. 1975); *Jacoby*, 260 N.W.2d at 838; *Waller*, 816 S.W.2d at 214 ("A single act may have been exceptional, unusual and uncharacteristic; an isolated episode does not provide a true picture of the character of a person."); *Duncan*, 467 S.W.2d at 867-68; *Tribble*, 428 A.2d at 1084 (citing the most common arguments in support of excluding such evidence, one of which is the minimal probative value of the evidence); Horton, *supra* note 53, at 456 (citing *Waller*).

58. 101 Ill. 568 (1882).

59. *Id.* at 574.

> unworthy part, and, therefore, proof of particular transactions, in which the prisoner may have been concerned, are not admissible.[60]

Thus, the *Hirschman* court explained that proof of one's general character might be sufficient to raise the presumption that one behaved in conformity with his character during the incident in question; however, proof of prior bad acts is insufficient to raise such a presumption and, thus, is not admissible.[61]

The second argument focuses on the potentially unduly prejudicial nature of such evidence. Courts and commentators have argued that, in essence, juries would be invited to find for defendants on the ground that "the victim was a violent person and deserved to die."[62] The fear is that the jury might misuse the evidence and acquit the defendant based on the notion that the victim "got what he deserved," regardless of whether the victim was actually the aggressor.[63]

Considering the two arguments explained above, a concurring justice in the case of *People v. Fischer*[64] argued that, based on the weak probative value and the highly prejudicial impact that specific act evidence has, Illinois courts should apply the following rule when determining the admissibility of such evidence:

> If the evidence is offered by the defendant as a character trait of the decedent to show that the decedent was the aggressor, then the reputation of the decedent for turbulence and violence is admissible. This evidence would be admissible even if the defendant had not known of the decedent's reputation at the time. However, specific prior acts of turbulence and violence by the decedent would not be admissible whether or not known by the defendant at the time.[65]

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60. *Id.*

61. *Id.*

62. *See, e.g.*, Chandler v. State, 405 S.E.2d 669, 675 (Ga. 1991) (Benham, J., concurring) (warning that juries would be invited to find for defendants on the ground that "the victim was a violent person and deserved to die"); Heidel v. State, 587 So. 2d 835, 846 (Miss. 1991) (stating that "in the case of a man on trial for assault, the prosecution may not prove that the man assaulted another two weeks earlier" because the prejudicial effect of such evidence outweighs the probative value and that the same view of jury psychology also supports precluding the defendant from offering in similar evidence with respect to the victim); *accord* State v. Dallas, 710 P.2d 580, 589 (Idaho 1985) (noting that Idaho prohibits the accused from introducing specific instances of the victim's conduct in order to support the inference that the victim was the first aggressor because the "bad character of the deceased is likely to be thought of by the jury as an excuse for the killing"); Horton, *supra* note 53, at 457-58 (citing *Chandler*, 405 S.E.2d at 675).

63. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 782 (1986); *accord Dallas*, 710 P.2d at 589 ("Learning of the victim's bad character could lead the jury to conclude that the victim merely 'got what he deserved' and to acquit for that reason.").

64. 426 N.E.2d 965 (Ill. App. Ct. 1981) (Rizzi, J., concurring).

65. *Id.* at 970.

The third argument supporting inadmissibility addresses the systemic concern of wasting time by creating a trial within a trial. Admitting specific act evidence might open up numerous collateral issues and possibly create a mini-trial out of each separate instance to determine what really occurred.[66] The contention is that the victim's character itself is not an element of the crime or defense; rather, it is merely circumstantial evidence of whether the victim was the aggressor.[67] Allowing the jury to focus on these collateral issues could result in mini-trials, thereby resulting in a tremendous waste of judicial time and resources.[68]

In addition to wasting time, "[c]ollateral issues might cloud the real issues and confuse the jury."[69] Ultimately, the jury must decide "how the defendant and victim behaved on this [particular] occasion, not whether the victim . . . had a character . . . for aggression or violence."[70]

The fourth rationale is that "[t]he state cannot anticipate and prepare to rebut every specific prior act of violence of a . . . victim."[71] Requiring the prosecution to be prepared to litigate any prior bad act places an unjustifiable burden on the prosecution.[72] Allowing the de-

66. *See* People v. Fischer, 426 N.E.2d 965, 971 (Ill. App. Ct. 1981) (Rizzi, J., concurring) (stating that "permitting proof of specific prior acts of the decedent to show that he acted a certain way during the incident involved in the case on trial would open up numerous collateral issues, virtually making a separate trial out of each separate act"); *see also* State v. Waller, 816 S.W.2d 212, 214 (Mo. 1991) (en banc) ("Numerous collateral issues could be raised, resulting in a lengthy trial."); State v. Tribble, 428 A.2d 1079, 1084 (R.I. 1981) (citing the most common arguments in support of excluding specific act evidence); Kainen, *supra* note 55, at 17-18 (arguing that "the low probative value of [specific act evidence] weighed against its potential for prejudice and confusion of the issue by raising a collateral matter justifies New York's rule of exclusion" (citing Williams v. Lord, 996 F.2d 1481 (2d Cir. 1993))); Horton *supra* note 53, at 456 (citing *Waller*).

67. Kainen, *supra* note 55, at 17.

68. *Fischer*, 426 N.E.2d at 971; Horton, *supra* note 53, at 456.

69. Horton, *supra* note 53, at 456 (citing *Waller*, 816 S.W.2d at 214); *accord Tribble*, 428 A.2d at 1084; Kainen, *supra* note 55, at 17; *cf. Howell*, 649 P.2d at 96 (noting that Utah only allows a victim's violent character to be proven by reputation evidence and evidence of prior criminal convictions in order "[t]o prevent the trial from being drawn into pathways collateral to the central issue of guilt"). *But cf.* State v. Miranda, 405 A.2d 622, 624-25 (Conn. 1978) (allowing specific instances of conduct only in the form of a prior conviction, noting that the introduction of the victim's criminal record is not likely to confuse the jury or waste time).

70. Kainen, *supra* note 55, at 12.

71. *Waller*, 816 S.W.2d at 215; *accord Miranda*, 405 A.2d at 623 (allowing specific instances of conduct only in the form of a prior conviction, noting "[t]hat a homicide victim had a record of violent crime should not come as a surprise to the prosecution"); *Fischer*, 426 N.E.2d at 971 (Rizzi, J., concurring) (explaining that "although the State is bound to foresee that the reputation of the decedent may be put in issue, it cannot be expected to anticipate and prepare to rebut each and every specific prior act of the decedent"); Horton, *supra* note 53, at 456 (citing *Waller*).

72. *Fischer*, 426 N.E.2d at 971.

fendant to introduce evidence of prior bad acts committed by the victim, without advance notice to the state, could result in unfairness to the state due to the element of surprise.[73] In addition, evidence of prior bad acts, as opposed to prior convictions, is susceptible to exaggerated or "fabricated testimony by the defendant and defense witnesses concerning the [victim's] propensity for violence."[74]

Finally, some courts and commentators argue that the court should not allow the defendant to introduce evidence of the victim's past acts of violence since the state is not allowed to offer similar evidence relative to the defendant's prior bad acts.[75] Allowing the defendant to offer such evidence while precluding the state from doing so "creates a double standard favorable to the defendant."[76]

Strong policy arguments also support the position that specific act evidence should be admissible to prove that the victim was the aggressor. Supporters of admissibility similarly focus on the probative value, prejudicial impact and systemic concerns associated with such evidence.

First, supporters argue that specific act evidence is highly probative because an individual's past behavior is often the best indicator of his future behavior.[77] In fact, the Federal Rules of Evidence Advisory Committee's Notes state that "specific instances of conduct is the most convincing" method of proving character.[78]

In addition to its probative value, courts and commentators argue that specific act evidence should be admissible when offered by the defendant because there is a "constitutional imperative to preserve a defendant's right to present [an adequate] defense."[79] Specific act evidence is usually inadmissible against a defendant to prove the offense

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73. Chandler v. State, 405 S.E.2d 669, 674 (Ga. 1991) (imposing a requirement that the defendant notify the trial court prior to trial of his intention to introduce such evidence in order to avoid unfair "surprise" to the state).

74. Galvin, *supra* note 63, at 782.

75. *Waller*, 816 S.W.2d at 215; Horton, *supra* note 53, at 456 (citing *Waller*). *But 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, 653 (1993) (arguing "that there is a fundamental difference in the effect of specific acts evidence when it is offered by the state and when offered by the accused" and, thus, that the accused should not be prohibited from introducing such evidence).

76. *Waller*, 816 S.W.2d at 215; Horton, *supra* note 53, at 456 (citing *Waller*).

77. *See, e.g.*, Larsen, *supra* note 75, at 655 ("This premise is based on the reasoning, so ingrained in our collective intuition and common sense, that an individual's past behavior is often the best predictor of her future behavior.").

78. FED. R. EVID. 405 advisory committee's notes.

79. *See* Horton, *supra* note 53, at 457 (arguing that the "courts must weigh the constitutional imperative to preserve a defendant's right to present a defense" against the danger of "acquittals based on antipathy for the victim").

charged since potential for prejudice substantially outweighs the probative value of such evidence where the defendant's life or liberty is at stake.[80] However, where the victim's violent character is at issue, "the danger of prejudice to the defendant lies in refusing to admit such evidence, while its high degree of relevance and reliability remains constant."[81]

Finally, courts and commentators argue that the systemic concerns voiced by supporters of inadmissibility are unfounded. First, supporters state that "there is no basis for the . . . argument that the jury might acquit a guilty person because it perceives the third party, against whom the specific acts evidence is introduced, as a bad person deserving of punishment."[82] In addition, supporters contend that the argument that this type of evidence should not be admissible because it might confuse or mislead the jury 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.'"[83]

As the above discussion demonstrates, strong policy arguments favor both positions. The next section will trace the development of the Illinois rule with respect to the admissibility of specific act evidence in the self-defense context.

B. The Illinois Rule Before People v. Lynch

Prior to 1984, specific act evidence that was offered to prove that the victim had been the aggressor during the incident in question was not admissible in Illinois.[84] Rather, Illinois courts, with few exceptions, routinely ruled that a defendant is limited to proof of a victim's

80. People v. Lynch, 470 N.E.2d 1018, 1021 (Ill. 1984). *Contra* Heidel v. State, 587 So. 2d 835, 846 (Miss. 1991).

81. *Lynch*, 470 N.E.2d at 1021; *see also* Horton, *supra* note 53, at 457 ("[I]n 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 . . . ." (quoting *In re* Robert S., 420 N.E.2d 390, 394 (N.Y. 1981) (Fuchsberg, J., dissenting))). *Contra* Heidel v. State, 587 So. 2d 835, 846 (Miss. 1991) (stating that "in the case of a man on trial for assault, the prosecution may not prove that the man assaulted another two weeks earlier" because the prejudicial effect of such evidence tends to outweigh the probative value and that the same view of jury psychology supports precluding such evidence of the victim).

82. Larsen, *supra* note 75, at 660.

83. Horton, *supra* note 53, at 457 (quoting *In re* Robert S., 420 N.E.2d 390, 394 (N.Y. 1981) (Fuchsberg, J., dissenting)).

84. *See supra* note 2 (citing cases standing for the proposition that specific act evidence is inadmissible to prove that the victim was the aggressor).

reputation if the purpose of the evidence is to establish that the victim had been the aggressor during the incident in question.[85]

People v. Popovich[86] is a clear illustration of the application of this rule. In *Popovich*, the defendant, who was charged with murder, asserted self-defense.[87] At trial, the defendant sought to introduce evidence that the deceased at one time drew a pistol on him to force him to sign an agreement.[88] The trial court excluded this evidence and the defendant was subsequently convicted.[89] On appeal, the Illinois Supreme Court held that the exclusion of this evidence was not error because it was not probative of the victim's character.[90] In so holding, the court explained that a victim's violent character may be proved only by reputation evidence and not by evidence of a prior bad act committed by the victim.[91]

People v. Peeler[92] also exemplifies the pre-*Lynch* rule of admissibility. In *Peeler*, the defendant, who was charged with murder, asserted self-defense and testified that the victim had been the aggressor.[93] To prove that the victim was the aggressor, the defendant introduced evidence from a third-party witness that the victim "was feared in the neighborhood."[94] The defendant also attempted to elicit testimony from the same third-party witness about prior bad acts that were committed by the victim against someone other than the defendant.[95] The trial court excluded this evidence.[96]

The defendant appealed and claimed that the exclusion of this evidence was prejudicial error; however, the appellate court disagreed, finding that the trial court "was entirely proper" in excluding the evidence.[97] In ruling on the exclusion of this evidence, the appellate court recognized the general rule that a defendant who asserts self-defense and claims that the victim was the aggressor may offer evi-

85. *See supra* note 2 (citing cases standing for the proposition that specific act evidence is inadmissible to prove that the victim was the aggressor).

86. 129 N.E. 161 (Ill. 1920).

87. *Id.* at 163.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* The court explained that "[w]hile there was testimony of numerous witnesses that the reputation of the deceased for being a violent and dangerous man was bad, yet such testimony did not aid or render competent the testimony of [the witness] sought to be introduced here." *Id.*

92. 299 N.E.2d 382 (Ill. App. Ct. 1973).

93. *Id.* at 384.

94. *Id.* at 386.

95. *Id.*

96. *Id.*

97. *Id.*

dence of specific acts of violence directed against the defendant.[98] The court explained that this evidence is admissible because it "tends to show the circumstances confronting the defendant, the extent of his apparent danger and the motive by which he was influenced."[99] However, the *Peeler* court found that this rule did not apply to the evidence offered in the case at bar.[100] The court noted that the evidence that the defendant sought to introduce was evidence of acts committed by the victim that were not directed against the defendant.[101] Rather, the testimony which the defendant's counsel attempted to elicit from the third-party concerned specific instances which formed the basis of the witness' opinion of the victim's reputation.[102] The *Peeler* court found that "[i]t is fundamental that such evidence is inadmissible."[103]

People v. Robinson[104] represents another example of where a court applied the general rule that a defendant may use only reputation evidence to prove a victim's violent character and, thus, that the victim was the aggressor.[105] In *Robinson*, the defendant was charged with aggravated battery for allegedly striking a police officer in the face.[106] At trial, the defendant asserted that he did not strike the officer, but that the officer had filed the charge in an attempt to hide the truth.[107] The defendant alleged that the officer had stopped him for a traffic violation, lost his temper and struck the defendant in the face.[108] To support his defense, the defendant sought to admit, and the trial court subsequently excluded, evidence of specific instances in which the officer had allegedly used excessive force.[109]

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* After testifying that the victim "was pretty well feared by the neighborhood," the third party was asked why this was so. The prosecution's objections to this line of questioning were sustained. *Id.*

103. *Id.*

104. 371 N.E.2d 1170 (Ill. App. Ct. 1977).

105. *Id.* at 1176. In *Robinson*, the defendant did not claim self-defense; rather, he claimed that the officer had attacked him and that charges were brought against him only in order to conceal this fact. *Id.* at 1171-72, 1175. However, the court ruled that the rules on the admissibility of specific act evidence in the self-defense context apply because the defendant had introduced evidence that the police officer had attacked him. *Id.* at 1175.

106. *Id.* at 1171.

107. *Id.*

108. *Id.* at 1171-72.

109. *Id.* at 1172-73, 1176. The defendant also unsuccessfully tried to admit evidence that the Federal Bureau of Investigations was investigating charges that the officer had frequently used excessive force, especially against black individuals, in the course of his duties as a police officer

The defendant appealed the exclusion of this testimony, contending that the excluded evidence should have been admitted because the evidence was offered to show that the police officer "was of a violent disposition."[110] The court agreed that evidence of the officer's violent disposition was relevant because it "tended to corroborate the defendant's version" of the incident.[111] The court stated that "[t]he question remains, however, whether evidence of specific violent acts is admissible to prove that a witness has a violent character."[112] In answering this question, the court acknowledged:

> It is well settled that where a defendant claims self-defense and preliminary testimony establishes an act of aggression by the alleged victim of defendant's acts, the defendant is permitted to introduce evidence concerning the violent temper and disposition of the victim and any prior threats or misconduct by the victim directed toward the defendant.[113]

The court then stated,

> [T]he law in Illinois has long been settled that proof of a violent temper and disposition can only be made through evidence of the witness' reputation for that particular character trait (citations omitted), and we feel that if this rule is to be abolished it must be done by the supreme court. Accordingly, we hold that the trial court did not err in excluding the evidence of [the officer's] prior acts of violence.[114]

However, as *People v. Robinson* illustrates, while the general rule was that specific act evidence was inadmissible, a growing number of appellate court decisions seemed to indicate a willingness to admit this evidence when offered by a defendant to prove that the victim was the aggressor.[115]

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and evidence that on November 23, 1976, the officer had been suspended from the Alton police force for conduct unbecoming of a police officer. *Id.* at 1172-74.

110. *Id.* at 1175.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1176.

115. *See, e.g.*, People v. Gossett, 451 N.E.2d 280, 284-86 (Ill. App. Ct. 1983) (holding that the trial court erred in excluding evidence of specific acts of violence committed by the homicide victim "which were not directed at the defendant and of which the defendant had no knowledge at the time of the incident"); People v. Fischer, 426 N.E.2d 965, 969 (Ill. App. Ct. 1981) (suggesting that some types of specific act evidence might be admissible due to its probative value); People v. Buchanan, 414 N.E.2d 262, 264 (Ill. App. Ct. 1980) (stating that evidence that the victim had committed violent acts helps corroborate the defendant's testimony that the victim had been the aggressor); People v. Montgomery, 366 N.E.2d 623, 628 (Ill. App. Ct. 1977) (approving of the *Baer* court's conclusion that "specific prior incidents of violent aggression by the victim may be admissible as tending to show that he was the aggressor in the incident"); People v. Baer, 342 N.E.2d 177, 181 (Ill. App. Ct. 1976) (concluding that "specific prior incidents of

People v. Fischer,[116] decided three years prior to *Lynch*, exemplifies this trend in the appellate courts. In *Fischer*, the defendant, charged with two counts of murder and two counts of armed violence, pled self-defense and claimed that the victim was the aggressor.[117] To support his version of the incident, the defendant attempted to elicit testimony from a third party about prior bad acts committed by the victim.[118] The third-party witness, who was the bartender at a bar frequented by the victim, would have testified that on one occasion the bartender told the victim he could not exit through the back door of the tavern and the victim did so anyway.[119] The witness also would have testified that on another occasion, the witness refused to serve the victim a drink, after which the victim "began pounding the bar and name calling."[120]

The *Fischer* court found that the trial judge had properly excluded the evidence because these particular specific acts had no probative value in making the determination of whether the victim had been the aggressor during the incident in question.[121] The court stated,

> Many individuals become loud and somewhat less orderly after a few hours of drinking in their local tavern. This does not make them violent persons. We do not believe that this evidence has any probative value in determining whether in the fight with [the victim] defendant was the aggressor or acting in self defense. Accordingly, we find that the trial judge properly excluded this evidence.[122]

However, while holding that this particular evidence was insufficient, the court left open the question of whether some specific act evidence might be sufficient for this purpose.[123]

Thus, prior to the 1984 case of *People v. Lynch*, the general rule of law in Illinois was that a defendant who sought to establish that the victim was the aggressor by proof of the victim's violent character was limited to establishing such character by reputation evidence. Evidence of specific instances of conduct was inadmissible. However, a

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violent aggression by the victim may be admissible as tending to show that he was the aggressor in the incident").

116. 426 N.E.2d 965 (Ill. App. Ct. 1981).

117. *Id.* at 966-67.

118. *Id.*

119. *Id.* at 968-69.

120. *Id.* at 969.

121. *Id.*

122. *Id.*; *cf.* People v. Cobb, 542 N.E.2d 1171, 1178 (Ill. App. Ct.), *cert. denied*, 548 N.E.2d 1072 (Ill. 1989) (holding that evidence that the victim became "rowdy and argumentative" when she drank alcohol did not establish that the victim was a violent person).

123. *Fischer*, 426 N.E.2d at 968. The court stated that "[w]here evidence of specific acts is sought for such purpose [to prove circumstantially that the victim was the aggressor], it would serve no purpose to require defendant to have knowledge of the prior acts." *Id.*

growing number of appellate court decisions seemingly paved the way for *Lynch*.[124]

C. People v. Lynch

In *People v. Lynch*,[125] the Illinois Supreme Court created an exception to the well-established rule that specific act evidence is inadmissible to establish that the victim had been the aggressor during the incident in question. The *Lynch* court held that a victim's prior battery convictions, of which the defendant was unaware at the time of the incident in question, were admissible to prove that the victim had been the aggressor.[126]

1. *The Majority Opinion*

In *Lynch*, the defendant was tried for murder for shooting the decedent in the head.[127] The defendant asserted self-defense.[128] At the defendant's trial, the evidence conflicted as to whether the defendant or the victim was the initial aggressor.[129] To prove the victim's propensity toward violence and, thus, that the victim was the aggressor, the defendant sought to admit evidence of the victim's three prior convictions for battery.[130] The trial court excluded this evidence "[b]ecause the defendant was unaware of [the convictions] when he shot [the victim]"; therefore, the prior convictions were "irrelevant and inadmissible."[131] The jury returned a verdict of voluntary manslaughter and the appellate court affirmed the conviction.[132]

The Illinois Supreme Court reversed, holding that "when the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it."[133] The court found that the three prior battery convictions were

124. People v. Gossett, 451 N.E.2d 280 (Ill. App. Ct. 1983); People v. Fischer, 426 N.E.2d 965 (Ill. App. Ct. 1981); People v. Buchanan, 414 N.E.2d 262 (Ill. App. Ct. 1980); People v. Montgomery, 366 N.E.2d 623 (Ill. App. Ct. 1977); People v. Baer, 342 N.E.2d 177 (Ill. App. Ct. 1976).

125. 470 N.E.2d 1018 (Ill. 1984).

126. *Id.* at 1020-21.

127. *Id.* at 1019.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1019-20.

132. *Id.* at 1019. The appellate court rejected the defendant's contention that the exclusion of evidence of the victim's prior convictions was error on the ground that the defendant had failed to make an offer of proof. *Id.* However, the Illinois Supreme Court ruled that this conclusion was erroneous. *Id.* at 1021.

133. *Id.* at 1020.

"reasonably reliable evidence of a violent character;" thus, the trial court should have allowed the defendant to introduce this evidence in an attempt to prove that the victim had been the aggressor.[134]

The court explained that the violent character of the victim is relevant to prove two distinct evidentiary purposes when self-defense is at issue.[135] The first purpose is to prove that the defendant's use of deadly force was reasonable under the circumstances.[136] The court stated that "the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior" and, thus, may be used to prove that the use of deadly force was reasonable.[137]

The second evidentiary purpose to which the victim's character is relevant is to circumstantially establish who was the aggressor.[138] The court explained that "evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened."[139] In this factual scenario, the court determined that the jury should have been allowed to consider all of the available facts in order to determine what actually occurred.[140] Thus, evidence of the three prior battery convictions was relevant to determine whether the defendant or the victim had been the aggressor.[141]

The court acknowledged that such evidence is normally inadmissible against a defendant to prove the offense charged "because the danger of prejudice outweighs the relevance of the evidence where the defendant stands to lose his liberty . . . if convicted."[142] However, the court found that "[w]here the victim's propensity for violence is in question, . . . the danger of prejudice to the defendant lies in refusing to admit such evidence, while its high degree of relevance and reliability remains constant."[143]

The *Lynch* majority limited its holding in two ways. First, the court stated that "a defendant may not introduce evidence of the victim's character until some evidence has been presented that the victim was [the aggressor] and that the defendant therefore acted in self de-

134. *Id.* at 1020-21.
135. *Id.* at 1020.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1020-21.
142. *Id.* at 1021.
143. *Id.*

fense."[144] The court thus stated that such evidence is not admissible unless self-defense is at issue.[145]

The *Lynch* court also limited its holding by refusing to hold that any battery conviction necessarily proves a propensity towards violence.[146] Rather, the court found that these particular battery convictions were competent evidence because the convictions were recent[147] Illinois convictions.[148]

2. Lynch's *Dissent*

In *Lynch*, Chief Justice Ryan filed a dissenting opinion which was joined by Justice Ward.[149] Like the majority, the dissenters recognized the two distinct evidentiary purposes for which evidence of a victim's character may be admitted: (1) to prove the defendant's state of mind and (2) to prove that the victim was the initial aggressor.[150] However, the dissenters argued that, while evidence of a victim's threats or conduct may be admissible to prove the former, this same evidence may not be sufficient to prove the latter, i.e., that the victim was the aggressor at the time of the incident at issue.[151] The dissenters reasoned that "the mere fact that [someone] has been convicted of a battery is not necessarily evidence of a violent . . . character."[152] The conviction may have arisen "out of a domestic [quarrel] or out of charges and countercharges growing out of a quarrel."[153] In addition, a wide range of conduct may constitute a battery under Illinois law.[154]

Based on the above reasoning, the dissenters found that the evidence was insufficient to sustain a reversal for two reasons.[155] First, the defendant had not informed the court as to which of the two evidentiary propositions he was attempting to prove by the evidence.[156]

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144. *Id.* at 1022.

145. *Id.*

146. *Id.* at 1021. This court did state that "[i]n general, battery is *prima facie* probative enough of aggressive and violent tendencies to be admissible." *Id.*

147. One of the battery convictions came only weeks before the homicide. *Id.*

148. *Id.* The court noted that because the convictions were all in Illinois, the Illinois definition of battery had been the standard and there was "no problem of a strange definition of battery in another jurisdiction." *Id.*

149. *Id.* at 1022, 1024.

150. *Id.* at 1023 (Ryan, J., dissenting); *see supra* notes 17-24 and accompanying text (discussing the two distinct evidentiary purposes that the defendant may use character evidence to prove).

151. *Lynch*, 470 N.E.2d at 1023.

152. *Id.*

153. *Id.*

154. *Id.* Chief Justice Ryan noted that a push or a slap may constitute battery under the Illinois statute. *Id.*

155. *Id.* at 1024.

156. *Id.*

Second, the defendant had not informed the court of "the nature of the conduct which was the basis for the prior convictions."[157]

3. *Impact of the* Lynch *Opinion*

The *Lynch* holding was the first time that the Illinois Supreme Court had articulated this exception to the well-established rule that prior bad acts committed by the victim are not admissible to prove that the victim had been the aggressor. Read narrowly, the Illinois appellate courts could have determined that the *Lynch* court intended for this exception to apply only in limited cases. First, *Lynch* could be read as only allowing in evidence of a victim's prior bad acts of which the defendant was unaware at the time of the incident in question if the evidence is offered to prove that the victim was the aggressor.[158] Under this reading, such evidence would not be admissible to prove that the defendant feared the victim.[159] In addition, *Lynch* could be read as only allowing in such evidence in homicide cases.[160] Thus, *Lynch* would not be applicable in a case where the defendant is charged with anything less than homicide.[161] Finally, *Lynch* could be read as only allowing in such evidence if the prior bad acts are certified convictions and the court finds that the acts are admissible after conducting the requisite evidentiary balancing test of admissibility.[162] Not all Illinois appellate courts, however, have adopted this narrow interpretation of *Lynch*.[163]

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157. *Id.*

158. *But see infra* notes 172-85.

159. *But see infra* notes 227-29 (discussing why this should be the rule).

160. *But see infra* notes 186-98.

161. *Id.*

162. *But see infra* notes 199-209. Under the evidentiary balancing test, the court must first determine if the proffered evidence is relevant. GRAHAM, *supra* note 1, §§ 401.1, 403.1. "Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." People v. Lovings, 655 N.E.2d 1152, 1156 (Ill. App. Ct.), *cert. denied*, 660 N.E.2d 1275 (Ill. 1995); *accord* People v. Eyler, 549 N.E.2d 268, 288 (Ill. 1989), *cert. denied*, 498 U.S. 881 (1990); People v. Monroe, 362 N.E.2d 295, 297 (Ill. 1977).

If the court finds that the proffered evidence is relevant, the court must then determine whether to admit the evidence. GRAHAM, *supra* note 1, § 403.1. Generally, relevant evidence is admissible unless the court finds that the probative value of such evidence is substantially outweighed by one or more of the following disadvantages: "unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time, and the needless presentation of cumulative evidence." *Id.*; *accord* People v. Booker, 653 N.E.2d 952, 954 (Ill. App. Ct. 1995) ("Proffered evidence which has little probative value due to remoteness, uncertainty, or its potential prejudicial nature may be rejected as irrelevant.").

163. *See infra* part II.D (discussing decisions of the Illinois appellate courts which have interpreted the *Lynch* opinion).

D. *The Illinois Appellate Courts' Interpretation of* Lynch

Some Illinois appellate courts have read *Lynch* broadly and have not confined it to a narrow exception.[164] In so doing, the appellate courts have extended *Lynch's* holding in three significant ways.[165] First, citing *Lynch*, some appellate courts have allowed the defendant to offer evidence of a victim's prior bad acts, which were unknown to the defendant at the time in question, to prove that the defendant was reasonably afraid of the victim.[166] Thus, the appellate courts have not limited *Lynch's* holding only to cases where there is a dispute as to who was the aggressor.[167] Secondly, some lower courts have applied the *Lynch* rule to cases where the defendant is charged with a crime other than murder; thus, *Lynch's* holding now extends beyond homicide cases.[168] Finally, some appellate courts have cited *Lynch* as the authority for admitting a wide range of prior bad acts, ranging from

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164. *See infra* notes 165-209 and accompanying text (discussing the ways that the appellate courts have extended *Lynch*).

165. However, the *Lynch* rule has not been extended to apply in cases where self-defense is not at issue. People v. Armstrong, 653 N.E.2d 17, 18-19 (Ill. App. Ct. 1995); People v. Batac, 631 N.E.2d 373, 384 (Ill. App. Ct.), *cert. denied*, 537 N.E.2d 815 (Ill. 1994); People v. Chapman, 633 N.E.2d 718, 732 (Ill. App. Ct. 1992); People v. Isbell, 532 N.E.2d 964, 971 (Ill. App. Ct. 1988), *cert. denied*, 537 N.E.2d 815 (Ill. 1989); People v. Charleston, 477 N.E.2d 762, 765 (Ill. App. Ct. 1985). In addition, the courts have not extended the *Lynch* rule to allow in evidence of a bystander's propensity for violence. People v. Bridges, 544 N.E.2d 40, 42 (Ill. App. Ct.), *cert. denied*, 548 N.E.2d 1072 (Ill. 1989) (refusing to extend *Lynch* to cover a bystander, i.e., one who was merely present during the incident in question, as opposed to a victim, because doing so "would have the effect of making a man with a violent past fair game for killing").

166. *See, e.g.*, People v. Davidson, 601 N.E.2d 1146, 1150 (Ill. App. Ct. 1992) (allowing the defendant to prove that he was afraid of the victim by evidence of the victim's prior theft convictions, hospitalizations, and drug and alcohol dependencies); *see also infra* notes 170-82 and accompanying text (discussing the *Davidson* case in depth). *Contra* People v. Ciavirelli, 635 N.E.2d 610, 614-15 (Ill. App. Ct. 1994) (representing the opposite interpretation of *Lynch* in stating that prior acts of violence which postdated the shooting in question could not have affected the defendant's state of mind at the time of the shooting).

167. *See, e.g.*, *Davidson*, 601 N.E.2d at 1150 (holding that the trial court erred in excluding evidence that the defendant offered in order to prove that he was reasonably afraid of the victim where the evidence was that the victim had acted violently at a mental institution five months after the incident).

168. *See, e.g.*, People v. Harris, 587 N.E.2d 47, 49 (Ill. App. Ct. 1992) (holding that "[i]t is well-settled that when a theory of self-defense is raised in a battery case, evidence of the peaceful or violent character of either the accused or the victim may be relevant as circumstantial evidence to show which party was the initial aggressor"); People v. Keefe, 567 N.E.2d 1052, 1059 (Ill. App. Ct. 1991) (applying the *Lynch* rule in the battery context); People v. Randle, 498 N.E.2d 732, 735 (Ill. App. Ct. 1986) (reading the *Lynch* rule as applying to both homicide and battery cases); *see also infra* notes 183-95 and accompanying text (discussing the *Keefe* case in detail). *But cf.* People v. Lovings, 655 N.E.2d 1152, 1156 (Ill. App. Ct.), *cert. denied*, 660 N.E.2d 1275 (Ill. 1995) (refusing "to extend the *Lynch* rule and hold that, in an armed robbery or robbery case, a defendant may question the complaining witness regarding past instances of violent behavior by the witness for the purpose of showing that the witness did not subjectively feel threatened by the defendant's actions").

evidence of prior convictions to evidence of bad acts that had not resulted in a conviction.[169] For example, one court allowed the defendant to prove that the victim had been the aggressor by offering evidence that the victim, while waiting in a drive-through restaurant line, had once bumped another individual's automobile three times.[170] Thus, *Lynch's* holding is not necessarily limited to evidence of a victim's prior convictions; rather, the defendant might be allowed to offer evidence of any bad act, regardless of whether it resulted in a conviction.[171]

People v. Davidson[172] exemplifies the first broad interpretation of *Lynch,* which is that *Lynch* allows a defendant to offer evidence of a victim's prior bad acts, of which the defendant was unaware, to prove

169. *See, e.g.*, People v. Clarke, 612 N.E.2d 1351, 1354 (Ill. App. Ct.), *cert. denied*, 622 N.E.2d 1213 (Ill. 1993) (allowing the defendant to offer evidence that the victim, while waiting in a drive-through restaurant line, had once bumped another individual's car three times from behind); People v. Devine, 557 N.E.2d 953, 956 (Ill. App. Ct. 1990), *cert. denied*, 575 N.E.2d 918 (Ill. 1991) (noting that the trial court had allowed the defendant to attempt to prove that the victim was the aggressor by introducing evidence of the victim's prior misdemeanor conviction, and testimony that the victim had carried a gun on occasion, that the victim became violent when on cocaine, and that the victim had once shot at an old boyfriend); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 1989) (holding that the trial court improperly excluded evidence that the victim had pulled a gun on one or more individuals which the defendant offered to prove that he had acted in self-defense); People v. Hanson, 485 N.E.2d 1144, 1149-50 (Ill. App. Ct. 1985) (holding that the trial court committed prejudicial error when it prevented the defendant from presenting two witnesses who would have testified that the victim had threatened a person with a knife at a tavern and another witness who would have testified that the victim threatened "him and his wife with a knife when [the victim] felt the witness had run his car off the road" because this evidence was "relevant to show who was the aggressor"). *Contra* People v. Costillo, 608 N.E.2d 100, 107 (Ill. App. Ct. 1992) (holding that the victim's arrest record for unlawful possession of a weapon without evidence that the victim brandished the weapon or used it in any way did not indicate that the victim was a violent person); People v. Gilbert, 586 N.E.2d 1308, 1313 (Ill. App. Ct.), *cert. denied*, 596 N.E.2d 633 (Ill. 1992) (reading *Lynch* as allowing in evidence of the victim's prior aggravated battery conviction but not the victim's prior convictions for criminal damage to property and unlawful delivery of cannabis); People v. Ellis, 543 N.E.2d 196, 200 (Ill. App. Ct. 1989), *cert. denied*, 553 N.E.2d 398 (Ill.), *and cert. denied*, 498 U.S. 942 (1990) (holding that the trial court properly excluded evidence of the victim's prior arrests because "evidence of a victim's mere arrest is inadmissible since it does not indicate whether the victim actually performed any of the acts charged"); *but cf.* People v. Loggins, 629 N.E.2d 137, 143-44 (Ill. App. Ct. 1993) (finding that the trial court properly precluded the defendant from asking whether the victim had been "seen to get aggressive" because the question did not properly identify any specific prior act of violence).

170. *Clarke*, 612 N.E.2d at 154; *see infra* notes 199-209 and accompanying text (discussing the *Clarke* case in detail).

171. *See, e.g., infra* notes 199-209 and accompanying text (discussing the *Clarke* case where the defendant was allowed to prove the victim's violent character by offering in a third-party's testimony that the victim had once bumped his car three times from behind while waiting in a drive-through restaurant's line).

172. 601 N.E.2d 1146 (Ill. App. Ct. 1992).

that the defendant was afraid of the victim.[173] In *Davidson*, the defendant was charged with attempted first-degree murder, aggravated battery and armed violence for stabbing the victim three times in the chest during an altercation.[174] At trial, the defendant argued that he was afraid of the victim because the victim had attacked him the week before; thus, he had grabbed a knife in an effort to protect himself.[175] In contrast, the victim testified that he did not recognize the defendant at the time of the incident.[176] He further testified that the defendant had attacked him and had stabbed him three times in the chest because he had refused to give the defendant some of the beer that he was drinking.[177]

At trial, the defendant presented evidence of the victim's violent character to prove that the degree of force that he had used was justified because of the victim's propensity for violence.[178] First, the defendant testified that the victim had attacked him during the prior week.[179] In addition, the court allowed the defendant to introduce evidence of the victim's prior theft convictions, hospitalizations, and drug and alcohol dependencies.[180] However, the trial court refused to admit evidence that five months after the fight between the defendant and the victim, the victim had threatened the staff at a mental hospital with bodily harm and needed to be placed in restraints.[181]

The appellate court held that the trial court erred in excluding the evidence of the incident at the mental hospital since the incident was "undeniably connected to the self-defense argument."[182] Citing

173. *See id.* at 1150 (allowing the defendant to prove that he was afraid of the victim by evidence of the victim's prior theft convictions, hospitalizations, and drug and alcohol dependencies). *Contra* People v. Ciavirelli, 635 N.E.2d 610, 614-15 (Ill. App. Ct. 1994) (finding that prior acts of violence which postdated the shooting in question could not have affected the defendant's state of mind at the time of the shooting); People v. Williams, 617 N.E.2d 87, 96 (Ill. App. Ct. 1993) (explaining that "one can only consider facts one knows, and evidence of the victim's character is irrelevant to the self-defense theory unless the defendant knew of the victim's violent nature").

174. *Davidson*, 601 N.E.2d at 1147-48.

175. *Id.* at 1148.

176. *Id.*

177. *Id.*

178. *Id.* at 1149-50.

179. *Id.* at 1150. On cross-examination, the victim admitted to having a prior aggravated battery conviction, but he denied that he had an aggravated assault conviction and did not recall that he had fought with the defendant the prior week. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* *But see* People v. Ware, 536 N.E.2d 713, 717-18 (Ill. App. Ct. 1988) (holding that evidence of a psychiatric report taken of the victim twelve days after the incident in question was not relevant to prove that the victim had been the aggressor).

Lynch,[183] the appellate court reasoned that case law supports the proposition that where a defendant asserts self-defense, the defendant has the right to present evidence of prior violent and/or aggressive acts by the injured party, regardless of whether the evidence is offered to prove the defendant's state of mind or that the victim was the aggressor.[184] In addition, the *Davidson* court viewed *Lynch* as authorizing the admission of all types of specific act evidence, regardless of whether the incident resulted in a conviction.[185]

People v. Keefe[186] illustrates the Illinois appellate courts' second extension of *Lynch*, which is the extension to cases involving a defendant who is charged with a crime other than homicide.[187] In *Keefe*, the defendant was charged with attempted first-degree murder, aggravated battery, and armed violence.[188] These charges arose from an altercation that the defendant had had with the victim in which the defendant had stabbed the victim twice in the back.[189] At trial, the defendant asserted self-defense.[190] The evidence conflicted as to whether the defendant or the victim was the aggressor at the time of

183. *Davidson*, 601 N.E.2d at 1149-50. The court explained that the *Lynch* court had found the victim's prior convictions for violence admissible because the convictions were evidence of the reasonableness of the degree of force used against the victim. *Id.* at 1150. However, the *Lynch* court had actually found that particular type of specific act evidence was admissible to demonstrate that the victim had a violent character in order to prove that the victim was the aggressor. People v. Lynch, 470 N.E.2d 1018, 1020 (Ill. 1984).

184. *See supra* notes 126-49 and accompanying text (discussing the *Lynch* holding); *see also supra* notes 17-24 and accompanying text (discussing the two distinct evidentiary propositions for which character evidence is admissible).

185. *See Davidson*, 601 N.E.2d at 1150 (allowing the defendant to prove that he was afraid of the victim by evidence of the victim's prior hospitalizations and drug and alcohol dependencies). *But cf.* People v. Lynch, 470 N.E.2d 1018, 1021 (Ill. 1984) (holding that the prior battery convictions were admissible due to the probative value and high degree of relevance where the victim's propensity for violence was in question).

186. 567 N.E.2d 1052 (Ill. App. Ct. 1991).

187. *See id.* at 1059 (viewing the *Lynch* holding as applying to cases where the defendant is charged with battery and not just where the defendant is charged with homicide); *see also* People v. Harris, 587 N.E.2d 47, 49 (Ill. App. Ct. 1992) (holding that "[i]t is well-settled that when a theory of self-defense is raised in a battery case, evidence of the peaceful or violent character of either the accused or the victim may be relevant as circumstantial evidence to show which party was the initial aggressor"); People v. Randle, 498 N.E.2d 732, 735 (Ill. App. Ct. 1986) (reading the *Lynch* rule as applying to both homicide and battery cases). *But cf.* People v. Lovings, 655 N.E.2d 1152, 1156 (Ill. App. Ct.), *cert. denied*, 660 N.E.2d 1275 (Ill. 1995) (refusing "to extend the *Lynch* rule and hold that, in an armed robbery or robbery case, a defendant may question the complaining witness regarding past instances of violent behavior by the witness for the purpose of showing that the witness did not subjectively feel threatened by the defendant's actions").

188. *Keefe*, 567 N.E.2d at 1053.

189. *Id.* at 1054.

190. *Id.* at 1056.

the stabbing.[191] The trial court prohibited the defendant from eliciting testimony relating to the victim's character for violence.[192] A jury found the defendant guilty of all charges and the defendant appealed.[193]

The appellate court held that the trial court erred in excluding evidence of the victim's violent propensities.[194] The court reasoned that the *Lynch* holding is not limited to murder or attempted murder cases; rather, evidence of a victim's violent character may be admitted in battery cases where self-defense is at issue.[195]

In addition, the court held such evidence is admissible not only to show "who threw the first punch," but also to show who the aggressor was at the time the injury was inflicted.[196] Thus, the court reasoned that while the victim was indisputably the first aggressor, there was a question as to who the aggressor was at the time of the stabbing.[197] Accordingly, the court held that the trial court should have admitted the evidence because it tended to support the defendant's version of the facts.[198]

Finally, *People v. Clarke*[199] exemplifies the appellate courts' third extension of *Lynch*, which is that *Lynch* allows the court to admit a wide range of specific act evidence, not only prior convictions, to prove a victim's violent character.[200] In *Clarke*, the victim and the

191. *Id.* at 1059. Pursuant to the testimony at trial, it was undisputed that the victim was the initial aggressor; however, it was unclear who the aggressor was at the time of the stabbing. *Id.*

192. *Id.* at 1058. The evidence which the defendant attempted to elicit concerned a statement that the victim had made to a doctor, indicating that the victim had been to the "hospital on several occasions because of injuries incurred while fighting." *Id.* at 1054. The trial court prohibited the defendant from eliciting such testimony on the grounds that evidence of the victim's violent character was admissible only in homicide cases and, thus, was irrelevant here because it was undisputed that the victim was the initial aggressor. *Id.* at 1058-59.

193. *Id.* at 1053.

194. *Id.* at 1059.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. 612 N.E.2d 1351 (Ill. App. Ct.), *cert. denied*, 622 N.E.2d 1213 (Ill. 1993).

200. In *Clarke*, the evidence was testimony from a third party that the victim had once bumped another individual's automobile three times while waiting in a drive-through restaurant line. *Id.* at 1354; *see also* People v. Davidson, 601 N.E.2d 1146, 1150 (Ill. App. Ct. 1992) (holding that evidence related to an incident in a mental hospital that occurred five months after the incident in question and had not resulted in a prior conviction was admissible); People v. Devine, 557 N.E.2d 953, 956 (Ill. App. Ct. 1990), *cert. denied*, 575 N.E.2d 918 (Ill. 1991) (noting that the trial court had allowed the defendant to attempt to prove that the victim was the aggressor by introducing evidence of the victim's prior misdemeanor conviction, and testimony that the victim had carried a gun on occasion, that the victim became violent when on cocaine, and that the victim had once shot at an old boyfriend); People v. Crum, 539 N.E.2d 196, 203 (Ill. App. Ct.), *cert. denied*, 545 N.E.2d 118 (Ill. 1989) (holding that the trial court improperly excluded evidence

defendant had engaged in a fight in which the defendant had stabbed the victim in the ribs.[201] The defendant was indicted and tried for attempted murder and aggravated battery.[202] At trial, the defendant claimed that he had stabbed the victim in self-defense and that the victim had been the aggressor.[203] However, the victim testified that the defendant had initiated the incident.[204]

To prove that the victim was the aggressor, the defendant was permitted to produce evidence of the victim's aggressive and violent character.[205] This evidence consisted of two witnesses testifying to altercations that they had had with the victim.[206] The first witness testified to an incident where the victim had bumped the witness' automobile "three times from behind while in a drive-through restaurant line."[207] The second witness, a police officer, testified to the victim's violent conduct during the police officer's arrest.[208] The appellate court, citing *Lynch*, explained that this type of evidence of the victim's "aggressive and violent character was relevant and admissible to indicate who was the aggressor" because the defendant had raised the

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that the victim had pulled a gun on one or more individuals which the defendant offered to prove that he had acted in self-defense); People v. Hanson, 485 N.E.2d 1144, 1149-50 (Ill. App. Ct. 1985) (holding that the trial court committed prejudicial error when it prevented the defendant from presenting two witnesses who would have testified that the victim had threatened a person with a knife at a tavern and another witness who would have testified that the victim threatened "him and his wife with a knife when [the victim] felt the witness had run his car off the road" because this evidence was "relevant to show who was the aggressor"). *Contra* People v. Costillo, 608 N.E.2d 100, 107 (Ill. App. Ct. 1992) (holding that the victim's arrest record for unlawful possession of a weapon without evidence that the victim brandished the weapon or used it in any way does not indicate that the victim was a violent person); People v. Gilbert, 586 N.E.2d 1308, 1313 (Ill. App. Ct.), *cert. denied*, 596 N.E.2d 633 (Ill. 1992) (reading *Lynch* as only allowing in evidence of the victim's prior aggravated battery conviction but not the victim's prior convictions for criminal damage to property and unlawful delivery of cannabis); People v. Ellis, 543 N.E.2d 196, 200 (Ill. App. Ct. 1989), *cert. denied*, 553 N.E.2d 398 (Ill.), *and cert. denied*, 498 U.S. 942 (1990) (holding that the trial court properly excluded evidence of the victim's prior arrests because "evidence of a victim's mere arrest is inadmissible since it does not indicate whether the victim actually performed any of the acts charged"); *but cf.* People v. Loggins, 629 N.E.2d 137, 143-44 (Ill. App. Ct. 1993) (finding that the trial court properly precluded the defendant from asking whether the victim had been "seen to get aggressive" because the question did not properly identify any specific prior act of violence).

201. *Clarke*, 612 N.E.2d at 1352.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 1353-54. Citing *People v. Lynch*, the court explained that "[s]ince defendant raised the theory of self-defense and defendant and McBain [the victim] gave extremely different versions of the stabbing, evidence of McBain's aggressive and violent character was relevant and admissible to indicate who was the aggressor." *Id.*

206. *Id.* at 1354.

207. *Id.*

208. *Id.*

theory of self-defense and the defendant and the victim had given different versions of the stabbing.[209]

E. The Cook County State's Attorney's Office's Response to Lynch

In response to the deleterious effect the *Lynch* rule has had on prosecutorial efforts, the Cook County State's Attorney's Office proposed a statutory remedy.[210] The Office is currently lobbying for a new statute which would allow specific act evidence to be used only to prove the defendant's state of mind if the defendant was aware of the incidents.[211] This proposed statute reads as follows:

> 725 ILCS 5/115-16. Prior violent acts by the victim as evidence.
> a. In prosecutions for crimes involving the use of force by a defendant where a defendant asserts that he was legally justified in the use of force, evidence of the victim's prior violent acts is not admissible unless such prior violent acts were actually known to the defendant at the time he committed the crime being prosecuted.
> b. This section shall not be construed to alter existing law regarding the use of prior convictions as impeachment.[212]

The author of the proposed statute argues that the statute's provisions are necessary to alleviate the problems that *Lynch* has created.[213] The most significant problems are that *Lynch* allows the defendant to introduce unreliable evidence that is not relevant to his state of mind regarding his self-defense claim; that *Lynch* allows the defendant to introduce propensity evidence that can never be introduced against the defendant; and that *Lynch* allows propensity evidence to be introduced against the victim who is unable to defend himself.[214] Such problems, according to the author, have "pervert[ed] the trial process" and have created a "prosecutor's nightmare."[215] The proposed statute would eliminate these problems and return Illinois law to the pre-*Lynch* rule that evidence of a victim's prior violent acts must be actually known to the defendant to be admissible.[216]

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209. *Id.* at 1353-54.

210. Memorandum from Peter Fischer, Deputy Supervisor of the Cook County State's Attorney's Office, to Randall E. Roberts, Executive Assistant of the Cook County State's Attorney's Office (July 10, 1995) (on file with the author).

211. *Id.* at 1.

212. *Id.* at 15. The memo further explains "[p]aragraph (b) is necessary to signal the fact that the legislature is not engaging the traditional rules for impeachment by a prior conviction." *Id.*

213. *Id.* at 1.

214. *Id.* at 14. The author also notes the additional problem that "in cases involving police officers as victims there will be a ready made *Lynch* file in the form of OPS [Office of Professional Standards] records yet the positive information in those files cannot go to the jury." *Id.*

215. *Id.* at 13-14.

216. *See supra* notes 84-124 and accompanying text (discussing the Illinois rule of admissibility of such evidence prior to *Lynch*).

F. The Rule on the Admissibility of Such Evidence in Other Jurisdictions

American courts are almost evenly split on this issue, with Illinois representing the minority view. Twenty-one jurisdictions have adopted the *Lynch* position.[217] "Nearly all of [these jurisdictions] have applied the rule with some sort of limitation . . . ."[218] For example, Connecticut and Utah have adopted the position that specific act evidence that is offered to prove that the victim was the aggressor is admissible only in the form of a prior conviction.[219] In contrast, Iowa only allows in evidence of a victim's prior bad acts in criminal cases,[220] while the District of Columbia only admits such evidence in homicide cases.[221]

In contrast, thirty jurisdictions have adopted the pre-*Lynch* rule that "prior specific instances of a victim's conduct are admissible to show a defendant's state of mind, but not to show that the victim was the probable aggressor."[222] One state, Montana, has not adopted a definitive rule.[223]

II. ANALYSIS

A. *Illinois Appellate Courts' Improper Reading of* Lynch

The broad rule of admissibility established by the post-*Lynch* appellate courts is an unsupported and improper reading of *Lynch*. First,

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217. Horton, *supra* note 53, at 454-55 (citing cases in Alabama, Alaska, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Maryland, Mississippi, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, and Virginia and the code of Wyoming which have adopted a rule similar to the *Lynch* rule).

218. Horton, *supra* note 53, at 454-55.

219. Horton, *supra* note 53, at 455 (citing State v. Miranda, 405 A.2d 622, 625 (Conn. 1978) (holding that only prior convictions for crimes of violence are admissible to prove a victim's violent propensity); State v. Howell, 649 P.2d 91, 96 (Utah 1992) (holding that criminal convictions are the only form of specific act evidence admissible to prove the victim's violent character)).

220. *See, e.g.*, Klaes v. Scholl, 375 N.W.2d 671, 674-75 (Iowa 1985) (refusing to allow evidence of a victim's prior bad act in a civil assault case).

221. *See, e.g.*, Harris v. United States, 618 A.2d 140, 144 (D.C. 1992) (allowing evidence of specific instances of a victim's prior violent conduct only in homicide cases).

222. Horton, *supra* note 53, at 455 (citing cases from Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, the Virgin Islands, Washington, West Virginia, and Wisconsin).

223. Horton, *supra* note 53, at 455 (citing MONT. R. EVID. 405 comment ("Existing Montana law has dealt with this method of proof only in criminal cases involving the violent character of the victim offered by the accused to show that the amount of force used by the accused to defend himself was reasonable.")).

the courts should not allow a defendant to prove the reasonableness of his state of mind by offering evidence of a victim's prior bad acts if the defendant was unaware of them at the time of the incident in question.[224] Secondly, the courts should not apply *Lynch* to cases where the defendant is charged with anything less than homicide.[225] Finally, *Lynch* does not stand for the authority to admit prior bad acts that did not result in a conviction.[226]

First, the courts should not allow a defendant to prove the reasonableness of his state of mind by offering evidence of a victim's prior bad acts if the defendant was unaware of them at the time of the incident in question. When the defendant seeks to prove that he was afraid of the victim, specific acts of evidence of which the defendant was unaware are irrelevant since the defendant's state of mind could not have been affected by such prior acts.

The *Lynch* court clearly articulated a difference in admitting specific act evidence offered to prove the defendant's state of mind and specific act evidence offered to prove the victim's propensity for violence.[227] The *Lynch* court explicitly stated, as courts prior to *Lynch* had,[228] that when the defendant offers specific act evidence to prove his state of mind, he must have been aware of the violent acts before the incident in question.[229] Thus, *Lynch* does not and should not stand for the proposition that the defendant may prove that he was afraid of the victim by evidence of the victim's prior bad acts of which the defendant was unaware at the time of the incident in question.

Secondly, Illinois courts should not apply *Lynch* to cases where the defendant is charged with anything less than homicide. The policy arguments that support admissibility of such evidence, such as the constitutional imperative to preserve a defendant's right to an adequate

224. *See supra* notes 172-86 and accompanying text (discussing the Illinois appellate court's view in *Davidson* that *Lynch* allows a defendant to prove the reasonableness of his state of mind with evidence of a victim's prior bad acts even where the defendant was unaware of the acts at the time in question); *see also infra* notes 227-29 and accompanying text (discussing why this is an unsupported and improper reading of *Lynch*).

225. *See supra* notes 186-99 and accompanying text (discussing the extension of the *Lynch* holding to cases other than ones involving homicide); *see also infra* notes 231-35 and accompanying text (discussing why this extension of *Lynch* is unwise).

226. *See supra* notes 199-209 and accompanying text (discussing the extension of *Lynch* to include all types of prior bad acts, not just convictions).

227. *See supra* notes 125-48 and accompanying text (discussing *Lynch's* holding and reasoning).

228. *See supra* notes 84-124 and accompanying text (discussing the pre-*Lynch* cases).

229. *See supra* notes 125-48 and accompanying text (discussing the holding and reasoning of *Lynch*).

defense,[230] are stronger in a homicide than in a non-homicide case. Because the victim is dead in a homicide case, there is less available information and testimony from which the jury can discern the truth. In a non-homicide case, the prosecution can call the victim as a witness who can then tell his side of the story; thus, the need for additional evidence in such cases is mitigated.

Additionally, the potential sentence for the defendant subject to a murder charge weighs in favor of admitting such evidence in a homicide case. The stakes are the highest for the defendant in a homicide case because the court could potentially impose a sentence of life-imprisonment or death. As a result, the court should allow the defendant greater latitude in defending himself. Admitting evidence of a victim's prior bad acts is an example of the greater latitude that the court should give the defendant charged with murder.

The contrary view is that the arguments that favor including such evidence are stronger in non-homicide cases; thus, evidence should be admitted in both contexts. In non-homicide cases, the victim is available to testify and can explain or defend his actions.[231] In addition, the victim is able to cooperate with the prosecution so that the prosecution's burden in preparing to rebut every prior bad act is not insurmountable.[232] Thus, the argument for admissibility in non-homicide cases is even stronger and, thus, the appellate courts' extension of *Lynch* to the non-homicide context was fair.

While addressing some concerns, however, this argument ignores the systemic and prejudicial concerns involved when the court allows evidence of a victim's prior bad acts in this context. While the availability of the victim's testimony could weigh in favor of admitting such evidence, the systemic and prejudicial concerns still weigh heavily in favor of excluding it.[233] Regardless of whether the victim is dead or alive, evidence of the victim's prior bad acts has the potential to cloud

230. *See supra* notes 55-76 and accompanying text (discussing the policy rationales that support admissibility of specific act evidence that is offered by the defendant to prove that the victim was the aggressor).

231. *See supra* notes 57-61 and accompanying text (discussing the argument that the probative value of specific act evidence is minimal because the prior bad act may have been exceptional or unusual).

232. *See supra* notes 71-74 and accompanying text (discussing the argument that the state should not be forced to anticipate and prepare to rebut every specific prior act of violence of a victim).

233. *See supra* notes 66-70, 75-76 and accompanying text (discussing the systemic concern that admissibility of such evidence leads to inefficiency and litigation of collateral issues; the prejudicial concern that the jury will find the defendant not guilty because the victim is an unsavory character; and the prejudicial concern that it is unfair to allow the defendant to introduce the type of evidence that is inadmissible against him).

the issues, confuse the jury, and create mini-trials.[234] Moreover, admitting such evidence undeniably creates a double standard in favor of the defendant.[235] Thus, due to the prejudicial and systemic concerns, admissibility of such evidence should be limited to those instances in which the need for information is the greatest and the defendant's risks are the highest, namely, in homicide cases.

Finally, the appellate courts' third extension of *Lynch* is improper because *Lynch* does not stand for the authority that all types of prior bad acts, even those that did not result in a conviction, should be admitted. Not all types of the prior bad acts are probative of the victim's character.[236] The danger in admitting such evidence is apparent. First, evidence of situations that never resulted in an arrest, much less a conviction, is open to exaggeration and fabrication.[237] In addition, this evidence implicates the systemic concerns of inefficiency, jury confusion, and litigation of collateral issues.[238]

As the above discussion illustrates, Illinois needs to change its currently overbroad rule on the admissibility of specific act evidence that is offered by the defendant who asserts self-defense to prove that the victim was the aggressor. The question is whether Illinois should return to a strict exclusionary rule or whether there is an alternative rule that strikes a proper balance between the strict exclusionary rule of pre-*Lynch* and the overly broad admissibility rule of post-*Lynch*. The next section will focus on the various approaches that Illinois could adopt.

B. Alternatives to the Currently Overbroad Rule of Admissibility

There are a variety of alternatives that Illinois could adopt to amend its currently overbroad rule of admissibility. Illinois could adopt the Cook County State's Attorney's Office's proposed statute which would return the Illinois rule to the pre-*Lynch* strict exclusionary rule.[239] In addition, there are a number of alternative rules that

234. *See supra* notes 66-76 and accompanying text (discussing the systemic concerns of allowing in such evidence).

235. *See supra* notes 75-76 and accompanying text (discussing the double standard that admitting such evidence creates).

236. *See supra* notes 84-124 and accompanying text (discussing the pre-*Lynch* cases).

237. *See supra* notes 62-63, 71-76 and accompanying text (discussing the prejudicial nature of specific act evidence).

238. *See supra* notes 66-70, 75-76 and accompanying text (discussing the systemic concerns involved in admitting such evidence).

239. *See supra* notes 210-16 and accompanying text (discussing the Cook County State's Attorney's Office's proposed statute); *see also infra* notes 244-48 and accompanying text (discussing the problems of this statute).

Illinois could adopt which lie between the two extremes of total exclusion and total inclusion.

One such alternative rule (hereinafter the "Connecticut Rule") is to restrict the admissibility of a victim's prior bad acts to only prior convictions for a violent offense.[240] Another alternative rule (hereinafter the "District of Columbia Rule") is to limit the types of cases in which proof of a victim's prior acts of violence may be made at all, but not to restrict the evidence to convictions only.[241] For instance, the court may allow such evidence only in criminal cases[242] or only in homicide cases.[243] In order to determine the proper rule for Illinois, one must examine the advantages and disadvantages of each of these three alternative rules.

1. The Cook County State's Attorney's Office's Proposed Rule

As previously mentioned, the Cook County State's Attorney's Office has proposed a statutory remedy to the current Illinois rule.[244] This statute would prohibit the use of any type of specific act evidence to prove a victim's propensity for violence. In effect, this statute would return Illinois to the pre-*Lynch* rule of strict inadmissibility.[245]

This statute would arguably make the prosecutor's job an easier one because he would not have to ferret out, and prepare to defend, all prior bad acts that could possibly be brought out at trial.[246] In addition, this statute would eliminate the procedural and systemic concerns of inefficiency, jury confusion, and extended trials.[247] Finally,

240. This position is the one adopted by Connecticut in State v. Miranda, 405 A.2d 622, 625 (Conn. 1978), and Utah in State v. Howell, 649 P.2d 91, 96 (Utah 1992). *See supra* notes 217-23 and accompanying text (discussing other jurisdictions' approach to this issue).

241. *See* Harris v. United States, 618 A.2d 140, 144 (D.C. 1992) (allowing evidence of specific instances of a victim's prior violent conduct only in homicide cases); Klaes v. Scholl, 375 N.W.2d 671, 674-75 (Iowa 1985) (refusing to allow such evidence in a civil assault case); *see also* notes 217-23 and accompanying text (discussing various jurisdictions' approach to this issue).

242. *See Klaes*, 375 N.W.2d at 674-75 (refusing to allow such evidence in a civil assault case); *see also supra* notes 217-23 and accompanying text (discussing other jurisdictions' approach to this issue).

243. *See* Harris v. United States, 618 A.2d 140, 144 (D.C. 1992) (allowing evidence of specific instances of a victim's prior violent conduct only in homicide cases); *see also supra* notes 217-23 and accompanying text (discussing other jurisdictions' approach to this issue).

244. *See supra* notes 210-16 and accompanying text (discussing the Cook County State's Attorney's Office's proposed statute).

245. *See supra* notes 84-124 and accompanying text (explaining the rule in Illinois prior to *Lynch*).

246. *See supra* notes 71-74 and accompanying text (discussing the fourth rationale for prohibiting such evidence).

247. *See supra* notes 62-70 and accompanying text (discussing the second and third prohibition rationales).

the proposed statute would "even the playing field" in that the defendant would not be at a procedural advantage.[248]

A return to a rule of strict inadmissibility, however, would ignore the highly probative value that some types of specific act evidence have, namely convictions.[249] In this sense, a strict rule of inadmissibility would not further the quest for the truth. It also would ignore the need to give a defendant charged with murder greater latitude in preparing his defense. Thus, a rule of strict inadmissibility seems as poor an option as a rule of overly broad admissibility.

2. *The Connecticut Rule*

The Connecticut Rule's solution is to restrict the admissibility of a victim's prior bad acts to only prior convictions for a violent offense.[250] Under this rule, evidence of a victim's prior bad act that did not result in a conviction is strictly inadmissible. There are four primary advantages to the Connecticut rule, the first of which is that it creates a bright line rule of admissibility that is easy to administer. Courts are not free under the Connecticut Rule to arbitrarily determine which prior bad acts are probative and which are not.

This rule's second advantage is that "juries are not exposed to inflammatory testimony of dubious substantive value, the express purpose of which is to justify allegedly criminal action."[251] As previously mentioned, evidence of situations that never resulted in a conviction is open to fabrication, exaggeration and jury misuse.[252] Thus, the defense can make the incident sound as bad as possible in an attempt to convince the jury that the victim got what he deserved.[253] In contrast, evidence of a conviction is not open to fabrication. A conviction is the result of a factual inquiry supervised by the court and governed by the rules of evidence. Consequently, convictions are inherently more reli-

248. *See supra* notes 75-76 and accompanying text (discussing the argument that the defendant should not be able to use this evidence when the prosecution is prohibited from using the same type).

249. *See supra* notes 57-61, 77-78 and accompanying text (discussing the probative value of specific act evidence); *see also* People v. Lynch, 470 N.E.2d 1018, 1021 (Ill. 1984) (holding that prior battery convictions are highly probative because they show aggressive and violent tendencies).

250. This position is the one adopted by Connecticut, State v. Miranda, 405 A.2d 622, 625 (Conn. 1978), and Utah, State v. Howell, 649 P.2d 91, 96 (Utah 1992). *See also supra* notes 217-23 and accompanying text (discussing other jurisdictions' approach to this issue).

251. Horton, *supra* note 53, at 458.

252. *See supra* text accompanying note 237 (explaining that evidence of a victim's prior bad acts that did not result in a conviction is open to exaggeration and fabrication).

253. *See supra* notes 57-76 and accompanying text (articulating the different rationales that favor exclusion of specific acts evidence).

able and less unfairly prejudicial to either side than the testimony of occurrence witnesses or records made out of court.

The Connecticut Rule's third advantage is that it eliminates the concern of encouraging mini-trials.[254] As mentioned, evidence of a prior conviction is not open to fabrication. Thus, unlike bad acts that never resulted in a conviction, the jury will not have to determine whether the incident ever occurred. Rather, the defendant would simply offer into evidence a certified letter of conviction which the jury could use to determine the ultimate issue, namely, whether the defendant or the victim was the aggressor.

The Connecticut Rule's fourth and final advantage is that the prosecution would not have to prepare to rebut every prior bad act; rather, the prosecution only has to prepare to defend or to rebut prior convictions. These convictions are easily discoverable because the state only needs to check the victim's criminal record; thus, the concern about surprise would be eliminated.

3. *The District of Columbia Rule*

The District of Columbia Rule's approach is to limit the types of cases in which proof of a victim's prior acts of violence may be made at all, but to not restrict the evidence to convictions only.[255] For instance, the court may allow such evidence only in criminal cases[256] or only in homicide cases.[257] This rule is based on two assumptions. First, this rule assumes that the concerns of inefficiency, jury confusion and misuse of evidence, and litigation of collateral issues remain constant from a homicide case to a non-homicide case. Secondly, this rule assumes that the concern over potential prejudice to the defendant is greater in a homicide case because the defendant stands to lose more.[258] Thus, such evidence is admissible in homicide cases and not in others.

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254. *See supra* notes 66-70 and accompanying text (discussing the third rationale for excluding specific act evidence in this context).

255. *See* Harris v. United States, 618 A.2d 140, 144 (D.C. 1992) (allowing evidence of specific instances of a victim's prior violent conduct only in homicide cases); Klaes v. Scholl, 375 N.W.2d 671, 674-75 (Iowa 1985) (refusing to allow such evidence in a civil assault case); *see also* notes 217-23 and accompanying text (discussing various jurisdictions' approach to this issue).

256. *See Klaes*, 375 N.W.2d at 674-75 (refusing to allow such evidence in a civil assault case); *see also supra* notes 217-23 and accompanying text (discussing other jurisdictions' approach to this issue).

257. *See Harris*, 618 A.2d at 144 (allowing evidence of specific instances of a victim's prior violent conduct only in homicide cases); *see also supra* notes 217-23 and accompanying text (discussing other jurisdictions' approach to this issue).

258. *See supra* text accompanying notes 230-35 (arguing that the appellate courts were unwise to extend the *Lynch* rule to the non-homicide context).

The principal benefit of this position is that it protects a defendant's due process rights to defend against criminal prosecution where the defendant stands to lose life or liberty.[259] Conversely, in all cases where the stakes are less than punishment for murder, defendants are barred from using specific act evidence at all. Rather, a defendant would be limited to using reputation evidence to establish who was the probable aggressor.

The disadvantage to the District of Columbia Rule is that it does not limit the type of evidence to prior convictions only. Thus, the rule does not address the concerns of inefficiency, jury confusion and misuse of evidence, and litigation of collateral issues that are implicated by the admissibility of unconvicted prior bad acts.[260] Accordingly, in a homicide case, the defendant is free to offer evidence that has questionable substantive value because it is open to exaggeration and fabrication and that has the potential to result in lengthy trials and unjust results. [261]

4. *The Differing Effects of Each of the Alternative Rules*

To understand the different effects of these alternative rules on the trial process, it is useful to examine each of these rules in conjunction with the following hypothetical: Jay and Tim are in the corner of a bar drinking. The bar is dark, crowded and loud. After Jay and Tim have both had a number of drinks, they get into a shouting match. Due to the crowded conditions of the bar, nobody can tell who started the shouting match. The men leave the bar at the same time and go out to the parking lot. Ten minutes later, Jay runs into the bar and tells the bartender that he and Tim were fighting outside and that he shot and killed Tim. Jay has a prior murder conviction for which he is currently on parole. Tim has a prior battery conviction. In addition, three weeks before his death, Tim was involved in an altercation with another person. While Tim was waiting in line for beer at a football game, a woman named Katie shoved him. Tim shoved her back. When Katie heard that Tim had been killed, she contacted Jay to tell him about the incident; however, in Katie's version, Tim is the one who shoved her and she never shoved him. However, before Jay's

259. *See supra* notes 79-81 and accompanying text (discussing the constitutional imperative of allowing a criminal defendant sufficient latitude in preparing his defense).

260. *See supra* notes 55-76 and accompanying text (discussing the rationales behind excluding specific act evidence); *see also supra* text accompanying notes 236-38 (identifying the advantages of a rule that limits specific act evidence to prior convictions).

261. *See supra* text accompanying notes 236-38 (articulating the dangers of such evidence).

conversation with Katie, Jay had no knowledge of either Tim's prior conviction or the shoving match between Katie and Tim.

At trial, Jay asserts self-defense and claims that Tim was the aggressor. Jay wants to present a certified copy of Tim's prior battery conviction and testimony from Katie to prove that Tim was the aggressor and that Jay was acting in self-defense. The prosecution wants to present a certified copy of Jay's prior murder conviction to prove that Jay was not acting in self-defense; rather, he simply murdered Tim.[262]

Under the Cook County State's Attorney's Office's proposed rule,[263] the court would not allow Jay to offer evidence of either Tim's prior conviction or of Tim's shoving match with Katie. First, Jay cannot offer the evidence to prove that he was afraid of Tim because he was not aware of the acts at the time in question. In addition, Jay is not able to offer the evidence to prove that Tim was the aggressor because the State's Attorney's proposed statute operates to preclude this type of evidence to prove that the victim was the aggressor. Arguably, the latter effect is the pitfall of the proposed statute because it ignores the highly probative value that the prior conviction would have in determining whether Jay or Tim had been the aggressor.

Under the Connecticut Rule, Jay would be allowed only to offer evidence of Tim's prior battery conviction; Katie's testimony about the shoving match would be inadmissible. This seems a just result because of the minimal probative value and the prejudicial impact that the testimony concerning the shoving match could have on the trial. Tim and Katie were the only parties involved in the shoving match; however, Katie can testify and Tim cannot. Katie can make any type of accusation and deny any responsibility for the fight. Tim is not there to defend himself.

In addition, the question as to who caused the shoving match is a collateral matter. Allowing extrinsic evidence regarding this issue would be a waste of time and could mislead the jury. Moreover, the prosecution could easily prepare to defend against the prior battery conviction because Tim's criminal record, on file with the state, would be easy to obtain.

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262. Under the current Illinois rule, Jay would be allowed to offer both the evidence of Tim's prior conviction and Katie's testimony concerning Tim's prior bad act. The prosecution, however, would not be allowed to offer evidence of Jay's prior murder conviction in order to prove that he murdered Tim. *See supra* notes 164-209 and accompanying text (discussing Illinois' current rule on admissibility established by the Illinois appellate courts' interpretation of *Lynch*).

263. *See supra* text accompanying notes 210-16, 244-48 (discussing and analyzing the Cook County State's Attorney's Office's proposed statute).

The Connecticut Rule's primary problem is that Jay would be allowed to offer this evidence regardless of whether Tim had been killed or merely injured. Arguably, if Tim had only been injured, the evidentiary balancing test would weigh in favor of excluding this evidence. If Tim were alive, the prosecution could simply call him to tell his version of the events in question. The jury could then decide from the credibility of the witnesses which of the versions was the true version. Thus, the need for additional evidence is mitigated. In addition, Jay is not subject to as great of potential punishment; therefore, the need to allow him greater latitude in preparing his defense is not as strong. Thus, in the interest of efficiency and fairness, the court should not allow Jay to offer evidence of Tim's prior convictions or his fight with Katie.

Under the District of Columbia Rule, the hypothetical's outcome would not differ from the outcome under the current Illinois' rule because this is a homicide case. Thus, Jay is allowed to offer evidence of both Tim's prior conviction and Katie's testimony. However, if Jay had merely injured Tim and had not killed him, Jay would be precluded from offering evidence of both the prior conviction and Katie's testimony. While the additional evidence would add time and possibly raise the systemic and prejudicial concerns discussed above, the rule grants greater protection to the defendant when he stands to face harsher penalties.

C. This Comment's Proposed Rule

Based on the above discussion, the author recommends that Illinois adopt the following legislation to govern the admissibility of such evidence:

> 725 ILCS 5/5/115-16. Prior bad act by the victim as evidence.
> a. In prosecutions for crimes involving the use of force by a defendant, where the defendant asserts that he was justified in using such force pursuant to Section 7-1 of this Code, evidence of the victim's prior bad act is not admissible unless:
> 1. such prior bad act was actually known to the defendant at the time he committed the crime being prosecuted; or
> 2. in a homicide case, such prior bad act is offered to prove that the victim was the aggressor, the prior bad act is a conviction for a violent offense, and the offered evidence is in the form of a certified letter of conviction.
> b. This section shall not be construed to alter existing law regarding the use of prior convictions as impeachment.

This recommended statute combines the best features of the possible alternative rules. First, the statute leaves intact the current rule

that a defendant may offer in unrestricted evidence of a victim's prior bad acts of which the defendant was aware in order to prove that the defendant was reasonably afraid of the victim. In addition, it is a bright-line rule that allows the defendant who is charged with murder to prove circumstantially that the victim was the aggressor by evidence of a prior conviction.

Thus, the rule combines the advantages of the Connecticut Rule and the District of Columbia Rule while eliminating the disadvantages of both. This proposed statute is the best way to balance all of the competing policy interests. This solution minimizes the systemic concerns and prejudicial risks of specific act evidence while affording the criminal defendant charged with the serious crime of murder the greatest latitude in preparing his defense.

III. Conclusion

The Illinois rule on the admissibility of specific act evidence that is offered to prove a victim's violent propensity when a defendant asserts self-defense needs to change. The current broad rule of admissibility serves to allow in evidence that is not probative, that is highly prejudicial, and that implicates the systemic concerns of jury confusion, inefficiency, and collateral litigation.

Illinois needs a firm statutory rule that would restrict the type and form of evidence to evidence of prior conviction for a violent offense that is offered in a homicide case in the form of a certified letter of conviction. This rule would ensure that the evidence is probative. In addition, prosecutors would not have to prepare to defend every prior bad act; rather, they would have to defend only those acts which are on file in the form of a conviction with the state.

In addition, limiting the form to certified letters of prior convictions limits the prejudicial impact of such evidence because juries would not be exposed to inflammatory testimony. They would not have to hear the gruesome details of the previous crime. Moreover, this form of evidence limits the systemic concern of wasting time because the letters could be entered by way of stipulation.

Restricting the admissibility of such evidence to homicide cases would reserve the admissibility of this evidence to cases where the stakes for the defendant are the highest. A defendant charged with murder should be given latitude in preparing his defense, since he is potentially subject to life imprisonment or death. Prior violent convictions offered in the form of certified letters of conviction are sufficiently probative and the stakes in a homicide case are sufficiently

high to outweigh the remaining systemic concerns of admitting such evidence.

The need for a statute, as opposed to a judicial change of the common law, is evident from the Illinois appellate courts' overbroad interpretation of *Lynch*. Within the last fifteen years, the appellate courts have changed the rule from one of strict inadmissibility with certain exceptions to one that seemingly has no restriction on admissibility. Without a statute, the trial judge is free to adopt whatever rule fits the judge's personal philosophies. This gives the trial judge too much discretion and leads to too much uncertainty for the lower courts, prosecutors and defendants.

More importantly, the strong policy arguments behind the inclusion or exclusion of such evidence make this type of issue one that is more appropriate for the legislature than for the judiciary to resolve. The proposed statute that this Comment recommends works the most appropriate balance between the policy arguments favoring and opposing admissibility of such evidence. Moreover, by statutorily limiting the admissibility of such evidence, the legislature would solidify the Illinois rule into a workable solution that is not open for personal interpretation and wide-spread abuse.

Admittedly, this rule will adversely impact the criminal defendant who is asserting self-defense and wants to offer evidence of a victim's prior bad act to prove that the victim was the aggressor. However, the rule provides the defendant sufficient evidentiary avenues to prove a self-defense claim while eliminating only the most prejudicial and least probative type of character evidence. Moreover, the benefits of this rule far outweigh the minimal and justified adverse impact on the defendant. First, the criminal justice system will benefit from the impact that this rule will have on the efficiency and integrity of the system. Additionally, society as a whole will benefit from the justice that this rule produces, as well as the costs that the rule eliminates. Finally, victims will benefit from the justice that is served when the system precludes the defendant from turning the victim into the villain in order to escape his own culpability.

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