Why Modern Evidence Law Lacks Credibility

DANIEL D. BLINKA

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DANIEL D. BLINKA†

> You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.[1]
>
> [T]he system may work best when explained least.[2]

INTRODUCTION

The modern adversarial trial is at a crossroads. Curiously, it seems that trials, long a mainstay of popular culture, are better thought of by the general public than they are among legal professionals. The public embraces trials both real and fictional through a variety of media.[3] The legal profession is less sanguine. "Alternative" dispute resolution is ever so fashionable and the "vanishing trial" is bid good riddance as unreliable if not capricious.[4]

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† Professor of Law, Marquette Law School. This Article was written with the support of a summer research grant, for which I thank Dean Joseph D. Kearney. It also profited from a vetting by Patricia Cervenka, Michael O'Hear, Chad Oldfather, David Papke, Paul Secunda, and Andrea Schneider.

1. THE COMMITTEE ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.11 (2009), http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf [hereinafter SEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS].

2. Michelson v. United States, 335 U.S. 469, 481 n.18 (1948) (Jackson, J.).

3. *See* ROBERT A. FERGUSON, THE TRIAL IN AMERICAN LIFE 267-68 (2007). One distinguished authority asserts that the modern adversary trial is "now part of global popular culture." MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 1 (1997). Jury trials have captured the public's attention since the seventeenth century. *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 267-72 (1978).

4. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). Although clients must approve settlements, including plea bargains in criminal cases, lawyers heavily influence the decision. *See* Symposium, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1, 1-162, 370 (2007). For a thoughtful weighing of trials and plea bargains, see Michael M. O'Hear, *What's Good About Trials?*, 156 U. PA. L. REV. PENNUMBRA 209 (2007), http://www.pennumbra.com/responses/11-2007/OHear.pdf. For criticisms of the reliability of a trial, see, for example, Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction* 57 VAND. L. REV. 437, 449-

One's confidence in trials largely turns on how well they are believed to reveal the historical truth of "what happened."[5] And this is largely a function of witness credibility: Whom do we believe and why? Unsettling to some while a comfort to others, credibility is deliberately relegated to the amorphous realm of lay common sense and life experience. Evidence law provides no independent, meaningful standard of determining the credibility of lay witnesses.[6] Neither does religion nor science. Rather, the jury's life experience and "common sense" are thought sufficient or, more precisely, the only viable alternative.[7]

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66 (2004), who argues that appellate courts may have more "competence" in fact-finding than juries; and Gary L. Wells & Lisa E. Hasel, *Eyewitness Identification: Issues in Common Knowledge and Generalization*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 159, 164 (Eugene Borgida & Susan T. Fiske eds., 2008).

5. *See* FED. R. EVID. 102; 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6092, at 595 (2d ed. 2007) ("[There are] two crucial assumptions about the process of proof at trial. First, it assumes that expanding the opportunities of the advocates to present their competing versions of the facts usually will promote the truth. Second, it assumes the trier of fact usually has the ability to consider these competing versions and give the evidence its proper weight."); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 777 (1993) (noting that trials are how we "discover the historical truth").

6. In contrast to lay testimony, concerns about the reliability of expert testimony triggered radical doctrinal revisions which deputized trial judges as "gatekeepers" who are to ensure that expert opinions are based only on reliable methods, tests, and theories. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 579 (1993). Rule 702 was revised to reflect the *Daubert* line of cases in 2000. FED. R. EVID. 702 advisory committee note (amended 2000). For the insight that *Daubert* itself may be unreliable as applied by courts, see Robert P. Mosteller, *Finding the Golden Mean with* Daubert*: An Elusive, Perhaps Impossible Goal*, 52 VILL. L. REV. 723 (2007).

7. Religion is foreclosed by Rule 610, subject to the oath or affirmation requirement of Rule 603. FED. R. EVID. 603, 610; *see also* 1 MCCORMICK ON EVIDENCE § 46 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter MCCORMICK]. Evidence law is duly skeptical when science stakes claim to truth-telling proficiency, as best illustrated by the chilly reception of polygraph evidence. *See* MCCORMICK, *supra*, § 206, at 871 ("[There is] widespread and strongly rooted reluctance to permit the introduction of polygraph evidence."). The same chill extends to "psychoanalytically trained experts" who claim a "special faculty" to "discern the historical truth." Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 333 (1985). For the development of common sense reasoning in law, see *infra* text accompanying notes 37-49.

This Article considers the central, yet largely unexplored, role played by popular thought and culture in both the doctrine governing impeachment law generally and the determination of witness credibility in trials. Lurking in the background is the ever-present tension among legal rules and policy, the insights of modern psychology, and the community's common sense.[8]

Popular assumptions about witness credibility strike many critics as naïve and invalid, yet these very assumptions form the core of the law of evidence and support the trial's legitimacy.[9] More precisely, evidence law invokes four "testimonial assumptions" whenever a witness's testimony is believed accurate, and not a mistake or a lie: (1) the witness accurately perceived the event through her five senses; (2) she now accurately recalls those perceptions when testifying; (3) her words (testimony) accurately describe her memories; and (4) she is sincerely recounting those memories (and not lying).[10] While the general public finds these assumptions familiar and reliable—the very essence of "common sense"—the trial's critics are understandably skeptical in light of evidence law's wholesale abdication of credibility to popular thought.[11]

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8. My prime interest here is on the relationship between evidence law and popular thinking on credibility, which largely forms the law's epistemological foundation, not the role for modern psychology. For a discussion of the fascinating yet grossly understudied subject of the jury's "common knowledge," see John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 397-400 (1985), discussing considerations rooted in cost, fair notice, reliability, and political entitlement. Mansfield's focus is on factual inferences related to the merits, not on how juries evaluate credibility.

9. *See* Wells & Hasel, *supra* note 4, at 164.

10. For convenience, the term "testimonial assumptions" will be used to describe the social and cultural implications of these four determinations. 27 WRIGHT & GOLD, *supra* note 5, § 6092, at 593. Labeling them as "assumptions" usefully underscores our inability to articulate what seems to be an intuitive inference. *See* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE § 5162, at 11-12 (1978) (discussing jury trials and "khadi justice" where decisions depend more on shared culture and intuition than "logical analysis"). The assumptions are more extensively discussed at *infra* text accompanying notes 95-108.

11. *See* Mason Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239, 239 (1967) ("[Modern evidence law permits]

Why the neglect? Evidence law is largely barren of theory generally, and credibility is no exception.[12] Impeachment law regulates various techniques for probing credibility at trial, yet provides no measure apart from popular beliefs. Most impeachment rules sprouted as ad hoc responses to perceived abuses by lawyers in the nineteenth century, not from some reified theory of proof.[13] Credibility is deliberately entrusted to popular understanding; hence, the epistemology of evidence law is also rooted in common everyday beliefs that have not been fully analyzed by courts or academics. Although the eminent evidence scholar Mason Ladd once called credibility the "lawyer's problem," it is nonetheless a problem that a lay jury is ultimately expected to solve at trial drawing from its own experiences, insights, and beliefs.[14] One cannot rethink witness credibility without altering fundamental features of the trial.

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more evidence . . . but it does not answer the question of whether a witness is mistaken or intentionally falsifying.").

12. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 248 (2003) (characterizing evidence law at the end of the eighteenth century as "undertheorized"); DAMASKA, *supra* note 3, at 11 ("[C]ommon law evidentiary doctrine evolved ad hoc, cobbled up over time from judicial rulings in individual cases.").

13. *See* LANGBEIN, *supra* note 12, at 253-54, 271, 296, 299-300. "[R]eliance on cross-examination," observes Langbein, "was at most an article of faith. Cross-examination was a blunt instrument, a hit-or-miss safeguard against the truth-bending and truth-concealing effects of placing partisans in charge of the production and presentation of the evidence." *Id.* at 270. Evidence law has vainly struggled to identify some overarching organizational principle that might explain its form and function. Is its prime mission to control slovenly thought by lay jurors? Or do its rules embody instead a preference for the "best evidence" available, a rationale that explains some but not all major doctrines? Other scholars, closer to the mark, point to a blinding fear of witness perjury. *See* Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1070-71 (1992) (surveying various explanatory theories).

14. Ladd, *supra* note 11, at 261. Uviller worried that the jury was not up to the task.

> I am led by my investigations to serious doubt concerning the ability of a trial jury to perform the central task assigned to them: to assess credibility. And I must add, insofar as I can determine, the laws of evidence and the contribution of the trial courts in interpreting and applying the laws do little to enhance my confidence.

Uviller, *supra* note 5, at 778.

This Article develops several themes. First, the testimonial assumptions recognized by evidence law are products of mainstream thought and culture, an epistemology founded upon lay common sense and popular ideas about how people perceive, remember, and describe events as well as their sincerity. Second, the legitimacy of the modern trial depends upon this correspondence between popular (lay) thought and evidence doctrine, yet that correspondence is inadequately understood at present. Third, evidence law is bereft of any systematic approach to determining credibility. Rather, impeachment doctrine consists of ad hoc techniques that lawyers use at their discretion, the assumption being that lawyers are sufficiently adroit, knowledgeable, and experienced to draw out the strengths and weaknesses related to the testimonial assumptions (credibility).

Set against the modern trial are several notable threats. First, proof that rejects or contradicts the common law testimonial assumptions, particularly social scientific or psychological evidence directed at popular "misconceptions," effectively diminishes the jury's role in fact finding and threatens the trial's legitimacy.[15] More urgent, evidence law assumes that its testimonial assumptions as well as the rules governing credibility are consonant with current popular thought despite their nineteenth-century origins. A critical issue, largely unexplored, is the extent to which the popular beliefs that spurred the origins of evidence rules in the nineteenth century remain viable today. Put differently, does evidence law still reflect popular thinking about credibility? Second, trial lawyers with insufficient skill to use common law modes of impeachment fail to present the fact finder with the information popularly deemed necessary to determine credibility. Third, the "vanishing trial" risks relegating the trial jury to history's museum of curiosities while breeding a generation of lawyers lacking fundamental trial skills and adept only at settlement.[16]

This Article assesses the testimonial assumptions in light of the law governing the impeachment and

15. *See infra* text accompanying notes 154-61.

16. The effect is not confined to trials. The summary judgment process rests on the evaluation of "admissible" evidence. FED. R. CIV. P. 56; *see also* Bradley S. Shannon, *Responding to Summary Judgment*, 91 MARQ. L. REV. 815 (2008). Hence, flawed evidence doctrine also warps summary judgment determinations.

"rehabilitation" of witnesses. Evidence law is understandably reluctant to substitute its common sense underpinnings for the infirmities of modern psychology. Nonetheless, it should strive to better understand its roots in mainstream thought and popular culture if only to better appreciate where and how cultural changes, and psychology's insights, might assist credibility determinations without undermining the trial's legitimacy.[17]

The Article opens by assessing credibility's indifferent and incomplete treatment under the Federal Rules of Evidence (FRE). While it made several significant doctrinal improvements, the FRE's glaring omissions reflected the drafters' basic contentment with the common law's approach to credibility.

Section II provides a brief history of evidence law's nineteenth-century common law development. Impeachment rules originated as ad hoc limitations on excessive cross-examination tactics that seemed unfair or overly demeaning. Trial lawyers were far more concerned with blasting their opponent's evidence than pursuing the "truth" that the modern trial purports to be looking for.[18] The ad hoc emergence of impeachment rules meant that they were neither systematic nor necessarily coherent. Moreover, in shaping the meager doctrine related to credibility, the common law drew from prevailing nineteenth-century "common sense" thinking, a school of thought that dominated both intellectual and popular thought. Section II closes with two remarkable episodes from the early twentieth-century in which modern

17. That the roots of evidence law and the trial process are embedded in the community's "common sense" is nicely captured in an excellent collection of essays bearing the apt title, BEYOND COMMON SENSE, *supra* note 4. Of course trials should not be shackled to popular thought, yet we should not be embarrassed by it either. The debt should be recognized and its value appreciated so that rules and practices can be effectively scrutinized. Moreover, past shifts in popular thought have dramatically affected the assumptions along with evidence rules, most notably the preclusion of evidence of a person's religious beliefs to prove his truthfulness. *See infra* text accompanying note 19.

18. *See* Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 996-97 (1994) ("[Many evidence scholars accept] optimistic rationalism, that is, the belief that the overarching function of evidence law is to maximize the (already fairly high) probability that factfinders in our adjudicatory system will accurately determine objective historical truth.").

psychology unsuccessfully sought to displace popular knowledge (common sense) in the courtroom. Both instances involved seminal figures in modern evidence law (Wigmore and Hutchins).

Section III considers in some detail the four testimonial assumptions—perception, memory, narration, and sincerity—that provide the epistemological bedrock for the common law of credibility. Although modern psychology has battered the testimonial assumptions and many impeachment practices, the equally critical question is whether they remain consonant with today's popular thinking. The tension pits the trial's legitimacy against concerns about its reliability.

Section IV assesses how well the different modes of impeachment test these testimonial assumptions, particularly how effectively they expose the mistaken witness as well as the liar. Modern rules, for example, have abandoned religious beliefs as a measure of a witness's sincerity yet remain freighted with other nineteenth-century cultural baggage, such as the (amorphous) assumption of "truthful character."[19] Such quaintly Victorian notions are of little use in evaluating credibility in today's courtroom while carrying huge potential for unfair prejudice.

Finally, Section V argues for changes that demand trial judges play a more active role in the proof process, particularly to assure that juries are provided with information critical to assessing the accuracy of lay testimony. Both perjury and mistaken testimony are "wrong" and distort fact finding, yet present rules and procedures are more oriented toward exposing the liar than the innocently mistaken witness. This article proposes several fundamental changes in both trial practice and evidence law that balance the equation yet fall within the framework of the common law's testimonial assumptions.

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19. *See infra* text accompanying notes 245-57. Religious tests are excluded by FED. R. EVID. 610. Truthful character remains viable despite confusion and uncertainty over both the concept and the rules implementing it. *See* FED. R. EVID. 608, 609.

I. CREDIBILITY AND THE FEDERAL RULES OF EVIDENCE

One expecting to find a comprehensive, cogent approach to credibility in the FRE will be greatly disappointed. Instead one finds a fragmented treatment of impeachment law generally and no attempt to elucidate credibility despite its centrality at trial. Why? As we will see, the FRE largely deferred to the common law of evidence, which treated credibility as a feature of the community's common knowledge that trial lawyers would probe using ad hoc rules employed at their discretion.

Although the FRE never purported to be a comprehensive evidence code, it contains some troubling omissions nonetheless. For starters, there are no definitions of critical terms such as "evidence" or "witness."[20] Moreover, the FRE largely retained the common law's rules and practices governing impeachment and rehabilitation, yet their treatment is incomplete and scattershot.[21] The common law recognized five principal methods of impeachment:

- Defects in the witness's testimonial capacity.
- A witness's bias or interest.
- A witness's (poor) character for truthfulness, including prior criminal convictions.
- Prior statements that are inconsistent with the witness's testimony.
- Contradiction of the witness by other witness on material facts.[22]

The "dozing drafters," however, addressed only two of the five, and even then left some loose ends.[23]

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20. *See* 22 WRIGHT & GRAHAM, *supra* note 10, § 5163.

21. *See* MCCORMICK, *supra* note 7, § 33, at 147.

22. For a general discussion of the five modes under the FRE and common law, see *id*. § 33. See *infra* text accompanying notes 115-230 for a fuller discussion of each mode and how it purportedly relates to credibility.

23. Uviller, *supra* note 5, at 797-98; *see also* FED. R. EVID. 607, 608; 2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 607.02[6] (9th ed. 2006) ("Although the Federal Rules of Evidence contain a number of Rules that dictate how witnesses may be impeached and restrict certain forms of impeachment, . . . there is no serious

The "dozing drafters" did a commendable job in some respects. Rule 607 obliterated the common law's hoary ban against impeaching one's own witness.[24] Rule 608 took up the knotty issues governing when a witness's character for truthfulness could be attacked or rehabilitated, including the use of specific instances of untruthful conduct.[25] Two other rules addressed peculiar problems involving character evidence. Rule 609 governs when prior criminal convictions may be used to impeach a witness's truthful character while Rule 610 provides that a witness's religious beliefs may not be used to support or to attack her truthful character.[26] Finally, Rule 613 regulates the use of prior inconsistent statements to impeach a witness's trial testimony both on cross-examination and through extrinsic evidence (other witnesses).[27] Nonetheless, aside from addressing character evidence and prior inconsistent statements, the FRE were strangely silent about all else.

Especially mysterious was the complete omission of the two most significant methods of common law impeachment: defects in testimonial capacity and bias. The common law prized both methods, deeming them "non-collateral" issues which thereby accorded lawyers wide latitude on cross-examination and in using extrinsic evidence (other witnesses) to prove up the impeaching fact.[28] So glaring was their omission that the Supreme Court later held that, despite the absence of specific rules, impeachment by bias or interest inhered in the fundamentals of credibility and relevancy.[29]

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attempt in the Rules to specifically treat all traditional methods of impeaching a witness.").

24. FED. R. EVID. 607.

25. FED. R. EVID. 608. The original rule, though, was hardly a model of clarity and was revised in 2003. *See* 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6111, at 1 (Supp. 2d ed. 2009) (describing how the amendment clarified that the rule excludes extrinsic evidence only when it is offered solely to attack a witness's truthful character).

26. FED. R. EVID. 609, 610.

27. FED. R. EVID. 613.

28. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6095, at 627-34 (bias); § 6097, at 674-76 (testimonial capacity).

29. United States v. Abel, 469 U.S. 45 (1984).

Courts have given similar treatment to evidence regarding defects in a witness's testimonial capacity. Rule 601 had mostly obliterated the remaining vestiges of competency rules, broadly declaring all persons competent to testify regardless of age, gender, etc.[30] Thus, a mentally impaired witness would not be screened for competency; defects in her testimonial capacity would run only to her credibility and the weight of the testimony. Yet no rule addressed the scope of such impeachment or the order of proof. Faced with this lacuna, the courts decisively filled the gap by explicitly recognizing the continuing vitality of this common law mode of impeachment.[31]

Why the omissions? It is unlikely that the "dozing drafters" overlooked them.[32] A better answer looks at the FRE as a conversation with the common law of evidence that brought clarity and change where deemed necessary but otherwise left the common law intact.[33] Character evidence, for example, unfortunately reflects much of the "grotesque structure" of the common law in Rules 404 and 405 with relatively minor changes.[34] The character impeachment rules, Rules 608 and 609, fell in line.[35] The character rules, then, pulled together a complex body of doctrine that had been scattered among many cases. By contrast, impeachment by bias and defects in testimonial capacity seemed simple, well-settled, and straightforward. Drafting rules might have upset or shattered the perceived consensus.[36]

The understanding regarding impeachment by bias and defects in testimonial capacity was part of a larger consensus that relegated credibility to the realm of common

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30. FED. R. EVID. 601 advisory committee note.

31. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 672-73.

32. *See* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 5006-5007 (2d ed. 2005).

33. *See Abel*, 469 U.S. at 50 ("With this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely the evidentiary availability of cross-examination for bias.").

34. Michelson v. United States, 335 U.S. 469, 486 (1948); *see* 22 WRIGHT & GRAHAM, *supra* note 10, § 5232, at 340.

35. FED. R. EVID. 608, 609.

36. *See infra* text accompanying notes 122-26, 141-42.

knowledge. The consensus also conferred wide latitude on trial lawyers to determine how best to expose the strengths and weaknesses of witnesses. Put differently, the rules do not demand that lawyers take any particular steps to support or attack witnesses' credibility. It is assumed that the nature of the adversarial process provides the necessary inducement and that juries are fully capable of evaluating the information provided.

II. CREDIBILITY, COMMON SENSE, AND THE COMMON LAW: A BRIEF HISTORY

How is it that the common law relegated credibility to the community's general knowledge? The answer largely rests in the historical development of the modern adversary trial. Although that history is beyond our scope, several points are germane to our understanding of credibility.

The modern trial is the product of the nineteenth century. Before then trials were exceedingly brief and featured little of the procedural complexity we find today. The old-style criminal trial, for example, often lasted no more than minutes, the defendant was seldom represented by counsel, and few rules regulated evidence. [37] In many respects it featured the defendant's character as a central issue: one's reputation and standing mattered as much as what had happened. Rhetoric aside, "truth" was not the prize.[38] Nor were juries obligated to follow a judge's instructions or confined to the "evidence" in any technical sense.[39] Formal evidence rules, particularly those regulating impeachment, emerged only in the late eighteenth century along with the increased reliance on trial counsel to present and contest evidence.[40] Trial lawyers, though, were less concerned with abstract "truth" than in testing their opponent's evidence (and winning). Increasingly, courts fashioned evidence rules aimed at constraining zealous

37. J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 356-57, 363, 376 (1986); LANGBEIN, *supra* note 12, at 16, 178-79.

38. *See* LANGBEIN, *supra* note 12, at 307.

39. *See id.* at 217. I have elaborated upon this point and the old-style trial generally elsewhere. *See* Daniel D. Blinka, *"This Germ of Rottedness:" Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135 (2003).

40. LANGBEIN, *supra* note 12, at 178-80; ALLYSON N. MAY, THE BAR AND THE OLD BAILEY, 1750-1850, at 197-201 (2003).

advocacy, particularly cross-examination, yet these rules too became "levers" in the hands of lawyers.[41] Eventually, the pursuit of "justice" paralleled the search for truth as the legal profession rationalized the trial's rather strained claims to find the truth through an adversarial contest.[42]

Some saw salvation in evidence rules that might serve as a science of proof. Simon Greenleaf, one of Harvard Law School's founding faculty members and the author of the first American treatise on evidence law in 1842, placed more store in the rules than in trials.[43] Although Greenleaf's treatise addressed the burgeoning number of exclusionary rules that governed hearsay and witness examination, for example, it also portrayed the law of evidence as itself a science of proof, a view that reflected more Greenleaf's aspirations than the reality of the courtroom.[44] A devout evangelical Christian, Greenleaf harmonized his legal and religious beliefs in an 1846 tract that displayed how evidence law proved the truth of the New Testament.[45] In brief, Greenleaf meticulously applied the law's proof principles in establishing the credibility of the gospel writers, particularly their sincerity and skills at observing and recording Jesus's life and teachings.[46]

Yet Greenleaf's central point was not to prove the gospels's truth, which all evangelicals knew to be true anyway, but to demonstrate that credibility determinations and the discovery of truth generally was the special province of law and lawyers.[47] Greenleaf's views on evidence

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41. LANGBEIN, *supra* note 12, at 179, 248-51, 310.

42. May, *supra* note 40, at 233. Langbein lays out the transition from the older-form of criminal trial, the "accused-speaks" procedure, to the modern adversary trial. LANGBEIN, *supra* note 12, at 178-79 (evidence rules); *id.* at 253-54 (the adversary trial).

43. *See* Daniel D. Blinka, *The Roots of the Modern Trial: Greenleaf's* Testimony *to the Harmony of Christianity, Science, and Law in Antebellum America*, 27 J. EARLY REPUBLIC 293, 294 (2007).

44. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 3-4, 123-53 (4th ed. 1848).

45. SIMON GREENLEAF, AN EXAMINATION OF THE TESTIMONY OF THE FOUR EVANGELISTS, BY THE RULES OF EVIDENCE ADMINISTERED IN COURTS OF JUSTICE: WITH AN ACCOUNT OF THE TRIAL OF JESUS, at vii-viii (2d ed. 1847).

46. *See* Blinka, *supra* note 43, at 303-06.

47. *See id.* at 327.

law and proof fully embraced the school of common sense philosophy, which dominated scientific thinking while permeating religious and popular thinking in mid-nineteenth century America, thus forming the paradigm shared by most segments of society. Greenleaf explicitly rested the core principles and doctrines of evidence law on common-sense thinking to assure both its scientific acceptability and to guarantee its popular acceptance.[48]

In sum, there was nothing esoteric about evidence law's core assumptions; they were widely shared by scientific thinkers and the lay public.[49] This consensus furthered the legitimacy of trials, which depended upon lay participation, lay understanding, and lay acceptance. When modern psychology emerged in the late nineteenth century, it met resistance from the legal profession whenever it conflicted with these core assumptions, as we will see in the next section. Although some sciences moved beyond common sense thinking, the latter's tenets remained deeply set in evidence law and popular thinking. The legitimacy of trials seemingly depended upon it.

A. *Redux: Wigmore, Hutchins, and Modern Psychology*

One looking at the uneasy relationship between the popular beliefs ensconced in evidence law and the critiques of modern psychology may benefit from two earlier collisions. For better or worse, in each encounter the law triumphed over psychology which tells us something about both the age and staying power of popular views of credibility.

The first tale involves Professor Hugo Münsterberg, a German psychology professor. Münsterberg's 1907 book, *On the Witness Stand*,[50] ostentatiously declared that the "new science" of "applied psychology" would replace the "legal instinct" and "common sense" of judges, lawyers, and the "juryman" especially in understanding "the mind of the witness."[51] Münsterberg, for example, emphasized the

48. *See id.* at 325-26; *see also* EVANGELICALS AND SCIENCE IN HISTORICAL PERSPECTIVE (David N. Livingstone, D. G. Hart, & Mark A. Noll eds., 1999).

49. Blinka, *supra* note 43, at 325.

50. HUGO MÜNSTERBERG, ON THE WITNESS STAND (1908).

51. *Id.* at 10-11.

"treachery of human memory" that undercut a witness's reliability regardless of her sincere desire to be truthful.[52] He recounted the outcome of experiments in German classrooms where startling events (e.g., a violent confrontation) were staged for purposes of exploring how widely, and wildly, the accounts varied when student-witnesses were later questioned.[53] In some instances the witness's observations were "defective and illusory."[54] Nor was certainty of memory correlated with its accuracy.[55] Münsterberg harpooned the competence of Anglo-American evidence law and trials:

> The correlations between [sic] attention, recollection, and feeling of certainty become the more complex the more we carefully study them. Not only the self-made psychology of the average juryman, but also the scanty psychological statements which judge and attorney find in the large compendium on Evidence fall to pieces if a careful examination approaches the mental facts.[56]

Münsterberg, thus, sized up American law and found it sadly wanting in its capacity to determine credibility. And with no pretense at humility, the German professor asserted that "experimental psychology" could measure the differing capacities among people for perception and recollection "far beyond anything which common sense and social experience suggest."[57]

Into the breach stepped John Henry Wigmore, whose masterful four-volume *Treatise on Evidence* first appeared in 1904-1905 in place of later shop-worn editions of Greenleaf's work.[58] For the remainder of twentieth century, Wigmore dominated American evidence law like no other

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52. *Id.* at 44, 48.

53. *Id*. at 49-50.

54. *Id*. at 56.

55. *Id*. at 57-58.

56. *Id.* at 56.

57. *Id.* at 63. Münsterberg argued that his "experimental psychology" should be placed on the same footing as fingerprint analysis and testimony by "anatomists and physiologists," which had been accepted by "[m]odern law." *Id.*

58. William R. Roalfe, *John Henry Wigmore–Scholar and Reformer*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277, 283 (1962).

figure.[59] Wigmore wasted little time in essentially destroying Münsterberg's own credibility and reassuring the public and the legal profession that the trial system did not need further assistance from psychology or, for that matter, German professors.

In a savagely brilliant critique, Wigmore purported to place Münsterberg on trial for libeling the common law of evidence.[60] The plaintiffs, "Edward Cokestone and others," who personified the common law, claimed that defendant Münsterberg's *On the Witness Stand* contained "assertions erroneous, incorrect, and untrue."[61] The fictitious libel trial featured just one witness, Münsterberg himself, who pled truth as his defense.[62] Münsterberg's testimony described various psychological tests that allegedly measured differences in perception and memory among people.[63] Yet what rankled plaintiffs (Wigmore) was the German professor's charge that the legal profession was both blind to these issues and incapable of handling them.[64]

The nub of the plaintiffs' case questioned whether Münsterberg's experimental tests were as well accepted by "Continental psychologists and jurists" as he suggested, and whether those methods had such merit "that they could be actually now used and relied on in trials as being superior to the methods hitherto in use?"[65] As the reader might suspect, the cross-examination exposed Münsterberg's assertions as baseless. The defendant silently conceded that his experimental methods lacked the "Continental" support he had suggested.[66] The cross-examination also demolished

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59. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 111 (1985).

60. John H. Wigmore, *Professor Muensterberg* [sic] *and the Psychology of Testimony: Being a Report of the Case of* Cokestone v. Muensterberg, 3 ILL. L. REV. 399 (1909); *see also* TWINING, *supra* note 59, at 135-36.

61. Wigmore, *supra* note 60, at 399. Good lawyer he was, Wigmore's pleadings specified the defendant's numerous libels, including those maligning the common law's failures to stay current with modern thinking. *Id.* at 399-401.

62. *Id.* at 403.

63. *Id.*

64. *Id.* at 403-04.

65. *Id.* at 405 (emphasis omitted).

66. *Id.* at 415-16.

any pretense that psychology improved upon the common law's methodology.[67]

Wigmore's point was that Münsterberg had grossly overstated the capacity of modern psychology and vastly underestimated the common law's grasp of credibility issues and its efficacy in addressing them. Indeed, Wigmore hoped for an "energetic alliance of psychology and law, in the noble cause of justice."[68] Almost magnanimously, he closed by vigorously criticizing the legal profession's obstinacy and backwardness with respect to forensic sciences.[69] Far from slamming the door to modern psychology, Wigmore plaintively hoped the day would come when it could provide more assistance, but clearly the gatekeepers would be the lawyers themselves (actually Wigmore), not German psychologists.[70]

A second tale also involves Wigmore but centers on a dominant figure in American higher education, Robert Maynard Hutchins. Appointed to the Yale Law School faculty after graduating from Yale in 1925, Hutchins became the school's dean in 1927 before leaving several years later to become the president of the University of Chicago, a position he held until the 1970s.[71] An evidence teacher at Yale, Hutchins co-authored a series of path breaking articles that applied the latest insights of modern psychology to evidence law. Hutchins too challenged Wigmore's suzerainty, presenting a more significant threat than Münsterberg's because it came from within the American legal academy.[72]

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67. *See id*. at 416-31.

68. *Id.* at 432.

69. *Id.* at 433-34.

70. *See* TWINING, *supra* note 59, at 136 ("It might be said that, having dispatched Muensterberg [sic], [Wigmore] moved in to occupy the field himself.").

71. *See* HARRY S. ASHMORE, UNSEASONABLE TRUTHS: THE LIFE OF ROBERT MAYNARD HUTCHINS 45-56 (1989).

72. In 1929 Wigmore invited Hutchins to "collaborate" on a new edition of Wigmore's book, PRINCIPLES OF PROOF. TWINING, *supra* note 59, at 137. Hutchins declined citing the labors of learning his new job as president of the University of Chicago. *Id.* One suspects that Hutchins's earlier tweaking of Wigmore and later skepticism about the admixture of law and psychology made the joint endeavor unlikely in any event.

Hutchins insightfully observed that evidence law itself harbored a psychology of sorts borne of experience and lay intuition; this "subjective psychology," though, had devolved into a "morass."[73] In a 1926 address before the Association of American Law Schools (AALS), Hutchins asserted that law should look to the "objective psychologists" to "extricate the administration of the law" from the doctrinal swamp.[74] Failure to do so augured legal doom, as the lawyers would "abdicate our position as specialists in human behavior, reaffirm the traditional conservatism of the profession, and permit the rules of evidence to recede still further from reality."[75] Along with a psychologist, Hutchins co-authored a series of seminal law review articles that critiqued various evidence rules in light of modern psychology.[76] Their impact is attested by the Advisory Committee's use of the articles when drafting the FRE over forty years later.[77] Even today the articles are often excerpted and discussed in evidence text books.[78]

Hutchins's articles formed the phalanx of a thinly-veiled attack against Wigmore, whose "masterly treatise discloses the mass of conflicting rules, of metaphysical doctrines, of methods of concealing the truth now sanctioned in our courts."[79] Less than flattered, Wigmore wrote of his displeasure to Yale's president, James R. Angell, churlishly complaining that Hutchins had relegated him to the "fossils."[80] Oddly, he analogized Hutchins' fixation on

73. ASHMORE, *supra* note 71, at 47.

74. *Id.*

75. *Id.*

76. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence* (pts. 1, 2 & 3), 37 YALE L.J. 1017 (1928), 28 COLUM. L. REV. 432 (1928), 77 U. PA. L. REV. 725 (1929).

77. FED. R. EVID. 803(1)-(2) advisory committee note (citing Hutchins & Slesinger, 28 COLUM. L. REV. 432, *supra* note 76). The advisory committee observed that despite Hutchins's critique that "excitement impairs accuracy of observations," the rule "finds support in cases without number." *Id.*

78. *E.g.*, RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 549-550 (6th ed. 2007) (excerpting Hutchins, 28 COLUM. L. REV. 432, *supra* note 76); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 65 (6th ed. 2008) (citing Hutchins & Slesinger, 77 U. PA. L. REV. 725, *supra* note 76).

79. ASHMORE, *supra* note 71, at 46.

80. *Id.*

psychology to the extremist adherents of free-silver in economics.[81] Angell passed Wigmore's letter on to Hutchins along with a note, "I get the impression that you must have stepped on some of his most sensitive corns."[82]

Hutchins' iconoclasm was short lived. In a 1933 address to the AALS, which was printed in the very first volume of the University of Chicago Law Review, Hutchins virtually recanted.[83] Almost apologetically, Hutchins regretted that law schools had reached out to social scientists for answers to legal problems.[84] He credited them with exposing "the masses of social, political, economic, and psychological data which lay hidden in the cases."[85] Nonetheless, while "the social scientists seemed to have a great deal of information, we could not see and they could not tell us how to use it."[86] He then turned to evidence law:

> For example, the law of evidence is obviously full of assumptions about how people behave. We understood that the psychologists knew how people behave. We hoped to discover whether an evidence case was "sound" by finding out whether the decision was in harmony with psychological doctrine. What we actually discovered was that psychology had dealt with very few of the points raised by the law of evidence; and that the basic psychological problem of the law of evidence, what will affect juries, and in what way, was one psychology had never touched at all.[87]

Hutchins closed with "the hope of some day striking some mutual sparks" between law and psychology.[88] That day would be far off.

Wigmore had seemingly vanquished Münsterberg in the first contest, yet he had elided the issue of how well lawyers

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81. *Id.*

82. *Id.*

83. *See* Robert Maynard Hutchins, *The Autobiography of an Ex-Law Student*, 1 U. CHI. L. REV. 511, 512 (1934). Interestingly, modern commentators who rely on the Hutchins & Slesinger articles seldom take up Hutchins's recantation.

84. *Id.* at 512.

85. *Id.*

86. *Id.* at 513.

87. *Id.*

88. *Id.*

and juries actually assessed credibility. In the second contest the brilliant Hutchins had reconsidered his own stance, concluding that legal scholars need not surrender to psychology, but rather should "formulate legal theory" that is consonant with what he termed the "rational sciences of Ethics and Politics."[89] For present purposes, what matters is Hutchins's belated recognition that evidence and trials centered on ideas, values, and institutions that significantly differed in some respects from scientific psychology. His assessment that psychology did not hold all the answers, however, did not imply that evidence law did.

III. CREDIBILITY AND THE TESTIMONIAL ASSUMPTIONS

If the law uneasily eschews modern psychology, it has been simultaneously reticent to spell out its alternative vision. At its root, credibility raises three questions about a witness's testimony: Is he lying?; Is he (honestly) mistaken?; Or is he accurate? Modern evidence law is oddly silent about how we answer these critical questions. Over forty years ago, Mason Ladd observed that while the modern trend is toward "letting in more evidence," the law "does not answer the question of whether a witness is mistaken or intentionally falsifying."[90] The case law fixates on legal rules governing admissibility and the trial judge's broad discretion; it focuses on what is put before the jury, not how the jury may (or should) resolve credibility. The commentators too are largely quiet about the assumptions by which we sort testimony as false (lies), mistaken, or accurate, dwelling instead on particular rules or practices governing impeachment and rehabilitation. The peculiar epistemology (or psychology) underlying evidence law is seldom addressed on its own terms, largely on the assumption that it is consonant with popular thought.

A. *Testimonial Assumptions*

Briefly stated, there are four testimonial assumptions that must be made before testimony may be considered

89. *Id.* at 517.

90. Ladd, *supra* note 11, at 239.

accurate.[91] First, the witness accurately *perceived* the fact. Second, she has accurately *recalled* the perception while testifying. Third, her spoken words at trial (testimony) accurately describe her memory of the event (*narration*). And fourth, she is *sincerely* ("truthfully") describing this memory.

Before discussing how these assumptions play out in each of the five recognized modes of impeachment, it is useful to consider generally the common law's epistemology because, one assumes, it rests on popular notions about how people observe, remember, and narrate their experiences—so called "common knowledge." Neither the case law nor the legal commentary is awash in a careful discussion of the testimonial assumptions.[92] For example, the venerable McCormick's handbook relegates "credibility" and its assumptions to a footnote in its chapter on impeachment.[93] The reader purportedly understands that credibility turns on one's common sense evaluation; thus, the testimonial assumptions are themselves assumed. And to the extent that one is uneasy about this brand of epistemology, the

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91. *See* MCCORMICK, *supra* note 7, § 62, at 308; 27 WRIGHT & GOLD, *supra* note 5, § 6092, at 593 ("Accuracy is a function of the existence or non-existence of the four 'testimonial assumptions.' These are (1) that the witness perceived the fact, (2) that she accurately recalls her perception, (3) that she truthfully states her recollection, and (4) that she expresses her testimony in a way that permits it to be understood by the jury in the manner intended by the witness."); 22 WRIGHT & GRAHAM, *supra* note 10, § 5177, at 143-44.

92. Understandably, the commentators often focus on particular rules, doctrines, and practices that describe or delimit the lawyer's examination of the witness. *See, e.g.*, PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 22.01 (2d ed. 2006); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.18 (3d ed. 2009); ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 9.02 (2d ed. 2004); 2 SALTZBURG, MARTIN & CAPRA, *supra* note 23, § 6.07.02[6].

93. MCCORMICK, *supra* note 7, § 33, at 147 n.5, states in part:

> Credibility is dependent on the witness's willingness to tell the truth and his ability to do so. In turn, his ability to tell the truth as to an event of which he purports to possess personal knowledge is the product of his physical and mental capacity, actual employment of the capacity to perceive, record, and recollect, and his ability to narrate. Impeachment of a witness may be directed to one or more components of credibility. Thus the objective being pursued in any given situation may be to draw into question the accuracy of the witness's perception, recordation, recollection, narration, or sincerity.

basic premises underlying the modern trial are shaken to their foundation.[94]

1. *The Assumption of Perception*. We assume that human beings perceive external reality through the five senses: sight, hearing, touch, taste, and smell. Lay witnesses are required to have personal knowledge of the facts to which they testify.[95] Evidence law effectively equates "sensory perception with knowledge":

> If experience and science tell us anything, it is that there is a link between our sensory perception and objective reality. This is, in fact, the essential epistemological assumption underlying modern notions of proof and is embodied in Rule 602's equating sensory perception with knowledge.[96]

Absolute certainty is not required. Witnesses may testify in terms of what they "think" or "believe" or are "sure of," even though they are less than one hundred percent certain.[97] Speculation, though, is not acceptable. Witnesses may not testify, for example, to what another person "thought" or "knew" since mind reading is not within the range of the five senses.[98] Case law also categorically forbids one witness from testifying whether another witness is lying or truthful about a fact.[99]

This approach to perception is, as we have seen, solidly rooted in our common experience and popular culture.[100] No

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94. *See* Elizabeth F. Loftus et al., *Repressed and Recovered Memory*, *in* BEYOND COMMON SENSE, *supra* note 4, at 177, 190 ("Unfortunately for the legal system, there is no reliable way to listen to a memory report [in repressed memory claims] and judge whether it is true or false."). And unfortunately for psychologists, this largely explains why they are often excluded as witnesses.

95. FED. R. EVID. 602.

96. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6022, at 215. Discussing FRE Rule 602, the same authors carefully distinguish observations and sensory perceptions from "comprehension," but quickly note that witnesses are "presumed" to have experiences "common to society." A child witness or testimony by a "lunatic" may necessitate more foundation. *Id.* at 227.

97. *See* MCCORMICK, *supra* note 7, § 10, at 49-50; *see also* 27 WRIGHT & GOLD, *supra* note 5, § 6023, at 224 ("[A] relatively minimal level of perception is required[;]perceptions [that] are sparse or shallow usually [run] to the weight of the testimony . . . .").

98. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6022, at 215-16.

99. *See, e.g.*, Liggett v. People, 135 P.3d 725, 729-32 (Colo. 2006).

100. *See supra* text accompanying notes 47-48.

school of psychology or neurology underwrites these everyday notions of perception, yet they are readily embraced in taverns and bowling alleys, as well as courtrooms and law schools. Rule 602, then, defers to ordinary lay understanding: when questions surface about whether a witness has personal knowledge, the judge determines only whether a reasonable jury could find that the witness has such knowledge.[101] This shared governance reflects shared assumptions.

2. *Assumptions About Memory*. If the law equates personal knowledge with sensory perceptions, memory is concerned with how that knowledge is retained and preserved. The assumption is that perceptions are embedded in our memories, which may be recalled for later use. Its key elements are that memories are stable and retrievable. True, some events are completely forgotten or recalled only with difficulty and in sketchy detail. But this is normal and to be expected, just as one might not possibly perceive the whole event in the first place.

Courts and commentators describe memory in terms of "recollection" or, more revealingly, a "record" of events that have transpired.[102] An analogy is sometimes made to a "video camera": the lens capture images which are recorded by the camera's memory for later playback when needed.[103] While the analogy is useful, the "video camera" view must be qualified in two respects. First, it is distressingly mechanical yet also implies a biological process that has yet to be accepted by science.[104] Second, the assumption of stable, retrievable memories took root long before the advent of photography or, certainly, digital and video technology. Its long history and deep embodiment in popular culture effectively negates concerns that science

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101. FED. R. EVID. 602.

102. *See* 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 601:1, at 322, § 607:1, at 441 (6th ed. 2006) ("record and recollect"); MCCORMICK, *supra* note 7, § 33, at 147 n.5, § 62, at 304-05 (listing both "recall" and "record").

103. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6011, at 139 ("[M]any scientists dispute the validity of the video camera theory of memory.").

104. *See id*. The same authors assert that "innumerable" factors affect "narrative, perceptual and recall abilities" which are "hotly debated within the scientific community . . . ." *Id.* at 156; *see also id.* at 592 n.3 ("[F]urther particularization within the Federal Rules of some aspects of impeachment law would be a good idea.").

has yet to explicate memory's precise workings. Moreover, the assumption of stable, retrievable memories is perhaps the core testimonial assumption: unless one accepts it, the belief that a trial may function as a search for the truth is whimsical at best. Indeed, absent the assumption, a great many institutions and segments of our culture, not the least of which is history itself, is questionable.[105] Yet there are many respected authorities that assail the assumption of stable memories, a challenge that threatens the core of trial evidence.[106]

In short, we depend on this assumption in ordering our daily lives. A resolute belief in stable, retrievable memories is part of our cultural bedrock which also forms the core assumption of evidence law. We readily recall what we had for dinner last night yet are not at all alarmed that we cannot remember what we ate a year ago today. We have a good feel for memory's limits.

3. *Assuming Narrative Accuracy*. A witness's testimony consists of her attempt to describe in words what she remembers having perceived. The assumption is that witnesses articulate their memories with as much accuracy as their vocabulary, education, life experiences, and personality permit. The witness essentially verbalizes to the jury the memories she recalls.

This assumption of narrative accuracy is also firmly embedded in popular culture. Our social fabric depends upon countless daily conversations during which information is conveyed and exchanged. And despite our reverence for the written word and recent penchant for electronic communications, most of this communication is oral. Discussions of narrative accuracy are usually overshadowed by concerns relating to perception and memory, yet narration is the medium by which the witness transfers her information to the trier of fact. An unheralded, frequently overlooked feature of the assumption of narrative accuracy is the primacy of witness testimony in the modern trial. Witnesses are expected to recount orally their memories before the jury; the preference is for a "live" performance. And for the same reason, we generally exclude

105. *See generally* JOYCE APPLEBY, LYNN HUNT & MARGARET JACOB, TELLING THE TRUTH ABOUT HISTORY 198-237 (1994).

106. *See infra* text accompanying notes 110-11.

hearsay statements, even those uttered by the very witness, because they were made other than "while testifying" at the trial or hearing.[107]

The difficulties inherent in narration cannot be gainsaid; this is why good radio play-by-play announcers are well-paid. Most people shy away from public speaking, a fear more pronounced when one is placed under oath and subject to cross-examination before a jury's close, discerning gaze. Yet the assumption is that the witness's words accurately and meaningfully communicate her personal knowledge to the trier of fact. The general bar against leading questions on direct examination rests largely on the premise that the witness should choose her own words in describing her memories. By contrast, leading questions on cross-examination are usually intended to test the witness's resolve to describe things one way and not another.[108]

4. *Assuming Sincerity*. Finally, it is assumed that the witness is truthfully recounting what she knows in her testimony. Here, too, the assumption is part of our social fabric. People are normally sincere and trustworthy in what they relate to others. Yet the assumption as usually stated seems Pollyannaish and politically correct, at least in the sense that it emphasizes a human proclivity to be accurate and honest. Usually unstated is our general knowledge that all people tell lies on occasion. This too is part of the human condition, a dark fact too well understood to require demonstration. Perhaps it would be more accurate to restate the assumption of sincerity along the following lines: People are sometimes honest and sometimes deceitful, and we assume that the trier of fact is capable of distinguishing the one from the other. After all, we encounter deceit, lies, and distortions on a daily basis, experiences that prepare us to detect insincerity in sworn testimony. And while our confidence may be misplaced, we are without scientific or religious tests that present viable alternatives. In short, we must "deal with it."

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107. FED. R. EVID. 801(c).

108. *See* FED. R. EVID. 611(c).

B. *Coda: The Testimonial Assumptions, Popular Beliefs, and Modern Psychology*

Although commentators observe that the "epistemological basis for modern evidence law . . . is subject to challenge,"[109] there has not been much of a contest perhaps because this "epistemology" itself remains enigmatic, underdeveloped, and largely unexplained. Nonetheless, evidence law's testimonial assumptions roughly reflect popular thinking. And from this congruence, largely assumed, trials gain their legitimacy. If the public defers to law and lawyers it is generally because there is such a broad swath of consensus.

To be sure, psychologists and social scientists have attacked many aspects of the testimonial assumptions. Those regarding perception and memory have been particularly lambasted.[110] Yet modern psychology is itself divided among competing approaches that have yet to prove their worth at trial.[111] Unclear is why evidence law should defer to one or another school of psychology, especially in the absence of a dominant paradigm that significantly invalidates the common law's testimonial assumptions.[112] Case law excluding expert psychological testimony as unhelpful or as lacking reliability under Rule 702 provides even less reason to make modern psychology the arbiter of evidence rules themselves.[113] To do so would sacrifice the hard-won legitimacy of the modern trial for the latest trends

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109. 27 WRIGHT & GOLD, *supra* note 5, § 6022, at 216 n.10; *see also* Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 992-93 (2007).

110. *See, e.g.*, Loftus et al., *supra* note 94, at 178-90. With respect to repressed memory, the authors discuss the chasm between popular beliefs (i.e. what a jury might believe) and the "psychological community," which is more skeptical. *Id.* at 189.

111. *See id.* at 189-90; *see also* David L. Faigman, *The Limits of Science in the Courtroom*, *in* BEYOND COMMON SENSE, *supra* note 4, at 304-13.

112. *See* THOMAS HARDY LEAHEY, A HISTORY OF PSYCHOLOGY 365-76 (1980) (discussing the "disarray" surrounding cognitive psychology where three alternative paradigms contend for primacy).

113. In a sense, the Federal Rules of Evidence, through Rule 702, contain a self-defense mechanism that protects defendants from external threats to their coherence. For a survey of the issues, see MCCORMICK, *supra* note 7, §§ 20-26, at 113-26.

in academic styling. Hutchins' hope in the 1930s of some day "striking sparks" between law and psychology has yet to kindle a flame.[114]

IV. THE COMMON LAW MODES OF IMPEACHMENT AND THE TESTIMONIAL ASSUMPTIONS

The common law recognizes five modes of attacking or supporting credibility: (1) bias or interest; (2) defective testimonial capacity; (3) the witness's truthful character; (4) prior statements; and (5) contradiction.[115] These modes are not doctrinally integrated. Rather, they emerged haphazardly as curbs on abusive cross-examination and in no way embody a coherent system of proof determination.[116] Their common shortcoming is an obsessive preoccupation with perjury and concomitant insensitivity to the problem of mistaken testimony.[117] It warrants emphasizing that the application of any of the five modes is left entirely to the discretion of trial counsel. The law does not insist upon their use nor does it impose rigid foundations. Their application at trial, then, is ad hoc, contingent, and capricious, depending greatly on the tactical skill, judgment, and preparation of trial counsel. The five modes are at bottom techniques born of cross-examination, not analytic categories,[118] as illustrated by a leading case.

In *United States v. Abel*,[119] we see four of the five modes at work, although the Supreme Court's decision emphasized only bias impeachment. Two men, Abel and Ehle, were charged with robbery. In exchange for a plea deal, Ehle testified for the prosecution about Abel's involvement in the robbery. Abel, however, asserted that he had nothing to do with the robbery and that Ehle was lying just to get a better deal for himself. To prove this, the defense called a witness,

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114. *See supra* text accompanying notes 86-87.

115. MCCORMICK, *supra* note 7, § 33, at 147-48.

116. *See supra* text accompanying notes 41-42.

117. *See* Ladd, *supra* note 11, at 241; Uviller, *supra* note 5, at 779.

118. Uviller advances a more refined typology that identifies six "species" of credibility testing that he places among three categories: substantive (contradiction, inconsistency, and incoherence), motivational (bias, character), and behavioral (demeanor). Uviller, *supra* note 5, at 781-87.

119. 469 U.S. 45 (1984).

Mills, who testified that Ehle had earlier confided to him that he, Ehle, would falsely implicate Abel in the robbery in order to get a break from prosecutors. The government responded by later recalling Ehle to testify that all three men—Abel, Mills, and Ehle— belonged to a prison gang that obligated members to lie and commit crimes in order to protect fellow members.[120] *Abel* thus features the following impeachment modes: (1) bias (Ehle's search for a deal and Mills' duty to lie on Abel's behalf); (2) specific instances of untruthful conduct by a witness (Ehle's stated intent to lie about Abel); (3) a prior inconsistent statement (Ehle's alleged confession of perjury to Mills was, of course, inconsistent with his trial testimony implicating Abel); and (4) contradiction (Mills contradicted Ehle's testimony implicating Abel).

The following sections briefly describe each mode of impeachment and rehabilitation while assessing their fidelity to the common law testimonial assumptions, especially their relationship to popular culture and the community's understanding of how people observe, remember, and relate their knowledge. All reflect the modern trial's unconditional faith in adversary procedure and cross-examination, devices better suited for testing the opponent's proof than determining historical truth.[121] Of special concern is how well each mode protects against honest but mistaken testimony as well as perjury.

A. *Bias and Interest*

A witness's bias or interest is perhaps the most readily familiar avenue of impeachment. In everyday life we constantly assess other people's interests in myriad situations, whether buying cars or interviewing job applicants. When we ask whether someone is "objective" we are in effect assaying the risk that some bias or interest may affect the accuracy of what she says. Without overstating the matter, a person's interest or disinterest is inevitably considered in the same reflexive way that we observe her demeanor.

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120. *Id.* at 47.

121. *See* LANGBEIN, *supra* note 12, at 247 ("Contemporaries knew that the purpose of cross-examination was to win, whether that entailed seeking or distorting the truth."); *see also id.* at 270.

The law of evidence has long recognized the problem of bias and interest. Early rules woodenly excluded testimony by interested witnesses as "incompetent."[122] By the late eighteenth century, however, the law shifted to permit such testimony: theoretically, any interest now ran to the witness's credibility and the weight of her testimony; procedurally, the introduction of trial counsel and the opportunity to cross-examine allayed fears that a witness's bias would not be properly exposed to the trier of fact.[123]

Modern evidentiary doctrine highly esteems impeachment by bias, which has constitutional footings as well.[124] A cross-examiner has virtually free rein to explore a witness's interest. Multiple questions are routinely permitted regardless of the answers. Further, counsel is not bound by the witness's answers. Extrinsic evidence (i.e. other witnesses) may be called to prove the bias or interest of a target witness who denies or minimizes the influence.[125] Bias impeachment is so prized that the Supreme Court

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122. *See* MCCORMICK, *supra* note 7, § 65, at 313-17.

123. Bias impeachment doctrine dimly reflects older, outmoded cultural assumptions that gave rise to antiquated rules rendering interested persons incompetent to testify. The fear was that interested persons would succumb to perjury, a risk compounded by the eighteenth-century British reward and Crown Witness systems. *See generally* LANGBEIN, *supra* note 12, at 209-28 (discussing the problem of accomplice testimony and coerced confessions); *see also id.* at 217 ("We see in the Twelve Judges' opinion [in *Atwood and Robbins*, an accomplice-witness case] an indication of how primitive the theoretical basis of the law of evidence remained as late as 1787. The centrality of competency to the thinking . . . reflected the world of contemporary civil practice that the judges mostly inhabited, where the testimonial disqualification of parties and other witnesses for interest (competency) played such a prominent role in restricting the receipt of oral evidence at trial.").

124. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974) (finding that bias impeachment inheres in the constitutional right to confrontation); *see also* GIANNELLI, *supra* note 92, § 22.04[A], at 265-66.

125. *See Abel*, 469 U.S. at 51; *see also id*. at 52 ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment." (citations omitted)). The trial court has discretion to trim the cross-examination or limit the use of extrinsic evidence as provided by FRE Rule 403. *See, e.g.*, Lewy v. S. Pac. Transp. Co., 799 F.2d 1281, 1297-98 (9th Cir. 1986); *see also* GIANNELLI, *supra* note 92, § 22.04, at 263-66.

recognized that it is inherent in the very concept of "relevant" evidence and permissible despite the absence of a specific rule.[126]

Bias and interest are protean, occurring in innumerable ways and forms across the entire web of human relationships–social, financial, emotional, and political. A bias or interest may motivate a lie or induce mistakes, as the Supreme Court recognized in *United States v. Abel*:

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.[127]

Bias, then, is a familiar product of human nature which need only pass the minimal threshold of relevancy.[128]

Bias or interest potentially touches all four testimonial assumptions. Sincerity is the most obvious. Self-interest or a relationship with others may lead a witness to "slant" or "fabricate" testimony.[129] These interests may be financial, emotional, or venal. In criminal cases, accomplices are frequently tempted to trade testimony for favorable plea deals.[130] Cash rewards may also trigger fabricated

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126. *E.g., Abel*, 469 U.S. at 50-51. *Abel* discussed FRE Rules 401 and 402, explaining that "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." *Id.*

127. *Id.* at 52.

128. *See* Outley v. City of N.Y., 837 F.2d 587, 594 (2d Cir. 1988) ("The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experience of human nature, or, as it is usually put, they should not be too remote." (quoting 3A WIGMORE ON EVIDENCE § 950, at 795 (Chadbourn rev. ed. 1970))). Modern commentators discuss only the doctrine and foundation for bias impeachment, deeming the underlying rationale apparently too familiar for discussion. *See, e.g.*, PARK, *supra* note 92, § 9.10, at 497-501.

129. *Abel*, 469 U.S. at 52.

130. For this reason, post-arrest statements by accomplices are generally excluded because of their dubious reliability. *See, e.g.*, Williamson v. United States, 512 U.S. 594, 608 (1994).

testimony.[131] Kinship and friendship may also motivate a lie. (What parent wouldn't be tempted to lie on his child's behalf?) The lie may be one that favors or hurts a party.[132] Gang membership or political affiliations may also give rise to bias, depending on circumstances.[133]

Yet while bias may induce perjury, it also operates unconsciously to produce sincere yet mistaken testimony.[134] Thus, it may affect a person's perceptions, memory, or narration (word choice) of events. The trite-but-true saying, "We see what we want to see" nicely captures bias's role in subconsciously shaping our observations.[135] And despite our general belief in stable, "recorded" memories, we understand that over time memories fade like washed-out videos or yellowing photographs, leaving bleached images selected by the mind's eye because they conform to our predilections. Put differently, bias shapes how and what we remember of even life's most important events. Narrative accuracy may also be sacrificed by bias. Our choice of words

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131. *See, e.g.*, United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994). This is an old problem. *See* LANGBEIN, *supra* note 12, at 148.

132. *See* S. Pac. Transp. Co. v. Lewy, 799 F.2d 1281, 1298 n.11 (9th Cir. 1986).

133. *See Abel*, 469 U.S. at 54 (explaining how membership by witnesses and defendant in a prison gang, the Aryan Brotherhood, was relevant to bias because the gang's credo required members to lie and commit crimes to protect other members); United States v. Arias-Izquierdo, 449 F.3d 1168, 1180 (11th Cir. 2006) (holding that membership in Cuban Communist party "did not, by definition," impugn the credibility of key witnesses); United States v. Keys, 899 F.2d 983, 987 (10th Cir. 1990). In *Keys*, the prosecution failed to prove that the defendant and witnesses belonged to a prison gang, but defendant's statement that "he controlled sixty soldiers in the prison system who would do him favors, including breaking the law," was relevant to prove fear-induced bias. 899 F.2d at 987; *see also* State v. Brown, 739 N.W.2d 716, 720 (Minn. 2007). *Brown* held that the defense failed to lay a foundation of "common gang membership" and that "membership in a gang, by itself, does not necessarily have a direct bearing on the fact of bias or the source and strengths of the witness's bias." 739 N.W.2d at 720.

134. *See Abel*, 469 U.S. at 52.

135. See RASHOMON (Daiei Motion Picture Co. Aug. 25, 1950), a classic film portraying different versions of the same event from the varying perspectives of the witnesses. The aphorism "we see what we want to see" is firmly embedded in our culture and used is diverse settings. *See, e.g.*, Carlo Ungaro, *Seeing What We Want to See*, N.Y. TIMES, Feb. 2, 2008, http://www.nytimes.com/2008/01/22/opinion/22iht-edungaro.3.9407834.html (applying this aphorism to military involvement in Afghanistan).

often reflects deep-seated convictions and feelings which may be effectively exposed on cross-examination, where the witness's responses are necessarily more extemporaneous than carefully crafted written statements.

Not only does bias often affect all four core testimonial assumptions, it also cuts across other modes of impeachment.[136] *Abel* illustrates bias's legal dexterity. As we have seen, Mills' testimony impeached Ehle under four different modes: (1) bias, (2) a specific instance of untruthful conduct, (3) a prior inconsistent statement, and (4) contradiction.[137] And the befuddled lawyer who asks, "Which one is it?" is asking the wrong question because the *Abel* Court trenchantly observed that the proponent may choose any or all depending on the situation.[138]

Regardless of bias's probative value, its familiarity to lay jurors, and rules that favor its use, lawyers are not obligated to pursue a witness's bias or lack thereof. Charitably, we may say that bias is left to the lawyer's tactical judgment; less charitably we must appreciate that its effective use will turn on the lawyer's creativity, preparation, and trial skills. There is no commanding principle that directs an exploration of a witness's interest in a case, much less that it be done effectively. In extreme cases a criminal defense lawyer's negligence may give rise

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136. Where bias implicates other forms of impeachment, some courts have ordained hybrid procedures, such as requiring that the witness be given an opportunity to explain or deny a prior statement regarding bias. Rules of this sort straddle traditional bias impeachment (wide open) and the use of prior statements. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6095, at 649-51. When faced with overlapping impeachment modes, most courts seem to permit the proponent to select whichever is most advantageous subject to the discretion of the trial judge. *See* MCCORMICK, *supra* note 7, § 39, at 176-77. *But see* GIANNELLI, *supra* note 92, § 22.04[B], at 266 (asserting that "most" jurisdictions require cross-examination of the witness before permitting extrinsic proof of the bias).

137. *See supra* text accompanying notes 119-21.

138. *Abel*, 469 U.S. at 56. The issue appealed in *Abel*, of course, did not involve Mills' testimony attacking Ehle, but rather Ehle's rebuttal testimony regarding gang members' duty to protect other members. Ehle's rebuttal testimony was relevant to Mills' gang-related bias yet it also constituted a specific instance of Mill's untruthful character, which could not be proved by extrinsic evidence (Ehle) under the rules. *Id.*; *see* FED. R. EVID. 608(b). The Court's short answer was that extrinsic evidence could be used to prove Mills' bias; thus, it did not matter that it was inadmissible under other rules. *Abel*, 469 U.S. at 55-56.

to an ineffective assistance of counsel claim,[139] but otherwise bias is left to the lawyers and the realm of caprice.

In sum, bias seemingly merits "most-favored rule" status in impeachment doctrine. Its protean form, its ubiquity in everyday life and corresponding lay familiarity, its range across all four testimonial assumptions, and its overlap with other modes of impeachment combine to make bias the most accessible, readily understandable, and useful form of impeachment.

B. *Defects in Testimonial Capacity*

The law of evidence assumes that witnesses have four core "capacities."[140] They are the capacity to be sincere (to testify truthfully), to perceive accurately through the five senses, to remember (record) those perceptions, and to narrate (describe) those memories later while testifying in court. There is nothing particularly esoteric about them. In daily life we constantly factor in a person's bad vision, poor hearing, immaturity, weak memory, or inarticulate ramblings when assessing his credibility. Few would credit a three-year-old child in the same way we might assess a thirty-year-old adult who witnessed a car accident.

Under the common law, a severe defect in one capacity or another might result in a finding of incompetency, which disqualified the person as a witness.[141] The modern approach, however, deems all persons qualified to be witnesses while permitting robust impeachment of any defective capacity.[142] Nonetheless, the law focuses on only

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139. *See, e.g.*, Daniels v. Knight, 476 F.3d 426, 435 (7th Cir. 2007) ("Here, Daniels' trial counsel made a tactical decision to subject one of Daniels' cohorts to more intensive cross-examination, while going easier on the traumatized son of the murder victim. Because Streett had an independent, non-tainted basis for his in-court identification, we find the conduct of Daniels' trial counsel conduct fell within the wide range of reasonable professional assistance.").

140. *See supra* text accompanying notes 91-92.

141. *See supra* text accompanying note 28.

142. *See supra* text accompanying notes 30-31; *see also* 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 673 ("[A] basic assumption underlying Rule 601 is that capacity evidence will be admissible to expose reliability problems associated with testimony from such witnesses."). Some cases permit disqualification of an individual so lacking in one or more capacities that she cannot provide relevant testimony. *See* GIANNELLI, *supra* note 92, § 18.02, at 218 n.8.

three of the four capacities: perception, memory, and narration. The fourth capacity, sincerity, is subtracted more or less out of despair. Evidence law recognizes no religious or scientific measures of one's capacity for sincerity.[143] The closest the law comes to grappling with a witness's capacity for sincerity is the oath/affirmation requirement and inquiries into a witness's character for truthfulness (discussed below).[144]

Impeachment for defects in testimonial capacity parallels bias impeachment in most respects. Like bias, there is no specific rule that governs this practice in the FRE. Rather, it too is deemed integral to the relevance of the witness's testimony under Rule 401.[145] Defects in one's capacity to perceive or to remember directly impact the witness's personal knowledge, a determination entrusted to the trier of fact by Rule 602.[146] The defect may be one present at the time of perception (bad eyesight) or while testifying (intoxication).[147] Wide-latitude is permitted on cross-examination to explore the defect. This may include

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143. Religious inferences are forbidden by FRE Rule 610. Polygraphs, voice stress analyzers, and other "truth detectors" are geared toward the reliability of particular testimony, not the witness's capacity as such. Regardless, they are given a chilly reception in courts when not excluded altogether. *See, e.g.*, United States v. Scheffer, 523 U.S. 303 (1998) (holding that a *per se* rule excluding polygraph evidence did not violate defendant's constitutional right to present a defense).

144. FED. R. EVID. 603 (oath or affirmation requirement); FED. R. EVID. 608 (witness's character for truthfulness); *see infra* text accompany notes 163-86 (impeachment related to untruthful character).

145. FED. R. EVID. 401; *see* GIANNELLI, *supra* note 92, § 22.05, at 267 ("Mental condition is sometimes relevant to credibility."); 2 GRAHAM, *supra* note 102, § 607:4, at 484 ("The capacity and actuality of a witness' perception, his ability to record and remember sense impressions, and his ability to comprehend questions and narrate are relevant to an assessment of the weight to be given a witness' testimony.").

146. FED. R. EVID. 602; *see* 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 673-74 ("[T]he admissibility of capacity evidence is an essential part of the scheme created by the Evidence Rules to deal with unreliable testimony."); Ladd, *supra* note 11, at 258. Ladd forecasts the greater use of psychiatrists with "respect to the capabilities of subnormal witnesses . . . ." Ladd, *supra* note 11, at 258.

147. *See* 2 GRAHAM, *supra* note 102, § 607:5, at 493 (drug or alcohol use at the time of the event or while testifying may affect the witness's ability to perceive, record, recollect, and narrate); *see also* GIANNELLI, *supra* note 92, § 22.05, at 267.

an in-court demonstration, as where a witness's vision or hearing is tested before the trier of fact. Like bias, defects in testimonial capacity is also deemed a non-collateral issue, which means that the proponent (usually the cross-examiner) need not "take the answer."[148] Extrinsic evidence (other lay or expert witnesses) may be used to prove up the defect,[149] subject to the trial judge's discretion under Rule 403 and Rule 611.[150]

When defects in capacity are within the realm of common sense and everyday experience, they may be proved through lay testimony and are readily understandable by the jury. The testimony may come from the target witness on cross-examination (usually) or from another witness with personal knowledge of the defect ("She wasn't wearing her glasses."). The case law draws no refined distinctions among defects pointed at perception, memory, or narration, settling instead for a rather generic approach to defective capacity. Suppose, for example, that a witness had five beers shortly before observing a car accident. At the scene he gave an incoherent account to police yet at trial his testimony is detailed, confident, and compelling. Cross-examination is readily permitted on the issue of intoxication, including how much he drank, in what time period, and how he "felt" ("Weren't you drunk that night?"). Other witnesses, including the police officer who interviewed him, may testify to opinions about the target witness's intoxication at the scene. How the alcohol may have affected his perception, memory, and narration (his statements to police at the scene) are left for the lawyers to argue in closing and the jury to sort through as best it can. The larger point is that

148. *See generally* MCCORMICK, *supra* note 7, § 44, at 206-08. McCormick asserts that where a witness suffers from an "abnormality" that affects her capacity to perceive or remember, "this condition is provable, on cross or by extrinsic evidence, to impeach." *Id.* at 208. In contrast, "defects of mind within the range of normality" are subject to the judge's discretion, particularly with respect to extrinsic evidence. *Id.* at 207.

149. *See* 2 GRAHAM, *supra* note 102, § 607:4, at 448; MCCORMICK, *supra* note 7, § 44, at 206; PARK, *supra* note 92, § 9.11, at 501; 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 674-75.

150. FED. R. EVID. 403 (allowing the judge to exclude relevant, otherwise admissible evidence); FED. R. EVID. 611 (providing that the judge has the power to control the mode and order of interrogation); *see* GIANNELLI, *supra* note 92, § 22.05, at 267 (asserting that there is no "hard and fast rule" on extrinsic evidence to prove sensory or mental defects).

alcohol, for example, may affect the various capacities very differently, yet our common experience comfortably blurs them together.

In assessing relevancy, though, it is helpful to distinguish among the three capacities. Defects in perception relate to flaws in one or more of the five senses: sight, hearing, touch, taste, and smell. Sight and hearing problems dominate the case law. Some defects, such as poor eyesight or partial deafness, may be permanent. Others may be temporary when induced by alcohol and drugs or caused by trauma. Although defective perception is usually keyed to observations of the underlying event (the car accident), a witness's drug or alcohol use while testifying is clearly relevant as well, although one might ask whether the concern here has more to do with memory (recalling the car accident) than perception (understanding the lawyer's questions). This example illustrates that while evidence law distinguishes perception from memory, it tracks popular usage by not insisting upon rigid definitions and by leaving the interaction of memory and perception largely unexplained. We commonly experience people with "bad memories," giving little thought to whether the problem is one of not grasping the question, an inability to "retrieve" the memory, or obliteration of the recorded memory itself. A witness's poor memory may be shown in different ways. She might admit the fact ("I have a poor memory"), another witness could offer a lay opinion ("I've known her well for years and she has a bad memory"), or an in-court experiment might test her memory.[151] Finally, people with limited language skills or other afflictions may be poor narrators of events.[152] The deficiency may arise because of age (young, old) or because the witness's lack of education or experience impoverishes her vocabulary. Thus, an eight-year-old child is ill-equipped to describe the speed of a car.

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151. There are several simple tests given to persons believed to be suffering from early onset dementia (i.e. Alzheimer's disease). The object here is not to diagnose dementia, but to show that the witness's capacity for memory is impaired. For an example of a "mini mental state examination," see The Forgetting: A Portrait of Alzheimer's, http://www.pbs.org/theforgetting/diagnosis/testing.html (last visited Feb. 9, 2010).

152. For example, Tourette's Syndrome affects the narrative capacity. *See* Nat'l Tourette Syndrome Ass'n, What is Tourette Syndrome?, http://www.tsa-usa.org/Medical/whatists.html (last visited Feb. 9, 2010).

In some cases expert testimony is necessary to show that a condition is relevant to the witness's testimonial capacity. The expert educates the court about how the witness's mental health history affected his capacity to perceive, to remember, or to describe events. Not all mental illnesses or disabilities are relevant.[153] Depression, for example, does not entail an inability to distinguish reality from fantasy like some other disorders. Witnesses who may be suffering from early stages of dementia may present an otherwise normal demeanor that requires qualification by a doctor or psychologist who can educate the jury about the witnesses' limits.

Yet the use of such experts invites a clash between modern psychology and evidence law, which, as we have seen, is based on a popular (lay) psychology with nineteenth-century roots.[154] Psychologists today often speak of "cognition" and contend that memory is dynamic and fluid.[155] The legal model of perception and memory as recorded images, like those of a digital camera, strikes them as simplistic or just wrong.[156] Put differently, the testimonial assumptions that form the core of modern evidence law are inconsistent with many of the presuppositions of modern psychology.[157] Evidence law, though, continues to trump modern psychology largely because the latter has failed to supplant popular thinking (literally) with another, acceptable model. Absent a compelling, acceptable alternative, there is little reason for the legal system to jettison its time-tested assumptions that are shared by the lay public generally and which serve to legitimate the outcomes of trials.

Case law on expert testimony offered to show defective testimonial capacities, especially that involving mental

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153. PARK, *supra* note 92, § 9.11, at 504-05; 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 686.

154. *See supra* text accompanying notes 12-13.

155. *See* Loftus et al., *supra* note 94, at 177.

156. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6011, at 139 ("[M]any scientists dispute the validity of the video camera theory of memory.").

157. *See* MCCORMICK, *supra* note 7, § 44, at 206 ("In truth, the limits of human powers of perception should probably be studied more intensively in the interest of a more accurate, objective administration of justice.").

illness, is sparse compared to bias impeachment.[158] Criminal defendants often lack the resources to pay experts of any genus, much less such an exotic species. The cost for any party must be weighed against the risk that a judge might exclude such testimony as unhelpful or insufficiently reliable under Rule 702.[159] And even where admissible, a jury may well tune out a PhD, whose seemingly odd, bookish ideas run counter to common sense and everyday experience.[160]

This clash is most evident where expert testimony is offered to show the limits of lay witnesses of normal capacities, particularly the shortcomings of eyewitness identifications. Despite "impressive" documentation showing the weakness of eyewitness testimony, courts have steadfastly resisted expert testimony on grounds that it provides little appreciable assistance to the trier of fact and usurps the jury's role of determining credibility.[161] The issue, though, is less one of usurpation and more one of why and when a jury needs expert help when the witness has normal capacities to perceive, to remember, and to describe (i.e. there is no "defect").

In sum, the doctrine governing defective testimonial capacities is squarely rooted in testimonial assumptions that are fully consistent with popular thinking. When lay and expert testimony conforms to those same assumptions, evidence law permits wide ranging inquiry on defective capacities. Nonconforming testimony not only conflicts with

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158. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 676 ("Attacking witness capacity sometimes raises difficult issues."). The problem of hypnotically refreshed testimony has sparked considerable debate in the courts and is excellent fodder for discussion in law school textbooks. *See, e.g.*, DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE (2d ed. 2008) (devoting roughly two pages to defects in capacity, *id.* at 441-43, and nearly eight pages to hypnotically refreshed testimony, *id.* at 33-41).

159. FED. R. EVID. 702; *see* Faigman, *supra* note 111, at 304-13.

160. Judges also factor in the "hired expert's tendency toward overstatement." 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 691.

161. *See id.* at 705. The authors point to a "new willingness" by the courts to permit such expert assistance, but it is unclear whether this evinces a sea-change in thinking. Nor is it clear whether the "new willingness" stems from dissatisfaction with the prevailing legal model or a loss of faith in trial lawyers' ability to expose eyewitnesses' fallibility. *Id.* at 706.

controlling doctrine, it threatens the very legitimacy of fact finding in the modern trial.

C. *Truthful Character, Specific Instances of Untruthful Conduct, and Prior Convictions*

Evidence of a witness's truthful character is but another way of asking if he is a liar. We are comfortably familiar with the vague but compelling idea that people have a character trait for truthfulness, some people having greater regard for "truthfulness" than others.[162] Since the jury is blissfully ignorant of witnesses' backgrounds, the law provides a clumsy mechanism for proving their truthful character, positive or negative. Thus, for example, in *United States v. Abel* it was relevant that several key witnesses, as well as the defendant, belonged to a secret prison gang whose members were sworn to lie on one another's behalf.[163]

No other form of impeachment has provoked more confusion and criticism. The problems are partly triggered by awkward rules but the real difficulty may lie at the core of what is meant by "truthful character," its relationship to the common law testimonial assumptions, and an undue fixation on perjury.

In contrast to the free-market principles regulating evidence of bias and defects in testimonial capacity, impeachment of a witness's character for truthfulness is closely regulated by Rules 608 and 609.[164] The rules are concerned with a single, ostensibly narrow character trait: "truthfulness."[165] And the truthful character must be that of

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162. I will generally speak of a "truthful character" with the understanding that it may be more or less in certain people. This minimizes the need to distinguish constantly between "truthful" and "untruthful" character.

163. 469 U.S. 45, 54 (1984).

164. FED. R. EVID. 608, 609.

165. *See* 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, PRACTICE AND PROCEDURE: EVIDENCE, § 6117, at 12 (Supp. 2009). As originally drafted, Rule 608 obliquely addressed "credibility", which caused undue confusion about whether the rule applied more broadly than to a witness's truthful character. FED. R. EVID. 608. The 2003 amendment to Rule 608 unambiguously limits the rule to a witness's truthful character. FED. R. EVID. 608 advisory committee note (amended 2003).

a "witness."[166] Together, Rules 608 and 609 regulate three forms of proof: (1) the use of character witnesses, positive or negative; (2) prior specific instances of conduct relevant to truthful character; and (3) prior criminal convictions.[167] We will consider the doctrines regulating this form of evidence before turning to broader policy issues.

Character witnesses provide testimony about *another* witness's (the "principal's") truthful character. The law assumes that all witnesses have the requisite (good) character for truthfulness until there is an assertion to the contrary, although it may be more accurate to say that until a witness's truthful character is attacked, the court will not spend time on the subject. Character witnesses may be used for the express purpose of proving the principal witness's character for *untruthfulness*. No evidence of *truthful* character is permitted unless the principal witness has been attacked for having an "untruthful" character. Proof that a witness is mistaken or even lying is not sufficient; the assertion must be that the witness is a "liar" generally.[168]

Character witnesses may testify in the form of reputation or opinion once it is established that they have sufficient personal knowledge of the principal witness.[169] Reputation demands a character witness's familiarity with gossip about the principal's truthful character (good or

166. The rules apply to all witnesses regardless of the content of their testimony, lay or expert. Hearsay declarants' character for truthfulness may also be shown. FED. R. EVID. 805, 806.

167. FED. R. EVID. 608, 609.

168. *See* FED. R. EVID. 608(a) ("[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."). The character attack is most often launched on cross-examination of the principal witness, but it may also be leveled during an opening statement—"We'll prove that Witness X is a liar." Regardless of form or timing, evidence of a principal witness's truthful character is thereafter admissible. *See* 28 WRIGHT & GOLD, *supra* note 5, § 6116, at 66.

169. *See* United States v. Whitmore, 359 F.3d 609, 616-18 (D.C. Cir. 2004) (finding that the trial court properly exercised its discretion when excluding defense character witnesses offered to prove the untruthful character of a law enforcement officer called by the prosecution, because the defense failed to provide a sufficient foundation for their reputation and opinion testimony; one witness, a reporter, wrote a story involving the cop, another was a "local defense counsel" who proffered an opinion about the cop's reputation among the "court community," and the third was an "acquaintance" from the neighborhood where the cop "worked"); 2 GRAHAM, *supra* note 102, § 608:3, at 576.

bad).[170] Opinion testimony requires sufficient contacts upon which to base a helpful opinion about the principal witness's truthful character.[171] Nonetheless, either foundation is wholly conclusory because the direct examiner may not elicit any specific conduct to support the opinion or reputation.[172] The evidence, though, must relate only to the principal witness's truthful character, not any other trait. Finally, neither a character witness nor any other witness may testify that some other witness is testifying truthfully or accurately.[173]

Rule 608(b) commands that specific instances of one's truthful character may only be brought out on cross-examination.[174] And because cross-examiners are most often focused on impeaching a witness's credibility, such specific conduct is inexorably negative, consisting of prior deceitful acts, lies, and misrepresentations of all varieties.[175] Effective cross-examiners ask about the details, a process that makes the prior lie more "vivid" while permitting multiple questions regardless of the answers.[176] Any witness, lay or expert, may be cross-examined about his prior untruthful conduct.[177] Character witnesses may be cross-examined

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170. *See* FED. R. EVID. 803(21).

171. *See* FED. R. EVID. 701.

172. *See* FED. R. EVID. 608(b).

173. *See, e.g.*, Liggett v. People, 135 P.3d 725, 729-32 (Colo. 2006). *Liggett* adopts the majority rule that finds such questions "categorically improper." *Id.* at 732.

174. FED. R. EVID. 608(b).

175. *See, e.g.*, United States v. Whitmore, 359 F.3d 609, 618-22 (D.C. Cir. 2004) (holding that the trial court erred by precluding the defense from cross-examining a prosecution witness about three specific instances of untruthful conduct, including one in which a judge found that the witness had "lied" in a different proceeding); United States v. Simonelli, 237 F.3d 19, 19 (1st Cir. 2001) (finding that a prosecutor properly cross-examined defendant about whether he had altered company records such as time cards, acts which he denied).

176. MCCORMICK, *supra* note 7, § 41, at 182-83 (noting that a witness may be pressed but the cross-examiner must ultimately "take [the] answer"); 28 WRIGHT & GOLD, *supra* note 25, § 6112, at 34-35, § 6117, at 79.

177. *See* FED. R. EVID. 608. The cross-examiner must have a good faith basis for inquiring into the specific conduct, which spares most witnesses the agony of chronicling their past lies in response to an open-ended question such as, "Tell us about all the lies you've ever told?" *See* United States v. Simonelli, 237 F.3d

about the principal's prior acts.[178] The cross-examiner, however, must take the witness's answer (or, more accurately, answers). Extrinsic evidence is not admissible to prove up the specific conduct under Rule 608(b), although other theories of admissibility may well permit this result.[179] For example, in *United States v. Abel* the impeaching evidence was relevant not only to a witness's untruthful character, but also to his bias, a non-collateral matter that may be proved by extrinsic evidence.[180]

Although Rule 608(b) invites its share of evidentiary mischief, it pales when compared to the damaging effect of a witness's prior criminal convictions, particularly where the criminal defendant testifies. Rule 609 permits the use of some prior criminal convictions because, it is assumed, they are probative of the witness's untruthful character.[181] All convictions for crimes involving "dishonesty or false statement" are admissible.[182] Felony convictions are also admissible, subject to the court's discretion.[183] Misdemeanors are inadmissible unless they are crimes of false statement or dishonesty.[184] Under the majority

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at 23. Commentators have been very critical of the unfair prejudice engendered by Rule 608(b). *See* 2 GRAHAM, *supra* note 102, § 608:4, at 611-12.

178. 28 WRIGHT & GOLD, *supra* note 2, § 6120, at 124.

179. FED. R. EVID. 608(b).

180. 469 U.S. 45 (1984); *see also supra* text accompanying notes 119-20.

181. FED. R. EVID. 609; *see* 2 GRAHAM, *supra* note 102, §§ 609:3-:6 (discussing doctrine); MCCORMICK, *supra* note 7, § 42; 28 WRIGHT & GOLD, *supra* note 25, § 6133.

182. FED. R. EVID. 609(a)(2). It is immaterial whether the offense is a felony or a misdemeanor. The only effective limitation is the ten-year rule set forth in FRE Rule 609(b). *See* 2 GRAHAM, *supra* note 102, § 609:5; 28 WRIGHT & GOLD, *supra* note 25, §§ 6135-6136 (1993 & Supp. 2008).

183. FED. R. EVID. 609(a)(1). The criminal defendant's prior felony convictions are excluded unless the prosecution shows that their probative value "outweighs" their prejudicial effect. All other witnesses in civil and criminal trials are subject to the balancing test in Rule 403, which favors of admissibility unless the opponent shows that such probative value is "substantially outweighed" by unfair prejudice and the like. FED. R. EVID. 403; *see* 2 GRAHAM, *supra* note 102, § 609:3, at 648; 28 WRIGHT & GOLD, *supra* note 25, § 6134, at 215-16.

184. FED. R. EVID. 609(a). Juvenile adjudications are generally inadmissible, although the court has discretion to allow them in a narrow band of cases. FED. R. EVID. 609(d).

approach, Rule 609 provides the court discretion to admit varying levels of detail, including the nature of the offense (e.g., "armed robbery"), the date of conviction, and the sentence.[185] Other jurisdictions follow variants of the "mere fact" rule, which permits evidence of only the "fact" of prior convictions; details, including the nature of the offense, are withheld to reduce unfair prejudice.[186]

Turning to how these doctrines affect our testimonial assumptions, evidence of truthful character impacts only that of sincerity; that is, whether the witness is honestly (sincerely) describing his memory of events.[187] It has no discernable relevance to a witness's accuracy of perception, recollection, or narration because it tells us nothing about whether a witness is honestly mistaken, only whether he or she is lying or being truthful (even if incorrect).[188] The efficacy of truthful character evidence turns on how well it functions to identify a liar in the courtroom, being especially mindful that the law eschews both religious and scientific tests for this purpose.[189]

The seminal point, however, must be what is meant by truthful or untruthful character? Its existence is usually assumed without careful definition or critical thought.[190]

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185. 28 WRIGHT & GOLD, *supra* note 25, § 6134, at 216-17; *see also* 2 GRAHAM, *supra* note 102 § 609:6, 692-98; MCCORMICK, *supra* note 7, § 42, at 196-98; *e.g.*, United States v. Smith, 454 F.3d 707, 715 (7th Cir. 2006) ("[T]he court ruled that it would allow the government to ask Smith whether he had been convicted of a felony, when he was convicted and what the offense was.").

186. *See* MCCORMICK, *supra* note 7, § 42, at 199-200.

187. *See* 2 GRAHAM, *supra* note 102, § 608:1, at 557; Ladd, *supra* note 11, at 242.

188. Ladd, *supra* note 11, at 241-42.

189. FED. R. EVID. 610 (religious beliefs cannot be used to determine credibility). Polygraphs and similar tests are also generally excluded. *See* GIANNELLI, *supra* note 92, § 24.08.

190. Uviller observes that the "trait of truthfulness" is in accord with "common intelligence" and "emanates from personality," which straddles the realms of everyday common experience and modern personality theory. Uviller, *supra* note 5, at 786. McCormick is clearly unsettled about character for truthfulness, contending that it is a "poor predictor of whether [a witness] is truthful on a specific occasion" and an anachronism left over from the "pioneer trial" which must give way to the "businesslike atmosphere of the modern courtroom." MCCORMICK, *supra* note 7, at 178; *see also* 28 WRIGHT & GOLD, *supra* note 25, § 6113, at 43 ("[W]itness character evidence may be defined as evidence that

The notion of character traits, including truthfulness, is so familiar in our everyday thinking about people that close scrutiny seems unwarranted. Yet it is this very same familiarity that defines character as a social and cultural construct deserving more rigorous analysis. Truthful character, like any character trait, is a product of popular culture with roots deeply set in a very different historical context.[191] Moreover, the nineteenth-century conception of character, steeped in that period's commitment to a "moral science" influenced by Scottish common sense and faculty psychology, not to mention a heavy dose of Protestant theology, coincided with emergence of evidence law.[192]

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directly relates to the general credibility of the witness, rather than the believability of specific testimony, and conveys some judgment about the ethics or moral qualities of that witness."). Other commentators seemingly accept "truthful character" without discussion. *E.g.*, PARK, *supra* note 92, § 9.06.

191. For the influence of nineteenth-century moral philosophy on conceptions of character, see DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 29, 266 (1979); and Alan C. Guelzo, *"The Science of Duty": Moral Philosophy and the Epistemology of Science in Nineteenth-Century America*, *in* EVANGELICALS AND SCIENCE IN HISTORICAL PERSPECTIVE 267 (David N. Livingstone et al. eds., 1999).

192. *See* HOWE, *supra* note 191, at 29-32 (brilliantly explaining how "Whig" thinkers transformed eighteenth-century conceptions of character to serve an emerging commercial society and economy); *id.* at 266 (discussing Abraham Lincoln while noting "the Whig preoccupation with character building and control"); Guelzo, *supra* note 191, at 267 ("'[M]oral philosophy' was the offspring of a misbegotten attempt to blend Enlightenment science and Protestant theology . . . ."); *id.* at 271 ("[F]undamentally what moral philosophy asked was that human conduct, or ethics, be understood to embody, or at least resemble, the methodology of science."); *id.* at 273 (observing that the Scot's insistence that people possessed a "moral sense" provided "the moral philosophers all the reason and all the credibility they needed for discovering a scientific moral order that would, incidentally, be in a position to prescribe Christian moral order without looking *too* Christian"); *id.* at 275 ("[A]mong [the many character] 'traits' and 'courses' [of conduct] the moral philosophers easily found all the familiar constituents of Christian morality."). The point is not that these same mid-nineteenth century cultural constructs somehow remain fossilized in present-day social discourse or legal doctrine. Rather, the point is to appreciate how differently we may understand character today when compared to the antebellum social, intellectual, and cultural environment in which many of our evidence rules were brewed. The failure to define character in twenty-first century popular thought makes it a tempting strawman for critics, particularly for those who see psychology as holding perhaps more promise than it can possibly deliver at present. These legal developments are nicely captured in Wesson, *supra* note 7, and Poulin, *supra* note 109.

Today's culture continues to recognize various traits of character but in an amorphous, far different, and desultory manner that seems largely oblivious to how that flaccid concept has itself changed over the last 150 years.

Nonetheless, character remains one important way our society sorts people for various purposes. The legal profession, for example, revels in character proof generally. Reference letters on behalf of job applicants are in effect character testimonials, the writer attesting to the applicant's desirable traits, including his trustworthiness, honesty, diligence, etc. Bar admission typically requires proof of applicants' "good moral character."[193] Character's roots in popular thinking is evident in how we prove the person's traits. The common law limited proof to reputation, namely gossip and small talk about the person among the local community.[194] Recognizing that reputation evidence often consisted of little more than the character witness's personal opinion, the FRE explicitly allows proof by lay opinion as well.[195] The lay opinion must be predicated upon personal knowledge, which is to say on frequent contacts and interactions at work or in the neighborhood, for example.[196]

Since "opinion" is not expressly restricted to lay testimony in Rule 608, some courts allow expert testimony, perhaps beguiled by the lure of modern psychology, exasperated by the amorphousness of "character," and uneasy with character's roots in popular culture.[197] Left

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193. *E.g.*, The N.Y. State Bd. of Law Examiners, Rules of the Court, Rule 520.12, http://www.nybarexam.org/Rules/Rules.htm#520.12 (last visited Feb. 9 2010) ("Every applicant for admission to practice must file . . . affidavits of reputable persons that the applicant possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as required by section 90 of the Judiciary Law").

194. FED. R. EVID. 405 advisory committee note. The FRE still recognizes reputation as a method of proving character. *See* FED. R. EVID. 405, 608. Reputation is, of course, hearsay (gossip) but is excepted by FRE Rule 803(21).

195. *See* FED. R. EVID. 608 advisory committee note.

196. FED. R. EVID. 701 (stating that lay opinion must be helpful and based on the witness's firsthand knowledge); *see also* FED. R. EVID. 405 advisory committee note.

197. *See* 28 WRIGHT & GOLD, *supra* note 25, § 6114, at 56 (asserting that "many courts" admit expert testimony on truthful character); *see also* FED. R. EVID. 405 advisory committee note (asserting without qualification or citation

unaddressed is how an expert's "specialized knowledge" bears on something as banal as truthful character: If truthful character is a social and cultural construct based on community interaction, it is manifestly unclear how psychologists and psychiatrists can assist the trier of fact on this point.[198] And if such experts are drawing instead upon their esoteric knowledge of mental illnesses and how they affect a person's perceptions and memory, this may be relevant to a witness's testimonial capacities (discussed above), but it does not bear on what we popularly understand as truthful character.[199] In sum, truthful character is something that lay witnesses and jurors frequently encounter in their daily lives; it is a peculiarly lay construct that by definition falls outside the scope of expert opinion testimony.[200]

Finally, how effectively does truthful character help us assess the testimonial assumption of sincerity? Here we encounter a chasm between rhetoric and reality. Prima facie, the allure is irresistible: persons of untruthful

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that "[n]o effective dividing line exists between character and mental capacity," thus, character may be proved in "varying ways," including an employer's opinion about the person's honesty and "the opinion of [a] psychiatrist based upon examination and testing"); MCCORMICK, *supra* note 7, § 44, at 209-14 (expressing unease about expert opinion testimony offered to prove truthful character). For a thoughtful article that assumes expert testimony may be used to prove truthful character, see Poulin, *supra* note 109.

198. *See* 27 WRIGHT & GOLD, *supra* note 5, § 6097, at 693-95 (observing that Rule 702 often precludes expert testimony both about a witness's "general disposition to tell the truth" and whether a witness testified "truthfully" because it is of little assistance to the trier of fact and the opinions are not sufficiently reliable). To be sure, some aspects of personality theory seem analogous to the cultural construct of character. "Trait psychology" appears to be an updated reification of common sense thinking that has since been left outside the scientific mainstream. 28 WRIGHT & GOLD, *supra* note 25, § 6132, at 193 n.9 (referencing Gordon Allport, a leading trait psychologist). Legal commentators occasionally and understandably conflate the popular construct of "character" with personality theory without closely considering whether they are materially different. *See id*. § 6112, at 33 n.7.

199. *See supra* text accompanying notes 153-58.

200. *See* 28 WRIGHT & GOLD, *supra* note 25, § 6113, at 43 ("[W]itness character evidence may be defined as evidence that directly relates to the general credibility of the witness, rather than the believability of specific testimony, and conveys some judgment about the ethics or moral qualities of that witness."). So defined, it is difficult to see what light mental health experts can shed on the "ethics or moral qualities" of others.

character are more likely to commit perjury while truthful persons are less likely to do so—the propensity inference. The relevant link is between the character trait and the moment the witness testifies. It is doubtful, however, that the general public has the same faith in character's surgical precision as the legal profession. We manifestly do not need evidence of untruthful character to tell us that a person might lie; we know to a moral certainty that all human beings lie in certain situations.[201] Rather, character functions more as a social score card; what does the community (society?) think of this person?

Character witnesses, then, are a measure of one's standing in a community or group. When impressive people, for example, testify that another witness is truthful, they are effectively vouching for that witness in the same way as one who writes a letter of recommendation for another.[202] Reputation and opinion testimony run to the bottom line: Do other people think the witness is "truthful?" It is this willingness to place one's own reputation on the line that distinguishes the character witness. When a cross-examiner inquires about specific lies, she is providing vivid details about what the jury assumes anyway: this witness, like all humans, has occasionally lied and prevaricated. And it is those details that resonate.

The most problematic form of character evidence, however, involves prior criminal convictions. In the 1880's Oliver Wendell Holmes described the inferences with Victorian frankness: the prior conviction shows a "general readiness to do evil" from which one infers a "readiness to

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201. *See* Wilson v. City of Chi., 6 F.3d 1233, 1239 (7th Cir. 1993) (Posner, C.J.) ("Trials would be endless if a witness could be impeached by evidence that he had once told a lie or two. Which of us has never lied?").

202. The highly publicized public misconduct trial of Alaska senator Ted Stevens featured all-star character evidence by former secretary of state Colin Powell and Hawaii senator Daniel Inouye. Powell testified to Stevens' "sterling" character and that "'[h]e's a guy who, as we said in the infantry, we would take on a long patrol.'" Erika Bolstad & Richard Mauer, *Colin Powell: Stevens Reputation 'Sterling'*, ANCHORAGE DAILY NEWS, Oct. 10, 2008, http://www.adn.com/2008/10/10/551875/colin-powell-stevens-reputation.html. The notion that one is "sterling" or worthy of partaking in a "long patrol" underscores the banality of character itself today. For Ted Stevens, getting Powell and Inouye, a war hero, to appear on his behalf was the whole point. *Id.*

lie" and, therefore, that "he has lied in fact."[203] Rule 609 carries this inclination-toward-"evil" rationale into the twenty-first century, although modern courts seem plainly troubled, if not confused, about how prior criminal convictions affect "credibility."[204] Courts solemnly intone the verbal formula under Rule 609, yet know that a lay jury will use the prior convictions as marks of a social outsider, especially to the detriment of the criminal defendant.[205]

Evidence of truthful character serves as a window into the witness's standing in the community. It reveals less about whether the witness's testimony is believable and much more about whether this is the type of person we want to believe. The vaunted propensity inference is mostly gloss that opens the way for evidence, largely negative, that warns us against placing undue faith in a "disreputable" witness's testimony lest we become disreputable.[206] Its cost is considerable, engendering confusion in the trier of fact and sparking pointless litigation that is seldom worth the candle.[207]

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203. Gertz v. Fitchburg RR Co., 137 Mass. 77, 78 (1884) (Holmes, J.), *quoted in* 2 GRAHAM, *supra* note 102, § 609:1, at 629-30. Graham observes that Rule 609 is "premised upon the assumption that a person with a criminal record has a bad general character, evidenced by his willingness to disobey the law, and that his bad general character would lead him to disregard his oath to testify truthfully." 2 GRAHAM, *supra* note 102, § 609:1, at 629; *see also* 28 WRIGHT & GOLD, *supra* note 25, § 6132, at 190-92.

204. *See* United States v. Howell, 285 F.3d 1263, 1268 (10th Cir. 2002) ("'We are not certain what evidence of two convictions for theft by taking, one conviction for armed robbery, and one conviction for aggravated assault says about [the witness'] credibility, but we are certain that the jury should have been given the opportunity to make that decision.'" (alteration in original) (quoting United States v. Burston, 159 F.3d 1328, 1335 (11th Cir. 1998))).

205. *See* 28 WRIGHT & GOLD, *supra* note 25, § 6112, at 34-35.

206. *See* 2 GRAHAM, *supra* note 102, § 609:1, at 631-32 (discussing the special problem of Rule 609 and the criminal defendant as a witness). Limiting instructions are largely useless and the jury may use the defendant's prior conviction to lower its threshold of regret should it be wrong. *Id.*

207. *See* United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004); *see also* discussion *supra* note 169.

D. *Prior Statements by Witnesses*

Lawyers are rapturous when examining witnesses about what they said *before* testifying.[208] In part, it may be a function of trial preparation: lawyers so immerse themselves in reams of depositions, reports, and pre-trial interviews that it seems natural to ask a witness about what he or she said earlier. And in everyday life we also often consider a person's prior statements. The commonly-heard expression "he's talking out of both sides of his mouth" indicates a person who may be lying or confused based on his inconsistent statements. Conversely, consecutive consistent descriptions of events often indicate a firm memory and careful use of language–or a practiced liar. Prior statements are sometimes said to be more trustworthy because the witness's memory was "fresher" and freer from bias.[209] Nonetheless, the law of evidence restricts the use of prior statements through both the hearsay and impeachment doctrines. In this section we will consider how both prior inconsistent and consistent statements relate to the common law's testimonial assumptions after briefly reviewing the pertinent evidentiary principles.

The hearsay rules impose a technical barrier that is easily traversed. Any statement made other than "while testifying at the trial or hearing" is hearsay if used to prove "the truth of the matter asserted" (substantive use).[210] Hearsay is inadmissible unless it falls within an exception or exemption to Rule 802.[211] Experienced trial lawyers readily circumvent the hearsay ban by offering prior statements, whether consistent or inconsistent, as relevant to the witness's "credibility," not as substantive evidence of the facts asserted.[212] In this event the proponent need not

208. *See* MCCORMICK, *supra* note 7, § 34, at 149 (stating that impeachment by prior inconsistent statement is the "most widely used" method of attack).

209. *Id.* at 153.

210. FED. R. EVID. 801(c).

211. FED. R. EVID. 802.

212. In hearsay parlance, the statement is offered to prove the declarant's state of mind, here a prior belief manifest in the out-of-court statement that is inconsistent or consistent with whatever belief is expressed in his testimony at trial. GIANNELLI, *supra* note 92, § 31.06, at 429. *But see* 28 WRIGHT & GOLD, *supra* note 25, § 6206 (Supp. 2008) (asserting, with good cause, that trial

demonstrate compliance with any hearsay exemption or exception. When the statement is used substantively, however, the FRE provides two exemptions expressly directed at prior inconsistent and consistent statements by witnesses. Both require that the witness/declarant testify at the trial or hearing, subject to cross-examination. Prior inconsistent statements must be shown to have been made under oath, subject to the penalty for perjury, at a trial, hearing, or other proceeding.[213] Consistent statements are admissible for their truth only "if offered to rebut an express or implied charge against the declarant[/witness] of recent fabrication or improper influence or motive."[214] Case law requires that such prior statements antedate the alleged impropriety if offered for their truth (again, a hurdle easily avoided by offering the evidence only for "credibility").[215] Nothing in the FRE, though, restricts a witness's hearsay to these two rules. When the witness is a party opponent, for example, her prior statements are freely admissible as party admissions, which may be used for any relevant purpose, including impeachment and substantive use.[216] Thus, the hearsay barrier is easily scaled by offering the prior statement only to prove credibility or by satisfying any one of about forty exceptions or exemptions.

Impeachment doctrine is even less imposing.[217] Other than relevance, no rules regulate the use of prior consistent statements to rehabilitate a witness, whether they are drawn from the witness herself or elicited from other witnesses who heard them (extrinsic evidence). Prior

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lawyers' "true purpose" is to "expose the jury to the prior inconsistent statement . . . trusting to the inefficacy of a limiting instruction," and thereby "improperly induc[ing] the jury to consider the statement for the truth of the matters asserted therein.").

213. FED. R. EVID. 801(d)(1)(A).

214. FED. R. EVID. 801(d)(1)(B).

215. The substantive use of prior consistent statements is governed by *Tome v. United States*, 513 U.S. 150 (1995). *Tome*'s strictures are not applicable when the statement is offered only for credibility. *See* United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001) (joining the "majority" of circuits holding that Rule 801(d)(1)(B) does not govern when prior statements are offered only for credibility). Extrinsic evidence may be used to prove prior consistent statements. *See* United States v. Green, 258 F.3d 683, 692 (7th Cir. 2001).

216. FED. R. EVID. 801(d)(2).

217. *See* MCCORMICK, *supra* note 7, § 33, at 149.

inconsistent statements are subject to the flaccid requirements of Rule 613. On cross-examination the witness may be confronted with the prior statement without a forewarning of what may be coming.[218] Extrinsic evidence (other witnesses) to prove the prior inconsistent statement may be offered only if the principle witness was given an opportunity to explain or deny it, unless the interests of justice require otherwise.[219] The statement's subject matter must also be non-collateral to justify the resort to extrinsic evidence.[220] Noteworthy is that Rule 613 eased the common law standards because of perceived "widespread attorney incompetence."[221] Evidentiary doctrine, then, poses few significant barriers to the use of prior statements. Hearsay problems are readily skirted by the expedience of offering the statements only to show "credibility." Impeachment rules are more nettlesome than foreboding.

Yet, what does it really mean when we say a statement is offered only to prove "credibility"? Prior inconsistent statements may touch multiple testimonial assumptions, although much will turn on the nature of the inconsistency. The critical term "inconsistent" is undefined in the FRE, so the case law draws directly from common experience to give it meaning. A prior statement is said to be "inconsistent" with the witness's trial testimony if the variance between the two raises questions about credibility.[222] Where the witness is plainly "blowing hot and cold," the prior statement may reveal his insincerity—the cross-examiner has caught the witness in a lie.[223] Yet the range of

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218. A standard technique is to "lock" in the witness's testimony ("Yes, I'm certain about . . .") and then confront her with the prior inconsistent statement. Rule 613(a) only requires that the cross-examiner, upon request, furnish opposing counsel with the prior statement or its contents (if oral). FED. R. EVID. 613(a); *see also* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 5.09 (7th ed. 2008).

219. FED. R. EVID. 613(b); *see* United States v. Lashmett, 965 F.2d 179, 181-82 (7th Cir. 1992) (holding that extrinsic evidence of prior statements is admissible).

220. 28 WRIGHT & GOLD, *supra* note 25, § 6206, at 537.

221. *See* MCCORMICK, *supra* note 7, § 37, at 160-61 (citing FED. R. EVID. 613 advisory committee note).

222. *See* MCCORMICK, *supra* note 7, § 34, at 151; *see also* GIANNELLI, *supra* note 92, § 22.10, at 282-83; 28 WRIGHT & GOLD, *supra* note 25, § 6203, at 514.

223. MCCORMICK, *supra* note 7, § 34, at 151.

inconsistencies is limitless, spanning subtle shadings of meaning (e.g., "dark" versus "black") to the proverbial stark contrast ("He ran the red light" versus "He had the green light"). Easy cases involve a stated intent to lie. Recall that in *United States v. Abel* the critical issue was whether Ehle was lying when he testified that he and Abel committed a robbery.[224] Yet in other cases, an inconsistency may signal problems with memory or narration.[225] A frazzled witness may agree with both the direct and cross-examiner about diametrically opposed facts, strongly suggesting she has no independent memory of the event or is riven with uncertainty. Discrepancies between the prior statement and the witness's testimony may also demonstrate a witness who is troublingly imprecise in her choice of words. In either event, the witness is honest but her testimony may well be inaccurate. The "forgetful witness" problem is even more complex, but ultimately reduces to whether she is lying (a feigned lack of recall) or has a poor memory.[226] The larger point is that evidence law cannot calibrate the degree of inconsistency with the witness's credibility; rather, the law gives trial lawyers wide leeway to draw out such inconsistencies and trusts that the trier of fact resolves the discrepancies based on our social and cultural experiences.

Roughly the same approach governs prior consistent statements, which are, by definition, "consistent" with the witness's trial testimony and therefore are not needed as substantive evidence because the testimony serves that function.[227] Their relevance to credibility rests on the common experience that a consistent "story" indicates

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224. 469 U.S. 45 (1984); *see also supra* text accompanying notes 119-20. Obviously, Ehle's alleged prior statement about an intent to lie is inconsistent with his trial testimony implicating Abel, so the jury had to decide if Ehle had indeed made that statement.

225. MCCORMICK, *supra* note 7, § 34, at 151 (stating that inconsistencies may show the witness is "uncertain or untruthful"); *see also* 28 WRIGHT & GOLD, *supra* note 25, § 6203, at 514-15, § 6206.

226. *See* 28 WRIGHT & GOLD, *supra* note 25, § 6203, at 515.

227. *See* United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001) (permitting such statements only for credibility but with the "caution . . . that the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may be meaningless to jurors"). The line may well be meaningless to lawyers and judges too.

stability in memory and narration—a good memory and careful word choice. It also speaks to the witness's confidence in what she says. In general, it is meaningful to us whether the witness has said the same thing before, although the timing, place, and circumstances may well be critical. Consistency may, of course, also reveal the practiced lie or a stubborn refusal to think critically (i.e., a reluctance to admit that one may be mistaken), yet here too we trust our common experience in sorting through this.

In sum, evidence of prior statements is largely tossed to the realm of our social experience, trusting that popular culture will provide sufficient guidance. Yet its effectiveness turns directly on the lawyers' skill and preparation in presenting the prior statements and later explaining their likely effect on credibility. The perceived "widespread attorney incompetence" that led to Rule 613's relaxed standards, as mentioned above, does little to instill confidence. As every teacher knows, making the test easier does not make the student smarter or the teacher more effective.

E. *Impeachment by Contradiction*

Left for last, contradiction is the bedrock of the adversary trial where factual disputes are fueled by witnesses who testify to different facts. In *United States v. Abel*,[228] the prosecution called Ehle who testified that he and Abel committed the robbery. To contradict Ehle, the defense called Mills who said that Ehle planned to perjure himself by falsely implicating Abel. The jury was left to choose between Ehle and Mills. A more mundane example involves Driver 1 who claims Driver 2 ran the stop sign and struck his car, while Driver 2 testifies that it was Driver 1 who disregarded the stop sign.

Contradiction is regulated by a single doctrinal imperative: the contested issue must be non-collateral, which generally means one relevant to a claim, charge, or defense as set forth in the pleadings.[229] For example, parties

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228. 469 U.S. 45 (1984).

229. *See* United States v. Fonseca, 435 F.3d 369, 374-75 (D.C. Cir. 2006) (observing that collateral evidence may be excluded under Rule 403). Bias and defective testimonial capacity are deemed non-collateral methods of impeachment. Character witnesses may contradict one another as provided by

frequently fend off an opposing expert's opinion on causation or standard of care by presenting its own expert. To highlight the differences among witnesses, some courts permit the proponent to confront witness X with the conflicting account testified to by witness A, although most prohibit the questioning of one witness about whether another witness is lying or being truthful.[230]

When witness X's testimony contradicts that of witness A, any of the four testimonial assumptions may be implicated. Either witness (or both?) may be lying, as illustrated by Mills' challenge to Ehle's testimony. Mistaken testimony may also be exposed, as where the contradiction invites the jury to consider whether one or the other more accurately observed and remembered the event. Less frequently, the contradiction may call into question a witness's narrative accuracy, as when two witnesses observe the same event but describe it differently. Which version "best" describes the event is left for the jury.

Contradiction is something readily understood in popular culture. Indeed, jurors come to the courthouse expecting precisely such a clash between opposed witnesses. Their means of choosing which one to believe consist of the preceding four methods of impeachment along with the accumulated life experience that stems from deciding family squabbles, neighborhood disputes, workplace riffs, and even fractious faculty meetings.

V. A REVISED APPROACH TO CREDIBILITY, IMPEACHMENT, AND REHABILITATION

The Federal Rules of Evidence improved the modern trial in some ways but inadvertently created new problems while still leaving others to fester. In the 1990s the courts reacted to perceived abuses involving expert testimony by

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Rule 608(a). *See supra* text accompanying notes 124-25, 145-48 and 164-79. *But see* GIANNELLI, *supra* note 92, § 22.11; MCCORMICK, *supra* note 7, § 49, at 232-24 (noting also that the collateral fact rule does not dilute the cross-examiner's opportunity to vigorously press a point with the witness).

230. *Compare* State v. Johnson, 2004 WI 94, ¶ 22, 273 Wis. 2d 626, ¶ 22, 681 N.W.2d 901, ¶ 22 (2004) (noting that a lay witness may be questioned about whether another witness is lying in order to clarify discrepancies between their accounts), *with* Liggett v. People, 135 P.3d 725, 732 (Colo. 2006) (prohibiting "were they lying" types of questions).

obligating trial judges to act as "gatekeepers" to ensure that only "reliable" specialized knowledge was admitted.[231] As amended in 2000, Rule 702 demands that expert opinions now be based on "sufficient facts or data" that are subjected to reliable methodologies and tests.[232] Yet lay testimony, which provides the underlying "facts and data" essential to fact finding by the expert, not to mention the jury, is subject to radically less scrutiny and control.[233] Put differently, the reliability of lay testimony is left largely to the caprice of an adversary system that blithely assumes that trial lawyers possess sufficient skill and judgment to attack or to support credibility.

More rigor and structure must be instilled to ensure the reliability of lay testimony. The suggestions outlined below do not, it should be emphasized, argue for a *Daubert*-like approach to lay testimony. They call upon the judge to play a more active role than that of a passive observer who involves herself only upon hearing the word, "objection." The task of identifying "reliable" lay testimony is entrusted to the modern adversary trial which must function with acceptable rigor and popular participation if it is to retain legitimacy.

The starting point is Rule 602, which requires that lay testimony be based on a witness's personal knowledge, which in turn ensures the testimony's reliability. Personal knowledge, as we have seen, is a lay construct that falls within the broad mainstream of popular thought.[234] For this reason, when a witness's personal knowledge is contested the trial judge shares this decision with the jury: the judge need only be convinced that a reasonable jury could find personal knowledge by the witness.

Rule 602 must be taken seriously.[235] The first step is to explicitly embrace the common law's testimonial assumptions that are the roots of a witness's purported personal knowledge[236]: Did she accurately perceive the

231. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

232. FED. R. EVID. 702 advisory committee note (amended 2000).

233. *See* FED. R. EVID. 701 advisory committee note.

234. *See supra* text accompanying notes 91-108.

235. *See* MCCORMICK, *supra* note 7, § 10; Ladd, *supra* note 11, at 240 ("The function of a witness is to communicate matters of his personal knowledge.").

236. *See supra* Part III.

event? Is she accurately recalling it at trial? Does her testimony accurately describe the memory? And is she being sincere in her testimony? Explicitly embracing them is important for multiple reasons. First, modern psychological science has yet to supplant the common law assumptions with anything better. Second, this will better enable courts and commentators to critique and improve trial practice and evidence rules. Third, the legitimacy of civil and criminal trials is integrally related to the rootedness of the testimonial assumptions in popular culture. They resonate among the public, promoting widespread confidence in judicial fact-finding and legitimating trial verdicts as public judgments.

Trial judges must ensure that the jury understands the testimonial assumptions. The jury should be explicitly instructed (in the broadest sense) about the assumptions and how they relate to the modes of impeachment and rehabilitation. It is important for the jury to understand that its common sense and life experience are welcomed in the courtroom and essential to factfinding. The instruction may take multiple forms. Technical instructions should be read that describe the assumptions, the modes of impeachment, and the jury's role to determine if *each* answer by a witness is accurate, a mistake, or a lie.[237] The

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237. Mason Ladd elaborated upon the multiplicity and interrelatedness of factors that affect credibility:

> Some of the same factors which cause a witness, whose character for veracity is bad, to give perjured testimony may cause another witness whose character is good to make mistakes. Truth testing involves a consideration of the multiple effect [sic] of character, motive, contradiction, intelligence, knowledge, quality of memory, friendly or hostile feeling toward the parties, interest, bias and prejudice–all of which give insight into the probability of reliable testimony. In addition to these qualitative areas of inquiry the candor and forthrightness of the witness, his hesitancy or willingness to testify, his evasion or concealment, his poise or frustration, and his emotional reaction to questions indicated through his demeanor and conduct on the witness stand also aid in determining the credit to be given his testimony.

Ladd, *supra* note 11, at 256-57 (footnotes omitted). Most modern jury instructions include a standard "credibility" instruction. Most can stand improvement. *E.g.*, SEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, *supra* note 1 (jury to use its "common sense"). In guiding the jury in "deciding what to believe" the Seventh Circuit offers the following assistance:

jury must understand that the law's standard for witness credibility is the jury's common sense; every answer by every witness implicates the four testimonial assumptions. It would not be overreacting to give jurors a written statement to the same effect to promote engaged "learning" as they listen to testimony. In jurisdictions where jury note-taking is permitted, the assumptions should be included as a ready reference.[238] The judge cannot sit back and assume that the lawyers will make the necessary points during their examinations or arguments.

The witness's demeanor while testifying should be made an explicit basis for determining credibility. The prime purpose of *viva voce* testimony is to ensure that the witness speaks ("testifies") before the trier of fact. Our supposition, mostly cultural, is that such observations yield valuable, if amorphous, clues to credibility based on speech, eye contact, and body language. Indeed, it is for this reason that we tolerate the doctrinal arcana of the hearsay rule. Demeanor of the witness, then, should be recognized as "evidence" not only to better instruct the jury about what it should consider (and does anyway) and why, but also with an eye toward developing more coherent doctrine which better accounts for decision-making in adjudication.[239]

> You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.
>
> In evaluating the testimony of any witness, [including any party to the case,] you may consider, among other things:
>
> - the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
> - the witness's memory;
> - any interest, bias, or prejudice the witness may have;
> - the witness's intelligence;
> - the manner of the witness while testifying;
> - [the witness's age];
> - and the reasonableness of the witness's testimony in light of all the evidence in the case.

Id. § 1.13 ("Testimony of Witnesses").

238. While note-taking is permitted in the Seventh Circuit, jurors are told that their notes are not evidence, but rather "aids to your memory." *Id.* § 1.07.

239. Instructions sometimes tell the jury to consider "the manner of the witness while testifying." *See id.* § 1.13. *But see* Oldfather, *supra* note 4, at 457

Turning to the rules governing impeachment, there is a need to rethink them and to take a different approach that makes the judge a more active participant at trial. Some of the suggestions entail a different approach to existing rules. Others argue for more substantial change. The emphasis is on working within the mainstream of the legal tradition rather than advocating radical changes that likely will flounder for pragmatic reasons alone.[240]

A witness's bias or interest as well as her "capacities" to testify are simply too important to be left to chance. Disclosure of this information should be mandatory because it is the bedrock of personal knowledge. The common law sagely recognized the significance of bias and testimonial capacity when it denominated both as non-collateral issues. Disinterestedness, or the absence of bias, is significant regardless of whether bias has been "attacked." And where bias or interest is implicated, the disclosure should occur before the jury hears detailed testimony of the event. For similar reasons the jury should be informed of the witness's capacities to perceive, remember, and narrate. Neither inquiry consumes much time, particularly when measured against their usefulness. Scant time is spent asking a witness about his capacity to see or hear, for example. Such information should be elicited when the witness provides information about his "background," namely, at the start of the direct examination. The judge herself may question the witness about these matters in a manner reminiscent of jury voir dire or, alternatively, ensure that the lawyers do so. Disclosure of these matters should be as automatic as taking the oath or affirmation before the jury.[241]

Contradiction and the use of prior statements, however, are best left to counsels' discretion because they necessarily involve details of the case and tactical judgments in a way that bias and testimonial capacity do not. Although judges have the power to interrogate witnesses,[242] it is an authority best left for extreme cases. The sheer abundance of prior

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(discussing the limits of "demeanor" in determining credibility, yet focusing on the "lie/truth" distinction and not the problem of sincerely mistaken testimony).

240. *See* Uviller, *supra* note 5, at 778 (arguing for an "enriched inquisitorial ingredient in the criminal process").

241. FED. R. EVID. 603.

242. FED. R. EVID. 614.

statements generated through depositions and discovery generally foreclose judges from making informed decisions about how they might be used to attack or support credibility. Here too, though, the jury would profit from instruction about how contradiction or prior statements affect the testimonial assumptions. In particular, the jury should be educated about how prior inconsistent statements, while they may mark a liar, may also be relevant to identifying mistaken perceptions, recollections, and narrative descriptions. The critical concern is how the prior statement, whether consistent or inconsistent with testimony, helps the jury evaluate the testimonial assumptions. And on this point the FRE should be revised to eliminate the technical hearsay impediments to using prior consistent or inconsistent statements. Trial lawyers, abetted by case law, have wisely circumvented the restrictions anyway, but at the cost of useless fictions and confusing jury instructions that breed cynicism and disrespect for the law.[243]

The remaining mode, evidence of a witness's truthful character, should be eliminated as both a ground for attack and as a basis for supporting credibility.[244] This recommendation parallels the approach taken by Rule 610, which excludes proof of a witness's religious beliefs as insufficiently helpful in the courtroom, whether to attack or to support credibility. While religion is off the table, evidence of prior crimes and deceit bedevil the courts. Rules 608 and 609 trigger some of the fiercest firestorms of litigation at trial and on appeal while shedding the least

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243. *See* United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001); discussion *supra* text accompanying note 226. The case law experience underscores the wisdom of the original draft of FRE Rule 801(d)(1)(A), which broadly exempted all prior inconsistent statements, not just those made under oath, etc. *See* 28 WRIGHT & GOLD, *supra* note 25, § 6202, at 509-10.

244. Religious belief may not be used to attack or support credibility. FED. R. EVID. 610; *see* 28 WRIGHT & GOLD, *supra* note 25, § 6152, at 309-10 (discussing the "low probative value" of this evidence while observing that the rule raises assumptions that are "open to question" by "many people"). McCormick expressly links Rule 610 to discarded notions of truthful character. *See* MCCORMICK, *supra* note 7, § 46, at 218 ("Today, there is no basis for believing that the lack of faith in God's avenging wrath is an indication of greater than average truthfulness.").

light on credibility.[245] Truthful character is undeniably a useful social construct when vetting strangers for jobs and the like. That a socially distinguished person "vouches" for another is generally regarded as a useful way of ranking an applicant relative to others, just as knowing some "dirt" provides the opposite perspective. Yet, at bottom, evidence of a witness's "untruthful" character tells us nothing the jury does not already know. All people lie depending on the circumstances.[246] Specific instances of untruthful conduct merely give detail (time, place, and circumstance) to the known certainty that this witness, like all others, has told a lie or been deceitful. Evidence of prior criminal convictions bear no obvious relevancy to truth-telling in-and-of-itself, and in the case of a criminal defendant only serves to lower the jury's threshold of regret. Most salient is that Rules 608 and 609 ham-handedly address only a witness's sincerity, that is, whether she is deliberately lying in court. Unlike the other four modes which are also applicable to the risk of mistaken testimony, truthful character is unhelpfully focused on perjury.[247]

The loss of truthful character evidence is inconsequential. Juries fully comprehend that people are occasionally prone to deceit and dissimulation. The absence of such evidence may be accounted for by instructing the jury that no such evidence (e.g., prior criminal record) will be heard regarding any witness in the case and should not be speculated about. Rather, the jury should rely on its own life experiences and evaluation of the witness's testimony in court. The assumption is that an explicit warning about what the jury will *not* hear will forestall speculation or unwarranted inferences about witnesses' life history. Of course, prior convictions and uncharged misconduct relevant to bias or as other acts evidence under Rule 404(b) may be admissible under those theories.[248]

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245. *See supra* text accompanying notes 119-20, 180, 187; *see also* Paul Bergman, *Admonishing Jurors to Disregard What They Haven't Heard*, 25 LOY. L.A. L. REV. 689, 695-96 (1992).

246. *See* text accompanying *supra* note 200.

247. *See* MAY, *supra* note 40, at 234; *see also supra* text accompanying note 117.

248. FED. R. EVID. 404(b).

Expert testimony should be used primarily when necessary to explain defects in another witness's testimonial capacity. Trials are not social science seminars. Expert testimony that conflicts with the core testimonial assumptions should usually be excluded as unhelpfully confusing and a threat to the legitimacy of trials. When lay witnesses suffer illnesses or conditions that affect their ability to perceive, remember, or accurately narrate, expert testimony is likely needed to understand their impact on credibility. And even then exposition (lecture) should be the preferred mode of expert testimony; expert opinions on another witness's accuracy are usually of little assistance and only invite the jury to substitute the expert's credibility for that of a lay witness.[249]

As Wigmore and Hutchins observed a century ago, modern psychology undoubtedly offers fresh perspective on human cognition but its insights must be reconciled with the values and imperatives of trial. Above all, the law of evidence must better understand the social and cultural landscape of its own testimonial assumptions—its "epistemological basis"—before it can fully appreciate where and how such changes may be introduced, whether in the form of new doctrine, rules, or innovative testimony, without sacrificing the legitimacy of the modern trial.[250]

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249. *See* Faigman, *supra* note 111, at 310.

250. *See* MCCORMICK, *supra* note 7, § 44; *see also supra* text accompanying notes 109-14.