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# Character Evidence

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# CHARACTER EVIDENCE

*Hon. George C. Pratt**:

We start out with Professor James Kainen, Associate Professor of Fordham Law School who is going to address problems of character evidence. Professor Kainen.

*Professor James L. Kainen***:

My subject is the admissibility of evidence of a victim's violent character when offered by a defendant to defeat a charge of homicide or assault by establishing that he acted in self-defense. The admissibility of such evidence is different under the Federal Rules of Evidence and New York State law. Its analysis provides the occasion to explain and evaluate the differences, and finally, to say some things about how to think about character evidence generally, whether under state or federal law.

First, just to explain the difference in state and federal law requires some background on character evidence generally. As you may recall, state and federal law start with the proposition that proof of a person's character or trait of character is not admissible to show action on a particular occasion except in very limited circumstances.[1] Thus, the general prohibition of character

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1. *See* FED. R. EVID. 404. Rule 404 provides:

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

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of

proof prohibits a jury from hearing evidence that would enable it to draw an inference that we often draw in our everyday lives; people are apt to act in conformity with their character traits. It prohibits what the idea of relevance alone would otherwise allow.[2] Evidence of a trait of character to prove action in conformity with that trait is relevant, but it is nonetheless inadmissible except in limited circumstances. Evidence that a person has an aggressive disposition, for instance, would be relevant to show that he acted aggressively on a particular occasion. Proof of the disposition makes it more likely that he acted aggressively than it would be without the evidence. Although relevant under state and federal law, the evidence is excluded as improper character proof unless it falls into limited exceptions.[3]

The next step is to look at the exceptions to the general rule excluding character evidence to prove action in conformity. When can you properly establish a trait of a person's character as proof that he or she acted in conformity on a particular occasion?

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the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

*Id.*; *see also* People v. Santarelli, 49 N.Y.2d 241, 401 N.E.2d 199, 425 N.Y.S.2d 77 (1980) (holding evidence of prior uncharged criminal conduct inadmissible as part of People's direct case, unless it pertains to specific aspect of People's case other than propensity of accused to commit crimes).

2. *See* FED. R. EVID. 401. Rule 401 states that: "'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." *Id.*

3. *See supra* note 1. New York does not recognize the exception embodied in Rule 404(a)(2). *See infra* notes 11-12 and accompanying text.

Here, New York and Federal law are alike in at least recognizing two categories of exceptions,[4] although they differ on specifics about what falls into each category.[5] We may call the two

4. *See* FED. R. EVID. 404 (a)(1) and (2) (allowing character evidence for parties to a crime) and FED. R. EVID. 404 (a)(3) (allowing evidence of witnesses' character). In New York, see People v. Pavoa, 59 N.Y.2d 282, 451 N.E.2d 216, 464 N.Y.S.2d 458 (1983) (admitting character evidence probative of witnesses' credibility) and People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907) (admitting evidence probative of criminal defendant's character).

5. As to substantive character evidence, see *supra* note 4 for differences. For credibility proof, compare People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974) (holding that trial judge may admit prior acts of violence, viciousness, or immortality for purpose of impeaching defendant's credibility) with Rule 608 and Rule 609, which more specifically targets character for truthfulness or mendacity. Rule 608 provides:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of an opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
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> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608. Rule 609 provides:

> (a) General rule. For the purpose of attacking the credibility of a witness,
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> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
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> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

categories credibility and substantive character evidence. The first category - credibility - permits one to prove that a witness in the proceeding possesses some character trait that bears on the likelihood that his testimony at the proceeding is false. Here we are talking only about a character trait that bears on the truthfulness of testimony - permitting the inference of action in conformity from the trait to the giving of truthful or false testimony. In the second category - substantive character evidence permitted by exception to the general character prohibition - we are talking about permitting the action in conformity inference from a character trait to some action that is

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(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction admissible. Evidence of the pendency of an appeal is admissible.

FED. R. EVID. 609.

relevant because it relates to the substantive allegations in the case.

Under the federal rules, substantive character evidence is permitted when it pertains to the character of a criminal defendant and when it is offered by the defendant in a criminal case or by the prosecution to rebut that evidence.[6] The same is true under New York State law.[7] But the federal rules also allow the defendant to introduce evidence of a pertinent trait of character of a victim,[8] and once admitted, they also allow the prosecution to rebut the evidence.[9] For our present purposes, that exception in Rule 404(a)(2) permits a criminal defendant in a homicide or assault prosecution to prove that the victim was an aggressive person to establish a claim of self-defense. Thus, the defendant could prove the victim's aggressive or violent character and argue that it establishes that the victim was the first aggressor or, if not, that the victim had responded to the defendant's aggression with such disproportionate force as to justify the defendant's response.

Based largely on a venerable 1904 case, *People v. Rodawald*,[10] New York law does not recognize an exception to the character evidence bar when a defendant seeks to prove the character of a victim for aggression. The recent Second Circuit case of *Williams*

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6. *See* FED. R. EVID. 404 (a)(1), *supra* note 1; *see also* United States v. Hegwood, 977 F.2d 492 (9th Cir. 1992) (holding that prosecution may offer rebuttal character evidence once defendant opens the door), *cert. denied*, 113 S. Ct. 2348 (1993).

7. *See* People v. Van Gaasbeck, 189 N.Y. 408, 82 N.E. 718 (1907) (holding that evidence probative of criminal defendant's character is admissible); People v. Araronowicz, 125 A.D.2d 682, 683, 509 N.Y.S.2d 869, 870 (2d Dep't 1986) (holding criminal defendant has "absolute and unqualified rights" to introduce evidence of good character to raise inference of innocence regardless of whether defendant takes the stand).

8. FED. R. EVID. 404 (a)(2), *supra* note 1.

9. *See supra* note 1.

10. 177 N.Y. 408, 70 N.E. 1 (1904) (holding that evidence of decedent's general reputation for violence admissible only if defendant had knowledge of it at time of the homicide, but inadmissible to establish such by proof of specific acts).

*v. Lord*[11] illustrates the continued vitality of that rule. In *Williams*, the court observed that New York courts, relying on common law traced back to *Rodawald*, had excluded evidence that a victim of a homicide had, on an earlier, unrelated occasion, raped a woman at knife-point after using drugs.[12] The defendant sought to use this evidence to corroborate her claim that she had stabbed the victim in self-defense after he had similarly attempted to rape her at knife-point in a drug-induced state.[13] Ruling on a subsequent habeas petition, the Second Circuit found that the New York rule excluding the proof did not violate the defendant's constitutional right to present a defense.[14] Thus, *Williams* not only illustrates that *Rodawald* remains the law in New York, it also shows that the New York rule passes constitutional muster. There is no constitutional imperative requiring that a defendant be allowed to prove the aggressive character of a victim in a homicide or assault prosecution when it may bear on the defendant's claim of self-defense.

If we look at the reasons that the Second Circuit gave for finding that there was no violation of the defendant's constitutional right, we can work our way back to some bases for the particular New York approach. For one thing, the court noted that New York is allowed to make a policy decision to exclude this kind of proof because there might be some prejudice were the proof to be admitted.[15] Everyone is entitled to the protection

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11. 996 F.2d 1481 (2d Cir. 1993) (holding that exclusion of murder victim's prior violent act did not violate defendant's constitutional right to present a defense), *cert. denied*, 114 S. Ct. 1073 (1994).

12. *Id.* at 1482.

13. *Id.*

14. *Id.* at 1481. Furthermore, the court stated that the right to present a defense is not absolute, and may "'bow to accommodate other legitimate interests in the criminal trial process.'" *Id.* at 1483 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). However, the court added that restrictions placed upon those interests may not be "'arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* (quoting Rock v. Arkansas, 483 U.S. 44, 55-56 (1987)).

15. *Id.* at 1483-84 (holding that exclusion of evidence of victim's prior criminal act did not violate defendant's constitutional right to present a defense

of the criminal law, including protections against assault and homicide. New York could legitimately decide that if evidence of the victim's character were admitted, there is a risk that the jury might decide improperly that this aggressive person, perhaps with a history of violent acts, really got what he deserved. Therefore, the jury would not properly evaluate the evidence considering the defendant's claim of self-defense, but decide that despite that claim, even if the defendant had not so acted, the victim's character justifies or excuses the defendant's act.

The Second Circuit also noted that New York could appropriately decide that a jury would likely overestimate the significance of evidence regarding the aggressive character of the victim.[16] Although relevant, it is not particularly probative. Just because someone might have an aggressive or violent character does not necessarily mean that he acted in conformity on a particular occasion.[17] The propensity inference is relatively weak.

Additionally, the *Williams* court noted that it was appropriate for New York courts to make a policy decision not to get into the matter of the victim's character because it introduces a potentially collateral issue.[18] The victim's character here is not itself an element of the charge or defense. It is some circumstantial evidence of whether the victim was the first aggressor. But raising the victim's character may involve the trial in an issue that is peripheral to what the jury is ultimately going to be asked to decide which is, of course, how the defendant and victim behaved on this occasion, not whether the victim, in fact, had a character trait for aggression or violence. In all, the low probative value of the proof weighed against its potential for

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because such propensity evidence has only "limited relevance" where such evidence had no bearing on reasonableness of defendant's actions).

16. *Id.* at 1483. *See* People v. Hudy, 73 N.Y.2d 40, 535 N.E.2d 250, 538 N.Y.S.2d 197 (1988) (holding that there is a danger that trier of fact would overestimate the significance of the evidence).

17. *Williams*, 996 F.2d at 1483 ("New York has a legitimate interest in seeing that every person, regardless of his worth to the community, is not unlawfully assaulted.").

18. *Id.* at 1483-84.

prejudice and confusion of the issue by raising a collateral matter justifies New York's rule of exclusion.

The *Williams* court also noted a distinction initially drawn in the *Rodawald* case between the situation present in *Williams* and a situation in which the defendant knows of the victim's character for aggression or violence.[19] If the defendant is aware of the victim's character trait, she can prove it. The rationale is that in the latter circumstance the evidence is much more probative. The reasoning goes as follows. Here we are not talking about the propensity inference from someone's character trait to action in conformity on a particular occasion. We are talking about the defendant's perception of the actions of the victim. Did the defendant, for example, act in reasonable fear of imminent bodily harm? How did the defendant interpret the actions of the victim? New York courts have found evidence about the character of the victim, if known to the defendant, far more probative.[20] We are not talking about the propensity inference; we are talking about what was known to the defendant and how that knowledge might bear on the requisite state of mind for establishing his or her claim of self-defense.

Under the federal rules, evidence of the victim's violent character comes in simply to establish the propensity inference.[21] There is no requirement that the defendant be aware of this trait of the victim. And in *Williams*, that was exactly the situation.

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19. *Id.* at 1482.

20. *See generally* People v. Miller, 39 N.Y.2d 543, 349 N.E.2d 841, 384 N.Y.S.2d 741 (1976). In *Miller*, the court stated that "[k]nowledge of prior violent acts of the victim may weigh heavily upon the mind a defendant when, as asserted, he moved to blunt the aggression of the victim." *Id.* at 551, 349 N.E.2d at 847, 384 N.Y.S.2d at 748. The court, therefore, held that evidence of prior acts of violence committed by the decedent is admissible when the defense of justifiable homicide is asserted. *Id.*

21. *See* Perrin v. Anderson, 784 F.2d 1040, 1045 (10th Cir. 1986) (holding that evidence of decedent's character, though unknown by defendants at time of incident, is admissible from which jury could infer propensity for aggression); *see also* United States v. Burks, 470 F.2d 432, 434-35 n.4 (D.C. Cir. 1972) (holding that defendant's lack of knowledge regarding decedent's character irrelevant; inquiry is "objective occurrence" and not subjective belief).

The defendant was not aware of the victim's violent propensity, and where the federal courts admit character proof in this situation, the New York courts exclude it.

How to evaluate the different approaches to start thinking about which approach is preferable? A key point is to understand precisely what is meant by the New York approach that distinguishes the use of character evidence to establish propensity and to establish the state of mind necessary to self-defense. As the interpretation of New York law comes down to us, there is a clear distinction between what is called the objective or subjective use of the victim's character according to whether it is used to prove what the victim probably did or what the defendant probably thought he was going to do. New York law is said to permit only the subjective use of the proof.[22] But if you go back to *Rodawald*, the case does not say precisely that.[23] What it seems to say is that once it is established that the defendant pleading self-defense is aware of the victim's violent character, the evidence can be admitted because it has become doubly probative. It is relevant to whether the defendant was the first aggressor and to the defendant's state of mind. Where doubly relevant, the balance between probative value on the one hand and prejudice, confusion and diversion on the other tips in favor of admissibility. You can use the proof to show the defendant's state of mind and the victim's propensity. As far as I can tell, this aspect of *Rodawald* does not come down to us today; New York cases continue to suggest that even when the proof comes in, it does so solely to establish the defendant's state of mind.[24]

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22. *See Miller*, 39 N.Y.2d at 548-49, 349 N.E.2d at 845, 384 N.Y.S.2d at 745. The court in *Miller* reiterated that in a homicide prosecution, the defendant may introduce evidence of the decedent's general reputation for violence provided the defendant knew of that reputation. *Id.*

23. *See generally Rodawald*, 177 N.Y. 408, 70 N.E. 1.

24. *See Miller*, 39 N.Y.2d at 552, 349 N.E.2d at 847, 384 N.Y.S.2d at 746 ("[T]he jury must be cautioned that this evidence may only be considered with respect to the issue of the reasonableness of defendant's apprehensions, and, further, that the character of the deceased and his specific past violent acts are not otherwise relevant to the issues before them."); People v. Trivette, 175 A.D.2d 330, 332, 572 N.Y.S.2d 85, 87 (3d Dep't 1991) (holding

In a curious way, *Rodawald* may be better justified than the current New York rule. *Rodawald* seemed to identify a rather specific set of circumstances, where victim character evidence is relevant to the victim's likely action and the defendant's state of mind, under which its probative value might well outweigh the dangers of prejudice, confusion and diversion.[25] But as it seems today to be understood, *Rodawald* stands for the proposition that New York takes a purely subjective approach to victim character evidence.[26] Under that subjective approach, the truth is that we are not really talking about the character of the victim at all. If all we care about is what the defendant perceives about the victim for the light it sheds on the reasonableness of the defendant's actions or his state of mind, then we do not even care if what the defendant believes about the victim is true or not. What we care about is the defendant's belief. If that is true, then you can imagine that all kinds of evidence that seems to fall under the rubric of victim character proof is not really character proof at all. It may be admissible in a criminal trial solely to establish the defendant's belief, be immune to rebuttal by evidence of the victim's peaceable character, and thus have precisely the kinds of prejudicial effects on the determination that commentators and courts worry that it might have. At the same time, the evidence would be shorn of its probative value as propensity proof. *Rodawald* at least suggested a screen for the prejudice by requiring that the evidence be doubly relevant before being

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decedent's psychiatric evaluation inadmissible where defendant unaware of such, could not have affected defendant's state of mind at time of incident).

25. *Rodawald*, 177 N.Y. at 423, 70 N.E. at 5-6. The court stated that a defendant may introduce general reputation evidence of the decedent - "that of a quarrelsome, vindictive or violent man" - as long as such reputation was known to the defendant at the time of the homicide. *Id.*

26. Williams v. Lord, 996 F.2d 1481, 1484 (2d Cir. 1993) (holding that it was not error to exclude evidence of murder victim's prior violent acts since defendant had no knowledge of such acts at time of homicide), *cert. denied*, 114 S. Ct. 1073 (1994); *In re* Robert S., 52 N.Y.2d 1046, 420 N.E.2d 390, 438 N.Y.S.2d 509 (1981) (holding that general reputation evidence of decedent to show quarrelsome or vindictive admissible, but excluded evidence of general propensities for violence unless had bearing on defendant's state of mind).

admitted, and where it is admitted, it would be acknowledged to be character proof and subject to rebuttal.

Having said that about the New York approach, I should add something about the federal alternative. I suppose that in going back to *Rodawald*, I am bucking the tide by suggesting that, perhaps, there is a greater rationale for the New York approach than many have suggested. For example, Judge Cardamone, concurring in *Williams*, while agreeing that the New York rule does not interfere with the defendant's constitutional right to present a defense, urged the New York courts to reevaluate a rule that he noted represents a "much criticized minority view."[27]

Nonetheless, it is not clear, as Judge Cardamone's suggestion presupposed, that the federal rules would have allowed the proof. Although Rule 404(a)(2) allows proof of a victim's violent character to show that he was the first aggressor, Rule 405[28] allows proof of that character only by reputation or opinion evidence.[29] The proof in *Williams*, however, consisted of the testimony of the victim's previous rape victim. It is hard to imagine how the defendant could turn this single incident into persuasive opinion or reputation proof, if she could do so at all. The federal rules prohibit proof of character by specific acts, despite their more probative nature, precisely because of their additional tendency to prejudice, confuse or divert the jury's attention from the central issue in the case at bar. Thus, even the federal rules seem to exclude the proof in *Williams* for precisely the same underlying reasons that the *Rodawald* court suggested.

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27. *Williams*, 996 F.2d at 1484-85 (Cardamone, J., concurring).

28. FED. R. EVID. 405. 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 that person's conduct.

*Id.*

29. *Id.*

On the other hand, Judge Cardamone recognized what may seem to many to be the compelling nature of the proof excluded in *Williams*. There may be circumstances under which character evidence established by specific acts seems far more probative than the character rules allow, especially when it concerns unusual acts of violence. To admit it, however, is to require a more general overhaul of the character evidence rules, not the simple amendment of the state rule to mirror the federal rule. In this circumstance, the same factors that made the specific act proof highly probative also rendered it especially likely to prejudice, confuse or divert the jury. Where both probative value and prejudicial effect are high, general evidentiary principles, such as those embodied in Rule 403,[30] admit the evidence. But the categorical character evidence rules governing exclusion, admission and method of proof combine to exclude evidence that nonetheless meets the standard of Rule 403. Accommodating the proof in *Williams* requires more than amending those categorical rules to allow character proof of the victim.

In reevaluating New York's rule, New York courts should go back to *Rodawald* itself and ask whether its rationale for the New York approach is something that has been lost over the years and is, perhaps, something worth reviving or continuing. Alternatively, the courts should ask whether the character rules in their entirety are in need of revision in favor of a flexible standard that allows highly probative character evidence despite its admitted potential for prejudice.

*Hon. George C. Pratt*:

Thank you, Professor Kainen.

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