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The Character Evidence Defense: Acquittal Based on Good Character

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THE CHARACTER EVIDENCE DEFENSE: ACQUITTAL BASED ON GOOD CHARACTER¹

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I. INTRODUCTION

This article centers on the case of *United States v. Martinez*,³ the only recent case in which an accused was acquitted on the ground of good moral character. *Martinez* illustrates the powerful effect of a good character evidence defense that showed the accused led a blameless life before being inveigled into drug courier service by an intimidating DEA informer.⁴

This article begins with a brief review of *United States v. Martinez*. Following a presentation of this case, the article shifts focus to examine what our sister discipline of psychology can tell us about human personality and the cross-situational stability of human behavior and the scientific basis for or against admission of character evidence. Results of psychological research support the existence of a real "human personality" which, when viewed from a moral perspective, is "human character" as the courts understand it. The findings of some of our psychologist counterparts support the admissibility of lay reputation or opinion evidence about character as informal lay personality assessments. Consequently, the explanatory power and logical relevance of character evidence admissibility.

Next, the article examines the state of the law relating to defense character evidence and the prosecution's right to rebut good character with bad character. All jurisdictions in the United States permit a criminal defendant to call reputational or opinion witnesses to the defendant's good character to raise a reasonable doubt about the defendant's guilt. The prosecution may rebut by cross-examining defense character witnesses or by calling its own reputational or opinion witnesses. In special instances, such as entrapment, duress, or insanity, both the defense and the prosecution may be able to prove specific instances of good or bad conduct relating to the character trait at issue in the case. All this evidence is admitted undigested, and the courts discourage expert opinion evidence as an aid to interpreting raw data from lay witnesses.

Finally, the article proposes some changes in the structural system for admitting character evidence. The chief changes recommended include greater use of expert testimony to establish relevant personality structure which raises the issue of whether what is sauce for the defendant in a criminal prosecution ought to be sauce for the prosecutorial gander.

³924 F. Supp. 1025 (D. Or. 1996).

⁴*Id.*

II. UNITED STATES *v.* MARTINEZA. *The Players and the Plot*

Samuel, Pablo and Benjamin Martinez emigrated from Mexico to the Pacific Northwest around 1988.⁵ The three brothers found jobs in Washington, then moved to Canby, Oregon, where they lived together for about three and a half years before splitting up.⁶ Benjamin Martinez, the youngest brother, worked two jobs. He packed plants for shipment at Agri-Pack in Woodland, Oregon, and worked in a cannery at Gervais.⁷ He had never been in trouble with the law in Mexico or in the United States.⁸ He never bought, sold or used any controlled substances.⁹ Benjamin had only four years of formal education.¹⁰ Although he was a good worker, he was not a leader and was content to let others dictate.¹¹ In January of 1995, he decided to move to Gervais. A mutual friend introduced him to Alberto "Fermin" Flores, who agreed to rent a room to Martinez in his house.¹² Flores knew an auto mechanic named Alvaro Plancarte who passed himself off as a "big time" drug dealer.¹³ Plancarte was a DEA operative who received a salary from the Federal government, together with bonuses for bringing in offenders who received convictions.¹⁴ In 1988,

⁵Transcript of the Record, Part 2 at 85, United States *v.* Martinez, 924 F. Supp. 1025 (D. Or. 1996) (CR-95-266-PA) [hereinafter Transcript of the Record, Part 2]. The Martinez record is in two sections. Record Transcript, Part 1 contains the testimony of Alvaro Plancarte and Benjamin Martinez. Record Transcript, Part 2 contains statements by the court and counsel and all other witnesses.

⁶Transcript of the Record, Part 2, *supra* note 5, at 85.

⁷Transcript of the Record, Part 1 at 27, United States *v.* Martinez, 924 F. Supp. 1025 (D. Or. 1996) (OR-95-266-PA) [hereinafter Transcript of the Record, Part 1] (direct examination of Benjamin Martinez).

⁸Transcript of the Record, Part 1, *supra* note 7, at 29.

⁹*Id.* (direct examination of Benjamin Martinez); Transcript of the Record, Part 2, *supra* note 5, at 97 (direct examination of Pablo Martinez).

¹⁰Transcript of the Record, Part 1, *supra* note 7, at 36.

¹¹Transcript of the Record, Part 2 at 100 (direct examination of Pablo Martinez); Transcript of the Record, Part 2 at 96 (direct examination of Jose Antonio Ramirez). Samuel, his eldest brother, summarized his brother's mental ability as follows:

Q. Do you think that Benjamin is a very intelligent person?

A. In some things, like work. Sometimes he still thinks like a child. He doesn't think about things in the future, you know, like, for example, what's happening now.

Q. Is he very easily influenced by people?

A. Well, that's what happened. We saw that. Because I'm the oldest one here . . .

¹²Transcript of the Record, Part 2, *supra* note 5, at 71 (direct examination of Alberto Flores).

¹³*Id.* at 73.

¹⁴*Id.*

Plancarte tried to enlist Flores in his drug operation, but Flores refused to become involved with Plancarte.¹⁵

About a month after he moved in with Fermin Flores, Benjamin Martinez' car developed engine problems.¹⁶ Fermin Flores introduced him to Plancarte, who promised to fix Benjamin's car.¹⁷ In February of 1995, Plancarte performed work on Martinez' car and also began enticing Martinez to work with him as a drug runner.¹⁸ First, Plancarte asked Benjamin Martinez if he knew people who manufactured drugs. Martinez did not know anyone. Plancarte dropped the subject for a few days, but later came back to see Martinez and offered to teach Martinez how to sell drugs.¹⁹ Martinez refused to find drugs for Plancarte.²⁰ Finally, Plancarte found out that Martinez had a wife in Mexico and a girlfriend who had borne him a child that lived in Oregon.²¹ Plancarte then offered to become Benjamin's "padrino."²² Martinez understood Plancarte would help him settle his domestic problems in Mexico provided Martinez helped Plancarte locate local drug dealers from whom to make purchases.²³ Only then did Martinez agree to help him find sources for methamphetamine in or near Gervais.²⁴ Martinez started asking people at his workplace if they knew who had drugs to sell, and he made contact with a Colombian woman named Rosario Lucas who had access to methamphetamine.²⁵ Martinez passed this information on to Alvaro Plancarte.²⁶

Plancarte's police supervisor and contact, Detective Tim Diede, told Alvaro to set up a "buy" of methamphetamine through Martinez. This "buy" was scheduled to take place on May 24, 1995, at a McDonald's restaurant parking lot in Woodburn, Oregon.²⁷ Plancarte was equipped with a body wire and

¹⁵*Id.* at 73.

¹⁶Transcript of the Record, Part 2, *supra* note 5, at 77.

¹⁷*Id.*

¹⁸Transcript of the Record, Part 1, *supra* note 7, at 32 (direct examination of Benjamin Martinez).

¹⁹*Id.* at 32.

²⁰*Id.* at 33.

²¹*Id.*

²²*Id.* at 35.

²³Transcript of the Record, Part 1, *supra* note 7, at 35.

²⁴*Id.*

²⁵Transcript of the Record, Part 2, *supra* note 5, at 37, 39, 43 (cross examination).

²⁶*Id.*

²⁷*Id.* at 11 (direct examination of Detective Diede).

\$4,000 in cash.²⁸ Martinez turned over a half pound of methamphetamine to Plancarte and left with the \$4,000.²⁹

The Salem police decided not to arrest Martinez at the first "buy." Plancarte agreed to set up another larger "buy." A second drug deal was set up for June 7, 1995, and the exchange was to be made at Martinez' house. Martinez was supposed to convey a pound of methamphetamine from Rosario to Plancarte for \$6,000.³⁰ There were problems with the "buy" because Martinez had to leave his house and drive to his source's apartment in Salem to pick up the drugs for Plancarte.³¹ The police did not move in and arrest Martinez because they were hoping to locate and arrest his source.³² Plancarte then arranged a third, much larger "buy" on June 20, 1995, of five pounds of methamphetamine for \$25,000, \$10,000 down and \$15,000 to be paid from future street sales.³³ The Salem police were still not satisfied that they had probable cause to move against Martinez' source of supply, so another "buy" was arranged for June 27, 1995. The Salem police staked out the suspected source's house on 23rd Street in Salem and waited for Martinez to appear. They followed Martinez from the house to a Thriftway supermarket where Martinez met an associate in a pickup truck that held six pounds of methamphetamine. Martinez entered the truck which was parked head to head with Plancarte's truck. The source delivered six pounds of methamphetamine, and Plancarte handed over the down-payment money and gave a signal. The Salem police then arrested all three men. The police recovered around \$70,000 to \$75,000 worth of methamphetamine and the marked cash.³⁴

Martinez and the source of his supply were separately indicted in the U.S. District Court for the District of Oregon for possession of a controlled substance with intent to sell.³⁵ The case went to trial on February 21, 1996. The Government proved a prima facie case of four sales of methamphetamine by Martinez to Plancarte, calling only Salem Police Department Detective Diede, Detective Staples and Plancarte as government witnesses to prove the offense.³⁶ Defendant's motion for directed verdict of acquittal was denied.³⁷

²⁸*Id.* at 16.

²⁹*Id.*

³⁰Transcript of the Record, Part 2, *supra* note 5, at 16.

³¹*Id.* at 19

³²*Id.*

³³*Id.* at 20-21.

³⁴*Id.* at 27.

³⁵Brief of United States at Appendix 51, *United States v. Martinez*, 122 F.3d 1161 (9th Cir. 1997) (No. 96-30178).

³⁶Transcript of the Record, Part 2, *supra* note 5, at 3 (direct examinaiton of Detective Diede); Transcript of the Record, Part 2 at 25 (direct examination of Alvaro Plancarte).

³⁷Transcript of the Record, Part 1, *supra* note 7, at Appendix 56.

Martinez testified he made the four purchases from Rosario for Plancarte because Plancarte had induced him to be a go-between for him.³⁸ Martinez also testified that Plancarte promised to be his "padrino" if he helped Plancarte find someone who sold methamphetamine.³⁹ This promise induced Martinez into drug trafficking, since Plancarte was then honor-bound to help him with his marital problems.⁴⁰ Martinez also told the jury he had never been in trouble with the law before his association with Plancarte.⁴¹ Martinez stated Plancarte taught him code words for drugs so that he could converse with Plancarte in front of other people without being detected.⁴² Martinez also denied knowing that "crank" was a slang term for methamphetamine until Plancarte explained the term to him.⁴³

Defense counsel called seven witnesses. Two witnesses testified Alvaro Plancarte tried to lure them into buying drugs for him or acting as middle persons in drug sales.⁴⁴ Each of these witnesses provided negative character evidence of Alvaro Plancarte's character, which was apparently directed at Plancarte's credibility as a witness.⁴⁵ Martinez called five character witnesses who testified his reputation for good moral character in the Mexican-American community in which he lived was excellent.⁴⁶ The government presented no rebuttal to these five witnesses.⁴⁷ However, the jury returned a guilty verdict.⁴⁸

At this point, the case began to crumble. Judge Panner sent a letter to defense counsel in which the judge requested defense counsel to file a Rule 29 motion for directed verdict of acquittal or a Rule 33 motion for new trial.⁴⁹ Defense

³⁸Transcript of the Record, Part 1, *supra* note 7, at 35-36 (direct examination of Benjamin Martinez).

³⁹*Id.* at 35-36.

⁴⁰*Id.*

⁴¹*Id.* at 38-39.

⁴²*Id.*

⁴³Transcript of the Record, Part 1, *supra* note 7, at 46.

⁴⁴Transcript of the Record, Part 2, *supra* note 5, at 63-69, 70-82.

⁴⁵*Id.* at 63-69, 70-82.

⁴⁶*Id.* at 84-92, 96-107, 110-18. Three of these witnesses were Martinez' relatives, including his oldest brother Samuel, his brother Pablo and his sister Maria Martinez. Lydia Tartula and Pedro Torres were not family members.

⁴⁷*Id.* at 107.

⁴⁸*Martinez*, 924 F. Supp. at 1025.

⁴⁹Brief of United States at Appendix 20, *United States v. Martinez*, 924 F. Supp. 1025 (D. Or. 1996) (No. 96-30178). The letter read:

The court requests that you file a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c), or a motion for a new trial under Federal Rule of Criminal Procedure 33 within ten days of the date of this letter. The Government will have ten days to respond to your motion. You will then have five days to reply

counsel complied and filed both motions.⁵⁰ On April 30, 1996, the trial judge granted both motions in the alternative.⁵¹

The trial judge also issued an opinion justifying his extraordinary action.⁵² After reciting a summary of the facts, the trial judge stated the only issue before the court was whether Plancarte entrapped Martinez.⁵³ The judge noted the prosecution had to prove beyond a reasonable doubt that Martinez was predisposed to commit the crime charged before Plancarte approached him.⁵⁴ Although the trial judge recognized entrapment was generally a jury question, he set aside the verdict as contrary to law.⁵⁵

The trial judge was appalled the Salem police had employed a bounty hunter such as Plancarte as an undercover operative and then paid him conviction bonuses. The judge was persuaded that the government failed to prove Martinez was not entrapped beyond a reasonable doubt.⁵⁶ Objectively, Plancarte's police behavior substantiated Martinez' claim that he was not predisposed to commit the crime.⁵⁷ Rather, the jury's verdict shocked the conscience of the community and should be set aside. The judge granted both the Rule 29 and Rule 33 motions.⁵⁸

Essentially, the defendant in *Martinez* first admitted making four "buys" of methamphetamine from Rosario on behalf of Plancarte.⁵⁹ Second, the defendant was supposed to receive cash from Plancarte for acting as "go-between."⁶⁰ Third, Plancarte promised the defendant to be his "padrino" and take care of his marital problems for him.⁶¹ Fourth, Plancarte initiated all conversations about drugs and taught defendant the street language for drugs.⁶² Fifth, Plancarte was a paid bounty hunter employed by the Salem

to the government's response. I will set oral argument as soon as briefing is complete. Thank you.

Id.

⁵⁰*Martinez*, 924 F. Supp. at 1025.

⁵¹Brief of United States at Appendix 32, *United States v. Martinez*, 924 F. Supp. 1025 (D. O. 1996) (No. 96-30178).

⁵²*Martinez*, 924 F. Supp. at 1028.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.* at 1029.

⁵⁶*Id.*

⁵⁷*Martinez*, 924 F. Supp. at 1028.

⁵⁸*Id.* at 1030.

⁵⁹*Martinez*, 122 F.3d at 1161.

⁶⁰*Id.* at 1162.

⁶¹*Id.* at 1162 n.1.

⁶²*Id.* at 1162, 1164.

Police to trap drug dealers.⁶³ Sixth, Plancarte received a cash bonus for every successful arrest.⁶⁴ Seventh, Martinez had never been in trouble with the law and had a reputation in the community in which he lived as a good man.⁶⁵ Eighth, the government presented absolutely no evidence to rebut Martinez' evidence of good moral character.

Martinez is the only case since the adoption of the Federal Rules of Evidence in which the defendant was acquitted on account of good character standing by itself. The government has filed its notice of appeal on several grounds, but none address the following principal issue: was the judge justified in overturning the jury verdict because the judge believed the defendant was of such good moral character that he was a victim of police tactics rather than a willing participant? This case raises the issues hinted at long ago in *United States v. Michelson*⁶⁶—can a defendant be acquitted on account of good character alone?

The *Martinez* appeal was not decided on this issue.⁶⁷ The Ninth Circuit affirmed the District Court on the grounds Martinez produced persuasive evidence of entrapment which the government failed to disprove beyond a reasonable doubt.⁶⁸ The court did not issue instructions to the trial judges within the 9th Circuit on how to handle a character evidence defense and did not advise the lower courts whether a directed verdict of acquittal may be given on the strength of good character evidence alone.

III. PERSONALITY THEORY AND CHARACTER EVIDENCE

A. Personality Theory in General

For generations, most psychologists have accepted the notion that human behavior is stable under a variety of similar situations because each human being has a set of predispositions or tendencies to act in similar fashion under

⁶³*Id.* at 1162-63.

⁶⁴*Martinez*, 122 F.3d at 1162.

⁶⁵*Martinez*, 924 F. Supp. at 1027.

⁶⁶335 U.S. 469 (1948).

⁶⁷Normally, a directed verdict of acquittal cannot be granted after the jury returns a guilty verdict on the grounds that the government's chief witness is inherently unbelievable. The trial judge's opinion suggested Alvaro Plancarte's testimony was not worthy of belief and should have been rejected by the jury. The 9th Circuit chose to affirm the District Court initially without mentioning this issue in an unpublished opinion that was withdrawn on September 4, 1997. The published opinion, reported at 122 F.3d 116, dealt with this issue. The majority said it was true the District Court cannot consider the credibility of government witnesses in dealing with a motion for acquittal, but the District Court's error was harmless because the acquittal was justified even if Plancarte's testimony is taken to be credible. *Martinez*, 122 F.3d at 1161.

⁶⁸*Martinez*, 122 F.3d at 1164.

similar circumstances.⁶⁹ Unless individual human behavior is relatively predictable under similar circumstances, character evidence is irrelevant. For more than a century, psychologists have studied human behavior in order to demonstrate an empirical basis for cross-situational behavioral stability.

Psychologists who study the phenomenon of human personality gravitate towards two views of behavioral consistency. One school identified specific innate personality traits that produce similar actions under similar circumstances.⁷⁰ Their opponents deny the existence of an innate personality structure, and prefer to account for cross-situational behavioral stability by referring to externally similar stimuli.⁷¹ In the end, both groups admit that the other has a legitimate point to make. Each individual human being has a personality structure which to some extent is innate, and to some extent is the product of repetitive interaction with external stimuli.

Both groups agree human behavior is predictable within broad limits, once the observer knows the personality structure of the individual and the external stimuli operating on that individual. Consequently, character evidence is relevant because the legal term "character" is identical to the psychological concept of "personality." Evidence that proves an individual's personality or character structure is relevant to prove that an individual acted in conformity with that structure.

The Federal Rules of Evidence, however, state that "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in a conformity therewith on a particular occasion."⁷² As soon as the general rule is announced, the Federal Rules make exceptions. There are three exceptions to the general prohibition about character evidence: (a) the defendant in a criminal prosecution can always prove good moral character, and the prosecution may rebut that proof; (b) in crimes of violence, the character of the victim for violent conduct may be proved to show the victim was the first aggressor and the state has the right to rebut by proving the victim's good character and the defendant's bad character for violence; and (c) the character of any witness may be proved with regard to truthfulness.⁷³

The Federal Rules of Evidence and the courts have failed to generate a definition or description of character evidence. Usually, when the courts talk

⁶⁹ See, e.g., Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. LAW. BULL. 504, 513-21 (1991).

⁷⁰ See, e.g., GORDON W. ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION 25-46 (1937) (summarizing historical definitions of personality from ancient times to 1937); Raymond B. Cattell, *The Grammar of Science and the Evolution of Personality Theory*, in HANDBOOK OF MODERN PERSONALITY THEORY 3-42 (Raymond B. Cattell & Ralph M. Dreger eds., 1977) (summarizing post-war theoretical models of personality).

⁷¹ See, e.g., WALTER MISCHEL, INTRODUCTION TO PERSONALITY 1-9, 63-81 (1971).

⁷² FED. R. EVID. 404(a).

⁷³ FED. R. EVID. 404(a)(1) (defendant may prove good character); FED. R. EVID. (a)(2) (defendant may prove victim's character for violence); FED. R. EVID. (a)(3)(credibility).

about "character evidence," the courts assume that the audience knows exactly what the court is talking about. This is an incorrect assumption.

"Character evidence" appears to be a loose, slippery name given to evidence that shows someone is predisposed to act in a particular relevant fashion due to something innate. When the courts offer any explanation of character evidence to their audience, the explanation takes the form of attributing human behavior under similar circumstances due to a "character trait."⁷⁴ A "trait" is apparently some form of innate predisposition. A brief example may help here.

Suppose that the defendant is charged with check forging. Check forging is a dishonest act. Dishonesty is said to be a "character trait."⁷⁵ If defense counsel believes the defendant is an honest individual, i.e., has a "character trait" for honesty, then defense counsel would want to prove the defendant had that character trait. It would be "out of character" for the defendant to do a dishonest act. Therefore, the defendant is innocent. Federal Rule of Evidence 404(a)(1) gives the defendant this option in a criminal prosecution.⁷⁶ Federal Rule of Evidence 405(a) tells the defendant that the only way the defendant can prove the existence of a good "character trait" is to call reputation or opinion witnesses to testify that the defendant has a good moral character trait for honesty.⁷⁷ Although the defendant may want to tell the jury about the many honest acts

⁷⁴Gordon Allport dealt with the relationship between "character" and "personality." Character is a term frequently used as a synonym of personality. It has a history as long and nearly as intricate . . . [i]nstead of defining character as the volitional aspect of personality, it is sounder to admit frankly that it is an ethical concept. Sir John Adams writes, [c]haracter is the moral estimate of the individual, an evaluation." Defined in this way, the psychologist does not need the term at all; personality alone will serve. Character is personality evaluated, and personality is character devaluated . . .

ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 52. For Allport and most personality theorists, "character trait" is identical to "personality trait," defined as "'consistent differences between the behavior or characteristics of two or more people.' Thus, a 'trait is any distinguishable, relatively enduring way in which one individual varies from another.'" MISCHEL, INTRODUCTION TO PERSONALITY, *supra* note 71, at 14.

⁷⁵See, e.g., *United States v. Weir*, 861 F.2d 542, 545 (9th Cir. 1988); *Colaizzi v. Walker*, 812 F.2d 304, 309 (7th Cir. 1987); *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 484, 494 (7th Cir. 1972); *Peacock v. Board of Regents*, 380 F. Supp. 1081, 1086 (D. Az. 1974); *Shirley v. Smith*, 933 P.2d 651, 665 (Kan. 1997); *Board of Law Exam. v. Stevens*, 868 S.W.2d 773, 776 (Tex. 1994); *Attorney Grievance Comm'n v. Holdsbrough*, 624 A.2d 503, 515 (Md. 1993); *People v. Castro*, 696 P.2d 111, 129 (Cal. 1985); *State v. Branch*, 164 P.2d 182, 186 (Idaho 1945); *Tarling v. People*, 194 P. 931, 940 (Colo. 1921); *Commonwealth v. Boring*, 684 A.2d 561, 563 (Pa. Super. Ct. 1996); *People v. Krause*, 609 N.E.2d 980, 985 (Ill. App. 1993); *People v. Caldwell*, 333 N.W.2d 105, 108 (Mich. App. 1983); *Craddolph v. Ackerman*, 385 N.E.2d 1091, 1093 (Ohio App. 1978); *Riddle v. State*, 223 P.2d 379, 386 (Okla. Crim. App. 1950).

⁷⁶FED. R. EVID. 404(a)(1).

⁷⁷FED. R. EVID. 404(a).

the defendant performed during the defendant's entire life before the criminal action was commenced, the defendant cannot do so.

On the other hand, the prosecution can rebut "good character" evidence with "bad character" evidence.⁷⁸ Federal Rule of Evidence 405(a) limits the prosecution to reputation or opinion witnesses.⁷⁹ However, if the prosecution knew the defendant had committed one or more similar dishonest acts prior to the crime charged, the prosecution can cross-examine defense reputation or opinion witnesses on whether or not they heard about defendant's dishonest acts.⁸⁰ Federal Rule of Evidence 608 permits this tactic.⁸¹ However, Federal Rule of Evidence 405 precludes the prosecution from proving those dishonest acts by calling its own fact witness.⁸²

The truth of these propositions depend on judicial recognition of an underlying scientific foundation for the existence of "character traits," and the deduction that people generally behave in similar fashion under similar circumstances due to "character traits." The lawyer's idea of character evidence, a bundle of more or less stable traits that do not change from situation to situation, is close to the psychologist's notion of personality trait.⁸³

Depending upon their doctrinal training, psychologists think of the stability of cross-situational behavior as either a personality trait or a conditioned response to environmental stimuli or habit.⁸⁴ The psychologist looks at this data as part of the study of personality and looks to personality theory to understand the significance of the issues involved. If that psychologist was conversant with Gordon Allport's personality textbook or the writings of one of his many disciples in personality psychology, the psychologist would identify "character evidence" with personality evaluated according to a moral standard.⁸⁵ In the case of the courts and criminal prosecution, the moral standard emanates from a confused mass of commonly held notions of right and wrong.

As will be explained later, psychologists have been trying to devise theories, tests and equations to identify human personality traits and use them to predict

⁷⁸ *Id.*

⁷⁹ FED. R. EVID. 405(a).

⁸⁰ *See* FED. R. EVID. 608.

⁸¹ *Id.*

⁸² *See* FED. R. EVID. 405.

⁸³ *See* Davies, *supra* note 69, at 513-21 (quoting Professor Wigmore's definition of character as a "fixed trait or the sum of traits" from 1A JOHN H. WIGMORE, EVIDENCE § 55, at 1159 (Tiller Rev. 1983)).

⁸⁴ *See, e.g., supra* notes 69-71.

⁸⁵ ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 52.

future human behavior cross-situationally for more than seventy-five years.⁸⁶ Although the psychological community is unable to agree generally on a precise standard for predictability of future human behavior, all agree that individual human behavior is more or less stable across situations and across time. If so, then knowing the personality structure of an individual actor should lead to knowing the probability that the actor behaved in a particular way at a particular time.

The courts tend to find ways to exclude character evidence, even though character evidence may be relevant as proof of guilt or innocence. According to the courts, character evidence has low probative value and carries with it a high degree of prejudice against the accused.⁸⁷ Therefore, it must generally be excluded outside of the exceptions contained in Rule 404(a). If the courts are wrong in their assessment of the probative value of character evidence, however, then the general rule barring character evidence is also wrong and reliable character evidence ought to be admissible generally by both sides in a criminal prosecution.

According to the best available psychological data, character or personality trait theory has a scientific basis. Human beings do behave more or less consistently across a multitude of similar situations. That consistency may be the product of genetic predisposition, environmental conditioning, or both. To understand the scientific basis for character evidence, one has to spend some time reviewing personality theory in psychology.

B. Personality Theory in Psychology

Nearly every scientist who studied individual human behavior found human behavior is characterized by consistency of cross-situational behavior patterns.⁸⁸ Scientists disagree about the kind and frequency of cross-situational stability; however, they agree individual human behavior, whether conscious

⁸⁶ See Cattell, *supra* note 70, at 3-42 (discussion of evolution of personality theory since World War II).

⁸⁷ Davies, *supra* note 69, at 523. "The primary justification for the exclusion of most character evidence is the fear that the prejudicial effect of such evidence outweighs its probative value." *Id.* (citing CHARLES MCCORMICK, MCCORMICK ON EVIDENCE §§ 186, 188 (3d ed. 1984); JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL § 7.01[10](1988)).

⁸⁸ ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 25-54 (extended discussion of the historical development of personality theory). Salvatore R. Maddi develops the almost universal acceptance of a center in each human called "personality." Salvatore R. Maddi, *The Continuing Relevance of Personality Theory*, in FIFTY YEARS OF PERSONALITY PSYCHOLOGY 85 (Kenneth H. Craik, et al., 1993). Maddi attempts to reconcile the warring psychologists who disagree on a definition of personality and the relationship between inherent, biological predisposition to act and external stimuli that condition responses. *Id.* at 86-87. He refers to this as a the "person-situation dichotomy." *Id.*

or unconscious, is not random or whimsical.⁸⁹ Otherwise, individual human behavior could not be studied at all. All investigators agree individual human behavior is the product of the interaction of genetic factors, particularly intelligence, and external environmental factors.⁹⁰ The construct used to describe the location of this center of biophysical interaction with external stimuli is "personality." Only American behavioralists have challenged the existence of this interaction center.⁹¹ While there are at least four current definitions of personality used in clinical and academic psychology, they all contain the elements shown above.⁹² While theorists rightly defend and promote the definition of personality that fits their theory, the common definition stated above is a good working foundation for comparative analysis.

⁸⁹The warring theoretical models that have been designed to test cross-situational behavioral stability are discussed in some detail in PETER BORKENAU, TO PREDICT SOME OF THE PEOPLE MORE OF THE TIME INDIVIDUAL TRAITS AND THE PREDICTION OF BEHAVIOR IN FIFTY YEARS OF PERSONALITY PSYCHOLOGY 237 (1993). Borkenau discusses several of the traditional trait theory models and Mischel's social learning theory model, as well as Hartshorn and May's pioneering work on lying. He covers all the current, known theories of cross-situational behavioral stability in this brief essay. All these models depend on statistical correlations between observed human behavior and scores on psychological tests administered to the human subjects under study. Such a theoretical modeling system eliminates any possibility that repeated similar behavior under similar external stimuli is random or whimsical. For a complete treatment of Hartshorn and May's situation theory on lying, see HUGH HARTSHORN & MARK A. MAY, 1 STUDIES IN THE NATURE OF CHARACTER: STUDIES IN DECEIT (1928).

⁹⁰See MISCHEL, INTRODUCTION TO PERSONALITY, *supra* note 71, at 2-10.

⁹¹E. C. Thorndyke, one of the founders of American behavioralism, asserted that there was no such thing as general personality traits, and no such thing as a stable center for the interaction of personality traits with the environment. Rather, he claimed human individual conduct was simply a chain of disconnected stimulus-response habits. E.C. THORNDYKE, EDUCATIONAL PSYCHOLOGY 29 (1903).

⁹²The following is a sampling of the definitions of personality commonly used by contemporary psychologists. (1) Personality is the dynamic organization within the individual of those psychophysical systems that determine his unique adjustments to his environment. ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 49. (2) Personality is a person's unique pattern of traits. JOY P. GUILFORD, PERSONALITY 51 (1959). (3) Personality is the most adequate conceptualization of a person's behavior in all its detail that the scientist can give in a moment in time. DAVID C. MCCLELLAND, PERSONALITY 69 (1951). (4) Personality is a more or less stable and enduring organization of a person's character, temperament, intellect and physique, which determines his unique adjustment to the environment. *Character* denotes a person's more or less stable and enduring system of conative behavior (will); *temperament*, his more or less stable and enduring system of affective behavior (emotion); *intellect*, his more or less stable and enduring system of cognitive behavior (intelligence); *physique*, his more or less stable and enduring system of bodily configuration and neuroendocrine endowment. HANS J. EYSENCK & MICHAEL EYSENCK, PERSONALITY AND INDIVIDUAL DIFFERENCE 9 (1985).

Walter Mischel, the principal exponent of the social learning theory of personality development, refuses to define personality, preferring instead to treat personality as a verbal description of the locus of all an individual's habits learned in specific situational contexts. See MISCHEL, INTRODUCTION TO PERSONALITY, *supra* note 71, at 2.

1. The Four Humors

Personality theory dates back at least to the second century A.D.⁹³ Galen, the Greek slave physician, was the first medical thinker to classify illnesses and organize folk medicine into treatment based on diagnosis.⁹⁴ He was also the first personality theorist.⁹⁵ Galen, a shrewd observer of mankind, noticed that people's temperaments fell into four gross categories or types: (a) the Choleric type—people with strong emotions, high spirited, aggressive and easily angered; (b) the Melancholic type—people with strong emotions, sensitive, pessimistic, anxiety-ridden and unstable; (c) the Phlegmatic type—people with weak emotions, sedentary, thoughtful, stable and calm; and (d) the Sanguine type—a sociable, outgoing, optimistic person governed by weak emotions.⁹⁶

Galen produced the first serious classification of human personality types or temperaments. According to his treatise, each of his four temperaments were represented by people whose predominant behavioral patterns were derived from an excess of one of the four humors that governed the human body.⁹⁷ Galen adhered to the scientific theory that the human circulatory system consisted of four "humors" or substances.⁹⁸ Thus, these general dispositions or temperaments were innate. Galen's personality theory based on the four humors was widely accepted for a millennium. The theory turns up in Shakespeare's plays⁹⁹ and in medieval and early modern era medical and philosophical writing.¹⁰⁰ In the eighteenth century, Immanuel Kant imported the four humors into his philosophical system, and adopted the temperament classification originated by Galen.¹⁰¹

In the late nineteenth century, Wilhelm Wundt, parent of modern experimental psychology, accepted Galen's classification of human personality types, although the biological basis for the four humors classification had long been rejected.¹⁰² Wundt took the four humors theory one step further, positing

⁹³Eysenck recognizes Galen as the first personality theorist. See HANS J. EYSENCK, CRIME AND PERSONALITY 48-51 (3d ed. 1977). Allport, however, dates humor theory, the first known personality psychology, back to Hippocrates and Empedocles 450-400 B.C. ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 63.

⁹⁴EYSENCK, CRIME AND PERSONALITY, *supra* note 93, at 48.

⁹⁵*Id.* at 49-50.

⁹⁶*Id.* at 50.

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹See, e.g., WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING act II, sc. 3.

¹⁰⁰For an account of the medical teachings of Arnold of Villanova, see *Arnold of Villanova*, in ROBERT I. WATSON, THE GREAT PSYCHOLOGISTS 129-30 (J.B. Lippincott ed., 1968).

¹⁰¹For an account of Kant's psychological theories, see *id.* at 219-23.

¹⁰²EYSENCK, CRIME AND PERSONALITY, *supra* note 93, at 48.

that the four humors were not static type classifications but positions on a two dimensional continuum that covered all human personalities. The first dimension was emotionality. Although different in other respects, choleric and melancholic individuals shared strong emotional reactions. Phlegmatic and sanguine individuals had relatively weak emotional reactions, though different in other respects. The second dimension was changeability or stability. Choleric and sanguines had relatively unstable changeable emotions, whereas melancholic and phlegmatic individuals had stable emotional patterns.¹⁰³

Wundt theorized that many possible combinations of temperament could occur depending upon each individual's distribution along these two axes of personality taxonomy.¹⁰⁴ He hoped to be able to predict individual human behavior from personality assessments made in the laboratory using experimental objective testing. These assessments classified individuals statistically on the two axes he identified as relevant to human behavior. Scientists after Wundt attempted to confirm the existence of four temperamental poles empirically. In the 1950's, Keirsey and Bates, two American researchers, developed a modernized version of the four humors theory that identified four temperamental types present in any large population.¹⁰⁵ The Guardians, the first temperament group, consisted of those individuals who were oriented realistically to the "here and now," gathered information by looking at the facts, and quickly reached conclusions about situations in order to satisfy an inner need for closure.¹⁰⁶ The Guardians were about thirty-eight percent of the adult population of the United States, and were society's traditionalists, conserving what was good from the past, slow to adapt to changing conditions and unwilling to look into the future for further possibilities. The second temperament group, also about thirty-eight percent of the United States adult population, were labeled Artisans.¹⁰⁷ They were impulsive, fun-loving, practical, realistic, "here and now" people who were able to get things done in an emergency because they were more interested in gathering sense data to look at all the possibilities up to the very last "moment of truth."¹⁰⁸ Keirsey and Bates' third group, the Idealists, tended to gather

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵DAVID KEIRSEY & MARILYN BATES, PLEASE UNDERSTAND ME: CHARACTER AND TEMPERAMENT TYPES 21-46 (5th ed. 1984).

¹⁰⁶*Id.* Later, after Keirsey and Bates had become imbued with the Jungian typology of the Myers-Briggs variety, they identified the Guardian temperament with an SJ orientation on Myers-Briggs Type Inventories. Guardians become police officers, soldiers and mid-level administrators and managers. They do well at accomplishing routine repetitive tasks.

¹⁰⁷*Id.* at 55-60.

¹⁰⁸*Id.* Keirsey and Bates later identified this group with an SP orientation (dominant sensing, secondary perceiving), life's fun-loving Fallstaffs, the good mechanics and tinkerers.

information via subjective intuition and inserted themselves into the situation and solved problems from the inside out.¹⁰⁹ The fourth group, the Rationalists, tended to gather information intuitively and to apply objective rules to information to solve problems.¹¹⁰

Keirsey and Bates later adapted Jungian type theory to support their findings and employed the Myers-Briggs Type¹¹¹ Inventory as an empirical test instrument that worked well for classifying people by temperament.¹¹² They claim their theory is empirically verifiable via self-reporting inventories and by observer-completed inventories.¹¹³ Since Keirsey and Bates' theory is a modern version of Galen's Four Humors, there is empirical support for evaluating human behavior based on more or less stable temperament factors that are apparently a matter of genetics rather than environmental conditioning.¹¹⁴

2. Jungian Type Theory

The great early twentieth century psychiatrist Carl G. Jung adapted a taxonomy for classification of personality types for mentally normal and abnormal individuals. Jung noticed in his clinical practice that some individuals were emotionally energized by the external world of people and events, while other individuals were energized by their internal thought processes.¹¹⁵ He labeled the first group "extraverts" and typed the second as "introverts" based on the source of their emotional energy. The person who was extraverted typically was oriented to the exterior world¹¹⁶ while the introverted person was oriented toward his or her own subjectivity.¹¹⁷ Jung also noticed individuals acquired information according to distinct personality preferences, whether the person was oriented toward extraversion or introversion. Some individuals acquired information directly from sensation or sense perception. Jung labeled this way of acquiring information

¹⁰⁹*Id.* at 62-68. The Idealists were identified with an NF orientation, having a dominant intuitive preference and an auxiliary feeling used to deal with social and personal issues.

¹¹⁰KEIRSEY & BATES, *supra* note 105, at 62-68. The Rationalists were identified with an NT orientation having a dominant intuitive preference and an auxiliary thinking preference.

¹¹¹The Myers-Briggs Type Inventory was developed by the mother-daughter team of Katherine Briggs and Isabelle Briggs Myers in 1942. It is a pencil and paper inventory of individual preferences related to Jungian type theory. OTTO KROEGER & JANET M. THUESSEN, TYPE TALK 281-84 (1988).

¹¹²KEIRSEY & BATES, *supra* note 105, at 21-24.

¹¹³*Id.* at 72-79.

¹¹⁴*Id.*

¹¹⁵CARL G. JUNG, PSYCHOLOGICAL TYPES (Princeton/Bollingen Paperback ed. 1994).

¹¹⁶*Id.* at 333-37.

¹¹⁷*Id.* at 373-78.

"sensation."¹¹⁸ Other individuals unconsciously absorb information intuitively using sense data as an intermediary. He classified these individuals as "intuitive."¹¹⁹ According to this theoretical analysis, an introverted person could learn either through a preference for sensing or through a preference for intuition.¹²⁰ In either instance, the person's introverted orientation interacted with the preference for a particular learning mode. An extraverted person could also use either the sensing or intuitive preference for learning.

Jung also believed human mental processing and organizing of initial information was subject to a preference difference between individuals.¹²¹ Some individuals organize and process information according to logical, detached, analytical processes dominated by external "objective" standards. Jung classified them as enjoying a "thinking" preference.¹²² Other individuals organize and process information according to their own subjective values, rather than by external objective standards. Jung classified these individuals as having a "feeling" preference.¹²³ Consequently, introverted people who had a preference for gathering information through sensing could process that information using "objective" external standards or by inserting themselves into the situation and working out the conclusion according to a subjective value structure.¹²⁴ In either case, an introverted, sensing-thinking type individual would work out intellectual, moral and personal problems objectively and by "the rules" while an introverted sensing-feeling type would work them out by applying a personal value structure from within the problem.¹²⁵ The same analysis would hold for extraverted people.¹²⁶ They might adhere to a sensing or to an intuitive preference for learning. Extraverts might also adhere to a thinking or feeling preference for reaching decisions. By grouping these preferences, Jung generated eight different types of individuals.¹²⁷

Jung also observed that an individual could be further classified by identifying the relationship between extraversion-introversion orientation and

¹¹⁸*Id.* at 362-63, 393-95.

¹¹⁹*Id.* at 366-67, 398-401.

¹²⁰JUNG, *supra* note 115, at 395-98.

¹²¹*Id.* at 398-403.

¹²²*Id.* at 342-43, 380-83.

¹²³*Id.* at 354-56, 383-84.

¹²⁴*Id.* at 342-43, 380-83.

¹²⁵JUNG, *supra* note 115, at 387-91.

¹²⁶*Id.* at 346-54, 356-59 (discussion of the extraverted thinking type and the extraverted feeling type).

¹²⁷*Id.* at 482-83 (definition of type).

sensing-intuiting and thinking-feeling preferences.¹²⁸ According to Jung, type theory was dynamic.¹²⁹ The interaction of a person's preference along one of the three axes of orientation worked predictably according to which of the two orientations and four functions was dominant. Each individual would be controlled by the dominant function, i.e. sensing or intuiting, thinking or feeling. In order to function in society, each individual had to have some semblance of a "helper" or auxiliary function which helped to support the dominant function's operations.¹³⁰ According to Jung, extraverts always exhibited their dominant function, and their auxiliary function was inward-turning or introverted.¹³¹ Likewise, introverts showed the public their secondary function but shielded their dominant function from public scrutiny.¹³²

Jung described eight different personality types generally found among all human communities.¹³³ His theory promised to assist a psychotherapist in identifying the appropriate therapeutic regime specifically geared to the patient's dominant and auxiliary functions. Although Jung warned his readers that this classification process was a useful tool and not dogmatic theology, it became embedded in the work of others as dogma.¹³⁴

In 1923, Katherine Briggs read Jung's book *Psychological Types*. Briggs was a literarily gifted, middle-aged house wife who had no formal psychological education.¹³⁵ Her husband was the chief scientist for the National Bureau of Standards.¹³⁶ Katherine Briggs, a shrewd observer, began to develop her own "type" theory which structured her literary work. Jung's psychology of types was a better "fit" than her own characterization, so she switched to Jungian classification. Her exceptionally gifted daughter and school teacher, Isabel Briggs Myers, adapted her mother's Jungian type theory to a very practical problem: selecting people for jobs.¹³⁷ In the early days of World War II, she used her mother's type theory to construct a pencil and paper inventory that

¹²⁸*Id.*

¹²⁹See CARL G. JUNG, *PSYCHOLOGICAL TYPES, A LECTURE DELIVERED AT THE INTERNATIONAL CONGRESS OF EDUCATION (1923)*, reprinted in CARL G. JUNG, *PSYCHOLOGICAL TYPES* 510-19 (Princeton/Bollingen Paperback ed. 1994).

¹³⁰JUNG, *supra* note 115, at 436-37 (definition of function).

¹³¹*Id.* at 340.

¹³²*Id.* at 373-76.

¹³³*Id.* at 554.

¹³⁴See, e.g., CARL G. JUNG, *ON THE PSYCHOLOGY OF INDIVIDUATION* (H.G. Baynes trans., 1923), reprinted in *BASIC WRITINGS*, 191-240, 248, 262 (Violet Straub ed., 1959).

¹³⁵KROEGER & THUESSON, *supra* note 111, at 281-84.

¹³⁶ISABELL BRIGGS MYERS, *GIFTS DIFFERING* 207 (1980).

¹³⁷*Id.* at 207-08.

could be used to help classify people for jobs.¹³⁸ The test, later famous as the Myers-Briggs Type Inventory, purported to measure the presence of Jungian preferences on all three axes, and thus lead to identifying psychological types by an empirical process.¹³⁹ Isabel Myers-Briggs noticed that individuals differed on their need for closure.¹⁴⁰ Some people favored a scheduled, planned life without surprises and were neat and tidy. Briggs-Myers labeled these people "judging" because they had great need for closure and order. Other individuals favored a more open-ended, tentative and spontaneous life style, which she labeled "perceiving."¹⁴¹ By adding the Judging-Perceiving scale to the Extraversion-Introversion, Sensing-Intuiting, Thinking-Feeling scales, Myers-Briggs came up with sixteen personality types whose orientation and preferences could be empirically classified.¹⁴² The Myers-Briggs Type Inventory (hereinafter "MBTI") quickly proved itself as a useful job classification tool. The preferences of people holding certain positions were identified by empirical study. People took the MBTI and the distribution of their types defined which individuals would likely do well in a particular position. For example, sales people tended to be disproportionately Extraverted, Sensing, and Judging compared to a whole population sample. Scientific research aids tended to be Introverted, Intuitive, and Thinking in greater number in relation to a whole population sample. These initial hypotheses were empirically established by a great number of MBTI scores collected in a central data bank.¹⁴³

The Myers-Briggs Type Inventory has been administered to such diverse groups as troubled African-American school children rated as "high risk" and "female correction institute inmates" and to lawyers and dentists, developing

¹³⁸*Id.* at 20.

¹³⁹For a detailed description of the Myers-Briggs Type Inventory, see ISABELLE BRIGGS MYERS & MARY H. MCCAULEY, *MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR* (1985).

¹⁴⁰MYERS, *supra* note 136, at 8.

¹⁴¹Katharine Briggs and Isabelle Briggs-Meyers, her daughter, were not psychologists. Mrs. Briggs had educated her brilliant daughter entirely at home. Isabelle Briggs matriculated at Swarthmore College and graduated *summa cum laude*. Her mother had developed a human phenomenology of character types on her own. When Mrs. Briggs read Jung's *Psychological Types* in the early 1920's, she revised her own classification to integrate Jung's personality preferences into her own. In 1942, the two women produced a Meyers-Briggs Type Indicator, a pencil and paper test designed to objectively measure an individual's preferences among these four axes. The test was validated and published by Educational Testing Service in 1956. Since that time, the MBTI has been administered to millions of individuals for job classification, educational screening and other purposes with great practical success. KROEGER & THUESEN, *supra* note 111, at 281-84.

¹⁴²MYERS, *supra* note 136, at 21, 291.

¹⁴³MYERS & MCCAULEY, *supra* note 139, at 44-47, 229-38.

a type table for each group based on relatively large sample sizes.¹⁴⁴ These Type Tables tend to lend empirical support for Jung's type psychology and to demonstrate that certain types are over represented in certain socially at-risk populations, i.e., juvenile offenders. Myers-Briggs Type Inventory testers, however, do not have to be licensed psychotherapists or people with a degree in psychology or social work.¹⁴⁵ Until recently, the organized professional psychological community looked at the Myers-Briggs Type Inventory predictors of behavior as "astrology" or "Barnum statements."¹⁴⁶ Research psychologists studying human personality structure devised self-inventories to prove or disprove the existence of personality traits and their orientation around axes devised by the researcher. In 1989, however, two leading personality researchers who produced their own scale for personality assessment found that the MBTI correlated very well with their assessment form when a fairly large group of volunteers took both tests and had common evaluations for "fit" within those tests.¹⁴⁷ Because their form purported to measure the commonly used five factor personality structure model, they inadvertently provided strong empirical support for the hypothesis that the MBTI measures dichotomous personality factors with rare precision in a psychological self-assessment instrument.¹⁴⁸ By implication, the massive research effort based on the five-factor model also demonstrates that the dynamic theory of Jungian type theory applies to populations not previously tested by MBTI testers, i.e., incarcerated populations and offenders.

3. Modern Trait Theory

About the same time that Jung was using his type theory for treating mentally ill individuals, Ernst Kretschmer was formulating his theory of bodily build, temperament, and personality classification. Kretschmer noted that schizophrenic patients in mental institutions were often tall, thin, angular, and weak, while manic-depressive patients were often short, well-developed, and strongly built. Generalizing from his clinical observations of abnormal psychotic individuals, Kretschmer identified two distinct body types, the asthenic and the pyknic.¹⁴⁹ The asthenic type, when mentally ill, tended to be schizophrenic, and within normal limits, was the withdrawn, sensitive bookish

¹⁴⁴*Id.* at 243-95.

¹⁴⁵Robert R. McCrea & Paul T. Costa, *Reinterpreting the Myers-Briggs Type Indicator from the Perspective of the Five-Factor Model of Personality*, 57 J. PERSONALITY 17 (1989).

¹⁴⁶See T. A. Carskaddon, *Myers-Briggs Type Indicator Characterizations: A Jungian Horoscope?*, 5 RES. IN PSYCHOL. TYPE 87 (1975).

¹⁴⁷McCrea & Costa, *supra* note 145, at 16.

¹⁴⁸*Id.*

¹⁴⁹For a review of Kretschmer's theories, see ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 71-73.

introvert; and the pyknic, when mentally ill, tended to be manic-depressive, and within normal limits, was outgoing, jovial, and extraverted.¹⁵⁰

Of course, the reason for fashioning these theories about the relationship of bodily build to behavior was to devise a way to predict individual human behavior from observation. Kretschmer's typology resembled Jung's personality axes and attempted to link them to bodily build without great success. However, neither Jung's type theory nor Kretschmer's bodily build and temperament theory had been tested by empirical analysis.

American psychologist Gordon Allport, a contemporary of both Jung and Kretschmer, developed a personality trait theory based on observable behavioral measurement between 1922 and 1937.¹⁵¹ Since Allport's trait theory has been important to the development of personality psychology and has affected his disciples and the opposition raised by behaviorists, it is worth detailed explanation.

Allport embodied his theories in an undergraduate text book in 1937 which was one of the two pioneer text books on personality psychology.¹⁵² Allport contrasted his definition of human personality with that used by his contemporaries who were behaviorists and sociologists. He rejected the definitions of personality proposed by sociologists because sociologists defined human personality as a phenomenon that depended upon the social system and reflected it.¹⁵³ Sociologists did not consider that an individual could act as a center for the origination of behavior.¹⁵⁴ The behaviorists defined personality as a system of responses to external social stimuli. They also fell into the trap of providing no definition that accounted for persistence of behavior across situations.¹⁵⁵ Allport proposed his own definition that accounted for observed individual behavior that showed cross-situational consistency: personality is the dynamic organization within the individual of those psychophysical systems that determine his unique adjustments to his

¹⁵⁰*Id.*

¹⁵¹See Gordon W. Allport, *Six Decades of Social Psychology*, in *THE PERSON IN PSYCHOLOGY* 28-31 (1968).

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴It is characteristic of all sociological definitions of personality that they deny to it the attribute of self-sufficiency. In one way or another, personality is always considered a reflection of, or dependent upon, the social ground. *Id.* at 37.

¹⁵⁵The biosocial views are best summarized in the brief definition proposed by May. According to him personality is a man's "social stimulus value." "It is these responses made by others to the individual as a stimulus that defines his personality." *Id.* at 41.

Biologists and behaviorists are inclined to view personality as an evolutionary phenomenon, as a mode of survival. According to them, personality is the "whole-organism-in-action." The point of view is most fully developed by Kempf whose conception is essentially the integration of those systems of habits that represent an individual's characteristic adjustments to his environment. *Id.* at 45.

environment.¹⁵⁶ This definition accounted for cross-situational behavioral consistency because it located a biological center within every human individual in which the individual adjusted to the external environment, which included external behavior of others as well as geographical reference points.¹⁵⁷

Allport was also careful to distinguish "character" from "personality." In his view, "character" meant a moral estimation of an individual, or "personality evaluated."¹⁵⁸ This distinction will become useful in applying personality theory to character evidence issues. In addition, Allport carefully distinguished "temperament" from "personality," in order to distinguish his theoretical system from the systems based on extraversion-introversion and bodily type or humor theory. Temperament was the raw material for the structural formu-

¹⁵⁶ ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 48.

¹⁵⁷In speaking of the inclusion of "determine" in his definition Allport said: "This term is a natural consequence of the biophysical view. Personality is something and does something. It is not synonymous with behavior or activity; least of all it is merely the impression that this activity makes on others." ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 48.

"Adjustment to his environment," according to Allport, "has a functional and evolutionary significance. Personality is a mode of survival. "Adjustments", however, must be interpreted broadly enough to include maladjustments and environment to include the behavioral environment (meaningful to the individual" as well as the surrounding geographical environment. *Id.* at 49-50. Above all, adjustment must not be considered as merely reactive adaptations capable of such as plants and animals. *Id.*

¹⁵⁸Character is a term frequently used as a synonym of personality. Many writers identify character with some special phase of personality, making it a subdivision of the whole. For example, it is said that personality may be viewed as intelligence plus character, or as intelligence temperament and character. Since personality is never an additive phenomenon, such statements serve to characterize neither personality nor character.

Whenever character is considered to be a subdivision of personality, it is nearly always identified with volition in some way; thus, "the degree of ethically effective organization of all the forces of the individual" or "in enduring psychophysical disposition to inhibit impulses in accordance with a regulative principle." Large numbers of writers hold this view; for all of them, character is the aspect of personality that engenders stability and dependability, is responsible for sustained effort in the face of obstacles, or works for remote end rather than those that are nearer in time but of less worth. This is the meaning endorsed not only by many psychologists but by the church, educators, and common speech. With due respect to the prevalence of this usage, one must still question the wisdom of separating the volitional faculty from the remainder of personality. The exercise of "will" in each case is a phenomenon of personality. Character enters the situation only when this personal effort is judged from the standpoint of some code.

Therefore, instead of defining character as the volitional aspect of personality, it is sounder to admit it is an ethical concept. Sir John Adams writes, "[c]haracter is the moral estimate of the individual, an evaluation." Defined in this way, the psychologist does not need the term at all; personality alone will serve. Character is personality evaluated, and personality is character devalued.

lation of personality, as was a person's intelligence and physical conformation, but not identified with the structural whole of personality.¹⁵⁹

Further, Allport adopted William Stern's trait theory that individual human personality structure was characterized by fundamental predispositions called traits.¹⁶⁰ Traits exist within individuals and constitute the structural components of human personality. Traits are generalized readiness to respond to external stimuli. These traits were identified and evidenced by the adjectives used by people to describe behavior. Allport and Odbert classified 17,953 adjectives used to describe individual human behavior taken from Webster's New International Dictionary.¹⁶¹ Allport refused to reduce this huge list into any typological structure or map, although he stated abstract conceptual categories could be drawn from his work to make constructs called "common traits."¹⁶²

According to Allport, every human personality develops from infancy until death, which indicates personality is an evolutionary and historical entity, a "becoming" rather than a fixed type or essence.¹⁶³ However, later researchers thought of personality as a mixture of fixed "traits" with the usual theoretical consequences: a non-interactive human behavioral model.

Allport taught that personality was based on hereditary components, such as intelligence and temperament, and could not be a pattern of stimulus-response habits alone.¹⁶⁴ He observed that neonates do not come into the world with a personality, that personality begins to develop in the cradle as the infant encounters the environment and tries to live in it using intelligence

¹⁵⁹Temperament, like intelligence and physique, might be said to designate a certain class of raw material from which personality is fashioned. Strictly speaking, there is no temperament apart from personality, nor any personality devoid of temperament. It is seldom doubted today, any more than it was among the ancient, that temperament is dependent somehow upon the biochemical constitution. Work dealing primarily with glands, physical build, or blood composition (to name only a few popular fields of contemporary study) frequently claims to be seeking the biological functions of personality. And so it is—indirectly, but, first it is seeking the physical correlates of temperament. *Id.* at 53.

¹⁶⁰*Id.* at 286-87.

¹⁶¹GORDON ALLPORT & ODBERT, TRAIT NAMES: A PSYCHO-LEXICAL STUDY IN PSYCHOLOGICAL MONOGRAPH 211 (1936).

¹⁶²*Id.*

¹⁶³In spite of variations from case to case, there is one law to which there are no exceptions: *every personality develops continually from the stage of infancy until death, and throughout this span, it persists even though it changes.* ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 102.

¹⁶⁴This doctrine of genetic determination does not state that personality is inherited, but rather that *no feature of personality is devoid of hereditary influences.* It means simply that if the genes are altered the personal characteristics are altered, not that personal characteristics are determined solely by the genes. *Id.* at 105.

and emotion to cope with stimuli.¹⁶⁵ The infant accomplishes this by integrating environmental stimuli, acquiring learned forms of adaptive behavior. He suggested that integration was hierarchical, the lowest form being conditioned reflexes, followed by habits, traits, the self, and the highest form being the integrated whole, or personality.¹⁶⁶

Allport was not familiar with European cognitive development psychology, in particular with Jean Piaget's work on the stages of cognitive development, but his theoretical construct gave an account of structural development that was consistent with later cognitive development psychological work.¹⁶⁷ Allport was conversant with Jungian psychology but did not try to relate his work to Jung's type theory.¹⁶⁸

Allport did not attempt a factor analysis that reduced the 17,295 adjectives in the dictionary describing behavior to a few general intellectual constructs or super factors.¹⁶⁹ However, he conceded the scientific value of this approach

¹⁶⁵The newborn infant *lacks* personality, for he has not yet encountered the world in which he must live, and has not developed the distinctive modes of adjustment and mastery that will later comprise his personality. *Id.* at 106.

¹⁶⁶One might distinguish a hierarchy of the levels produced by integration as follows:

Conditioned reflexes, the simplest learned forms of adaptive behavior involving substitution of associated stimuli for congenitally effective stimuli, with the result that the individual performs innate acts to altered stimulus associations.

Habits, integrated systems of conditioned responses, involving altered responses as well as an extended range of effective conditioning, leading to fairly stereotyped forms of response in the face of recurrent situations of a similar type.

Traits, more dynamic and flexible dispositions, resulting, at least, in part from the integration of specific habits, expressing characteristic modes of adaption to one's surroundings. Belonging to this level are the dispositions variously called sentiments, attitudes, values, complexes and interests.

Selves, systems of traits that are coherent among themselves, but are likely to vary in different situations.

Personality, the progressive final integration of all the systems of response that represent an individual's characteristic adjustments to his various environments. (Considered as a *perfect* integration this level represents the ideal final sage, never actually attained).

(1) *The Hierarchical Organization of Personality*. Integration means that from disparate units of behavior larger and more inclusive integers are formed. The actual functional scope of these new integers may be narrow or broad.

(2) *The Chronological Character of Integration*. The base-line of the figure is roughly chronological. It represents the process of separate adjustive acts that the individual is compelled to perform from birth to old age.

ALLPORT & ODBERT, *supra* note 161, at 139, 142.

¹⁶⁷Piaget is not cited in any of Allport's published writings.

¹⁶⁸Allport cites Jung on occasion. *See, e.g.* ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 40 n.38.

¹⁶⁹Allport said:

Strictly speaking, no two persons ever have precisely the same tastes. Though each of two men may be *aggressive* or (esthetic) the style and

and the possibility that what he called "common traits" could be derived that applied to large groups of individuals on a scaled basis.¹⁷⁰

Sixty years after Gordon Allport's path-breaking effort to describe human personality traits, psychological researchers use a number of conflicting definitions of "personality trait." Allport's classical definition is still accepted by many current theorists. Allport identified traits as "generalized and focalized neuropsychic system (peculiar to the individual), with the capacity to render many stimuli functionally equivalent, and to initiate and guide consistent (equivalent) forms of adaptive and expressive behavior."¹⁷¹ However, Cattell defined a trait as "a mental structure inferred from behavior and a fundamental construct that accounts for behavioral regularity or consistency."¹⁷² Professor Eysenck defines trait as "essentially dispositive factors that regularly and persistently determine our conduct in many types of situations."¹⁷³ On the other hand, social behaviorists described traits as an intellectual construct made by the experimental psychologist to signify a group of interrelated actions in subjects, signifying the existence of some internal predisposition to behave in a predictable way in similar situations. Social behaviorists did not grant the assumption that traits actually existed in real

range of the aggression (or estheticism) in each case is noticeably different. What else could be expected in view of the unique hereditary endowment, the different developmental history, and the never-repeated external influences that determine each personality? The end product of unique determination can never be anything but unique.

This evidence fact is one that most psychologists have great difficulty in accepting. If individuals cannot be compared with one another in respect to the same traits, what is to become of the psychology of personality as a "scientific" (i.e. nomothetic) discipline?

The original endowment of most human beings, their stages of growth, and the demands of their particular society, are sufficiently standard and comparable to lead to some basic modes of adjustment that from individual to individual are *approximately* the same.

In the strict sense of the definition of traits, only the individual trait is a true trait: (a) because traits are always in individuals and not in the community at large, and (b) because they develop and generalize into dynamic dispositions in unique ways according to the experiences of each individual. The common (continuum) trait is not a true trait at all, but is merely a measurable aspect of complex individual traits.

ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION, *supra* note 70, at 297-99.

¹⁷⁰*Id.*

¹⁷¹*Id.* at 29.

¹⁷²Cattell, *supra* note 70, at 177. Cattell also distinguished between surface and source traits. Surface traits are clusters of overt or manifest trait elements (responses) that seem to go together. Source traits are the underlying variables that are the causal entities determining the surface manifestations. Source traits are identified by factor analysis. *Id.* at 3-42.

¹⁷³H.J. EYSENCK & M.W. EYSENCK, PERSONALITY AND INDIVIDUAL DIFFERENCES 17 (1992).

human subjects.¹⁷⁴ All researchers except cognitive development and existential psychologists agreed that traits were a handy way of describing consistency or covariation between self-reporting inventories, peer judgments and objective experimental tests for individual's reaction to anxiety stimuli and the like.¹⁷⁵ Cognitive development psychologists ignored trait theory because they concentrated on structural formation of intellectual behavior controlled by self conscious reasoning processes.¹⁷⁶ Cognitive development psychologists are agnostic about human personality traits: they neither accept nor reject trait theory.

In the 1960's, trait theory psychologists experimented with factor analysis and derived what has been called the "big five" or "Five Factor Model" of personality.¹⁷⁷ While there is by no means perfect agreement on the individual traits that go into the five factor model, the most recent research indicates that five consistent superfactors consistently emerge from self-reporting studies; rating studies and objective tests: (a) Neuroticism is a superfactor that emerges when individuals are measured for traits that reflect anxiety level, hostility and depression; (b) Extraversion reflected by high scores for traits measuring warmth, sociability or gregariousness, assertiveness, activity or excitement seeking; (c) Openness derived from measuring traits reflecting aesthetics, feelings, ideas and values; (d) Agreeableness emerges from measuring traits associated with trust, altruism, modesty and similar traits; and (e) Conscientiousness composed of covarying traits such as order, dutifulness, self-discipline and deliberation.¹⁷⁸

Each of these superfactors produces sample distributions along a continuum or scale from low to high scores that are apparently consistent for different age

¹⁷⁴See Walter Mischel, *Toward a Cognitive Social Learning Reconceptualization of Personality*, 80 PSYCHOL. REV. 252 (1973).

¹⁷⁵MISCHEL, *supra* note 71, at 19-22 (trait theorists); 44-45 (psychodynamic theory resembles trait theory); 86 (social behavioral theorists do not posit traits); 106-07 (existentialists reject traits).

¹⁷⁶For a description of the cognitive development theory of moral reasoning and its impact on behavior and education, see L. Kohlberg & E. Turiel, *Moral Development and Moral Education*, in PSYCHOLOGY & EDUCATIONAL PRACTICE 410 (Lesser ed. 1971).

¹⁷⁷The five factor analysis system was first reported by two U.S. Air Force psychologists, Ernest C. Tupes & Raymond E. Christal in 1961, on a study of air force recruits. Ernest C. Tupes & Raymond E. Christal, *Recurrent Personality Factors Based on Trait Rating*, USAF AD TECHNICAL REPORT NO. 61-97, (Lackland AFB 1961). It was much more widely publicized by W.T. Norman in a 1963 article. See W.T. Norman, *Toward an Adequate Taxonomy of Personality Attributes: Replicated Factor Structure in Peer Nomination Personality Ratings*, 66 J. ABNORMAL & SOC. PSYCH. 574 (1963).

¹⁷⁸Paul T. Costa & Robert R. McCrea, *Four Ways Five Factors Are Basic*, 13 PERSONALITY AND INDIVIDUAL DIFFERENCE 653, 654-55 (1992).

groups and different cultures.¹⁷⁹ There is also strong evidence that individual positions on the scale scores for these five factors are genetic and heritable.¹⁸⁰ Although British and American trait psychologists have disavowed Jung's preference types on scientific grounds, the "big five" personality traits seem to be closely related to Jung's three axes of personality preference in content and in the observed distribution along a continuum for observed behavior within these super-factors constituting personality structure.¹⁸¹ In fact, five factor self-inventory studies produce findings that correlate well with Jungian type preference self-inventory studies based on the MBTI.¹⁸² The implication is that both groups of researchers have identified common cross-situational stability in human behavior.

4. Behaviorism and Rejection of Trait Theory

Although English and American psychologists have in many instances carried out parallel investigations into human personality structure, the two diverged in the 1960's when most American psychologists rejected trait-based personality theories.

American behaviorist psychologists adopted the doctrine first put out by Harvard's E.C. Thorndyke at the turn of the century that "there are no broad general traits of personality, but only independent and specific stimulus-response bonds or habits."¹⁸³ In the late 1960's, this view was revitalized by Walter Mischel, who challenged trait theory by reexamining a mass of studies deemed to demonstrate subject behavior in accordance with traits. Mischel concluded that the studies which allegedly supported the existence of personality traits were flawed by low order correlations between the behavior patterns measured and cross-situational consistency.¹⁸⁴ His critique started a twenty year war among psychologists on the validity of trait psychology. Dr. Mischel found very low correlations between supposed traits and actual behavior, particularly when the trait was rated by judges in a lab experiment involving only a single exposure to the individual's behavior.¹⁸⁵ He rejected the statistical proof of cross-situational consistent behavior, and instead, argued human activity was conditioned by external social environment such that very specific human behavior patterns were the product of interaction between the social environment and the organism, for example, conditioned habits.

¹⁷⁹*Id.* at 656-59.

¹⁸⁰*Id.* at 658-59.

¹⁸¹McCrea & Costas, *supra* note 145, at 30-31.

¹⁸²*Id.*

¹⁸³E.C. THORNDYKE, EDUCATIONAL PSYCHOLOGY 29 (1903).

¹⁸⁴WALTER MISCHEL, PERSONALITY AND ASSESSMENT 1014 (1968).

¹⁸⁵*Id.*

Hopefully, by data as well as on theoretical grounds, the observed inconsistencies so regularly found in studies of non-cognitive personality dimensions often reflect the state of nature and not merely the noise of measurement.¹⁸⁶

American behaviorists did not recognize trait theory as scientifically valid.¹⁸⁷ They rejected the notion that a nexus of action such as "personality" existed.¹⁸⁸ Since personality traits could not be adequately measured, and the existence of traits was key to proving the existence of a center in each individual called personality, the best that could be said for "personality" was that it afforded a convenient label for describing human habits engendered by environmental conditioning.¹⁸⁹

Social learning theory, a form of behavioralism, recognized that individuals showed cross-situational consistency.¹⁹⁰ However, they accounted for cross-situational consistency by asserting that widely generalized behaviors were reinforced by stimuli across many stimulus conditions.¹⁹¹ This theory made individuals passive receptors for environmental stimuli, and underestimated the effect of intelligence and temperament on habit formation, or the construction of some internal behavioral structure within individuals.

For about fifteen years, psychologists battled over traits. The social learning theorists rejected traits and insisted that only conditioned-response habits could be identified by empirical research.¹⁹² They placed much more stress on

¹⁸⁶*Id.*

¹⁸⁷MISCHEL, INTRODUCTION TO PERSONALITY, *supra* note 71, at 74-75.

¹⁸⁸*Id.*

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²Salvatore R. Maddi, *The Continuing Relevance of Personality Theory*, in FIFTY YEARS OF PERSONALITY THEORY 85 (Craik, et al., 1992). Trait theory underlies most of the available psychological personality self-assessment inventories and peer assessment rating scales used by clinical psychologists, such as the Minnesota Multiphasic Personality Inventory (MMPI), the sixteen PF Inventory developed by Cattell, the Myers-Briggs Inventory commonly used in job placement and a host of other clinical psychological rating systems. The psychological testing industry is founded on the principle that personality traits can be identified and measured by normal statistical inference and applied to analyze present behavioral patterns and predict future behavior in accordance with those traits. Psychological inventories based on trait analysis are widely used in diagnosing and treating patients in mental institutions.

In truth, some of the empirical evidence for certain traits in studies done before 1968 was pretty weak. The mainstream theorists responded to Mischel's critique by pointing out that he identified weak studies involving only one observation of the subject which was compared with standard psychological test scores for the trait. Theorists developed better study designs in which observers rated individuals for the presence or absence of traits over a long period of time. Control groups were also paired with the subjects of the experiment, something that had not been routinely done before. By the mid 1980's, controversy over the existence of traits had pretty well been settled

situational conditioning that produced consistent behavior, and down played the role of genetic and biological factors.¹⁹³ Trait theory psychologists argued that environmental stimuli had to be organized by internal biophysical processes, and the product of that organization would be traits.¹⁹⁴ They placed greater emphasis on personal consistency, and inherent genetic and physiological determination of behavior.¹⁹⁵

By the mid-1980's this debate had worn itself out. Psychologists on both sides of the Atlantic accepted the existence of cross-situational consistency that resulted from an interaction between individual biophysical predispositions and external environmental stimuli.¹⁹⁶

C. Eysenck's Theory of Personality

To date, most personality psychologists have not addressed the predictability of deviant, criminal conduct based on individual variation, personality type, or factor scales derived from paper and pencil personality inventories. If criminal behavior was relatively predictable from knowledge of a person's personality structure, then character evidence that reflected that personality structure would be relevant to criminal prosecutions and probative of eventual guilt or innocence.¹⁹⁷ Dr. Hans Eysenck, a British researcher, has attempted to prove that social deviants have a different personality trait structure than non-deviant persons.¹⁹⁸ For that reason alone, his personality theory is worth exploration.¹⁹⁹ According to Eysenck, an individual's

by a mass of better studies that demonstrated the existence of cross-situational behavioral consistency independent of the identity of environmental stimuli. Eysenck notes that critics of trait theory demand correlations in psychological studies of personality traits and behavior of .7 or greater to be positively correlated. See EYSENCK & EYSENCK, *supra* note 92, at 10-11.

The statistical argument disposes of this criteria. No correlation can exceed the square root of the product of the product of the reliability of any given scale.

¹⁹³Maddi, *supra* note 192, at 86-87.

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 87. Maddi comments that all person-situation debates end up inconclusively because human behavior could never be entirely the result of internal genetic or biological predisposition or of external environmental conditions.

¹⁹⁷Most of the work on the predictability of deviant criminal conduct based on personality structure has come from Canada and Great Britain. It has been the result of the influence of Hans J. Eysenck, who has worked on a coherent personality theory for a half century. Prof. Eysenck's disciples have tested his theories on criminal personality structure and have shown some progress in identification of future criminals from school teacher personality ratings and other accessible sources of personality measurement.

¹⁹⁸HANS J. EYSENCK, CRIME AND PERSONALITY 130-35 (3d ed. 1977).

¹⁹⁹A representative sample of the studies done by occupational or industrial psychologists on personality and occupational qualifications include the following:

predisposition to commit antisocial acts can be measured and predicted early in life, because that individual will demonstrate that predisposition by answers to self-reporting inventories and by judgmental ratings performed by grade school teachers.²⁰⁰ Eysenck's theory supports admission of character evidence in criminal prosecutions in two ways: (a) reputational or opinion evidence, a lay personality assessment; and (b) specific acts sufficient to support the jury's own assessment of the defendant's predisposition to commit crimes of the type charged in the indictment.²⁰¹

Because Eysenck's theory of criminal behavior depends upon his general theory of personality development, his personality theory must be described before his criminality theory is completely understandable. Eysenck defines the human personality as a "more or less stable and enduring organization of a person's character, temperament, intellect and physique, which determines his unique adjustment to the environment."²⁰²

So far, Eysenck follows the doctrine of trait psychology developed by Gordon Allport.²⁰³ However, Eysenck was unsatisfied with classification of traits as the end of personality psychology. He noticed that groups of traits to cluster or intercorrelate with each other along an axial distribution line.²⁰⁴ In 1937, Allport had suggested that factor analysis could be applied to traits to develop intellectual constructs called common traits, and the American "big five" model had been constructed by factor analysis in the 1960's.²⁰⁵ Eysenck did his own factor analysis of data derived from self-reports, peer ratings and objective tests on thousands of British soldiers during World War II.²⁰⁶ His

Cary L. Cooper & Roy Payne, *Extraversion and Some Aspects of Work Behavior*, 20 PERSONNEL PSYCH. 45 (1967); A.G. Elliott, *Some Implications of Lie Scale Scores in Real-Life Selection*, 54 J. OCC. PSYCH. 9 (1981); Karin Gotz & Karl O. Gotz, *Introversion-extraversion and Neuroticism in Gifted and Ungifted Art Students*, 36 PERCEPTUAL & MOTOR SKILLS 675 (1973); R.B. Hersey, *Rates of Production and Emotional State*, 10 PERSONNEL J. 355 (1932); Gilbert Jessup & Helen Jessup, *Validity of the Eysenck Personality Inventory in Pilot Selection*, 45 OCC. PSYCH. 111 (1971); Robert Loo, *Role of Primary Personality Factors in the Perception of Traffic Signs and Driver Violations and Accidents*, 11 ACCIDENT ANALYSIS & PREVENTION 125 (1979); David B. Lynn, *Personality Characteristics of a Group of Entrepreneurs*, 43 OCC. PSYCH. 151 (1969); Y. Rim, *Significance of Work and Personality*, 50 J. OCC. PSYCH. 135 (1977); LYNETTE SHAW & HERBERT S. SICHEL, *ACCIDENT PRONENESS: RESEARCH IN THE OCCURRENCE, CAUSATION AND PREVENTION OF ROAD ACCIDENTS* (1971).

²⁰⁰EYSENCK, *supra* note 198, at 130-35.

²⁰¹*Id.*

²⁰²*Id.*

²⁰³*Id.* at 12-13. Eysenck quotes Allport's definition of trait from Allport's 1937 personality textbook.

²⁰⁴*Id.* at 14-15.

²⁰⁵For a discussion of the "Big Five" factor personality theory, see Costa & McCrea, *supra* note 178, at 654-55.

²⁰⁶EYSENCK & EYSENCK, *supra* note 92, at 14-15.

factorial model ultimately evolved into three substantive axial scales and a "lie scale" to detect those who answered self-reporting questionnaires disingenuously.²⁰⁷

Eysenck identified his first factored supertrait as extraversion-introversion, borrowing from Wundt's character typology and Jung's generally accepted classification of individuals into inward turning (introverted) and outward turning (extraverted) types.²⁰⁸ This superfactor measured the intercorrelations of such traits as sociability, sensation-seeking, assertiveness and other traits associated with extraversion.²⁰⁹ His trait intercorrelation scale that is supposed to measure this factor is the "Extraversion" scale.²¹⁰ The "Neuroticism" scale, his second superfactor scale, measured traits associated with mood stability such as anxiety, depression, low self-esteem, and other traits associated with neuroticism in clinical patients.²¹¹ Eysenck derived the third scale during further research in the 1960's and 1970's with psychotics confined to mental institutions.²¹² This scale measures such traits as impulsiveness, aggression, egocentricity, impersonality and is labeled the "Psychoticism" scale.²¹³ This scale is based on the theoretical rejection of Sigmund Freud's doctrine that deviant behavior is directly related to normal behavior on a continuum and is merely an excessive, exaggerated amount of otherwise normal behavior.²¹⁴ Eysenck finds that his empirical studies show that psychoticism is a different axis or dimension analytically distinct from neuroticism.²¹⁵ The Psychoticism Scale measures traits related both to serious mental illness and to antisocial or psychopathic behavior.²¹⁶ If this superfactor is scientifically defensible, then it is possible to measure the predisposition of individuals to commit antisocial acts including crimes.²¹⁷ It is also possible to construct treatment programs aimed at early detection and intervention in potential offender's personality development.

Eysenck's personality theory is supported by a number of British and Continental researchers, but is probably not generally accepted by a majority

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹*Id.*

²¹⁰*Id.* at 14-15.

²¹¹EYSENCK & EYSENCK, *supra* note 92, at 14-15, 44-45, 50.

²¹²*Id.* at 13, 61-68.

²¹³*Id.*

²¹⁴*Id.*

²¹⁵*Id.* at 61-62.

²¹⁶EYSENCK & EYSENCK, *supra* note 92, at 54-61.

²¹⁷*Id.*

of American personality theorists.²¹⁸ First, Eysenck's research has included biophysical and genetic research which he believes demonstrates that his three personality scales are directly related to known human neurological situations.²¹⁹ For example, Eysenck ties his traits relating to extraversion and introversion to the level of cortical arousal within the human brain cortex, which is the portion of the brain that governs emotions.²²⁰ Eysenck has measured differences in cortical arousal level for persons who scored highly on his extraversion scale and for some who scored at a low level, for example, those who were quite introverted.²²¹ Highly extraverted individuals demonstrated a very low level of cortical arousal, while introverted individuals demonstrated a high level of arousal.²²² Eysenck used this observation to explain extraversion-introversion as the result of an individual's need to experience emotions. The introvert being easily aroused by external stimuli, experiences emotions more readily than the extravert who has a much lower innate level of arousal.²²³

²¹⁸American trait theory psychologists are divided on whether or not to accept Eysenck's position that his three personality superfactors are actually present in individuals as dominant trait organization systems. For example, Costa and McCrae, who work with gerontological patients, accept the principle that superfactors detected by factor analysis of trait intercorrelation are in fact descriptions of real entities inside human individuals, but reject Eysenck's three factor model, preferring the more common U.S. five factor descriptive model as a means of explaining trait relationships and structural personality organization. *See, e.g.,* Costa & McCrae, *supra* note 178, at 653, 658-59.

Other psychologists do not believe that either the three factor or five factor personality models correspond to anything to be found within individuals, and dismiss these models as psychological constructs existing only in the minds of the experimental psychologist. The social learning theory psychologists, of course, reject all forms of trait theory as undemonstrated by studies claiming to identify traits and cross-situational consistency. *See generally* WALTER MISCHEL, *PERSONALITY* (1968).

Cognitive development psychologists reject trait theory because it does not "fit" with staged structural intellectual development controlled by reflective reason. *See, e.g.,* Lawrence Kohlberg, *Moral Development*, in *INT'L ENCYCLOPEDIA OF THE SOC. SCIENCES* 489, 490-91 (1968).

Finally, Eysenck's theory is grounded in hereditary biological data that collides with prevailing American views on individual worth and the malleability of human personality. He rejects the sociological view of human development that holds environmental conditions responsible for all forms of deviant human behavior. *See* EYSENCK & EYSENCK, *supra* note 92, at 62-77. Since some of his studies and the identical twin studies of others reflect genetic differences that may divide along ethnic or racial lines, Eysenck's theory can be misinterpreted as ethnocentric or racist.

²¹⁹EYSENCK & EYSENCK, *supra* note 92, at 87-88.

²²⁰*Id.*

²²¹*Id.*

²²²*Id.*

²²³*Id.* at 89.

Eysenck has studied neurobiology and his empirical findings are consistent with known neurobiological phenomena.²²⁴ Introverts tend to show greater pupillary dilation to objective anxiety-producing stimuli, and exhibit stronger galvanic skin responses when confronted with anxiety-producing stimuli.²²⁵

Third, he has used studies of identical twins and adoptive children to support his theory that personality structure along his three axes is genetically based, although alterable, by later environmental stimuli. Starting with Joannes Lange's 1929 study of identical and fraternal twins in German correctional institutions which showed that the mate of an identical twin was six times more likely to have been in a correctional institution than the mate of the fraternal twin, Eysenck has examined all studies of incarcerated twins up to 1989 and concluded that deviant behavior patterns are based in part on hereditary factors unexplained by environmental factors.²²⁶

Eysenck also examined studies of the behavioral characteristics of adopted psychopathic children's biological relatives. These studies showed that the biological relatives of these adopted psychopaths were much more likely to be psychotics or psychopaths than were the adoptive relatives of these children, or the relatives of matched control children who were not put up for adoption.²²⁷ In addition, Eysenck reviewed studies of children adopted as infants whose mothers were incarcerated. These children were matched for socio-economic status to a corresponding number of adoptive children whose mothers were not incarcerated. The children of incarcerated mothers showed a much higher frequency of arrest and conviction for crimes than the control children.²²⁸ Eysenck concluded that the predisposition to commit deviant acts was in part due to hereditary biophysical factors.²²⁹

D. Eysenck's Theory of Criminal Behavior

Eysenck acknowledges criminal offenders are a heterogeneous population. He divided criminal offenders into five classes: violent offenders,²³⁰ property offenders,²³¹ inadequate offenders,²³² residual offenders,²³³ and confidence

²²⁴EYSENCK & EYSENCK, *supra* note 92, at 89.

²²⁵*Id.*

²²⁶HANS J. EYSENCK & GISLI H. GUDJONSSON, *THE CAUSES AND CURES OF CRIMINALITY* 96-100 (1989).

²²⁷*Id.* at 103.

²²⁸*Id.* at 105-08.

²²⁹*Id.*

²³⁰This class includes murderers, robbers and sex criminals.

²³¹Eysenck considers his personality theory peculiarly valuable to the identification and treatment of violent offenders and chronic property offenders. EYSENCK, *supra* note 198, at 56-57. In his view, these individuals are psychopaths or antisocial personalities, whose score on Eysenck's three dimensional factor analysis scale would be high for E, N and P. *Id.* at 59. Eysenck offers the following description of a high P score personality:

men.²³⁴ Each class of offenders has a markedly different personality profile on Eysenck's Personality Questionnaire. The kind of person who has a marked predisposition for violent offenses will have a high score on the Extraversion, Neuroticism and Psychoticism scale.²³⁵ This kind of person will be a solitary individual who does not fit in, lacks empathy, seeks sensations, is foolhardy, shows a cruel streak, and is aggressive in all relationships.²³⁶ The kind of individual who commits theft or burglary, on the other hand, will also be solitary, lacking in empathy, insensitive to others, but will not be a sensation seeker, and less of a risk-taker, and will show greater signs of anxiety and guilt and less self-esteem than the violent offender.²³⁷

What is a person like who scores high on the P factor who is not psychiatrically ill? When we consider this empirically derived factor, we find that such a person is characterized by the following traits: (1) solitary, not caring for other people; (2) troublesome, not fitting in; (3) cruel, inhumane; (4) lack of feeling, insensitive; (5) lacking in empathy; (6) sensation-seeking, avid for strong sensory stimuli; (7) hostile to others; aggressive; (8) liking for odd and unusual things; (9) disregard for dangers, foolhardy; (10) likes to make fools of other people, and to upset them.

Id. at 58. The kind of individual Eysenck identifies with the person who has a predisposition to violent conduct has a high P score, a high E score and a relatively low N score on Eysenck's personality questionnaire. The individual who is more likely to commit crimes against property than against the person has a high P score, a low E score and a relatively low N score. *Id.* at 60-61.

²³²Eysenck describes this classification as "a large group of people characterized by inadequate personality, rather dull and helpless, who drift into crime not because they are in any sense antisocial, but because they simply cannot cope with the complexities of modern life. They are often solitary figures without friends and family, and their 'crimes' often consist of smashing a shop-window and then waiting to be arrested, thus earning themselves a bed, warmth and some food" EYSENCK, *supra* note 198, at 59. Inadequate offenders generally speaking, have a high N score, a low E score and a relatively high P score. *Id.* at 60-61.

²³³These offenders are non-specialists who have committed crimes against property as well as against the person. Residual offenders have a high N score, a high P score and a high E score. *Id.*

²³⁴Eysenck interprets confident men as high on the extraversion scale, and low on the neuroticism and psychoticism scales, because their kind of criminality demands normal social relationships. *Id.* Unwittingly, Eysenck may have identified the personality profile for all types of white collar criminals.

²³⁵Eysenck notes that high P score individuals are overwhelmingly male, a difference not detected with the E and N scale. He also notes that the personality profiles of psychopaths defined as High P-E-N scale scorers without a criminal record) and criminals are sausage shaped on the three dimensional axes. Primary psychopaths are those who lie nearer to the P than to the N or E scale, secondary psychopaths lie near to N or E than to the P scale. EYSENCK, *supra* note 198, at 58.

²³⁶*Id.* at 58. This is the high P-E-N scorer who is classified as a primary psychopath.

²³⁷*Id.* at 60-61. Since MBTI researchers have never undertaken a study correlating the MBTI with Eysenck's three factor personality assessment scale, no theoretical framework exists permitting Eysenck's work with criminal populations to be

Eysenck also has found evidence suggesting that adult criminal behavior, particularly the kind exhibited by violent offenders and property offenders, can be predicted from school teacher personality assessments.²³⁸ He reviewed studies of disciplinary problem and control "normal" school children who were given personality assessment tests and teacher evaluations in pre-teen years, and were later followed up for juvenile and adult arrests and convictions.²³⁹ Eysenck concludes that the evidence supports the ability of teachers, who are by definition lay observers, to identify potential delinquents and to predict future criminal behavior.²⁴⁰ This finding has peculiar importance to admissibility of character evidence. It has been replicated with respect to "Big Five" factor personality trait assessments by American researchers, who were not particularly interested in identifying criminal behavior, but were concerned with the ability of lay people to make personality assessments. Funder, Colvin, Funder, and Sneed report that lay personality assessors who have longstanding contact with the child to be rated are able to make accurate personality trait assessments that correlate well with individual personality questionnaire scores for the same children.²⁴¹

The researchers who use the Myers-Briggs Type Inventory have done very little work with deviant populations, and have made no attempt to relate their theoretical findings to predicting criminal behavior based on type theory. However, because researchers using the "Big Five" factor personality classification system have shown that the two scales measure much the same traits, further research may show that the Myers-Briggs Type Inventory can be employed to identify socially deviant individuals.

transposed to dynamic type theory. However, Eysenck's deviant offender model does resemble Keirse & Bates' SP Artisan temperament type, which has been correlated with MTBI types. This is one of the personality theory areas that cries out for further research. There are three or four variant systems of identifying personality traits and assessing individual personality traits. Only one researcher has spent any considerable time measuring personality traits for known offenders or at-risk populations. Since each personality factor scale and personality self-reporting test has its own fan club, only a tiny handful of researchers bother to correlate the results of two or more different self-reporting inventory scores to see whether they measure the same effects.

²³⁸EYSENCK & GUDJANSSON, *supra* note 226, at 64-65.

²³⁹*Id.*

²⁴⁰*Id.*

²⁴¹*See, e.g.,* David C. Funder & Geoffrey Colvin, *Friends and Strangers: Acquaintanceship, Agreement, and the Accuracy of Personality Judgment*, 55 J. PERS. & SOC. PSYCH. 149 (1988); David C. Funder & Geoffrey Colvin, *Social Roles and Social Perception: Individual Differences in Attribution and Error*, 51 J. PERS. & SOC. PSYCH. 1200 (1986); David C. Funder & William Sneed, *Behavioral Manifestations of Personality: An Ecological Approach to Judgmental Accuracy*, 64 J. PERS. & SOC. PSYCH. 479 (1993).

E. Implications for Evidence

Returning to Hans Eysenck's long-term research and its implication for character evidence, Eysenck has provided empirical support for the relevance of reputational or opinion character evidence. Lay personality assessments, if based on long term contact, are reasonably accurate.²⁴² Ordinary school teachers can predict with astonishing accuracy which of their students are most likely to become adult offenders. Federal Evidence Rule 404(a)(1) and 405(a), as well as the common law, permit lay persons to give an opinion on the character of someone in certain instances. Lay people may give a personality assessment in a criminal prosecution, based on long term first hand observation by (a) the defendant to prove the defendant's character (or personality) is not predisposed to commit the crime charged in the indictment;²⁴³ (b) the prosecution to rebut the defendant's evidence that the defendant is not predisposed to commit the crime charged in the indictment;²⁴⁴ (c) the defendant, when charged with a violent crime, to show that the victim was the first aggressor because the victim was predisposed to commit violent acts;²⁴⁵ (d) the prosecution to rebut the defendant's evidence that the victim was the first aggressor because the victim was predisposed to commit violent acts;²⁴⁶ and (e) either side to show that a witness should not be believed.²⁴⁷

All of these evidentiary rules depend on the proposition that human personality structure is relatively stable across situations and prolonged contact with any alleged offender permits an intelligent lay person to make an accurate assessment of the alleged offender's major personality traits.²⁴⁸ Further, following Jung, prolonged contact permits the observer to state the dominant and auxiliary functions of the alleged offender, which may place the offender in an at risk population of likely deviants.²⁴⁹

The foregoing review of personality trait theory supports lay personality assessment as a reasonably accurate way to determine an alleged offender's major personality traits. There are psychologists, who do not rely on trait theory but define personality as the locus of habit formation through conditioned

²⁴²See, e.g., David C. Funder & Geoffrey Colvin, *Friends and Strangers: Acquaintanceship, Agreement and the Accuracy of Personality Judgment*, 55 J. PERS. & SOC. PSYCH. 149 (1988).

²⁴³FED. R. EVID. 404(a)(1); CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 188 (John W. Strong ed., 4th ed. 1992).

²⁴⁴*Id.*

²⁴⁵FED. R. EVID. 404(a)(2); MCCORMICK, *supra* note 243, at § 188.

²⁴⁶FED. R. EVID. 404(a)(2).

²⁴⁷FED. R. EVID. 404(a)(3), 608(a); MCCORMICK, *supra* note 243 at § 188.

²⁴⁸See *supra* notes 195-99.

²⁴⁹See the discussion of "type watching" in OTTO KROEGER & JANET M. THUESSEN, TYPE TALK AT WORK 3-14, 46-50 (Dell ed. 1992).

responses, that may not accept this analysis.²⁵⁰ A significant number of personality psychologists accept the assertion that traits can be accurately assessed by lay observers who have prolonged contact with the assessed person.²⁵¹ To date, no person has studied the quality of expert personality assessments. Logically, however, a trained professional's personality assessment is bound to be more reliable than an amateur's if the professional has sufficient information on the actions of the person whose personality is at issue.

When juries receive character evidence, they must make personality assessments without long term background knowledge of the alleged offender. Jurors are not experts, and are not qualified to diagnose or treat people for mental disorders. However, the law requires juries to make such assessments whenever character evidence is introduced in a trial.²⁵² Although the present state of the law does not encourage parties to call psychological experts who will make personality assessments of critical players in the case for the jury to aid them in reaching a conclusion,²⁵³ jurors must plow ahead and make such assessments when required by law.

Take the issue of introducing specific dishonest acts to show that a witness is not to be believed. Specific similar act evidence would provide data on which to base an assessment for the personality or character trait at issue, for example, predisposition to lie.²⁵⁴ However, one or two reports of similar lying would be a weak basis for an inference that the witness who is supposed to be rated or assessed is lying on the stand. The sheer lack of long term contact with the witness makes such assessments weak at best. To that extent, the jury may well be overpersuaded by one or two egregious instances of falsehood when the data is really insufficient to give a reasonably accurate opinion or assessment.

However, as the number of similar, specific instances of conduct rise, the value of the induction or assessment increases and the jury's assessment becomes more accurate.²⁵⁵ The jury can also make use of other people's lay

²⁵⁰ See *supra* notes 189-91.

²⁵¹ See *supra* notes 243-45.

²⁵² This is the meaning of the stock jury instruction that tells the jury that they "are the sole judges of the credibility of the witnesses."

²⁵³ Generally, the courts have interpreted the rules on admissibility of expert opinion evidence very narrowly, excluding expert evidence on eye-witness identification and other psychological matters not related to insanity. Arizona does invite expert testimony, however, to explain the personality of sex offenders. Under the rationale of *State v. Treadaway*, 568 P.2d 1061 (Ariz. 1977), an Arizona trial court permits expert testimony on a sex offender's predisposition to commit similar sexual crimes.

²⁵⁴ This was the basis of Hartshorn and Man's 1929 study of lying.

²⁵⁵ This was precisely the point made by the New York Court of Appeals in *Halloran v. Virginia Chem. Co.*, 361 N.E.2d 991 (N.Y. 1977), when it recognized the danger of admitting one or two instances of similar conduct on which to base inference of habitual conduct. See also *MCCORMICK*, *supra* note 243, at § 195.

assessments, e.g., reputational character witnesses to reach an induction, using and subsequently using that vicarious experience to make an assessment of credibility. It follows that specific instances of conduct are less harmful and more probative when the number of instances is greater than one or two, and is coupled with reputational evidence on the same issue. Further, it would be helpful to the jury to invite expert testimony on credibility.

The soundest conclusion to be drawn from the conflicting opinions of personality psychologists is that each sees a different part of human personality. The behaviorists see the external stimuli to which human individuals react and deduce that human action is totally conditioned by external stimuli.²⁵⁶ The trait psychologists look at the internal subjective processes of each individual and conclude there are innate predispositions to act in predictable fashion, given similar external conditions. Jungians and MBTI exponents look at the interaction of predisposed behavior patterns.²⁵⁷

All concede that individual human behavior is difficult to predict from prior, similar behavior. All agree that future behavior can be predicted from past similar behavior. While the conceptual and methodological differences between personality psychologists are scientifically important, they can be reduced to a practical division. The trait theoreticians and MBTI type theorists use clinical observations or pencil and paper inventories to measure human individual behavior.²⁵⁸ The behaviorists prefer lab experiments on mice, with occasional sorties into lab experiments with human subjects to verify their findings.²⁵⁹ Both schools recognized that there is something "out there" that predisposes human beings to act in predictable fashion under similar circumstances. For that reason, it can be taken as scientifically established that human beings behave in similar fashion under similar circumstances. It is therefore reasonable to consider an alleged offender's predisposition to act in predictable fashion in reaching a conclusion about the offender's guilt.

IV. DOCTRINAL BASIS FOR CHARACTER EVIDENCE DEFENSE

A. *English Practice*

In a sixteenth century English criminal trial, an altercation broke out between the defendant, the prosecutor, and the crown's witnesses. The judge first swore in the jury. The crier then called for everyone having evidence in the case to come forward and give evidence against the defendant. The written examination of the defendant and accusing witnesses before the Justice of the Peace was turned over to the judge by the examining magistrate. The prosecutor then put on his witnesses under oath. The defendant could question

²⁵⁶MISCHEL, *supra* note 71, at 74-75.

²⁵⁷See *supra* notes 142-46.

²⁵⁸MISCHEL, *supra* note 71, at 21-22, 113, 123-24.

²⁵⁹*Id.* at 62-67 (discussion of B.F. Skinner's research).

the witness, but the defendant had no right to counsel and a deposition from the magistrate could be admitted even though the witness was not in court.²⁶⁰ As yet the defendant could not put on witnesses to prove his innocence. By the mid-seventeenth century, however, the defendant could call witnesses to clear himself of the indictment in the Assizes and in Star Chamber.²⁶¹ At this point, the defendant was still without the assistance of counsel and was unaware of the witnesses arrayed against him until trial. An ingenious defendant could attack the character of the principal accusing witnesses by this time. In 1669, Robert Hawkins, an Anglican clergy member, was tried for larceny above the value of 1s before Sir Matthew Hale and a jury in Aylesbury. The defendant later published a trial transcript which survives in Howell's *State Trials*.²⁶² Hawkins was acquitted after proving that the complaining witness was "a notorious Anabaptist, and an enemy to the Church of England, and a hater of the minister in general" ²⁶³ Still, this was not the same as proving the defendant had no predisposition to commit the offense charged because of his hitherto unblemished life. By the end of the century, however, witnesses in state trials were permitted to call favorable character witnesses to disprove treason charges.²⁶⁴ By this time, state trial defendants were represented by counsel, who engineered the rebuttal case.²⁶⁵ The judge ordinarily charged the jury to consider the defendant's favorable character witnesses together with all other evidence in the case before reaching a verdict.²⁶⁶

In the trial of Timothy Murphy for larceny, Thomas Noads and Robert Carter were acquitted of forgery on account of defense character evidence showing that the opinion of people who knew the defendants for up to eight years before trial was uniformly favorable.²⁶⁷ This case demonstrated that a criminal defendant could clear himself of criminal charges by proving his good character.²⁶⁸

²⁶⁰9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 225-26 (1926).

²⁶¹*Id.* at 193, 195.

²⁶²T.B. HOWELL, THE TRIAL OF ROBERT HAWKINS FOR FELONY, 21 Charles II 1669, 6 STATE TRIALS 921 (1810).

²⁶³*Id.* This, of course, represents impeachment by proof of bias, prejudice interest or corruption as well as character evidence impeachment.

²⁶⁴T.B. HOWELL, THE TRIAL OF ROBERT LOWICK FOR HIGH TREASON, 8 William III 1696, 13 STATE TRIALS 267, 301 (1812).

²⁶⁵*Id.* at 304-05.

²⁶⁶*Id.*

²⁶⁷19 T.B. HOWELL, THE TRIAL OF TIMOTHY MURPHY FOR FELONY AND FORGERY, 26 George II 1753, 19 STATE TRIALS 693 (1813).

²⁶⁸*See also* T.B. HOWELL, THE TRIAL OF HAAGEN SWENDSEN, I Anne 1702, 14 STATE TRIALS 559 (1812). The prisoner was indicted for forcibly carrying away Pleasant Rawlings, an heiress, and marrying her against her will. At that time, forcible marriage was a capital crime. The complaining witness told the jury that she was abducted by three of the defendant's confederates and brought to a local tavern where she was

By the mid-eighteenth century, early evidence commentators taught the defendant could prove his good moral character in order to escape conviction.²⁶⁹ Sir Francis Buller, for example, placed this right or reservation in his fourth rule concerning testimonial evidence for civil actions and criminal prosecutions:

*The fourth general rule is, that in all cases where a general character or behavior is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally So in cases where the defendant's character is put in issue by the prosecution, the prosecution may examine to particular facts, for it is impossible without it to prove the charge. Yet there is one case of that sort in which the prosecutor is not allowed to examine to any particular fact without giving previous notice of it to the defendant; and that is, where a man is indicted for being a common barreitor But in other criminal cases, the prosecutor cannot enter into the defendant's character unless the defendant enable him so to do, by calling witnesses in support of it, and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally.*²⁷⁰

Buller's statement of the law was copied literally by the criminal law commentators as authority for permitting the defendant to call character witnesses in criminal prosecutions to clear himself.²⁷¹

By the early nineteenth century, English courts routinely permitted defendants to prove their good character.²⁷² According to well-established English precedent, the defendant in a criminal prosecution for felony or misde-

married to the defendant. The defendant, a Swede, had courted her for a number of months prior to the abduction. Her family swore out a warrant for the defendant's arrest, and she related how she was in bed with the defendant and turned the sheriff's men away by telling them she had willingly married Swendson. She also swore to the voluntariness of her marriage before a justice of peace, then charged her story and denounced her husband as a kidnapper. The defendant called three character witnesses who testified that they knew the defendant and his reputation for good moral character was excellent. Each related specific instances where they had entrusted money or property to the defendant based on his good reputation. The jury nonetheless convicted Swendson who was executed.

²⁶⁹SIR FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 296 (7th ed. 1817).

²⁷⁰*Id.*

²⁷¹*See, e.g.,* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 3-6 (1801); 4 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT DIGESTED UNDER PROPER HEADS 457 (Thomas Leach ed., 7th ed. 1800).

²⁷²*See, e.g.,* Rex v. Stannard, 137 Eng. Rep. 295, 296 (K.B. 1837); Rex v. Brown (1798), reported in MCNALLY, EVIDENCE 320 (1802).

meanor²⁷³ was entitled to prove his good moral character in his defense, using reputation witnesses who were familiar with his reputation for good moral character in his community.²⁷⁴ Some judges refused to admit defense character evidence unless the case was a close decision without character persuasion to the prosecution to overcome defense good character evidence, probably because the commentators view character as collateral to the main issues of the case, a negative proposition that the defendant does not have the predisposition to commit the crime charged.²⁷⁵ However, by an odd quirk of evidence law, the defendant may not show the basis for lay and for expert personality assessments that demonstrate lack of predisposition.²⁷⁶ The prosecution may cross-examine defense witnesses, however, to shake their basis in fact supporting their opinion or reputation evidence.²⁷⁷ This leads to the next portion of the character evidence doctrinal stew.

²⁷³See McNALLY, EVIDENCE 320 (1802).

²⁷⁴Sargent v. Gaunon, 137 Eng. Rep. 296 (K.B. 1849)(passing on the right of the prosecution to rebut).

²⁷⁵See, e.g., 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58 (Peter Tiller ed., 1983) (extended discussion of prosecution's right to rebut defense good character, no cases assigning burden of proof).

²⁷⁶*Id.*

²⁷⁷Defense character witness may be cross examined on whether or not they had heard of (were familiar with) specific instances of the defendant's pertinent bad conduct. *Michelson v. United States*, 335 U.S. 469, (1948); *United States v. Frost*, 914 F.2d 756, 771 (6th Cir. 1990); *United States v. Manos*, 848 F.2d 1427, 1430-31 (7th Cir. 1988); *United States v. Grady*, 665 F.2d 831, 834 (8th Cir. 1981); *United States v. Curtis*, 644 F.2d 263 (3d Cir. 1981); *Government of Virgin Islands v. Roldan*, 612 F.2d 775, 780 (3rd Cir. 1979); *United States v. Wiley*, 534 F.2d 659, 662 (6th Cir. 1976); *Mullins v. United States*, 487 F.2d 581, 585 (8th Cir. 1973). See also *Murphy v. State*, 18 So. 557 (Ala. 1895); *Goodwin v. State*, 15 So. 571 (Ala. 1894) (defense character witnesses may be cross-examined on whether or not they heard of specific instances of defendant's bad conduct); *Hawes v. State*, 7 So. 302 (Ala. 1890) (prosecution for murder of daughter; defense character witnesses properly cross-examined on defendant's prior wife-beating). *People v. Ah Lee Doon*, 31 P. 933 (Cal. 1893); *People v. Gordon*, 37 P. 534 (Cal. 1894) (holding harmless error to ask "do you know" rather than "have you heard"); *State v. Rault*, 445 So.2d 1203 (La. 1984); *State v. Johnson*, 389 So.2d 372 (La. 1980); *State v. Sterling*, 670 So.2d 1316 (La. App. 1996); *State v. Miller*, 489 So.2d 268 (La. App. 1986); *State v. Watson*, 580 A.2d 1067 (Md. 1990); *Winters v. State*, 482 A.2d 886, 895 (Md. 1984); *Taylor v. State*, 360 A.2d 430, 432 (Md. 1976); *State v. Clark*, 682 P.2d 1339 (Mont. 1984); *Commonwealth v. Little*, 295 A.2d 287 (Pa. 1972); *Commonwealth v. Becker*, 191 A. 351 (Pa. 1937); *Commonwealth v. Mayfield*, 396 A.2d 662, 666 (Pa. Super. Ct. 1978); *Commonwealth v. Hurt*, 60 A.2d 828 (Pa. Super. 1948); *State v. Reeves*, 391 S.E.2d 241, 242 (S.C. 1990); *State v. Allen*, 224 S.E.2d 881 (S.C. 1976); *Wiggins v. State*, 778 S.W.2d 877, 887 (Tex. App. 1989); *Rutledge v. State*, 749 S.W.2d 50, 52 (Tex. Crim. App. 1988); *Smith v. State*, 763 S.W.2d 836, 842 (Tex. Ct. App. 1988); *Weimer v. Commonwealth*, 360 S.E.2d 381, 383 (Va. App. 1987).

There are limitations on prosecutorial cross examination of defense character witnesses. For example, in Pennsylvania, defense character witness cannot be asked on cross examination whether he heard the defendant was arrested for a charge which did not result in a conviction. *Commonwealth v. Scott*, 436 A.2d 607 (Pa. 1981);

1. Expert Opinion Evidence

In the last thirty years, the courts have been invited to consider the legitimacy of defense expert witness testimony on the defendant's predisposition to commit the crime charged in the indictment. As one might suspect, this phenomenon began in sex offender prosecutions in which the defense tried to prove the defendant was not predisposed to be a sexual psychopath or sex offender.²⁷⁸ A few courts decided that expert opinion testimony was admissible to show the defendant lacked predisposition to commit the crime.²⁷⁹ Most courts have rejected such opinion evidence as unhelpful to the jury or as a waste of judicial time.²⁸⁰

Judicial reluctance to admit expert opinion testimony on the defendant's predisposition to commit the crime charged seems to be the product of general

Commonwealth v. Becker, 191 A. 351, 356 (Pa. 1937); *Commonwealth v. Vander Weele*, 514 A.2d 189 (Pa. Super. Ct. 1986). If the defendant is granted permission to call psychological or psychiatric witnesses to give an opinion on the defendant's predisposition to commit the offense, the prosecution may not cross examine the witnesses on specific relevant instances of prior conduct. *Freeman v. State*, 486 P.2d 967 (Alaska 1971). When the defendant calls reputational character witnesses, the prosecution may not cross examine defense character witnesses on the defendant's prior juvenile adjudications. *McAdoo v. United States*, 515 A.2d 412, 417 (D.C. 1986); *State v. Holzworth*, 651 P.2d 1255 (Mont. 1982). This is consistent with FED. R. EVID. 609(c).

²⁷⁸*See, e.g.*, *People v. Jones*, 266 P.2d 38 (Cal. 1954); *Robertson v. State*, 319 N.E.2d 833 (Ind. 1974).

²⁷⁹*United States v. Staggs*, 553 F.2d 1073, 1076 (7th Cir. 1977) (expert testimony admissible to prove defendant did not intend to put federal agent in fear); *Freeman v. State*, 486 P.2d 967 (Alaska 1971); *People v. Stoll*, 783 P.2d 698, (Cal. 1989) (defendant may present psychological expert character evidence to prove defendant's personality is inconsistent with crime charged, and state may rebut with its own expert evidence on same issue). *See also* *People v. Jones*, 266 P.2d 38 (Cal. 1954) (holding defendant charged with lewd & lascivious acts with a minor may offer expert psychiatric opinion evidence that defendant was not predisposed to be a sexual psychopath); *Robertson v. State*, 319 N.E.2d 833, 835 (Ind. 1974).

²⁸⁰*See, e.g.*, *United States v. McDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982); *Byrd v. State*, 593 N.E.2d 1183 (Ind. 1992) (MMPI results held inadmissible to show lack of predisposition to commit crime; also expert opinion on same issue held inadmissible); *State v. Hulbert*, 481 N.W.2d 329 (Iowa 1992); *People v. Watkins*, 440 N.W.2d 36 (Mich. App. 1989); *State v. Friederich*, 398 N.W.2d 763 (Wis. 1987); *Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985); *State v. Cavallo*, 443 A.2d 1020 (N.J. 1982) (testimony showing sexual abuse had not occurred held unreliable under Frye rule); *Commonwealth v. Weinstein*, 274 A.2d 182 (Pa. 1971); *State v. Hansen*, 743 P.2d 157 Or. 1987); *State v. Hobbs*, 172 N.W.2d 268 (Iowa 1969); *Painter v. Commonwealth*, 171 S.E.2d 166, 171-72 (Va. 1969); *State v. Cypher*, 438 P.2d 904 (Idaho 1968); *State v. Sinnot*, 132 A.2d 298 (N.J. 1957) (holding defendant charged with sodomy could not call expert psychiatric witness to show defendant was not predisposed to unnatural sex act); *Crabtree v. Commonwealth*, No. 1365-95-4, WL 290309 at *1, 1996 (Va. App. June 4, 1996); *People v. Wheeler*, 575 N.E.2d 1326 (Ill. App. 1991); *State v. Person*, 564 A.2d 626 (Conn. App. 1989) (testimony that defendant did not fit profile for pedophile excluded); *State v. Roberts*, 393 N.W.2d 385 (Minn. App. 1986); *Williams v. State*, 649 S.W.2d 693 (Tex. App. 1983).

judicial skepticism regarding scientific evidence in general, and the difficulty of conducting a trial within a trial on the defendant's good character. In bifurcated trials, however, the courts usually welcome expert opinion evidence on the offender's predisposition toward the crime charged and use expert opinion freely in passing sentence.²⁸¹ It is not clear why such evidence is deemed highly useful to arriving at an appropriate sentence, but inadmissible on the issue of guilt or innocence.

2. Specific Instances of Good Conduct

When the defendant raises good character as a defense, the defendant may not show lack of predisposition to commit the crime by specific instances of good conduct.²⁸² However, the prosecution may cross-examine defense reputational or opinion witnesses on specific instances of conduct tending to prove predisposition that could have formed the basis of the witness' reputational or opinion evidence.²⁸³ Since specific acts not charged in the indictment are collateral, the cross-examiner is barred from proving the specific act from extraneous sources if the witness denies the existence of the specific instance of conduct.²⁸⁴

In another odd turn of evidence law, the prosecution may call its own reputational or opinion witnesses to rebut the defendant's attempt to establish good character.²⁸⁵ Although there is some disagreement on the point, the

²⁸¹See, e.g., Christopher K. Tahbaz, Note, *Fairness to the End: The Right to Confront Adverse Witnesses in Capital Sentencing Proceedings*, 89 COLUM. L. REV. 1345 (1989); Charles P. Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J.L. & MED. 407 (1983); Steven M. Garrett, Note, *Criminal Law: People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 CALIF. L. REV. 1069 (1982).

²⁸²See FED. R. EVID. 405; UNIF. R. EVID. 405(b); CAL. EVID. CODE § 1102.

²⁸³This is the Michelson rule, derived from Justice Jackson's opinion *Michelson v. United States*, 335 U.S. 469 (1948). Defense character witness may be cross examined on whether or not they had heard of specific instances of the defendant's pertinent bad conduct to test the basis for their relation of the defendant's reputation for good character. *Michelson v. United States*, 335 U.S. 469 168 (1948).

²⁸⁴See, e.g., FED. R. EVID. 608(b); UNIF. R. EVID. 608(b). *But see* CAL. EVID. CODE § 770 (repeals the collateral fact rule).

²⁸⁵Most of the cases simply hold that the prosecution may not rebut defense character witnesses with proof of specific bad acts. Federal Rule of Evidence 405(a) states that the usual way in which character evidence will be given will be by reputation or opinion. Rule 405(b) provides that specific instances of conduct can be proved to show character when "character is an essential element of a charge, claim or defense." So far, the courts have not held that the character evidence defense is one of those defenses where character is an essential element. A few courts have been asked to rule that the character defense makes character essential, but they have specifically declined to do so.

On the positive side, Virginia has adopted a rule that the prosecution may rebut defense good character evidence (a) by cross examining defense character witnesses on specific instances of defendant's misconduct; and (b) by calling its own adverse

majority of states hold that the prosecution cannot call fact witnesses who will rebut the defendant's good character defense by testifying to the defendant's specific acts showing predisposition to commit the crime charged.²⁸⁶ In the minority of states that permit fact witnesses to testify to specific instances of conduct, fact witnesses need not express any opinion or state the defendant's reputation for the predisposition at issue.²⁸⁷

In general, courts do not think much of character evidence defenses. When the defendant chooses to defend on the grounds of good character, the courts prefer lay personality assessments delivered in the form of opinion or reputation as proof of specific instances of good or bad conduct.²⁸⁸ Although

reputation witnesses. *Mostyn v. Commonwealth*, 420 S.E.2d 519, 520 (Va. 1992); *Zirkle v. Commonwealth*, 55 S.E.2d 24, 29 (Va. 1949); *Weimer v. Commonwealth*, 360 S.E.2d 381, 383 (Va. App. 1987). Pennsylvania requires that reputational witnesses speak to a time relatively close to the time of the alleged offense. Reputational character evidence that is too remote from the time of the crime is inadmissible. *Commonwealth v. White*, 271 Pa. 584 (Pa. Super. Ct. 1922)

²⁸⁶The majority rule precludes the prosecution from rebutting defense good character evidence with proof of the defendant's relevant specific bad acts from prosecution witnesses. *Michelson v. United States*, 335 U.S. 469, 482 (1948); *People v. Lucas*, 603 N.E.2d 460, 470 (Ill. 1992); *Virgin Islands v. Roldan*, 612 F.2d 775, 781 (3d Cir. 1979); *United States v. Curry*, 512 F.2d 1299, 1304-05 (4th Cir. 1975); *United States v. Rinaldi*, 301 F.2d 576, 578 (2d Cir. 1962); *Lee v. United States*, 245 F.2d 322, 326 (9th Cir. 1957); *State v. Stewart*, 276 N.W.2d 51, 54-55 (Minn. 1979); *State v. Zdanis*, 377 A.2d 275 (Conn. 1977); *Nelson v. State*, 13 So. 361 (Fla. 1893); *People v. Perez*, 239 N.W.2d 432, 436 (Mich. 1976); *People v. Wagner*, 532 P.2d 105, 108-09 (Cal. 1975); *State v. Earvin*, 510 S.W.2d 419, 422 (Mo. 1974); *Freeman v. State*, 486 P.2d 967, 973-77 (Alaska 1971); *State v. Elliott*, 267 N.E.2d 806, 809 (Ohio 1971); *State v. Wyman*, 270 A.2d 460 (Me. 1970); *Henson v. State*, 393 S.W.2d 856, 859-61 (Ark. 1965); *Commonwealth v. Butts*, 204 A.2d 481, 486 (Pa. Super. Ct. 1964); *State v. Crowl*, 337 P.2d 367, 370 (Mont. 1959); *People v. Russell*, 194 N.E. 65, 66 (N.Y. 1934); *State v. Bolin*, 180 S.E. 809 (S.C. 1935); *Locke v. Commonwealth*, 141 S.E. 118, 120 (Va. 1928); *State v. Smith*, 174 P. 551 (Kan. 1918); *Bullock v. State*, 47 A. 62 (N.J. 1900); *Ballowe v. Commonwealth*, 44 S.W. 646 (Ky. 1898); *State v. Moore*, 48 P. 468 (Or. 1897); *Fosdahl v. State*, 62 N.W. 185 (Wis. 1895); *Basye v. State*, 63 N.W. 811 (Neb. 1895); *State v. Ellwood*, 24 A. 782 (R.I. 1892); *Kearney v. State*, 8 So. 292 (Miss. 1890); *State v. Sterrett*, 32 N.W. 387 (Iowa 1887); *Dupree v. State*, 33 Ala. 380 (1859) (defendant was escaped convict); *DeLoach v. State*, 453 S.E.2d 766 (Ga. App. 1995); *State v. Anderson*, 831 P.2d 376 (Ariz. App. 1991); *People v. Clark*, 547 P.2d 267, 272-73 (Col. App. 1975); *Pitman v. State*, 487 P.2d 716, 726 (Okla. Crim. App. 1971); *Webber v. State*, 472 S.W.2d 136, 137 (Tex. Crim. App. 1971).

²⁸⁷A minority of jurisdictions permit the prosecution to rebut defense good character evidence with specific instances of bad conduct testified to by prosecution witnesses: *State v. Rault*, 445 So.2d 1203 (La. 1984); *People v. Wagner*, 532 P.2d 105, 107 (Cal. 1975); *State v. Gunzelman*, 502 P.2d 705 (Kan. 1972); *State v. Gregory*, 488 P.2d 757 (Wash. 1971) (prosecution permitted to prove prior military offenses because accused testified in uniform and claimed to have a distinguished service record); *Young v. Commonwealth*, 69 Ky. 312 (1869); *DeLoach v. State*, 453 S.E.2d 766 (Ga. App. 1995) (holding that conviction for child abandonment is not conviction for moral turpitude); *Rutledge v. State*, 749 S.W.2d 50, 52 (Tex. Crim. App. 1988); *Smith v. State*, 763 S.W.2d 836, 842 (Tex. Ct. App. 1988).

²⁸⁸See cases cited *supra* note 286.

some jurisdictions have approved of expert psychological or psychiatric opinion testimony showing the defendant was not predisposed to commit the crime charged in the indictment, most courts have been very skeptical about such evidence and have excluded it.²⁸⁹

3. Habit

Habitual conduct can be proved by opinion evidence, by reputation or by specific instances of similar conduct.²⁹⁰ If the defendant claims no predisposition to commit the crime charged, then it follows the prosecution can establish the defendant's predisposition to commit the crime by showing the defendant was a habitual offender. However, the courts have never been asked to consider a mass of specific instances of conduct as proof of habitual criminality. The issue lurks within every entrapment case in which the prosecution is free to introduce a plethora of similar bad acts evidence. Likewise, defense counsel fails to raise the issue of defendant's habitual good behavior to rebut the prosecution's *prima facie* case.

In fact, no court to date has given much thought to habitual criminal conduct outside the penalty phase of bifurcated trials. Part of this judicial reluctance stems from the lack of precision in defining "habit" as something different from "character trait" and the inability to structure sound guidelines for an appropriate foundation for introducing habit evidence.²⁹¹ The courts have not developed a bright line test for determining how many similar acts constitute a sufficient basis to prove a habit.²⁹²

The character defense is as absurdly structured today as it was in the time of Michelson nearly fifty years ago. The Federal Rules of Evidence froze pre-1975 case law into a series of unintelligible rules about character evidence

²⁸⁹See *supra* notes 287-90.

²⁹⁰*Id.*

²⁹¹Only one case in recent years seems to have dealt with this issue at all. As might be expected, the case involved drug abuse. In *State v. Bragg*, 516 A.2d 556 (Me. 1986), the defense tried to introduce evidence that the accused was habitually temperate and did not abuse drugs or alcohol. The trial court excluded the evidence on the grounds that the prosecution had not tried to prove defendant was under the influence of drugs or alcohol when he assaulted the victim. The Maine Supreme Judicial Court affirmed the court below. It held that if there is no foundation showing that the defendant was intoxicated at the time of the assault, the defendant cannot introduce evidence proving that he was temperate to rebut criminal responsibility for the assault.

²⁹²Unfortunately, most of the "habit" cases are civil actions with limited applicability to criminal prosecutions. Federal criminal precedent is particularly sparse. In *United States v. Angelilli*, 660 F.2d 23, 37-42 (2d Cir. 1981), the court permitted proof of other rigged auctions to prove a "habit" or "routine practice" of a ring of conspirators that rigged judicial cases in Manhattan. See, e.g., *Frase v. Henry*, 444 F.2d 1228, 1231-32 (10th Cir. 1971) (attempted statement of the differences between habit and character that is unconvincing). See also *Chomicki v. Wittekind*, 38 N.W.2d 561 (Wis. Ct. App. 1985) (not error to admit four prior instances of sexual harassment of tenants in sexual harassment suit).

that have proved to be the source of many criminal appeals. The Federal Rules of Evidence have adopted unproved assertions about the probative value of character evidence without reflecting on the mass of psychological literature on personality theory, and structure over the past seventy years has shown that all the psychological schools of thought agree that human beings are predisposed to act in predictable fashion under the same circumstances, although the theorists who have discovered behavioral stability do not agree on the proper way to measure stability. They do not agree on what language to use to describe behavioral stability.

The current system of proof of character is conceptually infirm, although it has stumbled upon a way to present fairly useful personality assessments to the jury. The best way to prove or disprove an alleged offender's predisposition to commit the crime charged in the indictment is by opinion evidence, and not by specific instances of conduct recited by fact witnesses. Conduct without an assessment or evaluation of that conduct is practically meaningless.²⁹³ The courts permit lay assessment, with all the fragility that untrained lay observers bring to interpreting their observations.²⁹⁴ The courts can exclude expert evidence on grounds of waste of time and lack of general scientific acceptance.²⁹⁵

Again, lay and expert personality assessments are only as good as the basis for the conclusion. Although the prosecution may test the basis for defense opinion witnesses' personality assessments of the defendant by cross examining them on specific bad instances of conduct, the defense cannot display the basis for its favorable assessment. This conflicts with the letter and the spirit of Federal Rules 703 and 705, the expert basis rules.²⁹⁶ Opinion

²⁹³See *supra* notes 254-57.

²⁹⁴FED. R. EVID. 404(a).

²⁹⁵FED. R. EVID. 403.

²⁹⁶FED. R. EVID. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id.

FED. R. EVID. 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

Id.

evidence should be tested. The jury should know what the basis for the opinion is in order to evaluate that opinion.²⁹⁷

B. Entrapment and Good Character

The Rule 404 and 405 synthesis really disintegrates when the defendant claims entrapment. When a defendant claims that the defendant committed the offense charged in the indictment because of law enforcement officers' inducement, the defendant admits committing the criminal act, but denies criminal liability because outrageous police conduct lured the defendant into committing a crime the defendant was not predisposed to commit.²⁹⁸ If successful, the defendant cannot be convicted.²⁹⁹ Depending on whether the court focuses on the outrageous conduct of law enforcement officials, or upon the defendant's state of mind when committing the criminal act, the defendant's predisposition to commit the crime becomes the central focus of the trial.³⁰⁰

1. Subjective vs. Objective View

The courts and legal scholars have two theories of entrapment.³⁰¹ Most courts and most commentators have adopted the subjective view of entrapment.³⁰² The central issue is the defendant's state of mind at the time the offense was committed.³⁰³ The defendant must offer some evidence that police conduct overrode the defendant's inhibitions.³⁰⁴ The prosecution must disprove this claim.³⁰⁵ This requires the court to conduct a two step inquiry when entrapment enters the prosecution: (a) was the offense induced by a government agent; and (b) was the defendant predisposed to commit the type

²⁹⁷The Advisory Committee Note to Federal Rule of Evidence 701, the lay opinion rule, may implicitly accept this principle. Federal Rule 701 requires lay opinion to be based on first-hand knowledge. The Advisory Committee Note states:

The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness

FED. R. EVID. 701.

²⁹⁸*See, e.g.,* LAFAVE & SCOTT, CRIMINAL LAW § 5.2 (2d ed. 1986).

²⁹⁹*Id.* at 421-22.

³⁰⁰*Id.* at 427-30.

³⁰¹*Id.* at 422 (subjective); 424 (objective).

³⁰²*Id.* at 422.

³⁰³LAFAVE & SCOTT, *supra* note 298, at 423.

³⁰⁴*Id.* at 430.

³⁰⁵*Id.*

of crime charged.³⁰⁶ Under the subjective viewpoint, the defendant can be convicted if the defendant was already predisposed to commit the offense, disregarding the outrageousness of police conduct.³⁰⁷ The courts usually countenance "a searching inquiry" into the defendant's criminal history to determine if the defendant was predisposed to commit crimes like those charged.³⁰⁸

The minority, objective view of entrapment, originally set out in the concurring opinions of Justice Frankfurter in *Sherman v. United States*,³⁰⁹ and Justice Roberts' in *Sorrell v. United States*,³¹⁰ focuses on the conduct of law enforcement personnel that may have induced the crime, holding that if the law officer's conduct is outrageous, then the defendant should be discharged to punish the law enforcement personnel. The defendant's predisposition to commit the offense is immaterial under the objective viewpoint.³¹¹ Depending on the entrapment theory followed by the jurisdiction, the defendant's predisposition to commit offenses of the type charged in the indictment may be relevant or irrelevant to a determination that the defendant was entrapped.³¹²

In majority position jurisdictions, the entrapment defense is treated as an occasion for a "searching inquiry into [the accused's] own conduct and predisposition' as bearing upon his claim of innocence."³¹³ The rationale for this permission comes from the definition of subjective entrapment: the defendant's conduct is said not to be criminal because the legislature did not intend criminal acts instigated by government functionaries to be prohibited.³¹⁴ Therefore, the defendant's predisposition to commit the crime charged is a major issue whenever the defendant raises entrapment.³¹⁵

2. Character Begets Character: The State's "Searching Inquiry"

In subjective entrapment jurisdictions, the defendant puts his entire life on the line by pursuing the entrapment defense. Therefore, the defendant may offer reputational or opinion evidence that the defendant had good character

³⁰⁶*Id.* at 423.

³⁰⁷*Id.*

³⁰⁸*Sorrell v. United States*, 287 U.S. 435 (1932).

³⁰⁹356 U.S. 369 (1958).

³¹⁰287 U.S. 435 (1932).

³¹¹LAFAVE & SCOTT, *supra* note 298, at 424.

³¹²*Id.* at 427 (subjective approach).

³¹³*Sherman*, 356 U.S. at 373.

³¹⁴LAFAVE & SCOTT, *supra* note 298, at 423.

³¹⁵*Id.*

for the pertinent trait involved in the crime charged.³¹⁶ The prosecution may rebut defendant's good character evidence by introducing its own reputation and opinion witnesses who will state that the defendant's character for the pertinent trait was bad.³¹⁷ The prosecution may also introduce specific instances of similar bad conduct, including criminal convictions and uncharged misconduct.³¹⁸

This system is in direct conflict with the Rule 405 synthesis because it permits the prosecution to disprove good character by extrinsic proof of the defendant's bad character by specific acts. So far, no court has noticed the problem that the prosecution has been given a significant advantage in entrapment cases not held by the prosecution in other character defense cases. No court has ruled that character is an essential element of the prosecution's case in entrapment cases.

On the other hand, entrapment cases can be interpreted by the courts to permit the prosecution specific instances of conduct under Federal Rule 404(b) because entrapment admits the crime but denies criminal intent. The fact that the defendant committed similar crimes or similar uncharged criminal misconduct may be admitted to disprove defendant's claim of lack of criminal intent.³¹⁹ This simply compounds the problem and points out the lack of consistency of Federal Rules 404 and 405.

Finally, when the defendant claims entrapment, the defendant should be permitted to prove by reputation or opinion witnesses that the police operative induced the defendant to commit the crime had a bad character for intimidating victims into committing crimes. If the defendant claims that the police operative induced the defendant to engage in criminal activity due to duress, the defendant should be able to prove the operative's bad character for violent conduct in support of his case.³²⁰

³¹⁶*See, e.g.,* United States v. Mitchell, 67 F.3d 1248 (6th Cir. 1995) (instruction that state in part "Ask yourself what the evidence shows about the defendant's character and reputation" approved); United States v. Kirkland, 34 F.3d 1068 (6th Cir. 1994); United States v. Smith, No. 93-5817, 1994 U.S. App. LEXIS 8123, at *1 (6th Cir. Apr. 15, 1994); People v. Perez, 568 N.E.2d 250 (Ill. App. Ct. 1991); People v. Flax, 498 N.E.2d 667 (Ill. App. Ct. 1986); State v. Troquille, 493 So.2d 686 (La. App. 1986).

³¹⁷United States v. Faymore, 736 F.2d 328, 334 (6th Cir. 1984); United States v. Wolfe, 594 F.2d 77, 85 (5th Cir. 1979); United States v. Daniels, 572 F.2d 535, 539 (5th Cir. 1978).

³¹⁸*See, e.g.,* United States v. Blackman, 950 F.2d 420, 423 (7th Cir. 1991) (defendant's black notebook showing other drug transactions admissible to rebut entrapment); United States v. Swiatek, 819 F.2d 721, 728 (7th Cir. 1987) (harmless error to admit dissimilar criminal acts); United States v. Sullivan, 772 F.2d 909 (6th Cir. 1985).

³¹⁹State v. Agrabante, 830 P.2d 492 (Haw. 1992).

³²⁰Keith v. State, 612 P.2d 977 (Alaska 1980); Commonwealth v. Russell, 473 A.2d 1383 (Pa. Super. Ct. 1984).

C. Defense Character Evidence to Support Diminished Capacity Defense

Although the case law on diminished capacity defenses and character evidence is sparse, the logic of the character evidence defense indicates that a defendant who claims the criminal act committed was the product of a diminished mental state, i.e., insanity, chronic alcohol or drug abuse, or organic brain disease, ought to be able to establish good character to show the act was a mental aberration. In *State v. Eakins*, the Washington Supreme Court reversed a conviction to permit the defendant to introduce favorable character evidence in an insanity defense case, to show the act charged in the crime was an aberration.³²¹ Cases such as *Eakins* collide with decisions that prevent defendants from proving prior good character when they claim the criminal act was the product of chronic alcoholism or drug abuse and associated mental disease.³²²

United States v. Staggs,³²³ the only case that examined all the parameters of the character defense and diminished capacity, held that the defendant was entitled to establish prior good character to support a claim of innocence due to mental aberration. Defendant deserted from the United States Marine Corps and went home.³²⁴ The local FBI unit received and executed a fugitive warrant.³²⁵ Agents went to the defendant's house and apprehended him in his bed room.³²⁶ Defendant pulled and waived a gun. Defendant was indicted for assaulting a federal officer.³²⁷ Staggs wanted to call a psychiatrist who would explain the defendant's impulsive behavior with the pistol was directed toward self-destruction and not a threat to the arresting FBI Agent.³²⁸ Although the district court excluded the psychiatrist's evidence and Staggs was convicted, the Seventh Circuit reversed.³²⁹ The panel held that the psychiatrist would be giving character evidence showing the defendant was not predisposed to threaten a federal officer.³³⁰ The psychiatrist would give evidence showing Staggs meant to destroy himself, and the court reasoned, this would be evidence of defendant's character admissible to show his lack of intent to harm others.³³¹ Straying into Federal Rule 404(b), the court also held

³²¹*State v. Eakins*, 902 P.2d 1236, 1237 (Wash. 1995).

³²²*State v. Janes*, 822 P.2d 1238 (Wash. Ct. App. 1992).

³²³553 F.2d 1073 (7th Cir. 1977).

³²⁴*Id.* at 1074.

³²⁵*Id.*

³²⁶*Id.*

³²⁷*Id.* at 1075.

³²⁸*Staggs*, 553 F.2d at 1075.

³²⁹*Id.* at 1077.

³³⁰*Id.* at 1075.

³³¹*Id.*

the psychiatrist's testimony admissible to rebut specific intent, an element of the offense charged.

D. Duress and Good Character

When the defendant claims he committed the crime charged in the indictment due to fear of physical harm or death to the defendant or to the defendant's family, the defendant is not guilty by reason of duress.³³² Duress and entrapment are closely related defenses to criminal liability.³³³ In both cases, the defendant claims that he lacked any predisposition to commit the crime charged and the agency responsible for the crime was a third party who exerted improper influences on the defendant to cause the defendant to commit the crime. It should follow the defendant can prove good character to substantiate the claim of duress. The defendant should also be able to prove the third party's bad moral character for violence and threatening behavior to show the defendant's state of mind. The defendant should be permitted to call reputational or opinion witnesses in either case, the prosecution being permitted to cross examine those witnesses on specific instances of conduct. Finally, the prosecution should be able to rebut the defendant's case by calling its own adverse character witnesses who will testify to the defendant's bad reputation and the alleged third party's good reputation.

E. Self-Defense

When the defendant claims he acted in response to threats of immediate deadly force being used by the victim against the defendant or a family member, the defendant is not guilty of the crime charged on grounds of the claim of privilege of self-defense.³³⁴ Although a claim of self-defense does not automatically put the defendant's character "at issue" for the character trait related to the crime charged,³³⁵ the courts permit the defendant and the prose-

³³²LAFAYE & SCOTT, *supra* note 298, at 437-38.

³³³*Id.* at 437-38.

³³⁴*Id.* at § 5.7.

³³⁵However, the defendant may soon make an issue of the defendant's character by giving seemingly innocuous testimony by way of background evidence. When the defendant testifies that he had never been charged with an act of violence or a criminal offense, character is in issue and the prosecution may rebut the defendant's claim of character by evidence of prior bad acts reflecting on the defendant's predisposition to violence. *Spohn v. State*, 837 S.W.2d 873 (Ark. 1992); *State v. Hall*, 793 P.2d 737 (Kan. 1990) (defendant testified he was a good Kansas farm boy and court held character was at issue and prosecution could rebut with proof of specific criminal acts); *Commonwealth v. Petrulli*, 128 A.2d 108 (Pa. Super. Ct. 1956). California and Missouri are exceptions to the general rule. In those states, when the defendant offers evidence that the victim was the first aggressor, the state may offer evidence of the defendant's prior violent acts similar to the act perpetrated in the case at bar to show predisposition to commit the crime. CAL. EVID. CODE § 1103(b) (Deering 1997); *People v. Walton*, 49 Cal. Rptr. 2d 917 (1996); *People v. Blanco*, 13 Cal. Rptr. 2d 176 (1992); *State v. Schlup*,

cution to prove the victim's propensity to commit violent acts.³³⁶ The courts also permit the defendant to prove good character, subject to the prosecution's right to rebut that claim.³³⁷ The defendant may also "open the door" to good character evidence by making statements in the defendant's opening statement that show the defendant intended to introduce bad character evidence about the victim, even if the evidence is not admitted.³³⁸

To establish self-defense, the defendant may prove the victim placed the defendant in a position where the defendant feared for the defendant's safety or the safety of the defendant's family. Commonly, this is established by showing the victim struck the defendant, threatened the defendant with a gun, knife or other weapon, or made some act of first aggression. Federal Rule of Evidence 404(a)(2) specifically provides for admission of character evidence to show that the victim of a violent crime was the first aggressor.³³⁹ The defendant can also prove the victim was predisposed towards violent conduct.³⁴⁰ Under one theory, the victim's prior, similar aggressive and violent acts are admissible just to establish the victim's predisposition to commit violence.³⁴¹ The defendant does not have to know of these prior violent acts before the crime.³⁴² Another theory, not consistent with Rule 404(a)(2), admits specific violent acts

785 S.W.2d 796, 801 (Mo. Ct. App. 1990); *State v. Hill*, 614 S.W.2d 744 (Mo. Ct. App. 1981); *State v. Robinson*, 130 S.W.2d 530 (Mo. 1939). However, the prosecution may not prove the defendant verbally threatened the victim with harm during a recess at trial to rebut the defendant's claim of self-defense. *DuPont v. State*, 556 So.2d 457 (Fla. Dist. Ct. App. 1990). When defendant testifies that his actions "broke every moral code" defendant opened the door to character evidence proving prior convictions for crimes to rebut claim of general good character. *State v. Blackburn*, 840 P.2d 497 (Kan. 1992).

³³⁶*See, e.g.*, *Landrum v. State*, 894 S.W.2d 933 (Ark. 1995); *Johns v. United States*, 434 A.2d 463, 471 (D.C. 1981) (defense proved victim was predisposed to violence, did not open door to attacking defendant's character); *People v. Lynch*, 470 N.E.2d 1018 (Ill. 1984) (defendant testified he was a "generally peaceful guy" on cross-examination); *Commonwealth v. Salone*, 525 N.E.2d 430 (Mass. Ct. App. 1988).

³³⁷FED. R. EVID. 404(b).

³³⁸*See, e.g.*, *People v. Whitters*, 588 N.E.2d 1172 (1992).

³³⁹FED. R. EVID. 404(a)(2).

³⁴⁰*See, e.g.*, KAN. STAT. ANN. § 60-446 (1995); *State v. Richards*, 438 S.E.2d 331 (W. Va. 1993); *State v. Woodson*, 382 S.E.2d 519 (W. Va. 1989); *State v. Arteaga*, 896 P.2d 1035 (Kan. 1995); *People v. Lynch*, 470 N.E.2d 1018 (Ill. 1984); *State v. Edwards*, 420 So.2d 663 (La. 1982); *State v. Lui*, 603 P.2d 151 (Haw. 1979); *Steele v. State*, 3 So. 547 (Ala. 1888); *Franklin v. State*, 29 Ala. 14 (1856); *State v. James*, No. 95-KA-1182, 1996 La. App. LEXIS, at *1 (La. Ct. App. June 5, 1996); *McCracken v. State*, No. A-5427, 1996 Alaska App. LEXIS 15, at *1 (Alaska App. Apr. 12, 1996); *State v. Montz*, 632 So.2d 822 (La. Ct. App. 1994); *People v. Harris*, 587 N.E.2d 47 (Ill. App. Ct. 1992); *People v. Randle*, 498 N.E.2d 732 (Ill. App. Ct. 1986).

³⁴¹*See, e.g.*, *State v. Sims*, 331 N.W.2d 255 (Neb. 1983); *State v. Lewchuk*, 539 N.W.2d 847 (Neb. App. 1995).

³⁴²*Id. But see* *Britt v. State*, 645 S.W.2d (Ark. App. 1983) (holding that actual knowledge of a prior bad act of the victim is required foundation for admissibility).

committed by the victim if the foundation shows the defendant knew about the violent act before the affray.³⁴³ Certainly, a majority of states that have reviewed the issue permit the defendant to prove the victim told the defendant about prior violent acts perpetrated by the victim to establish the defendant's state of mind.³⁴⁴

Following the first branch of the theory, however, leads some courts to the conclusion that so long as the victim's specific bad acts are not known by the defendant at the time of the affray, the defendant cannot prove them.³⁴⁵ Instead, the defendant is limited to putting on reputation or opinion witnesses who testify that the victim had a bad reputation for violent conduct.³⁴⁶ Indeed, a number of courts have held that the violent disposition of the victim is not one of those cases in which "character is an essential element of a claim or defense."³⁴⁷ It is hard to understand how the victim's predisposition to behave

³⁴³See, e.g., *State v. Latham*, 519 N.W.2d 68, 71 (S.D. 1994); *State v. Duncan*, 805 P.2d 621, 623 (N.M. 1991); *State v. Bland*, 337 N.W.2d 378, 383 (Minn. 1983); *State v. Lui*, 603 P.2d 151 (Haw. 1979); *McMorris v. State*, 205 N.W.2d 559 (Wis. 1973) (holding error to exclude specific violent acts of victim known to defendant to prove self-defense); *McCracken v. State*, No. A-5427, 1996 Alaska App. LEXIS 15, at *1 (Alaska App. Apr. 12, 1996); *Hedges v. State*, 667 So.2d 420 (Fla. Dist. Ct. App. 1996); *State v. James*, No. 95-KA-1182, 1996 La. App. LEXIS 1123, at *1 (La. Ct. App. June 5, 1996); *State v. Leichman*, 651 So.2d 355 (La. Ct. App. 1995); *State v. Carter*, 651 A.2d 1088 (N.J. Super. Ct. Law Div. 1994); *Smith v. State*, 606 So.2d 641 (Fla. Dist. Ct. App. 1992); *State v. Cano*, 743 P.2d 956, 958 (Ariz. Ct. App. 1987); *Quintana v. State*, 452 So.2d 98 (Fla. Dist. Ct. App. 1984); *Jones v. State*, 284 A.2d 635 (Md. Ct. Spec. App. 1971).

³⁴⁴See, e.g., *State v. Lui*, 603 P.2d 151 (Haw. 1979); *McCracken v. State*, No. A-5427 1996 Alaska App. LEXIS 15, at *1 (Alaska App. Apr. 12, 1996); *Hedges v. State*, 667 So.2d 420 (Fla. Dist. Ct. App. 1996); *State v. Leichman*, 651 So.2d 355 (La. Ct. App. 1995); *State v. Carter*, 651 A.2d 1088 (N.J. Super. Ct. Law Div. 1994); *Smith v. State*, 606 So.2d 641 (Fla. Dist. Ct. App. 1992); *Quintana v. State*, 452 So.2d 98 (Fla. Dist. Ct. App. 1984).

³⁴⁵*State v. Alexander*, 765 P.2d 321, 324 (Wash. App. 1988).

³⁴⁶See, e.g., *State v. Smith*, 608 A.2d 63, 72 (Conn. 1992); *Thompson v. Commonwealth*, 652 S.W.2d 78, 79 (Ky. 1983); *State v. Miranda*, 405 A.2d 622 (Conn. 1978) (victim's character for violence may be proved by reputation, opinion or specific convictions for violent offenses); *Amos v. Commonwealth*, 516 S.W.2d 836 (Ky. 1974); *McGill v. Commonwealth*, 365 S.W.2d 470 (Ky. 1963); *Steele v. State*, 4 So. 547 (Ala. 1888); *State v. Alexander*, 765 P.2d 321, 324 (Wash. Ct. App. 1988).

³⁴⁷See, e.g., *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995) (threat made by victim to defendant's brother to get even outside courtroom during trial not admissible to show victim was predisposed to violent conduct at time of offense); *United States v. Talamante*, 981 F.2d 1153, 1156 (10th Cir. 1992) (proof of victim's violent character is circumstantial use of character evidence); *State v. Arteaga*, 896 P.2d 1035 (Kan. 1995); *People v. Lynch*, 470 N.E.2d 1018 (Ill. 1984); *Thompson v. Commonwealth*, 652 S.W.2d 78, 79 (Ky. 1983); *State v. Miranda*, 405 A.2d 622 (Conn. 1978) (victim's character for violence may be proved by reputation, opinion or specific convictions for violent offenses); *McClellan v. State*, 570 S.W.2d 278 (Ark. 1978); *Amos v. Commonwealth*, 516 S.W.2d 836 (Ky. 1974); *State v. Smith*, 608 A.2d 63, 72 (Conn. 1992); *McGill v. Commonwealth*, 365 S.W.2d 470 (Ky. 1963); *Steele v. State*, 3 So. 547 (Ala. 1888); *Franklin v. State*, 29 Ala. 14 (1856); *People v. Harris*, 587 N.E.2d 47 (Ill. App. Ct. 1992); *People v. Devine*, 557 N.E.2d 953 (Ill. App. Ct. 1990); *State v. Alexander*, 765 P.2d 321, 324 (Wash.

violently is not an essential element of a self-defense plea. A minority of jurisdictions have held that the victim's predisposition towards violence is an essential element of a self-defense claim and have permitted proof of specific violent acts of the victim that the defendant was not aware of at the time of the affray.³⁴⁸ In those jurisdictions where self-defense is held to raise a defense in which character is an essential element, the courts permit the defendant to prove prior violent acts of the victim that did not result in a conviction.³⁴⁹ Pennsylvania has a *sui generis* rule that permits the defendant to introduce the victim's prior convictions for violent crimes whether or not the defendant was aware of them, but denies admission to the same acts proved by eye-witness testimony if no conviction resulted from the act.³⁵⁰

When the prosecution chooses to rebut self-defense by calling character witnesses who testify to the victim's reputation for peaceable disposition, the defendant may conduct a *Michelson* cross-examination on specific instances of bad conduct that would form part of the victim's reputation.³⁵¹

Although not technically within self-defense, a number of cases have come up dealing with claims by defendants in sexual assault cases which the trial court precluded them from presenting evidence that the victim had previously made false complaints of sexual assault with reference to other men. The courts in such instances seem to be more concerned with the effect that such evidence has on rape shield rules.³⁵² However, no state rape shield rule or statute

Ct. App. 1988); *State v. Black*, 587 S.W.2d 865 (Mo. Ct. App. 1979) (no error to exclude evidence victim was a brawler).

³⁴⁸See, e.g., *Virginia Islands v. Carino*, 631 F.2d 226 (3d Cir. 1980) (harmless error to exclude specific instances of victim's violent conduct in case of overwhelming guilt); *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972); *Burgeon v. State*, 714 P.2d 576 (Nev. 1986); *State v. Sims*, 331 N.W.2d 255 (Neb. 1983); *State v. Miranda*, 405 A.2d 622 (Conn. 1978) (victim's character for violence may be proved by reputation, opinion or specific convictions for violent offenses); *State v. Lewchuk*, 539 N.W.2d 847 (Neb. Ct. App. 1995); *Gonzales v. State*, 838 S.W.2d 848 (Tex. Ct. App. 1992); *Chapman v. State*, 469 N.E.2d 50 (Ind. Ct. App. 1984).

³⁴⁹See, e.g., *State v. Koon*, 440 S.E.2d 442, 450 (W. Va. 1993); *Thompson v. State*, 813 S.W.2d 249, 251 (Ark. 1991); *State v. Dunson*, 433 N.W.2d 676, 681 (Iowa 1988); *Gottschalk v. State*, 881 P.2d 1139, 1143 (Alaska Ct. App. 1994); *Gonzales v. State*, 838 S.W.2d 848, 859 (Tex. Ct. App. 1992).

³⁵⁰See, e.g., *Commonwealth v. Amos*, 284 A.2d 748 (Pa. 1971); *Commonwealth v. Stewart*, 647 A.2d 597 (Pa. Super. Ct. 1994); *Commonwealth v. Ignatavich*, 482 A.2d 1044 (Pa. Super. Ct. 1984).

³⁵¹The defendant may prove the victim's bad character for violence by proof of specific violent acts only if the act resulted in a criminal conviction, or was known to the defendant before the offense was committed. See *Commonwealth v. Amos*, 284 A.2d 748 (Pa. 1971); *Commonwealth v. Stewart*, 647 A.2d 597 (Pa. Super. Ct. 1994); *Commonwealth v. Ignatavich*, 482 A.2d 1044 (Pa. Super. Ct. 1984).

³⁵²See, e.g., *People v. Lankford*, 210 Cal. App. 3d 227, 237 (1989); *State v. Johnson*, 692 P.2d 35 (N.M. Ct. App. 1984); *State v. Demos*, 619 P.2d 968 (Wash. 1980). But see *Little v. State*, 413 N.E.2d 639, 643 (Ind. Ct. App. 1980).

precludes proof that the victim has made false complaints of sexual assault prior to the criminal assault at issue in the trial.³⁵³ Although the attack crosses the line between substantive character evidence of the victim and impeaching evidence based on Federal Rule 608(a) and (b) considerations, it has nothing to do with the sexual conduct of the victim. It has to do with the victim's honesty.

*State v. Nauslar*³⁵⁴ is a typical "prior spurious complaint" case. The defendant was charged with first degree sexual assault.³⁵⁵ He admitted having sexual contact with the victim, but tried to call witnesses to testify that she had previously made a false accusation of sexual misconduct against another man.³⁵⁶ The witnesses would also have testified she made false theft accusations as well.³⁵⁷ The testimony was excluded and the Nebraska Appellate Court affirmed.³⁵⁸ The court held that the defendant may not offer specific instances showing the victim lied or acted deceitfully substantively to prove the victim was predisposed to lie.³⁵⁹ The court also held the proffered bad character evidence inadmissible to impeach the victim's credibility.³⁶⁰ Instead, the court admonished defense counsel's failure to elicit reputation or opinion evidence from these witnesses.³⁶¹

V. CONCLUSION

To return to Benjamin Martinez' case after the extensive analysis of the psychological support for character evidence and review of the law of character evidence, Benjamin Martinez committed four criminal acts that he was not predisposed to commit.³⁶² Alvaro Plancarte used psychological intimidation tactics to get Martinez involved in criminal behavior.³⁶³ Martinez gave in to Plancarte's importuning after Plancarte told him that he would be Martinez' "padrino" or God-father.³⁶⁴

³⁵³Several states make express exceptions to their rape shield rules for the victim's false complaints against other men. *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.15, at 232 n.24 (1995).

³⁵⁴No. A-93-580, 1994 Neb. App. LEXIS 179, at *12 (Neb. App. Jun. 14, 1994).

³⁵⁵*Id.* at *5.

³⁵⁶*Id.* at *14.

³⁵⁷*Id.* at *13.

³⁵⁸*Id.* at *29.

³⁵⁹*Nauslar*, 1994 Neb. App. LEXIS at *18-19.

³⁶⁰*Id.*

³⁶¹*Id.* at *19-20.

³⁶²*Martinez*, 924 F. Supp. at 1025.

³⁶³*See supra* notes 12-26.

³⁶⁴*See supra* notes 22.

Martinez' personality structure was particularly susceptible to this type of intimidation. The record describes Martinez as a person with limited education, shy, introverted, and dependent upon others for guidance and direction. The record also shows Plancarte worked on Martinez' guilt feelings relating to his wife and his girlfriend and the child that his girlfriend had borne him. Plancarte posed as a big time drug dealer, with the implication he used deadly force to carry out his wishes.³⁶⁵ The implied threat of harm and the offer to pave the way for Martinez to clear up his marital problems pushed Martinez over the edge.³⁶⁶

Despite language barriers, Martinez' five favorable character witnesses told the court and jury that Martinez had never been charged or convicted for any criminal act before his arrest.³⁶⁷ They gave enough background evidence to show Martinez was an easily led, introverted man who knew nothing about drugs and drug slang.³⁶⁸ Martinez also called two witnesses who testified they were present when Alvaro Plancarte had been intimidating Martinez into working for him as a drug courier.³⁶⁹ Both witnesses testified Plancarte had a well-known reputation in the Mexican-American community as a drug dealer and liar.³⁷⁰

Although this case was tried without the intervention of a psychological expert to explain Benjamin Martinez' personality structure to the judge and jury, the judge overrode a guilty verdict based on the strength of the lay character assessments of the defendant and the government's undercover operative.³⁷¹

Given the general agreement among psychologists that human personality structure is relatively stable, Martinez' acquittal made eminent good sense. The defense proved Martinez was not the kind of person to engage in criminal enterprise. Therefore, Plancarte's intimidation tactics and offers of special help were the legal cause of Martinez' participation in drug running.

The *Martinez* case suggests the courts ought to rely on personality assessments in reaching a verdict on an accused's guilt or innocence. The accused's basic predisposition towards criminal activities of the type charged in the indictment help the jury to understand the fact testimony from incident witnesses and to discover the motivation of the accused. That is why the entire criminal history and psychological history of the accused is the very first item of evidence admitted in a French, German, Swiss or Austrian criminal prosecution, before the story of the crime itself is told by the fact witnesses. The

³⁶⁵See *supra* notes 12-26.

³⁶⁶See *supra* notes 18-24.

³⁶⁷See *supra* notes 46-48.

³⁶⁸*Id.*

³⁶⁹See *supra* notes 44-45.

³⁷⁰See *supra* note 45.

³⁷¹*Martinez*, 940 F. Supp. at 1025.

judicial panel, usually made up of legal and lay justices, then assesses the accused's guilt.

It is very difficult to defend current U.S. practice from a scientific or logical point of view. *Martinez* shows that when the court has some rough character assessment to work from, the court can avoid doing a substantial injustice to the accused. It also shows the contrary: admitting the accused's criminal history can avoid working an injustice against all the people.

The quality of personality assessment depends on the skill of the observer and the amount of contact between the person observed and the observer. A long term assessment made by a professional psychologist will be more reliable and more useful to a jury of unskilled lay people than short term observations by unskilled observers. A psychologist should be able to synthesize information derived from lay personality assessments with her own observations of the person observed. Consequently, if the courts are in search of reliable personality assessments that are based on sound scientific theory, the courts should accept expert opinion evidence on personality traits. Cases such as *United States v. Martinez* call for trained personality assessors.