

1951

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Jerome F. Goldberg

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Recommended Citation

Jerome F. Goldberg, Right of the Prosecution to Attack the Character of the Defendant: A Limited Recognition of a New Exception, 41 J. Crim. L. & Criminology 456 (1950-1951)

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CRIMINAL LAW NOTES AND COMMENTS

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RIGHT OF THE PROSECUTION TO ATTACK THE CHARACTER OF THE DEFENDANT

(A LIMITED RECOGNITION OF A NEW EXCEPTION)

Jerome F. Goldberg

As a general proposition, the right of the prosecution to initially attack the character of a defendant is not of itself a problem in the law of Evidence.¹ The principles of law on this subject are conceded to be well-settled. It is established law that unless and until a defendant has put his good character in issue,² the prosecution may not subject it to attack,³ and then only by showing the general reputation of the defendant for bad character and not by showing specific instances of misconduct alleged to have been committed by him.⁴ Factual situations arise, however, when one questions the sufficiency and adequacy of these rules.

In *Roberson v. State*⁵ the defendant was indicted for murder and convicted of manslaughter in the first degree. At the trial he interposed a plea of self-

1. As a prerequisite to any understanding of the fundamental principles involved in the subject of the character of an accused, certain distinctions must be observed. Initially, the term *character* should be distinguished from the term *reputation*, the latter terms being merely a source or mode of evidencing character. One must also distinguish between the relevancy of character itself, *i.e.*, the admissibility of character to evidence something else, and the use of conduct (*e.g.*, specific conduct) to evidence character. A further distinction is to be noted between the admissibility of *character as evidentiary*, *i.e.*, to show the doing or not doing of an act by an individual, or for any other evidentiary purpose (*e.g.*, a deceased's character to show that the defendant was reasonably afraid of an attack by the deceased), and *character as an issue on the pleadings* (*e.g.*, the character of a plaintiff in a defamation action as bearing on a plea of truth or on the assessment of damages). In the latter, no evidentiary use is made of such character; it merely plays a part in the legal issues of the case. This note is concerned only with the admissibility of the character of a defendant as evidentiary. For a general discussion of the above distinctions and the terminology involved, see 1 WIGMORE, EVIDENCE §§52, 53, 54 (3rd ed. 1940).

2. A defendant's good character is always admissible in his favor to evidence the improbability of his doing the act charged, even as to misdemeanors: 1 WIGMORE, EVIDENCE §§55, 56 (3rd ed. 1940); *Hawley v. United States*, 133 F. 2d 966 (10th Cir. 1943); *Johnson v. State*, 138 Tex. Cr. 188, 135 S.W. 2d 485 (1940); the character or disposition offered, whether for or against the defendant, must involve the specific trait related to the act charged: *De Angelo v. State*, 187 Miss. 84, 192 So. 444 (1939); *State v. Sbrilli*, 136 N.J. 66, 54 A. 2d 221 (1947) (rape; accused's honorable discharge from army and good conduct medal excluded); *People v. Kendall*, 357 Ill. 448, 192 N.E. 378 (1930) (robbery; accused's character for truth and veracity excluded); 22 C.J.S. §676, p. 1067 and n. 99; McCORMICK, CASES ON EVIDENCE pp. 487, 488 (2d ed. 1948).

3. 1 WIGMORE, EVIDENCE §§57, 58 (3rd ed. 1940); 22 C.J.S. §676, pp. 1068, 1069 and n. 17-20; No such rule prevails under the continental procedure in France: See *People v. Shea*, 147 N.Y. 78, 41 N.E. 505 (1895); It is a rule of Anglo-Saxon origin which is "firmly and universally established in policy and tradition." 1 WIGMORE, EVIDENCE §57, p. 456 (3rd ed. 1940).

4. 1 WIGMORE, EVIDENCE §193 (3rd ed. 1940); *Jones v. State*, 20 Okla. Cir. 154, 201 P. 664 (1921); It is the general reputation in the community in which the defendant resides: 5 WIGMORE, EVIDENCE §1610 (3rd ed. 1940).

5. — Okla. Cr. —, 218 P. 2d 414 (1950).

defense and in support of such plea introduced evidence of the character of his victim for turbulence and violence,⁶ both as to the general reputation of the deceased for such character traits and as to specific acts of violence on the part of the deceased.⁷ Thereupon the prosecution, supported by the trial court's ruling, cross-examined the defendant as to specific acts of violence alleged to have been committed by him in the past. The prosecution's theory was that such evidence was competent to prove that the defendant ". . . is a turbulent, high-tempered man given to seeking trouble."⁸ The trial court agreed that ". . . since the defendant had elected to open up the question as to the turbulence of the deceased, that he now likewise is subject to attack by the State for the sole purpose of showing and bearing upon the question of who was the aggressor, the defendant having interposed a plea of self-defense."⁹

The prosecution in its rebuttal did not follow up the cross-examination with proof relative to the matters inquired about on cross-examination.¹⁰ On appeal, one judge dissenting, the Criminal Court of Appeals of Oklahoma reversed and remanded for a new trial.

The majority opinion regarded the cross-examination of the defendant as a notorious violation of the rule that the character of a defendant may not be made the subject of inquiry by the prosecution before the defendant has put it in issue by offering evidence of his good character. Moreover, the cross-examination of the defendant in relation to specific acts of violence transcended the requirement that an attack on the defendant's character when he has invoked the issue must be confined to his general reputation for bad character, and that there cannot be any resort to particular acts of misconduct.¹¹

Particular emphasis was placed on the fact that these rules represent "the almost universal agreement of the courts," and are "all but universally

6. Where the issue of self-defense is raised on a trial for homicide and there is evidence to support such a plea, the defendant may offer evidence of the character of his deceased victim for turbulence or violence as bearing on the issue of who was the probable aggressor; 1 WIGMORE, EVIDENCE §63 (3rd ed. 1940); see Note, 64 A.L.R. 1029.

7. The mode of evidencing such character is usually confined to the general reputation of the deceased. Wigmore argues that "there is no substantial reason against evidencing such character by particular instances of violent or quarrelsome conduct." 1 WIGMORE, EVIDENCE §198 (3rd ed. 1940); but the weight of authority is apparently to the contrary; see Note, 121 A.L.R. 380; However, specific acts of violence on the part of the deceased known or communicated to the defendant are admissible for the purpose of showing the defendant's state of mind and whether he acted reasonably under the circumstances: 2 WIGMORE, EVIDENCE §§246, 248 (3rd ed. 1940); *Saunders v. State*, 4 Okla. Cr. 264, 111 P. 965 (1910); *Mulkey v. State*, 5 Okla. Cr. 75, 113 P. 532 (1911); *Jones v. State*, 182 Md. 653, 35 A. 2d 916 (1944).

8. *Roberson v. State*, ___ Okla. Cr. ___, 218 P. 2d 414, 418 (1950).

9. *Roberson v. State*, ___ Okla. Cr. ___, 218 P. 2d 414, 418, 419 (1950).

10. This omission is of considerable importance. It prompted the writer of the majority opinion in the *Roberson* case to conclude, after evaluating the conflicting authorities on the rule in question, that "in any event, this is not a case where the "Missouri rule" can be invoked. The state did not bring this case within that rule. The "Missouri rule" is not satisfied by merely asking highly prejudicial questions on cross-examination. If the trial court desired to invoke the same, the cross-examination should have been followed up with proof relative to the matters inquired about on cross-examination." *Roberson v. State*, ___ Okla. Cr. ___, 218 P. 2d 414, 424 (1950).

11. This statement should be qualified in that evidence of similar, specific crimes alleged to have been committed by a defendant is admissible when independently relevant, subject to limitations as to its purpose. This aspect is discussed later. See in general, 28 CALIF. L. REV. 516 (1949); *People v. Gray*, 154 Cal. 472, 98 P. 194 (1884); *People v. Tokoly*, 313 Ill. 177, 144 N.E. 808 (1924); *Carrol v. State*, 41 Tex. Cr. 30, 58 S.W. 340 (1900).

applied throughout the nation."¹² Even the attorney general in his appeal brief conceded that ". . . under the law where the defendant has not made an issue of his reputation in a homicide case, the state may not attack the same."¹³

The court was, however, confronted with authority to the contrary. In a similar factual situation the Supreme Court of Missouri, in *State v. Robinson*,¹⁴ had held that where the accused brings in issue the bad character of the victim of his assault to substantiate his plea of self defense, he thereby opens the door for admission of evidence of his own bad reputation as a violent and turbulent individual. The majority of the court in the *Roberson* case was not willing to follow the Missouri view, feeling that its adoption would "open the door to confusion and irreparable prejudice, invite the temptation of abuse, and inescapably raise a variety of issues, divert the attention of the one immediately before the jury and in many instances, provoke the conviction of the accused upon general principles instead of on the issues involved in the particular case."¹⁵

The dissenting judge, in a lengthy and carefully reasoned opinion, argued vigorously for the adoption of the "Missouri rule" as an exception to the conventional rule of character exclusion. His search of the authorities revealed that two other jurisdictions had adopted it,¹⁶ others had discussed and indicated its propriety,¹⁷ and no less an authority than Dean Wigmore favored the rule.¹⁸ The dissenting opinion emphasized that ". . . only the defendant has the key to the door. He may, if he chooses, keep it closed. Only when he elects to open up the subject of the reputation of the deceased for violence and turbulence may like inquiry be made as to himself . . ."¹⁹ The controversy thus resolves itself into an analysis and evaluation of the conflicting rules.

At the outset one must concede that a defendant's bad character, par-

12. *Roberson v. State*, — Okla. Cr. —, 218 P. 2d 414, 416, 417 (1950).

13. *Roberson v. State*, — Okla. Cr. —, 218 P. 2d 414, 416 (1950).

14. 344 Mo. 1094, 130 S.W. 2d 530 (1939); Note, 5 Mo. L. Rev. 430 (1940).

15. *Roberson v. State*, — Okla. Cr. —, 218 P. 2d 414, 422 (1950).

16. Alabama: *Cook v. State*, 5 Ala. App. 11, 59 So. 519 (1912) in which case the court said: "Where the question as to whether the deceased or the defendant in a trial for homicide, was free from fault in bringing on the fatal difficulty, is in doubt, the fact and character of previous difficulties between the defendant and the deceased may be shown . . . and the general character of the deceased and the defendant for peace and quiet or for turbulence and for bloodthirstiness . . . may also be shown." See also *Carr v. State*, 147 Ark. 524, 227 S.W. 776 (1921), where the court in a dictum stated: "The plea of self-defense was interposed, so the question as to whether defendant or deceased was the aggressor became a material issue. The general reputation of each for peace and quiet was therefore admissible as tending to show who was the probable aggressor." In *People's Loan and Inv. Co. v. Traveller's Ins. Co.*, 151 F. 2d 437 (8th Cir. 1945), the Arkansas rule is stated to be ". . . that where a question of self-defense is involved, the reputation of each party to the encounter for peace and quiet is admissible as tending to show who was the probable aggressor . . ."

17. *Strong v. Commonwealth*, 216 Ky. 98, 287 S.W. 235 (1926); *State v. Padula*, 106 Conn. 454, 138 Atl. 456 (1927); See also *People v. Rodawald*, 177 N.Y. 408, 70 N.E. 1 (1904), where the court in a homicide case where the plea was self-defense, refused to admit proof of the general reputation of the deceased for violence in order to show that deceased was the aggressor because "if competent for that purpose, similar evidence could be given as to the reputation of the defendant, as bearing on the probability that he was the aggressor."

18. 1 WIGMORE, EVIDENCE §63, p. 472 (3rd ed. 1940).

19. *Roberson v. State*, — Okla. Cr. —, 218 P. 2d 414, 443 (1950).

ticularly in a homicide case, is relevant.²⁰ Similarly, evidencing such character by placing in evidence specific acts of misconduct which exhibit the particular trait involved conforms to the requirement of relevance.²¹ Why, then, are there rules of exclusion? If relevance were the only criteria for admissibility, no satisfactory answer could be given. Additional considerations enter into the problem. It is said that these rules of character exclusion are founded upon "the policy of avoiding the uncontrollable and undue prejudice and possible unjust condemnation, which such evidence might induce."²² If the bad character of a defendant were initially admissible, there would be an "overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts, and a tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped punishment from other offenses."²³ There are additional reasons which operate to exclude particular acts of misconduct to evidence the character of the defendant, among which is the "injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated."²⁴

Concisely stated, then, the auxiliary policy principles of undue prejudice,²⁵ unfair surprise,²⁶ and to a lesser extent, confusion of issues,²⁷ are at the foundation of these exclusionary rules of evidence. In the abstract one may agree with both the rules and their rationale.²⁸ Faced with a factual situation where a defendant in a homicide case pleads self-defense, and then proceeds to attack the character of his victim for turbulence and violence in order to show which of them was the probable aggressor, the issue squarely presents itself: may the prosecution make similar inquiry into the same limited traits of character which the defendant has attacked on the part of the deceased? Are the considerations here precisely the same as in any case where the prosecution seeks to attack the character of a defendant before he has put it in issue?

Although Wigmore vigorously defends the exclusionary rule and its

20. To the effect that a defendant's bad character is essentially relevant yet initially inadmissible. See: *People v. White*, 24 Wend. 574 (1840); *People v. Shea*, 147 N.Y. 78, 41 N.E. 508 (1895); *People v. Collins*, 265 App. Div. 756, 40 N.Y. Supp. 2d 675 (1st Dep't 1943); *State v. Hayes*, 356 Mo. 1033, 204 S.W. 2d 723 (1947); 1 WIGMORE, EVIDENCE §55 (3rd ed. 1940).

21. *People v. Diaz*, 61 P.R.R. 873 (1943); *Mager v. State*, 198 Miss. 642, 22 So. 2d 245 (1945); *Dennison v. State*, 17 Ala. App. 674, 88 So. 211 (1921); *Regina v. Shrimpton*, 2 Den. C. C. 322 (1851); 1 WIGMORE, EVIDENCE §193 (3rd ed. 1940).

22. 1 WIGMORE, EVIDENCE §57, p. 454 (3rd ed. 1940).

23. 1 WIGMORE, EVIDENCE §194 (3rd ed. 1940).

24. *Ibid.*

25. *State v. Saunders*, 14 Ore. 300, 12 Pac. 441 (1887); *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903); *Michelson v. United States*, 335 U.S. 469 (1948); 1 WHARTON, CRIMINAL EVIDENCE §330 (11th ed. 1935); 6 WIGMORE, EVIDENCE §1904 (3rd ed. 1940).

26. *Kirby v. State*, 182 Tenn. 16, 184 S.W. 2d 41 (1944); *State v. Linhardt*, 198 La. 182, 3 So. 2d 552 (1941); *People v. Manganò*, 375 Ill. 72, 30 N.E. 2d 428 (1940); *State v. Miller*, 60 Idaho 79, 88 P. 2d 526 (1939); 6 WIGMORE, EVIDENCE §1849 (3rd ed. 1940).

27. Wigmore contends that as a reason for character exclusion the principle of confusion of issues is not a vital one because of the fact that extrinsic testimony could be excluded and proof could be had by a record of prior conviction, or by cross-examination where the defendant has waived his privilege by taking the witness stand: 1 WIGMORE, EVIDENCE §194 (3rd ed. 1940); *But see*, *Kehoe v. State*, 194 Miss. 339, 12 So. 2d 149 (1943); *People v. Farricchia*, 266 App. Div. 667, 40 N.Y. Supp. 2d 154 (2d Dep't 1943); *State v. Barton*, 198 Wash. 268, 88 P. 2d 385 (1939).

28. Even the dissenting judge in *Roberson v. State* conceded this: "The majority opinion goes to great length in explaining the recognized rule, with which I find no fault as a general proposition, but does not adequately give consideration to the exception . . ." *Roberson v. State*, — Okla. Cr. —, 218 P. 2d 414, 425 (1950).

policy considerations, he agrees with the "Missouri rule" by way of an exception to the general rule of character exclusion. Wigmore states that "If the deceased's character for peaceableness has thus been introduced by the defendant, the same principle would then justify the prosecution (plaintiff) in introducing the defendant's character for violence by way of exception to the [general] rule."²⁹

In *State v. Padula*,³⁰ where the issue of self-defense was raised on a trial for homicide, the court refused to admit evidence of the character of the deceased for violence in order to prove who was the aggressor chiefly on the grounds that "If a violent disposition is to be given probative force in determining who was the aggressor, it is logically as applicable to the accused as to the deceased."³¹ Dean Wigmore's comment on this case and its reasoning was ". . . but why not let it be offered, on the principle that the accused has invoked the issue? Certainly, in lay experience, these two items of evidence are always looked for."³²

Those who would invoke the exception to the ordinary rule of character exclusion, termed the "Missouri rule," stress the apparent fairness of it, and the "justice and wisdom" of the principle.³³ To them, "impartial justice cannot be dispensed by allowing one litigant to present a given type of evidence bearing upon an ultimate factual issue while at the same time denying to his adversary the right to present his version of said issue by evidence of equally inherent quality."³⁴ At any rate, they argue, "the initiative is with the defendant, which is an asset in any contest and still clothes him with advantages over the state." . . . "If he has a past so fraught with violence as to create the possibility that he would be seriously prejudiced in the eyes of a jury and not receive a fair trial, he can by-pass the subject."³⁵

The advocates of this novel exception to the general exclusionary rule have indulged in a kind of reasoning which if accepted will seriously endanger the right of a defendant to an impartial trial.³⁶ A defendant in pleading self-defense is obviously vitally interested and concerned with proving that his victim was the aggressor. To subject him consequently to an attack on his character may indeed be relevant, but might nevertheless prove highly prejudicial.³⁷ Moreover, if the attack were not confined to his general reputation, but embraced in addition specific acts of misconduct

29. 1 WIGMORE, EVIDENCE §63, p. 472 (3rd ed. 1940); In support of his argument, Wigmore cites as judicial authority: *Stiles v. Lile*, 203 Ky. 225, 262 S.W. 18 (1924) (civil action for assault and battery; reputation of each litigant for peace and quietude held admissible on issue of who was the aggressor); *Strong v. Commonwealth*, 193 Ky. 132, 232 S.W. 235 (1926) (manslaughter; court indicated that the defendant's bad character ought equally to be receivable, after the deceased's character has been shown, but concludes that prior rulings of the jurisdiction forbid this).

30. *Supra* note 17.

31. *State v. Padula*, 106 Conn. 454, 456, 138 Atl. 456, 458 (1927).

32. 1 WIGMORE, EVIDENCE §63, p. 472 and n. 1 (3rd ed. 1940).

33. *Roberson v. State*, ___ Okla. Cr. ___, 218 P. 2d 414, 439 (1950).

34. *State v. Robinson*, 344 Mo. 1094, 1095, 130 S.W. 2d 530, 531 (1939).

35. *Roberson v. State*, ___ Okla. Cr. ___, 218 P. 2d 414, 443 (1950).

36. ". . . to follow the Missouri rule would plunge us into an extended experimentation relative to a rule of evidence tested in the crucibles of centuries of time and designed to protect the rights of the accused." *Roberson v. State*, ___ Okla. Cr. ___, 218 P. 2d 414, 422 (1950).

37. "We can visualize many instances, under the proof where the defendant would be entitled to be exonerated on the charge as laid in the information, and yet become the victim of the jury's general antipathy towards him." *Roberson v. State*, 218 P. 2d 414, 423 (1950).

alleged to have occurred on his part,³⁸ a new and serious element of confusion would result. Trials might degenerate into "boards of inquisition,"³⁹ and the defendant might easily fall victim to the jury's general antipathy towards him. Viewed in the light of our present fallible jury system, already overburdened with subjective emphasis, the "Missouri rule" might prove deadly to a defendant with a questionable reputation in his community or a reputation for violence. The issue in the trial of a criminal case is singular: "Did the defendant commit the crime charged?" and not ". . . has the defendant the reputation of having committed the crime charged, or some similar crime?"⁴⁰ Moreover, a procedure which would have a defendant answer for past maledictions may easily be construed as contrary to the fundamental rule of criminal pleading, that in an indictment charging a single offense, the issue must be confined to such offense,⁴¹ and as a violation of the constitutional requirement that the accused shall be informed of the accusation he shall be required to meet.⁴²

Legislation is perhaps the obvious answer to those who would change the existing rules.⁴³ It has already made substantial inroads upon the exclusionary rule of character, particularly in the form of habitual criminal acts.⁴⁴ Those who would defend the legal principle of a defendant's presumption of innocence may well fear any doctrine that seeks to condemn him on collateral issues. Also, the prosecution is already sufficiently armed with other legal though devious means by which a defendant's character may be attacked.⁴⁵

38. The original exception to the rule of character exclusion as enunciated in the *Robinson* case would apparently be confined to evidence of the general reputation of the defendant for violence. It would probably not permit evidence of specific acts of turbulence on his part. But the dissenting judge in the *Roberson* case felt that after the defendant had attacked the general reputation of his victim, the state should then be permitted to ". . . show the reputation of the accused for the same traits of character by showing his general reputation in the community in which he lives for such traits, or . . . by showing specific incidents if it can be shown that the deceased had knowledge of such incidents, and providing that defendant sought to show specific incidents of which he had knowledge prior to the homicide." *Roberson v. State*, 218 P. 2d 414, 442 (1950). This view suggests an unwarranted extension of the original exception as promulgated in the *Robinson* case.

39. *Roberson v. State*, 218 P. 2d 414, 423 (1950).

40. *Munson v. State*, 23 Okla. Cr. 64, 212 P. 438 (1923).

41. *United States v. Mitchell*, 2 Dall. 348 (1795); *State v. Bates*, 10 Conn. 372 (1834); 1 WIGMORE, EVIDENCE §194 (3rd ed. 1940).

42. U. S. Const. Amend. VI.

43. "If the legislature finds the rule of evidence herein involved out-moded as a vehicle of justice, they may change the same by laying down a new and different rule." *Roberson v. State*, 218 P. 2d 414, 423 (1950).

44. Under modern legislation for habitual criminals, the tribunal is authorized to increase the sentence of one whose offense when established is found to be the second or a later offense of the sort. Theoretically, proof of the prior offense for that purpose does not militate against the rule forbidding the use of prior misconduct to evidence character. Some of the state statutes, however, permit the fact of a prior conviction to be considered by the jury before verdict: ILL. REV. STAT. c. 38, §602 (1949), upheld in *People v. Lawrence*, 390 Ill. 499, 61 N.E. 2d 361 (1945); COL. STAT. c. 114, §3 (1945); An additional legislative example creating a decisive change in the ordinary rule of character exclusion is the Illinois Criminal Sexual Psychopath Act, ILL. REV. STAT. c. 38, §820 *et seq.* (1949). Act approved July 6, 1938. Its provisions declare admissible ". . . the commission by the said person of any number of crimes, together with whatever punishments if any were inflicted." ILL. REV. STAT. c. 38, §824 (1949). See also the English Criminal Evidence Act, 1898, 61-62 Vict., c. 36 §1; 1 WIGMORE, EVIDENCE, §§194a, 194b, 194c, 196 (3rd ed. 1940).

45. There are numerous purposes for which the prosecution is permitted to introduce proof of similar crimes alleged to have been committed by the defendant: (1) to complete