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Slough, M. C.-Impeachment of Witnesses: Common Law Principles and Modern Trends

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One of the most interesting facets of trial experience is the examination of witnesses for here one is constantly doing battle against the frailties and inconsistencies of the human element. The trier of fact, be it judge or jury, is not in a position to investigate and must constantly rely upon human assertions which in turn derive from human qualities. The usual forces that determine moral character, bias, interest, power of memory, and perception well from a complex of emotional influences and intellectual stimuli too vast for perfect comprehension. Legal scholars have long been cognizant of the difficulties inherent in our reliance upon testimony of witnesses, and ever so gradually rules of evidence have been devised to minimize the inadequacies rooted in testimonial proof.¹

Non-lawyer critics, undoubtedly reflecting the bias of their own professional ideals, have been unduly harsh in their appraisal of traditional and contemporary legal methods for extracting truth. Viewed in a cold scientific light, the rules of evidence are inevitably too general and run to over-simplification in terms of the personality equation. As far as witness credibility is concerned, little effort is expended in examining the psychological basis of testimony elicited and investigatory procedures aimed at culling out the accuracies or inaccuracies of testimonial assertions are flimsily contrived. Yet critics of the contemporary legal scene just as often fail to realize that the modern trial is a swift moving thing. A complete and accurate investigatory process at the trial level would necessitate an elaborate scheme of evaluation requiring the services of many psychiatrists, psychologists, sociologists, and workers in allied disciplines. As a result the cost of litigating would be burdensome and

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court dockets already brimful would present a spectre of unrelieved congestion. Since the dawn of the adversary system rules of evidence have been fashioned in general terms to meet the exigencies of an infinite variety of cases. For purposes of impeachment, counsel have been permitted to test and attack credibility in a number of ways: by proving that a witness has been inconsistent in his assertions, by pointing up bias, interest, or conscious false intent, by openly attacking the witness' character. Just as surely as methods of impeachment were constructed and refined, certain protective forces were at work, dedicated to the task of dignifying the role of witnesses and restraining the ardor of adversary interests. Thus the idea became current that a party vouched for the credibility of a witness whose testimony he introduced. Attacks upon the moral obliquities of a witness were curtailed by censoring references to general moral character and by narrowing the scope of inquiry into past infamous deeds and misadventures. Concomitantly there developed an unctuous but easily circumvented rule of exclusion which forbade reference to collateral offenses when one stood trial for a criminal offense. Evidence of character became confined to general reputation and individual opinion or evaluation was banned from the courtroom scene. In the interest of saving time and in the interest of minimizing the spectacular and softening the rude shock of prejudice, an elaborate web of rules evolved. The very fact that many of these concepts have survived for centuries bespeaks the wisdom and experience of many great persons.

Procedural innovations of recent vintage have overhauled and improved traditional modes of fact finding and have tended to eliminate certain areas of surprise and doubt inherent in our adversary system of litigation. By resorting to pre-trial conferences and discovery devices the modern lawyer is in a position to gauge the worth of his own witnesses and to test the strength or weakness of his opponent's case. Later trends also indicate that the legal profession is willing to accept the contributions of other professional groups, particularly as they affect the outcome of trial procedures. Yet, despite radical changes in certain areas of the fact finding pattern there is strong evidence of growing dissatisfaction with the baseless inflexibility of orthodox doctrines. Aside from the fact that present rules of evidence with respect to witness examination are oversimplified and unrealistic, it is quite evident that there is a tragic lack of uniformity in their application. The courts must seek

out a realistic solution, utilizing the best available knowledge at hand, whether it be legal or scientific. Many of these traditional concepts were wisely formulated on the basis of information obtaining at the time of their inception, but the ensuing years have witnessed an accumulation of knowledge that clearly points to the invalidity of many original principles.

It would indeed be beyond the scope of this article to analyze and criticize a major portion of these rules that guide and restrict the lawyer in his search for absolute truth. On the other hand, a particularized reference to restricted areas of conflict may well illustrate the equivocal values of present day trial techniques. The total subject is necessarily complicated by differences of opinion among the many American jurisdictions. These differences in turn are aided and abetted by ambiguous exceptions and definitions welling out of equally ambiguous precedents and piecemeal legislation. If for no other reason, an analysis of this sort is beneficial in that it demonstrates the folly of reliance upon general rules without resort to sedulous examination of precedents.

**Impeachment of One's Own Witness**

There is actually no agreement as to the origin of the common law rule forbidding a party to impeach his own witness. Dean Wigmore has suggested that the rule may have taken root in the medieval trials by compurgation where a party established his plea if a prescribed number of helpers swore that he told the truth. Since these oath helpers were chosen from among the kinsmen and adherents of the party involved, it was unthinkable that a party would take any stand against his helpers. Under the civil and canon laws the rule was well established that one who employed a witness for his own purposes could not thereafter object to his incompetency. Dean Ladd suggests that a more probable origin of the rule can be traced in the transition from the inquisitorial method of trial as it evolved into an adversary system. His theory seems plausible as it was not until the jury became judges of the evi-

4. 3 Wigmore, Evidence § 896 (3d ed. 1940).
5. Precise information is not available, though it appears by inference in the Code Justinian that a party under the Roman Law could not generally impeach his own witness. For an accurate historical account of the supposed origins of the rule against impeachment, see the opinion by Blume, J., in Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922).
6. Ladd, supra note 3, at 70.
vidence alone, apart from personal knowledge of issues involved, that
witnesses in the modern sense appeared. In this manner, Dean Ladd
accounts for the absence of reported cases involving the impeachment
rule until the seventeenth century and its first reported application in
Fitzharris' Trial, a century after compurgation had fallen into disuse.9

Various reasons have been assigned for perpetuation or justification
of the rule: that the party by calling a witness is morally bound by the
statements of his witness,9 that the party by calling a witness vouches
for or guarantees the trustworthiness of his testimony,10 that the party
calling a witness should be prohibited from coercing or controlling his
testimony.11 Obviously a party is not morally bound by the testimony
of his witness; hence this primitive ethical basis for exclusion became
moribund early in the nineteenth century. In a very practical sense, this
exclusionary principle clashed with another corollary of the impeachment
rule which permitted contradiction on material issues.12

One may inch closer to reality by asserting that a party vouches for
his witness or represents him worthy of belief, but the vouching idea
fares poorly on strict analysis. The great nineteenth century authority
Simon Greenleaf wrote in terms of guarantees and vouchings, even to
the point of stating that one is presumed to know the character of the
witnesses he adduces.13 Despite general criticism, the vouching theory
obtains in modern opinions just as it did a century ago, and for lack of a
better chant, it continues as a weak and riddled article of faith.14 In a
practical sense, one may vouch for the credibility of an expert witness or
of a character witness hand-picked to prove a definite point. But the
personal injury litigant and the prosecutor are driven to accept indi-
viduals as witnesses who have observed the facts in issue. Fate has

7. 8 How. St. Tr. 223, 369, 373 (1681).
8. "[W]hen the trial became completely adversary in character the rule for-
bidding impeachment remained a logical concomitant of it, whether consciously af-
fected by the analogy of compurgation or not." Morgan, The Jury and the Exclusionary
9. 3 Wigmore, Evidence § 897 (3d ed. 1940).
10. Wilson v. Prettyman, 195 Iowa 598, 192 N.W. 413 (1923); Pollock v. Pollock,
71 N.Y. 152 (1877); McCormick, Evidence § 38 (1954).
11. 3 Wigmore, Evidence § 899 (3d ed. 1940); Ladd, supra note 3, at 80.
12. Northern Pacific Railway Co. v. Everett, 232 F.2d 488 (9th Cir. 1956). All
authorities agree that a party shall have the right to contradict his own witness by call-
ing other witnesses to prove a fact material to the issues even though the necessary
effect is one of impeachment. See generally, 3 Wigmore, Evidence § 907 (3d ed. 1940).
14. "As a general rule, a party to a lawsuit voluntarily calling a witness to the
stand vouches for his credibility and cannot impeach him except as that result may be
incidentally accomplished by proving a state of facts differing from that sworn to by
the witness." McCray v. Illinois Central Railroad, 12 Ill. App.2d 425, 139 N.E.2d 817,
822 (1957).
ordered that certain persons, good or bad, shall observe certain events, and just as surely fate does not order that these observations be truthfully revealed.

Courts have unanimously rejected the idea that a party vouches for witnesses whom he is under a duty to call. The proponent of a will is obliged to call the attesting witnesses regardless of the fact that he might distrust them and desire to call persons of more reputable strain. Very clearly these are necessary witnesses in a legal sense and the proponent is everywhere afforded the luxury of impeachment should testimony prove adverse. A like rule applies in criminal cases, where the prosecution is under a legal duty to call witnesses whose names are indorsed on the indictment or information. In absence of an express legal duty courts have at times been willing to concede that a party may be compelled in a practical sense to call certain witnesses and have permitted impeachment on that basis when the situation demanded such action. Looking at the matter from a common sense point of view it would seem that many, if not most, witnesses are necessary in terms of obtaining a truthful account of the facts. However, at this juncture it would appear that judicial conservativism prefers to attach undue importance to precise legal tabs, practicalities notwithstanding.

The third reason assigned for perpetuating the common law rule has an impressive and honored tradition and has been quoted frequently in American opinions. It is founded on the proposition that the power to impeach implies the power to destroy. Reasoning thusly, one could coerce his witness to testify as desired, because he would be in a position to destroy the witness' credit if he dared to speak against him. The chief failing of this coercion theory lies in an assumption that all witnesses who give damaging testimony are testifying to the truth. It assumes that all unfavorable statements made out of court are truthful in content and that counsel, armed with the power to impeach, invariably attempt to coerce their witnesses into rendering false testimony. It further assumes that all or most witnesses are consumed with an innate fear of

15. Meeks v. United States, 179 F.2d 319 (9th Cir. 1950) (prosecution compelled to call witness to establish premeditation; impeachment allowed); Commonwealth v. Sarkis, 164 Pa. Super. 194, 63 A.2d 360 (1949) (prosecution compelled to call victim of aggravated assault as a witness for the Commonwealth, though not absolutely required by law; impeachment permitted).

16. The prohibition of impeachment does not apply to situations where one calls the adverse party as a witness. In addition to statutory provisions for the pre-trial examination of adverse parties and witnesses, the practice codes and statutes of most jurisdictions provide that a party may be called by his adversary and examined as on cross-examination as to any relevant facts in issue. Fed. R. Civ. P. 43(b); Ind. Ann. Stat. § 2-1728 (Burns Supp. 1957); Annot., 35 A.L.R.2d 756 (1954).

impeachment and will be willing to repudiate the truth to escape almost certain character assassination. As a matter of fact most witnesses suffer from an assorted variety of inhibitions when testifying in court, but it is quite another thing to insist that honest and reputable witnesses are affected unduly by conscious fears of impeachment. In reality the average witness is quite unaware of the rules which permit or deny impeachment, and as usual the legal mind is prone to give him more credit than he rightfully deserves.

The deceitful and dishonest witness has much to fear from impeachment when he strays from the truth, and no one should quarrel with his being exposed if deception is revealed. It is common knowledge in these times that witnesses are on occasion paid for their testimony, particularly in criminal cases where gang domination and control are evident. Sympathy for the accused figures high in criminal prosecutions, causing witnesses to change their testimony when they realize that they are condoning if not forcing conviction. Prohibiting impeachment by the offering party puts him at a tactical disadvantage inasmuch as the opposing party can always attack the witness' credibility, and all too frequently the opposing party will decide what the jury shall hear. Indeed this is an unfair advantage which the originators of the rule could not have contemplated, otherwise the rule would have failed for lack of a sponsor.\(^\text{18}\)

The strict common law rule of prohibition, like most rules of law that have outlived their usefulness, has faced gradual nullification. Thus courts have long held that a party's own witness could be examined, calling his attention to former statements made, for the purpose of refreshing his recollection.\(^\text{19}\) Nor is it uncommon for judges to allow leading questions to be put to witnesses who have demonstrated a talent for forgetting things past.\(^\text{20}\) Obviously these tactics do not bear the stigma of impeachment, but distinctions between memory probing and outright impeachment can be more tenuous than real.

Major limitations upon the non-impeachment doctrine have resulted from legislative action. In 1849, David Dudley Field, of New York, attempted a radical change in the impeachment rule by incorporating two

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\(^{18}\) Judge May, writing in 1877, carefully delineated the weakness of the coercion concept. "[I]f he betrays the party who calls him and falsifies every statement which he makes, the opposite party will of course accept the treason, say nothing of impeachment and leave the jury no alternative but to find an unjust verdict upon evidence which both parties know to be the rankest perjury. . . . Nobody can profit by the rule but the witness and the antagonist of the party who calls him and they only by the defeat of the ends of justice." May, Some Rules of Evidence, 11 Am. L. Rev. 261, 270 (1877).

\(^{19}\) People v. Michaels, 335 Ill. 590, 167 N.E. 857 (1929); People v. Purtell, 243 N.Y. 273, 153 N.E. 72 (1926); Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922).

\(^{20}\) BUSCH, LAW AND TACTICS IN JURY TRIALS § 266 (1949); MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 44 (1947).
sections into his proposed Code of Civil Procedure. One section pro-
vided that a party should not be allowed to impeach the credit of his
witness by evidence of bad character, but should be permitted to con-
trast him by other evidence, which would include a showing that the wit-
ness had at other times made statements inconsistent with his present
testimony. The other section provided for impeachment by proof of
statements inconsistent with present testimony provided proper founda-
tion was laid. Too radical for contemporary consumption these provi-
sions were rejected in New York but became law, in substance, in Eng-
land with the passage of the Common Law Procedure Act of 1854.21

Four American jurisdictions, Florida, New Mexico, Vermont, and
Virginia have passed legislation in substance identical to the English
Act, incorporating the English provision that the witness must prove to
be adverse.22 In 1869 a statute was enacted in Massachusetts providing
that a party may prove that his witness has at other times made state-
ments inconsistent with his present testimony.23 The Massachusetts
statute, in turn, has furnished the basis for legislation in at least eight
jurisdictions.24 Two of these jurisdictions allow evidence of bad charac-
ter if the witness is indispensable.25 Statutory provisions in Louisi-
ana and Texas apply only in criminal cases, though judicial decisions make
the rules applicable in civil cases as well.26 The Wisconsin statute applies
only to criminal proceedings but restricts impeachment to situations
where the judge regards the witness as hostile and where the statement
itself is in writing or in the form of a phonographic report.27 Wisconsin
will permit impeachment without benefit of statute in civil matters, sub-
ject to the discretion of the trial judge.28 Two statutory provisions in
New York sanction impeachment by prior inconsistent statements, how-
ever, the strength of these provisions is in large part dissipated by a re-

21. 17 & 18 Vict. c. 125 § 22 (1854).
22. FLA. STAT. § 90.09 (1955); N.M. STAT. ANN. § 20-2-4 (1953); VT. REV. STAT.
§ 1743 (1947); VA. CODE ANN. § 8-292 (1950).
23. MASS. ANN. LAWS ch. 233 § 23 (1956).
24. ALASKA COMP. LAWS ANN. § 58-4-49 (1949); ARK. STAT. ANN. § 28-706
(1947); CAL. CODE CIV. PROC. § 2049; IDAHO CODE ANN. § 9-1207 (1948); IND. ANN.
STAT. §§ 2-1726 (BURNS 1946); MONT. REV. CODES ANN. §§ 93-1901 to -8 (1947); ORE.
REV. STAT. § 45.590 (Supp. 1955); WYO. COMP. STAT. ANN. §§ 3-2606 (1945). For many
years, Kentucky followed the Massachusetts practice, however, KY. R. CIV. P. 43.07
(1953) eliminates the distinction between impeachment of a party's own witness and
impeachment of other witnesses.
Rattler, 192 S.W.2d 942 (Tex. Civ. App. 1946). McCormick and Ray, Texas Law of
Evidence § 689 (1956).
28. In re Krause's Estate, 241 Wis. 41, 4 N.W.2d 122 (1942).
quirement that the prior statements be in writing or under oath. The District of Columbia and Georgia allow impeachment by proof of inconsistent statements in the event that counsel is surprised or entrapped by the witness being examined. Statutory provisions in twelve jurisdictions sanction impeachment of one's own witness but only when the witness is an adverse party. Judicial decisions in these states have extended the scope of impeachment to other witnesses. In other jurisdictions, the courts, without aid of statute, have modified the common law rule, permitting impeachment under varying conditions.

Statutes and case precedents which have liberalized the common law rule of prohibition refer largely to impeachment by prior inconsistent statements. Therefore counsel will not be allowed to attack the credibility of his own witnesses by producing evidence of bad moral character, or evidence of bias, interest, or corruption. Despite the liberalizing force of statutory enactments, a general feeling persists that a party should not be granted the license of impeaching the character of his witnesses, and undoubtedly a point of policy may be raised in defense of the restrictive rule. If a party is not precluded from attacking the character of his witness, he will be in a position to bring pressure to bear upon his witnesses. This policy argument may convince momentarily until one reflects upon the favored position of the adversary party who can attack at will. Nor is it likely that a party will with frequency indulge

29. N.Y. CIV. PRAC. ACT § 343-a; N.Y. CODE CRIM. PROC. § 8-a. The present New York law adopted in 1936 is far less ambitious than the provisions of the original Field proposals. See Ladd, supra note 3, at 91-94; Schatz, supra note 3, at 386.

30. D.C. CODE ANN. § 14-104 (1951) (impeachment permitted if party producing witness has been taken by surprise); GA. CODE ANN. § 38-1801 (1954) (impeachment permitted if witness entraps the party calling him).

31. ARIZ. R. CIV. P. 43(g) (1956); COLORADO REV. STAT. ANN. § 153-1-16 (1953); ILL. REV. STAT. ch. 110, § 60 (1957); ME. REV. STAT. ANN. c. 113, § 118 (1954); MICH. STAT. ANN. § 27.915 (1935); MINN. R. CIV. P. 43.02 (1957); MISS. CODE ANN. § 1710 (1956); MO. ANN. STAT. § 491.030 (1952); NEV. R. CIV. P. 43(b) (1953); N.H. REV. STAT. ANN. 516:24 (1955); OHIO REV. CODE ANN. § 2317.07 (Baldwin 1958); PA. STAT. Ann. tit. 28, § 381 (1958). Annot., 35 A.L.R.2d 756 (1954).


34. 3 WIGMORE, EVIDENCE §§ 900, 901 (3d ed. 1940); Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure, 47 YALE L.J. 194, 201 (1937). Most state statutes expressly prohibit impeachment of witness character by the calling party. Arkansas, Indiana, and Kentucky allow evidence of bad character if the witness is indispensable. See note 25 supra; Hill v. Goode, 18 Ind. 207 (1862) (holding that a party may in given cases impeach his own witness by proof of bad character).
in the privilege of attacking his witness' character by cross-examining with respect to past crimes and misdeeds, by calling in character witnesses, or by revealing strong bias and corruption. These attacks upon witness character would be exceptional, and the equities of each case might well rest within the ambit of judicial discretion.35

Statutes and case precedents may have sanctioned impeachment by proof of inconsistent statements, but ever so gradually, subtle, sometimes useless limitations, have been grafted upon the liberating concept. As a general rule, a party may not impeach his own witness unless it appears that he has been surprised36 by the testimony given, or that the testimony elicited has been affirmatively prejudicial37 or damaging38 to his case. The task of seeking out surprise, prejudice, and damaging effects can become a futile wearisome affair, and more often than not, common sense joined with sound judicial discretion can dictate accurate, positive results. In the process of defining surprise and gauging the limits of damage, judges are perforce reduced to the status of syllabus experts, plagued by artificial distinctions that stifle intelligent consideration of conditions as they actually exist.

Where a party in good faith has called a witness and is surprised by adverse testimony, he may be allowed to cross-examine in the court's discretion or he may call other witnesses to show that a statement was previously made which contradicts present testimony.39 However, impeaching matters must be limited to the point of surprise, and where ills wrought by surprise have been remedied by cross-examination, it is im-

35. As far as impeachment is concerned there is often little practical distinction between pointing out inconsistent statements, attacking character, or demonstrating bias and corruption. The problem may be one of semantics alone as is evidenced by a half-century old Kansas decision, State v. Moon, 71 Kan. 349, 80 Pac. 597 (1905). A witness before trial had informed the prosecution of statements made by the defendant pertaining to the latter's plans to commit larceny. On the stand the witness denied knowledge of these statements and the prosecution was granted the privilege of cross-examination. After adjournment the witness was arrested for perjury. Next day he retracted and on the stand retold his story with all the details of the defendant's subornation. Degrading as the attack might have been with respect to the witness' character, the procedure was upheld.


39. Banks v. United States, 204 F.2d 666 (8th Cir. 1953).
proper to call other witnesses for the same purpose. Nor can a party claim surprise and thereby acquire the right to impeach simply because his witnesses do not testify as expected.

Only one matter is certain in this area of litigation: that courts have been unable to agree as to the meaning of surprise. Too many decisions have set up impossible requirements which deny contradiction when a party has reasonable notice that the testimony of his witness will deviate. In essence these decisions appear to require a complete lack of awareness on the part of counsel that the witness will change his story. Other courts, principally federal, have taken a realistic view of the situation, holding that prior notice alone is not sufficient to defeat a claim of surprise, and thus do not regard surprise as the equivalent of being taken unaware. These latter decisions rather look to see whether the party was reasonably justified in expecting the witness to testify in a favorable manner and place little stress upon the surprise-awareness equation. Of particular value to the stock of precedents are those decisions which pay scant homage to claims of surprise and place proper emphasis upon the trial court's discretion.

40. Forrester v. United States, 210 F.2d 923 (5th Cir. 1954).
43. Weaver v. United States, 216 F.2d 23 (9th Cir. 1954) (court held that the prosecution was surprised when the witness testified consistently with her Grand Jury testimony, but contrary to her earlier statement to the F.B.I.) ; Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019 (1954) (prosecution allowed to impeach when witness' testimony at trial, contrary to her police report and Grand Jury testimony, exculpated defendant, despite fact that defendant before trial had shown police an exculpatory statement allegedly signed by witness); United States v. Graham, 102 F.2d 436 (2d Cir. 1939) (district attorney allowed to cross-examine witness as to statement made at two former trials even though witness had told him that he would not so testify and that statements were false); People v. Spinoso, 115 Cal. App. 2d 659, 252 F.2d 409 (1953) (witness prior to trial said that he did not commit a crime, then later said that he did; at trial witness testified that he did not commit the crime, and prosecution allowed to impeach on ground that state had right to assume witness would testify according to latest story); Commonwealth v. Bowers, 182 Pa. Super. 628, 127 A.2d 806 (1956) (immediately after alleged offense, rape victim signed statement accusing defendant; at trial victim repudiated statement and district attorney allowed to impeach regardless of fact that defense counsel and victim had previously advised that statement was not true). See 1957 Ann. Survey Am. L. 555, 33 N.Y.U.L. Rev. 349 (1958).
44. "Where the trial court has permitted a party thus to cross-examine his own witness, there should be no reversal on that account unless it can be made to appear that justice was obstructed, and not furthered, thereby and that substantial prejudice resulted. . . . The claim of surprise has become largely a gesture which adds little or nothing to the trial court's discretion." London Guarantee & Accident Co. v. Woelfle, 83 F.2d 325, 334 (8th Cir. 1936); Nuzum v. Springer, 97 Kan. 744, 156 Pac. 704 (1916).
IMPEACHMENT OF WITNESSES

In a significant number of jurisdictions it is stated that, in addition to being surprising, the testimony of the witness must be damaging before impeachment will be permitted.\(^4\) This added requirement assumes that the only legitimate use of the prior inconsistent statement is to neutralize testimony already given.\(^4\) Hence, where testimony elicited has not appreciably damaged or hurt the proponent, there is nothing to impeach, or neutralize. This being the case, the prior statement serves no proper evidentiary function and the jury can only misinterpret its validity.

Ambiguity is further served by a judicial rule of thumb which asserts that damage can only result when the witness gives affirmative testimony regarding some material fact, \textit{i.e.}, testimony which asserts the existence or nonexistence of a material fact.\(^4\) A negative or doubtful re-
ply would not be sufficiently adverse to counsel's interest to qualify as damaging testimony. Rulings of this genre of necessity generate and breed technical judicial opinions dedicated to needless quibbling over rhetorical refinements. How does one spell precise distinctions between that which is affirmative and that which is negative, and furthermore who can accurately declare that an "I did not" or a "he did not" is inevitably more damaging than an "I don't know" or "I don't remember"? In attempting to gauge the damage potential of testimonial statements, appellate courts are time and again more concerned with verbal form than with the substance of information to be revealed.

Dissatisfaction with the status quo is becoming increasingly evident, and two recent decisions illustrate current trends. In *People v. LeBeau*, the Supreme Court of California has essayed the damage requirement with a fresh perspective. The defendant, charged with possession of cocaine, testified that he knew nothing about narcotics and had never been in contact with them. Asked by the prosecution if he had not told one Nancy McDowell that he used cocaine, he replied no. In rebuttal, the state called Nancy who also denied that the defendant had made such a statement. She was then questioned as to whether she had not previously told the district attorney that Le Beau had made a statement to her. She replied that she did not remember. Claiming surprise, the prosecution proceeded to impeach her testimony by calling a police inspector who testified that Nancy had made a statement to the district attorney with reference to the defendant's using cocaine. The Supreme Court found no error in permitting the prosecution to impeach and ruled that the state was damaged because the jury might conclude that the district attorney was harassing the defendant and attempting to discredit him without any basis in fact.

The problem of the forgetful witness has been artfully resolved by the Supreme Court of Utah in *Morton v. Hood*. Mrs. Gertrude Morton, while crossing a highway in company with her granddaughter, Greta Churchill, was struck by the defendant's car. Two days after the acci-

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50. 105 Utah 484, 143 P.2d 434 (1943).
dent, Gretta gave statements in the presence of a court reporter which constituted evidence highly favorable to the defendant. As a witness called by the defendant her testimony in court tended to corroborate the testimony of the plaintiff, and counsel for the defendant asked her about statements allegedly made before the court reporter. While she did not deny making these statements, she responded that she did not remember. Defense counsel asked for leave to impeach her testimony by introducing evidence relative to her prior statement, but the trial court denied this request. On appeal, the Supreme Court of Utah ruled that denial of the right to impeach in this instance was prejudicial error necessitating reversal of the judgment below. The majority opinion clearly noted that no witness, intentionally or unintentionally, should be permitted to prevent disclosure of material facts, either by refusing to answer or by failing to remember. Said the court: “If permitted to function, a convenient memory could readily defeat proof of prior contradictory statements and testimony given at a time when the witness would be more likely to remember how things happened with a greater degree of accuracy.”

The United States Court of Appeals, Third Circuit, in Johnson v. Baltimore & Ohio R.R., has lately announced that a party is not bound by the testimony of his own witness even though he is not an adverse party. A railroad detective shot and killed a man whose administratrix sued the railroad under a wrongful death statute. At the trial, the plaintiff called the detective as his own witness and the latter testified that he killed in self defense. The plaintiff called the detective out of sheer necessity after a suggestion by the trial judge that up to that time there was not a sufficient case for recovery. Apparently the jury chose not to believe the self defense story and returned a verdict for the plaintiff. The defendant contended that the plaintiff should have been bound by the testimony of the witness whom he called, and further contended that the verdict should have been directed for the defendant since this testimony was adverse to the plaintiff’s case. Despite the fact that the witness’ testimony was uncontradicted and that the plaintiff made no attempt to impeach, the appellate court affirmed the verdict. The majority

51. Id. at 492, 143 P.2d at 437.
52. 208 F.2d 633 (3d Cir. 1953), cert. denied, 347 U.S. 943 (1954). In Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950), this court interpreted Rule 43(b) of the Federal Rules of Civil Procedure, which permits a party to impeach the credibility of an adverse party he has called as a witness, to mean that the calling party is not bound by an adversary witness’ testimony.
53. In Texas Prudential Ins. Co. v. Turner, 127 S.W.2d 563 (Tex. Civ. App. 1939), the court stated that the plaintiff must allege and prove that the death of her husband was caused accidentally. She offered as her witness the person who shot her husband and was bound by this testimony because the testimony was uncontradicted and the witness was not impeached. The Johnson decision has been received with mixed feel-
opinion by Judge Goodrich is particularly noteworthy in that it places almost complete reliance upon modern text authorities who would abolish both the rule that a party is bound by the testimony of his witnesses and the prohibition against impeaching one's own witnesses.\(^{54}\) Whether called by plaintiff or defendant, witnesses are in court for the sole purpose of revealing the truth, and rules of evidence which restrict and distort this purpose should be rejected without cavil.\(^{55}\) The Johnson decision unashamedly records these sentiments.

**Impeaching the Adverse Witness**

The testimonial qualifications of the adversary's witness are always open to attack. In the main, credibility may be attacked on cross-examination or by extrinsic evidence, by proving that the witness has made statements inconsistent with his present testimony, by revealing bias, interest, or corruption, by alluding to past convictions and misdeeds, by assailing character directly through the medium of character witnesses. Restrictive rules, hewn from countless precedents and inflexible legislative enactments, make ready understanding of the impeachment process virtually impossible.

If prior statements of the witness are to be admitted for impeachment purposes, it is axiomatic that real inconsistency exist between the two assertions of the witness.\(^{56}\) No assumptions are made as to the falsity of present testimony or the truth of prior statements, as the triers of fact are free to reject both versions.\(^{57}\) Cases are not in agreement as to the degree of inconsistency required. A strict line of authorities would require that there be contradiction in plain terms between testimonial assertions and previous statements made.\(^{58}\) These authorities overlook the


\(^{55}\) Uniform Rule of Evidence 20 abolishes the prohibitory rule in plain, unequivocal language: "Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility." Rules 21 and 22 set limitations upon the types of impeaching evidence that may be offered. Rules 20 and 22 state in separate provisions the substance of Model Code of Evidence rule 106 (1942).

\(^{56}\) Denver City Tramway Co. v. Lomovt, 53 Colo. 292, 126 Pac. 276 (1912); 3 Wigmore, *Evidence* § 1040 (3d ed. 1940).

\(^{57}\) 3 Wigmore, *Evidence* § 1017 (3d ed. 1940).

\(^{58}\) "Before evidence of an impeaching character can be considered as competent, it must appear that such evidence is contradictory of what the witness states at the trial, and such evidence must appear after the evidence is construed most favorably to the witness sought to be impeached. . . ." Sanger v. Bacon, 180 Ind. 322, 328, 101
fact that the existence or non-existence of contradiction is largely a matter of degree, hence inferences of consistency might be found in many instances. If material variance between testimonial assertions and prior statements does exist, it seems fitting to allow comparisons, contradictions notwithstanding.²⁹

When counsel attempts to discredit the adverse witness by proving contradictory statements, sound trial tactics will generally require that adequate warning be given on cross-examination. The trial judge should be endowed with discretion to exclude extrinsic evidence of prior contradictory statements unless the witness, on cross-examination, has been given an opportunity to admit or deny making the extra-judicial assertions. In this manner, the witness is given fair warning that the statements may be offered against him, and if an admission is forthcoming, extrinsic proof will be unnecessary.⁶⁰ On the other hand it is unfortunate that this sound rule of practice should be treated as an article of faith which necessitates observance in every instance. A great majority of jurisdictions have accomplished just that by requiring foundation testimony as a condition precedent to impeachment by extrinsic evidence.⁶¹ The rule apparently made its debut in Queen Caroline's Case,⁶²


59. Commonwealth v. West, 312 Mass. 438, 45 N.E.2d 260 (1942) (contradiction in plain terms not necessary; enough if testimony taken as a whole indicates a difference); O'Neill v. Minneapolis Street Ry., 213 Minn. 514, 7 N.W.2d 665 (1942) (statement should be received if there is a variance, degree of inconsistency not considered); Kesten v. Forbes, 273 App. Div. 646, 78 N.Y.S.2d 769 (1948) (prior statements admissible when tending to prove differing facts; direct, positive contradiction not necessary).


61. Mattox v. United States, 156 U.S. 237 (1895); Conrad v. Griffey, 16 How. 38 (1853); United States v. Indian Trailer Corp., 226 F.2d 595 (7th Cir. 1955); Brower v. State, 236 Ind. 35, 138 N.E.2d 237 (1955); Roller v. Kling, 150 Ind. 159, 49 N.E. 948 (1899); State v. Aguirre, 167 Kan. 266, 206 P.2d 118 (1949); State v. Laspy, 298 S.W.2d 357 (Mo. 1957). There are a few states which impose no such condition. "Indeed, the utility of such a practice is not very obvious. Witnesses about to be impeached are generally persons of a doubtful or unknown character; and the wisdom of putting them on their guard . . . is not very discernible." Tucker v. Welsh, 17 Mass. 160, 166 (1821). See also State v. Chickering, 97 N.H. 368, 89 A.2d 206 (1952). However, the Massachusetts statute, permitting limited impeachment of one's own witness, does require the laying of a foundation. Mass. Ann. Laws ch. 233, § 23 (1956). An intermediate and workable solution leaves enforcement or remission of the foundation rule to the discretion of the trial judge. Giles v. Valentic, 355 Pa. 108, 49 A.2d 384 (1946). Model Code of Evidence rule 106(2) (1942) and Uniform Rule of Evidence 22(b) adopt the compromise position permitting the judge to exclude extrinsic evidence at his discretion.
decided early in the nineteenth century, and it seems quite evident that prior practice recognized no such requirement. Granted, the requirement does tend to reduce confusion to a minimum by eliminating unnecessary impeachments, but absolute insistence upon adherence in every case may work undeniable hardship. In many cases it will be impossible to lay a foundation while the witness is on the stand, because prior contradictions may not be apparent at that juncture. If the witness should die or be otherwise unavailable, there would no longer be opportunity for presenting the facts as they were previously represented.  

Another lingering by-product of *Queen's Case* complicates the task of laying a proper foundation. The English precedent required counsel, before examining a witness about the terms of a document, to produce the document in question. It inhibited counsel from effectively testing the witness because it gave the witness the decided advantage of informing himself as to the contents of the statement prior to being questioned and therefore limited the effectiveness of the statement as a truth-testing device. With the general revision of common law procedure in 1854, the rule was abolished by legislation in England, but it has received wavering allegiance in several American jurisdictions. Despite withering criticism, the rule has survived in some quarters, notably with reference to depositions and reported testimony.

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63. Majority decisions, following the strict foundation rule, often recognize that hardship may exist in unusual situations, yet disallow exceptions on the theory that relaxation of the rule in such cases would offer temptation to perjury and fabrication of testimony. Mattox v. United States, 156 U.S. 237 (1895). The strict rule has been held inapplicable where inconsistent statements were made subsequent to preliminary hearing; and where witness was unavailable at trial. People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946); Note, 20 So. CAL. L. REV. 102 (1946).
64. 4 WIGMORE, EVIDENCE § 1259 (3d ed. 1940).
65. 17 & 18 Vict. c. 125, § 24 (1854) (providing that witness may be cross-examined as to previous statements made in writing without writing being shown in advance).
67. Reilly Tar & Chemical Corp. v. Lewis, 326 Ill. App. 84, 61 N.E.2d 290 (1942) (deposition must be shown to witness); Cooper v. Hoeglund, 221 Minn. 446, 22 N.W.2d 450 (1946) (transcript need not be shown). Other jurisdictions have consistently ruled that it is not necessary to confront the witness with a written statement prior to questioning. United States v. Dilliard, 101 F.2d 829 (2d Cir. 1938) (a clear opinion by L. Hand, J.); People v. Young, 70 Cal. App. 2d 28, 160 P.2d 132 (1945); Martin v. Hoffman, 77 Kan. 183, 93 Pac. 625 (1908); Wassmer v. Public Service Electric & Gas Co., 122 N.J.L. 367, 5 A.2d 752, 122 N.J.L. 375, 5 A.2d 794 (1939). **Uniform Rule of Evidence** 22 (a) provides that it shall not be necessary to show or to read to the witness any part of the writing though the judge may require that counsel indicate the time and place of the writing and the name of the person addressed.
When the proper foundation has been laid and the witness clearly denies having made the statement in question, impeachment is in order. Yet, if the witness merely states that he does not remember or does not recall, question may be raised as to whether self-contradiction actually exists. Early judicial opinions were inclined to quibble, thereby restricting impeachment by extrinsic evidence unless witness response was unequivocal, though modern authorities almost invariably permit impeachment where the witness does not clearly admit having made the statements.

Counsel will frequently be permitted to cross-examine witnesses with regard to matters wholly immaterial to the issues in the case when cross-examination is aimed at testing credibility. Thus a witness may be interrogated concerning his past indiscretions, his convictions of criminal offenses and his inadequacies, regardless of the fact that information elicited has no probative value except for its bearing upon credibility factors. On the other hand, extrinsic evidence relative to prior inconsistent statements is almost invariably rejected unless it concerns facts relevant to material issues in the case. Contradiction, therefore, at least as it refers to extrinsic proof, is forbidden on collateral matters.

The term collateral is as ambiguous as it is overworked and furnishes no real test. In essence it means that the matter inquired about is not logically relevant, independently of pure impeachment, or else so remote that it should not be inquired into through the medium of contradictory extrinsic testimony. Many tests have been proposed in many precedents, but none has endured so satisfactorily as the test laid down more than a century ago in Attorney General v. Hitchcock. As Dean Wigmore

68. Wiggins v. Holman, 5 Ind. 502 (1854); Robinson v. Pitzer, 3 W. Va. 335 (1869).
70. State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936).
72. Many precedents have approved a narrow test which would permit impeaching proof provided the cross-examiner was entitled to prove facts adduced as part of his case, tending to establish his plea. Staser v. Hogan, 120 Ind. 220, 21 N.E. 911, 22 N.E. 900 (1889). In reality it is not merely matters part of the case that may be subject to cross-examination, but any matter which would have been otherwise admissible in evidence. Literal application of the narrow test would exclude evidence of bias, interest and the like which are neither collateral nor matters "part of the case."
73. 1 Exch. 91 (1847). This decision has been well received by authorities in the field, but subsequent judicial decisions by no means reflect unanimous acceptance. The
has so ably phrased it, the test reads: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" 74

Applying the foregoing test, two classes of facts would be admissible independently of self contradiction: (1) facts relevant to matters at issue; (2) facts admissible to discredit the witness by showing motive, bias, interest, or any other similar matter likely to affect his testimony. Bias, state of mind and feelings of a witness are not collateral factors, and bias or like emotions may be shown by extrajudicial statements of the witness from which an inference as to his feelings may be drawn. In pointing up bias, counsel would thus be allowed to contradict the primary witness by attempting to extract admissions on cross-examination or by offering extrinsic evidence independently of cross-examination. 75

Though the rule is clear that a witness' testimony regarding collateral matters may not be refuted by the calling of other witnesses and the production of extrinsic evidence, there should be no prohibition against examining the witness further himself on the chance that he may change his answer. This proposition was declared most forcefully in a recent New York decision, People v. Sorge, 76 where the defendant in a criminal case denied committing a specific crime. The district attorney was permitted to continue his cross-examination, provided of course that he acted in good faith, in the hope that he might induce the witness to abandon his negative answers. The Court of Appeals most unambiguously pointed out that a negative response will not fob off further interrogation of the primary witness, further asserting that a contrary ruling would follow.


74. 3 Wigmore, Evidence § 1020.
75. Mims v. United States, 254 F.2d 654 (9th Cir. 1958); Ewing v. United States, 135 F.2d 633 (D.C. Cir. 1942); Bryant v. State, 233 Ind. 274, 118 N.E.2d 894 (1954); Blum v. State, 196 Ind. 675, 148 N.E. 193 (1925); State v. Elijah, 206 Minn. 619, 289 N.W. 575 (1940); Kincheloe v. State, 146 Tex. Crim. 414, 175 S.W.2d 593 (1943). When primary witness denies revengeful feelings, it has been held that extrinsic evidence may be given that he made such assertions of revengeful nature. Johnson v. Griepenstroh, 130 Neb. 126, 33 N.W.2d 549 (1948). If bias, interest, or corruption is evidenced by utterances, the weight of authority requires that the witness be asked about the utterance on cross-examination; otherwise the extrinsic evidence will face rejection for lack of proper foundation. Davis v. Ivey, 93 Fla. 387, 112 So. 264 (1927); State v. Harmon, 21 Wash. 2d 581, 152 P.2d 314 (1944). Contra, Kidd v. People, 97 Colo. 480, 51 P.2d 1020 (1935). See generally Annots., 74 A.L.R. 1157 (1931); 16 A.L.R. 984 (1922).
76. 301 N.Y. 198, 93 N.E.2d 637 (1950). See also Bates v. Chilton County, 244 Ala. 297, 13 So. 2d 186 (1943); Dane v. MacGregor, 94 N.H. 294, 52 A.2d 290 (1947); People v. McCormick, 303 N.Y. 403, 103 N.E.2d 529 (1952); 3 Wigmore, Evidence § 1023 (3d ed. 1940).
grant the witness power to render most cross-examination a futile exercise. Contrary decisions have obtained in a few jurisdictions, based in main on the very false premise that a witness may never be contradicted with regard to matters collateral. In principle these decisions are at war with common sense and should be rejected.

The fact that a prior statement might happen to be in the form of an opinion should be incidental to a sound policy of admissibility, yet hyper-critical judicial minds have succeeded in weaving a blanket rule of exclusion that would prohibit any reference to statements of opinion.

What is supposed to be a difference in kind between fact and opinion is at most a difference in degree only, and a true test of admissibility should rest upon one factor—consistency. If a statement is inconsistent with present testimony, be it opinion or fact, the jury should be allowed to consider it in weighing the veracity of the witness and the accuracy of his testimony. A prior opinion may have little bearing upon the accuracy of facts testified to, or it may disclose glaring inconsistencies; admission or exclusion should rest upon this criterion and none other.

Character Factors and Impeachment

Witness character may be attacked: (1) by evidence of past crimes and misconduct, offered during cross-examination; (2) by records of past convictions; (3) by bad reputation evidence offered through character witnesses; (4) through cross-examination of a witness who has testified as to good character. In any one of these situations, the character or reputation of the adverse witness is brought to focus—in some jurisdictions reasonable protection against character assassination is afforded—in others, the mercy of God alone prevails.

77. Arine v. United States, 10 F.2d 778 (9th Cir. 1926); Starke v. State, 49 Fla. 41, 37 So. 850 (1905).
78. Welch v. State, 104 Ind. 349 (1885) (follows strict rule of exclusion); Ford v. Dahl, 360 Mo. 437, 228 S.W.2d 800 (1950) (Missouri has always rejected statements in form of opinion, no excuses offered); State v. Thompson, 71 S.D. 319, 24 N.W.2d 10 (1946) (predicated upon mythical danger of jury misusing opinion assertions); Webb v. City of Seattle, 22 Wash. 2d 596, 157 P.2d 312 (1945) (quoting from 40 Cyc. 2712 to effect that expressions of opinions should be excluded, Wigmore not figuring among citations of authority).
80. A majority of jurisdictions have in varying degrees accepted this position. Atlantic Greyhound Corporation v. Eddins, 177 F.2d 954 (4th Cir. 1949); Crowley v. Dix, 136 Conn. 97, 68 A.2d 366 (1949); Leinbach v. Pickwick Greyhound Lines, 135 Kan. 40, 10 P.2d 33 (1932); Commonwealth v. Jackson, 281 S.W.2d 891 (Ky. 1955); 296 S.W.2d 472 (Ky. 1956); Wolfe v. Madison Ave. Coach Co., 171 Misc. 707, 13 N.Y.S.2d 741 (Sup. Ct. 1939).
The extent to which instances of an evil past may be evidenced is not clear. To begin with, distinction must be made between evidencing past dishonorable conduct and past convictions, and reported decisions have not always drawn distinctions with clarity. Effort should also be made to dissipate the confusion surrounding the admission of extrinsic bad reputation evidence, offered to indicate that the witness is not worthy of belief. In this latter instance, specific conduct evidence is not appropriate, and courts have at times unwittingly superimposed the restrictive requirements peculiar to this type of impeachment upon techniques for cross-examination. A certain amount of disagreement among jurisdictions may well be anticipated, but consistent lack of agreement within an isolated jurisdiction can be disarming.

In England, cross-examining counsel may probe extensively into the past of the adverse witness by interrogating with respect to specific instances of crime and other dishonorable conduct. Since it is well established, in England and America, that cross-examination to impeach credibility is not restricted to the scope of the subject matter testified to on direct examination, an abundance of evil may be portrayed to the jury under the guise of questioning credibility. The extent to which examination may be carried appears to rest within the discretion of counsel himself, and whatever is relevant to character may be brought to light.

In the majority of American jurisdictions, the extent of examination in this regard will be determined by the trial judge. One might expect judicial temperament to restrict inquiry to the incidence of other crimes and misconduct which reflect lack of veracity, but a survey of case authorities reveals that judicial wisdom has not always drawn so fine a line. Certain courts have attempted to restrict the content of cross-

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81. 3 Wigmore, Evidence § 983 (3d ed. 1940). On the other hand it has long been settled in all Anglo-American jurisdictions that extrinsic evidence of bad conduct is inadmissible.
84. A Kansas opinion, State v. Roselli, 109 Kan. 33, 198 Pac. 195 (1921), presents an extreme example of liberality. The accused, charged with first degree murder, was asked on cross-examination if he had not sold cocaine, whether he had not acted as a fence, been confined to a reformatory and broken parole violations. Searching examination was made respecting his association with criminals of the beating, killing type. Questions were posed concerning the dubious morality of his girl friend Mabel, all in the interest of testing credibility.
examination to matters pertaining to veracity traits. A sizeable block of federal decisions has denied reference to specific acts of misconduct on cross-examination, which have not resulted in conviction for a felony or crime of moral turpitude. Questions which degrade or disgrace have been forbidden in other jurisdictions. Inquiry into past conduct has also been curtailed by rulings requiring that acts referred to be recent in the sense that they bear definite relation to present character. A select minority of jurisdictions has prohibited any inquiry with regard to acts of misconduct, thus forcing the trial judge to surrender any discretion he might have had pertaining to the limits of cross-examination.

When the accused in a criminal case takes the witness stand he abdicates his protected station as a party and assumes the more vulnerable role of witness. Like any other witness, he may now be subject to rigid cross-examination aimed at impugning his credibility, and the ugliness of an unfortunate past will be bared. This concept of liberal impeachment most certainly clashes with a much revered principle of Anglo-American law which proclaims that evidence of a collateral offense shall not be received as substantive evidence of the crime for which a defendant is being tried. Is there anyone so naive who would maintain


86. Abdul v. United States, 254 F.2d 292 (9th Cir. 1958); Echert v. United States, 188 F.2d 336 (8th Cir. 1951); United States v. Klass, 166 F.2d 373 (3d Cir. 1948). But see, Barnard v. Wabash R.R., 208 F.2d 489 (8th Cir. 1953).

87. This protective policy, once popular, has suffered for lack of adherents in a latter day, though isolated statutes have perpetuated the moral force of the rule. IOWA CODE § 622.14 (1954): “When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as otherwise provided.” See 3 WIGMORE, EVIDENCE §§ 984, 986(3) (3d ed. 1940).

88. State v. Dillman, 183 Iowa 1147, 168 N.W. 204 (1918).

89. CAL. CODE CIV. PROC. § 2051 (Deering 1953), provides that a witness may not be impeached by evidence of particular wrongful acts, though it may be shown that he has been convicted of a felony. In Pennsylvania, one charged with crime is not required to answer any question tending to show that he has committed crime, with two exceptions noted in the statute. PA. STAT. ANN. tit. 19, § 711 (1930). See also Myers v. State, 149 Tex. Crim. 301, 194 S.W.2d 91 (1946). Dean Wigmore would limit acts inquired into to those relating to veracity, regardless of whether conviction had resulted. 3 WIGMORE, EVIDENCE § 982 (3d ed. 1940). UNIFORM RULE OF EVIDENCE 22(d) provides that “evidence of specific instances of his [witness] conduct relevant only as tending to prove a trait of his character shall be inadmissible.”


91. A general rule of exclusion provides that on prosecution for a particular crime, evidence which tends to show that the accused has committed another crime, wholly independent of and unconnected with that for which he is on trial, is irrelevant and inadmissible. See generally Slough, Relevancy Unraveled, 6 KAN. L. REV. 38, 45 (1957);
that juries are endowed with superior powers of sifting impeachment evidence from substantive evidence? One may consciously accept impeachment evidence for what it is worth, but the barbs of prejudice possess an uncanny faculty for impressing the unconscious self. Warning judicial instructions may carefully distinguish the uses to which particular items of proof may be put, yet it is highly improbable that cold, judicial analysis will temper or control the juror’s very human propensity to take all things into account. If credibility be the object of attack, counsel might cross-examine the accused with respect to misconduct indicating a lack of veracity, however propriety dictates that examination in the name of impeachment cease at this juncture. Incidents of assaultive behavior, appetites for strong drink, and penchants for immorality invite scorn and censure among the moral kind, but they cast little light upon a witness’ inclinations to distort the truth.

All American jurisdictions, either by statute or decision permit evidence of convictions to be introduced to affect credibility, though there is no agreement as to the type of conviction that will be received. One formula adheres to common law terminology and requires the conviction to have been for an “infamous crime.”92 Another formula limits scope of examination to conviction for “felonies” or “crimen falsi.”93 A third formula admits evidence of conviction for “felony” or “crime involving moral turpitude.”94 Finally, there are jurisdictions that allow evidence of conviction to enter without limitation, meaning that conviction of any crime will satisfy.95 There is an increasing tendency to bar reference to traffic court convictions, and a declaration of delinquency in juvenile court will not ordinarily be classified with conviction for purposes of impeachment.96

Notes, 35 Calif. L. Rev. 131 (1947), 25 Ind. L.J. 64 (1949), 37 Minn. L. Rev. 608 (1953).
93. Commonwealth v. Kostan, 349 Pa. 560, 37 A.2d 606 (1944). “Crimen falsi” is a general designation of a class of offenses including those which involve deceit or falsification or affect the public administration of justice. Forgery, counterfeiting, and perjury are common examples.
94. A recent decision in Maine defines moral turpitude as being akin to baseness, vileness, or depravity. Thus driving while intoxicated was considered utterly base, whereas driving under the influence was not relegated to such a damning category. State v. Jenness, 143 Me. 380, 62 A.2d 867 (1948).
Assuming that a record of conviction is admissible to impugn credibility, will something less than conviction, for example arrest or indictment, be admissible? The answer should be unqualifiedly negative, and a decisive majority of jurisdictions are in accord with the premise that arrest and indictment are not sufficiently relevant to the task of character dissection. On principle it would seem that evidence of conviction should be limited to those crimes which indicate a specific readiness to falsify. Conviction on a charge of murder or rape will not necessarily imply a disposition to lie or fabricate. Dean Ladd has suggested as a partial solution the elimination of proof of crimes having no relationship to dishonesty or false statement. It is interesting to observe that the Model Code and Uniform Rules have since accepted his suggestions without hint of dissent.

One of the most firmly established rules of Anglo-American law is that which prohibits the prosecution from offering evidence of the defendant's bad character until the defendant has offered proof of his own good character. In proving the character of the defendant, particular acts of misconduct are inadmissible for policy reasons. This absolute blackout pertaining to evidence of specific instances of misconduct does not carry over to problems involved in the cross-examination of the defendant as a witness, or to problems inherent in cross-examination of a character witness. Opinion testimony of a witness as to the character of the accused is likewise excluded in a majority of jurisdictions.

The reputation of the defendant as a party is not vulnerable to attack unless he chooses to enter evidence of his good reputation, but when

99. MODEL CODE OF EVIDENCE rule 106(1)(b) (1942) bars extrinsic evidence of convictions "not involving dishonesty or false statements." For all practical purposes, the wording of UNIFORM RULE OF EVIDENCE 21 is identical. Rule 21 plainly provides that evidence of conviction shall be inadmissible against a defendant-witness unless he has first introduced evidence solely for the purpose of supporting his credibility. In a few jurisdictions, the accused may not be cross-examined as to the fact of former convictions, and prior convictions can only be shown by introducing record of conviction. People v. Halkens, 386 Ill. 167, 53 N.E.2d 923 (1944); Commonwealth v. Danton, 243 Mass. 552, 137 N.E. 652 (1923).
100. A minority of jurisdictions still cling to the traditional practice of permitting character witnesses to state their opinions, based largely on the premise that witnesses possess sufficient knowledge derived from observation of the defendant's conduct. State v. Ferguson, 222 Iowa 1148, 270 N.W. 874 (1937); Sabo v. State, 119 Ohio St. 231, 165 N.E. 28 (1928). Dean Wigmore infers that the modern reputation requirement is a by-product of heresy. 7 WIGMORE, EVIDENCE § 1981 (3d ed. 1940). MODEL CODE OF EVIDENCE rule 306(2) (1942) and UNIFORM RULE OF EVIDENCE 47 permit use of opinion evidence as well as reputation evidence in proving the character of the accused.
he assumes the role of witness he falls heir to the tribulations of other witnesses.\textsuperscript{101} As was true when evidencing party-character, the great majority of courts require that witness-character be proved by reputation, good or bad.\textsuperscript{102} Thus it is not permissible to establish reputation for truth and veracity by extrinsic evidence of particular acts, the object of this rule being to avoid unfair surprise, undue consumption of time, confusion of issues, and prejudice.\textsuperscript{103} Personal opinion of the character witness will be excluded, because permitting evidence of opinion from observation would likely provoke distracting side issues.\textsuperscript{104} That these dangers do exist is undeniable, but they are also present during cross-examination of a witness who testifies as to reputation; and in the long run, control by the trial judge should suffice to ameliorate an uncomely situation. Leading text writers in this country are opposed to the majority trend and would favor the use of opinion testimony except in those situations where sound judicial discretion would dictate otherwise.\textsuperscript{105} Even jurisdictions which sanction the use of opinion evidence in proving party-character\textsuperscript{106} are known to disapprove of it when evidencing witness-character.\textsuperscript{107} Hence character, as it relates to credibility, cannot be proved by opinion or knowledge of the character witness. The Uniform Rules of Evidence, on the other hand, in no sense create any obstacles to opinion testimony, and as long as veracity traits are relevant, qualified opinion evidence is receivable for impeachment purposes.\textsuperscript{108}

\textsuperscript{101} Witness-character may be attacked from the beginning. In fact, a witness may not enjoy the luxury of good reputation evidence offered in his behalf until his reputation has been attacked by the adverse party. When the defendant testifies as a witness his reputation for truth and veracity may be assailed despite the fact that he has not offered evidence of his good reputation. There are, however, scattered areas of dissent. In State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945), the Supreme Court of Idaho ruled that testimony concerning defendant's reputation for truth, honesty, and integrity in the community was improper without defendant first putting his reputation therefor in issue. The majority opinion is painfully technical but presents an elaborate review of statutes and cases in point.

\textsuperscript{102} 3 WIGMORE, EVIDENCE §§ 920-30 (3d ed. 1940) ; 7 id. § 1985.

\textsuperscript{103} Foreman v. State, 203 Ind. 571, 180 N.E. 291 (1932) ; Griffith v. State, 140 Ind. 163, 39 N.E. 440 (1895).

\textsuperscript{104} Sisson v. State, 168 Ark. 1005, 272 S.W. 674 (1925) ; Gifford v. People, 148 Ill. 173, 35 N.E. 754 (1893) ; State v. Johnson, 40 Kan. 266 (1888). In modern English practice, the rule of exclusion announced in Regina v. Rowton, 10 Cox Cr. Rep. 25 (1865), has apparently been disregarded when evidencing witness-character. Thus in England today, the orthodox practice sanctioning use of personal opinion testimony still prevails, American authorities to the contrary.


\textsuperscript{106} See citations note 100 supra.

\textsuperscript{107} State v. Ferguson, 222 Iowa 1148, 270 N.W. 874 (1937) ; State v. Caveness, 78 N.C. 486 (1878) ; Bucklin v. State, 20 Ohio 18 (1851).

\textsuperscript{108} UNIFORM RULE OF EVIDENCE 20, 21.
Perhaps out of recognition of the weakness of bland reputation evidence, or perhaps out of an innate desire to preserve some aura of practicality, a majority of decisions have relented and will permit qualified use of opinion testimony. After a character witness has declared as a fact that the witness' reputation is good or bad, the following question may be put: "From your knowledge of that reputation, would you believe him upon oath?" Apparently courts have compromised upon this hybrid form of interrogation because it merely emphasizes the general testimony of the impeaching witness and does not stress personal evaluation. In theory, then, the inquiry as to personal belief is based upon knowledge acquired from reputation and not upon personal dealings or personal acquaintance of the impeaching witness with the witness assailed. This curious interlarding of wishful thinking and devotion to stereotype only serves to emphasize the weakness of a type of legal mind that becomes infatuated with the sound of a rule without really knowing why. Ideally, the law of evidence should reflect the warp and woof of human values, but technical rules of this order simply perpetuate a pseudo-professional brand of casuistry.

Now that it is agreed that a character witness may impeach the primary witness by reference to general reputation, an additional question arises: What type of reputation? It appears only logical that a character witness should restrict his testimony to reputation for truth and veracity, nevertheless decisions are in conflict as to whether inquiry should be limited to reputation for truthfulness and like traits or whether general moral character may be shown. A substantial majority of jurisdictions have limited inquiry to reputation for truth and veracity. A dwindling minority will admit evidence of general moral character, either by statute or decision. Further-

110. This conflict of authority is ably discussed in Ladd, Credibility Tests—Current Trends, 89 U. PA. L. Rev. 166, 172 (1940).
111. Pandula v. Fonseca, 145 Fla. 395, 199 So. 358 (1941); Taylor v. Clendenning, 4 Kan. 524 (1868); Chatham v. State, 65 Okla. Crim. 240, 84 P.2d 804 (1938); State v. Ternan, 32 Wash. 2d 584, 203 P.2d 342 (1949). This mild approach appears out of phase with rulings permitting the ultimate of defendant torture on cross-examination. 3 WIGMORE, EVIDENCE § 923 (3d ed. 1940); Slough, Other Vices, Other Crimes, 41 IOWA L. Rev. 325 (1956).
112. IND. ANN. STAT. §§ 2-1724 (Burns 1946), 9-1608 (Burns 1956); IOWA CODE § 622.18 (1954). Grammer v. State, 239 Ala. 633, 196 So. 268 (1940); State v. Guy, 106 La. 8, 30 So. 268 (1901). Missouri for years followed the dictates of the minority rule permitting evidence of bad reputation for morality to be introduced for purpose of impeaching credibility. Little more than two decades ago, the supreme court of that state overruled all previous decisions on the subject and joined hands with the majority, thus restricting impeachment to truth and veracity. State v. Williams, 337 Mo. 884, 87
more, almost fanatical emphasis has been placed upon the form of the
question to be put, and even the slightest deviation from norm may supply
grounds for objection, if not reversal. For example, California, Idaho,
and Utah are linked together in that their statutes limit inquiry to general
reputation of the witness for truth, honesty, or integrity. Many juris-
dictions restrict questioning to general reputation for truth and veracity,
whereas general reputation for truth may be the proper object of inquiry
in other courts. Judges have even quibbled over the omission of a
single word: thus the phrase "reputation for truth, honesty, or integrity"
may be stricken as highly improper if not preceded by and qualified by
the word "general." This uncompromising reverence of technicality
perforce assumes that jurors will be at once shocked and prejudiced by
departure from precedent, yet a modicum of common sense compels re-
jection of such an assumption. Recourse to picayune distinctions in the
name of justice only serves to demonstrate the foolish sophistication of
the ultra-legal mind.

When the character witness has disclosed his general information,
void of opinion and specific familiarity, he will, of course be subject to
searching cross-examination. Once again the rules of the game permit
excavation into the muck of past misdeeds and vices for purposes of cast-
ing light upon the witness' sources of information. Conventional prac-
tice permits the good reputation witness to be interrogated with respect
to rumors or reports of specific acts imputed to the defendant or wit-
ness. This evidence is admitted, not to establish the truth of such re-
ports or rumors, but to test the credibility of the character witness him-
self. The jury should be instructed with regard to proper uses of testi-

S.W.2d 175 (1935). See generally Annots., 100 A.L.R. 1516 (1936); 90 A.L.R. 870
(1934).
114. State v. Marks, 16 Utah 204, 51 Pac. 1089 (1898).
115. Various jurisdictional rules are discussed in 3 Wigmore, Evidence § 923 (3d ed.
1940).
116. In State v. Marks, 16 Utah 204, 51 Pac. 1089 (1898), the prosecution called
two witnesses, and they were asked if they knew the defendant's reputation in the com-

munity for truth, honesty, and integrity. The form of inquiry was objected to on ground
that it was incompetent, irrelevant, and immaterial. Approving the basis for this ob-
jection, the appellate court ruled that only the general reputation of the defendant-

witness for truth, honesty, and integrity could be called forth, insisting that the word
general was of crucial import. An early Indiana decision similarly held that the word
general preceding character was an essential requisite. Meyncke v. State, 68 Ind. 401
(1879). Moral is that it is important to call witnesses who are acquainted with reputa-
tion generally.
Ind. 320, 119 N.E.2d 558 (1954); Jordan v. State, 232 Ind. 265, 110 N.E.2d 751 (1953);
dence § 158 (1954); 3 Wigmore, Evidence § 988 (3d ed. 1940); Annots., 47 A.L.R.2d
1258 (1956); 71 A.L.R. 1504 (1931).
mony elicited; however there is strong reason to believe that harm will result in any event despite the formal persuasion of judicial counseling.

To remain within technical limits set by propriety and copious precedent, the cross-examiner must fashion his inquiry in a very special manner. He must not frame his question in such a manner as to insinuate guilt, particularly where evidence in the record of prior misdeeds is nonexistent.\textsuperscript{118} Since the purpose of cross-examination in detail is to ascertain the general talk of people about the defendant or primary witness, rather than the witness' own knowledge of these details, the form of inquiry, "Have you heard?" meets with general approval.\textsuperscript{119} If the examiner asks, "Do you know?" he courts objection in most jurisdictions.\textsuperscript{120} For fear that the witness may testify as to fact, he may not be cross-examined as to his knowledge of particular acts of misconduct. On the opposite side of the ledger, during cross-examination of a witness who has testified as to bad reputation, the examiner cannot call attention to specific \textit{good} deeds performed by the primary witness. Reasons for this restrictive principle are obvious because even the worst among us have performed certain works of mercy.

Courts are in general agreement that propounding of questions in bad faith may be ground for reversal,\textsuperscript{121} yet establishing bad faith is no easy matter. The task of curbing the unethical cross-examiner lies within the province of the trial judge, and the judge will not always be cognizant of the source of the examiner's information. Dean McCormick has suggested that the trial judge be required to request counsel to give his professional statement to the judge (in the absence of the jury) that he has reasonable ground to believe, and does believe, that the acts of misconduct, imputed by rumor, were actually committed by the accused or primary witness.\textsuperscript{122}

\textsuperscript{118} United States v. Phillips, 217 F.2d 435 (7th Cir. 1954); State v. Carroll, 188 S.W.2d 22 (Mo. 1945).
\textsuperscript{119} Kasper v. United States, 225 F.2d 275 (9th Cir. 1955); State v. Steensen, 35 N.J. Super. 103, 113 A.2d 203 (1955). This specific problem was first referred to the United States Supreme Court in Michelson v. United States, 335 U.S. 469 (1948). Character witnesses were asked if they had heard that Michelson had been convicted and arrested for different violations. Over objections, the trial court permitted this interrogation, the Court of Appeals (United States v. Michelson, 165 F.2d 732 (2d Cir. 1948)) and the Supreme Court affirming.
\textsuperscript{120} Regardless of the prestige of the general rule, there are dissenting voices. Baehner v. State, 25 Ind. App. 597, 58 N.E. 741 (1900) (character witnesses asked whether they "knew" of a slot machine in defendant's saloon); State v. Cyr, 40 Wash. 2d 840, 246 P.2d 480 (1952) (cross-examination as to "knowledge" proper as long as it is directed at credibility).
\textsuperscript{122} McCormick, \textit{Evidence} § 158 (1954).
Decisions in Illinois and North Carolina have for many years been at odds with the majority trend. In Illinois, on cross-examination of a character witness, the witness can be questioned only as to acts of misconduct or charges similar to those for which the accused is being tried.\(^2\) North Carolina decisions have ruled that a character witness may be cross-examined concerning the general reputation of the defendant as to particular vices and virtues, but not as to rumors of specific acts of misconduct.\(^4\)

Mr. Justice Rutledge, dissenting in *Michelson v. United States*,\(^3\) championed a restrictive rule—the "fair play" rule—which would place the same limits upon cross-examination by the prosecution as are placed upon the defense in direct examination of a character witness. Under this hypothesis, the entire line of inquiry concerning specific crimes in the defendant's past would be foreclosed, and the prosecution in effect would be limited to introducing character witnesses who would testify as to the "bad reputation" of the defendant and nothing more. On the surface, this viewpoint appears most humanitarian; however, it should be pointed out that the prosecution would be completely disarmed if the Rutledge formula were carried out to the letter. It must be remembered that the prosecution is not on an equal footing with the defense as far as the gathering of character evidence is concerned. Limiting the prosecution to calling adverse witnesses to rebut defense character witnesses would mean shutting out the prosecution altogether.

**Expert Analysis of Credibility**

Mr. Justice Jackson delivered a sterling apologia for the status quo with respect to the law of evidence and proof of reputation when he wrote:

"[M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy..."
system when moderated by discretionary controls in the hands of a wise and strong trial court."

However, justification of the status quo should by no means compel censure of judicial resort to psychiatric examination and other scientific procedures for testing the veracity of key material witnesses. Certainly the modern tendency has been one of permitting mentally disordered witnesses to testify at trial, leaving defects in question to have whatever weight they deserve in discrediting powers of observation, recollection, and communication. As competency requirements have relaxed, the need for psychiatric evaluation of key witness testimony has become more compelling. Anglo-American lawyers have been too complacent about accepting the traditional mode of character impeachment as a panacea for evaluating character and credibility factors. Community judgment and scathing cross-examination may indeed uncover the usual flaws in a witness’ observation, recollection, and veracity, but these veracity-testing devices shed little light upon defective organic capacity or personality structure. The abnormal witness may appear remarkably lucid and credible to the average juror, and vigorous cross-examination, far from uncovering tendencies to distort or confabulate, may only make the witness and his story more plausible.

Of recent date, many have come to agree that scientific evaluation can be of valuable assistance in manifesting the less recognizable mental disorders. Psychiatric appraisal of credibility has been recognized as a very definite aid in exposing hysteria and pathological lying among complaining witnesses of sexual assault. Less than ten years ago, Judge Goddard, at the second trial of Alger Hiss, held admissible psychiatric testimony designed to impeach the credibility of government witness

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126. Id. at 486.
127. 2 WIGMORE, EVIDENCE § 501 (3d ed. 1940); 3 id. § 931.
128. Cross-examination will rarely expose the psychopathic or pathological liar on the witness stand. Mental illness is not always manifested in outward changes in demeanor or social attitudes, thus deep-seated personality disturbances can often be discerned only by a trained clinician. HENDERSON & GILLESPIE, A TEXTBOOK OF PSYCHIATRY 101 (6th ed. 1947); OVERHOLSER & RICHMOND, HANDBOOK OF PSYCHIATRY 9-10 (1947); Althshuler, The Psychopathology of Lying, 6 J. OF NEUROLOGY AND PSYCHOPATHOLOGY 20 (1925); Karpman, Lying, 40 J. Crim. L., C. & P. S. 135 (1949); Note, Current Med. Sept. 1954, p. 21.
129. 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940); Note, 26 IND. L.J. 98 (1950). Judges have not always welcomed psychiatric diagnoses in discovering defects and disorders likely to impair credibility. Whereas evidence of extreme mental disorder or illness is generally admissible, courts have frequently rejected expert diagnosis of disorders of lesser moment. This result likely stems from an erroneous assumption that diagnosis of lesser disorders is based upon inference and speculation. 3 WIGMORE, EVIDENCE § 932 (3d ed. 1940).
Whittaker Chambers.\(^{130}\) On the basis of a laborious hypothetical question, an expert witness arrived at a diagnosis of psychopathic personality based upon twelve symptoms ranging from repetitive lying to paranoid thinking and pathological accusations. This ruling evidently marked a new departure in terms of federal precedent, but as noted by the court, several decisions in state courts have approved reception of expert opinion.\(^{131}\)

Though the Hiss case represents a modern innovation in veracity testing, it also illustrates some of the obvious dangers inherent in reliance upon scientific appraisal. Dr. Binger, the expert witness, testified that his opinion was based on personal observation of Mr. Chambers at the first trial for five days and on one day at the second trial. He had read plays, poems and articles written by Chambers, but his diagnosis rested largely on courtroom observation, and his conclusions were extracted through the medium of a disjointed, onesided hypothetical question. The climate of the courtroom does not lend itself to proper scientific evaluation of the personality structure as overt behavior will rarely offer sufficient basis for accurate diagnosis.\(^{132}\) If reliable opinion is to be expressed, it must derive from thorough clinical study and examination.\(^{133}\)


\(^{131}\) People v. Champion, 193 Cal. 441, 225 Pac. 278 (1924); Jeffers v. State, 145 Ga. 74, 88 S.E. 571 (1916); State v. Alberts, 199 Iowa 815, 202 N.W. 519 (1925); Pool v. Day, 143 Kan. 226, 53 P.2d 912 (1936); People v. Bastian, 330 Mich. 457, 47 N.W.2d 692 (1951). In Taborsky v. State, 142 Conn. 619, 116 A.2d 433 (1955), a new trial was granted to a defendant convicted of murder solely on the basis of his brother's testimony. The brother was subsequently discovered to be insane, the court noting that this information might be given great weight by the jury in assessing credibility.

\(^{132}\) In State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921), the West Virginia Supreme Court of Appeals rejected a courtroom diagnosis by a psychiatrist that witness belonged to a class of morons prone to tell lies. Judge Goddard attempted to distinguish the Hiss case on grounds that the West Virginia court had not considered psychiatric testimony in 1921 to be sufficiently expert. In reality, it appears that exclusion in the earlier decision rested largely upon invalidity of technique rather than upon weakness of psychiatric testimony in general. GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW ch. 15 (1952). Jones, Admission of Psychiatric Testimony in Alger Hiss Trial, 11 ALABAMA LAWYER 212 (1950); Roche, Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses, 22 PA. BAR ASS'N Q. 140 (1951).

\(^{133}\) Attempt was made to apply the Hiss rule in United States v. Rosenberg, 108 F. Supp. 798 (S.D.N.Y.), aff'd, 200 F.2d 666 (2d Cir. 1952), cert. denied, 345 U.S. 965 (1953). A government witness testified as to a copy of a sketch of a lens mold drawn from memory. Three psychiatrists expressed their opinions that it was improbable that the witness could make the sketch from memory. A science writer stated that drawing of such sketch from memory was an impossibility. Opinion evidence rejected for obvious reasons.
IMPEACHMENT OF WITNESSES

Atelic appraisal of witness testimony will be of undoubted value in certain demanding test situations, but omnibus methods of truth testing simply encourage mediocrity at its worst.\(^{134}\)

In *Lindsey v. United States*,\(^{135}\) a prosecution for sodomy and statutory rape, the defense introduced in evidence letters and an affidavit of the prosecuting witness which affectively repudiated her original charges against the accused. In an effort to rehabilitate their witness' testimony, the prosecution called a psychiatrist who had given the girl a series of psychological tests and conducted an interview during which the subject was under the influence of sodium pentothal.\(^{136}\) On appeal, judgment of conviction was reversed, the Court of Appeals ruling that admission of statements by a material witness while under the influence of sodium pentothal constituted prejudicial error, even though not admitted as substantive evidence but only to rehabilitate the impeached witness' testimony. The court did agree that sodium pentothal and like barbiturates possessed properties that would release inhibitions and enhance psychiatric examination, but would not recognize that tests of this order were sufficiently trustworthy to be accorded the status of competent evidence.\(^{137}\)

Of recent date, the Supreme Court of California in the case of *People v. Jones*,\(^{138}\) departed from most precedents and allowed the defense


\(^{136}\) The use of pharmacological agents as aids in the study of personality structure is not new to psychiatry, and police investigators have frequently employed narcoanalysis (or narcosynthesis) in criminal interrogation. Drugs such as scopolamine and the barbiturates (sodium pentothal and sodium amytal) alter the metabolism of the central nervous system and effect psychological adjustment, but they are not "truth sera." Though common parlance refers to these drugs as "truth sera," the drug used in any given case is not a serum and does not insure telling of the truth.

\(^{137}\) Courts have been fairly consistent in their refusal to recognize the results of scientifically conducted truth-searching tests. State v. Thomas, 79 Ariz. 158, 285 P.2d 612 (1955); Knight v. State, 97 So. 2d 115 (Fla. 1957); State v. Lindemuth, 56 N.M. 157, 243 P.2d 325 (1952); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951). In Brown v. State, 304 P.2d 361 (Okla. Crim. 1957), the Criminal Court of Appeals of Oklahoma admitted testimony of a hospital superintendent relative to defendant's sanity though use of sodium pentothal was made during examination. The opinion pointed out, however, that narcoanalysis constituted but a small portion of the total examination and the record clearly indicated that defendant's mental condition was not determined by narcoanalysis alone. Therein lies the distinction between this decision and *Henderson v. State*, *supra*. See generally Annot., 23 A.L.R.2d 1306 (1952).

\(^{138}\) 42 Cal. 2d 219, 266 P.2d 38 (1954). Prior to the *Jones* case, California had followed the orthodox rule that character must be proved by general reputation. See Note, 42 CALIF. L. REV. 880 (1954). In *People v. Ford*, 304 N.Y. 679, 107 N.E.2d 595 (1952), the New York Court of Appeals refused to permit an expert witness to testify with regard to defendant's ability to premeditate murder, opinion deriving from narco-
to submit expert psychiatric opinion of the personality traits of the defendant on the issue of the likelihood that he had committed the crime of sexual abuse. The opinion was based in part on a narcoanalysis interview with the defendant and was not offered for the purpose of proving the truth of matters asserted by the defendant. The proffered evidence was not the answers of Jones to certain inquiries, but the interrogator's expert analysis of those answers for the purpose of determining whether Jones was a sexual deviate.

Granted, the Jones case did represent a radical departure from orthodox doctrine which limits proof of character to reputation evidence. But assuming that expert testimony is based upon adequate clinical examination there is scant reason for believing that controlled testimony of this sort will do violence to trial procedures as they actually exist. Present day restriction of character evidence to reputation testimony is anomalous, since specific items of information inevitably find their way into the trial scene. The character witness will be cross-examined with regard to specific rumors and facts; the primary witness is subject to searching cross-examination that may delve into many and varied aspects of the witness' past. It can readily be appreciated that existing rules in no sense restrict character analysis to reputation evidence, simply because circumvention of the rules is warranted by time honored precedents. Both the Model Code of Evidence and the Uniform Rules of Evidence allow presentation of opinion evidence as to personality traits. The authors of these codes have indeed reflected upon the ignominy of exaggerated reliance upon general reputation as a workable test.

Fears are expressed in some quarters that much valuable time will be wasted on battles between partisan experts, and these fears are not without foundation. A jury will not receive altogether trustworthy information under this purely adversary method of presenting medical evidence,
yet the adversary system need not dictate every facet of trial experience. The anticipated battle between experts is a situation present whenever expert testimony is presented, however the trial court should have broad powers to limit expert testimony as it might limit the number of character witnesses in any case. To insure maximum psychiatric assistance, it might be feasible to provide for clinical examination by a court appointed psychiatrist upon a reasonable showing that one or more material witnesses are affected with an acute personality disorder.\textsuperscript{142}

Whatever course veracity-testing may take in future years, one premise remains unobscured: that governing rules of evidence should be geared to an all out search for the truth. Despite piecemeal reform through judicial decision and legislative enactment, present day rules still reflect the haphazard mold of the many common law precedents that spawned them. Trouble lies not in the number of rules to be mastered, but in the unnecessary confusion of ideas and the further fact that so many carefully devised concepts work at crosspurposes. In these days of fusion and fission, any trend toward simplicity commands welcome. New and improved codes of civil procedure have demonstrated that sweeping reform is neither shocking nor unsavory, and uniform acceptance of basic evidential principles would insure competent administration of the legal process.

\textsuperscript{142} That courts have the power to appoint medical experts is clear. Authority stems either from inherent power to call witnesses or from statutes or rules confirming authority to summon expert testimony. 2 \textsc{Wigmore, Evidence} § 563 (3d ed. 1940). Dession, Freedman, Donnelly, and Redlich, \textit{Drug-Induced Revelation and Criminal Investigation}, 62 \textsc{Yale L.J.} 315 (1953).