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Guided Discretion in Massachusetts Evidence Law: Standards for the Admissibility of Prior Bad Acts against the Defendant

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GUIDED DISCRETION IN MASSACHUSETTS EVIDENCE LAW: STANDARDS FOR THE ADMISSIBILITY OF PRIOR BAD ACTS AGAINST THE DEFENDANT

*Honorable Peter W. Agnes, Jr.**

I. INTRODUCTION	2
II. THE DOCTRINAL FRAMEWORK: THE PROCESS MODEL OF JUDICIAL DISCRETION	5
III. THE MASSACHUSETTS GUIDE TO EVIDENCE	10
IV. THE ADMISSIBILITY OF PRIOR BAD ACTS	11
A. Introduction	11
B. The Problem of Character Evidence	12
C. Valid Uses of Character Evidence	15
D. Resolving the Tension Between Proper and Improper Uses of Prior Bad Acts	17
E. Application of the Principles of Commonwealth v. Jackson	20
F. Development of the Common Law Doctrine	22
G. The Modern Doctrine	26
H. Application of the Doctrine in Sexual Assault Cases	27
I. Preliminary Findings of Fact: Conditional Relevancy	33
V. AN ANALYTICAL FRAMEWORK USING THE PROCESS MODEL OF JUDICIAL DISCRETION TO DETERMINE THE ADMISSIBILITY OF PRIOR BAD ACT EVIDENCE	34
VI. CONCLUSION	43

“Our principal concern in admitting character evidence is that a person might not necessarily act in conformity with his or her character on a particular occasion.”¹

“The pursuit of justice has not permitted, and must not now permit, a man to be convicted based on an image created of him in the courtroom

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¹ Commonwealth v. Bonds, 840 N.E.2d 939, 946 (Mass. 2006).

based on the idiosyncrasies of his past life.”²

I. INTRODUCTION

There is a rich body of academic writing about discretion and law.³ Indeed, a debate has been carried on for many years about whether there is such a thing as judicial discretion.⁴ Some scholars, most notably Ronald Dworkin, view the judge’s task as discovering the applicable legal rule or principle, each of which is a form of binding authority, and following it to achieve the correct result.⁵ Others, such as H.L.A. Hart, are skeptical of the capacity of legal rules, whether in the form of common law decisions, court rules, or legislation, to adequately anticipate all potential future applications with sufficient precision to lead the trial judge to the correct result.⁶ As Professor Hart put it, courts often write decisions that lead the reader to conclude that the result followed logically from a predetermined rule “whose meaning is fixed and clear.”⁷ He continued,

In very simple cases this may be so; but in the vast majority of cases that trouble the courts, neither statutes nor precedents in which the rules are allegedly contained allow of only one result. In most important cases there is always a choice. . . . [A]ll rules have a penumbra of uncertainty where the judge must choose between alternatives.⁸

² *People v. Hendricks*, 560 N.E.2d 611, 621 (Ill. 1990).

³ See David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 938 nn. 3-7 (1990) [hereinafter *Power and Responsibility*] (listing various legal areas in which writing occurred).

⁴ See *id.* at 952 (noting existence of debate over discretion).

⁵ See *id.* at 948-52 (describing Dworkin’s reliance on legal rules and principles rather than judicial discretion).

⁶ See *id.* at 944-48 (summarizing Hart’s view that legal rules are often insufficient to provide guidance in cases).

⁷ H.L.A. HART, *THE CONCEPT OF LAW* 12 (reprinted 1972).

⁸ *Id.* According to David P. Leonard,

Hart explained this “penumbra” of uncertainty in legal rules by what he called the “open texture” at their borderline. He believed that open texture was an inevitable effect of either legislative or judicial efforts to use language to create rules for later application. As he termed it, open texture was “the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.” Hart’s view in this regard is compelling and has almost certainly predominated legal thought on the subject.

Professor Hart believed that whether one is operating in the environment of a common law system of evidence, as in Massachusetts, or under the Federal Rules of Evidence or a similar codified regime, there is some open texture.⁹ Experienced trial lawyers understand that if a scorecard was completed at the conclusion of a trial, it would reveal that far more points were awarded or deducted by the trial judge as a result of the exercise of discretion than on the basis of the application of hard and fast rules. “In both criminal and civil cases, and regarding matters profound and trivial, the exercise of discretion is a core judicial function.”¹⁰

A common feature of discretionary decisions is a choice among competing alternatives in circumstances in which there is more than one correct answer.¹¹ In some areas of evidence law—for example, whether to permit a leading question, the scope of redirect and re-cross examination, whether to allow a party to admit rebuttal evidence, whether to admit evidence de bene, or a decision about the order of proof—it may be accurate to characterize the judge’s discretion as “primary” because the judge acts free of the constraints that we associate with legal rules.¹² In most circumstances relating to evidentiary questions, however, trial judges are constrained by, as Justice Cardozo explained, “[a] thousand limitations—the product some of statute, some of precedent, some of vague tradition or of an immemorial technique,—[and these limitations] encompass and hedge us even when we think of ourselves as ranging freely and at large.”¹³

⁹ See HART, *supra* note 7, at 131-32 (describing the inherent indeterminacy of both common law and statutes).

¹⁰ Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMPLE L. REV. 1075, 1075 (2006).

¹¹ See Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 636 (1971) (citations omitted) (“If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of *choice*.”). Rosenberg continued, “[t]o say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another.” *Id.* at 636-37; see also AHARON BARAK, JUDICIAL DISCRETION 10 (Yadin Kaufmann trans. 1989) (defining discretion as the existence of more than one solution).

¹² Rosenberg, *supra* note 11, at 637-38 (distinguishing between primary and secondary judicial discretion); SUPREME JUDICIAL COURT ADVISORY COMMITTEE ON MASSACHUSETTS EVIDENCE LAW, MASSACHUSETTS GUIDE TO EVIDENCE: REVISED PRELIMINARY DRAFT FOR PUBLIC COMMENT § 611 and advisory committee note (February 2008), http://mass.gov/courts/sjc/docs/Revised_Mass_Guide_Evidence.pdf (outlining court’s control over witness examination) [hereinafter EVIDENCE GUIDE].

¹³ BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 61 (1924). There are at least two types of constraints on the exercise of judicial discretion by trial judges. First, judges are constrained by the rules, principles, and guidelines established by appellate courts and/or the legislature. For example, a judge cannot admit evidence of the prior sexual history of an alleged victim of a sexual assault—even when such evidence has significant probative value—without first conducting a hearing and making certain findings. See MASS. GEN. LAWS ANN. ch. 233, § 21B

Professor Jon R. Waltz illustrates Justice Cardozo's point when he distinguishes between "unguided" and "guided" discretion:

Unguided judicial discretion is judicial decision-making unhedged by any formal constraints or guidelines and consequently a judge exercising it need never worry that an appellate court will find his ruling in error. *Guided* discretion, on the other hand, identifies areas in which a judge has some flexibility and choice in decision-making but is restrained by more or less specific standards or guidelines to which he visibly must adhere.¹⁴

The trend in the Massachusetts common law of evidence has been toward guided discretion. Since the introduction of the Federal Rules of Evidence and the Massachusetts Rules of Civil Procedure and Criminal Procedure in the 1970's, we have seen more and more examples of appellate decisions in which the Massachusetts Supreme Judicial Court has set forth guidelines—in some cases general and in others very specific—to regulate the exercise of discretion concerning the admissibility of evidence.¹⁵

One of the most controversial subjects in the law of evidence, and

(West 2000) (limiting admissibility of sex crime victim's prior sexual history). Second, judges are constrained by the risk of reversal on appeal. See *Commonwealth v. Harris*, 825 N.E.2d 58, 68-69 (Mass. 2005) (characterizing as error trial judge's lack of recognition of discretion to permit defendant to impeach alleged victim of sexual assault with prior conviction for prostitution). In this article, I am concerned exclusively with the former type of constraint. It should be noted, however, that when the trial judge properly exercises his or her discretion, the risk of reversal on appeal is low. See *Commonwealth v. Valentin*, 649 N.E.2d 1079, 1082-83 (Mass. 1995) (citation omitted) (exercise of discretion by the trial judge will be upheld on appeal absent "palpable error"); see also *United States v. Frabizio*, 459 F.3d 80, 91 (1st Cir. 2006) (citation omitted) ("An abuse of discretion occurs when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales.").

¹⁴ Jon. R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1103 (1984); see also Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2442-43 (2000) (discussing nature of guided discretion).

¹⁵ See, e.g., *Commonwealth v. Dwyer*, 859 N.E.2d 400, 416-18 (Mass. 2006) (describing guidelines for access to and use of statutorily privileged records of witnesses in criminal cases where records are in the hands of third party); *Commonwealth v. King*, 834 N.E.2d 1175, 1197-1201 (Mass. 2005) (replacing doctrine of "fresh complaint" with doctrine of "first complaint" and providing guidelines for the admission of such evidence); *Commonwealth v. Britto*, 744 N.E.2d 1089, 1105-06 (Mass. 2002) (suggesting guidelines for juror questioning of witnesses at trial); *Commonwealth v. Festa*, 341 N.E.2d 276, 283-84 (1976) (establishing guidelines for use of interpreters at trial).

among the most difficult challenges for the trial judge, is the question of the extent to which the jury should be made aware of the defendant's prior bad acts when offered by the government for a purpose other than to prove the defendant's bad character or propensity to commit a crime.¹⁶ My goal in this article is to identify the doctrinal framework in Massachusetts for the exercise of judicial discretion, and then to apply it to the admissibility of prior bad acts in order to provide lawyers and judges with a model for the determination of when, and under what circumstances, such evidence should be admitted against the defendant in a criminal case. To aid in the analysis of the governing legal principles, I will refer to the new Guide to Massachusetts Evidence recently published by the Supreme Judicial Court's Advisory Committee on Evidence (the "Evidence Guide").¹⁷ The Evidence Guide is a compilation of the current law of evidence in Massachusetts organized in the format of the Federal Rules of Evidence.

II. THE DOCTRINAL FRAMEWORK: THE PROCESS MODEL OF JUDICIAL DISCRETION

Judicial discretion in Massachusetts is a process that demands that the judge understand and follow both professional and ethical norms that operate in tandem with legal principles to ensure a decision in accordance with the law.¹⁸ These legal principles, which take the form either of gen-

¹⁶ See *United States v. Wright*, 573 F.2d 681, 683 (1st Cir. 1978) (highlighting admissibility of relevant evidence of commission of other crime if introduced for purpose other than to show bad character or other criminal activity); *Commonwealth v. Odell*, 607 N.E.2d 423, 426 (Mass. App. Ct. 1993) (upholding admission of subsequent bad act evidencing pattern of conduct). Throughout this article, the reference to "prior" bad acts should be understood to include "subsequent" bad acts that also may be admitted for a limited purpose of proving something other than propensity to commit a crime.

¹⁷ See generally EVIDENCE GUIDE, *supra* note 12.

¹⁸ In addition to the ethical obligations established by Rule 3:07 of the Code of Judicial Conduct, which are found in the Rules of the Supreme Judicial Court, the common law recognizes that trial judges must observe professional norms in the conduct of civil and criminal trials in order to insure impartial justice and a fair trial for all concerned. See *Commonwealth v. Loguidice*, 629 N.E.2d 1349, 1350 n.1 (Mass. App. Ct. 1994) ("[T]he trial judge did not exhibit the patience and the skill to maintain courtroom decorum in the manner exemplified by Justice Francis J. Quirico or Justice Henry T. Lummus, whose treatise all trial judges would be well advised to study. . . ."). Justice Lummus described the responsibility of the trial judge at trial by quoting from an opinion by Justice Braley: "The judge who discharges the functions of his office [is] . . . the directing and controlling mind at the trial, and not a mere functionary to preserve order, and lend ceremonial dignity to the proceedings." HENRY T. LUMMUS, *THE TRIAL JUDGE* 19 (1937) (quoting *Whitney v. Wellesley & Boston St. Ry. Co.*, 84 N.E. 95, 95-96 (Mass. 1908)); see also ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, 6-3.4. (3d ed. 2000) (outlining judge's expected conduct). Thus, in Massachusetts, trial judges have the authority to act independently of counsel to enforce important policies of the law of evidence. See

eral standards or detailed instructions, are part of a broader framework to which I will refer as the process model of judicial discretion.

Of all the efforts in Massachusetts jurisprudence to explain and illuminate the meaning of judicial discretion, there is no better statement of its nature as a process than that offered by Chief Justice Rugg in *Davis v. Boston Elevated Railway Co.*¹⁹ *Davis* involved an action in tort for personal injuries sustained by the plaintiff when a piece of metal struck his left eye.²⁰ At trial, the plaintiff argued that the metal came from a fuse in the defendant's railway car while the defendant argued that it came from a bullet.²¹ The jury returned a verdict for the plaintiff but the trial judge allowed a motion for a new trial on the ground that the verdict was against the weight of the evidence.²² At the second trial, the jury again returned a verdict for the plaintiff.²³ The defendant's exceptions were overruled and the judgment affirmed by the Supreme Judicial Court.²⁴ Shortly thereafter, the

Commonwealth v. Haley, 296 N.E.2d 207, 210-11 (Mass. 1973) (holding "the judge may of his own motion deal with offered evidence"); Posell v. Herscovitz, 130 N.E. 69, 70 (Mass. 1921) ("Very much must be left to the sound discretion of the trial judge in the orderly conduct of proceedings."). This includes the right to question witnesses. See Commonwealth v. Fiore, 308 N.E.2d 902, 908 (Mass. 1974) (affirming trial judge's right to intervene in questioning of witness), *departed from on other grounds*, Commonwealth v. Forde, 466 N.E.2d 510 (Mass. 1984). Because most "trial" lawyers try fewer and fewer cases per year and because there are a growing number of lawyers who come to court to try a case with little if any prior trial experience, the time has come when it is prudent for the bench and the bar to develop standards for courtroom behavior. See ABA STANDARDS FOR CRIMINAL JUSTICE: THE SPECIAL FUNCTIONS OF A TRIAL JUDGE, *supra*, at 6-3.1 ("The trial judge, preferably before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.").

¹⁹ 126 N.E. 841 (Mass. 1920).

²⁰ See *id.* at 842. At the time of his injury, the plaintiff was standing on a covered platform that Boston Elevated Railway used as a regular stopping place and as a point of transfer for its passengers. *Davis v. Boston Elevated Ry. Co.*, 111 N.E. 174, 175 (Mass. 1916). Around 10:30 p.m., just as one of the defendant's cars was either stopping or starting, a noise like an explosion occurred, along with a flash and smoke. *Id.* At the same time, a piece of lead metal struck the plaintiff—who was standing six feet from the car—in the eye. *Id.*

²¹ *Id.* at 175. There was no direct evidence that anyone fired a bullet that evening in the area where the incident occurred. *Id.* The defendant's contention appeared to be that a bullet or cartridge had been placed or dropped on the track and was ignited when the streetcar passed over it. *Id.* On the plaintiff's side, there was evidence that an explosion had occurred in the fuse box, that some fuse boxes contained lead material, that the resulting heat was sufficient to cause parts of the fuse to break apart and to be propelled outward from the fuse box, and that the explosion could be attributed to the negligence of the motorman. *Id.*

²² *Davis v. Boston Elevated Ry. Co.*, 126 N.E. 841, 842 (Mass. 1920) (quoting ground for new trial). Neither of the two appellate decisions in this case offered an explanation of this decision by the trial judge.

²³ *Id.* at 842.

²⁴ *Id.*

defendant filed a motion for a new trial on the ground of newly discovered evidence.²⁵ The trial judge conducted several evidentiary hearings and issued a written decision denying the motion.²⁶

The case was returned to the Supreme Judicial Court on the defendant's exceptions to the trial judge's decision to deny his motion for a new trial.²⁷ In upholding the trial judge's decision, Chief Justice Rugg explained that the law governing whether or not to grant a motion for a new trial cannot be reduced to any hard-and-fast rule.²⁸ Chief Justice Rugg then went on to offer what has become the most influential exegesis in Massachusetts jurisprudence about the meaning of judicial discretion:

It commonly and rightly is said that such a motion is addressed to the discretion of the court. By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not

²⁵ *Id.* The defendant's motion for a new trial was based on evidence consisting of X-ray plates and their accompanying prints, allegedly taken of the plaintiff's injury within 48 hours after the accident; affidavit and oral testimony of the physician who took the X-rays; and affidavits of firearm experts. *Id.* The defendant contended that this evidence showed that it was indeed a bullet that struck the plaintiff's eye, thereby clearing it of any liability for the plaintiff's injury. *See id.*

²⁶ *Id.* The trial judge granted the defendant's motion for a rehearing, but again denied the defendant's motion for a new trial. *Id.* The trial judge found that neither the x-ray plates nor the testimony of the defendant's witness—the physician who took the plates—were sufficiently credible to justify overturning the jury's verdict. *See id.* at 844-46. In addition, the judge found that the evidence was not in fact newly discovered and that it was merely cumulative when viewed in light of the entire case. *Id.* at 844.

²⁷ *Davis v. Boston Elevated Ry. Co.*, 126 N.E. 841, 842 (Mass. 1920).

²⁸ *See id.* at 843 (observing "[The] statements of the extent of the power and of limitations upon the right to grant new trials, illuminating, guiding and controlling as they are in most cases, are not necessarily decisive in every case."). Chief Justice Rugg continued:

[These statements] must yield to the fundamental test . . . that such motions ought not to be granted unless on a survey of the whole case it appears to the judicial conscience and judgment that otherwise a miscarriage of justice will result. . . . [I]t is not imperative that a new trial be granted even though the evidence is newly discovered and, if presented to a jury, would justify a different verdict.

swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just. It may be assumed that conduct manifesting abuse of judicial discretion will be reviewed and some relief afforded.²⁹

The *Davis* case is usually cited by lawyers for the party that benefited from a decision by the trial judge or by an appellate court in upholding the decision of the trial judge to indicate that only in the most extraordinary circumstances will the decision be overruled on appeal.³⁰ The *Davis* case, however, should be read and studied by lawyers and judges as an exemplar of the process model of judicial discretion.

A careful reading of the *Davis* case indicates that the exercise of a sound judicial discretion does not refer to the search for the correct rule of decision. Presumably, the trial judge also would have been affirmed on appeal if he had granted the motion for a new trial based on a view that the defendant's new evidence was sufficiently credible and substantial to justify overturning the jury's verdict. As Justice Henry Tilton Lummus pointed out in *Long v. George*,³¹ there is no hard-and-fast rule in cases where discretion is exercised.³² Rather, *Davis* and *Long* suggest that sound judicial discretion refers to a process that a trial judge must follow. This process, in my view, consists of the following elements:

First, *an awareness* by the court that a choice must be made, in some situations even without a request by a party, that there is no hard-and-fast rule that compels only one outcome, and that before any action is taken

²⁹ *Id.* at 843-44 (citations omitted). He added that it is not up to the reviewing court to decide that it would have "take[n] a different view of the evidence or . . . made an opposite decision from that made by the trial judge. To sustain these exceptions it is necessary to decide that no conscientious judge, acting intelligently, could honestly have taken the view expressed by him." *Id.* at 846. Regarding the trial judge's evaluation of the credibility of the new evidence, Chief Justice Rugg stated: "The credit to be given to a witness who testifies orally before a magistrate . . . is ordinarily for the judge who sees him and observes his manner of giving evidence, and his decision will not be revised unless found to be plainly wrong." *Id.*

³⁰ In my experience as a lawyer and trial judge for more than thirty years, the most frequently quoted portion of Chief Justice Rugg's opinion in the *Davis* case is the language describing the burden on the party seeking to overturn a discretionary decision by a trial judge: the appealing party must demonstrate that "no conscientious judge, acting intelligently, could honestly have taken the view taken by him [the trial judge]." *Davis*, 126 N.E. at 846.

³¹ 7 N.E.2d 149 (Mass. 1937).

³² *Id.* at 151 (quoting *The Steamship Styria v. Morgan*, 186 U.S. 1, 9 (1902) ("The term discretion implies the absence of a hard-and-fast rule.")). In *Long*, the Supreme Judicial Court upheld the trial judge's decision to refuse to reopen a district court case to correct an erroneous judgment that affected the outcome of a proceeding in the Superior Court due to a delay of five years by the aggrieved party. *Id.* at 152.

by the court it must consult and consider the applicable general or specific statutory or common law criteria;³³

Second, *an inquiry* by the court into the facts, including in some cases facts concerning persons who are not parties, and either a preliminary finding of fact or a judgment that there is sufficient evidence of the existence of a relevant fact to permit the jury to consider it for a general or a limited purpose;³⁴ and

Third, *an impartial*³⁵ *consideration* by the judge of the authoritative criteria, in light of the facts, and a clear statement of the basis for that decision on the record or in a written memorandum.³⁶

³³ Massachusetts law provides that when a judge fails to acknowledge that he or she has the discretion to make a ruling to admit or exclude evidence in circumstances in which discretion exists, the judge commits an error of law. *See, e.g.,* Commonwealth v. Knight, 465 N.E.2d 771, 773 (Mass. 1984) (citations omitted) (reversing conviction where judge improperly ruled no discretion existed regarding admission of evidence of prior convictions); Commonwealth v. McFarland, 445 N.E.2d 1085, 1086 (Mass. 1983) (citations omitted) (finding error where judge noted he had no discretion to exclude prior convictions); Commonwealth v. Edgerly, 435 N.E.2d 641, 647 (Mass. 1982) (citations omitted) (finding error where judge denied he had discretion to exclude prior convictions despite recent case granting such discretion).

³⁴ A preliminary question of fact requires the court to make a determination of credibility and it enjoys the same finality as the factual findings made by a jury. *See* Commonwealth v. Lyons, 688 N.E.2d 1350, 1354 (Mass. 1998) (rejecting defendant's contention that judge erred in finding defendant competent where finding was supported by evidence); Davis v. Boston Elevated Ry. Co., 126 N.E. 841, 845-46 (Mass. 1920) (highlighting judge's evaluation of witness's credibility as finding that cannot be revised on appeal as matter of law); *see also* Gorton v. Hadsell, 63 Mass. 508, 511 (1852) (citation omitted) (explaining that Massachusetts follows the orthodox principle under which "it is the province of the judge . . . to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact . . . the solution of which may be necessary to enable him to determine the other question of admissibility."); EVIDENCE GUIDE, *supra* note 12, § 104(a) (assigning preliminary questions of admissibility of evidence to court). In some cases, even though the ultimate determination of credibility and weight is left up to the jury, the court must make a preliminary determination that is referred to as relevancy conditioned on fact. *See, e.g.,* Commonwealth v. Perry, 733 N.E.2d 83, 101 (Mass. 2000) (pointing to trial judge's admission of evidence and subsequent instruction that jury could consider evidence if certain condition met); Commonwealth v. Leonard, 705 N.E.2d 247, 250 (Mass. 1999) (stating judge's role as initial gatekeeper of evidence and jury's role as evaluator of its weight); Fauci v. Mulready, 150 N.E.2d 286, 291 (Mass. 1958) (reiterating principle that trial judge decides admissibility of evidence); *see also* EVIDENCE GUIDE, *supra* note 12, § 104(b) (describing relevancy conditioned on fact).

³⁵ The duty of the trial judge to act impartially means not only the obligation to avoid favoritism or its appearance in any form, *see In re Bonin*, 378 N.E.2d 669, 676 (Mass. 1978) (discussing appropriateness of judicial acceptance of gifts), but also the duty to avoid decisionmaking on the basis of personal preference or philosophy, *see Lonergan-Gillen v. Gillen*, 785 N.E.2d 1285, 1288 (Mass. App. Ct. 2003) (describing as error judge's refusal to consider order permitted by statute).

³⁶ This helps to explain an abuse of discretion as an error of law. *See Henry v. I.N.S.*, 74 F.3d 1, 4 (1st Cir. 1996) (explaining abuse of discretion may occur as result of judge's failing to consider significant factor, giving weight to improper factor, or incorrectly weighing pertinent factors).

III. THE MASSACHUSETTS GUIDE TO EVIDENCE

In a common law jurisdiction such as Massachusetts, in which the law of evidence is scattered throughout the decisions of our appellate courts, in a number of different chapters of our general laws, and in a myriad of court rules, the task of identifying the controlling principles of law—including the critical areas in which the decision whether to admit or exclude evidence is committed to the judge's discretion—is a formidable one. Moreover, in such a vast body of law, the expression of the controlling legal principle that should guide judges in the exercise of judicial discretion may be difficult to locate; a legal principle may be expressed in slightly different ways at different times; or the relationship between and among several principles of law, each of which may have application to the facts, may be difficult to assess. Finally, the task of lawyers and judges is made more difficult when an authoritative expression of a legal principle that may have application in a case appears both in the common law and in a statute.

Judges are accustomed to determining whether and how a particular principle or rule applies in a particular factual setting, but when the dispute is over what expression of the principle or rule is authoritative, the complexity of the lawyer's and judge's work is increased many-fold and there may be a corresponding decrease in the accuracy of the judge's ruling.

These are some of the reasons that led a coalition comprised of the Massachusetts Bar Association, the Boston Bar Association, and the Massachusetts Academy of Trial Lawyers to ask the Justices of the Supreme Judicial Court to revisit the subject of whether Massachusetts should join the majority of states and adopt uniform rules of evidence.³⁷

In response to the concerns expressed by the bar and mindful of developments around the nation, the Supreme Judicial Court appointed an Advisory Committee on Massachusetts Evidence Law and charged it with the responsibility for preparing a statement of the current law of evidence in Massachusetts, organized in the framework of the Federal Rules of Evidence. The Evidence Guide is comprised of eleven sections corresponding to the eleven articles of the Federal Rules of Evidence. It has been published in the form of a Revised Preliminary Draft and will be submitted to the Supreme Judicial Court this year.

One of the great values of the Evidence Guide is that it enables us

³⁷ See generally MASS. BAR ASSOC., REPORT OF THE JUDICIAL ADMINISTRATION SECTION: IMPROVING ACCESS TO, CERTAINTY ABOUT AND UNDERSTANDING OF MASSACHUSETTS EVIDENCE LAW (unpublished report, on file with the *Suffolk Journal of Trial & Appellate Advocacy*).

to better appreciate the relationship between various principles of evidence law, to categorize them as areas in which the court is afforded or expected to exercise discretion, and to assess whether that discretion is guided by general principles or detailed instructions.

IV. THE ADMISSIBILITY OF PRIOR BAD ACTS

A. Introduction

The heart of the modern law of evidence in a common law jurisdiction such as Massachusetts as well as under the Federal Rules of Evidence consists of three principles. First, the court makes the determination of whether evidence is relevant.³⁸ Second, relevant evidence is generally admissible and evidence that is not relevant is not admissible.³⁹ Third, relevant evidence may nonetheless be excluded based on a judicial analysis of its probative value measured against countervailing considerations that include “unfair prejudice, confusion of the issues, misleading [of] the jury . . . unnecessary[y] time consum[ption], or needless presentation of cumulative evidence.”⁴⁰ These are quintessentially discretionary judgments.⁴¹ Apart from the hearsay rule that addresses concerns about the trustworthiness of evidence and the rules designed to ensure the authentication of documen-

³⁸ Relevant evidence is “evidence having 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.” EVIDENCE GUIDE, *supra* note 12, § 401.

³⁹ *Id.* § 402.

⁴⁰ *Id.* § 403; see also *Ruszczyk v. Sec’y of Pub. Safety*, 517 N.E.2d 152, 155 (Mass. 1988) (adopting Proposed Massachusetts Rule of Evidence 403, identical to Federal Rule of Evidence 403 and Evidence Guide § 403).

⁴¹ See *United States v. Abel*, 469 U.S. 45, 54 (1984) (outlining the nature of judicial discretion regarding admissibility of evidence). The *Abel* decision stated: “A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court’s sound judgment under Rules 401 and 403. . . .” *Id.* As the United States Supreme Court has recently noted, “This is particularly true with respect to Rule 403 since it requires an ‘on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant.’” *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1145 (2008) (quoting 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 4.02, at 4-16 (3d ed. 1999)); see also *id.* at 1147 (“Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.”) (quoting FED. R. EVID. 401 advisory committee’s note). The Supreme Judicial Court also addressed trial judges’ evaluations of the admissibility of evidence, noting that “we afford trial judges great latitude and discretion” when they undertake to weigh the probative value of the evidence against any prejudicial effects of it. *Commonwealth v. Arroyo*, 810 N.E.2d 1201, 1210 (Mass. 2004) (citation and quotation omitted).

tary evidence, all the other principles of evidence law are designed to address special problems that arise in the application of these three principles.

B. The Problem of Character Evidence

“By way of definition, character marks the sum total of a person’s qualities—character is what a person actually is.”⁴² The problem with the use of character evidence is that it may prove the wrong thing. In a criminal case, the government alleges that the defendant should be punished for committing a past act that the law forbids or, in some cases, for failing to do something that the law commands. We do not prosecute and punish people, however, because they are thieves, violent personalities, drug dealers, or sexual predators. Indeed, the Constitution prohibits the government from undertaking such prosecutions.⁴³ During the development of the common law in the United States, it became universally recognized that character evidence, whether in the form of reputation, opinion, or specific acts of misconduct, is not admissible to prove that the accused is guilty because he acted in conformance with his or her character.⁴⁴ Nevertheless, exceptions have always been recognized whereby character evidence may be admitted to prove disputed subsidiary or intermediate facts, such as intent or knowledge, apart from propensity.⁴⁵ The precise contours of this

⁴² WILLIAM G. YOUNG ET AL., 19 MASSACHUSETTS PRACTICE SERIES § 404.1, at 194 (2d ed. 1998).

⁴³ See Edward J. Imwinkelried, *An Evidentiary Paradox: Defending The Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U. RICH. L. REV. 419, 432 (2006) [hereinafter *An Evidentiary Paradox*] (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)).

⁴⁴ See 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 186 n.2 (Kenneth S. Brown ed. 6th ed. 2006) (citing case describing history of rule); see also FED. R. EVID. 404(a) and advisory committee’s note (explaining basis for federal rule prohibiting character evidence generally); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (noting common law practice of excluding character evidence to prove defendant’s guilt); *Commonwealth v. Jackson*, 132 Mass. 16, 18-21 (1882) (outlining rule of inadmissibility of character evidence and its exceptions); *People v. Molineux*, 61 N.E. 286, 291-93 (N.Y. 1901) (acknowledging history of rule); EVIDENCE GUIDE, *supra* note 12, § 404(a) and advisory committee’s note (setting out basis for state rule barring “propensity” evidence).

⁴⁵ See Thomas J. Reed, *Admitting the Accused’s Criminal History: The Trouble With Rule 404(b)*, 78 TEMP. L. REV. 201, 201 (2005) (noting existence of exceptions at common law and under Federal and Uniform Rules of Evidence). Professor Reed offers an interesting analysis of a leading New York case, *People v. Molineux*, 61 N.E. 286 (N.Y. 1901), which he maintains is the genesis of the current federal rule, Federal Rule of Evidence 404(b), and the law of most states—including Massachusetts—which excludes character evidence in the form of prior bad acts unless it is offered for one of a number of limited purposes apart from proving propensity. See Reed, *supra*, at 202-13 (summarizing history of current rule). Professor Reed maintains that Rule 404(b) derived the wrong principle from *People v. Molineux* and that federal and state evidence law should embody a rule of inclusion with respect to character evidence, unless it is excluded

doctrine have been the source of unending debate, and the application of the doctrine leads to the most litigation of any evidentiary matter that arises under the Federal Rules of Evidence.⁴⁶ Professor Wigmore aptly described the common law's treatment of character evidence as "one of the great enigmas of the law of evidence" because on the one hand it reflected a value judgment that we should not judge people based on their character, and on the other hand it recognized many exceptions because lay people rely on character evidence to make judgments in daily life about people's future behavior.⁴⁷

Character evidence⁴⁸ presents special problems at trial not because it has marginal relevance but because of its potency—jurors may use it to dispense with proof of the defendant's guilt beyond a reasonable doubt.⁴⁹

under Rule 403 because its probative value is substantially outweighed by its prejudicial effect. See *id.* at 250-53 (calling for a change in Rule 404(b)). Professor Reed's analysis, however, overlooks a fundamental objection to the general use of character evidence: scientific research does not support the view that a prior act of misconduct can be used to predict whether someone acted in conformance with that character trait and thus committed the crime with which they are charged. See generally Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. UNIV. L. REV. 741 (2008) [hereinafter *Reshaping the "Grotesque" Doctrine*] (discussing latest scientific research studies and implications for admissibility of character evidence).

⁴⁶ See 1 EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 1:04, at 19 (rev. ed. 2006) (noting large volume of legal authority on subject).

⁴⁷ 1A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 54.1, at 1150 (Peter Tillers ed. 1983); see also *id.* §§ 54.1, 55 (discussing nature of character evidence).

⁴⁸ In *Figueiredo v. Hamill*, the Court explained the difference between character (a general account of one's disposition) and habit (a regular way of doing things), and held that evidence offered by the defendant that the decedent "habitually acted in a reckless and negligent manner" was inadmissible evidence of the decedent's character. 431 N.E.2d 231, 232-33 (Mass. 1982); see also *Commonwealth v. Bonds*, 840 N.E.2d 939, 946-48 (Mass. 2006) (upholding admission of witness's description of victim with mental health disorder as overly trusting because it was not impermissible character evidence but rather colloquial description of her mental health).

⁴⁹ See *People v. Richardson*, 118 N.E. 514, 517 (N.Y. 1917). The New York Court of Appeals stated:

The reasons [against admitting evidence of an accused's bad character] are rooted in practical policy, justice, and fairness. It is not a part of them that the proof they forbid is not relevant to the real issue, namely, is the defendant guilty or not guilty. Indeed, the exclusion is rather because they have an inescapable and a too potent relevancy. For reasons of policy and humanity rather than of irrelevancy is the evidence excluded. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

Id. (quoting 1A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 58.2 (Peter Tillers ed. 1983)); accord *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (emphasizing prejudicial effect of character evidence); *United States v. Varoudakis*, 233 F.3d 113, 125 (1st Cir. 2000) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

As Professor Imwinkelried has observed, a jury engaged in “character reasoning” is “force[d] . . . to focus on the question of the type or kind of person the defendant is. The jury must ask itself: Is the defendant a law-abiding, moral person or a law-breaking, immoral person? It is hazardous to compel the jury to consciously advert to that question.”⁵⁰ This concern about the potency of character evidence led to a strong policy restricting its use at common law.⁵¹ Put simply, if character evidence was admitted for its full probative value, innocent persons could be wrongfully convicted because people do not always behave in the way our experience predicts they will behave.⁵² Thus, it is an axiom of the common law that “the prosecution may not introduce evidence of a defendant’s prior or subsequent bad acts for the purpose of demonstrating bad character or propensity to commit the crime[s] charged.”⁵³ This principle is reflected in the Federal Rules of Evidence,⁵⁴ the Uniform Rules of Evidence,⁵⁵ and Massachu-

⁵⁰ *An Evidentiary Paradox*, *supra* note 43, at 427. He continued, “There is a grave risk that the jury may decide to punish the defendant for being a criminal rather than because the jurors are convinced beyond a reasonable doubt that the defendant committed the charged crime.” *Id.* There is also the threat that “the uncharged misconduct evidence could easily bias the jurors at a subconscious level.” *Id.*

⁵¹ See *Commonwealth v. Jackson*, 132 Mass. 16, 20-21 (1882) (early case outlining general character evidence policy); *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901) (same); see also David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1167-72 (1998) [hereinafter *In Defense*] (summarizing common law history of rule). As Justice Jackson observed on behalf of the United States Supreme Court:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Michelson v. United States, 335 U.S. 469, 476 (1948) (citations and footnotes omitted).

⁵² See *Commonwealth v. Bonds*, 840 N.E.2d 939, 946-47 (Mass. 2006) (indicating concern that people do not always act in conformity with their characters); see also *In Defense*, *supra* note 51, at 1167 (“Over the last several decades, the validity of the assumption about stable character traits from which accurate predictions about conduct can be made has been questioned in both the psychological and the legal literature.”).

⁵³ *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1306 (Mass. 1994), and cases cited; EVIDENCE GUIDE, *supra* note 12, § 404(a). As the New York Court of Appeals put it, “character is never an issue in a criminal prosecution unless the defendant chooses to make it one.” *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) (citation omitted). The exclusion extends to evidence from which bad character can be inferred. See *Commonwealth v. Simpson*, 750 N.E.2d 977, 991 (Mass. 2001) (holding evidence that defendant possessed police scanner and assault weapon case label had no probative value and served only to suggest impermissible inference that defendant had a criminal disposition).

⁵⁴ See FED. R. EVID. 404(b) (disallowing admission of prior bad acts to show conformity

setts evidence law.⁵⁶

C. Valid Uses of Character Evidence

Massachusetts, like every American jurisdiction, follows the common law's prohibition against the use of character evidence to prove that a person acted in conformance with his or her character, and authorizes the government to use character evidence in only limited circumstances for purposes other than to prove propensity.⁵⁷ To be admissible, character evidence, like every other type of evidence, must meet the threshold requirement of relevancy: it must shed light on a fact in dispute.⁵⁸ There are many aspects of the law relating to character evidence that are beyond the scope of this article. These include the following:⁵⁹

First, in a criminal case, the defendant may introduce evidence of his own good reputation for a character trait such as peacefulness in order to suggest that he or she is not the type of person to have committed the

with character).

⁵⁵ See UNIF. R. EVID. 404(b) (same).

⁵⁶ See EVIDENCE GUIDE, *supra* note 12, § 404(b) (same); see also, e.g., *Commonwealth v. Brusgulis*, 548 N.E.2d 1234, 1237 (Mass. 1990) (discussing exception whereby prior bad act evidence may be admitted to prove identity of defendant); *Commonwealth v. Triplett*, 500 N.E.2d 262, 263 (Mass. 1986) (citing rule that prior bad act evidence is inadmissible to show bad character or propensity); *Commonwealth v. Welcome*, 201 N.E.2d 827, 829 (Mass. 1964) (same); *Commonwealth v. Stone*, 73 N.E.2d 896, 897-98 (Mass. 1947) (same); *Commonwealth v. Jackson*, 132 Mass. 16, 20-21 (1882) (same). See generally MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.4.1 (8th ed. 2007) (summarizing general rule of inadmissibility of character evidence to prove conduct); YOUNG ET AL., *supra* note 42, §§ 404.1-404.4 (discussing admissibility of character evidence in general and prior bad act evidence).

⁵⁷ See EVIDENCE GUIDE, *supra* note 12, §§ 404(a)-(b) and advisory committee's notes (laying out Massachusetts rules regarding character evidence).

⁵⁸ See *id.* § 401 (defining relevant evidence); see also *Commonwealth v. Fayerweather*, 546 N.E.2d 345, 347 (Mass. 1989) (describing relevant evidence as that which has a "rational tendency to prove an issue in the case" (quoting *Commonwealth v. Chretien*, 417 N.E.2d 1203, 1211 (Mass. 1981))); *Commonwealth v. Copeland*, 377 N.E.2d 930, 933 (Mass. 1978) (stating "evidence must have rendered the desired inference more probable than it would have been without it" to be relevant). Thus, in *Commonwealth v. Degro*, the Supreme Judicial Court upheld the trial judge's exclusion of a murder victim's prior bad acts because they were not relevant or only marginally relevant at best to the issues for which they were introduced. See 733 N.E.2d 1024, 1033 (Mass. 2000). The court observed that what was really going on was an attempt to suggest that the victim was a person of bad character, in violation of the common law doctrine that forbids such proof. See *id.*; see also EVIDENCE GUIDE, *supra* note 12, § 404(a) (prohibiting victim character evidence unless defendant makes a self-defense claim).

⁵⁹ In the examples that follow (except the first, character evidence offered by the defendant, and the sixth, character evidence offered at sentencing), the trial judge is required to exclude the evidence if its probative value is substantially outweighed by its prejudicial effect. See EVIDENCE GUIDE, *supra* note 12, §§ 403, 1105 (describing balancing of probativeness and prejudice regarding relevant and third party culprit evidence).

crime charged.⁶⁰

Second, in a criminal case when there is a claim of self-defense, character evidence may be admissible on the issue of whether there is a basis for self-defense and as to who was the first aggressor.⁶¹

Third, in both civil and criminal cases, character evidence in the form of prior criminal convictions (but not the sentence that was imposed) may be offered by the Commonwealth or the defendant to impeach the credibility of a testifying witness.⁶²

Fourth, in a civil or criminal case, character evidence may be ad-

⁶⁰ See EVIDENCE GUIDE, *supra* note 12, § 404(a)(1) (permitting reputation evidence); see also *Commonwealth v. Belton*, 225 N.E.2d 53, 56 (Mass. 1967) (noting the rule regarding defendant reputation evidence). The Supreme Judicial Court noted, "The rule is that 'the defendant in a criminal case may put in evidence his general good reputation in regard to the elements of character involved in the commission of the crime charged against him . . . [to] establish the improbability of his having done the wrong imputed to him.'" *Belton*, 225 N.E.2d at 56 (quoting *Commonwealth v. Nagle*, 32 N.E. 861, 861 (Mass. 1893)); accord EVIDENCE GUIDE, *supra* note 12, § 404(a) advisory committee's note ("The accused is limited to introducing reputation evidence of traits that are involved in the charged crime.") (citing *Commonwealth v. Beal*, 50 N.E.2d 14, 25 (Mass. 1943)). The prosecution may rebut such evidence by cross-examining the witness about specific instances of the defendant's bad conduct. See *Commonwealth v. Piedra*, 478 N.E.2d 1284, 1288-89 (Mass. App. Ct. 1985) (noting that cross-examination may include questions regarding defendant's prior bad acts inconsistent with reputation testimony).

⁶¹ See EVIDENCE GUIDE, *supra* note 12, § 404(a)(2) (outlining instances where victim character evidence may be admissible). Character evidence may be admissible in two circumstances in self-defense cases. First, if known to the accused, evidence of "the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the accused" may be admissible on the issue of whether grounds existed for self-defense. *Id.* §404(a)(2)(A); see *Commonwealth v. Fontes*, 488 N.E.2d 760, 762 (Mass. 1986) (establishing admissibility of specific instances of victim's recent violent acts known to defendant). Second, when it is unclear who was the first aggressor, "the accused may offer evidence of specific incidents of violence allegedly initiated by the victim, or a third party acting in concert with or to assist the victim, whether known or unknown to the accused, and the prosecution may rebut the same in reputation form only." EVIDENCE GUIDE, *supra* note 12, § 404(a)(2)(B); see *Commonwealth v. Adjutant*, 824 N.E.2d 1, 13 (Mass. 2005) (holding admissible evidence of victim-initiated violent acts). See generally Hallie White Speight, Note, *Hard Cases Make Bad Law: Commonwealth v. Adjutant and Evidence of the Deceased's Propensity for Violence in Self-Defense Cases in Massachusetts*, 86 B.U. L. REV. 793 (2006).

⁶² See MASS. GEN. LAWS ANN. ch. 233, § 21 (West 2000) (outlining general rule of admissibility of convictions for impeachment and accompanying exceptions); EVIDENCE GUIDE, *supra* note 12, § 609 and advisory committee's note (same). The trial judge is required to exercise discretion before admitting a prior criminal conviction against the defendant in a criminal case. See *Commonwealth v. Maguire*, 467 N.E.2d 112, 113-15 (Mass. 1984), and cases cited (discussing "great weight of authority" in favor of judicial discretion regarding admission of criminal convictions). There is a narrow exception in Massachusetts that permits the defendant to make use of specific instances of prior misconduct by a witness to impeach credibility. See *Commonwealth v. Bohannon*, 378 N.E.2d 987, 990-92 (Mass. 1978) (holding evidence concerning credibility of rape complainant in form of prior false accusations was excluded in violation of defendant's "right to present a full defense.").

missible with regard to the reputation of a witness for a lack of truthfulness.⁶³

Fifth, although the Rape Shield Law generally forbids the use of the alleged victim's prior sexual conduct for impeachment purposes, in very limited circumstances evidence of specific instances of prior sexual activity may be admissible.⁶⁴

Sixth, reliable evidence of the defendant's character is admissible in sentencing proceedings.⁶⁵

Seventh, the defendant may have a right to offer evidence of specific acts of misconduct by another person to support a claim that the perpetrator was a third party and not the defendant.⁶⁶

But what if character evidence is offered against the defendant in a criminal case for a relevant purpose unrelated to the defendant's character? The law does not permit the government to prove the defendant's guilt in an arson case in which there is no direct evidence of his involvement by simply offering evidence that within the past six months the defendant committed two other acts of arson (whether he was charged and convicted or not). But what if there is evidence that all three fires occurred in the same neighborhood, were ignited by means of the same accelerant, and started in the same general area of the buildings? If evidence of the prior arsons is admitted, how do we insure that the jury will use the evidence for a proper and limited purpose—namely, as evidence of the identity of the perpetrator—but not to infer that the defendant is guilty of the crime charged due to prior acts of misconduct? This was the problem faced by the Supreme Judicial Court in *Commonwealth v. Jackson*.⁶⁷

D. Resolving the Tension Between Proper and Improper Uses of Prior Bad Acts

In *Jackson*, the defendant was charged with larceny by false pretenses based on an allegation that he sold a horse to the victim by falsely

⁶³ See EVIDENCE GUIDE, *supra* note 12, §§ 404(a)(3), 608, and advisory committee's notes (describing general rule of admissibility of reputation evidence and accompanying limitations).

⁶⁴ See MASS. GEN. LAWS ANN. ch. 233, § 21B (West 2000) (outlining general rule of inadmissibility and accompanying limited exceptions).

⁶⁵ See *Commonwealth v. Goodwin*, 605 N.E.2d 827, 831 (Mass. 1993) (stating that trial judge may consider character evidence in sentencing defendant); see also *Commonwealth v. Stuckich*, 879 N.E.2d 105, 116 (Mass. 2008) (noting defendant cannot be punished for uncharged conduct, but relevant and reliable uncharged conduct may be considered at sentencing).

⁶⁶ See EVIDENCE GUIDE, *supra* note 12, § 1105 (outlining admissibility of third party culprit evidence).

⁶⁷ 132 Mass. 16 (1882).

representing that it was "sound and kind."⁶⁸ The jury was properly instructed that in order to convict the defendant, they had to determine if the defendant's representation was merely "dealer's talk" designed to puff up the sale or "the assertion of a fact material to the negotiation."⁶⁹ Over the defendant's objection, the trial judge permitted the Commonwealth to admit evidence of three other transactions in the previous few months involving three other persons, each of whom testified that they were induced to buy horses from the defendant based on his false statements of soundness, kindness, and other features.⁷⁰ The judge instructed the jury that this evidence was admitted "solely for the purpose of showing the intent with which the defendant made the sale of the horse" to the alleged victim.⁷¹

The Supreme Judicial Court acknowledged that the case presented a clash between two fundamental principles in the law of evidence: on the one hand, the defendant's guilt of the crime charged cannot be proven by evidence of other independent crimes, but on the other hand, evidence of a defendant's criminal intent is not inadmissible simply because it shows the commission of other crimes.⁷² It is not a satisfactory answer to say that the former is a more fundamental principle and should trump the latter. As the United States Supreme Court has explained, "[E]xtrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."⁷³ The Supreme Judicial Court made the same observation in *Jackson*.⁷⁴ *Jackson* thus establishes that the admission of evidence of other criminal transactions that tends to prove a defendant acted with a criminal intent should be confined to circumstances in which there is a necessity for the evidence in that the Commonwealth otherwise would be left without the means to meet its heavy burden of proof on an essential matter.⁷⁵

⁶⁸ *Id.* at 16.

⁶⁹ *Id.*

⁷⁰ *See id.* at 17.

⁷¹ *Id.*

⁷² *See Commonwealth v. Jackson*, 132 Mass. 16, 17 (1882) (noting both sides of the coin).

⁷³ *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

⁷⁴ *See Jackson*, 132 Mass. at 18 (making observation regarding defendant's intent). The court stated: "It is the knowledge which it may be inferred [the defendant] must have derived from other transactions, and not the intent that the defendant had in other transactions, that renders the evidence admissible, as affording just ground for inference against him as to intent in the matter under examination." *Id.*

⁷⁵ *See id.* at 20-21 (noting that, in light of problems inherent in admitting prior bad act evidence, "[i]t may well be doubted whether the exceptions to the general rule of law ought to be further extended"). The requirement that the court must find a necessity for the admission of prior bad act evidence also finds support in *Commonwealth v. Jeffries*, 89 Mass. (7 Allen) 548

In *Jackson*, the Supreme Judicial Court acknowledged that there are other exceptions that may allow proof of independent crimes.⁷⁶ For example, such evidence may be admissible when “the acts done are connected by unity of plan and motive, and therefore bear upon the purpose, the criminality of which is in question.”⁷⁷ The *Jackson* court also noted that evidence of other criminal transactions may be admitted where the defendant unsuccessfully attempted to commit the same crime previously.⁷⁸ Finally, the court observed that evidence of other criminal transactions may be offered to show a relationship between parties when that is an important element of the trial.⁷⁹

The Supreme Judicial Court ultimately held in *Jackson* that the admission at trial of evidence of the defendant’s three previous transactions did not come within any of the above exceptions.⁸⁰ Rather, it was tantamount to evidence that the defendant was a thief.⁸¹ The court’s observations led it to offer a powerful caution against the use of prior bad acts as evidence against a defendant.⁸² Despite the limiting instruction given by

(1863). There, Chief Justice Bigelow stated:

[W]here the intent of a party charged with crime is to be proved, a wider range of evidence is permitted than is allowed in support of other issues. *And this from the necessity of the case; because otherwise there often would be no means to reach and disclose the secret design or purpose of the act charged, in which the very gist of the offense may consist.*

Id. at 567 (emphasis added); see also *In Defense*, *supra* note 51, at 1173-76 (discussing early common law limitation of necessity of evidence).

⁷⁶ See *Commonwealth v. Jackson*, 132 Mass. 16, 18-19 (1882) (highlighting other exceptions at common law).

⁷⁷ *Id.* at 18-19.

⁷⁸ *Id.* at 19 (suggesting the prior bad act evidence is useful in proving defendant’s purpose).

⁷⁹ *Id.* (citing crime of adultery as an example).

⁸⁰ *Id.* at 19-20 (applying three exceptions and rejecting their suitability to admitted prior bad act evidence). *Commonwealth v. Kosior*, 182 N.E. 852 (Mass. 1932), involved a similar situation wherein the Supreme Judicial Court ordered a new trial. The defendant was convicted of burning his house and barn in order to defraud his insurance company. *Id.* at 853. Over the defendant’s objection, the trial judge allowed the Commonwealth to offer evidence of statements by the defendant to the police to the effect that the defendant had fires in a number of other buildings for which he had also collected insurance. *Id.* at 854. The court observed that even if it was assumed that these other fires were set by the defendant, the evidence was not admissible “because of the rule that generally the commission of independent crimes in the past is no evidence of guilt of the crime charged.” *Id.*

⁸¹ See *Jackson*, 132 Mass. at 19-20 (pointing out while defendant’s past statements might have been false, his current ones may be true); see also *Commonwealth v. Ellis*, 75 N.E.2d 241, 670 (Mass. 1947) (reversing defendant’s conviction where prior bad act evidence only showed defendant was lewd); *Commonwealth v. Danton*, 137 N.E. 652,653 (Mass. 1923) (reversing defendant’s conviction for larceny based on admission of evidence of unrelated criminal acts).

⁸² See *Jackson*, 132 Mass. at 20-21 (summarizing the problems in admitting prior bad act

the trial judge at Jackson's trial, the court ordered a new trial.⁸³ The two principles that we can draw from *Jackson* are (1) evidence that in the past the defendant committed the same or similar crimes, whether charged and convicted or not, without more, is not admissible;⁸⁴ and (2) prior bad acts consisting of prior charged or uncharged criminal acts or acts of misconduct are not admissible unless they relate to a disputed question of fact and the Commonwealth demonstrates that the jury cannot fairly carry out its truth-seeking function without it.⁸⁵

E. Application of the Principles of Commonwealth v. Jackson

Since its decision in *Commonwealth v. Jackson*,⁸⁶ the Supreme Judicial Court has considered the application of the principles it announced in a myriad of varied factual circumstances. In *Commonwealth v. Farmer*,⁸⁷ several defendants were charged with larceny and conspiracy to commit larceny.⁸⁸ At trial, the jury heard evidence that the defendants made certain representations to the victim about their identity and other matters.⁸⁹ Over one of the defendants' objections, the trial judge admitted evidence that two years earlier, defendant made false representations about the value of

evidence). The court remarked that prior bad act evidence "compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defence [*sic*], raises a variety of issues, . . . diverts the attention of the jury from the one immediately before it[, and] . . . creates a prejudice which may cause injustice to be done to him." *Id.*

⁸³ *Id.* at 21.

⁸⁴ See *Commonwealth v. Mandell*, 562 N.E.2d 111, 507 (Mass. App. Ct. 1990) (upholding trial judge's exclusion in motor vehicle homicide case of victim's prior acts of possible negligence).

⁸⁵ See *Commonwealth v. Butler*, 839 N.E.2d 307, 312-13 (Mass. 2005) (evaluating admissibility based on whether jury needed evidence to determine elements of case); *Commonwealth v. Ramos*, 826 N.E.2d 245, 248 (Mass. App. Ct. 2005) (indicating hesitation where defendant's plan and pattern established without resort to prior bad act evidence); see also *United States v. Aguilar-Aranceta*, 58 F.3d 796, 798-99 (1st Cir. 1995) (highlighting rule that prior bad act evidence may be admitted where knowledge element of crime is unclear); *United States v. Lynn*, 856 F.2d 430, 436-37 (1st Cir. 1988) (reversing defendant's conviction where witness testimony, rather than prior bad act evidence, could have proved intent).

⁸⁶ 132 Mass. 16 (1882).

⁸⁷ 106 N.E. 150 (Mass. 1914).

⁸⁸ *Id.* at 151. One of the defendants, using an alias, persuaded the victim to accept and hold a set of the works of Shakespeare that he represented to be worth \$75,000 if other similar sets could be found to go with it, and promised to arrange for their sale at a later time. *Id.* at 151-52. Another defendant later contacted the victim and reported that he found one of the missing sets of Shakespeare's works, but that it was in manuscript form (loose sheets). *Id.* at 152. He asked for and obtained funds from the victim, ostensibly to pay for the binding of the manuscript pages. See *id.* Funds totaling \$80,000 were thus obtained from the victim. *Id.* at 151. There was evidence that the total value of the books given to the victim was less than \$5,000. *Id.* at 152.

⁸⁹ See *id.* at 151-52.

certain publications to two other persons to induce them to pay far more money than the publications were worth.⁹⁰ The judge instructed the jury to confine its use of this evidence to the issue of the defendant's intent in the case at bar.⁹¹ In explaining the appropriateness of the admission of this evidence because of similarities between the larcenous schemes, the Supreme Judicial Court drew on the reasoning in *Jackson* to support its view that due to the potential for prejudice whenever such evidence is offered, its admissibility should rest on necessity, not mere convenience.⁹²

A classic illustration of the *Jackson* court's concern about the improper use of character evidence is supplied by *Commonwealth v. Stone*,⁹³ where the defendant was convicted of larceny based upon false representations he made to the victim regarding a certain product.⁹⁴ At trial, over the defendant's objection, the Commonwealth was permitted to offer evidence that about nine months earlier, the defendant engaged in a separate transaction with a different person involving the same product.⁹⁵

On appeal, the Supreme Judicial Court reversed the defendant's conviction.⁹⁶ In doing so, it emphasized that for prior bad act evidence to be admissible, it must be relevant to an issue other than the defendant's propensity to commit the crime, and there must be a nexus in terms of the time and the nature of the acts between the crime charged and the prior

⁹⁰ See *id.* at 152.

⁹¹ *Id.*

⁹² See *Commonwealth v. Farmer*, 106 N.E. 150, 152-53 (Mass. 1914) (noting general rule of inadmissibility of prior bad act evidence to show propensity due to problems with such evidence). Regarding the element of the defendant's intent, the court stated that "[t]he thought of the human mind is not capable of direct observation. It can be determined only from external signs and from the knowledge the person is proved to possess. . . . [Prior bad act evidence] has some tendency to show a fraudulent intent on the part of [defendant]." *Id.* at 152-53.

⁹³ 73 N.E.2d 896 (Mass. 1947).

⁹⁴ See *id.* at 897. The defendant told the victim that he had purchased radio tubes from an established manufacturer, who had produced them for the military, and that he would sell some of them to the victim. *Id.* The victim tested 500 of the tubes and found them all usable. *Id.* The defendant sold the tubes to the victim under a bill of sale that included a guarantee by the defendant that fifty percent of the tubes would be usable. *Id.* Almost all the tubes proved to be worthless. *Id.* The evidence showed that the defendant had actually purchased the tubes from junk dealers for about \$150. *Id.*

⁹⁵ See *id.* In the prior transaction, the defendant was indebted to one Sternlieb. *Id.* The defendant showed Sternlieb an invoice for the purchase of radio tubes and told him he could get as many radio tubes as he desired. *Id.* The defendant took Sternlieb to a room filled with radio tubes and introduced him to Fisher, who he identified as an agent of the radio tube manufacturer. *Id.* The defendant told Sternlieb that Sternlieb could purchase the radio tubes in satisfaction of the defendant's debt, and then sell the tubes at a profit. See *id.* Sternlieb agreed and gave the defendant a check payable to Fisher. *Id.* It was later shown that the defendant, not Fisher, endorsed the check. See *id.* Sternlieb never received any radio tubes. *Id.*

⁹⁶ *Id.* at 898.

misconduct.⁹⁷

F. Development of the Common Law Doctrine

In more recent decisions, the Supreme Judicial Court has explained that although character evidence in the form of prior bad acts must not be admitted as evidence of the defendant's guilt, it may be received to prove subsidiary issues such as motive,⁹⁸ intent,⁹⁹ knowledge,¹⁰⁰ identity,¹⁰¹ ab-

⁹⁷ See *id.* at 897-98 (outlining rule of admissibility of prior bad act evidence if admitted to show intent). The court explained that the evidence of the defendant's transaction with Sternlieb was not admissible because "[i]t related to an independent transaction which occurred nearly a year prior to the offence charged in the indictment. And it was not shown to be similar in design or plan." *Id.* at 898; *accord* United States v. Lynn, 856 F.2d 430, 434-35 (1st Cir. 1988) (overturning defendant's conviction where it was error to admit evidence of six-year-old conviction for selling drugs to suggest a common scheme because crimes were dissimilar in manner and too far apart in time); Commonwealth v. Rancourt, 503 N.E.2d 960, 965 (Mass. 1987) (affirming admission of evidence that defendant attempted to forcibly enter another car thirty minutes before forcibly entering victim's car).

⁹⁸ See, e.g., Commonwealth v. O'Laughlin, 843 N.E.2d 617, 633 (Mass. 2006) (evidence of defendant's drug abuse and attempt to obtain more drugs admitted in robbery trial); Commonwealth v. Mendes, 806 N.E.2d 393, 402 (Mass. 2004) (evidence of defendant's subsequent money-spending habits admitted in trial of murder of wife with inheritance); Commonwealth v. Sholley, 739 N.E.2d 236, 244-45 (Mass. 2000) (evidence of defendant's prior domestic violence convictions and restraining orders admitted in trial for being disorderly person and disrupting court proceedings); Commonwealth v. Gunter, 692 N.E.2d 515, 520 (Mass. 1998) (evidence of defendant's involvement in drug business admitted in murder trial); Commonwealth v. Weichell, 453 N.E.2d 1038, 1045-46 (Mass. 1983) (evidence of victim's state of mind admitted in murder trial); Commonwealth v. Bradshaw, 431 N.E.2d 880, 896 (Mass. 1982) (evidence of defendant's search for money on day of murder admitted in murder trial); Commonwealth v. DiMarzo, 308 N.E.2d 538, 543 (Mass. 1974) (evidence of defendant's prior abusiveness that established course of conduct admitted in murder trial). Evidence of a hostile relationship between the victim and the defendant in the form of prior bad acts committed by the defendant against or in the presence of the victim may be admitted to suggest a motive for an act of violence against the victim. See Commonwealth v. Butler, 839 N.E.2d 307, 313 (Mass. 2005) (victim's protective orders and black eye from defendant); Commonwealth v. Bianchi, 757 N.E.2d 1087, 1092 (Mass. 2001) (defendant's earlier assault of victim); Commonwealth v. Nardone, 546 N.E.2d 359, 363 (Mass. 1989) (victim's stay in battered women shelter); Commonwealth v. Bartolini, 13 N.E.2d 382, 387 (Mass. 1938) (defendant's two prior physical assaults of victim); see also BRODIN & AVERY, *supra* note 56, § 4.4.6, at 157-58 (listing cases in which prior bad act evidence admissible to show motive).

⁹⁹ See, e.g., Commonwealth v. Pagan, 794 N.E.2d 1184, 1187-88 (Mass. 2003) (evidence of defendant's hostile attitude towards victim admitted in murder trial); Commonwealth v. Sullivan, 768 N.E.2d 529, 537 (Mass. 2002) (evidence of defendant's statement that he liked to rob jewelry stores admitted in robbery trial); Commonwealth v. Ashman, 723 N.E.2d 510, 514-16 (Mass. 2000) (evidence of violent altercation between victim and defendant admitted in murder trial); Commonwealth v. Snell, 705 N.E.2d 236, 244 (Mass. 1999) (evidence of defendant's choking of wife admitted in murder trial); Commonwealth v. Sneed, 597 N.E.2d 1346, 1351 (Mass. 1992) (evidence of defendant's violent striking of victim shortly before her death admitted in murder trial); Commonwealth v. Jordan (No. 1), 492 N.E.2d 349, 350-51 (Mass. 1986) (evidence of defendant's prior beatings and mistreatment of victim admitted in assault and battery and kidnap-

sence of accident or mistake,¹⁰² common scheme,¹⁰³ pattern of conduct,¹⁰⁴ and modus operandi.¹⁰⁵ In the case of prior bad acts offered to prove the identity of the perpetrator as the defendant, the required nexus between the prior or subsequent bad act and the crime charged must be closer than in

ping trial); *Commonwealth v. Bennett*, 118 Mass. 443, 453 (1875) (evidence of defendant's other acts of embezzlement in embezzlement trial); *see also* BRODIN & AVERY, *supra* note 56, § 4.4.6, at 155-56 (listing cases in which prior bad act evidence admissible to show motive). Another category of prior bad act evidence that may be admitted to shed light on the defendant's intent is evidence that suggests a consciousness of guilt. *See Commonwealth v. Brousseau*, 659 N.E.2d 724, 727 (Mass. 1996) ("[E]vidence tending to show consciousness of guilt will not be rendered inadmissible simply because it may reveal to the jury that the defendant committed another offense.") (quoting *Commonwealth v. Burke*, 607 N.E.2d 991, 997 (Mass. 1993)).

¹⁰⁰ *See Commonwealth v. Mullane*, 840 N.E.2d 484, 492-94 (Mass. 2006) (evidence of earlier investigation of defendant's massage business admitted to show defendant's knowledge of illegal prostitution occurring there); *Commonwealth v. Imbruglia*, 387 N.E.2d 559, 567 (Mass. 1979) (evidence of defendant's other fencing activities admitted to show defendant's knowledge that materials were stolen or counterfeit); *see also* BRODIN & AVERY, *supra* note 56, § 4.4.6, at 156-57 (listing cases in which prior bad act evidence admissible to show knowledge).

¹⁰¹ *See Commonwealth v. Campbell*, 353 N.E.2d 740, 743 (Mass. 1976) (evidence of other crimes defendant might have committed admitted to show identity of defendant as perpetrator of scheme). One of the most striking illustrations of the use of prior bad act evidence to establish the identity of the defendant as the perpetrator is *Commonwealth v. Kater*, 734 N.E.2d 1164 (Mass. 2000). In that case, the Supreme Judicial Court upheld the trial judge's admission of evidence of the defendant's prior conviction for a crime very similar to the one for which the defendant was currently on trial for the purpose of showing that the defendant was the one who committed the crime. *See id.* at 1175-76 (agreeing with judge that crimes were "'strikingly similar'"); *see also* BRODIN & AVERY, *supra* note 56, § 4.4.6, at 160-61 (listing cases in which prior bad act evidence admissible to show identity).

¹⁰² *See Commonwealth v. Young*, 416 N.E.2d 944, 953 (Mass. 1981) (evidence of defendant's drug dealing with victim admitted to show defendant was not mistaken in targeting victim); *Commonwealth v. Snell*, 75 N.E. 75, 80 (Mass. 1905) (evidence of homeowner's money admitted to show that defendant was not mistaken in killing victim to get to money).

¹⁰³ *See Commonwealth v. Schoening*, 396 N.E.2d 1004, 1009 (Mass. 1979) (evidence of defendant's prior transactions carried out in similar manner admitted in bribery and larceny conspiracy trial); *Commonwealth v. Gettigan*, 148 N.E. 113, 120 (Mass. 1925) (evidence of defendant's attempt to hire someone to kill uncle admitted as part of scheme to become sole heir to aunts' property); *see also* BRODIN & AVERY, *supra* note 56, § 4.4.6, at 159-60 (listing cases in which prior bad act evidence admissible to show common scheme).

¹⁰⁴ *See Commonwealth v. Fleury-Ehrhart*, 480 N.E.2d 661, 663-64 (Mass. App. Ct. 1985) (evidence of two other similar assaults and batteries committed by defendant admitted to show pattern of conduct); *see also* BRODIN & AVERY, *supra* note 56, § 4.4.6, at 159-60 (listing cases in which prior bad act evidence admissible to show pattern of conduct).

¹⁰⁵ *See, e.g., Commonwealth v. Leonard*, 705 N.E.2d 247, 251 (Mass. 1999) (evidence of earlier fire admitted where circumstances of that fire and fire for which defendant currently charged were similar); *Commonwealth v. Jackson*, 702 N.E.2d 1158, 1162 (Mass. 1998) (evidence of defendant's prior conviction admitted where physical description and conduct of perpetrator there were similar to those of current perpetrator); *Commonwealth v. Cordle*, 537 N.E.2d 130, 134-35, 137 (Mass. 1989) (evidence of defendant's previous break-in of victim's home admitted where break-in charged at trial was accomplished in similar manner).

other circumstances in which such evidence is admissible.¹⁰⁶

Another non-p propensity reason for offering prior bad act evidence is to impeach the credibility of the defendant or another witness who creates an impression by his or her direct examination testimony that is contradicted by the prior bad act evidence.¹⁰⁷ The Commonwealth may also offer prior bad act evidence to establish the defendant's predisposition to commit the crime when the defense relies on entrapment.¹⁰⁸ Finally, prior bad act evidence may be admissible when otherwise it would appear to the jury that an act of violence occurred for no reason at all.¹⁰⁹ In order to facilitate the truth-seeking function of the jury, the law permits it to receive evidence, which may involve the commission of other offenses or bad acts,

¹⁰⁶ See *Commonwealth v. Brusgulis*, 548 N.E.2d 1234, 1237 (Mass. 1990) (requiring "special mark or distinctiveness" in acts before prior bad act evidence is admitted to prove identity). The Supreme Judicial Court explained that "[t]here must be a uniqueness of technique, a distinctiveness, or a particularly distinguishing pattern of conduct common to the current and former incidents to warrant the admission of evidence of prior bad acts as tending to prove that the defendant was the person who committed the crime charged." *Id.* In *Commonwealth v. Montez*, 881 N.E.2d 753 (Mass. 2008), the Supreme Judicial Court held that the trial judge had permissibly admitted evidence of the defendant's involvement in three prior housebreaks to establish him as the perpetrator of a housebreak and murder. *Id.* at 762. Although the housebreaks were not committed in the same manner, the court found the existence of sufficient common denominators: among other similarities, the defendant's possession of a key related to each break-in, evidence of theft as a motive in each case, and the proximity of the apartments to each other was sufficient to enable the jury to determine that the crimes were committed by the same person. See *id.* at 761-62 (listing similarities and holding them adequate to admit prior bad act evidence to identify defendant as perpetrator).

¹⁰⁷ See *Commonwealth v. Varney*, 461 N.E.2d 177, 183-84 (Mass. 1984) (discussing prosecutor's use of defendant's evidence of his spending habits to depict defendant as drug dealer). There, the defendant portrayed himself as a "legitimate businessman who had nothing to do with narcotics." *Id.* at 184. This warranted the Commonwealth to argue that the defendant's source of income, as shown largely by the defendant's own evidence, was the sale of narcotics. See *id.* at 184 (affirming prosecution's right to rebut defendant's inference he was a legitimate businessman). The evidence was not admitted to establish bad character, but to impeach the defendant's credibility. See *id.* (describing prosecution's purpose to draw inference from evidence that defendant was drug dealer). Likewise, prior bad act evidence may be admitted to rehabilitate a witness whose motive for testifying is challenged by the defendant on cross-examination. See *Commonwealth v. Moure*, 701 N.E.2d 319, 323-25 (Mass. 1998) (upholding admission of gang's prior bad acts to show witness's real motive for testifying after his motive was called into question by defense counsel).

¹⁰⁸ See *United States v. Russell*, 411 U.S. 423, 428-29 (1973) ("[I]f [*sic*] the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.") (quoting *Sorrells v. United States*, 287 U.S. 435, 451 (1932)); *Commonwealth v. Vargas*, 632 N.E.2d 1223, 1225 (Mass. 1994) (citing Massachusetts common law rule that predisposition may be shown by prior criminal acts).

¹⁰⁹ See *Commonwealth v. Marrero*, 691 N.E.2d 918, 920-21 (Mass. 1998) (quotations omitted) (explaining prior bad act evidence admissible where "inextricably intertwined" with charged conduct).

of the context in which the acts charged occurred in the form of the surrounding events.¹¹⁰ Thus, in a prosecution for murder of the defendant's mother's fiancé, it was reversible error to admit evidence of the defendant's prior violent behavior toward his mother and others because it served merely to depict the defendant as a violent person.¹¹¹

One of the concerns with the current state of the law is that the all-important distinction between the probative value of prior bad act evidence depending on the forbidden inference of bad character and the probative value of evidence not depending on this inference has become blurred.¹¹² For this reason, Professor Imwinkelried has urged that the most effective way to maintain the core of the common law rule against the use of character evidence to prove propensity is to recognize the doctrine of chances as a rationale for the admission of prior bad acts.¹¹³ As Professor Imwinkelried explained:

The doctrine does not ask the jurors to utilize the defendant's propensity as the basis for a prediction of conduct on the alleged occasion. Instead, the doctrine asks the jurors to consider the objective improbability of a coincidence in assessing the plausibility of a defendant's claim that a loss was the product of an accident or that he or she was accidentally enmeshed in suspicious circumstances.¹¹⁴

¹¹⁰ See *Commonwealth v. Drew*, 489 N.E.2d 1233, 1242-43 (Mass. 1986) (affirming admission of defendant's involvement in Satanic cult rituals to show basis for victim's murder). The Supreme Judicial Court stated that "[w]ithout [evidence of the defendant's participation in Satanism], both the killing and the defendant's other actions at the scene could have appeared to the jury as . . . essentially inexplicable act[s] of violence." *Id.* at 1243 (citations and quotations omitted); see also, e.g., *Commonwealth v. Bradshaw*, 431 N.E.2d 880, 895-96 (Mass. 1982) (evidence of defendant's prior bad acts on day of murder admitted to show context); *Commonwealth v. Young*, 416 N.E.2d 944, 953 (Mass. 1981) (evidence of defendant's drug dealing with victim admitted to give jury full view of relationship between the two); *Commonwealth v. Hoffer*, 377 N.E.2d 685, 689 (Mass. 1978) (evidence of defendant's bad character admitted because linked to events on night of murder); *Commonwealth v. Chalifoux*, 291 N.E.2d 635, 638 (Mass. 1973) (evidence of defendant's statements regarding being in jail admitted to fully outline the events of the night in question).

¹¹¹ See *Commonwealth v. Triplett*, 500 N.E.2d 262, 263-64 (Mass. 1986) (reversing defendant's conviction where prior bad act evidence admitted solely to portray defendant as violent and dangerous).

¹¹² See *United States v. Lynn*, 856 F.2d 430, 437 n.16 (1st Cir. 1988) (highlighting lower court's incorrect evaluation of probative value of defendant's prior conviction).

¹¹³ See *An Evidentiary Paradox*, *supra* note 43, at 439 (listing advantages to doctrine of chances approach to admissibility of evidence of prior bad acts).

¹¹⁴ *Id.*

G. The Modern Doctrine

One of the most frequently cited cases in this area in Massachusetts is *Commonwealth v. Helfant*.¹¹⁵ The defendant physician was charged with rape and drugging a person for unlawful sexual intercourse when he went to his ex-girlfriend's apartment for treatment purposes, injected her with Valium, and sexually assaulted her.¹¹⁶ Over the defendant's objection, and after a voir dire, two other women testified that they had been patients of the defendant and that he had come to their homes, injected them with Valium, and then sexually assaulted them.¹¹⁷ The trial judge instructed the jury they could consider the evidence of the defendant's other bad acts only with regard to the drugging for sex charge, not the rape charge.¹¹⁸ Although the Supreme Judicial Court described the issue as a close question, it upheld the admission of the evidence.¹¹⁹

¹¹⁵ 496 N.E.2d 433 (Mass. 1986).

¹¹⁶ See *Commonwealth v. Helfant*, 496 N.E.2d 433, 436-37 (Mass. 1986) (reciting facts). The victim, a technician who worked at the same hospital where the defendant practiced, had dated the defendant from 1980 to 1981. *Id.* at 436. After injuring her back in the summer of 1983, she sought medical treatment from the defendant. *Id.* After the victim made an appointment to see the defendant, he called her and suggested he come to her apartment to examine her there. *Id.* The defendant examined her at her apartment and recommended and subsequently administered a shot of Valium for a muscle spasm. *Id.* The victim immediately became groggy and was essentially unconscious. *Id.* She then awoke to find herself naked with the defendant lying beside her touching her crotch. *Id.* at 437. She recalled awakening on two other occasions to find the defendant on top of her having intercourse with her. *Id.* During one of these occasions, she asked the defendant whether the activity would hurt her back and he replied that the medicine would take care of that. *Id.* The victim was able to get out of bed to let the defendant exit her apartment. See *id.* Persons who spoke to the victim shortly after these events stated that her speech was slow and slurred, but that she made no mention of rape. *Id.* Later in the day, as her mind cleared, the victim disclosed to friends and others that she believed she had been raped. See *id.* The defendant claimed that he did treat the victim in her apartment on the day in question by injecting her with a small dose of Valium to relieve her immediate symptoms and then giving her a prescription for an oral dose of Valium. *Id.* The defendant denied having sexual intercourse with the victim. *Id.* At trial, several physicians testified that an intravenous injection of Valium in such a case was not indicated. See *id.* at 442 n.10 (describing expert testimony showing injections did not follow good medical practice).

¹¹⁷ *Id.* at 440. One witness reported that she sought treatment from the defendant in his office for migraine headaches. *Id.* at 441. On one occasion, the defendant came to her home, persuaded her to put on a nightgown, and gave her an injection of Valium. *Id.* She said the defendant had intercourse with her as she faded in and out of consciousness. *Id.* The other witness testified that her roommate called the defendant—who previously treated the witness at the hospital—to their home to treat the witness' muscle spasm. *Id.* When the defendant arrived, she said he insisted on examining her even though she told him she was no longer in pain. *Id.* The witness testified that the defendant gave her an injection of Valium and that she then almost immediately felt "heavy." *Id.* After injecting the witness, the defendant pulled down her nightgown and fondled her breasts. *Id.*

¹¹⁸ *Id.* at 442.

¹¹⁹ See *id.* (finding no error in admission of evidence). The court explained that the witness'

With its decision in *Helfant*, the Supreme Judicial Court crossed a line that previously had confined prior bad act evidence to other offenses that were connected in some way to the conduct that formed the basis of the defendant's prosecution.¹²⁰ Thus, while it is no longer required that the evidence of prior bad acts involves the same parties or a single or continuous course of conduct, "[t]o be admissible, evidence of uncharged conduct must be related in time, place, and/or form to the charges being tried. There must be, in other words, a sufficient nexus to render the conduct relevant and probative."¹²¹ Nothing in *Helfant*, however, suggests the court overruled the principle in *Commonwealth v. Jackson*¹²² that restricts the use of evidence of prior bad acts to circumstances in which the court determines it is necessary.¹²³

H. Application of the Doctrine in Sexual Assault Cases

The greatest change in the common law doctrine limiting the use of character evidence has occurred in cases involving the prosecution of persons charged with sexual assaults. The Federal Rules of Evidence underwent a radical change in 1995 as a result of direct congressional action that transformed the common law's rule of exclusion with regard to prior bad acts into a rule of inclusion in prosecutions for sexual assaults.¹²⁴ Under

testimony was relevant to show the defendant's intent when injecting the victim: "It tended to show the defendant's state of mind when administering the drug, to rebut the defense of innocent, therapeutic intent and to make more probable the existence of the requisite illegal intent." *Id.* at 442.

¹²⁰ See *Helfant*, 496 N.E.2d at 443 n.12 ("This case presents the first instance in which this court has directly considered whether instances of prior misconduct, not connected with the charged offense as part of an ongoing criminal enterprise or plan, may be used to show the defendant's intent."). Justice O'Connor, who dissented in another case regarding admission of prior bad act evidence, registered a strong dissent in *Helfant*. See *id.* at 446-49 (O'Connor, J., dissenting) (arguing witness' testimony of earlier druggings by defendant improperly admitted). He expressed dismay at what he termed the majority's "sharp retrogression in its sensitivity to the unfairness of admitting in a criminal case evidence of a defendant's prior bad acts" and called it an "unenlightened trend" irreconcilable with the court's recent recognition of the problem in admitting evidence of a defendant's prior convictions." *Id.* at 449 (O'Connor, J., dissenting) (citing cases discussing admissibility of evidence of defendant's prior convictions).

¹²¹ BRODIN & AVERY, *supra* note 56, § 4.4.6, at 153 (citing *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1307 (Mass. 1994)).

¹²² 132 Mass. 16 (1882).

¹²³ See *supra* note 75 and accompanying text (discussing necessity principle).

¹²⁴ See *Reshaping the "Grotesque" Doctrine*, *supra* note 45, at 743-44 (describing enactment of Federal Rules of Evidence 413-415); see also *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 150-51 (3d Cir. 2002) (outlining briefly history of enactment of Federal Rules of Evidence 413-415). Professor Imwinkelried posits that Rules 413-415 arose out of several different factors: a highly-publicized case in which a defendant was acquitted of sexual misconduct despite the avail-

Federal Rule of Evidence 413(a), where a defendant is charged with a crime of sexual assault, evidence of the defendant's other crime or crimes of sexual assault is admissible to show any relevant matter.¹²⁵ Similarly, under Federal Rule of Evidence 414(a), where a defendant is charged with a crime of child molestation, evidence of the defendant's other crime or crimes of child molestation is admissible to show any relevant matter.¹²⁶ Although these federal rules appear to simply mandate the admissibility of evidence of prior sexual conduct by the defendant whenever it is relevant, the predominant view is that the trial judge must nevertheless exercise discretion under Federal Rule of Evidence 403 and exclude such evidence when the danger of undue prejudice substantially outweighs its probative value.¹²⁷

The law in Massachusetts has not followed the development of federal law in cases involving charges of sexual assault against adults or children by removing the common law prohibition against the use of character evidence to prove propensity, although evidence of other sexual offenses committed by the defendant against persons other than the victim may be admitted under certain conditions.¹²⁸ In *Commonwealth v. Wel-*

ability of testimony—ultimately not admitted—that he had raped or assaulted three other women; the national campaign against child abuse; and a recognition that the United States was alone in strictly banning character evidence. See *Reshaping the "Grotesque" Doctrine*, *supra* note 45, at 744-45 (listing influences on enactment of Federal Rules of Evidence 413-415). The rules enacted in 1995 "were based upon fear, supposition, and a laudable desire to do something in the face of what appeared to be an epidemic of sexual abuse. Unfortunately, most recent studies establish a lack of sound statistical data supporting these initial assumptions." Charles H. Rose III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal With Sexual Offenders*, 34 AM. J. CRIM. L. 1, 30 (2006). Nevertheless, at least a dozen states have followed the approach of the federal rules in altering the law regarding the use of character evidence in sexual assault cases. See *An Evidentiary Paradox*, *supra* note 43, at 424 n.40 (listing states that have adopted federal rules approach); see also *People v. Falsetta*, 986 P.2d 182, 186-87 (Cal. 1999) (summarizing enactment and legislative history of California's rule based on Federal Rule of Evidence 413); *McLean v. Florida*, 934 So.2d 1248, 1258-59 (Fla. 2006) (discussing Florida's rule similar to Federal Rule of Evidence 414); see also *In Defense*, *supra* note 51, at 1162 n.7, 1163 n.8 (collecting scholarly articles critical of and favorable toward these changes to federal rules).

¹²⁵ FED. R. EVID. 413(a).

¹²⁶ FED. R. EVID. 414(a).

¹²⁷ See *United States v. Hawpetoss*, 478 F.3d 820, 824 & n.9 (7th Cir. 2007) (noting that Federal Rule of Evidence 413 does not remove court's exclusionary authority derived from Rule 403 and citing other circuits with comparable view).

¹²⁸ See *Commonwealth v. Dwyer*, 859 N.E.2d 400, 408 (Mass. 2006) (holding as error repeated references to defendant's uncharged prior sexual misconduct with victim). The Supreme Judicial Court explained that in sexual assault cases evidence of prior bad acts in the form of previous acts of sexual misconduct by the defendant against the alleged victim are admissible, if at all, only for the limited purpose of explaining the relationship between the parties and whether the same passion that existed previously continued up to the time of the acts that make up the pending charges. See *id.* at 407 (describing permissible uses of prior bad acts in sexual assault cases). In such cases the trial judge must weigh the probative value and prejudicial effect of such evi-

come,¹²⁹ in which the defendant was convicted of indecent assault and battery on a child under the age of fourteen, the trial judge allowed the jury to hear testimony that during a conversation with the police the defendant admitted to past involvement in similar incidents with young children.¹³⁰ Applying the logic of *Commonwealth v. Jackson*,¹³¹ the Supreme Judicial Court reversed the conviction: “[W]e invoke the rule that evidence of a distinct crime unconnected with that for which the defendant is indicted cannot be received.”¹³²

When the defendant’s past sexual conduct involves the same person as the person alleged to be the victim in the case on trial, however, the evidence may be admissible. In *Commonwealth v. Bemis*,¹³³ the defendant was charged with three counts of statutory rape of two females under the age of sixteen.¹³⁴ The trial judge permitted one of the victims to testify not only to the two incidents of statutory rape, but also to a third incident in which she and the defendant had sexual intercourse shortly after she became sixteen years old.¹³⁵ The Supreme Judicial Court upheld admission of this evidence.¹³⁶

dence and exclude it if there is a significant danger of unfair prejudice. See *id.* (noting required balancing test).

¹²⁹ 201 N.E.2d 827 (Mass. 1964).

¹³⁰ See *id.* at 828 (detailing conversation between policewoman and defendant).

¹³¹ 132 Mass. 16 (1882).

¹³² *Id.*; accord *Commonwealth v. Ellis*, 75 N.E.2d 241, 241-42 (Mass. 1947) (“Ordinarily the commission of one offense may not be shown upon a trial for another.”). The Supreme Judicial Court has more recently removed the requirement that the prior bad acts be linked to the crime charged in order to be admissible. See *supra* notes 120-21 and accompanying text (discussing implications of *Helfant*). In *Welcome* and *Ellis*, however, there was no evidence of any nexus in terms of time, place, or form between the prior offenses and the crime charged. Thus, even under the standard enunciated in *Helfant*, the prior bad act evidence was not admissible.

¹³³ 136 N.E. 597 (Mass. 1922).

¹³⁴ See *id.* at 597 (setting out indictments).

¹³⁵ See *id.* at 585 (describing victim’s testimony).

¹³⁶ See *id.* (pointing to victim’s testimony and affirming judge’s admission of testimony). The court explained that evidence of the defendant’s prior sexual crimes committed with the same victim “if not too remote in time, is competent to prove an inclination to commit the act charged in the indictment, and is relevant to show the probable existence of the same passion or emotion at the time in issue.” *Id.* at 598; accord *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1307 (Mass. 1994) (citing same exception to general rule of inadmissibility). In *Commonwealth v. Piccerillo*, 152 N.E. 746 (Mass. 1926), the court stated that “[i]n prosecutions involving unlawful sexual intercourse, testimony of undue familiarity before and after the alleged criminal intimacy is admissible to show the adulterous disposition of the parties. Such testimony is admissible to render it not improbable that the act might have occurred.” *Id.* at 747. Likewise, in *Commonwealth v. Machado*, 162 N.E.2d 71 (Mass. 1959), *departed from on other grounds* in *Commonwealth v. Forde*, 466 N.E.2d 510 (Mass. 1984), a prosecution for statutory rape based on the defendant’s equivocal response to an accusation posed by the police and the fact that his step-daughter gave birth to a child about nine months after the alleged offense, the court upheld admission of testimony by the victim’s mother that she saw her husband in bed with her daughter on one occasion

More recently, however, in *Commonwealth v. Dwyer*,¹³⁷ the Supreme Judicial Court held that the trial judge erred by allowing the jury to hear evidence that the defendant had sexually assaulted on many previous occasions the alleged victim of the two charged acts.¹³⁸ The court stated: "Allowing the complainant to testify in detail about each of seven uncharged incidents was excessive. The judge should have intervened to prevent the 'danger of overwhelming a case with such bad act evidence.'"¹³⁹

What if the prior sexual conduct is with persons other than the defendant? Should the evidence be excluded under the reasoning of the *Welcome* case or should it be received in evidence under the reasoning of the *Bemis* case? This was the problem the Supreme Judicial Court confronted in *Commonwealth v. King*.¹⁴⁰ The defendant was charged with statutory rape of his girlfriend's daughter, who was under the age of sixteen.¹⁴¹ The Commonwealth's case included evidence of defendant's prior sexual activities with both the victim and her younger brother.¹⁴² At trial, the defense counsel objected to the admission of evidence regarding the defendant's uncharged abuse of the victim's brother.¹⁴³

On appeal, the Supreme Judicial Court relied on prior cases in which evidence of the defendant's other crimes involving different victims may be admitted against a defendant to establish a common scheme or course of conduct.¹⁴⁴ Although such evidence had not previously been admitted in a Massachusetts prosecution for the sexual assault of a child, the court pointed to authority in other jurisdictions that sanctioned the receipt of such evidence.¹⁴⁵ The court concluded that it did not violate the princi-

several months after the date of the incident charged in the indictment. See *Machado*, 162 N.E.2d at 72-73 (highlighting admissibility of evidence of similar sexual crimes between defendant and victim).

¹³⁷ 859 N.E.2d 400 (Mass. 2006).

¹³⁸ See *id.* at 408 (pointing to trial judge's error).

¹³⁹ *Id.* (quoting *Commonwealth v. Roche*, 691 N.E.2d 946, 953 (Mass. App. Ct. 1998)).

¹⁴⁰ 441 N.E.2d 248 (Mass. 1982).

¹⁴¹ See *id.* at 249 (reciting charges).

¹⁴² See *id.* at 249-50 (reciting facts of various sexual activities between defendant and victim and defendant and victim's brother). The evidence included testimony of a confession made by the defendant to two of the victim's family members in which he admitted to sexual activity with the victim four times a week over a period of time and more frequent bouts of oral sex with the victim's younger brother, testimony of fresh complaint evidence from a police detective that corroborated the testimony of the victim, and testimony from the same police detective that she recovered sexual paraphernalia used on the victim by the defendant. See *id.* at 250 (describing testimony of two witnesses).

¹⁴³ *Id.* at 251.

¹⁴⁴ See *id.* at 252 (listing cases admitting evidence of defendant's other crimes to show common pattern of conduct).

¹⁴⁵ See *Commonwealth v. King*, 441 N.E.2d 248, 252 & n.3 (Mass. 1982) (acknowledging

ple applied in *Welcome* to admit evidence of the defendant's acts with the victim's younger brother because the offenses charged and the offenses uncharged had common characteristics.¹⁴⁶ As the court stated, "The evidence here showed a common pattern or course of conduct toward the two children, and was sufficiently related in time and location to be logically probative. . . . Because the acts involved here formed a temporal and schematic nexus, we cannot say that the judge abused his discretion."¹⁴⁷

What is missing from the analysis of both the majority and dissenting opinions in *King*, however, is any consideration of the principle from *Jackson* that prior bad act evidence should be reserved for situations in which there is a real need for evidence of uncharged conduct because there is no direct evidence on a subsidiary issue such as intent, knowledge, or identity.¹⁴⁸ In *King*, the Commonwealth had available to it not only the testimony of the victim but also the defendant's confession to the victim's family members, fresh complaint evidence, and testimony from the police corroborating the existence of the paraphernalia allegedly used to perform sex acts on the child victim.¹⁴⁹

Regarding evidence of a defendant's sexual misconduct with

admissibility of evidence of a defendant's sexual misconduct with child not named in indictment had not been ruled on in Massachusetts, but citing cases from other jurisdictions where such evidence admissible).

¹⁴⁶ See *id.* at 252-53 (listing common characteristics, including same time period and same location).

¹⁴⁷ *Id.* at 253 (citations and quotations omitted). In a dissenting opinion, Justice O'Connor maintained that unlike other cases in which evidence of other crimes involving different victims had been received for a limited purpose, here the prior bad acts were received to prove the commission of the crime charged in violation of the principle of *Welcome* and *Ellis*. See *King*, 441 N.E.2d at 256-57 (O'Connor, J., dissenting) (arguing evidence of defendant's acts with victim's younger brother impermissibly show propensity); see also *Commonwealth v. Hanlon*, 694 N.E.2d 358, 365 & n.5 (Mass. 1998) (applying *King* but noting that critics have questioned the "logical consistency and ultimate coherence" of such evidence because of "the closely related and in many contexts interchangeable use of the terms 'propensity,' 'inclination,' and 'disposition.'"). A good illustration of a case in which there was a genuine need for the admission of such evidence of the defendant's prior sexual misconduct is *Commonwealth v. Madyun*, in which the Massachusetts Appeals Court upheld the trial judge's admission of testimony of subsequent rapes committed by the defendant. See 458 N.E.2d 745, 746-47 (Mass. 1983) (finding no error where there were "striking similarities in the unconnected crimes and the subject crimes"). The court pointed out that "[t]here were no witnesses to the subject crimes to support the victim's identification of the defendant," so evidence of subsequent rapes of two other women committed by the defendant under similar circumstances to the conduct charged was admissible to show identification of the defendant. *Id.* at 747.

¹⁴⁸ For a case in which necessity of the evidence was a factor, see *Commonwealth v. Brown*, 450 N.E.2d 172, 385 (Mass. 1983) (reversing defendant's conviction because evidence admitted by trial judge of defendant's earlier robberies was not integral to show reliability of defendant's confession where reliability was at issue).

¹⁴⁹ See *supra* note 142 (listing various sources of evidence of *King* defendant's other acts of sexual misconduct).

someone other than the complainant, the Supreme Judicial Court acknowledged that "the admission of such evidence carries with it a high risk of prejudice to the defendant."¹⁵⁰ In subsequent cases applying the reasoning of *King*, our appellate courts have stressed three things. First, the Commonwealth must demonstrate the legitimate probative value of such evidence: "[E]vidence of a sexual assault on a person other than the victim is only admissible if it is connected 'in time, place, or other relevant circumstances to the particular sex offense for which the defendant is being tried.'"¹⁵¹ Prior or subsequent bad acts involving sexual abuse of the same or a different victim separated from the date of the offense charged by more than several months are unlikely to meet the test of temporal proximity unless there is a regular series of similar events forming a pattern over a long period of time.¹⁵² Second, there is a need for a determination by the trial judge as to whether the evidence's probative value is substantially

¹⁵⁰ *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1307 (Mass. 1994); *accord* *State v. Saltarelli*, 655 P.2d 697, 699 (Wash. 1982) (stating potential for prejudice stemming from evidence of defendant's prior bad acts at highest in sex cases); *State v. Bovee*, 706 P.2d 1005, 1007 n.3 (Or. Ct. App. 1985) (recognizing "highly inflammatory effect" of evidence of defendant's prior sex crimes).

¹⁵¹ *Commonwealth v. Hanlon*, 694 N.E.2d 358, 818 (Mass. App. Ct. 1998) (quoting *Commonwealth v. King*, 441 N.E.2d 248, 251 (Mass. 1982)); *see, e.g.*, *Commonwealth v. Emence*, 713 N.E.2d 374, 304-05 (Mass. App. Ct. 1999) (finding error where subsequent bad act evidence admitted because it did not show actual pattern of conduct); *Commonwealth v. Yetz*, 643 N.E.2d 1062, 1063 (Mass. App. Ct. 1995) (holding two years between charged and uncharged assaults was too long to permit evidence of uncharged offense when incidents did not occur in the same place and form of conduct was not similar); *Commonwealth v. Johnson*, 617 N.E.2d 1040, 1044 (Mass. App. Ct. 1993) (reversing defendant's conviction where trial judge admitted evidence of defendant's sexual misconduct against victim which occurred forty months after offense charged). In *Johnson*, the Appeals Court held that the defendant's subsequent bad conduct was too remote from the offense charged; it observed that "[i]f an exception for 'inclination' is not to subvert the canon and foster intolerable prejudice against the accused, it must be applied with care; thus the cautionary phrase, 'if not too remote in time.'" *Johnson*, 617 N.E.2d at 1044. There is no bright-line test to determine whether the prior bad acts are sufficiently connected to the charged conduct to make them probative of a disputed fact. *See Commonwealth v. Hanlon*, 694 N.E.2d 358, (Mass. App. Ct. 1998) (discussing remoteness of uncharged conduct). As the Appeals Court noted in *Hanlon*, "[a]lthough the last witness claimed to have been abused in 1990 and 1991, nine years after the last charged act, this testimony was not too remote, given the continuing nature of the pattern, and the striking similarity of each incident to the charged acts." *Id.* at 367; *see also* *Commonwealth v. Scullin*, 687 N.E.2d 1258, 1263 (Mass. App. Ct. 1997) (finding no error in trial judge's admission of evidence of assault that occurred as much as two and one-half years earlier because time lapse did not render evidence inadmissible, particularly in view of "the distinctiveness and near-identity [sic] of the conduct").

¹⁵² *See Commonwealth v. Gillette*, 600 N.E.2d 1009, 1012 (Mass. App. Ct. 1992) ("No case brought to our attention has dealt with an act done, or a statement made, more than a few months before or after the alleged offense."); *see also* *Commonwealth v. Calcagno*, 574 N.E.2d 420, 422 (Mass. App. Ct. 1991) (finding "strong logical connection" between charged incident and evidence of prior similar acts of sexual abuse occurring continually over eight years).

outweighed by its prejudicial impact.¹⁵³ Third, in close cases, the decision to admit such evidence will be upheld on appeal if the trial judge gives strong cautionary instructions to the jury that the evidence must be limited to subsidiary issues and may not be used as evidence of the defendant's guilt.¹⁵⁴

I. Preliminary Findings of Fact: Conditional Relevancy

A fundamental question involved in the determination of whether to admit prior bad act evidence is whether the prior bad acts actually occurred, and if so whether they were committed by the defendant. This, in turn, raises the question of who should make this determination—the court or the jury. In *Huddleston v. United States*,¹⁵⁵ the Supreme Court determined that the Federal Rules of Evidence modified the common law doctrine that assigned to trial judges the responsibility for making these preliminary determinations of fact.¹⁵⁶ The responsibility of the judge in the context of the admission of bad act evidence is to determine whether the jury “can reasonably conclude that the act occurred and that the defendant was the actor.”¹⁵⁷ Thus, whether the defendant committed a prior bad act is a matter of conditional relevancy under Federal Rule of Evidence 104(b) and not a preliminary question of fact under Federal Rule of Evidence 104(a).¹⁵⁸ The responsibility of the judge faced with the question whether to admit or exclude such evidence is to determine that the government has offered sufficient evidence to warrant the jury in making the determination by a standard of preponderance of the evidence.¹⁵⁹ The determination of conditional relevance should be made after a hearing outside the presence of the jury. Massachusetts follows the approach outlined in *Huddleston*.¹⁶⁰

¹⁵³ See *Commonwealth v. Barrett*, 641 N.E.2d 1302, 1307 (Mass. 1994) (declaring weighing of prior sexual misconduct evidence's probative value versus prejudicial effect as second step in admissibility test); cf. *Commonwealth v. Lewin* (No. 2), 555 N.E.2d 557, 558 (Mass. 1990) (recognizing general judicial discretion to bar evidence whose prejudicial effect outweighs probative value).

¹⁵⁴ Cf. *Commonwealth v. Chartier*, 686 N.E.2d 1055, 1058-59 (Mass. App. Ct. 1997) (noting practice of properly instructing jurors to limit use of prior conviction to credibility judgment).

¹⁵⁵ 485 U.S. 681 (1988).

¹⁵⁶ See *id.* at 688 (discussing legislative history of Federal Rule of Evidence 404(b)).

¹⁵⁷ See *id.* at 689 (explaining relevant evidence under Federal Rule of Evidence 104(b)). See generally EVIDENCE GUIDE, *supra* note 12, §§ 104(a)-(b) and accompanying advisory committee notes (outlining court's role in preliminary questions).

¹⁵⁸ See *id.* at 689-90 (discussing requisite preliminary determinations when evidence of defendant's prior bad acts offered).

¹⁵⁹ See *id.* at 690 (describing requirements to meet Federal Rule of Evidence 104(b)).

¹⁶⁰ See, e.g., *Commonwealth v. Rosenthal*, 732 N.E.2d 278, 280-82 (Mass. 2000) (citing and

V. AN ANALYTICAL FRAMEWORK USING THE PROCESS MODEL OF JUDICIAL DISCRETION TO DETERMINE THE ADMISSIBILITY OF PRIOR BAD ACT EVIDENCE

A careful examination of the myriad of cases dealing with the admission of prior bad act evidence does not yield a bright-line test to determine when it should be admitted and when it should be excluded. What emerges from the case law is a guideline at a level of generality that leaves judges and lawyers with uncertainty:

Evidence of prior misconduct—"prior bad acts"—not offered solely for the prohibited purpose of proving bad character (and thus, inferentially, a "propensity" toward crime) is admissible if "substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it. . . ." ¹⁶¹

Because relevancy is a concept with no fixed meaning and it can only be determined in the context of the evidence taken as a whole, as noted above, this general guideline is simply another way of saying that in every instance in which prior or subsequent bad act evidence is offered by the Commonwealth, the trial judge is presented with a choice and is not compelled by any rule of law to admit or exclude the evidence. The court is compelled by law, however, to exercise its discretion.¹⁶² Based on the

applying *Huddleston* determination); *Commonwealth v. Leonard*, 705 N.E.2d 247, 250-51 (Mass. 1999) (same); *Commonwealth v. LeClair*, 862 N.E.2d 774, 778-79 (Mass. App. Ct. 2007) (same). *Huddleston* turns on an interpretation of the Federal Rules of Evidence. See Edward J. Imwinkelried, "Where There's Smoke There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404, 42 ST. LOUIS U. L.J. 813, 816-17 (1998) (asserting *Huddleston* Court viewed rules as replacing common law practice that "trial judge must find by clear and convincing evidence that the accused had committed the uncharged act"). It is at odds with the common law and is not universally followed by the states. See *id.* at 817-18, 817 nn.34-36 (listing various state responses to *Huddleston*). Professor Norman M. Garland supplies a useful guideline for differentiating between preliminary questions that are the responsibility of the court and those that are left to the jury: "If the preliminary fact question is one, the answer to which determines the relevance of the evidence and nothing more, then the jury must have the final word on deciding the existence of the fact." Norman M. Garland, *An Essay On: Of Judges and Juries Revisited in the Context of Certain Preliminary Fact Questions Determining the Admissibility of Evidence Under Federal and California Rules of Evidence*, 36 SW. U. L. REV. 853, 878 (2008).

¹⁶¹ *Commonwealth v. Yelle*, 475 N.E.2d 427, 431 (Mass. App. Ct. 1985) (quoting *Harper v. United States*, 239 F.2d 945, 946 (D.C. Cir. 1956)).

¹⁶² See generally *Commonwealth v. White*, 800 N.E.2d 712 (Mass. App. Ct. 2003) (detailing

process model of judicial discretion discussed in Part II of this article, and a study of the appellate cases in the area, it is possible to construct the following analytical model to assist lawyers and judges who are faced with this issue. The model consists of four stages as follows:

(1) *Judicial Awareness of Discretion*. The case law dealing with the admission of prior or subsequent bad acts offered for a purpose other than to show propensity requires the court to recognize that there is a choice to be made and that the outcome is not governed by a hard-and-fast rule.¹⁶³ The trial judge must appreciate that what is at stake is the fairness of the trial.¹⁶⁴ The discretionary decision may arise at trial when the evidence is offered and an objection is made. Even in the absence of an objection, due to the potency of prior bad act evidence, the trial judge has a duty to intervene *sua sponte* to prevent the improper admission of prior bad act evidence.¹⁶⁵

Because of the many factors that enter into the exercise of discretion to admit or exclude prior bad act evidence, the best practice is for counsel to raise the question in advance of trial by filing a motion in limine seeking to admit or exclude such evidence.¹⁶⁶

motion judge's careful process in evaluating admissibility of evidence of defendant's prior bad acts). It should be noted that this process is required in jury waived trials as well. See *Commonwealth v. Jacobs*, 750 N.E.2d 1028, 1035 (Mass. App. Ct. 2001) (noting admissibility rule regarding evidence of defendant's unrelated prior crime same for jury and jury waived trials).

¹⁶³ See *Commonwealth v. Harris*, 825 N.E.2d 58, 70 (Mass. 2005), and cases cited (declaring error where trial judge did not use any discretion in determining admissibility of prior convictions); see also *supra* notes 11, 33 and accompanying text (discussing nature of trial judge's discretion); cf. *Commonwealth v. Pillai*, 833 N.E.2d 1160, 1166-67 (Mass. 2005). In *Pillai*, the court stated that a judge has discretion in deciding whether to join offenses; this discretion is like the discretion a judge exercises regarding whether to admit prior bad act evidence. *Id.* at 1166 (discussing joinder of offenses). In both situations, a reviewing court applies a deferential standard of review that will likely uphold the trial judge's ruling in close cases, even when the appellate court might have taken a different view. *Id.* at 1167 (describing review standard).

¹⁶⁴ See *Commonwealth v. Baker*, 800 N.E.2d 267 (Mass. 2003) (finding error where trial judge admitted evidence of child murder victim's previous injuries because it had effect of forcing defendant to defend against uncharged allegations of child abuse). See generally *United States v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000) (holding trial judge's admission of evidence of defendant's prior act of uncharged arson was in error due to tendency to impermissibly show propensity).

¹⁶⁵ See *Commonwealth v. Dwyer*, 859 N.E.2d 400, 408 (Mass. 2006) ("The judge should have intervened to prevent the 'danger of overwhelming a case with such bad act evidence.'") (quoting *Commonwealth v. Roche*, 691 N.E.2d 946, 953 (Mass. App. Ct. 1998)).

¹⁶⁶ Neither the Supreme Judicial Court nor the Appeals Court has established an explicit requirement that the issue of the admissibility of prior bad act evidence must be raised in advance of trial. But such a requirement can be inferred from the requirement established in *Commonwealth v. Adjutant* that a defendant in a self-defense case who wishes to offer specific instances of an alleged victim's prior bad acts on the issue of identity of the first aggressor must provide notice well in advance of the trial to the court and to the prosecution of the intent to offer such evidence and of the specific evidence to be offered. See 824 N.E.2d 1, 14 (Mass. 2005) (classifying

(2) *Judicial Inquiry into the Existence, Relevance, and Unfair Prejudice of the Bad Acts*. Based on the views expressed by the Supreme Judicial Court in *Commonwealth v. Jackson*¹⁶⁷ and subsequent cases, a trial judge must inquire into several factual areas before ruling on the admission of evidence of prior bad acts. Under this prong of the process model, the trial judge must make the following factual and legal determinations:

(a) *Legitimate Probative Value*. In making this determination, the trial judge should begin by asking whether the prior bad act evidence is being offered to establish a matter in dispute other than the defendant's propensity to commit the crime charged. If the answer is no, the evidence is not admissible.¹⁶⁸ The prosecutor, as the proponent of the admission of the prior or subsequent bad act evidence, has the burden of demonstrating that there is a logical relationship between a prior or subsequent bad act and proof of a disputed issue at trial such as specific intent, knowledge, or motive. The court's responsibility is to ascertain whether there is such a logical relationship. *Commonwealth v. Jackson*¹⁶⁹ and *Commonwealth v. Welcome*,¹⁷⁰ discussed earlier, support the view that "the doing of similar acts is not relevant to the doing of a particular act."¹⁷¹ In most cases, for prior or subsequent bad acts to have legitimate probative value there must be a relationship between the uncharged conduct and the conduct that forms the basis of the charges that are the subject of the trial.¹⁷² This occurs most often when there are prior or subsequent dealings between the defendant and the alleged victim or a course of conduct by the defendant that suggests the charged conduct is part of an ongoing pattern of criminal activity.¹⁷³ In these cases, the court must consider both the interval of time between the events and the characteristics of the events.¹⁷⁴ The Supreme Judicial Court observed,

such notice as "safeguards for prosecutors").

¹⁶⁷ 132 Mass. 16 (1882).

¹⁶⁸ See EVIDENCE GUIDE, *supra* note 12, §§ 404(a)-(b) (stating general character evidence and specific prior bad acts evidence inadmissible to show action in conformity with evidence).

¹⁶⁹ 132 Mass. 16 (1882).

¹⁷⁰ 201 N.E.2d 827 (Mass. 1964).

¹⁷¹ *United States v. Lewis*, 693 F.2d 189, 193 (D.C. Cir. 1982) (quoting 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 304, at 249-51 (Peter Tillers ed. 1983)); see discussion *supra* Part IV.D and accompanying notes (discussing *Jackson*); *supra* text accompanying notes 129-32 (discussing *Welcome*).

¹⁷² See discussion *supra* Part IV.G and accompanying notes (discussing expansion of admissibility of prior bad act evidence to include evidence with time, place, and/or form nexus with charged conduct).

¹⁷³ See *supra* text accompanying note 77; *supra* notes 133-36 & 140-47 and accompanying text (pointing to prior bad act evidence admissible to show defendant's pattern of conduct).

¹⁷⁴ See *supra* notes 146-47 and accompanying text (discussing case where characteristics and time were similar enough to admit prior bad act evidence).

There is no bright-line test for determining temporal remoteness of evidence of prior misconduct. Where the prior misconduct is merely one instance in a continuing course of related events, the allowable time period is greater. Where the logical relationship between the charged and uncharged offenses is more attenuated, a time span of fifteen minutes may be too much.¹⁷⁵

The court also must consider whether the inference that can be drawn from the evidence of uncharged misconduct about some disputed fact other than guilt or innocence is strong enough to be logically probative.¹⁷⁶ For example, in a case in which a defendant is charged with possession with intent to distribute drugs and one of the disputed questions is the defendant's knowledge that a container—such as a backpack, suitcase, or gym bag—under his control in a vehicle or a home contained drugs, there is no “logical thread” between a prior instance of drug possession or distribution and the crime charged without something beyond the existence of the prior bad act.¹⁷⁷ Finally, it is important to consider whether intervening circumstances call into question the logical relevancy of the evidence.¹⁷⁸

(b) *Preliminary Finding of Conditional Relevancy.* The trial judge must be satisfied that there is sufficient evidence that the bad acts occurred

¹⁷⁵ Commonwealth v. Helfant, 496 N.E.2d 433, 443 n.13 (Mass. 1986) (citations omitted).

¹⁷⁶ Prior bad act evidence of only minimal probative value does not qualify for admission even apart from a consideration of its prejudicial effect. See, e.g., Commonwealth v. Podkowka, 840 N.E.2d 476, 480-81 (Mass. 2006) (upholding exclusion of child victim's mother's prior bad acts because no logical relevance to defendant's theory that mother killed child); Commonwealth v. Trapp, 485 N.E.2d 162, 165-66 (Mass. 1985) (holding evidence of defendant's prior bad acts inadmissible where only slightly relevant to issue of defendant's sanity); cf. Commonwealth v. Prashaw, 781 N.E.2d 19, 23-24 (Mass. App. Ct. 2003) (finding error after trial judge admitted sexually provocative photographs of defendant where photographs had minimal probative value regarding issue for which admitted.). This raises major problems for lawyers and judges in light of emerging scientific research that casts doubt on the consistency between a person's character and his or her conduct on any particular occasion. See *Reshaping the "Grotesque" Doctrine, supra* note 45, at 742 (noting existence of many psychological studies showing little consistency). The predominant view of psychological professionals is that behavior cannot be predicted on the basis of character traits alone, and that the most promising theory is the integrative model, which posits that human behavior is the result of the interplay between character traits and situational cues. See *id.* at 752-53, 754-55 (pointing out consensus rejecting trait theory and growing consensus accepting integrative model).

¹⁷⁷ See United States v. Mayans, 17 F.3d 1174, 1181-82 (9th Cir. 1994) (discussing United States v. Hernandez-Miranda, 601 F.2d 1104 (9th Cir. 1979)).

¹⁷⁸ See United States v. Hawpetoss, 478 F.3d 820, 825 (7th Cir. 2007) (explaining trial judge has “wide discretion” under Federal Rule of Evidence 403 to exclude evidence falling within scope of Federal Rules of Evidence 413 and 414).

and that the defendant committed them to permit the jury to find the facts by a preponderance of the evidence.¹⁷⁹ The mere fact that a witness' statement in a police report or medical record indicates a history of uncharged misconduct committed by the defendant may not be sufficient; an evidentiary hearing may be necessary to permit the jury to reach its own conclusion. An important task for lawyers and the court is to identify the nature of the prior bad act or acts with precision. Often there are multiple accounts of what may or may not have happened. If the account relied on by the Commonwealth appears in a report and the court ultimately decides to admit the evidence after completing its analysis, care should be taken—before any witness is permitted to testify—to ascertain that the witness is going to give the account that appears in the report and not an embellished account or a completely different story.¹⁸⁰

(3) *Balancing Probative Value Versus Undue Prejudice.* All relevant evidence is prejudicial to the party against whom it is offered. Prejudice alone, therefore is not sufficient grounds to exclude relevant evidence.¹⁸¹ Any evidence of prior or subsequent bad acts presents a special problem, however, because it may lead a jury to reason that the defendant is a person of bad character and thus someone who is more likely to have committed the crime charged.¹⁸² In order to guard against the potential for misuse of this evidence, before it may be admitted the court must engage in a balancing test that involves “the full evidentiary context of the case as the court understands it when the ruling must be made.”¹⁸³ Massachusetts evidence law, like Federal Rule of Evidence 403, calls upon judges to exclude otherwise admissible evidence on the basis of a discretionary judgment that its probative value is substantially outweighed by the risks of unfair prejudice, confusion of the issues, or misleading of the jury.¹⁸⁴

¹⁷⁹ See *supra* text accompanying note 159 (discussing role of trial judge in this preliminary question).

¹⁸⁰ One expedient to ensure compliance with the court's ruling is to instruct the prosecutor to advise the witness about what the judge has excluded.

¹⁸¹ See *Commonwealth v. Berry*, 648 N.E.2d 732, 740-41 (Mass. 1995) (finding no abuse of discretion where trial judge admitted photographs showing naked body of murder victim and blood-stained and torn clothing because danger of prejudice did not outweigh probative value).

¹⁸² See *supra* notes 49-52 and accompanying text (explaining potential harm of prior bad act evidence).

¹⁸³ *Old Chief v. United States*, 519 U.S. 172, 182 (1997).

¹⁸⁴ See FED. R. EVID. 403 (listing factors to weigh against evidence's probative value); EVIDENCE GUIDE, *supra* note 12, § 403 and advisory committee's note (same); see also *Reed*, *supra* note 45, at 214-15 (discussing competing views of role of Federal Rule of Evidence 403). *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006), supplies a good illustration of the court's duty to undertake this balancing test. In *Dwyer*, the Supreme Judicial Court explained that the trial judge failed to properly weigh the probative value and the prejudicial impact of prior bad act evidence in the form of testimony by the victim of two charged sexual assaults that she

In applying this balancing test, judges do not simply assess probative value on the one hand and prejudicial effect on the other hand and then make a judgment about whether the scales tip significantly toward prejudice. Neither probative value nor unfair prejudice are characteristics of evidence considered in isolation. It is only when judges consider prior bad act evidence in the context of the evidence as a whole that an appropriate judgment can be made in the nature of a cost-benefit analysis.¹⁸⁵ A cost-benefit analysis involves a “systematic weighing of pros and cons.”¹⁸⁶ The court must consider the relative probative value of the evidence, asking how significant is the government’s need for the evidence under the particular circumstances of the case.¹⁸⁷ The court also must consider how likely it is that the jury will misuse the evidence and rely on it as evidence of the defendant’s bad character.¹⁸⁸ According to the First Circuit,

Here is the crux of our analysis. The prejudice to an opponent can be said to be unfair when the proponent of the evidence could prove the fact by other, non-prejudicial evidence. Doubts about the probative value of prior bad acts evidence are thus compounded when prosecutors have other evidence available, rendering negligible their need to show intent by the prior bad acts.¹⁸⁹

Case law suggests that the probative value of prior bad act evidence may be substantially outweighed by its prejudicial effect when (1)

had previously been sexually assaulted by the defendant on an “uncountable” number of occasions. *See id.* at 407-08 (quotation omitted) (“Allowing the complainant to testify in detail about each of seven uncharged incidents was excessive. The judge should have intervened to prevent the danger of overwhelming a case with such bad act evidence.”).

¹⁸⁵ *See United States v. Lewis*, 693 F.2d 189, 194 (D.C. Cir. 1982) (noting need to weigh evidence “other means of proof and other factors”).

¹⁸⁶ *UAW v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991).

¹⁸⁷ *See YOUNG ET AL.*, *supra* note 42, § 404.4, at 209 (“Since the risk factor is so high . . . [the] admissibility [of prior bad act evidence] should be strictly limited to those situations where its probative value and the urgent need for such proof are clear.”); David P. Leonard, *The Legacy of Old Chief and the Definition of Relevant Evidence: Implications for Uncharged Misconduct Evidence*, 36 SW. U. L. REV. 819, 824 (2008) (suggesting trial judge should consider need for prior bad act evidence in light of context of case).

¹⁸⁸ *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) (“The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”); *see also United States v. Varoudakis*, 233 F.3d 113, 122 (1st Cir. 2000) (stating judge must consider risk that jury will make impermissible propensity inference based on evidence of prior bad acts) (citing *Old Chief v. United States*, 519 U.S. 172, 184 (1997)).

¹⁸⁹ *Id.* (citations and quotations omitted).

the legitimate probative value of the bad acts evidence is minimal;¹⁹⁰ (2) the need for the use of the evidence is low—for example, the Commonwealth has alternative means of establishing motive, intent, knowledge, or other subsidiary issues based on other evidence such as incriminating statements made by the defendant to law enforcement or physical evidence that supports an inference of guilt;¹⁹¹ (3) the evidence of the defendant's guilt is weak and the potential for misuse of the bad acts evidence is great;¹⁹² or (4) the sheer volume of evidence relating to the prior bad acts in comparison to the evidence of the defendant's guilt of the offense charged is so great that it will tend to lead the jury to regard it as propensity evidence.¹⁹³

Another problem stems from the fact that what often contributes to the legitimate probative value of prior bad acts is, at the same time, what creates the greatest potential for unfairness: where evidence of the prior bad act is very similar to the conduct charged, it is more likely that a jury will impermissibly infer that the defendant has a propensity to commit the conduct charged.¹⁹⁴ Thus, the mere fact that there is a high degree of probative value associated with the prior bad act is not sufficient to resolve the balancing test in favor of the admission of the evidence, just as a judge would not be warranted in admitting evidence for impeachment purposes of a defendant's prior criminal conviction for an offense identical or similar to the crime charged without considering the heightened potential for unfair prejudice.¹⁹⁵ Instead, in view of the concerns expressed by the Supreme Judicial Court in *Commonwealth v. Jackson*¹⁹⁶ and its progeny, in a close case the trial judge should insist on a strong showing of need before admitting evidence of a prior bad act.¹⁹⁷ The balancing test in the nature of a cost-benefit analysis performed by the court presents the trial judge with a

¹⁹⁰ See *supra* notes 168-78 and accompanying text (discussing trial judge's obligation to find legitimate probative value).

¹⁹¹ See *supra* note 75 and accompanying text (citing necessity requirement for admission of prior bad act evidence).

¹⁹² See *supra* text accompanying notes 185-88 (describing need to examine prior bad act evidence in light of evidence as a whole and potential for misuse).

¹⁹³ See *supra* text accompanying notes 137-39 (discussing case in which "excessive" evidence of uncharged conduct admitted).

¹⁹⁴ See *United States v. Varoudakis*, 233 F.3d 113, 123 (1st Cir. 2000) (highlighting tension between Federal Rules of Evidence 404(b) and 403).

¹⁹⁵ See *Commonwealth v. Elliot*, 473 N.E.2d 1121, 1126-27 (Mass. 1985) (recognizing danger of unfair prejudice when prior conviction used to impeach defendant is substantially similar to crime charged).

¹⁹⁶ 132 Mass. 16 (1882).

¹⁹⁷ See *supra* note 75 and accompanying text (citing necessity requirement for admission of prior bad act evidence).

choice that must be based on the objective factors set forth above and cannot be made to turn on the basis of the judge's personal views or judicial philosophy.¹⁹⁸ But, the decidedly discretionary character of the decision may lead different judges to reach different results in similar cases.¹⁹⁹

Once the court makes its decision, it should memorialize it on the record for the benefit and guidance of the lawyers and any future reviewing court.

(4) *Cautionary Jury Instruction.* Strong, cautionary instructions to the jury are regarded by our appellate courts as indispensable to the exercise of a sound judicial discretion with respect to the admission of prior bad acts.²⁰⁰ The courts adhere to the view that jurors follow the cautionary and limiting instructions given by trial judges.²⁰¹ Massachusetts law provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope

¹⁹⁸ See *supra* note 35 (citing trial judge's duty not to let personal preference or philosophy influence decisions).

¹⁹⁹ See *Lonergan-Gillen v. Gillen*, 785 N.E.2d 1285, 1288 (Mass. App. Ct. 2003) (acknowledging lack of "hard-and-fast rule" and range of permitted options inherent in exercise of discretion); see also *United States v. Bell*, 516 F.3d 432, 445 (6th Cir. 2008) (dictum) ("Because of the highly discretionary nature of this balancing process, the district court's decision is afforded great deference.")

²⁰⁰ See *Commonwealth v. DeMarco*, 830 N.E.2d 1068, 1073 (Mass. 2005) (approving of trial judge's strong limiting instruction regarding jury's permitted uses of prior bad act evidence).

²⁰¹ See, e.g., *Commonwealth v. Pillai*, 833 N.E.2d 1160, 1173 (Mass. 2005) (stating presumption that jury abided by judge's curative instruction); *Commonwealth v. McGeoghean*, 593 N.E.2d 229, 231 (Mass. 1992) (citing trial judge's limiting instruction as partial basis for upholding admission of evidence); *Commonwealth v. Clifford*, 372 N.E.2d 1267, 1272 (Mass. 1978) (asserting view that jurors are expected to follow instructions to disregard certain matters); *Commonwealth v. Gordon*, 254 N.E.2d 901, 904 (Mass. 1970) (same); *Commonwealth v. Crehan*, 188 N.E.2d 923, 926 (Mass. 1963) (same). It must be acknowledged, however, that despite the conventional view that jurors are presumed to follow the court's instructions, see *Delli Paoli v. United States*, 352 U.S. 232, 242-43 (1957) (citing assumption jury will follow court's instructions), *overruled in part by Bruton v. United States*, 391 U.S. 123 (1968) (citing with approval jury instruction assumption language from *Delli Paoli*); *Commonwealth v. Festo*, 146 N.E. 700, 702 (Mass. 1925) (noting presumption in 1925 case), experienced trial judges and others have expressed skepticism as to the effectiveness of curative or cautionary instructions. See, e.g., *Krulewicz v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Circuit Judge Hand expressing doubt regarding juries' adherence to limiting instructions); *Commonwealth v. DiMarzo*, 308 N.E.2d 538, 546 (Mass. 1974) (Hennessy, J., concurring) (citing duty to be skeptical of juries' following limiting instructions where admitted evidence had very high prejudice potential); J. Alexander Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 UMKC L. REV. 645, 646 (1992) (declaring research shows jurors incapable of disregarding prejudicial evidence).

and instruct the jury accordingly.”²⁰² The general rule is that the party opposed to the admission of the evidence has the obligation to request a limiting instruction and that the court has no duty to act on its own.²⁰³ But because there is a risk that evidence of prior bad acts may be used by the jury as evidence of the defendant’s guilt and that, as a result, the defendant may be deprived of a fair trial, trial judges should give strong, cautionary instructions about the limited use of such evidence both at the time it is received and again in the final instructions.²⁰⁴ What is preferred is “plain, unmistakable language”²⁰⁵ that explains (i) the limited purpose for which the evidence is admitted; (ii) that to use the evidence the jury has to be satisfied that the prior acts occurred and the defendant committed them; (iii) that the evidence cannot be considered as evidence of the defendant’s guilt or bad character; and (iv) that the jury cannot reason that it is more likely that the defendant is guilty of the crime charged because he may have committed the prior bad acts.²⁰⁶

²⁰² EVIDENCE GUIDE, *supra* note 12, § 105.

²⁰³ See *Commonwealth v. Roberts*, 740 N.E.2d 176, 179 (Mass. 2000) (explaining where no instruction requested by defendant, evidence admitted for all purposes).

²⁰⁴ On the question of timing, however, much is left to the judgment of the trial judge. See *Commonwealth v. Robinson*, 512 N.E.2d 514, 518 (Mass. App. Ct. 1987) (categorizing timing of instruction as issue of trial management and therefore within judge’s discretion).

²⁰⁵ *Commonwealth v. Weston*, 135 N.E. 465, 472 (Mass. 1922).

²⁰⁶ The following instructions are ones that I have used to reinforce these principles:
When the evidence is excluded:

The defendant is not charged with committing any crime other than the charge(s) contained in the indictment. You have heard mention of other acts allegedly done by the defendant. I have struck that reference from the record, and you are to disregard it entirely. I want to emphasize to you that you are not to consider that reference to other alleged acts at all. No one should even discuss it. Your verdict must be based only on the admissible evidence relating to the charges contained in the indictment.

When the evidence is admitted:

The defendant is not charged with committing any crime other than _____, based on the charges contained in the indictment. You have heard mention of other acts allegedly done by the defendant. [It may be advisable to describe the other acts in general terms here]. It is for you to decide whether to believe this evidence and you cannot even consider it unless you believe it. This other evidence is not evidence of the defendant’s guilt on the charges before the court. You cannot use this other evidence as a substitute for proof that the defendant committed the crimes he/she is charged with. Also, this other evidence is not to be used as proof that the defendant has a criminal personality or bad character. The only reason I allowed you to hear this other evidence and the only purpose you may use it for is a very limited one: [e.g., whether the defendant acted intentionally and not because of some mistake, accident or other innocent reason]. You may not consider this evidence for any other purpose. Specifically, you may not use it to conclude that if the defendant committed the other act(s), he/she must also have committed the crimes charged in this indictment. Any juror who considers

For example, in *Commonwealth v. Chartier*,²⁰⁷ the Appeals Court considered it significant that the trial judge stressed in his final instructions that the jury could not use the evidence of uncharged misconduct as proof that the defendant committed the acts charged, could not use it as evidence of the defendant's bad character, and could not conclude that it was more likely that the defendant committed the acts charged because of his commission of the prior bad acts.²⁰⁸ Likewise, in *Commonwealth v. Dunn*,²⁰⁹ the Supreme Judicial Court indicated that a specific limiting instruction given by the trial judge alleviated the potential for the improper use of evidence that the murder victim was pregnant at the time of her death.²¹⁰

VI. CONCLUSION

In a criminal case, the Commonwealth is required to prove the existence of the facts that constitute the elements of the offense by a standard of proof beyond a reasonable doubt. We do not allow the jury to reason that the defendant is more likely to be guilty than not guilty because he or she committed similar acts in the past. We do not allow the jury to substitute for proof of guilt beyond a reasonable doubt a finding that the defendant is a violent personality, a thief, or any other sort of criminal character. The general rule of our common law, however, is that when the Commonwealth is required to prove subsidiary or intermediate facts—such as whether the defendant acted with a specific intent or with knowledge, among other things—which usually are not capable of proof by direct evidence, it may introduce character evidence accompanied by careful limiting instructions. This evidence is in the form of prior or subsequent bad acts and the Commonwealth asks the jury to draw inferences about the disputed question of fact from the prior or subsequent conduct of the defendant with the same alleged victim or with other persons. Because this circumstance creates a risk that the jury may conflate evidence offered to establish the disputed subsidiary fact with evidence of the defendant's guilt, we call upon trial judges to carefully assess whether the legitimate probative value of this evidence is substantially outweighed by the danger of unfair prejudice.

this other evidence for any purpose other than the limited purpose I just explained you may use it for has violated these instructions.

²⁰⁷ 686 N.E.2d 1055 (Mass. App. Ct. 1997).

²⁰⁸ *Id.* at 1058.

²⁰⁹ 556 N.E.2d 30 (Mass. 1990).

²¹⁰ *See id.* at 36 (noting limiting instruction diminished chance of prejudice).

Our appellate courts have not established a hard-and-fast rule that trial judges can follow to determine when to admit or to exclude evidence of prior or subsequent bad acts. What they have commanded, however, is that in every case the trial judge (1) must be aware that there is a choice to be made; (2) must inquire into the facts and circumstances of the case and make preliminary determinations about the facts; (3) must conduct a cost-benefit analysis of the consequences of admitting the evidence; and (4) then must make an impartial determination on the record. By applying the process model of judicial discretion outlined in this article, lawyers can assist judges in fulfilling their obligations and in keeping faith with "a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent . . . [namely that] a defendant starts his life afresh when he stands before a jury. . . ."²¹¹

²¹¹ *People v. Zackowitz*, 172 N.E. 466, 197 (N.Y. 1930) (opinion of Chief Justice Cardozo); see also *State v. Lapage*, 57 N.H. 289 (1876) ("The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of a trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all it should not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing he is not worthy of painstaking and care. . . ."). As noted earlier, Professor Imwinkelried has pointed out that the common law prohibition against the use of character evidence has a constitutional dimension because the state is forbidden from criminalizing a person's status. See *An Evidentiary Paradox*, *supra* note 43, at 432 (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)); see also *Estelle v. McGuire*, 502 U.S. 62, 74 n.5 (1991) (leaving open question whether admission of character evidence to show propensity would violate due process).