ADMISSIBILITY OF PROOF OF AN ASSAULT VICTIM'S SPECIFIC INSTANCES OF CONDUCT AS AN ESSENTIAL ELEMENT OF A SELF-DEFENSE CLAIM UNDER IOWA RULE OF EVIDENCE 405

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In Iowa testimony concerning character or traits of character of an assault or murder victim, when offered by a defendant asserting a self-defense claim, is admissible for limited purposes by Iowa Rules of Evidence 404(a)(2)(A) and (B).[1] The scope of admission of such evidence requires an

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1. Iowa Rules of Evidence 404(a)(2)(A) and (B) state:

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

. . . .

(2) *Character of victim.*

(A) In criminal cases. Subject to rule 412, Iowa Rules of Evidence, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in any case where the victim is unavailable to testify due to death or physical or mental incapacity to rebut evidence that the victim was the first aggressor;

(B) In civil cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self defense by a party accused of the assaultive con-

analysis of the interrelationships of Iowa Rules of Evidence 401,[2] 403,[3] 404,[4] and 405.[5] The two primary issues raised by an offer of such evidence are: (1) whether the evidence offered is relevant to a purpose permitted by Rules 404(a)(2)(A) and (B); and (2) if offered for a permitted purpose, what forms—*i.e.*, reputation, opinion, or specific instances of conduct—the offered evidence may take under Rule 405. Although these two issues appear to be easily resolvable, the nature of the self-defense claim presented by a defendant must be carefully examined and the admissibility of character evidence in its multiple forms must be evaluated in light of concerns about the unfair prejudicial impact of character evidence.

In *State v. Dunson*[6] the Iowa Supreme Court discussed the admissibility of a specific instance of violence by the victim occurring *after* the charged assault, which was offered by the defendant as so-called character evidence. The supreme court treated admissibility of evidence of the victim's post-assault act, offered as character evidence, as an issue of first impression in Iowa. In that process the supreme court ignored existing Iowa case law[7] and the majority position of the federal courts interpreting the virtually identical Federal Rules of Evidence 403, 404, and 405 dealing with admissibility of prior acts of an assault victim where a defendant has asserted a self-defense claim.[8]

In *Dunson* the defendant and the alleged victim,[9] his live-in girlfriend, were visiting friends. While at the friends' home, the defendant apparently initiated a fight with the victim by striking her with a belt.[10] After the combatants were separated by the witnesses, the defendant went to the front porch.[11] The victim went to another room and returned with a vase and attempted to hit the defendant.[12] The defendant took the vase from the vic-

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duct, or evidence of peaceable character to rebut the same . . . .
IOWA R. EVID. 404(a)(2)(A),(B).

2. *See infra* note 31.

3. *See infra* note 33.

4. *See supra* note 1 and *infra* notes 35, 38, 71.

5. *See infra* note 20.

6. State v. Dunson, 433 N.W.2d 676 (Iowa 1988).

7. *See* Klaes v. Scholl, 375 N.W.2d 671 (Iowa 1985), *appeal after remand*, 412 N.W.2d 178 (1987); State v. Jacoby, 260 N.W.2d 828 (Iowa 1977); State v. Badgett, 167 N.W.2d 680 (Iowa 1969); State v. Wilson, 236 Iowa 429, 19 N.W.2d 232 (1945). *See also* Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985); State v. Pletka, 310 N.W.2d 525 (Iowa 1981); State v. Miller, 359 N.W.2d 508 (Iowa Ct. App. 1984).

8. *See infra* note 40.

9. Throughout the discussion of the *Dunson* case, the girlfriend, the complainant in this case, will be referred to as the "victim." The Iowa and Federal Rules of Evidence and commentators refer to the complainant as the victim, although the complainant's status as a victim is not legally determined until after the defendant's trial.

10. State v. Dunson, 433 N.W.2d at 677.

11. *Id.*

12. *Id.*

tim and struck her with the vase several times, injuring the back of the victim's head.[13] The defendant then left the porch.[14] The victim pursued him in her automobile and ran him down.[15] Perhaps because it is irrelevant, the opinion does not indicate if the defendant suffered any injuries.

Dunson was charged with assault with intent to inflict serious injury,[16] apparently based on striking the victim with the vase.[17] The specific issue at trial was the admissibility, as part of defendant's self-defense claim, of the victim's attempt to run over the defendant with her automobile after the charged assault. The trial court excluded testimony about the post-assault response of the victim as irrelevant to the earlier assault by the defendant and to the defendant's claim of self-defense.[18] On appeal the Iowa Supreme Court remanded the case for a new trial on the grounds that the defendant had been improperly denied a self-defense instruction.[19] The court also ruled that the offered testimony concerning the victim's post-assault conduct was relevant to the defendant's self-defense claim under Iowa Rule of Evidence 404(a)(2) and that the specific instance of conduct was admissible under Rule 405(b).[20] Crucial to the supreme court's analysis of admissibility under Rule 405(b) was the determination that the victim's character or trait of character was an essential element of the defendant's self-defense claim.

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13. *Id.*
14. *Id.* at 679.
15. *Id.*
16. The Iowa Code defines assault as follows:

> A person commits an assault when, without justification, the person does any of the following:
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> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

IOWA CODE § 708.1 (1987).

17. State v. Dunson, 433 N.W.2d at 677. After describing the fights involving the belt and the vase, the court states only that defendant was charged "[i]n connection with the incident." *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 680. Rule 405 provides:

> **(a) Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> **(b) Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

IOWA R. EVID. 405.

The court, while finding the testimony about specific instances admissible in the form offered, did not require its admission. Instead, the court left the ultimate decision on admission to the trial judge to evaluate under Iowa Rule 403 if the probative value was substantially outweighed by its unfair prejudicial impact. State v. Dunson, 433 N.W.2d at 681. *See infra* note 33; J. ADAMS & K. KINCAID, IOWA EVIDENCE § 403.1 (1988).

Although Dunson initiated the conflict, he relied on Iowa Code section 704.6(3),[21] which provides a defendant with the defense of justification in two situations where the defendant initially provoked the use of force by the victim. A person who initiates an assault regains the right to respond with reasonable force after the initial attacker clearly indicates the intent to withdraw from the conflict and the victim continues or resumes the use of force.[22] Even if a defendant does not withdraw, a defendant is also entitled to defend him or herself with reasonable force when the victim's response is grossly disproportionate to the force of the defendant's initial attack and is so great that the initial attacker reasonably believes him or herself to be in imminent danger of serious injury.[23]

Thus, in *Dunson* the defendant asserted that a jury could find he had withdrawn from the conflict and had clearly indicated that intent to the victim. The victim then renewed the conflict by assaulting him with the vase. The defendant also asserted that he used reasonable force to protect

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21. Section 704.6 of the Iowa Code provides:

> The defense of justification is not available to the following:
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> . . .
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> 3. One who initially provokes the use of force against oneself by one's unlawful acts, unless:
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> a. Such force is grossly disproportionate to the provocation, and is so great that the person reasonably believes that the person is in imminent danger of death or serious injury or
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> b. The person withdraws from physical contact with the other and indicates clearly to the other that the person desires to terminate the conflict but the other continues or resumes the use of force.

IOWA CODE § 704.6 (1989).

22. *See* IOWA CODE § 704.6(3)(b) (1989), *supra* note 21. The jury instruction that applies in this situation states:

> **Justification - Provocation - Withdrawal From Combat.** Concerning element number 1 of Instruction No. ____, though a person who provokes the use of force against [himself] [herself] is not justified, there is an exception.
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> If you find the defendant provoked the use of force by (*name of victim*) and there was physical contact, but the defendant, in good faith, quit, clearly indicating [he] [she] was abandoning the fight and (*name of victim*) knew or should have reasonably known the defendant was quitting, but [he] [she] continued, or if stopped, resumed the fight, then the defendant was justified.

IOWA CRIM. JURY INSTRUCTION 400.24.

23. *See* IOWA CODE § 704.6(3)(a) (1989), *supra* note 21. The applicable jury instruction provides:

> **Justification - Provocation - Disproportionate Force.** Concerning element number of Instruction No. ____, though a person who provokes the use of force against [himself] [herself] is not justified, there is an exception.
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> If the defendant provoked the use of force, but (*name of victim*) used force greatly disproportionate to the provocation and it was so great that the defendant reasonably believed [he] [she] was in immediate danger of death or injury, [he] [she] is not considered to have provoked the incident and [his] [her] acts would be justified.

IOWA CRIM. JURY INSTRUCTION 400.23.

himself at that point in the conflict. In the alternative, the defendant asserted that if the jury did not find that he withdrew from the fray, it could find that the victim's attack with the vase was grossly disproportionate to his provocation, that the victim's assault was of such force that he reasonably believed that he was in danger of serious injury, and that his response was with the use of reasonable force[24] under the circumstances. Both forms of justification urged by the defendant are roughly equivalent to the standard self-defense claim where a defendant asserts that the alleged victim was the first aggressor and that the defendant was entitled to use reasonable force in response to the attack because of a reasonable belief that such force was necessary for self-protection or protection of another.[25]

I. Self-Defense and Character Evidence Generally

With respect to either self-defense claim made in *Dunson*—that the victim became the aggressor after the defendant's withdrawal or that the victim's response was disproportionate and the defendant reasonably believed himself in danger—evidence of the victim's character or character traits for violence, aggression, or quarrelsomeness may be offered for two purposes. One purpose is to encourage the factfinder to infer conduct by the victim in conformity with the victim's character or character traits. Thus, the inference that a victim's conduct conformed to character traits for violence, aggression, or quarrelsomeness may make more probable the defendant's claims that the victim was the first aggressor or that the victim's response was disproportionate to the provocation.[26] A determination by the factfinder that the victim was the first aggressor or responded in a disproportionate manner is a decision concerning an objective factual occurrence,[27] based on

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24. Reasonable force is defined as follows:

> *"Reasonable force"* is that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, and it is reasonable to believe that such force is necessary to resist a like force or threat. Reasonable force, including deadly force, may be used even if an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party, or requires one to abandon or retreat from one's dwelling or place of business or employment.

Iowa Code § 704.1 (1989).

25. *See* Iowa Code § 704.3 (1989). This section provides: "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." *Id.*

26. *Id.* For a discussion of this aspect of the self-defense claim, see *infra* notes 41-42 and accompanying text.

27. 1A J. Wigmore, Wigmore on Evidence § 63, at 1369 (Tillers rev. 1983) ("In the present use, the additional element of communication [to the defendant of prior acts to the accused] is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence,

the totality of the circumstances, part of which may be character evidence.

A second purpose for offering character evidence is to demonstrate the reasonableness of the *defendant's belief*, under either justification defense claim, that the defendant was in imminent danger of serious injury.[28] In this context the character evidence goes to the defendant's subjective state of mind; it is not offered to prove an objective occurrence and not offered to prove the victim's conduct conformed to the victim's character.

Because victim character evidence may be offered for those two substantially different purposes, each must be analyzed separately to determine the relevance and admissibility of character evidence in its three primary forms: reputation, opinion, and specific instances of conduct.

II. Conduct in Conformity

A. *General Rule*

Iowa Rule 404(a) states the general rule that evidence of a person's character or a trait of character is not admissible for the purpose of proving the person acted in conformity with that character or trait of character.[29] Generally such character evidence is inadmissible because of potential prejudicial impact, whether offered concerning a defendant or a victim, in spite of the fact that it appears relevant to conduct of the person.[30] Rule 401

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not subjective belief."). *See also* 2 Weinstein's Evidence (MB) ¶ 404[06], at 404-49 n.3 (Sept. 1985)(quoting Wignore with approval).

28. For a discussion of this aspect of the self-defense claim, see *infra* section III(A).

29. *See supra* note 1.

30. Issues relating to both relevance and prejudice have been considered. The relevance of character evidence has been discussed as follows:

> [E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how he acted (and perhaps with what state of mind) in the matter in question. By and large, persons reputed to be violent commit more assaults than persons known to be peaceable. Yet, evidence of character in any form—reputation, opinion from observation, or specific acts—generally will not be received to prove that a person engaged in certain conduct or did so with a particular intent on a specific occasion, so-called circumstantial use of character. The reason is the familiar one of prejudice outweighing probative value. Character evidence used for this purpose, while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise.

C. McCormick, McCormick on Evidence § 188, at 554 (3d ed. 1984). The prejudice to defendant resulting from the admission of character evidence has also been considered:

> Rule 404 requires, with certain exceptions, the exclusion of character evidence whenever its only relevance is in tending circumstantially to show conduct on a particular occasion. The Rule is broad in application, for it speaks to both criminal and civil cases. The Rule is narrow in scope, however, for it does not exclude character evidence which is relevant for any other purpose, such as showing motive or intent, nor does it speak to a closely related kind of proof—evidence of "habit"—which is admissible pursuant to Rule 406 to show conduct.
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> Especially in criminal cases, what may be called the basic rule of exclusion is of

defines relevant evidence as any evidence making any fact of consequence to the litigation more or less probable.[31] Character evidence meets that definition because of the belief that people generally act in conformity to their character.[32] Relevant evidence is only excluded at trial if a specific rule of evidence precludes its admission or if the trial judge excludes the evidence because its probative value is substantially outweighed by its unfair prejudicial effect under Rule 403.[33]

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fundamental importance. It implements the philosophy that a defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged. In practical effect, the rule limits the use of prior crimes evidence, calling for exclusion of such evidence where its only bearing in the case is to show the propensity of the accused toward the crime. As the Supreme Court has stated emphatically, such evidence is *not* excluded because it is irrelevant, but rather because of "the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 135, at 117 (rev. 1985).

In other cases where character is used circumstantially to prove a consequential fact, proof by specific instances is not permitted for practical reasons. This type of evidence is so convincing that it may cause a jury to give it too much weight as well as put defendant to the difficult task of preparing to refute numerous charges covering the entire period of his life. Moreover, it is likely to lead to claims of surprise and confusion.

2 WEINSTEIN'S EVIDENCE (MB) ¶ 405[01], at 405-15 (Sept. 1986). Prejudice to the victim may also result from the admission of character evidence:

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

2 D. LOUISELL & C. MUELLER, *supra*, § 139, at 161-62.

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

See C. MCCORMICK, *supra*, § 193, at 572. *See also* 2 WEINSTEIN'S EVIDENCE (MB) ¶ 404[06], at 404-49-50 (Sept. 1985).

31. Rule 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." IOWA R. EVID. 401.

32. *See supra* note 30.

33. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or mislead-

Admissibility of character evidence offered to prove conduct in conformity belongs in the former category of relevant evidence that is specifically excluded by Iowa Rule 404(a). Rule 404(a) renders such character evidence inadmissible unless it falls within one of the listed exceptions. Essentially, Rule 404(a) is a legislative decision that, except in the limited circumstances catalogued in the exceptions, the unfairly prejudicial effect of evidence of character or character traits to prove conduct in conformity always substantially outweighs its probative force.[34]

B. *Exceptions*

Iowa Rule 404(a) provides four exceptions to the general rule of exclusion of character evidence to prove conduct in conformity by permitting: (1) a criminal defendant to offer the defendant's own relevant character traits to suggest that a person possessing that trait would not commit the charged offense;[35] (2) a criminal defendant to offer the relevant traits of the victim of

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ing the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." IOWA R. EVID. 403. Therefore, if not excluded by a rule of evidence, trial judges may use their discretion under Rule 403 in determining admissibility of the evidence. A determination under Rule 403 will only be reversed for an abuse of discretion. *E.g.*, State v. Roth, 403 N.W.2d 762 (Iowa 1987); Blakely v. Bates, 394 N.W.2d 320 (Iowa 1986); State v. Williams, 360 N.W.2d 782 (Iowa 1985).

34. Federal Rule of Evidence 404(a) has been discussed as follows:

> It is the unmistakable directive of [Federal] Rule 404(a) that, with certain important exceptions, evidence of a person's character, or pertinent trait of character, shall not be received if it is relevant only as tending to show that the person engaged in certain conduct on a particular occasion. In other words, the basic rule is that character evidence may not be introduced circumstantially to prove conduct.
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> The basic rule is narrow, and by its very terms it does not speak to three common situations. It does not reach (i) the use of character evidence to prove pertinent facts other than conduct, such as motive, intent, knowledge, etc., (ii) situations in which character itself is "an essential element of a charge, claim, or defense" (in the words of Rule 405(a)), [sic] and (iii) the use of character evidence to attack or support the veracity of witnesses pursuant to Rules 608 and 609 (a fact expressly recognized in Rule 404(a)(3)).

2 D. LOUISELL & C. MUELLER, *supra* note 30, § 136, at 124-25.

> Evidence of the general character of a party or witness almost always has some probative value, but in many situations, the probative value is slight and the potential for prejudice large. In other circumstances, the balance shifts the other way. Instead of engaging exclusively in the case-by-case balancing outlined in Chapter 16, however, the courts tend to pass on the admissibility of evidence of character and habit according to a number of rules with myriad exceptions that reflect the recurring patterns of such proof and its usefulness.

C. MCCORMICK, *supra* note 30, § 186, at 549-50. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5266, at 596 (1978), *infra* note 53. *See also* State v. Williams, 427 N.W.2d 469 (Iowa 1988) (regardless of the stated purpose for offering evidence of prior crimes, where its only effect is to establish a propensity to commit a certain type of offense, it must be excluded).

35. Rule 404(a)(1) states:

the crime;[36] (3) a civil defendant to offer evidence of the victim's character for violence when the defendant has been charged with assault and claims self-defense;[37] or (4) any party to present evidence of the character of a witness on the issue of truthfulness or untruthfulness.[38] The second exception permitting criminal defendants to offer evidence of relevant traits of a victim under Rule 404(a)(2)(A) applies primarily to self-defense claims in murder or assault cases.[39] The discussion that follows also appears to apply to the Rule 404(a)(2)(B) exception for civil assault defendants since, in effect, a crime has been charged and the issues are the same.[40]

> **(a) Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

IOWA R. EVID. 404(a)(1). A case decided prior to the promulgation of rules which applies the principle expressed in Rule 404(a)(1) is State v. Buckner, 214 N.W.2d 164 (Iowa 1974). In *Buckner* the defendant was charged with robbery with aggravation. *Id.* at 166. Character traits of the defendant deemed relevant to two elements of the charge (assault and theft) included honesty, integrity, peacefulness and non-violence. *Id.* at 167. *See generally* C. MCCORMICK, *supra* note 30, § 191; 2 WEINSTEIN'S EVIDENCE (MB) ¶ 404[05] (Sept. 1985); 2 D. LOUISELL & C. MUELLER, *supra* note 30, § 137.

36. IOWA R. EVID. 404(a)(2)(A). *See supra* note 1.

37. IOWA R. EVID. 404(a)(2)(B). *See supra* note 1.

38. Rule 404(a)(3) states:

> **(a) Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> . . .
>
> (3) *Character of witness.* Evidence of the character of a witness, as provided in IOWA R. EVID. 607, 608, and 609.

IOWA R. EVID. 404(a)(3). Rule 403(a)(3) refers issues of character to prove truthfulness or untruthfulness to Iowa Rules 607, 608, and 609. Basically, Rule 607 provides that any witness can be impeached. Rule 608 permits impeachment and rehabilitation of the credibility of a witness through reputation and opinion testimony. Specific instances of conduct other than conviction of a crime may be inquired into on cross-examination in the discretion of the trial judge but may not be proved by extrinsic evidence. Rule 609 governs admissibility for impeachment purposes of prior convictions, which are essentially prior specific instances of conduct admitted for a purpose other than proving conduct in conformity.

39. By its terms, the exception prohibits its application to sexual abuse cases that are governed by Rule 412. Iowa Rule 412 is an update of an earlier rape shield law (IOWA CODE § 782.4 (1976), repealed). Prior to adoption of rape shield laws, the sexual conduct of a rape victim frequently was admitted into evidence.

See 2 D. LOUISELL & C. MUELLER, *supra* note 30, § 139, at 162; Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

40. *See* Klaes v. Scholl, 375 N.W.2d 671 (Iowa 1985). Iowa Rule of Evidence 404(a)(2)(B) is substantially different from the corresponding federal rule in that the Iowa rule permits introduction of character evidence of a victim in civil cases to prove conduct in conformity where a party has been accused of assaultive conduct. The exception in Iowa Rule 404(a)(2)(B) does not apply to civil cases that charge criminal conduct other than assault. Federal Rule 404(a)(2)

When offering character evidence regarding the victim to prove conduct in conformity in character situations, the defendant attempts to demonstrate one of two conclusions through the victim's character or character traits for aggressiveness, violence, or quarrelsomeness. One conclusion that a defendant may suggest to the factfinder is that if the victim's conduct conformed to the victim's character, this character evidence corroborates the defendant's claims that the victim was the first aggressor in the conflict or re-initiated the conflict after the defendant had withdrawn. A second desired conclusion is that the character evidence increases the likelihood that the victim responded to the provocation in a manner disproportionate to the provocation, again corroborating the defendant's claim.

When evidence of the victim's character is offered to prove conduct in conformity with either conclusion, it is irrelevant whether the defendant had an opinion concerning the victim's aggressiveness or propensity for violence or was aware of either specific acts of violence by the victim or the victim's reputation in the community for violence. The defendant's awareness or lack of awareness of the victim's character does not make it more or less probable that the victim was the first aggressor or responded to provocation in a disproportionate manner.[41] The existence of the victim's character traits

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does not appear to admit character evidence in civil cases. *See* C. McCormick, *supra* note 30, § 192, at 571; 2 D. Louisell & C. Mueller, *supra* note 30, § 142 (suggests that there is little logical support for the federal rule exclusion of character evidence in civil cases that essentially charge a party with criminal conduct). *But see* Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) (although a civil case, the court determined that the central issue was criminal in nature and applied Federal Rule 404(a)).

41. *See* State v. Wilson, 236 Iowa 429, 443, 19 N.W.2d 232, 238-39 (1945). The court in *Wilson* stated:

> The State objected to the testimony of Bolden's bad reputation because it claimed it was not shown that Glenn knew about it. This may be true as related to Glenn's apprehension, but it is immaterial as bearing upon the fact as to which was the aggressor, and as tending to corroborate other testimony relative to the assault. On that issue it is not different from the rule as to uncommunicated threats. It is the *fact* of the deceased's character and reputation as to this trait, and not the accused's knowledge of it, that is important and material.

Id. See 2 Weinstein's Evidence (MB), ¶ 404[06], at 404-49 (Sept. 1985) ("Even if the accused was unaware of deceased's reputation, evidence of it may be introduced pursuant to [Federal] Rule 404(a)(2)."). Wigmore states that:

> In the present use [conduct in conformity] this additional element of communication is unnecessary, for the question is what the deceased probably did, not what the accused probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief. This distinction, however, was in early rulings not always appreciated by the courts; nor was it clearly laid before them by counsel. Hence, an early ruling excluding the present use of the evidence cannot always be taken as a repudiation of the present principle but is often merely a ruling that the offer does not satisfy the doctrine of communicated character; and such a court may in the future recognize the present doctrine if the distinction is pressed upon it. Apart from a few such precedents, the principle is now generally accepted.

1A J. Wigmore, *supra* note 27, § 63, at 1369. *See also* Perrin v. Anderson, 784 F.2d 1040, 1045

of aggressiveness, violence, or quarrelsomeness are the relevant factors. Those character traits are being used circumstantially to show an objective occurrence—that the victim was the first aggressor or that the victim's response was disproportionate to the provocation—is more or less probable.[42]

C. *Methods of Proving Character*

When utilizing the Rule 404(a)(2) exceptions, the method of proving the victim's character to establish conduct in conformity is governed by Rule 405.[43] Rule 405(a) states that in all situations "in which evidence of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."[44] Under Rule 405(a), inquiry into specific acts of conduct is permissible only on cross-examination. The opportunity to cross-examine with respect to specific acts is provided

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n.3 (10th Cir. 1986).

42. The Advisory Committee Note accompanying Federal Rule 404 states:

> Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.
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> In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: . . . (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved . . . .

FED. R. EVID. 404 advisory committee's note.

43. The Advisory Committee Note accompanying Federal Rule 404 states:

> Note to Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

FED. R. EVID. 404 advisory committee's note.

44. IOWA R. EVID. 405(a). Commentators state:

> Rule 405(b) provides that when character (or a trait thereof) amounts to an element in a claim, charge, or defense, then it may be proved by evidence of specific instances of conduct. In all other cases, when character amounts to anything less than such an element, the clear intent of FRE 405 is to disallow proof in this form.

2 D. LOUISELL & C. MUELLER, *supra* note 30, § 150, at 333.

The foundation needed for reputation and opinion testimony was established in State v. Hobbs, 172 N.W.2d 268, 274-75 (Iowa 1969). *See also* State v. Hood, 346 N.W.2d 481 (Iowa 1984); State v. Buckner, 214 N.W.2d 164 (Iowa 1976); State v. Scalf, 254 Iowa 983, 119 N.W.2d 868 (1963). The reputation or opinion testimony offered in cases applying the rule to self-defense situations appears to relate to reputation or opinion that existed by the time of the offense. State v. Hobbs, 172 N.W.2d at 274-75.

only to test the credibility of the character witness by examining the basis for the testimony. The specific instances are not offered to prove conduct in conformity.[45]

Rule 405(b) provides the only exception to the exclusion in Rule 405(a) of specific instances of conduct in situations in which evidence of character or character traits is admissible under Rule 404(a). Rule 405(b) allows specific acts of conduct to be admitted in instances where "character or a trait of character of a person is an *essential element* of a charge, claim, or defense."[46] The intended limits of the exception by use of the term "essential element" were suggested in the advisory committee's note to Federal Rule 405: "[T]he rule confines the use of evidence of this kind [specific instances of conduct] to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry."[47]

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45. Klaes v. Scholl, 375 N.W.2d 671, 675-76 (Iowa 1985).

46. IOWA R. EVID. 405(b) (emphasis added). *See supra* note 20.

47. The Advisory Committee's Note accompanying Federal Rule 405 states:

> Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine.

Wigmore states:

> As a general rule . . . the character of the victim may not be shown by particular instances of conduct unless those instances of conduct are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion.
>
> 1. . . . *Federal:* Federal Rule of Evidence 405, if construed as written, does not compel the trial court to permit the defendant to introduce specific instances of the victim's conduct to show the character of the victim as circumstantial evidence of the victim's doing of an act (*e.g.*, initiating aggression) on another occasion (*e.g.*, at the time of the crime charged). . . .
>
> Rule 405(b) provides that "proof . . . of specific instances [of a person's] conduct" may be made "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense." . . . However, when character is not an essential element, it may be shown only by reputation or opinion evidence (Rule 405(a)). Hence, construed literally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary *act* of aggression against the defendant, which is to say that the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue. Cf. Henderson v. State, 234 Ga. 827, 218 S.E.2d 612, 614 (1975) ("It is unlawful to murder a violent and ferocious person, just as it is unlawful to murder a nonviolent and inoffensive person").

Iowa Rule 405 is identical to Federal Rule 405. The advisory committee comment to Iowa Rule 405 cited *State v. Jacoby*[48] as an example of the application of Rule 405(b) and the limitation of evidence of specific acts to situations where character is an essential element of a charge, claim, or defense. In *Jacoby* the defendant asserted a self-defense claim and introduced specific acts of conduct of the victim apparently without objection.[49] The defendant then requested that the jury be instructed that it could consider those specific acts in determining who was the first aggressor.[50] Thus, the defendant was asking that the jury consider the victim's prior acts to infer conduct in conformity on the charged occasion. The trial court refused to grant the instruction and the ruling was sustained by the supreme court because the specific acts evidence should not have been admitted and thus could not support the requested instruction.[51]

The court in *Jacoby* quoted:

> "The reasons for the rule prohibiting proof of specific acts of violence appear to be at least threefold: (1) A single act may have been exceptional, unusual, and not characteristic and thus a specific act does not necessarily establish one's general character; (2) although the state is bound to foresee that the general character of the deceased may be put in issue, it cannot anticipate and prepare to rebut each and every specific act of violence; and (3) permitting proof of specific acts would multiply the issues, prolong the trial and confuse the jury."[52]

Further, and perhaps more importantly, the court in *Jacoby* recognized that the capacity of such evidence to arouse an unfair emotional prejudice is usually greater than its probative value.[53] *Jacoby* did not view the victim's char-

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> Nevertheless, as is noted elsewhere . . ., courts often fail to follow the logic of the distinction just described—though repeatedly chastised by scholars of evidence for failing to do so—and not infrequently courts have said . . . that character is "in issue" when such is not the case according to the logic described above. . . . The same sort of jumbling of categories of character in issue and character as circumstantial evidence is sometimes also apparent in the present situation, involving proof of the character of the victim of a crime (and the consequent implications for the types of evidence that may be used to show the character of the victim).

1A J. WIGMORE, *supra* note 27, § 63.1, at 1382-83.

48. State v. Jacoby, 260 N.W.2d 828 (Iowa 1977).

49. *Id.* at 836.

50. *Id.* at 838.

51. *Id.* at 838-39.

52. *Id.* at 838 (quoting Henderson v. State, 234 Ga. 827, 829, 218 S.E.2d 612, 615 (1975)). *See also* C. MCCORMICK, *supra* note 30, § 187, at 552 ("The hazards of prejudice, surprise and time-consumption implicit in this manner of proof [specific acts] are more tolerable when character is itself in issue than when this evidence is offered as a mere indication that the defendant committed the acts that are the subject of the suit.").

53. State v. Jacoby, 260 N.W.2d at 839. *See* Advisory Committee Note Accompanying Federal Rule 405, *supra* note 47; 2 D. LOUISELL & C. MUELLER, *supra* note 30. Wright and Graham state:

> The general rule excluding specific instances of conduct to prove character is

acter as an essential element of a claim of self-defense under Rule 405(b) where the victim is asserted to be the first aggressor.[54]

Similarly, in *Klaes v. Scholl*,[55] a civil case, the court applied the *Jacoby* conclusion to a self-defense claim involving a civil assault where the defendant asserted that the victim was the first aggressor. The court specifically examined whether character was in issue under Rule 405(b) for purposes of admitting specific instances of conduct on the issue of who was the first aggressor.[56] The court indicated that to be an essential element or in issue under Rule 405(b), character had to be "an operative fact determining the

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> founded on considerations of fairness and efficiency. An incident offered to illustrate character may have an emotional impact on the jury that is disproportionate to its real probative worth. The person whose character is thus attacked may be unprepared to rebut or explain the act alleged. In cases where the party is prepared to show that the incident never occurred or to offer proof in mitigation, such evidence may serve to distract the jury's attention from the ultimate issues in the case. Finally, even if the court can achieve fairness in the handling of specific instances offered to prove character, the time spent in this effort may not be justified in terms of probative worth. Although these competing considerations might have been left to the trial court under Rule 403, Congress and the Advisory Committee thought it best to deal with the issue by a rule of exclusion with specific exceptions.

22 C. WRIGHT & K. GRAHAM, *supra* note 34, § 5266, at 596.

54. State v. Jacoby, 260 N.W.2d at 837-38. The court noted that the majority view in the United States is that violent or aggressive character of a victim cannot be established by specific acts. *Id.* at 838. Further, the court indicated that the then new Federal Rules of Evidence were in accord with the majority view. *Id.* The opinion also noted the jurisdictions approving a minority rule admitting such specific acts. *Id.* Included in the listing was California, based on 1967 amendments to its Evidence Code. *Id.* For a discussion of the current California Code of Evidence and its explicit approval of admitting specific acts to prove conduct in conformity, see *infra* note 93. Commentators state:

> One court states in a dictum that evidence of specific instances of victim's conduct is admissible on the ground that the claim of self-defense is one in which character of victim is an ultimate issue, a dubious claim as it would imply that one could not assert self-defense against a person of good character. Amarok v. State, 671 P.2d 882 (Alaska Ct. App. 1983).

22 C. WRIGHT & K. GRAHAM, *supra* note 34, § 5266, at 635 n.38.

> One court has misunderstood Rule 405, stating that in a case of self-defense specific instances would be admissible under Rule 405(b) as "probative of 'an essential element'" of a claim of self-defense. State v. Melendez, C.A. 1981, 643 P.2d 609, 97 N.M. 738, reversed on other grounds 643 P.2d 607, 97 N.M. 738. Under rule 405(b), character must be an element of the defense, not simply probative of an element.

Id. § 5267, at 636 n.4 (Supp. 1990).

> An Ohio court has held that deceased's character for violence is an essential element of the claim of self-defense. State v. Smith, 1983, 460 N.E.2d 693, 10 Ohio App.3d 99. Does the court mean that the defendant cannot claim self-defense against an assailant with good character? If not, then it is hard to see why character is an essential element of the defense.

Id. at 636-37 n.5.

55. Klaes v. Scholl, 375 N.W.2d 671 (Iowa 1985), *appeal after remand*, 412 N.W.2d 178 (Iowa 1987).

56. *Id.* at 676.

parties' rights and liabilities."[57] Such occasions are rare and the rule is generally perceived as limited to issues such as defamation, negligent hiring or entrustment, determining the best interests of a child in a child custody hearing, and possibly entrapment when raised as a criminal defense.[58] Therefore, while the victim's character for violence may be circumstantial evidence of who was the first aggressor, proof of character is not an essential element of raising that claim of self-defense. According to *Klaes v. Scholl*, when considering the self-defense claim that the victim was the first aggressor, "the 'issue' in question is not one of *character* but rather of *conduct*."[59]

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57. *Id. See* C. McCormick, *supra* note 30, § 187, at 551 ("A person's character may be a material fact that under the substantive law determines rights and liabilities of the parties."). Louisell and Mueller state:

> *Form of proof.* On one point, the pre-Rules decision in *Burks* is slightly misleading, for it states that specific instances may be offered to prove character of the victim, hence his behavior on the occasion in question. But by virtue of Rules 404 and 405, it seems that proof of the victim's character or disposition must be cast in the form of opinion or reputation testimony. It is true that Rule 405(b) permits evidence of specific instances when character is an element of a charge, claim or defense, but this condition is not satisfied merely because the accused offers evidence of the victim's character to prove, for example, that he started the affray: Here the accused does not state a defense by proving a character trait (such as that the victim was belligerent), but by proving that the victim started the fight, so it is Rule 405(a)—and not Rule 405(b)—which provides the applicable principle, and evidence of specific instances is inadmissible to prove the conduct of the victim at the time.

2 D. Louisell & C. Mueller, *supra* note 30, § 139, at 164-66.

58. Klaes v. Scholl, 375 N.W.2d at 676; 22 C. Wright & K. Graham, *supra* note 34, § 5267, at 602 (cases cited in 1989 Supp.); 2 D. Louisell & C. Mueller, *supra* note 30, §§ 141, 150; C. McCormick, *supra* note 30, § 187; M. Graham, Handbook of Federal Evidence § 405.2 (2d ed. 1986); J. Adams & K. Kincaid, Iowa Practice § 405.2 (1988); *In re* Marriage of Snyder, 241 N.W.2d 733 (Iowa 1976) (child custody proceeding); *In re* Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974) (child custody proceeding); *In re* Marriage of Dawson, 214 N.W.2d 131 (Iowa 1974) (child custody proceeding). *But see* United States v. Manos, 848 F.2d 1427, 1429-31 (7th Cir. 1988) (honesty is, in a broad sense, an essential element of a defense to a bribery charge); United States v. Beros, 833 F.2d 455, 463-64 (3d Cir. 1987) (specific acts of defendant were admissible on the issue of credibility which was an essential element of the defense to a charge of embezzlement).

59. Klaes v. Scholl, 375 N.W.2d at 676. Louisell and Mueller state:

> But in fact in criminal cases it is seldom possible to outrun the basic rule, and in fact Rule 405(b) seldom applies. Since criminal sanctions aim to deter and penalize *misbehavior* (when generated or accompanied by a mental condition or purpose defined sometimes rather broadly and sometimes rather narrowly), and not *condition or status*, it is unsurprising that character is seldom an element in a charge. It is perhaps equally to be expected that character seldom amounts to an element of a defense, and a person who engages in the proscribed behavior (if he also has or entertains the requisite mental condition) may be guilty of a crime even if his general character assures him favored consideration in heaven or the esteem of posterity. And in fact proof of good character is almost always advanced as the basis for an inference that the accused did not engage in the behavior charged. The rarity of cases in which character may be said to be an element of a charge or defense is attested by the obscurity of the solitary example from the criminal sphere cited by the Advisory

With the Rule 405(b) option unavailable, proof of character is limited by Rule 405(a) to opinion and reputation; unrelated acts of violence are not admissible to prove conduct in conformity.

One effect of the *Dunson* opinion, by ignoring the analysis in *Jacoby* and *Klaes* and treating character as an essential element in proving the victim's conduct in conformity with prior specific acts in a self-defense claim, is to eliminate the need for Rule 405(a). Rule 405(a) purports to limit character evidence that is admissible under Rule 404(a) to opinion and reputation testimony, except in the limited situations covered by Rule 405(b). As interpreted by *Dunson*, however, proof of the victim's character in self-defense claims, presumably in both criminal and civil cases, are no longer limited by Rule 405(a). In addition, the other frequent common law criminal cases in which specific acts of a victim were admissible were sexual abuse cases. Because Rule 404(a)(2)(A) now provides that character of the victim is admissible only in accord with Rule 412,[60] Rule 405(a) also has no application to sexual abuse cases. Similarly, Rule 405(a) is inapplicable by definition to the exception for character of witnesses set forth in Rule 404(a)(3) because that exception specifically refers to admission of such witness character evidence in accord with Rules 607, 608, and 609.[61]

Thus, after *Dunson* there would appear to be little need for Rule 405(a) in its current form since it would only limit methods of proof under Rule 404(a)(1). If such a limitation had been intended it would have been more easily understood if included in Rule 404(a)(1). Further, if the *Dunson* "material to several elements of his defense" analysis[62] is applied to the Rule 404(a)(1) exception, Rule 405(b) would also appear to be applicable to that exception. For example, if a victim's specific instances of conduct are "material" in proving the victim's conduct in conformity for a self-defense claim, introduction of the defendant's specific acts to prove defendant's conduct in conformity would appear "material" in raising a reasonable doubt about the existence of the elements of a charged offense.[63] Applying the court's reason-

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Committee in its Note to Rule 405—"the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction."

2 D. LOUISELL & C. MUELLER, *supra* note 30, § 141, at 278-79. *See also* Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 852-53 (1982).

60. Iowa Rule of Evidence 412 strictly limits the situations in which prior specific acts of a sexual abuse victim are admissible.

61. Iowa Rule of Evidence 608 also imposes strict controls on references to specific instances of conduct of a witness, allowing only inquiry on cross-examination in the court's discretion. No extrinsic proof of the act is permitted. Rule 609 governs impeachment by prior convictions.

62. State v. Dunson, 433 N.W.2d 676, 681 (Iowa 1988).

63. Contrary to the analysis suggested by the *Dunson* opinion, a defendant's specific acts are generally not admissible to prove conduct in conformity with the revealed character trait. Louisell and Mueller maintain the orthodox view that the defendant's specific acts are not admissible if used as circumstantial evidence that the defendant did not commit the charged

ing in *Dunson*, Rule 405(a) will have no effect.

III. Reasonable Belief of Defendant

A. *General Rule*

A second aspect of both forms of the justification defense is the defendant's reasonable belief that the defendant was in danger of serious injury and the reasonableness of the defendant's response to the force being used against him. If the jury finds that the defendant has properly withdrawn from the conflict, the defendant is entitled to use reasonable force, as defined in Iowa Code section 704.1,[64] to respond to re-initiation of the conflict by the victim if the defendant reasonably believes such force is necessary. Similarly, where the defendant urges that the victim's response was grossly disproportionate to the initial provocation, the defendant is entitled to respond with reasonable force when the defendant reasonably believes such force is necessary. In both situations, the jury evaluates the mental element of defendant's reasonable belief under the circumstances. One of the factors that influences the reasonable belief of the defendant under the circumstances is the defendant's knowledge or awareness of the victim's character or character traits for violence, aggressiveness, or quarrelsomeness or of specific instances of aggression or violence committed by the victim.[65] Thus,

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offense, as follows:

> It is sometimes said that when the accused introduces evidence of his own good character circumstantially to prove that he did not commit the crime charged, he "puts his character in issue." The statement contains a kernel of truth, but it is misleading in two senses: First, as noted above, the defense evidence does not open the whole matter of the character of the accused, nor even all aspects of his character which may be germane, but only those aspects of his character which the accused himself has put in evidence. Second, it should be remembered in such cases that the ultimate issue in the case is still the actions of the accused, and not his character. Introducing evidence of good character to prove innocence does *not* make character "an essential element of a charge, claim, or defense" within the meaning of Rule 405(b), and therefore does not pave the way for the introduction of evidence of "specific instances of his conduct."

2 D. Louisell & C. Mueller, *supra* note 30, § 137, at 135-36. *See* 22 C. Wright & K. Graham, *supra* note 34, § 5266, at 601 ("Rule 405 puts the victim and the accused on the same footing with respect to proof of particular incidents to prove character."). *See also* United States v. Barry, 814 F.2d 1400 (9th Cir. 1987) (character evidence offered by defendant under Rule 404(a)(1) in an entrapment defense can only come in through reputation and opinion evidence under Rule 405(a)); Government of Virgin Islands v. Grant, 775 F.2d 508, 510-12 (3d Cir. 1985) (Under Rule 404(a)(1) a defendant may offer character evidence concerning defendant's pertinent character traits. Rule 405(a), however, precludes introduction of specific acts to prove good character.). *But see* United States v. Blackwell, 853 F.2d 86 (2d Cir. 1988) (admitted specific acts of defendant relevant to defendant's character for credibility as "background information" admissible under Rule 403).

64. *See supra* note 24.

65. *See* State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977). The court in *Jacoby* stated:

> This type of evidence concerning the deceased's character is admissible for one or

relevance of the victim's character or specific acts in the context of the de-

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both of the following purposes:

(1) To show the state of mind of the defendant, the degree and nature of his or her apprehension of danger which might reasonably justify resort to more prompt and violent measures of self-preservation. Rhone, *supra*, 223 Iowa at 1232-1233, 275 N.W. at 115-116; State v. Abarr, 39 Iowa 185, 189 (1874); 40 Am. Jur.2d, Homicide, § 302 at 570. Of course such evidence is admissible for this purpose only if these character traits were known to the accused. State v. Norton, 227 Iowa 13, 16, 286 N.W. 476, 478 (1939); State v. Sale, 119 Iowa 1, 3, 92 N.W. 680, 681 (1902); 1 Wigmore on Evidence, § 63 at 470 (3d ed. 1940).

Id.

Iowa Uniform Criminal Jury Instruction 400.22 indicates that the defendant must have been aware of the victim's character at the time of the assault in order to use the victim's character as evidence of defendant's state of mind:

> **400.22 Justification - Character Of Victim.** Evidence has been received concerning (*name of victim*)'s character of being (*traits, e.g., quarrelsome, vicious*) in an effort to show that (*name of victim*) was a dangerous and violent person.
>
> This evidence bears on whether (*name of victim*) was the aggressor at the time the defendant (*e.g., fired the shots*). If you find the defendant knew of (*name of victim*)'s character, the evidence also bears on whether the defendant acted under circumstances which would have caused a reasonable person to be afraid of being injured or killed by (*name of victim*).
>
> A deliberate and unprovoked use of force was not justified merely if (*name of victim*) was a dangerous and violent person. If the defendant used force in revenge or only to punish (*name of victim*), the defendant's act was not justified.

IOWA CRIM. JURY INSTRUCTION 400.22.

Wigmore states:

> The reason for the hesitation, once observable in many courts, in recognizing evidence regarding the deceased's violent character, and the source of much confusion upon the subject, was the frequent failure to distinguish this use of the deceased's character from another use, perfectly well settled but subject to a peculiar limitation not here necessary—the use of communicated character for violence to show the reasonableness of the accused's apprehension of violence (§ 246 *infra*). As the purpose there is to show the accused's state of mind, it is obvious that the deceased's character, as affecting the accused's apprehensions, must have become known to him, *i.e.*, proof of the character must indispensably be accompanied by proof of its communication to the accused; else it is irrelevant.

1A J. WIGMORE, *supra* note 27, § 63, at 1369.

Wright and Graham state:

> Similarly, prior acts of the victim of the crime may be admissible to prove the state of mind of the defendant who claims self-defense if there is some evidence that these incidents came to the attention of the defendant.

22 C. WRIGHT & K. GRAHAM, *supra* note 34, § 5266, at 600.

Louisell and Mueller state:

> A similar kind of evidence, though not strictly within the present topic, is that which shows prior threats by the victim directed toward the accused. Where these threats have been communicated to the accused, they bear upon the probability that the victim started the affray and upon the reasonable apprehension of the defendant, much like prior violent acts of the victim known to the accused. Where the threats have *not* been communicated to the accused, they still bear upon the probability that the victim was the first aggressor.

2 D. LOUISELL & C. MUELLER, *supra* note 30, § 139, at 167.

fendant's reasonable belief is dependent on the defendant's awareness of the character or specific acts so that the defendant can form the requisite reasonable belief.

Even if a defendant is mistaken in his belief as to the danger posed by the victim, the defendant is justified in using force if he reasonably believes the danger exists under the circumstances.[66] Neither the existence of the victim's character for violence nor the actual occurrence of specific instances of violence is required in this situation; the defendant's reasonable subjective belief is all that is necessary. Clearly, a defendant in this context is not urging that the victim's conduct conformed to his character or to past acts. Rather, the defendant is urging the jury to consider the subjective impact that the information, whether accurate or inaccurate, that the defendant possessed about the victim had on the defendant's state of mind during the altercation.

B. *Method of Proof*

When offered to demonstrate a defendant's reasonable belief, it is clear

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66. *See supra* note 25.

The Iowa Uniform Criminal Jury Instructions explain that a defendant may have acted reasonably even if factually mistaken as to the danger presented by the victim:

> **400.2 Justification - Elements - Self-Defense Of Person.** A person is justified in using reasonable force if [he] [she] reasonably believes the force is necessary to defend [himself] [herself] from any immediate use of unlawful force.
>
> If the State has proved any one of the following elements, then the defendant was not justified:
>
> 1. The defendant started or continued the incident which resulted in [injury] [death].
> 2. An alternative course of action was available to the defendant.
> 3. The defendant did not believe [he] [she] was in immediate danger of death or injury and the use of force was not necessary to save [himself] [herself].
> 4. The defendant did not have reasonable grounds for the belief.
> 5. The force used by the defendant was unreasonable.
>
> **400.4 Justification - Real Or Apparent Danger - Defense Of Person.** Concerning element number 3 of Instruction No. _____, the defendant claims danger existed. You are to consider the danger or apparent danger from the viewpoint of a reasonable person under the circumstances which existed at that time.
>
> It is not necessary that there was actual danger, but the defendant must have acted in an honest and sincere belief that the danger actually existed.
>
> Apparent danger with knowledge that no real danger existed is no excuse for using force.
>
> **400.5 Justification - Real Or Apparent Danger - Reasonable Belief Defense Of Person.** Concerning element number 4 of Instruction No. _____, in deciding this danger, the defendant was not required to act with perfect judgment. However, [he] [she] was required to act with the care and caution a reasonable person would have used under the circumstances which existed at that time.
>
> If in the defendant's mind the danger was actual, real, immediate, or unavoidable, even though it did not exist, that is sufficient if a reasonable person would have seen it in the same light.

that the victim's character or trait of character is not being offered to prove the victim's conduct in conformity. Therefore, Rules 404(a) and (b) place no limitation on admissibility of character evidence relevant to the defendant's state of mind.[67]

In addition, if proof of character for this purpose was limited by Rule 405, even if somehow governed by Rule 404(a), in theory Rule 405(b) would not authorize admission of the victim's specific acts unless once again it is determined that the victim's character is an essential element of that form of the self-defense claim. Rule 405(b) does not apply under the analysis in *Jacoby* and *Klaes* because the character of the victim is not an essential element of the reasonable belief portion of a self-defense claim. The prior specific acts will not be determinative of the rights and liabilities of the parties.[68] The defendant need not prove the prior acts nor the victim's character to prevail on the reasonable belief defense. The defendant's right is based on a reasonable, even if mistaken, belief.[69] Thus, testimony concerning specific instances of violence by the victim is merely circumstantial evi-

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67. Commentators state:

> In a homicide case, evidence of a victim's reputation for violence or aggression may be introduced in support of the accused's claim of self-defense. If it is proved that the accused knew of deceased's reputation, the evidence does not transgress the policy expressed in Rule 404 of excluding evidence of character as proof of conduct; it is being offered not to prove the deceased's acts but to establish the accused's apprehension and the reasonableness of his defensive measures.

2 Weinstein's Evidence (MP) ¶ 404[06], at 404-49 n.3 (Sept. 1985).

> But there is more to the story, and *Burks* is only slightly misleading, for on its precise facts it could be decided the same way today. If it can be established that the accused knew at the time of the alleged crime of prior violent acts by the victim, such evidence is relevant as tending to show a reasonable apprehension on the part of the accused.
>
> Since this is not the circumstantial use of character evidence to prove conduct, such use is not barred either by Rule 404 or by Rule 405.

2 D. Louisell & C. Mueller, *supra* note 30, § 139, at 166-67.

> In considering the scope of Rule 405, it must be kept in mind that it only deals with proof of character; it has no applicability to cases in which evidence of reputation or specific instances of conduct are offered as relevant without regard to character. For example a defendant claiming self-defense may introduce evidence of specific instances of the victim's conduct known to him or testify to his opinion of the victim's character if such evidence is offered to prove the defendant's state of mind and not the character of the victim. Of course, in such cases the evidence may be subject to other rules involving reputation evidence; e.g., the hearsay rule.

22 C. Wright & K. Graham, *supra* note 34, § 5263, at 573.

68. *See supra* note 57 and accompanying text.

69. *See* Iowa Uniform Criminal Jury Instructions, *supra* note 66; Sherrod v. Berry, 856 F.2d 802, 805 (7th Cir. 1988) (Defendant police officer was sued for a civil rights violation arising from his shooting of plaintiff's deceased. The defendant claimed self-defense. The court found that when the police officer allegedly fired his weapon in self-defense, the test is not whether there was a factual basis for the officer's reasonable belief, but whether objectively under the circumstances it was reasonable to believe as the officer claimed.).

dence supporting the defendant's claim that he reasonably believed the use of force was justified. Therefore, if Rule 405(b) were applicable, specific instances of conduct would not be admissible.

Although admissibility of prior specific instances of conduct by an assault victim on the issue of the defendant's reasonable belief is not determined under Rules 405(a) or (b), it is also clear that in the past such evidence has been deemed relevant and admissible on the issue of the defendant's reasonable belief in danger.[70] The most apt analogy for admission of specific instances of conduct comes from Rule 404(b), which precludes introduction of prior offenses, wrongs, or acts to prove conduct in conformity, but allows such evidence for other purposes such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[71] As noted above, when offered as a basis for the defendant's reasonable apprehension, prior acts of the victim are not being offered to show conduct in conformity.

Rule 404(b) does not purport to provide a complete listing of situations

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70. State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977); State v. Badgett, 167 N.W.2d 680, 686 (Iowa 1969); State v. Wilson, 235 Iowa 538, 17 N.W.2d 138 (1945). In Government of Virgin Islands v. Carino, 631 F.2d 226, 229 (3d Cir. 1980), the court stated:

> Carino sought to introduce Richardson's conviction for manslaughter of her prior boyfriend to "demonstrate the fear" and "the state of mind" of defendant at the time of the incident. Although there is no specific reference in the Federal Rules of Evidence to admissibility for that purpose, we do not read the Rules as changing the prior precedent under which certain acts of violence by the victim are admissible to corroborate defendant's position that he "reasonably feared he was in danger of imminent great bodily injury." *United States v. Burks*, 470 F.2d 432, 435 (D.C. Cir. 1972). Commentators on the Federal Rules of Evidence have reached a similar conclusion. Professors Louisell and Mueller state, "If it can be established that the accused knew at the time of the alleged crime of prior violent acts by the victim, such evidence is relevant as tending to show a reasonable apprehension on the part of the accused. Since this is not the circumstantial use of character evidence to prove conduct, such use is not barred either by Rule 404 or Rule 405." Louisell & Mueller, *supra* § 139, at 108 (emphasis in original). While such use of a victim's prior acts may not fall precisely into any of the enumerated purposes, it is close to some of them, such as "intent" and "knowledge." In any event, the enumerated purposes are not exclusive, as demonstrated by the language of the Rule authorizing use of other crimes evidence "for other purposes, *such* as . . . ." (emphasis added).

71. Iowa Rule 404(b) states:

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

IOWA R. EVID. 404(b). *See* Government of Virgin Islands v. Carino, 631 F.2d at 229 (Court would have admitted specific acts of the victim because, when offered to prove defendant's reasonable fear, the acts are not offered to prove conduct in conformity and are thus not barred by Rule 404(a). The court then found that the victim's acts were admissible under Rule 404(b) under a theory similar to proving intent or knowledge by specific acts.). *See supra* note 70.

in which prior acts are admissible.[72] Courts are free to expand the list where appropriate. In view of the interest in assuring that criminal defendants are afforded every opportunity to present a defense, admission of prior specific acts of the victim to demonstrate the defendant's subjective belief would appear to be analogous to the Rule 404(b) theory of admissibility. For instance, a listed purpose for admitting prior acts is to demonstrate the actor's mental state: motive or intent. Similarly, where the acts of another have an impact on the viewer's mental state, those acts are relevant.[73]

IV. Application of Analysis to *State v. Dunson*

State v. Dunson involves two primary issues: (1) whether specific instances of conduct by an assault victim are admissible to prove either conduct in conformity with those acts or reasonable fear by the defendant; and (2) if specific acts are admissible on either point, whether acts of the victim *subsequent* to the charged offense are also admissible.[74]

A. *Relevance of Character Evidence to Dunson's Claims*

Character evidence concerning the victim is admissible with respect to both forms of justification permitted by Iowa Code section 704.6(3).[75] First, the jury could find that when Dunson went to the porch after striking the victim with a belt, he had withdrawn from the battle that he had initiated. Therefore, the jury could find that the victim was the aggressor in the fight on the porch. It was that battle that led to the victim's injuries and the charge in this case. In effect, Dunson claimed that the victim was the aggressor and her character for aggression and violence should be admissible under Rule 404(a)(2)(A) to show conduct in conformity.

With regard to Dunson's alternative claim of justification, the evidence of the victim's character or character traits would be admissible even if the jury found that the defendant had not withdrawn from the conflict. The defendant claimed that even if he initiated the confrontation, the victim's response was so grossly disproportionate to his assault that he had a right to respond with the force necessary to prevent injury to himself. The victim's character for aggression and violence would be relevant to the jury in determining whether the victim would conform her conduct to her character and escalate the conflict in the manner suggested by the defendant. The character evidence would be admissible under Rule 404(a)(2)(A).

Therefore, in both situations Dunson offered the specific acts evidence to show the victim's conduct in conformity to her character. To prove con-

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72. C. McCormick, *supra* note 30, § 190; M. Graham, *supra* note 58, § 404.5.

73. Admissibility of relevant evidence that is not otherwise excludable is determined under Iowa Rule 403.

74. State v. Dunson, 433 N.W.2d 676, 677 (Iowa 1988).

75. *See* Iowa Code § 704.6(3), *supra* note 21.

duct in conformity with character, the character evidence was relevant to whether or not Dunson was aware of the character traits of the victim.[76] The character traits are used only as a basis to infer conduct of the actor: the victim. Rule 404(a)(2) permits precisely what is normally forbidden: using evidence of character or character traits to infer conduct in conformity with such character or traits. However, Rule 405(a) permits proof of character for such purpose only by reputation or opinion evidence, not by specific instances of conduct.[77]

Character evidence would also be admissible under either form of justification as relevant to Dunson's state of mind during the conflict. If the jury found that Dunson had withdrawn from the conflict when he went to the porch or that the victim's response to Dunson's provocation was grossly disproportionate to that provocation, Dunson's reasonable belief concerning the danger he faced is relevant to justifying the force used. Part of Dunson's belief in danger under the circumstances can be generated by his awareness of the victim's character for violence. Relevance of the character evidence to Dunson's state of mind, however, depends on his *awareness* of the character or traits of character of the victim.[78] Thus, Dunson must have held the opinion that the victim was violent, he must have been aware of her reputation for aggression and violence, or he must have been aware of specific acts of violence by the victim.

B. *Admissibility of Prior or Subsequent Acts of Violence by the Victim*

Given the foregoing factual and legal background, the Iowa Supreme Court in *Dunson* appears to have ignored the rationale for admissibility of prior specific acts and to have ignored its own pronouncements on the scope of Rule 405(b). First, the court examined the Rule 401 definition of relevance, noting that evidence is relevant if it makes more or less probable "any fact of consequence to the determination."[79] Included within that concept is evidence that is "material."[80] The court cited *State v. Clay* for the

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76. *See supra* notes 41-42 and accompanying text.

77. *See supra* section II(C).

78. *See supra* section III(A).

79. *See supra* note 31.

80. *See* C. McCormick, *supra* note 30, § 185 (suggesting that under Federal Rule 401 the term "relevance" has two components—materiality and probative value); Committee Comment—1983 accompanying Iowa Rule 401 ("The Iowa common law definition of relevance includes the concept of "materiality," as does Federal Rule 401. Materiality has been described by the Iowa Supreme Court as that which "ordinarily relates to the pertinency of offered evidence to the issues in dispute or to the issue of credibility." State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973). The concept is included within the definition of relevancy since relevant evidence must have a tendency to make more or less probable a fact "that is of consequence to the determination of the action."). Graham states:

> [Federal Rule 401] employs "fact of consequence to the determination of the action" in place of the term "material," a term which has proved ambiguous. Evidence, direct

definition of materiality: "that which 'ordinarily relates to the pertinency of offered evidence to the issues in dispute or to the issue of credibility.' "[81] The court offered no explanation for its discussion of "materiality."

After defining "materiality" as falling within the concept of relevance, the court stated, "We think Rules 404(a) and 405(b) permit the admission of the evidence in question. The evidence relates to a character trait of the victim: her aggressiveness and propensity for violence."[82] There is no explanation of how the court went from a general evidentiary discussion of relevance and materiality, to assuming admissibility of specific acts as meeting Rule 405(b)'s requirement that character must be an essential element of a defense to justify admission of such acts. Apparently, the court is equating materiality of evidence of character traits under Rules 401 and 404(a)(2)(A) to a finding that the character or trait of character is an essential element of the defense. Indeed, later in the opinion the court stated that "the evidence in question [the subsequent act of the victim] was material to several elements of his defense. *See* Iowa R. Evid. 405(b)."[83] There is no discussion of the *Klaes v. Scholl* language prohibiting admission of specific acts to prove character unless character is an essential element of the defense: an operative fact that determines rights and liabilities of the parties.[84] No case law from any jurisdiction is cited for approving the use of the concept of "materiality" as the equivalent to an essential element under Rule 405. In one sense, the opinion appears to revive the term "material" as a concept independent of the term "relevance."[85]

After concluding that specific instances of conduct were admissible under Rule 405(b), the opinion discussed admissibility of *subsequent* specific instances of conduct of the victim to prove the victim's character.[86] The

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> or circumstantial, is relevant when it possesses any tendency to establish a fact of consequence. Evidence affecting the weight accorded such relevant evidence by the trier of fact falls within the concept of relevancy employed in Rule 401. Use of the phrase "fact of consequence" in place of materiality serves to clarify that the breadth of admissibility of relevant evidence extends to facts not in dispute. Rulings on admissibility of evidence upon a point conceded by an opponent must be made by considering probative value in light of trial concerns such as waste of time and unfair prejudice, Rule 403.

M. GRAHAM, *supra* note 58, § 401.1, at 147-48 (footnotes omitted).

81. State v. Dunson, 433 N.W.2d at 680 (quoting State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973)).

82. *Id.*

83. *Id.* at 681.

84. *See supra* note 57.

85. *See supra* note 31 (suggesting that "materiality" is not to be considered separately from "relevance").

86. The Iowa court treated the issue of admissibility of subsequent acts to show character as a case of first impression in Iowa. In other circumstances where subsequent acts were deemed relevant to an issue of consequence to the litigation other than character, the court has already approved the concept of admissibility of such evidence. Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988) (letter written after an event is not necessarily irrelevant; it may

court did not, however, immediately specify the fact or claim to which the character trait was relevant. Instead, after deciding that the offered evidence was admissible under Rule 405(b), the court noted that Rule 405(b) does not limit evidence of specific acts to *past* instances of conduct.[87] Next, citing *People v. Shoemaker*,[88] the court stated that the California court "ruled that evidence of a victim's subsequent acts is admissible in a criminal case to prove the victim's aggressive and violent behavior at the time of the earlier crime."[89] The court also stated that "similar to the Iowa rule, California evidence code permits admission of evidence of subsequent conduct of the victim in a criminal case to prove victim's character on a specified earlier occasion."[90]

There are two major difficulties with the court's analysis of *People v. Shoemaker*. First, in the factual context of *People v. Shoemaker*, the defendant was offering the specific subsequent acts to demonstrate that the victim, because of his other violent acts, was the first aggressor.[91] It is clear that the California court was treating the specific acts solely as evidence of character traits for the purpose of showing conduct in conformity. It does not appear to have been offered on the issue of the defendant's state of mind during the encounter. Thus, it was only in the context of using specific acts to prove conduct in conformity that the California court indicated there is relevance to a post-assault act on the assumption that prior and subsequent acts reflect "more or less permanent qualities" of character.[92]

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illuminate the motives of a party with respect to the event); State v. Munz, 355 N.W.2d 576 (Iowa 1984) (sexual abuse case in which a subsequent beating of the victim by the defendant was admissible to show defendant's mental state: a passion of propensity for illicit sexual relations with the victim); State v. Johnson, 237 N.W.2d 819 (Iowa 1976) (subsequent similar crime was admitted to prove motive, intent, identity, and common scheme or plan). *See* State v. Walters, 426 N.W.2d 136 (Iowa 1988) (incidental demonstration of a separate later offense may be admissible to complete the story of the crime); State v. Barrett, 401 N.W.2d 184 (Iowa 1987) (journal written after the charged offense setting forth a plan like that used in the charged murder was excluded, not because it was subsequent to the event, but because of insufficient similarity to have relevance to prove identity or common scheme or plan; offered journal was too close to proving character for the purpose of demonstrating conduct in conformity). By treating the *Dunson* issue as a case of first impression, the court appears to mean "first impression" solely on the issue of subsequent acts offered to prove conduct in conformity or as proof of character where the party's character is an essential element of a charge, claim, or defense under Rule 405(b).

87. State v. Dunson, 433 N.W.2d at 680.

88. People v. Shoemaker, 135 Cal. App. 3d 442, 448, 185 Cal. Rptr. 370, 373 (1982).

89. State v. Dunson, 433 N.W.2d at 680.

90. *Id.*

91. People v. Shoemaker, 135 Cal. App. 3d at ____, 185 Cal. Rptr. at 372.

92. *Id.* at ____, 185 Cal. Rptr. at 373. *But see* Tyler v. White, 811 F.2d 1204, 1206 (8th Cir. 1987)(In a civil rights action, the court upheld a denial of an opportunity to cross-examine a defendant about post-assault conduct by the defendant as not relevant to prove conduct in conformity on the earlier occasion. The court added that even if character was admissible, it could only come in through reputation and opinion testimony).

Second, the California Code of Evidence, unlike Iowa Rules 404 and 405, explicitly states that evidence of character or traits of character "in the form of an opinion, evidence of reputation, or *evidence of specific instances of conduct*" is admissible if offered to prove a victim's conduct in conformity to the character or trait of character.[93] Thus, contrary to the suggestion made in *Dunson*, California has a substantially different rule from that in Iowa for admitting a victim's specific acts to prove conduct in conformity. As indicated earlier, Iowa Rule 405(a) permits only reputation and opinion evidence to prove conduct in conformity with character. The only possibility in Iowa for admission of specific acts to prove conduct in conformity is Rule 405(b) and only then if character is an essential element of a claim, charge, or defense. In *Shoemaker* there was no indication that character was an essential element of the self-defense claim. Thus, *Shoemaker*, in applying an evidentiary rule substantially different from Iowa's rule, does not provide a basis for the court's conclusions in *Dunson*.

After claiming to adopt the rule set forth in *Shoemaker* with regard to subsequent acts of violence by the victim to prove conduct in conformity on an earlier occasion, the Iowa court then indicated the following inferences it believed could be drawn from such evidence in *Dunson*:

> [1] Because the evidence of [the victim's] subsequent act was consistent with her earlier violent behavior, the evidence might, to the jury,

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93. The California Evidence Code provides:

§ 1103. Evidence of character of victim of crime to prove conduct; evidence of complaining witness' sexual conduct in rape prosecution

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

(a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

CAL. EVID. CODE § 1103 (West Supp. 1989). In *People v. Shoemaker*, the California court noted that prior to adoption of the California Evidence Code section 1103, character traits could be shown by reputation testimony only, not by proof of specific acts. People v. Shoemaker, 135 Cal. App. 3d at ____, 185 Cal. Rptr. at 372. Wright and Graham cited California Code of Evidence section 1103 as an example of Wigmore's position on admissibility of specific acts of a victim to prove character and distinguishes that position from Federal Rule 405. Wright and Graham state:

> Although not mentioned in the Advisory Committee's Note, Rule 405 makes one minor change in pre-existing law in excluding specific instances of conduct offered to prove the character of the victim of the crime. Wigmore thought the balance between probative worth and prejudice was not so striking as to require a rule of exclusion of specific acts of the victim. Although some state codes have maintained the common law rule, Rule 405 puts the victim and the accused on the same footing with respect to proof of particular incidents to prove character.

22 C. WRIGHT & K. GRAHAM, *supra* note 34, § 5266, at 600 (footnotes omitted).

> have shown that Dunson reasonably believed he needed to defend himself at the earlier time,
>
> [2] that he had indeed withdrawn from physical contact during the fight with the vase, or
>
> [3] that [the victim's] responsive acts were grossly disproportionate to the provocation.[94]

The first inference referred to by the court suggests that because the victim's subsequent act is consistent in terms of violence with the victim's earlier behavior, a jury could infer Dunson reasonably believed himself to be in danger on the porch during the vase assault.[95] One interpretation of the court's language is the post-assault event had a direct impact on the defendant's state of mind during the earlier attack with the vase. As indicated earlier, reasonable belief of imminent danger depends on the actual circumstances of the attack along with the defendant's state of mind based on his knowledge of the victim's reputation for violence or knowledge of acts of violence committed by the victim, which suggest to the defendant that he is in imminent peril.[96] Dunson's state of mind during the battle with the vase cannot have been affected by an event that had not yet occurred.[97] Also, use of the evidence for this purpose does not fall under Rule 404(a)(2),[98] which the Iowa court indicated was one of the bases for admission.

A second interpretation of the language is suggested by a subsequent paragraph in the opinion, where the court states: "For example, the evidence gave credence to Dunson's belief that he was, at the earlier time, in imminent danger of serious injury."[99] Here the court appears to suggest that the

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94. State v. Dunson, 433 N.W.2d at 681.

95. *Id.* at 678.

96. *See supra* section III(A).

97. In determining a party's state of mind, the cases have been relatively consistent in admitting only information known to the party at the time of the offense. State v. Jacoby, 260 N.W.2d 828 (Iowa 1977). *See also* Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988); Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986); Lagasse v. Vestal, 671 F.2d 668, 669 (1st Cir. 1982) (discussing a Maine evidentiary rule similar to the federal rule the court stated: "Here, where appellant did not know of the decedent's violent character, it is difficult to see how the proffered testimony [victim's violent conduct] was relevant in assessing whether appellant feared that he was about to be knifed or whether he reasonably believed that it was necessary to use deadly force"); Government of Virgin Islands v. Carino, 631 F.2d 226 (3d Cir. 1980). *But see* United States v. Greschner, 647 F.2d 740 (7th Cir. 1981) (The court approved admission of a prior act without discussion of Federal Rule 405); 2 D. LOUISELL & C. MUELLER, *supra* note 30, § 139, at 163 (suggests that Rule 405 was not discussed in *Greschner* perhaps because it was not argued).

98. *See supra* section III(B).

99. State v. Dunson, 433 N.W.2d at 681. The court continued by stating:

> The [victim's] act with the automobile was consistent with her violent behavior toward Dunson at other times. While they were living together, she admitted, they were "always fighting." We think the jury could have seen the evidence in question as part of the pattern of aggressive, even violent, behavior that apparently was a way of life to Dunson and [the victim].

subsequent act enhances the credibility of Dunson's claim that he reasonably believed himself in danger. Thus, instead of reflecting directly the reasonableness of Dunson's state of mind, the subsequent act goes only to suggest that Dunson is credible in claiming a state of mind of fear, whether or not the actual belief of imminent danger was reasonable. Because Dunson's credibility is not an essential element of his self-defense claim, specific acts of the victim would not be admissible under Rule 405(b). Therefore, to enhance Dunson's credibility, the court must be allowing the jury to consider the post-assault conduct as demonstrating a character trait of aggressiveness, establishing a propensity for violence and as proof that she conformed her conduct to those character traits during the encounter with the vase.[100] While that result may be consistent with the California Code of Evidence,[101] it does not appear to satisfy previous applications of the concepts expressed in Iowa Rules of Evidence 404 and 405,[102] unless the court is correct that a victim's character is an essential element of a self-defense claim. Unfortunately, none of the earlier Iowa decisions to the contrary are referred to or explicitly overruled by *Dunson*.

The second inference suggested by the court is that the victim's attempt to run over the defendant, consistent with other acts of violence by the victim directed at the defendant, might show that defendant "had withdrawn from physical contact during the fight with the vase."[103] From the facts recited by the court, the relevant withdrawal time was after the defendant struck the victim with a belt and then went to the porch while the victim went to another room from which she returned with the vase.[104] Apparently, it was during a confrontation on the porch that the defendant wrested the vase from the victim and struck her several times, inflicting the

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Id. The court does not suggest that "the pattern of aggressive, even violent, behavior" constituted a habit that might be admissible under Iowa Rule 406. Nor does the court indicate that the offered evidence was admissible under Rule 404(b) as establishing any of the listed exceptions such as motive, intent, plan, knowledge, or absence of mistake. Rather, the tone of the quoted language and an earlier observation by the court that although the victim stated "that the blow from the belt 'just stung' and 'didn't hurt much,' " the victim attacked Dunson with a glass vase, suggests that the court may have fallen victim to precisely the danger many courts seek to avoid by excluding specific acts evidence: a conclusion by the factfinder that because of the victim's prior conduct the victim probably deserved whatever happened. *See supra* notes 30, 53.

100. Because Dunson was apparently permitted to introduce evidence of prior specific acts of violence by the victim, if those were insufficient to demonstrate the credibility of Dunson's belief during the encounter with the vase, a subsequent instance of conduct should not resurrect that which was not reasonable at the time of its occurrence. The Iowa Rules, until interpreted in the *Dunson* opinion, specifically excluded specific acts to prove conduct in conformity.

101. *See supra* note 93.

102. Klaes v. Scholl, 375 N.W.2d 671 (Iowa 1985); State v. Jacoby, 260 N.W.2d 828 (Iowa 1977).

103. State v. Dunson, 433 N.W.2d at 681.

104. *Id.* at 679.

injury charged in this offense.[105] Whether or when the defendant withdrew from the battle with the vase does not appear to have any relevance to either form of the justification defense presented by the defendant concerning the vase assault itself. It is unclear how the court could be suggesting that the victim's subsequent conduct is relevant to the defendant's withdrawal from the fight on the porch, which is then somehow proof of an earlier withdrawal by the defendant. Also, because the evidence is not offered to demonstrate the victim's conduct in conformity with her character, Rule 404(a)(2) would not govern admissibility.

The third inference the court found material was that the jury could find that the victim's attempt to run down the defendant was grossly disproportionate to the defendant's assault on the victim with the vase and that, therefore, the victim's earlier response to the provocation of being struck by a belt was also grossly disproportionate.[106] Here a later act is being offered to prove circumstantially the objective fact that the response was disproportionate to the provocation. The victim's character does not appear to be an element of that defense and would not have been admissible under prior Iowa case law and interpretations of the rules of evidence to prove her conduct in conformity. It is only admissible under the *Dunson* court's expanded approach to Rule 405(b): admitting evidence of any specific acts that are "material" to any issue in the defense.

V. Conclusion

The court has made a substantial change in Iowa law that is not justified by rule or prior case law. The court ignored Iowa precedent regarding what constitutes an essential element of a defense under Rule 405(b) by permitting the use of specific instances of conduct to prove conduct in conformity as character evidence that is material to the defense. Rule 405(a) is rendered a nullity unless the court intends to require trial courts to distinguish between evidence that is merely relevant to a defense and evidence that is material to the defense. In those limited circumstances, Rule 405(a) would limit the form of character evidence if it was merely relevant to the defense; if the character evidence was material to the defense, Rule 405(b) would apply. There is nothing in the Iowa Rules of Evidence or the Federal Rules of Evidence from which they were derived that suggests such an interpretation is appropriate or desirable. Regardless, even if the court's decision were correct, the immense change in interpretation of Rule 405(b) without discussion of prior case law or any basis for the change does not provide significant guidance for bench and bar.

If the victim's character or prior acts of violence *known to the defendant* are offered to establish only the defendant's state of mind, there does

105. *Id.* at 677.
106. *Id.* at 681.

not appear to be any Rule 404 prohibition against introduction of specific instances of conduct for that limited purpose because the evidence is not being offered to prove conduct in conformity. In that situation, the Rule 403 balancing of probative value against unfair prejudice would appear to be appropriate. *Subsequent* acts of the victim, however, do not appear to ever have any relevance to the state of mind of the defendant on an occasion prior to the offered act. Like prior acts unknown to the defendant, subsequent acts could not have contributed to the defendant's mental state. At best, subsequent acts of the victim committed within reasonable time proximity to the charged offense may be relevant to the reputation of the victim or opinion about the victim when offered to establish conduct in conformity under Rule 405(a), and may be admissible when the character of the victim or other party is an essential element of a charge, claim, or defense under Rule 405(b).