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## CREDIBILITY AND CHARACTER: A DIFFERENT LOOK AT AN INTERMINABLE PROBLEM

Robert G. Lawson\*

### I. Introduction

Early in this century, Wigmore made the following statement about the use of character as a predictor of testimonial credibility:

From the point of view of modern psychology the moral disposition which tends for or against falsehood is an elusive quality. Its intermittent operation in connection with other tendencies, and the difficulty of ascertaining its quality and force, make it by no means a feature peculiarly reliable in the diagnosis of testimonial credit. Hence, to the psychologist, the common law's reliance on character as an index of falsehood is crude and childish.<sup>1</sup>

Nonetheless, he added, "the crude belief of the common law must . . . hold its place until science provides a better method."<sup>2</sup> In 1969 a committee of the Judicial Conference of the United States proposing rules of evidence for use in United States courts, stated that there was still no "acceptable alternative" to the law's treatment of character.<sup>3</sup> The committee then proposed rules that adopted almost all of the common law doctrine which Wigmore, decades earlier, had described as "crude and childish." Then in 1972 the Supreme Court concurred in the committee's judgment when it promulgated the Federal Rules of Evidence.<sup>4</sup> In more than fifty years, it might be said, the law progressed from nowhere to nowhere.

Yet, despite this action by the highest judicial authority in the country, there emerged a brisk and critical appraisal of this important and troublesome area of evidence law. The provisions in the rules that dealt with character and credibility attracted swift and piercing criticism. They were characterized by one writer as "a half step forward and three steps backward"<sup>5</sup> and by another as "a mere mediocre reorganization of worn out concepts."<sup>6</sup> The most significant criticism, however, was leveled by a federal judge who had only shortly before authored what many consider the most progressive judicial pronouncement on character evidence in many years.<sup>7</sup> Referring to the considerations which led to the proposals, he said:

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1 3A J. WIGMORE, EVIDENCE § 922 (J. Chadbourn rev. 1970) [hereinafter cited as WIGMORE].

2. *Id.*

3 Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 299 (1969).

4 Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972) [hereinafter cited as Proposed Rules].

5 Spector, *Impeaching the Defendant by his Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOYOLA U.L.J. 247 (1970).

6 Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330, 331 (1970).

7 McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOCIAL ORDER 1. He labeled the most prominent part of the proposed character rules as "an unfortunate step backwards" and a "dead end." *Id.* at 12, 15.

With all respect, it appears fair to say that the Committee [Advisory Committee on the Federal Rules of Evidence] has, in express terms at least, failed to come to grips with the merits of the Model Code and Uniform Rule treatment of this perplexing problem. Those merits, or lack of them, turn upon answers to infinitely more searching questions than the Committee purports to have asked itself.<sup>8</sup>

The impact of this and similar criticism was considerable, although, as matters ultimately developed, almost totally transitory in nature. A substantial review of the original character provisions occurred in the judiciary committees of Congress. As a product of that review, significant changes in those provisions were proposed in response to the criticism of the original proposals.<sup>9</sup> However, Congress rejected most of these revisions, enacting character rules nearly identical to the ones originally submitted by the Supreme Court.

The problems of character evidence "resolved" by the new Federal Rules are problems that involve the structure of human personality. The judgmental processing by jurors of character information involves a behavioral transaction called interpersonal perception. Each of these psychological problems has been intensively investigated for nearly 40 years. As the character problems of the law now take on the appearance of having been solved, there is not the slightest indication that the results of this scientific endeavor influenced the choices made by the law. The solutions to these problems composed by the Judicial Conference and embraced by the Supreme Court and Congress are grounded exclusively on supposed common sense and naive psychological thought. The persevering thought and creative imagination that typically accompany legal judgments do not appear in the intellectual effort underneath the new character rules. As a consequence, to defend its action the law has only Wigmore's claim that science has not yet provided an acceptable alternative to its own intuitive judgment about human personality. It is time to investigate the validity of that claim; this article initiates such an inquiry.

## II. Character Evidence Law: A Brief Survey

### *A. Relevancy*

To lawyers and judges, credibility is a two-dimensional concept. One implies the possibility of mistake or unintentional misrepresentation, the other a deliberate and corrupt misstatement of truth. The rules of character evidence, of course, deal only with the latter. As Wigmore stated, they are concerned with the "moral disposition which tends for or against falsehood."<sup>10</sup> The most fundamental difficulty posed for the law in its struggle to make use of this human tendency is the evidentiary concept of "relevancy." What is the precise nature of the mental quality that is predictive of the testimonial behavior of witnesses? Wigmore provided the most sensible answer to this question:

<sup>8</sup> *Id.* at 12.

<sup>9</sup> See H.R. REP. NO. 93-650, 93rd Cong., 1st Sess. 75 (1973).

<sup>10</sup> WIGMORE § 922.

[I]t is obvious that the quality or tendency which will here aid is his [the witness's] quality or tendency as to truth-telling in general, i.e., his *veracity*, or, as more commonly and more loosely put, *his character for truth*. This must be, and is universally conceded to be, the immediate basis of inference. Character for truth is always and everywhere admissible.<sup>11</sup>

Unfortunately, the law has not related relevancy to credibility in such elementary terms.

In the law the psychic quality that would lead a witness to testify truthfully or untruthfully is believed to be highly elusive and, more importantly, intermingled in some way with other moral aspects of personality. As a consequence, the law views "general moral character" to be relevant to testimonial credibility, having the following evidential value:

The argument for the use of bad general character to discredit a witness is, in brief, that it necessarily involves an impairment of the truth-telling capacity, that to show general moral degeneration is to show an inevitable degeneration in veracity, and that the former is often more easily betrayed to observation than the latter.<sup>12</sup>

In other words, the use of general moral character to reflect on credibility is based on a belief that individual units of personality are highly integrated and exert themselves pervasively across diverse situations. Not all jurisdictions hold that general moral character satisfies the requirement of relevancy.<sup>13</sup> The psychological assumption upon which it is based, however, has played a dominant, though inadequately recognized, role in the overall development of character doctrine. That role will become apparent in the following discussion of methods by which relevant traits of character are evidenced.

### B. *Methods of Proof*

In the development of character principles, the law has consciously maintained a distinction between two types of facts, the "factum probanda" or ultimate fact, and the "factum probans" or evidentiary fact. The discussion of relevancy concerned the ultimate facts of character, the mental dispositions considered to have the necessary logical relationship to credibility. The law has experienced no less difficulty in its efforts to deal with the evidentiary facts of character doctrine. The following have been considered potential sources for proving traits of character: (1) particular instances of conduct of a witness; (2) the personal knowledge or opinion of someone who has observed him; and (3) his reputation in the community.<sup>14</sup> The law's choice from among these possibilities need not be extensively discussed here. It is common knowledge that character witnesses must present their testimony in the form of community reputation.<sup>15</sup> They are not allowed to express personal opinions about character, nor

11 *Id.*

12 *Id.*

13 See Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166 (1940).

14 WIGMORE § 920.

15 C. McCORMICK, *LAW OF EVIDENCE* § 44 (2d ed. 1972).

to report particular instances of good or bad conduct that might bear on credibility.

There are two exceptions to the general prohibition against the use of particular acts, two instances in which specific misconduct may be introduced to reflect adversely on a witness's credibility. The least known and least significant allows the use of such information if elicited through cross-examination of the witness being impeached.<sup>16</sup> The other has served as the source for most of the controversy involving character and credibility. This universally recognized exception authorizes the impeachment of a witness through proof of misconduct that resulted in a criminal conviction.<sup>17</sup> The dispute over the use of this kind of information and the two principal resolutions of that dispute are suggested in this statement:

There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. . . . The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. . . . Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement."<sup>18</sup>

The view identified as "weighted" authority is based on a belief that proof of commission of a serious crime establishes a "general readiness to do evil" from which it is possible to infer "a readiness to lie in the particular case."<sup>19</sup> The Uniform Rules and Model Code view is based on a judgment that the determinative factor should not be the gravity of the crime underlying a conviction but its logical relationship to the character trait of veracity.<sup>20</sup> It should be obvious that the foundation of the first and prevailing view is the psychological assumption mentioned in connection with the discussion of "general moral character." Since personality is presumed to be fully integrated in its moral aspects, it is presumed to function indiscriminately in directing moral behavior across diverse situations.

### *C. Credibility of a Criminal Defendant*

Once a criminal defendant chooses to testify, he is no different from other witnesses. His testimony is subject to full scrutiny by the state; his credibility may be attacked through the use of character evidence. Specifically, the prosecution may do two things to reflect adversely on his character, though the precise nature of each varies somewhat among jurisdictions. In all jurisdictions it may be shown that the defendant possesses a community reputation for untruthfulness; in a few it may be shown that he has a reputation for bad moral character in general. Additionally, it may be shown that prior to his testimony he engaged in particular acts of misconduct resulting in subsequent convictions.

<sup>16</sup> WIGMORE § 981.

<sup>17</sup> *Id.* § 980.

<sup>18</sup> Proposed Rules *supra* note 4, at 270.

<sup>19</sup> *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884).

<sup>20</sup> *Glick*, *supra* note 6, at 337.

In a few jurisdictions such acts are admissible only if they involve an element of dishonesty or falsehood; but in most they may be introduced if the offenses underlying the convictions are classified as felonies.

The apparent ease with which these principles may be applied to a criminal defendant is misleading. The law has experienced special difficulty in its efforts to use a defendant's character to predict his testimonial behavior. Despite general claims to the contrary, a criminal defendant is not and cannot be like other witnesses. He is the purpose of the proceeding, its target and its center of gravity. He is the accused, a role that brings into operation an additional set of rules to govern the admissibility of character evidence. These principles, commonly referred to as "substantive" character rules, differ fundamentally from the principles that deal with credibility. Their main thrust is more exclusionary in nature.

They begin with a general prohibition against the use of "bad" character to prove the commission of a criminal act. The underlying reason is the possibility of prejudice against an accused. Bad character by itself, it is said, "may be thought by the jury to deserve punishment or to deprive an erroneous verdict of its moral injustice."<sup>21</sup> Therefore the state cannot use evidence otherwise considered relevant and probative. This denial, however, is provisional. Evidence of character is fully admissible to prove the absence of commission of a criminal act. But if a defendant elects to defend himself in this way—by proving that he is a man of "good" character—the prohibition against the state is lifted and evidence of "bad" character becomes equally admissible. Without this penalty, says Wigmore, "a defendant, secure from refutation, would have too clear a license unscrupulously to impose a false character upon the tribunal."<sup>22</sup> Once the prosecution is provided an opportunity to take advantage of this "penalty," evidence of the defendant's bad character must consist of community reputation. Because they are considered to pose a special danger of prejudice, particular acts of misconduct are not admissible under this set of rules even if they resulted in criminal convictions.<sup>23</sup>

It is common knowledge that the attempt to correlate the "substantive" rules with the "credibility" rules involves a major difficulty. Suppose a defendant with a criminal record elects to testify in his own defense. Evidence of his prior conviction is inadmissible to prove commission of the act for which he is charged. Yet it is admissible to reflect adversely on his credibility. The difficulty involved in this conflict is not fully reflected in the treatment it is accorded by the law. Juries are permitted to hear the evidence and then simply told that it must be used exclusively to reflect on the defendant's credibility. Occasionally, a court or writer will condemn this solution as unrealistic,<sup>24</sup> but most of the time the problem is conveniently ignored. Only recently has there been a significant effort

21 WIGMORE § 921.

22 1 J. WIGMORE, EVIDENCE § 58 (3d ed. 1940).

23 *Id.* §§ 193-94.

24 *United States v. Jacangelo*, 281 F.2d 574, 576 (3rd Cir. 1960) ("[A] ritualistic counsel of psychologically impossible behavior.") *Griswold, The Long View*, 51 A.B.A.J. 1017, 1021 (1965). ("Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence is on the jury?")

to do more than pretend that a simplistic instruction on "credibility" is sufficient to insure proper use of such information.

That effort began with Judge McGowan's opinion in *Luck v. United States*.<sup>25</sup> Charged with house breaking and larceny, the defendant offered an alibi defense and elected to take the witness stand to support it. Solely for the purpose of reflecting on credibility, the prosecution was permitted to introduce evidence of a prior conviction for grand larceny. The defendant was convicted but the conviction was reversed on appeal for reasons not connected with the use of this evidence. The Court of Appeals, however, made significant pronouncements about the impeachment of a defendant through prior felony convictions. They were subsequently summarized by the writer of the *Luck* opinion in these words:

It seemed to me that neither the letter nor the apparent purpose of the statute [i.e., a District of Columbia law that authorized impeachment by use of criminal convictions] compelled this result. Thus, the court in *Luck* observed that: (1) "The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense"; (2) the statute "leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case"; and (3) there may be circumstances "where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."<sup>26</sup>

Thus, the impact of prior convictions on a defendant's election to testify in his own defense seems to have been the court's major concern. Language from the opinion itself reveals a broader concern, one directed primarily at the possibility of improper use of such evidence by juries. The important contribution of this decision to character doctrine, however, was its suggestion that the law should not allow the automatic use of convictions, but only in the exercise of "sound judicial discretion." This idea has gained the *Luck* case recognition as a "revolutionary" step,<sup>27</sup> a "landmark decision,"<sup>28</sup> and "the most practical method for balancing the interests of both prosecutor and defense."<sup>29</sup> Despite such acclaim the reception given *Luck* by other jurisdictions has been mixed.<sup>30</sup>

#### D. The Federal Rules

As finally adopted by the Supreme Court, the federal rules applicable to character evidence contained few notable departures from prevailing doctrine. With respect to the use of such evidence for reflecting on credibility, the rules: (1) recognized character as an appropriate technique for supporting or attack-

<sup>25</sup> 348 F.2d 763 (D.C. Cir. 1965).

<sup>26</sup> McGowan, *supra* note 7, at 3.

<sup>27</sup> Peltz, *More Than a Matter of Luck*, 19 N.Y.L.F. 833, 837 (1974).

<sup>28</sup> Glick, *supra* note 6, at 339.

<sup>29</sup> Spector, *supra* note 5, at 253.

<sup>30</sup> See, e.g., *Nance v. State*, 7 Md. App. 433, 256 A.2d 377 (1969); *State v. Hawthorne*, 49 N.J. 130, 228 A.2d 682 (1967); *United States v. Allison*, 414 F.2d 407 (9th Cir. 1969); *United States v. Palumbo*, 401 F.2d 270 (2d Cir.), *cert. denied*, 394 U.S. 947 (1968).

ing the testimony of a witness;<sup>31</sup> (2) prohibited the rehabilitation of a witness through use of character until after his impeachment;<sup>32</sup> (3) required that evidence of character be put in the form of "reputation" or "opinion";<sup>33</sup> and (4) prohibited the use of specific instances of conduct to prove character.<sup>34</sup> The two long-standing exceptions to this latter prohibition were incorporated into the proposals. Specific conduct was treated as a proper subject of inquiry through cross-examination,<sup>35</sup> and particular acts of misconduct were recognized as a legitimate basis of impeachment if supported by an appropriate criminal conviction.<sup>36</sup>

In one sense the Supreme Court rules adopted a narrow approach to the issue of relevancy. Veracity or truthfulness was recognized as the only trait of character possessing the necessary logical relationship to credibility. Evidence of "reputation" and "opinion" had to be in reference to "character for truthfulness or untruthfulness."<sup>37</sup> The same limitation was imposed on the right to inquire into particular acts on cross-examination. Such acts were required to be "probative of truthfulness or untruthfulness."<sup>38</sup> With respect to the use of criminal convictions, however, the rules adopted a very broad definition of relevancy. They allowed for the impeachment of a witness through proof of misconduct that resulted in *any* felony conviction or in any misdemeanor conviction for an offense involving an element of dishonesty or false statement.<sup>39</sup>

As applied to a criminal defendant, the Supreme Court proposals contained a general prohibition against the use of character to prove commission of a criminal act.<sup>40</sup> If an accused elected to defend himself by showing his "good" character, countervailing proof could be offered in the form of "reputation" or "opinion."<sup>41</sup> Particular acts could not be used for this purpose, except through inquiry on cross-examination.<sup>42</sup> In his capacity as a witness a criminal defendant was given no special consideration. Reputation or opinion as to character for truthfulness or untruthfulness, inquiry through cross-examination about specific acts of conduct probative of truthfulness or untruthfulness, and evidence of appropriate criminal convictions were all treated as proper techniques for reflecting on his credibility. Despite a provision in the rules authorizing exclusion of relevant evidence considered to be prejudicial,<sup>43</sup> the character provisions left no room for application of the *Luck* doctrine. The drafters' commentary was very specific in this regard: "In the absence of an acceptable alternative, the rule adheres to the traditional practice of allowing the witness-accused to be impeached by evi-

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31 Proposed Rules, *supra* note 4, at 267.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 269.

37 *Id.* at 267.

38 *Id.*

39 *Id.* at 269.

40 *Id.* at 219.

41 *Id.*

42 *Id.*

43 *Id.* at 218.



dence of conviction of crime, like other witnesses."<sup>44</sup> In simple terms the treatment accorded a criminal defendant by the Supreme Court character proposals contained very little, if anything, new.

As indicated in the introduction, the character provisions of the Federal Rules were subjected to extensive review in the judiciary committees of Congress. The House committee made two important changes in the rules submitted by the Court. It eliminated the ability of litigants to prove traits of character by use of opinion evidence<sup>45</sup> and, more significantly, it modified the provision which allowed impeachment of witnesses by use of criminal convictions.<sup>46</sup> Under the modification "only convictions for crimes involving dishonesty or false statement [could] be used as impeachment material."<sup>47</sup> The Senate Judiciary Committee proposed still another version of this impeachment rule, one that provided for a more limited use of criminal convictions when the witness being impeached was an accused. Any felony conviction and any other conviction for an offense involving dishonesty or false statement would be admissible to impeach an ordinary witness, but only the latter could be used to impeach a criminal defendant.<sup>48</sup>

Ultimately this extensive congressional review of the original character proposals was not very productive. The law finally enacted<sup>49</sup> restored the right of litigants to prove character traits by use of opinion evidence,<sup>50</sup> rejected both judiciary committees' modification of the impeachment rule, and provided the following instead:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.<sup>51</sup>

In only one important way does this rule differ from the one proposed by the Supreme Court. With the phrase "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant," Congress appears to have adopted the *Luck* doctrine, limiting its application, however, to criminal convictions that have no element of dishonesty or false statement.

44 *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 299 (1969).

45 The reason for this change was explained as follows:

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 7 (1973).

46 H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 11 (1973).

47 Peltz, *supra* note 27, at 840.

48 S. REP. NO. 93-1277, 93d Cong., 2d Sess. (1974).

49 Pub. L. N. 93-595 (Jan. 2, 1975).

50 *Id.* at Rules 405, 608.

51 *Id.* at Rule 609(a).

### E. Conclusion

This article investigates from a scientific perspective the law of character evidence as applied to testimonial credibility. The discussion is divided into three parts. The first has consisted of a description of the legal doctrine used to control the admissibility of such evidence. It is not exhaustive but instead seeks to provide an adequate frame of reference for discussion of relevant scientific data. The description provided allows for a fruitful discussion of the usefulness of psychological findings and conceptualizations to a proper appraisal of legal problems surrounding character and credibility. The next two parts of the article will be directed toward that end. The first part will focus on problems involving the impact of character evidence on jurors. The last will center on a more critical matter—the evidential value of character as a predictor of testimonial credibility.

## III. Character Evidence and Interpersonal Perception

### A. Introduction

What is the impact of character evidence on the judgmental processes of judicial decision makers? No appraisal of the legal doctrine of character and credibility is complete without consideration of this question. Attention will therefore center on the "image" of character or, stated differently, on the ways in which character is perceived and used in a decision process. Behavioral scientists have long recognized this as an important area of psychological inquiry. Consequently, a great deal is known about the processes by which impressions of others are formed and about some of the features of these processes that distort and falsify judgments about others.

The objective is to use this knowledge to consider the following questions: (1) Does character evidence have the kind of influence on testimonial appeal that the law assumes it has? (2) Does it influence the persuasiveness of testimony in ways that are neither anticipated nor desirable? (3) Is it possible for jurors in a criminal trial to use evidence of an accused's character exclusively for the purpose of evaluating his testimonial credibility? (4) Is there a significant risk that evidence of a defendant's character serves to distort the decision in criminal cases? While this discussion will revolve primarily around the character evidence that has caused the greatest controversy in the law—proof of prior criminal convictions—most of the scientific material involved in the discussion is equally applicable to other types of character information.

### B. Testimonial Influences of Character

#### 1. Anticipated Influences

The manner in which jurors are instructed to use evidence of character for its effect on "credibility" only has already been described. The nature of these instructions reveals the law's expectations concerning the use of character

data. At the very least, it shows that credibility, in its relationship to character, is considered one dimensional, synonymous with "trustworthiness," and so simple that jurors can be expected to measure it properly without much guidance. The total lack of complexity believed to be involved in this aspect of decision making is glaringly manifested in the use of criminal convictions to impeach. Jurors are expected to receive information about a witness's prior criminal act, infer from that act that he is an untruthful person, and then conclude that his testimony about the event in question may not be believable. Two assumptions of psychological importance are implicit in this expectation, neither of which has ever been critically appraised in the law. One involves the process of perception, the other a reaction to a perceptual act.

The first assumption is that ordinary people will use a fragment of behavioral information about another to infer the existence of a general behavioral disposition. Scientific evaluations of interpersonal perception confirm the validity of this supposition.<sup>52</sup> A person who receives information about another's conduct does more than simply register or record that data. His interpretation of it goes substantially beyond an adequate explanation of the action itself. As an observer he cannot avoid mental activities that extend beyond the circumstances observed and impose on the actor personal responsibility for his action. There is no disagreement among psychologists about the existence of this psychological process. As one writer has stated succinctly, "an actor's deviance is seen to prompt dispositional inferences that far transcend the situational context."<sup>53</sup> Consequently, jurors no doubt perceive information about a witness's prior criminal acts in terms of his broad personal dispositions.

The law's assumption about jurors' reaction to this perceptual act involves something research psychologists call "communicator prestige" or "communicator credibility." Scientists have conducted extensive investigations of this subject, and nearly every study has demonstrated that audience attitude toward a communicator correlates very highly with the effectiveness of his communication.<sup>54</sup> As

52 S. ASCH, *SOCIAL PSYCHOLOGY* 206 (1952):

We think of people as kindly, irascible, happy; how do we discover these properties in them? . . . We saw earlier that one necessary step in coming to know others is to perceive action as an effect produced by a person who functions as cause. When act and person enter into cognitive unit-formation, the person takes on the quality of his acts, just as the action of an object becomes a functional property of it. A generous act alters our view of a person and endows him with a quality of generosity. . . . We include in our view of happenings the latitude of action that the environment permits, and we assign to the individual responsibility for the particular selection he makes from among the environmental possibilities.

F. FROM, *PERCEPTION OF OTHER PEOPLE* 46 (1971):

Sometimes the perception of a single behavioral consequence may be decisive for the way in which important traits in a person's character manifest themselves to us, especially when the relevant product deviates from what we perceive as the typical product. . . . If a man has committed a crime, many will perceive his personality in terms of this one behavioral consequence.

53 Alexander & Epstein, *Problems of Dispositional Inference in Person Perception Research*, 32 *SOCIOMETRY* 381, 384 (1969).

54 E.g., C. HOVLAND, I. JANIS & H. KELLEY, *COMMUNICATION AND PERSUASION* 19 (1953); Manis, *The Interpretation of Opinion Statements as a Function of Recipient Attitude and Source Prestige*, 63 *J. ABNORM. & SOC. PSYCHOL.* 82 (1961); Tannenbaum, *Initial Attitude Toward Source and Concept as Factors in Attitude Change Through Communication*, 20 *PUB. OPINION Q.* 413 (1956); Hovland & Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 *PUB. OPINION Q.* 635 (1951).

one researcher stated recently, "experimental results have shown unequivocally that there is a positive relationship between the credibility of the communicator and the extent of opinion change" that is generated by his communication.<sup>55</sup> While none of these psychological investigations have closely paralleled the situation that exists in the courtroom, one study seems especially predictive of the consequences of a witness's character on the persuasive appeal of his testimony.<sup>56</sup>

This study used a single tape-recorded communication advocating extreme leniency in the treatment of juvenile delinquents. It was presented to three separate audiences who were ostensibly to judge its educational value. The three presentations differed only with respect to an introductory description of the communicator. One audience was told that he was a juvenile judge, well-informed, sincere, and honest; a second was told that he had been selected at random, had been delinquent as a youth, and at the time of the communication was charged with drug violations; and a third audience was told simply that the communicator had been selected at random. The experimenters labeled these introductions as "positive," "negative," and "neutral."<sup>57</sup> The results of the experiment were described as follows:

With identical content, audience judgments concerning the fairness of the presentation were much more favorable when it was given by the positive communicator than by the negative one. The judgments for the neutral communicator were intermediate but more similar to those for the positive one. . . .

The opinion results closely parallel the evaluations of the presentation. . . . [T]he group hearing the communication from the positive source favored more lenient treatment . . . than those hearing it from the negative source.<sup>58</sup>

Two conclusions about the influence of character evidence may be drawn from this finding: (1) Jury reaction to a witness's testimony is significantly influenced by evidence of his character; and (2) evidence of good character will exert less influence than evidence of bad character if both are measured from a neutral position. Thus it is possible to conclude that the law is correct in its expectation that character has a significant impact on the persuasive appeal of a witness's testimony.

## 2. Unanticipated Influences

Is it possible that when jurors evaluate testimony they are influenced by character in ways neither intended nor anticipated by the law? Might the persuasiveness of a testimonial communication depend on variables other than the one the law conceptualizes as "trustworthiness"? The importance of these inquiries to the present discussion is suggested by the following statement:

55 Aronson, Turner & Carlsmith, *Communicator Credibility and Communication Discrepancy as Determinants of Opinion Change*, 67 J. ABNORM. & SOC. PSYCHOL. 31 (1963).

56 See Kelman & Hovland, "Reinstatement" of the Communicator in Delayed Measurement of Opinion Change, 48 J. ABNORM. & SOC. PSYCHOL. 327 (1953).

57 See HOVLAND, JANIS & KELLEY, *supra* note 54, at 31.

58 *Id.* at 32-33.

Finally, an experiment by Aronson and Golden (1962) indicates that not only are variables which are fully relevant to the content of the persuasive communication and which are also of general relevance (intelligence, honesty, sincerity, responsibility) important in affecting attitude change, but that those positive and negative aspects of a communicator that bear no objective relevance to the topic of communication are also important. Both relevant and irrelevant aspects of credibility determine change of attitude; audiences are not composed of people who respond only to the objectively relevant aspects of a communicator. *Thus, for example, whether a person is effective may depend on whether he is perceived as an expert, but also on whether he is fat, sloppy, neat, ugly, handsome, a poor athlete, or a member of a minority group.*<sup>59</sup>

Psychologists frequently make general observations of this type,<sup>60</sup> which reflect a widely held belief that the effectiveness of a communication is dependent in part upon factors that have no verifiable relationship to the reliability of that communication. These factors are "irrelevant aspects of credibility." To the extent that they influence the persuasive appeal of a communication, they distort the truth.

What does all this have to do with character doctrine? The ultimate answer is probably dependent on research yet to be conducted. Psychologists have undertaken a substantial investigation of the impact of "prestige" or "credibility" on communication effectiveness which has now established beyond question the importance of this factor; their research has recently directed its attention to the problem of "disentangling the main components of credibility,"<sup>61</sup> discovering the reasons underlying the persuasion differential tied to communication source. Unfortunately, this attempt to anatomize "credibility" has not yet progressed far enough to reveal fully its most elemental parts. Still, enough research has been done to demonstrate that: (1) the dimensions of credibility are considerably more complex than imagined by the law, and (2) certain "irrelevant" credibility factors might well be triggered by evidence of character. This is revealed most pointedly by the findings of two particular studies of credibility.<sup>62</sup>

One was designed specifically to identify criteria used by individuals to evaluate communication sources.<sup>63</sup> It was concluded that the factor of credibility has at least three dimensions, each consisting of numerous more elemental components:

59 A. COHEN, *ATTITUDE CHANGE AND SOCIAL INFLUENCE* 28-29 (1964) (emphasis added).

60 Most of the time these observations are embraced in lengthy, general discussions of communications and persuasion. See, e.g., HOVLAND, JANIS & KELLEY, *supra* note 54, at 19-55; A. COHEN, *supra* note 59, at 24-29. Only on occasion is a statement made with the specificity of the one quoted above or of the following: "[O]ur reaction to the same verbal statement will vary depending upon whether we judge the person making it to be reliable or unreliable, stable or unstable, safe or dangerous, happy or sad, etc." Levy, *Adaptation, Anchoring, and Dissipation in Social Perception*, 29 J. PERSONALITY 94 (1961).

61 A. COHEN, *supra* note 59, at 26.

62 Berlo, Lemert, & Mertz, *Dimensions for Evaluating the Acceptability of Message Sources*, 39 PUB. OPINION Q. 563 (1970); Kelman & Eagly, *Attitude Toward the Communicator, Perception of Communication Content, and Attitude Change*, 1 J. PERS. & SOC. PSYCHOL. 63 (1965).

63 Berlo, Lemert & Mertz, *supra* note 62, at 565.

*Safety*: safe-unsafe; just-unjust; kind-cruel; friendly-unfriendly; honest-dishonest.

*Qualification*: trained-untrained; experienced-inexperienced; skilled-unskilled; qualified-unqualified; informed-uninformed.

*Dynamism*: aggressive-meek; emphatic-hesitant; bold-timid; active-passive; energetic-tired.<sup>64</sup>

The implications of this finding for the doctrine of character evidence are neither specific nor clear. However, in addition to its revelation about the complexity of credibility, the study indicates that individuals react to a communicator in a very broad emotional manner. Information about him produces either a generalized negative or positive attitude. The audience either "likes" or "dislikes" him and reacts to his communication accordingly.<sup>65</sup>

The finding of the second study more specifically confirms this conclusion. The study was designed to investigate the relationship between audience attitude toward a communicator and perception of the content of his communication.<sup>66</sup> A single persuasive communication was prepared on a controversial public issue. It was then presented to two separate audiences whose members had been induced to form different impressions of the communicator (one positive and one negative). The investigators sought to determine if credibility effects could be explained in terms of a psychological theory known as cognitive balance. In simple terms, this theory suggests that everything associated with a "liked" person will be liked, that everything associated with a "disliked" person will be disliked, and that if a discrepancy develops in this relationship, a perceiver will restore the balance by misperceiving the situation.<sup>67</sup> It was hypothesized that the theory would function as follows in the area of communications:

There should be at least a tendency for the audience to perceive communications as congruent with their attitude toward the communicator.

64 *Id.* at 574.

65 The precise nature of this reaction and the cause for it have been explained well in the leading authoritative work on communications and persuasion:

1. Because of their unfavorable attitudes (toward the communicator), members of the audience do not pay close attention to the content and/or do not attempt to comprehend the exact meaning of what is said. The former could result from thinking about the communicator, while the latter might result from "reading into" the content various implications that correspond to the assumed intent of the communicator. As a result, they *learn* the material less well than when it is presented by a favorable source and, failing to learn it, are unable to adhere to the recommended conclusions.

2. Because of their unfavorable attitudes, members of the audience are not motivated to *accept* or believe what the communicator says and recommends.

HOVLAND, JANIS & KELLEY, *supra* note 54, at 37.

66 Kelman & Eagly, *supra* note 62.

67 Though greatly oversimplified, this theory is well described in the following statement:

According to Heider's (1958) theory of cognitive balance and related theoretical formulations, there are strong forces to maintain similarity of affect toward another person and toward the things that are associated with him—his actions, his possessions, his friends. Thus, if P likes O, he also tends to like what O does, or believes, or owns; and if P dislikes O, he also tends to dislike whatever is integrally linked with O. If there is a discrepancy in affect—for example, P might like O, but disapprove of O's action—forces toward restoring a balanced configuration will come into play. If the action is sufficiently ambiguous P may tend to misperceive it, thus removing the disturbing incongruity.

Kelman & Eagly, *supra* note 62, at 63.

*They should see the message of a negative communicator as more negative than it actually is . . . and the message of a positive communicator as more positive than it actually is. . . . To the extent that such displacements occur, they can be expected to have significant effects on the amount of attitude change that is produced. In the case of a negative communicator, misperception of his message is likely to reduce even further his persuasive impact; the further the listener displaces the communicator's position from his own, the more likely he is to dismiss the communication as irrelevant and outside of his range of acceptance.<sup>68</sup>*

The results of the study confirmed this hypothesis. Though both audiences heard the same communication, only the one induced to "dislike" the communicator rejected its message. The investigators concluded that rejection by members of the "negative" audience reflected "their general disapproval of this speaker and everything he stands for, rather than disagreement with the specific content of what he said."<sup>69</sup> Obviously this conclusion is totally consistent with the belief that communication persuasiveness is tied to some extent to "irrelevant aspects of credibility." It should also be obvious that an audience reaction such as that revealed by this study, if occurring in a jury, would cause a distortion of testimony and a consequent distortion of the decision process.

### 3. Conclusion

Scientific investigation has established with certainty that an individual's acceptance and use of information are dependent partially upon his evaluation of its source and that the evaluative variable commonly referred to as "credibility" is multidimensional and complex. It has also established that a highly reliable communication can be distorted or rejected because of an emotional reaction to the communicator that generates "irrelevant" credibility factors.

None of the results of this investigation have specified how character evidence might cause this kind of emotional reaction. Nonetheless, available scientific data establish a clear and certain risk that irrelevant, and therefore undesirable, testimonial influences emanate from evidence about a witness's character. As the law attempts to assess the positive and negative aspects of character doctrine, this risk is one of the factors that need to be carefully weighed against the probative value of character evidence.

### C. Nontestimonial Influences of Character

#### 1. Introduction

The psychological processes involved in interpersonal perception are obviously complex, for they represent the systems by which people respond to information about and action by one another. It is now known that perceivers cannot absorb and use every stimulus item confronted in social interaction. As one researcher has stated, "the abiding fact . . . is that organisms have a highly limited

<sup>68</sup> *Id.* at 64 (emphasis added).

<sup>69</sup> *Id.* at 67.

span of attention and a highly limited span of immediate memory" and, therefore, they are forced to select from their environment those things that are "somehow essential to the enterprises in which [they] are engaged."<sup>70</sup> This part of the article focuses on this process of selectivity as it functions in a criminal case in relation to evidence of an accused's prior criminal activity. The principal objective is to evaluate the claim that the law's attempt at a restricted use of such evidence is "a ritualistic counsel of psychologically impossible behavior,"<sup>71</sup> by asking whether jurors can receive information that a criminal defendant has previously committed criminal acts and use that information exclusively to assess his testimonial credibility.

## 2. Forming Impressions of Personality

The scientific study of interpersonal perception began about thirty years ago with a series of experiments designed to discover how impressions of personality are formed.<sup>72</sup> This initial investigation has had immeasurable influence on perception theory, and to this day it is regarded as a landmark in the area of psychological inquiry.<sup>73</sup> One experiment from this series stands out in importance and influence.<sup>74</sup>

The experiment began by presenting the personal characteristics of a fictitious person to two separate groups of subjects. The characteristics were portrayed by the reading of a list of trait adjectives. The presentation to the separate groups differed only with respect to one characteristic ("warm"- "cold"):

GROUP ONE: Intelligent — skillful — industrious — warm — determined  
— practical — cautious.

GROUP TWO: Intelligent — skillful — industrious — cold — determined  
— practical — cautious.

The purpose of the experiment was to observe methods by which subjects use information to "understand" other people. Two techniques were utilized to elicit the impressions that resulted. First, the subjects were asked to write brief sketches of the person described to them by the adjective list. Then they were presented with a checklist of other trait names and asked to select the ones considered most in accord with their impressions. Some of the additional traits had a semantic similarity to the trait variable in the stimulus list; for example, "sociable-unsociable," "popular-unpopular," and "humorous-humorless." Others did not have such similarity; for example, "dishonest-honest," "imaginative-hard-headed," and "humane-ruthless."<sup>75</sup>

70 Bruner, *Social Psychology and Perception*, in READINGS IN SOCIAL PSYCHOLOGY 86 (E. Maccoby, T. Newcomb, & E. Hartley eds. 1958).

71 United States v. Jacangelo, 281 F.2d 574, 576 (3d Cir. 1960).

72 Asch, *Forming Impressions of Personality*, 41 J. ABNORM. & SOC. PSYCHOL. 258 (1946).

73 See, e.g., Secord & Bercheid, *Stereotyping and the Generality of Implicit Personality Theory*, 31 J. PERSONALITY 63 (1963); Veness & Brierley, *Forming Impressions of Personality: Two Experiments*, 2 BRIT. J. SOC. CLIN. PSYCHOL. 11 (1963); Koltuv, *Some Characteristics of Intrajudge Trait Intercorrelations*, 76 PSYCHOL. MONOGR. 1 (1962); Bruner & Tagiuri, *The Perception of People*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 634 (G. Lindzey ed. 1954).

74 Asch, *supra* note 72, at 262.

75 *Id.*



Through this procedure it was discovered that the two groups of subjects formed significantly different impressions of the target person. Those formed by members of group one were far more positive than those formed by group two and these impressions carried through to "checklist" traits having no semantic similarity to the trait variable. For example, the "warm" person was seen as humane and imaginative, the "cold" one as ruthless and hardheaded.<sup>76</sup> Far more important, however, was a finding that the impressions formed, whether positive or negative, were not fragmentary in nature but instead complete in every way. The conclusion drawn from this finding about the general process of person perception is especially relevant:

There is an attempt to form an impression of the *entire* person. *The subject can see the person only as a unit; he cannot form an impression of one-half or of one-quarter of the person.* This is the case even when the factual basis is meager; the impression then strives to become complete, reaching out toward other compatible qualities. The subject seeks to reach the core of the person *through* the trait or traits.<sup>77</sup>

This was later stated more succinctly: Although a person "possesses many tendencies, capacities, and interests, we form a view of *one* person, a view that embraces his entire being or as much of it as is accessible to us. We bring his many-sided, complex aspects into some definite relations."<sup>78</sup>

The implications of this finding are definite and considerable. The results of this study suggest that the law's expectation that jurors can and will use evidence of a defendant's character exclusively to evaluate his credibility is naive and unrealistic. Any doubt on this score would have to focus on features of this experiment that distinguish it from the conditions under which impressions are formed of a criminal defendant. There are some such features. The person whose characteristics were being evaluated by use of the trait lists was fictitious. In the criminal courtroom jurors react to a real person.<sup>79</sup> In addition, the circumstances under which they receive information about that real person are vastly different from the artificial conditions that prevailed in the experiment. It is possible, therefore, that the conclusion drawn from this study—that personality is perceived in terms of an integrated, unitary impression—might not be transferable to the courtroom.

All of the scientific data developed since this early experiment point overwhelmingly to a contrary conclusion. The finding of the original study stimulated a comprehensive investigation of the processes involved in personality perception;

<sup>76</sup> *Id.* at 263.

<sup>77</sup> *Id.* at 284 (emphasis added).

<sup>78</sup> S. ASCH, *SOCIAL PSYCHOLOGY* 206 (1952).

<sup>79</sup> The effect of this factor ("hypothetical" versus "real" target) on impression formation has been of sufficient concern to psychologists to stimulate at least one direct study of its importance. See Burron, Carlson, Getty, & Douglas, *The Effects of Informational Characteristics on the Perception of Real and Hypothetical Target Persons*, 23 *PSYCHONOMIC SCIENCE* 145 (1971). The conclusion drawn from that investigation was as follows:

There is a lingering doubt on the part of some research workers that laboratory findings based on "artificial" laboratory procedures may not be generalizable to real life situations. While this possibility has not been unequivocally discounted, nevertheless, within limits, the reality of the target is not a crucial variable for personality judgments.

the "theory of unified impressions" has been subjected to virtually every conceivable empirical challenge. The original experiment has been duplicated scores of times, each duplication containing a significant variation in the manner by which information about the "target" person was presented for evaluation.<sup>80</sup> In every instance the experimental results have paralleled those of the first study. Personality has been found consistently to be perceived in terms of unified, integrated impressions. The existence of a tendency to structure images of others as complete personalities is, therefore, no longer subject to doubt among psychologists.<sup>81</sup> Consequently, it can be predicted with perfect confidence that information about a defendant's character, including evidence of prior misconduct, will be used by jurors to construct a complete, integrated image of his personality. It appears certain that when the law requests jurors to give character evidence a restricted use, it demands "a mental gymnastic which is beyond, not only the jury's power, but anybody else's."<sup>82</sup>

A second experiment in the landmark series described above revealed that in the perception process individual items of information about a person do not have an evenly distributed impact on the total impression formed.<sup>83</sup> The procedure used in that investigation was identical to the one used in the first experiment, except that the trait variable was changed. "Polite-blunt" was substituted for "warm-cold." When the results of the two experiments were compared it was

80 In one study, for example, an actual person was used in the experiment, with the stimulus information (the adjective list involved in the original experiment) being presented in the form of a prefrontation introduction of the target person. Kelley, *The Warm-Cold Variable in First Impressions of Persons*, 18 J. PERSONALITY 431 (1950). In a series of experiments, a fictitious person was the subject of evaluation but the adjective traits (again extracted from the original study), rather than being presented as a list, were skillfully incorporated into a narrative description of the person. P. WARR & C. KNAPPER, *THE PERCEPTION OF PEOPLE AND EVENTS* 118 (1968). In another experiment a tape recording was used to present the stimulus information, with the target person being the recording voice. The six constant traits of the standard list were presented to the subjects without express mention of the trait words, and the trait variable ("cold-warm") was presented in the form of tonal changes in the recording voice. Veness & Brierley, *supra* note 73. For other studies of similar type see Shapiro & Tagiuri, *Some Effects of Response Control on Trait Impression*, 26 J. PERSONALITY 42 (1958); Cofer & Dunn, *Personality Ratings as Influenced by Verbal Stimuli*, 21 J. PERSONALITY 223 (1952); Mensh & Wishner, *Asch on "Forming Impressions of Personality," Further Evidence*, 16 J. PERSONALITY 188 (1947).

81 P. VERNON, *PERSONALITY ASSESSMENT: A CRITICAL SURVEY* 32-33 (1964):

But it should be stressed that the observer always tends to see the subject as a unitary whole, however fragmentary the cues. He is not a sum of his physical, dynamic and other qualities any more than a chair is perceived as an addition of certain dimensions and colours. At first sight . . . he is an individual, and the information about more detailed qualities which is obtained from subsequent cues is integrated into this whole.

Ichheiser, *Misunderstandings in Human Relations*, 55 AM. J. SOCIOLOGY 27, 28 (1949) [hereinafter cited as Ichheiser]:

This, however, is not the way in which our social perception and its mechanisms actually do operate. Rather, they function so as to transcend in many ways and many directions the pure raw material and to construct out of this material a more or less well-organized and integrated image of the given personality.

P. WARR & C. KNAPPER, *THE PERCEPTION OF PEOPLE AND EVENTS* 35 (1968):

We do not perceive an object as a simple aggregate of stimuli, but rather we impose our own organization on the material. . . . Subjects who are given only a limited, incomplete set of information about a person (a list of characteristics or a photograph) impose their own organization upon this material so that they form an impression of the person which is detailed, ordered and self-consistent.

82 *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

83 Asch, *supra* note 72, at 266.

found that the "polite-blunt" variable had a much weaker effect on the impressions formed than the "warm-cold" variable. The experimenter concluded that certain qualities of a person become "central" and others "peripheral" with respect to their influence on an ultimate impression.<sup>84</sup> He explained: "We usually distinguish between qualities that furnish the key to a person and those that are subsidiary. By doing this we acknowledge that not all characteristics of a person have the same weight."<sup>85</sup> This finding poses an important question: What degree of influence on the total impression of a defendant results from introduction of evidence that he has previously engaged in criminal activity?

The discovery resulting from this second experiment has also been the subject of considerable subsequent investigation. Some of the factors that determine whether an item of information will be "central" or "peripheral" in the formation of impressions have now been unraveled. Two factors possess special relevance. The more significant of the two is suggested in the following statement:

The choice we make among different possibilities in classifying an individual in one particular way and not in another is motivated by two factors: by the attitude of the person performing the classificatory act and by the situation in which this act is being performed. *However, as a rule, the situation seems to be the dominant factor.*<sup>86</sup>

From the very beginning of impression formation research the importance of "context" in the perception process has been recognized. In the first study involving use of the trait adjective lists the experimenter said that "the content and functional value of a trait changes with the given context."<sup>87</sup> Additional experimentation of the same type has confirmed this conclusion. The specific setting in which judgment about a person is made bears significantly upon the evaluation of information about that person. The setting serves to sensitize the perceiver to the importance of certain kinds of stimulus information.<sup>88</sup>

How might this factor influence the reaction of jurors to information that an accused has committed criminal offenses other than the one charged? On the basis of the experimental data, we know that "[t]he perceiver does not passively assign equal priority to incoming cues, but actively seeks out information which is relevant to his purposes in the situation of interaction. The perceiver is tuned or set to process certain kinds of information but not others."<sup>89</sup> We also have reason to believe that jurors undertake their task already possessing certain general knowledge about the defendant. They know that he was arrested by a police

84 *Id.* at 284.

85 S. Asch, *supra* note 78, at 208.

86 Ichheiser, *supra* note 81, at 34.

87 Asch, *supra* note 72, at 285.

88 See, e.g., Wishner, *Reanalysis of "Impressions of Personality,"* 67 PSYCHOL. REV. 96, 109 (1960); Luchins, *Forming Impressions of Personality: A Critique*, 43 J. ABNORM. & SOC. PSYCHOL. 318, 325 (1948); J. BIERI, A. ADKINS, S. BRIAR, A. LEAMAN, H. MILLER, & T. TRIPODI, CLINICAL AND SOCIAL JUDGMENT: THE DISCRIMINATION OF BEHAVIORAL INFORMATION 209 (1966); Tagiuri, *Introduction*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR xiii-xiv (Tagiuri & Petrullo eds. 1958).

89 Jones & Thibaut, *Interaction Goals as Bases of Inference in Interpersonal Perception*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR 153 (Tagiuri & Petrullo eds. 1958).

officer who believed him guilty of a crime, that preliminary proceedings were held in which grounds were discovered for pursuing a formal charge, and that an independent body of citizens acting as a grand jury handed down an indictment. On top of this, of course, they realize that their ultimate responsibility is to determine whether the defendant engaged in criminal behavior. In this "setting" they are informed that he has previously engaged in behavior of a similar kind. It is inconceivable that they could avoid entering the judgment-making phase of the proceeding without expectations about the defendant which serve to impose on the evidence of prior criminal behavior a prominent role in the perception process. In other words, they are sensitized to respond to information about a defendant's criminal behavior.

In every criminal case this "set" exists though its precise nature might vary. The "context" effect could be expected to correlate to some extent with the relationship between the offense charged and the offense underlying a prior conviction. In a murder case the jurors' reaction to a prior theft conviction would differ from their reaction to a prior murder conviction. With respect to both, however, it seems certain that the stimulus information—the evidence about his prior criminal activity—would play a "central" role in the impressions formed of the defendant.

There is an additional basis supporting this conclusion. The research on impression formation has identified a second factor determinative of the relative impact of a given item of information on an impression: "When judging another person we do not only classify him and make predictions about him; we also respond to him in certain emotional ways. Indeed . . . this affective response is of outstanding importance and one which enters strongly into every interpersonal relationship."<sup>90</sup> Thus one person's reaction to another is at least partly evaluative. A judgment that a person possesses an unattractive attribute will result in a general impression that fits within that judgmental framework. In an attempt to flesh out their understanding of this feature of perception, psychologists have found that unfavorable, unpleasant or socially derogatory information about another person will have a greater impact on personality image than information of equal intensity but of a positive dimension.<sup>91</sup> As one writer has stated: "[A] single negative trait is more prepotent than its opposite positive."<sup>92</sup> Another has said that "a number of studies of personality impression formation have shown that negative traits have more influence on an impression response than do positive traits."<sup>93</sup> Though research support is still rather incomplete, this conclusion provides an additional basis for predicting that, when forming a unitary impression of a defendant's personality, jurors will be greatly influenced by evidence of prior criminal behavior.

90 P. WARR & C. KNAPPER, *supra* note 80, at 16.

91 See, e.g., Schneider, *Implicit Personality Theory: A Review*, 79 PSYCHOL. BULL. 294, 299 (1973); Weinstein & Crowder, *The Effects of Positive and Negative Information on Person Perception*, 21 HUMAN RELATIONS 383 (1968).

92 Koltuv, *Some Characteristics of Intrajudge Trait Intercorrelations*, 76 PSYCHOL. MONOGR. 1, 3 (1962).

93 Levin, Wall, Dolezal, & Norman, *Differential Weighting of Positive and Negative Traits in Impression Formation as a Function of Prior Exposure*, 97 J. EXP. PSYCHOL. 114 (1973).

### 3. Consequences

These perception studies leave little doubt that evidence of prior misconduct places a defendant in a generalized unfavorable light with jurors. It can almost be taken for granted that judgments on matters affecting the defendant, particularly the charge against him, will correlate highly with this unfavorable impression. Wigmore had something like this in mind when he said that bad character alone might "be thought by the jury to deserve punishment or to deprive an erroneous verdict of its moral injustice."<sup>94</sup> In other words, he assumed that impressions of a defendant linked to evidence of bad character might distort the decision-making process. This part of the article will focus more directly on this prospect by use of scientific evaluations of personality misinterpretation.

In their investigation of perception, psychologists have identified several psychic mechanisms that cause individuals to distort judgments about others.<sup>95</sup> A strong possibility exists that one of them could interact with evidence of a defendant's misconduct so as to falsify the ultimate judgment of his guilt or innocence. For lack of a better term, we will call this the error of oversimplification.

The tendency to oversimplify the personalities of others is generally ranked at the top of the list of misinterpretative mechanisms. It has been recognized by psychologists as an error of judgment "so persistent, and seemingly so unavoidable, that it should be constantly borne in mind."<sup>96</sup> Evidence of a defendant's character (specifically information about his prior criminal behavior) might trigger this mechanism and thereby distort the decision process in two ways. The first involves a universally recognized need to see others as consistent, simple beings whose behavior in a given situation is readily predictable. A constant perceptual error is an inevitable part of this need, labeled the "tendency to overestimate the unity of personality":<sup>97</sup>

[T]hey [i.e., processes of social perception] function so as to transcend in many ways and many directions the pure raw material and to construct out of this material a more or less well-organized and integrated image of the given personality. This image construction is usually endowed in our minds with only those alleged characteristics which promise to help us explain, as a manifestation of the underlying personality, the behavior with which we are confronted. In other words, we have the tendency to consider a partial structure of personality which happens to be visible to us as if this partial structure were the total personality "itself."<sup>98</sup>

Earlier we described the inability of individuals to react to others except in terms of a unified, integrated impression. The above statement emphasizes, however, that the tendency to see others as a "unit" is widely at variance with the unity of personality that exists in fact.<sup>99</sup>

94 3A WIGMORE § 921.

95 See Ichheiser, *supra* note 81; VERNON, *supra* note 81, at 36.

96 G. ALLPORT, PERSONALITY—A PSYCHOLOGICAL INTERPRETATION 520 (1937) [hereinafter cited as ALLPORT].

97 Ichheiser, *supra* note 81, at 27.

98 *Id.* at 28.

99 Others have made the same point in clearer, more concise terms. See, e.g., Heider, *Perceiving the Other Person*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR 25 (Tagiuri & Petrullo eds. 1958); VERNON, *supra* note 81, at 36.

This tendency can operate in a criminal case as a source of misinterpretation in a way best described by the psychologist who first identified it. Describing its impact on judgment, he used an illustration that has special and pointed application to the problem under discussion:

A man is under suspicion of murder. During the investigation certain definite abnormalities of his sexual behavior come to light, even though there is no evidence that they are related in any way to the committed murder. Again, the frequent reaction in many people, if verbalized, would read something like this: "This man whose sexual life deviates so strangely from the norm can also be expected to deviate from other social norms in any other respect."<sup>100</sup>

This reaction is known in psychology as the "halo effect"—"one outstanding 'good' or 'bad' quality in a person casts its reflection upon all judgments pertaining to him."<sup>101</sup> It results from the failure to understand and discriminate between the diverse behaviors of the person perceived.<sup>102</sup> The effect of this psychological process on evidence of an accused's prior criminal activity should be apparent. The immediate impact of such information would be an inference to a personality trait rated low on an evaluative dimension. A secondary impact would be the rejection of any substantial possibility that in this same individual there could also reside a personality trait rated high. The combined effect would be a generalized tendency in jurors to react toward the accused in a negative fashion.

The second way evidence about an accused's prior misconduct might trigger the misinterpretative mechanism of oversimplification is revealed in this statement: "We all have in everyday life the tendency to interpret and to evaluate the behavior of other people in terms of specific personality characteristics rather than in terms of specific social situations in which those people are placed."<sup>103</sup> An earlier part of this discussion described the way in which individuals use a particular instance of conduct by another to impute to that person a broad, enduring trait of personality. One consequence of that process is a distortion in interpersonal perception. This has been called a "tendency to overestimate the role of personal and to underestimate the role of situational factors."<sup>104</sup> Like the tendency described in the preceding paragraph, this one has received widespread recognition by psychologists.<sup>105</sup> It is predictable, therefore, that when jurors receive information about prior criminal acts of an accused they impute to him a dispositional quality and give inadequate attention to the possibility of situationally oriented explanations for his conduct.

100 Ichheiser, *supra* note 81, at 27-28.

101 ALLPORT, *supra* note 96, 521. *Accord*, Gage & Cronbach, *Conceptual and Methodological Problems in Interpersonal Perception*, 62 PSYCHOL. REV. 411, 420 (1955); Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APP. PSYCHOL. 25 (1920).

102 WARR & KNAPPER, *supra* note 80, at 147: "A desirable attribute is assumed to imply the possession of other desirable attributes" and "an undesirable attribute is assumed to imply the possession of other undesirable attributes."

103 Ichheiser, *supra* note 81, at 46-47.

104 *Id.* at 46.

105 See Alexander & Epstein, *Problems of Dispositional Inference in Person Perception Research*, 32 SOCIOLOGY 381, 384 (1969); W. MISCHEL, PERSONALITY AND ASSESSMENT 41-58 (1968) [hereinafter cited as MISCHEL].

What kind of overall impact on the decision-making process of criminal trials might be expected to flow from the combined operation of these two tendencies? As has been stressed, there is no question about the existence in our culture of a commonly held belief that human behavior is guided by dispositions internal to the individual. Likewise, there is no doubt that consistency in behavior from one situation to another is thought to be a certain consequence of these dispositions. As stated elsewhere, "mutual expectations of a considerable degree of constancy, stability, and continuity of personalities in the dimensions of time are among the basic presuppositions of an orderly organization of human relations."<sup>106</sup> The predictable operation of these psychological processes in relation to evidence of a defendant's prior criminal acts can best be revealed by once again using a quotation from a recognized work on interpersonal perception:

Sometimes the perception of a single behavioral consequence may be decisive for the way in which important traits in a person's character manifest themselves to us, *especially when the relevant product deviates from what we perceive as the typical product*. . . . If a man has committed a crime, many will perceive his personality in terms of this one behavior consequence. To many people, a murderer is a murderer and nothing else. They see in him only the abstract characteristic of being a murderer; and this single characteristic swallows up all the rest of the human nature. . . .<sup>107</sup>

Can jurors receive information indicating that an accused has previously engaged in criminal activity and use that information exclusively in the assessment of his testimonial trustworthiness? This section started with that inquiry. A more direct and certain answer to it from a scientific perspective than that contained in the above quotation cannot be provided. There can be no more positive warning of the need for a thoughtful appraisal of the probative worth of character evidence.

#### IV. Scientific Appraisals of Personality

##### A. Introduction

As applied to testimonial credibility, the law of character evidence, whether traditional doctrine or the more "enlightened" federal rules, rests upon a fundamental assumption that the mental organization of every individual embodies a predisposition toward truthful or untruthful behavior. The law believes this mental quality to be more than a mere label for describing consistent patterns of conduct. It is a psychic force existing independent of the observable behavior in which it is manifested. It is considered a stable entity as much a part of a person as his skin color, body structure, or intelligence: one that provides the energy and direction by which he adapts himself to his environment.

The principal purpose of this section is to examine the validity of this assumption in light of scientific appraisals of personality. The discussion will focus on a body of psychological data entirely different in orientation from that con-

<sup>106</sup> Ichheiser, *supra* note 81, at 44.

<sup>107</sup> F. FROM, PERCEPTION OF OTHER PEOPLE 46 (1971) (emphasis added).

sidered in the preceding part of this article. The concern there was with the perception or "image" of personality; here the concern will be with personality itself. More specifically, we will inquire whether the structure of personality consists of "traits" or "dispositions," as conceived by the law, or whether it obeys principles of organization significantly different in character. By asking these questions, we can formulate some judgments concerning the reliability of character evidence as a predictor of testimonial behavior.

### *B. Theoretical Explanations of Behavior*

At about the time that Wigmore's classic work achieved its massive influence on the law, Gordon Allport, a scholar of equal status in the field of psychology, published a treatise<sup>108</sup> that shortly thereafter exerted equivalent influence on scientific interpretations of personality. Some interesting and significant parallels are contained in the two works. Wigmore's expressions on character reflected then prevailing legal views. Allport reflected then prevailing scientific views about character. More importantly, and quite contrary to Wigmore's belief,<sup>109</sup> the underlying assumptions of both disciplines (at least as reflected by these scholarly works) about the nature of character were not substantially different. Both viewed "character" as a useful and reliable predictor of behavior, and both assumed that behavior of most people would be generally consistent across widely divergent situations.

To explain this consistency, Allport postulated that individuals develop stable elements of personality that exert determinative influence on behavior.<sup>110</sup> These elements were called "traits" and were considered the peculiar qualities of a person that distinguished him from all others. The language used to describe them could easily be substituted for the law's definition of character traits.<sup>111</sup> Psychologists generally agreed that traits were psychological entities that existed in some real form; and therefore that they represented more than semantical descriptions of consistent behavior.

The theoretical interpretation of behavior tied to the trait construct was described in different ways since its inception, but was probably best known as the theory of generality. Fundamentally, this theory contemplated that dispositions internal to the individual cause environment adjustment in one situation to correspond in a meaningful fashion to adjustments in other independent though similar situations.<sup>112</sup> As a consequence, human behavior was expected to show

108 ALLPORT, *supra* note 96.

109 WIGMORE § 922.

110 Mischel, *supra* note 105, at 1-39.

111 "A trait is any distinguishable, relatively enduring way in which one individual differs from others." J. GUILFORD, *PERSONALITY* 6 (1959). "Traits are not creations in the mind of observers, nor are they verbal fictions; they are here accepted as biophysical facts, actual psychophysical dispositions. . . ." ALLPORT, *supra* note 96, at 339. "Traits are regarded as *personal* dispositions, overlapping one another in structure and in function, but nonetheless possessed of focal characteristics. . . . Traits may originate through integration of many similar specific habits of adjustment, but with time the organization takes upon itself a generalized character. . . ." Allport & Odbert, *Trait Names: A Psycho-lexical Study*, 47 *PSYCHOL. MONOGR.* (No. 211, 1936).

112 ALLPORT, *supra* note 96, at 286; H. EYSENCK, *THE STRUCTURE OF HUMAN PERSONALITY* 1 (1970); GUILFORD, *supra* note 111, at 16.



a high degree of cross-situational consistency and stability.<sup>113</sup> When tied to the type of behavior relevant to the present discussion the theory of generality was explained in this way:

The unidimensional approach holds that a person is, or strongly tends to be, consistent in his behavior over many different kinds of situations. Thus a person who lies in one situation is not only likely to lie in other situations, but is also highly likely to cheat, steal, not feel guilty, and so on.<sup>114</sup>

From this statement it should be obvious that the law's conception and use of character as a basis for predicting testimonial behavior are not significantly different from the psychological theory of generality. With both, traits are the basic elements of personality and are considered to exert a generalized determining influence on social behavior.

This conceptualization of the psychic structure dominated psychological thought for many years. As one writer has recently put it, "the psychology of personality was dominated for a long time by reifying intrapsychic traits as the explanations of behavior."<sup>115</sup> During this period enormous research was undertaken to discover, measure, and make practical use of traits for behavioral prediction. The total product of this effort contained two surprising developments for personality theorists. One was the discovery of substantial evidence totally inconsistent with the notion of generality. In a comprehensive study of deception, for example, researchers found very little consistency of behavior from one situation to another.<sup>116</sup> And a study of aggressive behavior in boys<sup>117</sup> discovered that "parents who punished aggression in the home, but who simultaneously modeled aggressive behavior and encouraged it in their sons' peer relationships, produced boys who were nonaggressive at home but markedly aggressive at school."<sup>118</sup> As a consequence of these and similar findings there arose substantial doubt about the trait explanation of personality. That doubt was magnified by a second development. Researchers repeatedly failed to verify empirically the existence of personal dispositions or even that behavior was consistent across different situations. This produced general dissatisfaction with the theory of generality.<sup>119</sup>

113 H. EYSENCK, *CRIME AND PUNISHMENT* 9 (1964):

When we postulate a trait of sociability, we mean essentially that if we took a hundred people and put them into ten different situations, all of which were relevant to our notion of sociability, that the person who tended to be sociable in one situation would also tend to be sociable in the others, whereas a person who was unsociable in one would tend to be unsociable in the others also. In other words, his conduct would show a certain degree of consistency.

114 Burton, *Generality of Honesty Reconsidered*, 70 *PSYCHOL. REV.* 481, 482 (1963).

115 Bowers, *Situationism in Psychology: An Analysis and a Critique*, 80 *PSYCHOL. REV.* 307, 325 (1973).

116 See H. HARSBORNE & M. MAY, 1 *STUDIES IN THE NATURE OF CHARACTER—STUDIES IN DECEIT* (1928).

117 Bandura, *Relationship of Family Patterns to Child Behavior Disorders*, *PROGRESS REPORT, U.S.P.H. RESEARCH GRANT M-1734* (Stanford University, 1960).

118 MISCHEL, *supra* note 105, at 28.

119 It was stated mildly by some, for example: "The results of trait-state assessments . . . , lead to clear conclusions. . . . [H]ighly generalized behavioral consistencies have not been demonstrated, and the concept of personality traits as broad response predispositions is thus

But accepting that the trait theory had failed posed enormous difficulties. Psychologists naturally assumed that human personality consists of generalized dispositions. As one psychologist stated, the theory is "logical, inherently plausible, and also consistent with common sense and intuitive impressions about personality."<sup>120</sup> Without experimental data to support it and much to contradict it, however, "the influence of trait theory as a viable model of man has dwindled."<sup>121</sup> The rejection of trait theory, virtually complete, has taken two forms.

One involves a total rejection of the idea of personality "traits" and the formulation of an entirely different explanation of behavior. Known best as the theory of specificity, it emphasizes the situational determinants of behavior and postulates that an individual's conduct in a given situation is largely controlled by the circumstances under which it occurs.<sup>122</sup>

First, behavior depends on stimulus situations and is specific to the situation: response patterns even in highly similar situations often fail to be strongly related. Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories. The more dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the same individual. Even seemingly trivial situational differences may reduce correlations to zero.<sup>123</sup>

Thus it would appear extremely difficult to predict behavior on the basis of past conduct. Similar difficulty occurs when the theory is tied to the type of behavior relevant to testimonial credibility:

The doctrine of specificity of moral behavior holds that a person acts in each situation according to the way he has been taught to act under these particular conditions. The predictability of one's moral behavior from one situation to another depends on the number of identical elements which the two settings share. This formulation does not accept the abstract concept of "honesty" as a valid character trait, but instead argues that there are many different kinds of specific behaviors which tend to be independent even though they may be included under the same rubric.<sup>124</sup>

From this statement it is obvious that the theory of specificity is totally inconsistent with the law's conception of character and with its use of character evidence as a basis for predicting testimonial behavior.

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untenable." *Id.* at 146. Other theorists have expressed themselves more strongly. D. PETERSON, *THE CLINICAL STUDY OF SOCIAL BEHAVIOR* 23 (1968):

The findings required abandonment of a line of research to which I had devoted ten years of my life as a psychologist. The results also required a change in beliefs about the nature of personality. This research, *per se*, did not say which way the conceptual shift should go, but it suggested very strongly that traditional conceptions of personality as internal behavior dispositions were inadequate and insufficient.

VERNON, *supra* note 81, at 239:

To the writer, the real argument against the trait . . . approach is not that it is a bad theory; its weaknesses are recognized, and we cannot do without some form of "intervening variables." The real trouble is that it has not worked well enough and, despite the huge volume of research it has stimulated, it seems to lead to a dead end.

120 MISCHEL, *supra* note 105, at 147.

121 Bowers, *supra* note 115, at 307.

122 See generally Bowers, *supra* note 115; EYSENCK, *supra* note 112, at 3; EYSENCK, *supra* note 13, at 4.

123 MISCHEL, *supra* note 105, at 177.

124 Burton, *supra* note 114, at 482.

Other personality theorists have moved away from trait theory in a way not quite so radical. They believe that behavior is far less general than originally conceived,<sup>125</sup> but not as disintegrated and unpredictable as claimed by those who adhere to the theory of specificity. Basically, the less radical psychologists propose a modified trait theory: the behavioral response of an individual in a given instance is thought to be determined by an interaction between his "psychic structure" and the "situation."<sup>126</sup> To some extent, the degree of modification represented in this more modern view can be revealed by a recent statement by Allport, the father of original trait theory:

[M]y earlier views seemed to neglect the variability induced by ecological, social, and situational factors. This oversight needs to be repaired through an adequate theory that will relate the inside [the psychic structure] and outside [situational factors] systems more accurately.<sup>127</sup>

This statement reveals that the theory of behavior that was so compatible with the law's notions about character has ceased to have *any* scientific recognition.

### C. *Experimental Studies of Deception*

A significant part of the investigation from which the above theories were derived was directed toward an appraisal of tendencies of individuals toward moral or immoral behavior. It resulted in the discovery of "positive but small correlations between moral conduct in one situation and moral conduct in another situation."<sup>128</sup> To show this it would be helpful to consider in detail the dominant research effort in this area of personality study. Its application to the present discussion is so direct and so obvious that any attempt to use psychological data to reflect on the legal doctrine of character evidence inevitably leads to its findings.

Known in psychology as the "character education inquiry,"<sup>129</sup> this investigation started with the stated objective of obtaining "a complete picture of a person's tendencies to deceive."<sup>130</sup> It was conducted for five years at Harvard University by three American psychologists, and studied the tendencies toward deception of 11,000 subjects. It has been appropriately described as "the largest experimental project ever carried out in the field of personality,"<sup>131</sup> and exerts a

125 Allport, *Traits Revisited*, 21 AM. PSYCHOLOGIST 1, 2 (1966).

126 See, e.g., Nelsen, Grinder, & Mutterer, *Sources of Variance in Behavioral Measures of Honesty in Temptation Situations: Methodological Analyses*, 1 DEVELOPMENTAL PSYCHOL. 265 (1969); Wallace, *What Units Shall We Employ? Allport's Question Revisited*, 31 J. CONSULT. PSYCHOL. 56 (1967); Bowers, *supra* note 115; EYSENCK, *supra* note 113, at 17; Guilford, *supra* note 111, at 16.

127 ALLPORT, *supra* note 125, at 9.

128 R. BROWN, *SOCIAL PSYCHOLOGY* 408 (1965).

129 A complete description of this study in all its detail and with all its results can be found in the following sources: H. HARTSHORNE & M. MAY, 1 STUDIES IN THE NATURE OF CHARACTER—STUDIES IN DECEIT (1928); H. HARTSHORNE, M. MAY & F. SHUTTLEWORTH, STUDIES IN THE ORGANIZATION OF CHARACTER (1930); H. HARTSHORNE, CHARACTER IN HUMAN RELATIONS (1932).

130 HARTSHORNE & MAY, *supra* note 129, at 14.

131 EYSENCK, *supra* note 112, at 227.

yet unequalled influence on theoretical interpretations of behavior.<sup>132</sup> The principal focus of this impressive investigation was to evaluate the part of human character that has unquestionable relevance to testimonial credibility—"the moral disposition which tends for or against falsehood."

The full implications of this investigation for the doctrine of character evidence cannot be appreciated without a brief description of the methods used to uncover the true nature of "deception." Twenty-nine different tests were used.<sup>133</sup> Each involved a natural but controlled situation in which all subjects were assured equal opportunity to deceive. The tests were administered under circumstances that created an illusion that lying, cheating or stealing could be practiced without fear of detection. The techniques used by the experimenters to investigate cheating are exemplified in their most frequently used test:

In this method, the children are tested twice on alternate versions of a given test; on one occasion, conditions permit deception, on the other there is strict supervision and no opportunity to deceive. The difference between scores made on the two occasions is a rough measure of the tendency to deceive, *i.e.*, either to copy answers from the key or to change answers to match the key.<sup>134</sup>

With its adaptability to multiple settings (classroom assignments, homework, athletic contests, etc.), this technique was used to measure deception in a wide variety of situations. It offered an opportunity for a clear measurement of the consistency or inconsistency of such behavior. The method used to measure lying was described as follows: "Lying could be detected . . . by asking the children whether they had cheated on any of the tests. It was known, of course, whether they had cheated or not; and if they denied having done so, the lie was apparent."<sup>135</sup> In combination, the methods used in the investigation provided a unique and reliable opportunity to examine the true nature and quality of deceptive behavior.

The psychologists who conducted this study started their effort with notions about human personality not very different from those presently held by lawyers. It was thought to consist of generalized mental dispositions that influence behavior in a broad sense. Naturally, honesty was thought to be an important, identifiable trait of character. So the experimenters expected the distribution of deception scores on their tests to be bimodal in nature: "At one end of the scale we would have a piling up of saints and at the other sinners, with nothing much in between."<sup>136</sup> Nothing less could be expected if honesty were a unified trait providing the direction for individual adjustment to social situations.

The results of the investigation surprised the experimenters and shocked the world of psychology:

132 For comments on this study, see *e.g.*, EYSENCK, *supra* note 113, at 8; G. ALLPORT, *PATTERN AND GROWTH IN PERSONALITY* 315 (1961); BROWN, *supra* note 128, at 402; Burton, *supra* note 114, at 481; MISCHEL *supra* note 105, at 23; ALLPORT, *supra* note 96, at 250.

133 HARTSHORNE & MAY, *supra* note 129, at 14.

134 EYSENCK, *supra* note 113, at 10-11.

135 *Id.* at 11.

136 HARTSHORNE, *supra* note 129, at 210.

What we actually observe is that the honesty or dishonesty of a child in one situation is related to his honesty or dishonesty in another situation mainly to the degree that the situations have factors in common. For example, a child may cheat on his arithmetic test and ten minutes later, in the same room, under the same examiner, under the same general conditions, be perfectly honest in a spelling test. In like manner, he may be dishonest in all the classroom situations but be perfectly honest in his dealings with his fellow pupils on the playground or at party games. *Indeed, the most striking thing about the conduct of school children is the amount of inconsistency exhibited. If we call perfect consistency one hundred and perfect inconsistency zero, the average consistency score . . . is only twenty, and there are a great many more between twenty and zero, than there are between twenty and one hundred. The average child is no better integrated in terms of an ethical ideal than if he had never heard of it.*<sup>137</sup>

This finding delivered a crushing blow to the common belief that most people are "consistent and simple beings, who stay the same in different surroundings or at different times";<sup>138</sup> and suggested instead that the characteristics we see in other people may be in large measure illusory or that, as one theorist stated, "behavioral consistencies . . . are *constructed* by observers, rather than actual consistency in the subject's behavior."<sup>139</sup>

As important as these results are, the conclusion which the experimenters drew is even more important:

*The results of these studies show that neither deceit nor its opposite, "honesty," are unified character traits, but rather specific functions of life situations. . . . Lying, cheating, and stealing as measured by the test situations used in these studies are only very loosely related.*<sup>140</sup>

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We found that, when situations involving the possibility of deception were almost identical, the behavior of individuals did not greatly vary from occasion to occasion. But when the situations permitting dishonesty were altered, as when one moves from a classroom to a party or an athletic contest or has the opportunity to steal money rather than to copy the answers of a test from an answer sheet, then there was found greater and greater diversity of behavior, so that one could not predict from what a person did in one situation what he would do in a different situation.<sup>141</sup>

This conclusion has been called the "doctrine of specificity." Put in simpler terms, it means that dishonesty and falsehood (and presumably the entire range of deviant behavior) tend to be "unintegrated, unstable and unpredictable."<sup>142</sup> In short "no one is honest or dishonest by 'nature'";<sup>143</sup> "honesty is simply a name used to describe conduct as observed in specific situations."<sup>144</sup>

137 *Id.* at 209.

138 VERNON, *supra* note 81, at 36.

139 MISCHEL, *supra* note 105, at 43.

140 HARTSHORNE & MAY, *supra* note 129, at 411.

141 HARTSHORNE, MAY & SHUTTLEWORTH, *supra* note 129, at 1.

142 EYSENCK, *supra* note 113, at 15.

143 HARTSHORNE & MAY, *supra* note 129, at 412.

144 HARTSHORNE, *supra* note 129, at 210.

### D. *Implications for Character Doctrine*

#### 1. Introduction

These data have clear implications for the law of character evidence. Some serve only to confirm suspicions held by lawyers and, therefore, probably possess a significant degree of acceptability. For example, the data most certainly reveal that the probative worth of character evidence is very low. Others, perhaps the major ones, will be enormously controversial. The notion of specificity in moral behavior radically challenges the law's most basic assumption about human personality, the one upon which all principles of character evidence are constructed. The law believes that individuals possess broad traits of character, internal dispositions that direct the manner in which people adapt themselves to their environment. If this belief conflicts with scientific fact, as the doctrine of specificity indicates, the law of character evidence cannot withstand scientific scrutiny. There is another equally undeniable fact. Underlying the doctrine of specificity is the belief that moral behavior is largely determined by circumstances external to the human "character." This belief also challenges a fundamental legal assumption. The law is firmly committed and accustomed to classifying people in terms of traits. Consequently, nothing could be more unrealistic than to expect that the doctrine of character evidence will suddenly collapse. It is reasonable only to expect a capacity for change on a smaller scale, to expect that some elemental parts of the doctrine are still malleable. The following discussion focuses on two such parts.

#### 2. Evidence of General Moral Character

As described in the first part of this article, two features of character have been judged relevant to testimonial credibility—"veracity" and "general moral character." The relevancy of the latter is reflected in two principles: admissibility of community reputation for general moral character (recognized in but few jurisdictions) and impeachment by use of any felony conviction (followed by a majority of jurisdictions). Underlying this judgment is an assumption that a person's moral qualities are highly integrated and motivate transsituational consistency of moral behavior. The soundness of this assumption has been radically undercut by the scientific studies described above. But the total incompatibility of the legal assumption with scientific interpretations of personality has not been revealed. No modern psychologist would consider moral behavior so integrated.

Abundant evidence to support this conclusion can be found in the scientific literature. The studies of "honesty," described above, and other investigations of moral behavior have generated a universal viewpoint about the integration of moral conduct by psychologists. Psychologists uniformly agree that moral judgments made by a single individual are independent of one another and affected substantially by the particulars of each situation.<sup>145</sup> If this personality character-

<sup>145</sup> MISCHER, *supra* note 105, at 179:

Or take the area of moral behavior and resistance to temptation. When the probable reinforcing consequences for cheating differ widely across situations—depending on the particular task and circumstances, the behavior of others, the likelihood

istic is ignored, as the law continues to do, the task of predicting behavior on the basis of some index of general character is reduced to something worse than a mere guess. The truth of this assertion is confirmed by the following statement of a noted English psychologist, made after he had reviewed all of the scientific data on moral behavior:

The only thing that all "morally relevant" behaviors have in common is the attribution to them of the words good, bad, right or wrong by those who look on. . . . Of course to a certain extent the adult who is extremely aware of the moral-immoral distinction may make a self-conscious attempt to be consistently moral, *but the real point is that there is not a personality trait which defines that a person who finds resistance to temptation easy in situation A will also find it easy in situation B-Z, in short that people tend to be generally "moral" or generally "immoral."*

The major finding, that morality is a blanket term effectively useless for the scientific analysis of personality is as important as it is difficult to accept. The fact that the morally good-morally bad division is the central one in the layman's assessment of personality means that, on the face of it, people rate other people primarily on a dimension that doesn't mean much. *To the extent that "overall morality" of a person is a basis on which to rate him, to that extent the rating is inexact.* Clearly, the situation is not as simple as this. . . .<sup>146</sup>

This statement clearly reveals the direction in which the law would have to move to bring its character rules into line with this particular scientific viewpoint.

### 3. Evidence of Criminal Convictions

The rule that authorizes the use of criminal convictions for purposes of impeachment possesses the greatest potential for distorting the decision process. The rule is based on a belief that a trait of character may reliably be evidenced by a single particular act of conduct:

Thus, whenever resort is had to a person's past conduct or acts as the basis of inference to a subsequent act, it must always be done *intermediately through another inference*. . . . The impulse to argue from A's former bad

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of detection, the probable consequences of being caught, the value of success, and so forth—impressive generality in moral conduct is not to be found.

BROWN, *supra* note 128, at 410:

The evidence for specificity in the moral domain casts general doubt on the simplistic view that adults share a morality which parents introduce to the child which the child incorporates, as given, in all its dimensions. The evidence for specificity causes us to entertain some very different ideas. Perhaps there is no morality shared by all members of a society. Perhaps the morality parents bring is made up of many distinct learning problems. Perhaps the child's progress on these problems is uneven.

Allinsmith, *The Learning of Moral Standards*, in *INNER CONFLICT AND DEFENSE* 164 (Miller and Swanson eds. 1960):

A person may have very severe internalized prohibitions of stealing, but mild prohibitions of disobedience, or his severity may be high for disobedience and low for aggression. This interpretation is bolstered by our finding that our subjects' scores on intensity of guilt in one moral area are not significantly related to their scores in any other moral areas. The person with a generally severe conscience, then, may be rarer than has been thought. Judging from our data, the person with a truly generalized conscience . . . is a statistical rarity.

<sup>146</sup> Pease, *The Myth of the Moral Personality*, 4 *PAPERS IN PSYCHOL.* 16, 18 (1970) (emphasis added).

deed or good deed directly to his doing or not doing of the bad deed charged is perhaps a natural one; but it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character. . . . This intermediate step is always implicit, and must be brought out.<sup>147</sup>

The inquiry Wigmore's statement suggests should be apparent: Is it scientifically defensible to deduce a behavioral tendency—a so-called trait of character—from a single observable act of behavior?

Once again the scientific data described above generally indicate the law's irrationality. This data, however, does not adequately indicate the degree to which law and science conflict on this point. Obviously, psychologists adhering to the notion of specificity consider a prediction of behavior on the basis of a single act unsound. As a matter of fact, most would probably consider it an exercise in nonsense. As one theorist stated, "the assessor who tries to predict the future without detailed information about the exact environmental conditions influencing the individual's criterion behavior may be more engaged in the process of hoping than of predicting."<sup>148</sup> The most significant scientific revelations on this issue, however, were made by the old trait theorists.

The key to prediction of behavior under this outmoded theory of personality was the discovery of "traits." Without exception those who supported this theory believed that man's true character—his so-called traits—could only be discovered by observing his conduct over a lengthy period of time.<sup>149</sup> They left no room for inference of a trait from a single act of behavior. There had to be consistent observable acts of behavior or, as one writer stated, "a succession of specific adaptive acts that follow one another in close array."<sup>150</sup>

If any doubt exists about the trait theorists' reaction to the law's use of a criminal conviction to prove a character trait, it should be removed by the following statement made by the leading proponent of that theory after listing three indicators of a particular trait:

Three indicators, of course, are not enough. Although all might point to a trait of seclusiveness, they might also be accounted for in terms of John's busyness or a temporary mood. But when we have not three, but scores, hundreds, or even thousands of acts that show a dependable regularity and consistency, we feel on a firmer ground in saying that John *must* be a seclusive sort of chap.<sup>151</sup>

147 1 J. WIGMORE, EVIDENCE § 192 (3d ed. 1940).

148 MISCHER, *supra* note 105, 140.

149 EYSENCK, *supra* note 112, at 9-10:

It will be clear from these quotations that the notion of *trait* is intimately connected with the notion of *correlation*. Stability, consistency, repeated occurrence of action—all these terms, when translated into more rigorous and operationally definable language, refer to co-variation of a number of behavioural acts. . . . A trait may be defined as a co-variant set of behavioural acts; it appears thus as an organizing principle which is deduced from the observed generality of human behavior.

ALLPORT, *supra* note 96, at 314:

Traits, then are discovered not by deductive reasoning, not by fiat, not by naming, and are themselves never directly observed. They are discovered in the individual life—the only place where they can be discovered—only through an inference (or interpretation) made necessary by the demonstrable consistency of the separate observable acts of behavior.

150 ALLPORT, *supra* note 96, at 313.

151 *Id.* at 337.



When one considers that these viewpoints existed before trait theory fell into disrepute and before trait psychologists acknowledged the paramount importance of situational factors, it is beyond question that "any constructive understanding of character must rest on a knowledge of diverse actions and behavior."<sup>152</sup>

### V. Conclusion

The discussion in this article has had a modest purpose, which can best be suggested by reference to scientific studies having almost nothing to do with character evidence. They involve investigation of human behavior that only a most inquisitive mind would undertake. In the first an ordinary coin is flipped in the presence of a subject and he is requested to call out "heads" or "tails." The exercise is repeated with a large sample of subjects. Any reasonably intelligent person can predict the distribution of responses. With no recognizable basis for making a choice, 50 percent of the subjects would call out "heads" and 50 percent would call out "tails." In a second study, a large group of people acting individually is requested to choose a number from the list 1, 2, 3 and 4. Then the same people are subsequently asked to select a letter from the list A, B, C, and D. Again with no discernible basis for choosing one option over any other (and assuming of course a sufficiently large sample of subjects), the distribution of responses is readily predictable—25 percent for each letter and each number. Common sense and intuitive judgment, the same intellectual base underneath the law's character rules, enable us to make these simple decisions about the behavior of people.

To expose and emphasize the risk involved in making judgments about human behavior from this kind of intellectual base has been the goal of this writing. The results of these two investigations do that exceedingly well. For some yet inexplicable reason, approximately 80 percent of a group of people confronted with a coin toss will call out "heads."<sup>153</sup> Similarly, 60 percent of a group confronted with a list of numbers like that described above will select "3" and about the same percentage will select "B" from the list of letters.<sup>154</sup> Several important messages are conveyed by the results of these apparently trifling investigations. They reveal a complexity of individual behavior that can be anticipated only by someone more aware of psychological phenomena than lawyers can possibly be. They demonstrate vividly that sensible but naive judgments about human conduct can be permeated by critical elements of misinterpretation. But above all, they serve as a simple reminder that no person can know until he first knows that he knows not. A realization that understanding does not exist is a prerequisite to achieving understanding. The discussion in this article has been an effort to provide that prerequisite with respect to "character and credibility." It has been an attempt to move the law closer to truth by exposing its lack of knowledge about the true nature of human character and about the true nature of the perception of character.

<sup>152</sup> R. ALLERS, *THE PSYCHOLOGY OF CHARACTER* 10 (1935).

<sup>153</sup> Goodfellow, *The Human Element in Probability*, 33 J. GEN. PSYCHOL. 201 (1940).

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