Notes

CHARACTER AND REPUTATION EVIDENCE IN IOWA

I. INTRODUCTION

From the first years of statehood to the present day, the subject of character and reputation evidence has been a focal point of both judicial scrutiny[1] and legislative enactment[2] in Iowa. However, numerous problems have been encountered by both students and practitioners in understanding the appropriate use of this evidence at trial. Part of the confusion stems from the casual equation of two distinguishable concepts. *Character* denotes the aggregate of actual traits or qualities possessed by a person.[3] *Reputation* is one of several methods by which character may be established.[4] The close relationship between these two distinct terms understandably engenders much bewilderment as to the proper utilization of such evidence at trial. Although this blending of character evidence and reputation evidence may result in an occasional humorous anecdote,[5] this is small consolation to the erring practitioner or to the person whose character may be stained thereby.

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1. *See, e.g.*, State v. Thornburgh, 220 N.W.2d 579 (Iowa 1974) (impeachment by prior felony conviction, applying *State v. Martin*, 217 N.W.2d 536 (Iowa 1974)); Carter v. Cavenaugh, 2 Iowa (1 Greene) 171 (1848) (impeachment by general character and reputation for veracity).

2. *See, e.g.*, IOWA CODE § 622.17 (1975) (impeachment by a prior felony conviction), *derived from* IOWA CODE § 2398 (1851); IOWA CODE § 622.18 (1975) (credibility proven by good moral character), *derived from* IOWA CODE § 3991 (1860).

3. State v. Boak, 5 Iowa 430, 431 (1857); *see* MODEL CODE OF EVIDENCE rule 304 (1942); Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 505 (1939) [hereinafter cited as Ladd].

4. Ladd, *supra* note 3, at 505; Slough, *Relevancy Unraveled, Part II: Character and Habit Evidence*, 5 KAN. L. REV. 404, 417-18 (1957) [hereinafter cited as Slough].

5. Former President Theodore Roosevelt's experience as a witness was recounted in a story in D. LOUISELL, J. KAPLAN & J. WALTZ, PRINCIPLES OF EVIDENCE AND PROOF 289 (1972). Roosevelt was called to testify as a character witness for the president of the largest national bank in Washington, D.C. After a long, rambling discourse on his life in politics, humorous in itself, the former president was confined to the issue at hand:

> [F]inally he was asked, "Do you know the reputation of Mr. Glover for honesty, probity, and integrity and veracity?" . . . [Roosevelt replied] "Do I know it? Why, everybody in the city of Washington knows it. . . . I knew Mr. Glover as a civil minded citizen, . . . as one who in all philanthropic and charitable enterprises . . . would always come forward . . . . I knew Mr. Glover in his home . . . as a family man . . . . That is the way I knew Mr. Glover." And then the district attorney couldn't stand it any longer. He arose with a solemnity that I [the narrator] recall vividly to this day. He said, "If your honor please, I move to strike out the entire answer of the witness. Colonel Roosevelt has said that he knew Mr. Glover . . . . He has not said a word about what his reputation was . . . [after the motion was granted, and the witness reminded of the need for only general reputation testimony, Roosevelt continued] "Gentlemen of the jury, I knew Mr. Glover by general reputation and general repute—I'm right now, Judge, am I not? I am right now." (Laughter). And he went all over the whole thing

The goal of this Note is to acquaint the reader with the various functions and applications of character and reputation evidence in Iowa.[6] This Note will examine the scope of character and reputation evidence, the topic of relevancy and its bearing on such evidence, and the varied use of this evidence within guidelines established by the legislature and the court. Because evidence of character is generally excluded from civil cases,[7] this discussion will primarily center upon the use of such evidence in criminal cases.

II. Definitions of Character and Reputation

As mentioned above, the melding of the terms "character" and "reputation" has resulted in confusion by many people as to the proper relationship between the two. Etymologically, the two words are quite distinct: "character" derived from the Greek word *charakter*, meaning a graving tool or its mark; "reputation," from the Latin word *reputation*, meaning computation.[8] Likewise, the two words are not synonymous in their legal meanings.[9] As stated by Wigmore in his apt analogy, character and reputation "are as distinct as are destination and journey."[10] Character evidence is often the focal point of an evidentiary inquiry, and is mirrored in the glass of one's reputation.

Iowa's long accepted definition of character and reputation recognizes this distinction between the two words. In *State v. Poston*,[11] several witnesses were called to testify as to the good reputation of the defendant. Admonishing the prosecution for improper cross-examination of these witnesses,[12] the Iowa supreme court reversed the conviction of the defendant for assault with intent to commit rape. The court took the occasion to remark upon the close relationship between the terms "reputation" and "character," and provided the model definition for them: "While for some purposes [these terms] are recognized as

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again, with elaborations. The district attorney whispered to me, "Oh, hell." And I said, "I should have known better."

Id. at 292-93.

6. The principles discussed are not necessarily restricted in application solely to within Iowa's borders. Other jurisdictions follow similar procedures; still others have embarked on totally new paths. Particular attention should be paid to the work of Dean Ladd, *supra* note 3, and to J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (3d ed. 1940).

7. *See* text accompanying notes 56-65 *infra*.

8. Random House Dictionary of the English Language 247, 1218 (1967) ("character" and "reputation," respectively).

9. State v. Scalf, 254 Iowa 983, 985-86, 119 N.W.2d 868, 869 (1963); 1 B. Jones, Jones on Evidence § 4:33, at 453 (6th ed. 1972) [hereinafter cited as Jones]; 1 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 52, at 447 (3d ed. 1940) [hereinafter cited as Wigmore]; Slough, *supra* note 4, at 404.

10. 1 Wigmore, *supra* note 9, § 52, at 447. The analogy is especially apt when one realizes that proof of a person's character is the goal, and the use of reputation the pathway to that goal. *See* Ladd, *supra* note 3, at 505.

11. 199 Iowa 1073, 203 N.W. 257 (1925).

12. The defendant's witnesses testified as to his general reputation in the neighborhood where he lived. Therefore, the attempted cross-examination "must be limited to the same field. . . . [The] [w]itness cannot be asked as to certain acts of misconduct. . . ." State v. Poston, 199 Iowa 1073, 1074-75, 203 N.W. 257, 258 (1925).

expressing the same idea, yet fundamentally, 'character' and 'reputation' are wholly different. Roughly stated, character is what a man actually is; while reputation is what his neighbors say he is."[13] Thus, the character of a person is a quality which exists apart from the repute assigned to him by others.[14]

As with most definitions of character and reputation, the *Poston* opinion relates the two in terms of reality and appearance. Other commentators have similarly attempted to convey both the singular nature of, and the close relationship between, the two terms. "Character [is] like a tree, and reputation like its shadow. The shadow is what we think of it; the tree [is] the real thing."[15] It is through the use of such picturesque analogies as these that the exact relationship between character and reputation has been illuminated.

A person's character is readily observable as a result of the imprints left by certain qualities upon his personality.[16] However, although it is so solidly based, the concept of character is more elusive than that of reputation. Reputation has been criticized as a means of evidencing character,[17] yet as evidence it is more susceptible to definitive treatment.[18] Perhaps the problems in dealing with character and reputation evidence stem from this conundrum: it is much easier to demonstrate a person's reputation for certain character traits by using the hearsay of witnesses[19] than it is to demonstrate the actual character traits possessed by that person.

III. Circumstantial Evidence and Relevancy

Before proceeding to a specific discussion of character evidence,[20] an examination of circumstantial evidence and the principle of relevancy is necessary in order to provide a backdrop against which character evidence may be analyzed.

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13. *Id.* at 1074, 203 N.W. at 258; *accord*, State v. Scalf, 254 Iowa 983, 986, 119 N.W.2d 868, 869 (1963); State v. Case, 247 Iowa 1019, 1025, 75 N.W.2d 233, 237 (1956); State v. Hartung, 239 Iowa 414, 426, 30 N.W.2d 491, 498 (1948); Ladd, *supra* note 3, at 506.

14. Ladd, *supra* note 3, at 506. Good character is a quality required by statute of various applicants for positions of public trust. *E.g.*, Iowa Code § 114.14 (1975) (good character required of registered professional engineer); Iowa Code § 610.2 (1975) (good moral character required of applicant for admission to the bar). Lack of such character may justify the loss of certification or the suspension or disbarment of an attorney. *See* State v. Rohrig, 159 Iowa 725, 139 N.W. 908 (1913).

15. This is a comparison made by Abraham Lincoln before he became President, which is recounted in A. Gross, Lincoln's Own Stories 109 (1940).

16. Slough, *supra* note 4, at 404.

17. Carter v. Cavenaugh, 2 Iowa (1 Greene) 171, 173 (1848); B. Cardozo, The Nature of the Judicial Process 157-58 (1921); Ladd, *supra* note 3, at 514-17; Slough, *supra* note 4, at 404-05 (likening reputation evidence to neutral, colorless vanilla: a vague, indirect, but safe form of proof).

18. Although Slough may disagree as to the definitive nature of reputation evidence (*see* note 17, *supra*), the Iowa supreme court in *State v. Hobbs*, 172 N.W.2d 268 (Iowa 1969) set forth a seven-part formula for the offer of such evidence. *See* text accompanying note 92, *infra*.

19. Hearsay testimony is "the very source of reliability for this type of proof." Slough, *supra* note 4, at 418; *see* Ladd, *supra* note 3, at 513.

20. Unless otherwise distinguished, the phrase "character evidence" is used in this work to denote all evidence put forth to prove character, including evidence of reputation.

Because "order" is the watchword in a rational system of justice, our law has long been structured to promote a reasoned, analytical approach to the use of evidence. To convince the fact-finder two methods of persuasion are employed: autoptic proference and inferential proof. The former mode of proof requires no inferences. "[N]o question of relevancy arises. 'Res ipsa locquitur.' The thing proves or disproves itself."[21]

On the other hand, inferential proof employs the introduction of independent facts and requires the drawing of inferences to prove a proposition,[22] thus necessitating the application of the test of relevancy. Inferential proof may be introduced by either direct testimonial assertion or by circumstantial evidence.[23] Direct testimonial assertion occurs when a witness testifies to his own personal knowledge of the facts to be proven. Circumstantial proof, on the other hand, relies on the establishment of a chain of facts which gives rise to certain inferences and thus logically tends to prove the proposition asserted.[24] Facts may be established as well or better by circumstantial evidence as by direct proof.[25] This is especially true as it pertains to the establishment of a person's character traits. However, both case law[26] and *Iowa Rule of Civil Procedure* 344(f)(16) require that, to be admissible, the circumstantial evidence offered must render its proponent's theory reasonably probable, not merely possible. Facts established by circumstantial evidence—including those relating to character—must therefore initially meet this test of relevancy; they must have probative value.[27] The admissibility of all evidence hinges upon this challenge: "[W]hether it [the circumstance] fairly tends to prove that particular offense or an essential element thereof."[28]

As the first determinant of admissibility, relevancy relies upon the use of logic, reason and experience in the evaluation of evidence.[29] In their treatises, Professor Thayer[30] and his follower, Dean Wigmore,[31] have defined two

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21. 1 WIGMORE, *supra* note 9, § 24, at 397.
22. *Id.* § 25, at 398. "Aside from Autoptic Proference, then, all evidence must involve an inference from some fact to the proposition to be proved." *Id.*
23. *Id.* §§ 24, 25.
24. Jennings v. Farmers Mut. Ins. Ass'n, 260 Iowa 279, 284, 149 N.W.2d 298, 301 (1967); *see* Soreide v. Vilas & Co., 247 Iowa 1139, 1143, 78 N.W.2d 41, 44 (1956).
25. Turner v. Hansen, 247 Iowa 669, 677-78, 75 N.W.2d 341, 345 (1956); Hayes v. Stunkard, 233 Iowa 582, 586, 10 N.W.2d 19, 21 (1944).
26. *See* Wiley v. United Fire & Cas. Co., 220 N.W.2d 635, 637 (Iowa 1974); State v. Williams, 179 N.W.2d 756, 760 (Iowa 1970); Soreide v. Vilas & Co., 247 Iowa 1139, 1143, 78 N.W.2d 41, 43 (1956); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185, at 437 (2d ed. 1972) [hereinafter cited as MCCORMICK].
27. State v. Wilson, 173 N.W.2d 563, 565 (Iowa 1970).
28. State v. Rand, 238 Iowa 250, 265, 25 N.W.2d 800, 808 (1947); *accord*, State v. Wright, 191 N.W.2d 638, 640 (Iowa 1971); State v. Theodore, 260 Iowa 1038, 1043, 150 N.W.2d 612, 615 (1967); State v. Wallace, 259 Iowa 765, 770, 145 N.W.2d 615, 618 (1966).
29. "Admissibility is determined, first, by relevancy,—an affair of logic and experience, and not at all of law." J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 269 (1898) [hereinafter cited as THAYER]. *See* 1 JONES, *supra* note 9, § 4:5, at 391; 1 WIGMORE, *supra* note 9, §§ 9, 10.
30. THAYER, *supra* note 29, at 264-66.
31. 1 WIGMORE, *supra* note 9, §§ 9, 10. Wigmore dedicated his monumental treatise

fundamental axioms of admissibility, both of which rely on relevancy as their touchstone. These two axioms are particularly applicable in determining the admissibility of character evidence. The first premise holds that only facts having rational probative value are admissible.[32] The second axiom is a coordinate of the first: all facts which have rational probative value, *i.e.*, which are relevant, are admissible, unless excluded by some other rule of evidence or policy.[33]

The first evidentiary axiom has been utilized by the Iowa supreme court. In *State v. McDougal*,[34] the defendant was charged with publishing a false financial report. The trial court excluded the state's offer of other overvalued items as corroborative evidence of the falsity of the items listed in the indictment. On appeal, the supreme court held the state's offer relevant, noting "a basic rule of evidence that whatever facts are logically relevant are legally admissible."[35] This basic rule is of special importance in evaluating the pertinency of character or reputation evidence.

The focus of the test of relevancy is upon whether the offered fact has sufficient probative value to make it evidential.[36] To satisfy this test, the court must examine whether there is any logical or rational connection between the offered facts and the material issue to be established.[37] In this search, the basic inquiry for both relevancy and circumstantial evidence is used: "[W]hether the evidence offered would render the desired inference more probable than it would be without the evidence."[38] If it is found that the necessary logical relationship exists, the offered evidence is held admissible under the terms of the first evidentiary axiom. It is the application of the second premise which somewhat tempers this all-encompassing first formulation.

The second axiom adopts the general rule of admissibility for relevant

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to Thayer, whom he termed "the great master and expounder of the history of our law of evidence." *Id.* § 129, at 298.

32. THAYER, *supra* note 29, at 264-65; 1 WIGMORE, *supra* note 9, § 9, at 289; *see* FED. R. EVID. 402; MODEL CODE OF EVIDENCE rule 9(f) (1942).

33. THAYER, *supra* note 29, at 265; 1 WIGMORE, *supra* note 9, § 10, at 293; *see* FED. R. EVID. 402, 403; MODEL CODE OF EVIDENCE rules 10, 303 (1942).

34. 193 Iowa 286, 186 N.W. 929 (1922).

35. State v. McDougal, 193 Iowa 286, 296, 186 N.W. 929, 934 (1922); *accord*, State v. Knox, 236 Iowa 499, 515, 18 N.W.2d 716, 723 (1945). *See* State v. Rand, 238 Iowa 250, 264, 25 N.W.2d 800, 808 (1947).

36. "Evidence must generally have probative value to be relevant." 1 WIGMORE, *supra* note 9, § 11, at 296. *See* State v. Battle, 199 N.W.2d 70, 72 (Iowa 1972); State v. Wilson, 173 N.W.2d 563, 565 (Iowa 1970); West Chester Sav. Bank v. Dayton, 217 Iowa 64, 67, 250 N.W. 695, 697 (1933). Evidential facts are those which tend to prove or disprove the existence of other facts, termed "operative facts," which either invest, divest or interfere with a legal right. Bailey v. Iowa Beef Processors, 213 N.W.2d 642, 648 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974).

37. Schroedl v. McTague, 169 N.W.2d 860, 864 (Iowa 1969); Ipsen v. Ruess, 241 Iowa 730, 734, 41 N.W.2d 658, 661 (1950).

38. State v. Engeman, 217 N.W.2d 638, 639 (Iowa 1974); State v. Mathias, 216 N.W.2d 319, 322 (Iowa 1974). A reasonable inference must arise from the offered evidence, not mere suspicion. Smith v. Pine, 234 Iowa 256, 265, 12 N.W.2d 236, 242 (1943).

evidence provided by the first axiom.[39] However, a caveat designed to provide a safeguard against the indiscriminate acceptance of evidence is added to that initial premise. Other principles of evidence and policy may come into play and outweigh the certification provided to relevant evidence by its probative value.[40] Evidence which may otherwise be relevant is excluded under this axiom, either based upon Wigmore's ground of "auxiliary probative policy,"[41] or because the cost of admissibility is too high.[42]

Wigmore's rules of auxiliary probative policy operate to provide a safeguard against those dangers which experience has illuminated as inherent in the reception of certain evidence. Thus, hearsay testimony, although it may be relevant, is excluded. Likewise, a mere copy, when the document itself is available, is excluded as not being the "best evidence."[43] In addition to those auxiliary rules compiled by Wigmore, various policy factors enter the arena to exclude evidence having probative value where the price for its admission would be too great. Basically, there are four factors which may be held to outweigh the probative value of certain evidence and result in its exclusion: (1) Judicial economy—will the evidence be worth the time it takes to prove or disprove it?[44] (2) Prejudicial impact—will the evidence excite the passions and prejudices of the jury?[45] (3) Distraction—will the jury's attention be distracted to peripheral issues?[46] and (4) Surprise—will the introduction of the evidence, taken in conjunction with the other three factors mentioned, cause unfair surprise to the party against whom it is offered?[47] A careful examination of the offered evidence, especially if it relates to a person's character, must be made in light of these considerations.

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39. "The rules of exclusion are, in their ultimate relation, rules of exception to a general admissibility of all that is rational and probative." 1 WIGMORE, *supra* note 9, § 10, at 293.

40. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. *See* MODEL CODE OF EVIDENCE rule 303 (1942); MCCORMICK, *supra* note 26, § 185, at 438-40.

41. *See* 1 WIGMORE, *supra* note 9, § 11.

42. MCCORMICK, *supra* note 26, § 185, at 438-39.

43. 4 WIGMORE, *supra* note 9, §§ 1171, 1172 (Chadbourne rev. ed. 1972); 5 WIGMORE, *supra* note 9, §§ 1360-62 (1942) (the hearsay rule); 4 WIGMORE, *supra* note 9, §§ 1173, 1174 (Chadbourne rev. ed. 1972) (best evidence rule).

44. FED. R. EVID. 403; MODEL CODE OF EVIDENCE rule 303(1) (1942); MCCORMICK, *supra* note 26, § 185, at 439-40.

45. The prejudicial effect of evidence is most closely guarded against. As the Iowa supreme court has stated,

> . . . foremost among these policy considerations is the danger of undue prejudice. Evidence having a minimum of probative quality and which is highly prejudicial must be excluded. While most all evidence against an adverse party is prejudicial in the sense that it creates a resistance to the success of one party's case, . . . [some] evidence is too remote and prejudicial to be accepted as relevant.

State v. Slauson, 249 Iowa 755, 760-61, 88 N.W.2d 806, 809 (1958); *accord*, State v. Wallace, 259 Iowa 765, 770, 145 N.W.2d 615, 619 (1966). *See also* authorities cited at note 43 *supra*.

46. *See* authorities cited at note 45 *supra*.

47. *See* authorities cited at note 43 *supra*.

The exclusion of evidence on grounds of policy is within the province of judicial discretion[48] if it is believed that the risks attendant on the admission of the evidence far outweigh its relevancy. Whether evidence will be excluded on such grounds is for the trial court to decide, but the mere fact that the evidence is injurious to a party is not enough.[49]

IV. The Use of Character Evidence

A. *Introduction*

Character evidence may be offered by either party to a civil or criminal case for three separate reasons: (1) to raise an inference as to the probability of guilt or liability;[50] (2) to prove character where it is a substantive issue in the case;[51] or (3) to test the credibility of a witness.[52] In utilizing character evidence for any of these three functions, the distinction between "character" and "reputation" must be remembered.[53] This is especially true where the actual issue might be a party's reputation rather than his or her character.[54]

The various functions of character evidence likewise require various methods of proof. There are three ways by which character may be established at trial: (1) by reputation testimony; (2) by the personal opinion of a witness; and (3) by specific acts and conduct.[55] The appropriateness of any of these methods of proof depends upon whether the evidence is offered for probability or credibility purposes. It is also significant whether such evidence is offered in a civil or criminal case. The exact effect of these factors upon the offer of character evidence will be examined in greater detail below.

B. *The Arena: What Part Will Character Evidence Play?*

1. *Civil Cases*

Character evidence is generally excluded from civil cases where it is offered to prove the probability of liability or freedom from it. Although character evidence may be offered in civil cases to test the credibility of a witness,[56] a party's character may not be subjected to attack.[57] This is so

48. State v. Wilson, 173 N.W.2d 563, 566 (Iowa 1970) (evidence of other offenses may be admissible, within the trial court's discretion, to prove certain elements); *accord*, State v. Armstrong, 183 N.W.2d 205, 207-08 (Iowa 1971).

49. State v. Glaze, 177 Iowa 457, 472, 159 N.W. 260, 266 (1916) (perfectly proper testimony is often injurious; that it is so is no ground for complaint, since only prejudicial error is reversible).

50. McCormick, *supra* note 26, § 187; 1 Wigmore, *supra* note 9, §§ 55-69.

51. McCormick, *supra* note 26, §§ 189-94; 1 Wigmore, *supra* note 9, §§ 70-81.

52. McCormick, *supra* note 26, § 194; Slough, *supra* note 4, at 432-40.

53. *See* text accompanying note 13 *supra*.

54. 1 Jones, *supra* note 9, § 4:34, at 453; Slough, *supra* note 4, at 404-05.

55. McCormick, *supra* note 26, § 186; Ladd, *supra* note 3, at 507-09; Slough, *supra* note 4, at 415.

56. *See* text accompanying notes 176-78 *infra*.

57. Christianson v. Kramer, 255 Iowa 239, 250-51, 122 N.W.2d 283, 290 (1963). *See also* Koonts v. Farmers Mut. Ins. Ass'n, 235 Iowa 87, 94, 16 N.W.2d 20, 24 (1944)

largely for the reason that character evidence does not aid in illuminating the substantive issues which arise in the usual civil case, nor in apportioning damages. Rather, such proof misleads the trier of fact and is manifestly unfair to the party involved.[58] As has been noted, it is not unusual to find that "a very bad man may have a very righteous cause."[59]

The Iowa court has consistently followed this exclusionary rule.[60] Only where a party's intent is directly in issue will the court allow character evidence to be admitted in a civil case.[61] Iowa also adheres to the exclusionary rule in negligence cases, specifically excluding character evidence concerning a person charged with negligence, whether it is the defendant's negligence or the plaintiff's contributory negligence which is the issue.[62]

Even though the general rule excludes character evidence from civil cases, this evidence may be genuinely relevant. This is especially true where a party's character is an operative fact in the case.[63] Where character is an issue raised either specifically by the pleadings[64] or by the nature of the case,[65] evidence of a person's character may be rendered admissible. However, these cases are the exception, not the rule.

2. *Criminal Cases*

In criminal cases, the general rule allows evidence of the defendant's character to be admitted as going to the question of his guilt or innocence.[66] Such evidence is essentially relevant and has probative value.[67] Although at one time the admission of character evidence was limited to capital cases only, that rule has been relaxed and evidence relating to the character of the defendant may be introduced in all criminal cases.[68]

(where the insurer alleged the plaintiff's arson as a defense to a suit for a fire loss; court "committed" to the rule); 1 WIGMORE, *supra* note 9, § 64, at 473.

58. The limited value of character evidence is outweighed by the inconvenience and danger of its use. *See* authorities cited at note 59 *infra*.

59. 1 WIGMORE, *supra* note 9, § 64, at 472; *see* Ladd, *supra* note 3, at 503.

60. "[T]he general rule in civil actions unquestionably is that the general character of the parties is not involved in the issue, and evidence concerning it is not admissible." Stone v. Hawkeye Ins. Co., 68 Iowa 737, 743, 28 N.W. 47, 50 (1886); *accord*, Koonts v. Farmers Mut. Ins. Ass'n, 235 Iowa 87, 16 N.W.2d 20 (1944) (evidence of party's good character inadmissible).

61. *See* Barton v. Thompson, 56 Iowa 571, 9 N.W. 899 (1881).

62. The defendant druggist in *Hall v. Rankin*, 87 Iowa 261, 54 N.W. 217 (1893), offered to show that he was prudent and careful in handling medicines and poisons in an action against him for neglect in the sale of drugs. This evidence was excluded. *Id.* at 264, 54 N.W. at 218. *See* 1 WIGMORE, *supra* note 9, § 65.

63. *See generally* discussion at Division VI, § B, *infra*.

64. *E.g.*, Hardwick v. Hardwick, 130 Iowa 230, 106 N.W. 639 (1906). In *Hardwick*, the plaintiff sued for loss of consortium because her father-in-law had alienated her husband's affections. The bad character of the plaintiff was specifically pleaded in mitigation of damages, and proof of her moral character was allowed. *Id.* at 237, 106 N.W. at 641.

65. *E.g.*, Herr v. Lazor, 238 Iowa 518, 23 N.W.2d 11 (1947) (child custody suit in which character is a material issue).

66. Ladd, *supra* note 3, at 502.

67. 1 WIGMORE, *supra* note 9, § 55, at 450; Slough, *supra* note 4, at 413.

68. State v. Cather, 121 Iowa 106, 96 N.W. 722, 723 (1903); State v. Northrup, 48 Iowa 583, 584 (1878).

Some limitation has been placed upon this general rule, however, to control the dangers inherent in the use of character proof in a criminal trial. Thus, the issue of the defendant's character must be raised initially by the defendant. By introducing evidence as to his good character, the defendant strives to increase the probability of his innocence in the eyes of the jury.[69] Evidence which is presented as establishing the defendant's character "must relate particularly to the trait of character involved in the crime alleged."[70] Thus, a crime of violence would call for evidence by the defendant of the character traits of peacefulness and nonviolence; a crime such as robbery or larceny would require evidence pertaining to such character traits as honesty, integrity and good citizenship.[71]

Once the defendant has produced evidence of his good character, the state may offer rebuttal evidence of his bad character going solely to the question of the probability of his guilt. This rebuttal evidence may be put forth either by cross-examination or by independent evidence of bad character.[72] Thus, the rule of admissibility of character evidence in criminal trials applies to *good* character evidence proposed by the defendant and admissible in his favor.[73] But the election is a privilege of the accused,[74] and until the defendant raises the question of his character, basic policy will bar the prosecution's efforts to prove his bad character as bearing on the question of guilt or innocence.[75]

The effect which character evidence may permissibly have in a criminal trial is unclear. The question is whether the state's proof can serve only to neutralize the defendant's good character evidence, or whether it can be viewed by the jury as substantive evidence of bad character establishing the defendant's probable guilt.[76] Although good character itself will not provide a defense, it may be considered as a mitigative circumstance by the jury.[77] Generally, it is a question of the weight of the evidence, and the jury may find that the character evidence suffices to create a doubt and to allow acquittal.[78]

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69. Slough, *supra* note 4, at 408.
70. State v. Hall, 259 Iowa 147, 157, 143 N.W.2d 318, 324 (1966); State v. Scalf, 254 Iowa 983, 988, 119 N.W.2d 870, 871 (1963). *See also* McCormick, *supra* note 26, § 187, at 443; 5 Wigmore, *supra* note 9, §§ 1608-21; Slough, *supra* note 4, at 412.
71. Slough, *supra* note 4, at 415.
72. 1 Wigmore, *supra* note 9, § 58, at 458; Ladd, *supra* note 3, at 502-03; Slough, *supra* note 4, at 414.
73. State v. Kabrich, 39 Iowa 277 (1874); McCormick, *supra* note 26, § 191, at 454-55.
74. Ladd, *supra* note 3, at 502.
75. State v. Osborn, 200 N.W.2d 798, 808 (Iowa 1972); 1 Wigmore, *supra* note 9, § 57, at 454.
76. Ladd, *supra* note 3, at 503 n.14.
77. State v. Fador, 222 Iowa 134, 141, 268 N.W. 625, 629 (1936); State v. Wolf, 112 Iowa 458, 464, 84 N.W. 536, 538 (1900).
78. State v. Johnson, 211 Iowa 874, 878, 234 N.W. 263, 265 (1931); State v. Kinley, 43 Iowa 294, 295 (1876) (importance attached varies with the circumstances of the case); 1 Wigmore, *supra* note 9, § 56, at 452; Ladd, *supra* note 3, at 503.

V. Character Evidence as Circumstantial Evidence

A. *Character as Circumstantially Relevant*

The use of character evidence as circumstantial evidence to raise an inference of criminal guilt, or, in the rare civil case, liability, depends upon the observance of several "rules of the road." Generally, circumstantial evidence of character, while relevant, is excluded from presentation for various policy reasons.[79] As stated by Professor McCormick: "Evidence of character, in any form, whether reputation, opinion from observation, or specific acts, will not generally be received to prove that the person whose character is sought to be shown, engaged in certain conduct, or did so with a given intent, on a particular occasion."[80]

To this general rule of exclusion there are various exceptions: (1) the prosecution may prove other crimes for certain limited purposes without waiting for the defendant to produce evidence; (2) where the defendant evidences his good character, the state can then rebut that inference through using cross-examination or independent evidence; (3) the testing of a witness' credibility and its subsequent impeachment allow the use of character testimony; and (4) the character of a deceased person is relevant on the issue of a defendant's self-defense allegation.[81]

Even though generally excludable, because character evidence used for a circumstantial purpose *is* relevant a defendant is given the option of using it. He can choose to forego the use of such evidence, or he may decide to use evidence of his good character to raise an inference of his innocence.[82] Although courts often use the terminology that "character is being placed in issue" by the defendant, the offer of character evidence is "simply [an offer of] circumstantial evidence bearing on the probability that the defendant did or did not commit the act charged with the requisite criminal intent."[83]

When circumstantial character evidence is offered, it must of course relate particularly to the trait of character involved in the charge.[84] In addition, it must be evidence of character which dates from a time prior to the indictment. Proof of the character of an accused following the act for which he is charged is irrelevant.[85]

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79. McCormick, *supra* note 26, §§ 188-89 (especially not admissible in negligence suits); 1 Wigmore, *supra* note 9, § 57, at 456-57 (policy of fairness and sporting instinct in Anglo-American law); Slough, *supra* note 4, at 413 (danger that case will be tried on person's character, not the facts).

80. McCormick, *supra* note 26, § 188, at 445.

81. *Id.* § 191.

82. *Id.* § 191, at 454-55; Ladd, *supra* note 3, at 503; Slough, *supra* note 4, at 413.

83. Slough, *supra* note 4, at 414. *See* McCormick, *supra* note 26, § 158.

84. State v. Hall, 259 Iowa 147, 157, 143 N.W.2d 318, 324 (1966) (aggravated robbery); State v. Case, 247 Iowa 1019, 1024-25, 75 N.W.2d 233, 237 (1956) (statutory rape).

85. State v. Rowell, 172 Iowa 208, 216, 154 N.W. 488, 490-91 (1915); State v. Kinley, 43 Iowa 294, 296 (1876).

B. *Methods of Proving Character*

Character may be circumstantially established by introduction of evidence as to a person's reputation, the personal opinion of a witness as to character, or evidence of specific acts.

1. *Reputation Evidence*

One method of proving character is through the use of reputation evidence. Reputation evidence is testimonial evidence as to a person's reputation which is valued for its basis in the hearsay quality of community opinion.[86] The most important requirement of reputation testimony is that it be general within the community. Whether testimony regarding a person's reputation is offered for impeachment purposes, or to establish the probability or improbability of guilt, "the question should call for the *general* reputation of the person inquired about, not merely his reputation."[87] The testimony must be based on a broad cross-section of the community, and not restricted to a narrow group. This requirement has remained inflexible from the time it was first formulated. However, in recognition of the changes which have taken place in our society and the growth of the population located in urban areas, reputation testimony may now be gathered from persons located where the subject lives or works and not necessarily from the entire community.[88]

The discussion in *State v. Hobbs*[89] of the various problems involved in the use of character and reputation evidence is one of the most thorough undertaken by the Iowa supreme court. In *Hobbs*, the defendant was charged with aggravated robbery and attempted to establish the probability of his innocence by introducing evidence as to his good moral character. For this purpose, various character witnesses were questioned as to the defendant's reputation in the community. The court noted the defendant's right to place his character directly in issue in a criminal case, based on the premise that a person of good character probably would not have committed the crime alleged.[90] The court further noted that to prove character for the purpose of establishing his

86. 5 WIGMORE, *supra* note 9, § 1609 (Chadbourne rev. ed. 1974). This view has found legislative sanction in the recently enacted *Federal Rules of Evidence*. "Reputation of a person's character among his associates or in the community," is a specific exception to the hearsay rule. FED. R. EVID. 803(21); *see* MODEL CODE OF EVIDENCE rule 526 (1942).

87. State v. Mercer, 154 N.W.2d 140, 143 (Iowa 1969). *See* State v. Ferguson, 222 Iowa 1148, 1159, 270 N.W. 874, 881 (1937) (impeachment by proof of general moral character under *Iowa Code* section 622.18 requires proof of general reputation as known to the witness); State v. Hall, 259 Iowa 147, 158, 143 N.W.2d 318, 324 (1966) (proof of general reputation in community admissible to establish probability); Ladd, *supra* note 3, at 513.

88. State v. Buckner, 214 N.W.2d 164, 169 (Iowa 1974); 5 WIGMORE, *supra* note 9, § 1616 (Chadbourne rev. ed. 1974).

89. 172 N.W.2d 269 (Iowa 1969).

90. State v. Hobbs, 172 N.W.2d 269, 271 (Iowa 1969). The defendant must first put the matter of his character into issue, not the prosecution. State v. Hartung, 239 Iowa 414, 426, 30 N.W.2d 491, 498 (1948).

innocence, a defendant may use proof of either his real character or his general reputation.

Regardless of whether the defendant sought to prove his real character or his general reputation, the court reaffirmed the rule that character evidence relating to the probability of innocence must relate specifically to the character trait which forms a part of the crime alleged.[91] The supreme court then established a seven-part formula which must be strictly adhered to when reputation testimony is introduced to establish a person's character:

> Several evidentiary facts must be established before a witness may testify as to what he has heard concerning defendant's reputation. These include: (1) The background, occupation, residence, etc., of the character witness, (2) His familiarity and ability to identify the party whose general reputation was the subject of comment, (3) Whether there have in fact been comments concerning the party's reputation for a given trait, (4) The exact place of these comments, (5) The generality of these comments, many or few in number, (6) Whether from a limited group or class as opposed to a general cross-section of the community, (7) When and [over] how long a period of time the comments have been made.[92]

When a reputation testimony is given to evidence character as a circumstantial fact it must actually be the "aggregate judgment of a community,"[93] and although based on hearsay, it cannot be rumor.[94] The person's character as established through reputation evidence must be contemporary; a remote reputation cannot be described because of the problem of relevancy.[95] The use of reputation evidence to rebut character evidence produced by the accused is allowed whether the defendant's evidence is put forth by reputation or opinion testimony; the state is not tied to the same method of proof which is utilized by the defendant.[96]

Unlike the more affirmative methods of evidencing character, reputation evidence may also be based on a negative or non-existent report. Reputation testimony which indicates the absence of expression or comment may be the basis for inferring good character.[97] In discussing this phenomenon, Slough candidly acknowledges the reality of life which promotes the acceptance of reputation non-evidence to establish character: "It may be a fact to be

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91. State v. Hobbs, 172 N.W.2d 269, 271 (Iowa 1969). See also *State v. Case*, 247 Iowa 1019, 75 N.W.2d 233 (1956), in which the court said: "In larceny and robbery the traits involved are honesty and integrity. Upon a charge of perjury the traits are truth and veracity. In sex crimes, at least where (as here) force and violence are absent, the trait involved is morality." *Id.* at 1025, 75 N.W.2d at 237.

92. State v. Hobbs, 172 N.W.2d 269, 272 (Iowa 1969).

93. Slough, *supra* note 4, at 417; *see* State v. Buckner, 214 N.W.2d 164, 166 (Iowa 1974).

94. Ladd, *supra* note 3, at 513-14.

95. "Courts are much more reluctant to admit reputation which is perceived subsequent to the event in issue." Slough, *supra* note 4, at 419.

96. State v. Hartung, 239 Iowa 414, 427, 30 N.W.2d 491, 499 (1948); *see* 1 JONES, *supra* note 9, § 4:46, at 476.

97. 1 JONES, *supra* note 9, § 4:46, at 476; Ladd, *supra* note 3, at 514.

lamented, but it is nevertheless true that bad news travels faster than good news . . . [When a] person does an evil deed, the world will know and the world will talk. Let the saints be anonymous; notoriety is for devils."[98]

Reputation testimony is a valuable and valued means of proving a party's or defendant's character. Using the *Hobbs* seven-part qualification formula, a practitioner can establish the foundation for a particularly effective presentation of the subject's reputed character. Although the seven-part formula itself can present problems for the attorney,[99] its careful delineation will effectively qualify his witness and promote his goal of proving character through reputation testimony.

2. *Witness' Personal Opinions*

A majority of jurisdictions exclude the use of personal opinions of the character of a party or an accused as evidence of that character.[100] However, this general rule of exclusion has been disregarded in several states, including Iowa.[101] If based upon sufficient observation of the defendant's conduct to enable the witness to form and give an opinion, a witness is permitted to testify as to his or her opinion of the defendant's character.[102] This view has been adopted by the recently enacted *Federal Rules of Evidence*.[103] In fact, depending upon the use to which character evidence is put and the nature of the case in which it is used, opinion testimony relating an impression of the subject's character may be the "most trustworthy evidence of character."[104]

This direct method of evidencing character must come from witnesses who know the person's character. Noting the distinction between character and reputation discussed above,[105] the court in *State v. Hartung*[106] allowed a defendant to evidence his character by direct testimony from a witness "who *knew* his [the defendant's] character," as opposed to by testimony of the general reputation of the defendant.[107] Thus, whether proving character by

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98. Slough, *supra* note 4, at 419.

99. Particular difficulty is presented by the third foundation fact of *Hobbs*: "[w]hether there have *in fact* been comments concerning the party's reputation for a given trait" (emphasis added). Likewise, it may be difficult to demonstrate the range and depth of these comments within a sufficient "cross-section."

100. 1 JONES, *supra* note 9, § 4:45; Ladd, *supra* note 3, at 509; Slough, *supra* note 4, at 415.

101. State v. Ferguson, 222 Iowa 1148, 1157, 270 N.W. 874, 880 (1937). In *State v. Mayhew*, 170 N.W.2d 608 (Iowa 1969), the court reaffirmed its approval of the receipt of opinion evidence, within the trial court's discretion. Thus, a witness was allowed to testify that he had known the decedent for two years and that "[a]s far as I know, he wasn't mean." *Id.* at 619.

102. 1 JONES, *supra* note 9, § 4:45, at 474; Ladd, *supra* note 3, at 512; Slough, *supra* note 4, at 416.

103. FED. R. EVID. 701. *See also* FED. R. EVID. 405(a).

104. Ladd, *supra* note 3, at 511.

105. *See* text at notes 13, 14, *supra*.

106. 239 Iowa 414, 30 N.W.2d 491 (1948).

107. State v. Hartung, 239 Iowa 414, 427, 30 N.W.2d 491, 499 (1948). The use of a character witness has long been allowed in Iowa. In *State v. Sterrett*, 68 Iowa 76, 25 N.W. 936 (1885), the court said, "[w]e see no reason why any witness who is shown to

the more direct method of witness opinion, or by reputation, the person who testifies must have a foundation upon which to base his estimation of the defendant's character.[108] A witness who testifies as to his personal opinion of the accused's character must base that opinion upon observation[109] and establish his acquaintance with the subject.

3. *Specific Acts and Other Crimes*

The distinction between the evidentiary use of specific acts or instances of conduct and the use of prior crimes is important to note. Specific instances of past misconduct generally cannot be used at trial to evidence character; however, prior crimes may be used for certain limited purposes.[110] Thus, as Slough points out in his article:

> In referring to specific acts, care must be exercised to distinguish between evidence of specific acts offered to prove character, and evidence of specific acts (crimes) offered to prove an essential element of the offense. Where employed to prove character, evidence of specific acts is never admissible. However, an important group of several exceptions relating to other vices and crimes of the accused do sanction admission of evidence of specified acts.[111]

It is therefore necessary to distinguish between the various purposes for which proof of specific acts is offered into evidence. The basic principle is one of exclusion: Where prior conduct is offered to evidence character of an accused, the law "declares a general and absolute rule of exclusion."[112] Although previous misconduct may be relevant, it is excluded because of its highly prejudicial nature. Its high probative value is outweighed by the necessary considerations of policy: surprise, confusion of the jury, and prejudice.[113] To do otherwise might lead to convictions based upon prior misconduct and actions and not upon the facts of the case.

Thus, for reasons of policy, specific acts to evidence a person's character are excluded.[114] Iowa cases which have dealt with the permissible methods of evidencing character have obliquely hinted at the inadmissibility of specific acts by limiting the modes of proof of two: general reputation and personal opinion of witnesses.[115] It should be noted, however, that this exclusion of "specific acts" does not embrace the proof of other crimes. McCormick's explanation of

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have had opportunities for forming a just estimate of his [the defendant's] character should not be permitted to testify with reference to it." *Id.* at 79, 25 N.W. at 938.

108. State v. Scalf, 254 Iowa 983, 987, 119 N.W.2d 868, 878 (1963).

109. McCormick, *supra* note 26, § 187, at 443; 7 Wigmore, *supra* note 9, §§ 1980-86.

110. Slough, *supra* note 4, at 413-14; *see* 1 Wigmore, *supra* note 9, § 194; Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325 (1956).

111. Slough, *supra* note 4, at 413-14 n.89.

112. 1 Wigmore, *supra* note 9, § 193, at 643.

113. *Id.* § 194, at 646, 650.

114. 1 Jones, *supra* note 9, § 4:44, at 473; Ladd, *supra* note 3, at 507; Slough, *supra* note 4, at 415.

115. State v. Hobbs, 172 N.W.2d 268 (Iowa 1969).

the "other crimes" exception to the general rule of exclusion is the most enlightening:

> [T]he rule about the proof of other crimes is but an application of the wider prohibition against the initial introduction by the prosecution of evidence of bad character. The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant *for some other purpose* than to show a probability that he committed the crime on trial because he is a man of criminal character.[116]

Therefore, proof of other criminal acts is excluded if the offer is to demonstrate a disposition from which the accused's guilt can be inferred. However, where a material fact is at issue involving the person's character, the introduction of evidence of other criminal acts is permissible.

In summation, although there are three possible means of evidencing character circumstantially, the use of each is subject to certain strictures. Reputation testimony is the most often introduced, although in certain situations proof via the personal opinion of witnesses may be preferable. These are the sole means by which a person's character may be proven in Iowa. The offering of this proof may only be initiated by the defendant, but may be attacked on rebuttal by the state. Although some jurisdictions admit evidence of particular acts as being indicative of a person's character, such proof is unacceptable in Iowa and rigidly excluded. However, if these acts are in fact criminal acts and are offered to demonstrate material facts, they may be received as an exception to the rule.

VI. Character as an Operative Fact

A. *Character as an Issue*

The character of a party or an accused may be an operative fact in a case, the proof of which will determine the rights and liabilities of the parties.[117] The Supreme Court of Iowa in *Bailey v. Iowa Beef Processors, Inc.*,[118] defined the term "operative fact" to be one which acts "to invest some one with a legal right . . . [or] divest . . . [or] work a wrongful interference with an existing legal right . . . ."[119] Character is an operative fact in a case where it is put in issue by the pleadings. Thus, the manner in which a cause or defense is pleaded is important in determining the type and admissibility of character evidence.[120]

As with character evidence used circumstantially to raise an inference, proof of a person's character as an issue may be accomplished using one of

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116. McCormick, *supra* note 26, § 190, at 447 (emphasis added).
117. *Id.* § 187, at 443.
118. 213 N.W.2d 642 (Iowa 1973).
119. Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 648 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974).
120. McCormick, *supra* note 26, § 187, at 443; 1 Wigmore, *supra* note 9, § 71.

three methods: evidence of reputation, opinion evidence and proof of prior conduct.[121] The Iowa supreme court in *Hobbs* established the essential foundation for reputation evidence, whether it relates to circumstantial or, as here, operative character evidence. Likewise, it is permissible to use opinion evidence to establish a person's character as an operative fact. However, it is very important to note the exact function either reputation or opinion evidence will serve; its admissibility hinges upon the character trait being proven.

The use of specific acts to prove character as an operative fact differs greatly from the use of conduct to evidence character as a circumstantial fact. The policies which operate to exclude the latter form of proof do not similarly exclude character evidence used to establish an operative fact.[122] Conduct is relevant, has probative value and can legitimately be used to prove a certain disposition or character trait.[123] Yet, the nature of the case and its issues may sometimes serve to exclude character proof because of its inflammatory nature.

Whether or not any of these three modes of proving character may be used depends upon the issues in the case. Where one method of proof would be improper, another may suffice. What follows is a discussion of some of the more familiar actions where character evidence is used to establish an operative fact.

B. *Actions Where Character Evidence Is Used to Prove an Operative Fact*

1. *Defamation*

The tort of defamation is actually comprised of two torts: libel, where the written word is defamatory, and slander, where the defamation is orally conveyed.[124] One who is defamed is injured in his reputation and good name in the community,[125] and thus it is *reputation* rather than character which is the subject of inquiry. How the issue of reputation is raised, whether by general or specific allegations or by the defense of justification, is important.[126]

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121. 1 JONES, *supra* note 9, § 4:43; 1 WIGMORE, *supra* note 9, § 202; Slough, *supra* note 4, at 407. Where a person's care and competence is at issue, reputation testimony is generally not used unless offered to supplement the preferred proof of specific acts to establish character. Further, where moral traits such as honesty and peacefulness are in question, opinion evidence is usually excluded. MCCORMICK, *supra* note 26, §§ 187, 411; Slough, *supra* note 4, at 409.

122. 1 WIGMORE, *supra* note 9, § 202, at 689. Where as specific acts might be considered dangerously prejudicial for the purpose of evidencing character as a circumstantial fact, when offered to prove character as an operative fact, they are the "most decisive revelation of character, which is here the center of inquiry." *Id.* In fact, where a character trait for care or competence is at issue, courts prefer the proof of specific acts over the normal evidence of reputation, though reputed care is then used to corroborate the proof of prior acts. MCCORMICK, *supra* note 26, § 187, at 443-44; *see* 1 WIGMORE, *supra* note 9, §§ 202, 208a; Slough, *supra* note 4, at 408-09.

123. 1 WIGMORE, *supra* note 9, § 202, at 690.

124. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 737 (4th ed. 1971).

125. *Id.* at 737, 739.

126. 1 WIGMORE, *supra* note 9, § 71.

Where the general issue is pleaded, most courts admit evidence of the person's reputation, because of its essential relevance.[127] In a recent case, *Vojak v. Jensen*,[128] the Iowa supreme court dealt with allegedly defamatory letters written about a subcontractor by an architect. These letters contained comments about a construction job on which both parties had worked ten years previously. The defendant attempted to introduce proof of an earlier suit for defective workmanship against the plaintiff subcontractor. This offer was excluded by the trial court and that exclusion was affirmed by the higher court. The latter court noted:

> In a libel action it is proper to show plaintiff's general reputation was bad prior to the publication of the defamatory statement. However, ordinarily this may not be done by showing specific acts. . . . Damage to the reputation was one of the elements for which plaintiff sought recovery. Certainly defendant could show that reputation was already tarnished before the libel in order to minimize the harm suffered by the plaintiff. . . . However, one isolated instance of alleged negligence out of "thousands of jobs" is not proper evidence to establish reputation.[129]

As this statement indicates, in actions for defamation a defendant can introduce evidence of plaintiff's previously poor reputation to mitigate any damages which might be assessed.[130] Obviously, the reputed character of the plaintiff is an issue to be considered in such a suit, just as in "any other action in which the law of damages recognizes the harm to reputation as one of the elements of recovery."[131] However, Iowa does make a distinction between evidence of mere rumor or report and that of reputation for the purpose of mitigating damages. The exclusion of rumors and reports is based upon their hearsay nature; other factors which lend trustworthiness to reputation evidence are also lacking.[132] In addition, proof of specific acts may not be offered to establish a previously bad reputation and thereby mitigate damages.[133]

2. *Seduction*

The act of seduction may form the basis for either criminal prosecution or a tort action. In either proceeding, the character of the complainant has generally been held relevant.

Section 700.1 of the *Iowa Code* provides a penalty "[i]f any person seduce and debauch any unmarried woman of *previously chaste character*

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127. Sclar v. Resnick, 192 Iowa 669, 675, 185 N.W. 273, 275 (1921) (bad reputation of slandered party may be shown in mitigation).
128. 161 N.W.2d 100 (Iowa 1968).
129. Vojak v. Jensen, 161 N.W.2d 100, 110-11 (Iowa 1968).
130. 1 JONES, *supra* note 9, § 4:35.
131. 1 WIGMORE, *supra* note 9, § 75, at 504.
132. Ott v. Murphy, 160 Iowa 730, 744, 141 N.W. 463, 469 (1913); Robinson v. Home Fire & Marine Ins. Co., 244 Iowa 1084, 1092, 59 N.W.2d 776, 781 (1953).
133. Hanners v. McClelland, 74 Iowa 318, 322, 37 N.W. 389, 391 (1888) (proof of specific acts likewise excluded).

. . . ."[134] In cases involving the crimes of rape and seduction, the 1975 edition of the *Code* further provides that evidence of past conduct of the prosecutrix is not admissible unless at the defendant's request the court holds an *in camera* hearing to investigate the previous conduct's relevancy to the present allegations.[135] Prior to the enactment of this provision[136] the law in Iowa was clear on the question of the admissibility of evidence of previous immoral conduct: in an action for seduction the prosecutrix's previous bad reputation for chastity could be shown.[137] Numerous other jurisdictions adhere to this theory that where the crime or cause of action is based on the seduction statute, the character of the woman affects the case and is a proposition to be established by character evidence.[138] However, whether the new provision in the *Code* will affect the use of character evidence regarding the prosecutrix has not yet been answered. The most recent Iowa case dealing with section 782.4 on corroborative and past conduct evidence indicates that the recent enactment is so new that it may be some time before the question of the admissibility of such evidence is presented and answered.[139]

3. *Self-Defense and Assault and Battery*

Character evidence going to establish the probability of guilt is generally not relevant where a violent crime or tort must be proved. However, if the defendant alleges self-defense in justification of his injury of the victim or plaintiff, character evidence may be held relevant.[140] The Iowa supreme court in *State v. Wilson*[141] dealt with the admissibility of character evidence relating to a defendant's claim of self-defense in a manslaughter case. Quoting with approval from Wigmore and earlier cases, the court held that the *fact* of the deceased's character was important, not whether it was known to the defendant.[142]

> The character or reputation of the deceased for being a violent, quarrelsome person may well have added to the apprehension of the accused. As Wigmore has said: "When the issue of self-defense is made in a trial for homicide, and thus a controversy arises *whether the deceased was the aggressor*, one's persuasion will be more or less affected by the character of the deceased; . . ."[143]

The court continued its discussion with the comment that the admissibility of

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134. IOWA CODE § 700.1 (1975) (emphasis added). The penalty is 5 years of imprisonment and/or the payment of a $1,000 fine. *Id.*
135. *Id.* § 782.4.
136. Ch. 1271, § 1, [1974] Iowa Acts 981-82.
137. Carter v. Cavenaugh, 2 Iowa (1 Greene) 171, 175 (1848); *see* 1 WIGMORE, *supra* note 9, § 75, at 504.
138. 1 WIGMORE, *supra* note 9, § 205. See particularly *id.* § 205, at 696 n.1 for a voluminous collection of Iowa cases supporting this view.
139. State v. Taylor, 222 N.W.2d 439, 441 (Iowa 1974).
140. 1 JONES, *supra* note 9, § 4:40; MCCORMICK, *supra* note 26, § 193.
141. 236 Iowa 429, 19 N.W.2d 232 (1945).
142. State v. Wilson, 236 Iowa 429, 443, 19 N.W.2d 232, 237 (1945).
143. *Id.*

character evidence on the issue of self-defense required the laying of a foundation sufficient to justify the inquiry into the basis for the self-defense allegation.[144] This evidence need only be of a slight nature and tend to show the defendant acted in self-defense.[145] After the defendant has attempted to justify his actions by the claim of self-defense, the state may meet this attack upon the decedent's good character with evidence of its own. The state at that point may use general reputation evidence or other methods of proof to re-establish the good character of the decedent and to call into doubt the defendant's claim.[146]

The general rule in civil actions for assault and battery, as delineated in the few cases on the subject, focuses on the inadmissibility of character evidence to establish the defendant's good character.[147] These cases have excluded the use of such evidence. "In a civil action for an assault, or for an assault and battery, the character or disposition of the defendant as a peaceable man may not be shown by the defense."[148]

While dealing with character evidence in relation to the joint issues of self-defense and the plaintiff's aggression, these cases do not actually speak to the use of character evidence to establish an operative fact. Hence, although discussed under the general heading of "self-defense," it should be noted that these civil cases properly belong under the exclusionary rule discussed above.[149]

4. *Other Operative Facts*

There are various other causes of action in which an operative fact may allow or necessitate the use of character evidence. In cases involving negligence or lack of skill, a party's character has been proven by the demonstration of specific acts. Where the issue concerns the negligent entrustment of a dangerous object to an incompetent person, the Iowa court has allowed the use of specific instances of carelessness to evidence a habit or character trait.[150] When a professional's lack of skill is questioned, personal opinion may be utilized in most jurisdictions to establish that skill or lack thereof.[151] However, the Iowa court appears to hold otherwise, by affirming the exclusion of opinion testimony to establish a railroad engineer's skill as less than competent.[152]

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144. *Id.*
145. *Id.* at 444, 19 N.W.2d at 238.
146. State v. Rutledge, 243 Iowa 179, 198, 47 N.W.2d 251, 262 (1951).
147. Phelps v. Chicago, R.I. & P. Ry. Co., 162 Iowa 123, 128, 143 N.W. 853, 855 (1913); *accord*, Redden v. Gates, 52 Iowa 210, 213, 2 N.W. 1079, 1082 (1879).
148. Phelps v. Chicago, R.I. & P. Ry. Co., 162 Iowa 123, 128, 143 N.W. 853, 855 (1913).
149. *See* text accompanying notes 60-62, *supra*.
150. *In re* Hill's Estate, 202 Iowa 1038, 1043, 208 N.W. 334, 336 (1926). The Iowa court noted the acceptance of the use of specific acts of sufficient numerosity and similarity to evidence a habit of conduct. However, the court did not permit proof by either specific instances or general reputation. *Id.* at 1043, 208 N.W. at 336.
151. 7 WIGMORE, *supra* note 9, § 1984; Slough, *supra* note 4, at 411.
152. Butler v. Chicago, B. & Q.R. Co., 87 Iowa 206, 210, 54 N.W. 208, 209-10 (1893).

In cases in which fraudulent conduct is alleged, the general rule excludes proof of character to evidence the fraudulent conduct. In *Stone v. Hawkeye Insurance Co.*,[153] an action was brought on a fire insurance policy to obtain payment of an amount to cover the loss. The company defended on the basis that the plaintiff had committed arson in an attempt to defraud the insurer. The court held that evidence of the plaintiff's previous bad character was not admissible as a defense to the fire policy suit.[154] Noting that there are exceptions to the general rule forbidding proof of the party's character in civil cases, the court said that this case did not fall within one of those exceptions.

> The allegation in the answer is that the fire . . . was occasioned by the willful act, procurement, or connivance of plaintiff . . . [even though] a felony, it still cannot be said that his character for honesty was involved in the issue. His right of recovery did not depend on the question of whether his character was good or bad.[155]

In an action for false imprisonment, prior violations of ordinances by the plaintiff are not admissible to justify the defendant's actions or to mitigate the damages pleaded.[156] Where the suit is one for malicious prosecution, however, the Iowa court has permitted the plaintiff to establish his good character as showing that "such a person could be damaged to a greater extent than a person whose moral character or reputation for truth and veracity was shown to be bad."[157] Thus, the amount of damages recoverable in such an action may be affected by the character of the plaintiff.

Although Iowa has adopted the no-fault dissolution concept,[158] the conduct of the petitioner and respondent in a custody suit is still material and relevant to the inquiry.[159] A shift in emphasis has taken place which recognizes that although conduct and character evidence are no longer pertinent to the dissolution of a marriage, they remain important considerations when the welfare of a child is involved.

These cases digested above provide an example of the morass which exists in this area. Some cases permit the introduction of character evidence; others exclude it. Character evidence may be established by specific acts *contra* the general rule; reputation testimony may be barred *contra* the normal principle of admission. The exact outlines of reception and exclusion are blurred by these cases, seemingly contradictory of each other. Yet there is a noticeable harmony present, founded upon the nature of the pleadings. If a party has not

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It is possible that this holding does not actually stand against the general rule, however, because the exclusion was primarily based upon the fact that the proffered opinion went to establish one of the ultimate facts of the case, to be decided by the jury alone.

153. 68 Iowa 737, 28 N.W. 47 (1886).
154. Stone v. Hawkeye Ins. Co., 68 Iowa 737, 744, 28 N.W. 47, 50 (1886).
155. *Id.*
156. Schultz v. Enlow, 201 Iowa 1083, 1087, 205 N.W. 972, 973 (1925).
157. Kness v. Kommes, 207 Iowa 137, 141, 222 N.W. 436, 437 (1928).
158. *See* IOWA CODE ch. 598 (1975).
159. *In re* Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974); *see In re* Marriage of Jordan, 203 N.W.2d 314 (Iowa 1972).

pleaded another's bad character in mitigation of damages, the court is permitted to bar evidence of character from proof on that issue.[160] Thus, whether making allegations or offering a defense, a party must note the importance of his pleadings to the admissibility of character evidence. The pleadings will determine whether it is character or reputation that is to be proven and whether that proof is to come by way of reputation testimony, a witness' opinion or particular instances of conduct.

VII. Character Evidence for Impeachment Purposes

One of the purposes for which character evidence may be used is to impeach a witness' credibility. Although a witness is presumed to speak the truth,[161] his honesty is closely scrutinized by the opposing counsel. Evidence of the witness' untruthful character may be established either through the direct impeachment effort of counsel or as a by-product of the jury's own observations.[162] Whichever route is taken, the end result of a successful impeachment is the discrediting of the witness and his testimony.

As a prelude to the impeachment process, the target witness must first be adjudged competent to testify, and actually do so. The requisite competency is established initially by the taking of an oath,[163] and later by the witness' passing the hurdles of mental capacity[164] and first-hand knowledge.[165]

Once the witness testifies, various methods of impeachment may be employed to challenge the witness' veracity and diminish the force of his testimonial assertions. Evidence which has been excluded previously, such as evidence of the witness' character traits, may be admitted for the limited purpose of impeaching his credibility.[166] At the conclusion of this process, the

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160. *See* Herriman v. Layman, 118 Iowa 590, 593, 92 N.W. 710, 712 (1902); 1 Wigmore, *supra* note 9, § 71.

161. State v. Voelpel, 208 Iowa 1049, 1052, 226 N.W. 770, 771 (1929) and authorities cited.

162. *See* Uniform Jury Instruction No. 1.5 (Civil 1975). The direct line of attack may be employed in two ways: through using cross-examination to discredit the witness or his testimony, or through the proof of extrinsic evidence which contradicts and discredits the prior witness and his testimony. McCormick, *supra* note 26, § 33.

163. Iowa Code § 622.1 (1975). The *Federal Rules of Evidence* have adopted a basic rule of competency which does not hinge upon a witness' capacity to be impressed by his oath. *See* Fed. R. Evid. 601. However, *Federal Rule of Evidence* 603 requires a witness, before testifying, to swear or affirm his truthfulness in a manner "calculated to awaken his conscience and impress his mind with his duty to do so." *Id.*

164. Wigmore has compiled three types of incapacity. 2 Wigmore, *supra* note 9, § 478, at 519-20. These are: (1) Organic Incapacity, where mental or moral deficiencies render a witness incompetent (*id.* § 492, at 531); (2) Experiential Incapacity, in which the witness lacks the "skill to acquire accurate conceptions" (*id.* §§ 555-71); and (3) Emotional Incapacity, which arises from an emotional relationship (*i.e.*, marital or pecuniary interest) which taints the witness' capacity to be a disinterested observer and relator (*id.* §§ 575-620).

165. *Id.* § 478, at 518-19. The witness must have firsthand knowledge of that to which he testifies, he must recall the impressions made by these observations and he must relate these remembrances to the fact-finder. *Id.*

166. Iowa Code § 622.2 (1975).

jury has the duty to sift through the evidence and determine whether or not the witness' testimony has been successfully impeached.[167]

Certain limitations have developed in the law to prevent over-zealous inquisitors from turning the witness box into what Wigmore has termed "the slaughterhouse of reputations."[168] Professional ethics guard against a rabid attack being made upon a witness' character or credibility.[169] Additionally, a common law rule holds that the proponent of a witness may not question the veracity of his own witness.[170] These restrictions serve to confine the impeachment process within reasonable bounds.

A. *Discrediting the Witness—Impeachment*

It is a well-established rule that the initial interrogation of a witness must have one object: impeachment. No evidence to accredit or sustain a witness is allowed unless that witness' credibility has already come under attack.[171] Thus, evidence of a witness' truthful character may only be introduced after his credibility has been called into question.[172]

To test the credibility of a witness, cross-examination may be utilized. The *Iowa Code* envisions this process in its statement that "[a] party may interrogate any unwilling or hostile witness by leading questions."[173] The orthodox

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167. Jettre v. Healy, 245 Iowa 294, 298, 60 N.W.2d 541, 543 (1953).

168. 3A WIGMORE, *supra* note 9, § 983, at 941 (Chadbourne rev. ed. 1970).

169. *See, e.g.*, IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS, DR 7-106 (C)(2): "In appearing in his professional capacity before a tribunal, a lawyer shall not: . . . (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." Section 622.14 of the *Iowa Code* (1973) supported this concept by stating that the witness is "not compelled to answer" any matter questioned about which "would tend to render a witness criminally liable, or to expose him to public ignominy." This section was repealed by the 65th General Assembly. *See* ch. 1272, § 4, [1974] Iowa Acts 983; IOWA CODE §§ 782.9-.11 (1975). *See also* Gaudineer, *Ethics: The Zealous Advocate*, 24 DRAKE L. REV. 79, 85-87 (1974).

170. MCCORMICK, *supra* note 26, § 38, at 75.

171. State v. Brandt, 182 N.W.2d 916, 917 (Iowa 1971); MCCORMICK, *supra* note 26, § 49, at 102. The basis for this rule has been found to be either a corollary of the presumption of good character, or because the witness' character is unknown to begin with. *Id.* § 49, at 102 n.73. However, it is possible for a witness to undergo a type of informal accreditation. A lay witness or an expert witness may be accredited through the asking of preliminary qualifying or identifying questions. Thus, the introductory questions asked a witness on direct as to his occupation, hobbies and other activities of a positive nature, lend credence and dignity to his testimony. The expert witness is required to testify as to his experience, honors, education, distinction in a certain field, to provide a foundation on which he can base his opinion testimony. I. GOLDSTEIN, TRIAL TECHNIQUE § 317(3) (1935).

172. The final draft of *Federal Rule of Evidence* 608 continues the traditional practice of limiting the accreditation of a witness. The rule does allow the witness' credibility to be attacked or supported by either opinion or reputation evidence, but imposes two restrictions. First, the attack or support must have reference only to the witness' character for truthfulness. Second, "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." *Id.* In its note to this rule, the Advisory Committee acknowledged that the rule followed the common law tradition, but noted a practical justification: "The enormous needless consumption of time which a contrary practice would entail justifies the limitation." FED. R. EVID. 608(a) (Advisory Committee Notes).

173. IOWA CODE § 624.1 (1975).

rule holds that although questioning one's own witness may not lead to impeachment, where that witness has given surprise testimony and affirmatively damaged his proponent's case a party may then impeach his own witness.[174] If one reads section 624.1 in light of the traditional requisites of surprise and affirmative injury, the *Code* section appears more expansive. Basing impeachment upon the test of a witness' attitude, whether he is an "unwilling or hostile witness," allows a broad application of the statutory rule of interrogation.[175]

B. *Methods of Impeachment*

When a person mounts the witness stand, be it in either a civil or criminal case,[176] his or her credibility is immediately subject to challenge. There are basically five methods of impeachment—some of them directly related to character—which are recognized: (1) bias, prejudice or interest; (2) general reputation for truth and veracity; (3) proof of general moral character; (4) prior inconsistent statements; and (5) prior felony convictions.[177] Some of these techniques come from common law methods of ascertaining the witness' truthfulness; others are statutorily defined.[178] Each will be dealt with separately below so that the various guidelines of each are not confused. It should be remembered that these methods of evidencing dishonest character relate to the *credibility* of a witness, not to the probability of a party's guilt or liability.

1. *Bias, Prejudice and Interest*

A wide range of mental attitudes can act to place a witness' credibility and truthfulness in question, so that the witness is no longer perceived by the jury as a disinterested narrator of the truth. Such attitudes are present in a variety of favorable or hostile feelings which are in turn engendered by numerous

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174. United States v. Allsup, 485 F.2d 287, 291 (8th Cir. 1973); *see* McCormick, *supra* note 26, § 28, at 76 (stating the two foundation facts to be (1) surprise at the testimony of one's own witness, and (2) positively harmful testimony to one's cause). The *Federal Rules of Evidence* are geared to allow the interrogation of a witness without these two foundation facts: "The credibility of a witness may be attacked by any party, including the party calling him." Fed. R. Evid. 607. This latter rule has been cited in an Iowa case, *State v. Fetters*, 202 N.W.2d 84 (Iowa 1972), as being "[r]elative to the contention the State was attempting to impeach its own witness," which was objected to by the defendant. *Id.* at 93.

175. *Iowa Code* section 624.1 allows the interrogation of a witness by leading questions in two instances: (1) if the witness is an adverse party, and (2) if the witness is an "unwilling or hostile" witness. *See* Iowa Code § 624.1 (1975).

176. Gaskill v. Gahman, 255 Iowa 891, 896, 214 N.W.2d 533, 536 (1963).

177. McCormick, *supra* note 26, § 33. In like terms, McCormick lists five possible lines of attack on a prior witness' credibility. These are: (1) bias; (2) inconsistent statements; (3) direct attack on a person's character; (4) questioning the witness' capacity; and (5) testimony of other witnesses. *Id.* § 33, at 66. Regardless of the title given the technique used to impeach the witness, they all generally involve an inquiry into whether the witness possesses the character trait of truthfulness. *Id.* § 41, at 81; *see* State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974).

178. *See* Iowa Code § 622.17 (1975) (prior felony convictions); Iowa Code § 622.18 (1975) (general moral character).

> Character as referred to in this section [section 622.18] has been held to be the equivalent of general reputation . . . . However, it is the *moral character* of the witness and *not* his character as to truth and veracity, or character as to being peaceable and law abiding [which is important] . . . . Moreover, it is not some specific vice which may be shown.[195]

More recently, however, cases have spoken of "general reputation" in terms of both impeachment methods: general moral character evidence under section 622.18 and specific reputation for truth and veracity. Thus, although it appears from the wording of the statute that impeachment under section 622.18 may be somewhat broader than under the more defined "truth-veracity" variety, this difference is by no means clear. Cases dealing with reputation evidence to impeach a witness appear to treat the term "general reputation" in two different ways. Some cases speak of such proof as being similar to reputation evidence when offered on the issue of a person's probable guilt or liability. Thus, "general reputation" is reputation which is known throughout a broad cross-section of the community.[196] On the other hand, "general reputation for impeachment purposes" may relate to the breadth of a witness' overall character, and not permit proof of specific character traits or misdeeds to evidence reputation.[197]

The newly enacted *Federal Rules of Evidence* appear to permit as evidence of general reputation proof of specific character traits and not proof calculated to show a reputation which is known throughout a broad cross-section of the community. However, unlike in Iowa, the federal rule on impeachment recognizes the need to limit proof of general reputation for credibility purposes to the question of a person's veracity—not his or her overall moral character. "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) *the evidence may only refer to character for truthfulness or untruthfulness* . . . ."[198]

Whether this federal rule will have any effect upon future decisions of the Iowa supreme court is unclear at this point. However, the focus of the rule

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195. State v. Gregory, 148 Iowa 152, 154, 126 N.W. 1109 (1910) (emphasis added). *See also* State v. Parsons, 206 Iowa 390, 220 N.W. 328 (1928) (witnesses testified as to the general moral character of the defendant-witness and "*also* testified that the reputation of the defendant for truth and veracity" was bad. *Id.* at 395, 220 N.W. at 330 (emphasis added)).

196. State v. McCall, 245 Iowa 991, 1001, 63 N.W.2d 874, 879 (1954).

197. State v. Huckelberry, 195 Iowa 13, 16, 188 N.W. 587, 588 (1922); State v. Haupt, 126 Iowa 152, 153, 101 N.W. 739, 740 (1904). The supreme court recently in *State v. Johnson*, 219 N.W.2d 690 (Iowa 1974), confined general reputation to non-particularized evidence by holding that "extrinsic evidence of specific misconduct or criminal acts of a witness is admissible to impeach him," with some exceptions. *Id.* at 696.

198. FED. R. EVID. 608 (emphasis supplied). The Advisory Committee's Note to this rule explains their rationale: "In accordance with the bulk of judiciary authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive." FED. R. EVID. 608 (Advisory Committee Notes).

upon a particular trait to be established by reputation evidence and not upon the geography involved may provide some impetus for clarification by our court. In light of the *Hobbs* and *Sill* foundational requirements of generalized reputation throughout the community, continued reference to "general reputation" defined in terms of geographic locality appears redundant. Now would be an appropriate time for the court to examine the statutory method of impeachment of a witness by proof of general moral character and define and delineate its meaning and limitations.

4. *Prior Inconsistent Statements*

If used to impeach a witness, prior inconsistent statements must have some substantive value and be both material and relevant.[199] The orthodox view holds that although such statements have substance, they are not to be accorded the stature of substantive evidence, but merely used to impeach the honest character of the witness.[200] For this purpose, the inconsistent statement must be incompatible with and contradictory of the present testimony,[201] although the prior inconsistency may be either oral or written.[202]

In *Mead v. Scott*,[203] the Iowa supreme court set forth the foundation required for the use of prior inconsistent statements to impeach a witness. The foundation is first established by giving the witness "an opportunity to affirm or deny making the prior statements."[204] The witness is asked to identify the time and place at which the statement was made; then he or she is given the chance to adopt the earlier statement or to explain its meaning in the context of the present testimony.[205] If the statement is adopted, it becomes substantive evidence. If denied, then other witnesses or evidence may be produced to collaterally prove that the prior statement was in fact made, effectively impeaching the present testimony.[206]

There is a necessary distinction between the use of prior inconsistent statements of a witness and those of a party to an action.[207] Where a party's statement is offered, it requires no foundation as it is "an admission by a party

199. French v. Universal C.I.T. Corp., 254 Iowa 1044, 1048, 120 N.W.2d 476, 480 (1963); 4 JONES, *supra* note 9, § 26:2, at 174; MCCORMICK, *supra* note 26, § 34, at 68-69.

200. Law v. Hemmingsen, 249 Iowa 820, 835, 89 N.W.2d 386, 397 (1958); 4 JONES, *supra* note 9, § 26:2, at 173.

201. 4 JONES, *supra* note 9, § 26:2, at 172-73; *see* Hunt v. Waterloo, C.F. & N. Ry. Co., 160 Iowa 722, 726, 141 N.W. 334, 336 (1913).

202. 4 JONES, *supra* note 9, § 26:5. *See generally* Law v. Hemmingsen, 249 Iowa 820, 835, 89 N.W.2d 386, 396 (1958).

203. 256 Iowa 1285, 130 N.W.2d 641 (1964).

204. Mead v. Scott, 256 Iowa 1285, 1294, 130 N.W.2d 641, 646 (1964).

205. 4 JONES, *supra* note 9, § 26:2, at 176-77, § 26:6, at 187, § 26:9; MCCORMICK, *supra* note 26, § 37.

206. 4 JONES, *supra* note 9, § 26:7.

207. This distinction is highlighted by *Iowa Rule of Civil Procedure* 144 in which a deposition admissible under the rules of evidence may be used for two purposes: (1) to impeach the deponent-witness, or (2) for any purpose, impeachment or as substantial evidence, if the deponent is an adverse party. IOWA R. CIV. P. 144.

to the action and would have been competent as original evidence."[208] This is in contradistinction to the requirement of a foundation to impeach a witness by prior inconsistent statements. The phrase "admission of a party-opponent" should be reserved to the situation where a party makes an independent admission against his or her own interest.[209] The foundations are different for the two declarations, depending upon who made the earlier statement and is now on the stand.[210]

A provision in the new *Federal Rules of Evidence* is concerned with the use of prior statements to impeach a witness' present testimony. Rule 613 establishes the procedure for examining a witness on his or her prior statement and limits the use of extrinsic evidence of the statement.[211]

5. *Prior Felony Convictions*

The use of prior felony convictions for the purpose of impeachment is permitted by section 622.17 of the *Iowa Code*: "A witness may be interrogated as to his previous conviction for a felony. No other proof is competent, except the record thereof."[212]

This statute provides an exception to the general rule that proof of another crime or specific misdeed is excluded at trial.[213] The other exceptions to this basic rule relate to the use of other crimes to establish the probability of a person's guilt,[214] while this exception specifically relates to the impeachment of a witness' credibility. Whether used to establish probable guilt or to impeach a witness, this form of proof is extremely dangerous to use and requires careful management. Even a limiting instruction may not be sufficient to control the image of the witness which is created in the jurors' minds through the proof of other crimes for the purpose of impeachment.

Certain standards have been set by cases dealing with this statutory method of impeaching the credibility, and thus the character, of a witness.

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208. Tuthill v. Allen, 239 Iowa 181, 186, 30 N.W.2d 726, 728 (1948).

209. Mead v. Scott, 256 Iowa 1285, 1294-95, 130 N.W.2d 641, 646 (1964) (noting the distinction between prior statements by a witness and admissions of a party).

210. In *State v. Hephner*, 161 N.W.2d 714 (Iowa 1968), the Iowa supreme court held that,

> when offered against a party, whether or not he is a witness, his utterances or conduct inconsistent with and contradictory to his present claim whether evidenced by his own testimony, that of his witnesses or facts asserted by him in his pleadings, the warning required as a foundation necessary to impeach a non-party witness does not apply.

Id. at 720.

211. "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." FED. R. EVID. 613(b).

212. State v. Martin, 217 N.W.2d 536, 541 (Iowa 1974); *see* State v. Hackett, 200 N.W.2d 493, 497 (Iowa 1972) (concurring opinion).

213. State v. Martin, 217 N.W.2d 536, 539 (Iowa 1974); State v. Wright, 191 N.W.2d 638, 639 (Iowa 1971); MCCORMICK, *supra* note 26, § 157, at 326, § 194.

214. *See generally* text accompanying notes 110-16 *supra*. *See also* State v. Wright, 191 N.W.2d 638, 640 (Iowa 1971).

Section 622.17 permits the impeachment of a witness in either a civil trial or criminal case,[215] with the questioning permitted being solely for the purpose of impeachment.[216] For a witness to be questioned as to any previous convictions, those convictions must be for *felonies*, not merely "crimes," and the question must be specifically drawn.[217] When inquiring about a felony conviction in order to impeach a witness, the felonies questioned about must only be those which involve dishonesty or false statement.[218] Only in that way will the witness' character trait of honesty be challenged.

The impeachment of a witness by prior felony convictions may be accomplished by various means. Under section 624.1, a limited form of direct impeachment is permitted where the adverse party is called as a witness.[219] Prior felony impeachment of a witness may also be accomplished through cross-examination within the trial court's discretion[220] and through a blending of section 622.17 and the *Code* provision on cross-examination, section 781.13.[221] Finally, when a witness has denied that he has been convicted of a felony prior to his appearance as a witness in court, the record of that previous felony conviction may be entered into evidence.[222]

The Supreme Court of Iowa in *State v. Martin*[223] analyzed the subject of the previously unrestricted impeachment of a witness through the use of prior felony convictions. The court noted that section 622.17 is a statutorily permitted exception to the general rule which renders evidence of prior crimes

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215. State v. Allnutt, 261 Iowa 897, 909, 156 N.W.2d 266, 273 (1968); Gaskill v. Gahman, 255 Iowa 891, 896, 124 N.W.2d 533, 536 (1963).

216. State v. Miskell, 161 N.W.2d 723, 734 (Iowa 1968); State v. Underwood, 248 Iowa 443, 445, 80 N.W.2d 730, 732 (1957).

217. Hanners v. McClelland, 74 Iowa 318, 322, 37 N.W. 387, 391 (1888) (all crimes are not felonies and the question must specifically ask about felony convictions). A "conviction" does not include a plea of guilty. State v. Frese, 256 Iowa 289, 291, 127 N.W.2d 83, 85 (1964). Nor does that term encompass a mere accusation of a felony. State v. Mullen, 216 N.W.2d 375, 377 (Iowa 1974). It has been held, however, that a question may be propounded inquiring generally as to the witness' previous residence. Gaskill v. Gahman, 255 Iowa 891, 897, 124 N.W.2d 533, 536 (1963); State v. Row, 81 Iowa 138, 46 N.W. 872 (1890).

218. State v. Fields, 223 N.W.2d 197, 198 (Iowa 1974); State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974).

219. Section 624.1 of the *Iowa Code* reads in part: "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. . . ." IOWA CODE § 624.1 (1975).

220. Gaskill v. Gahman, 255 Iowa 891, 896, 124 N.W.2d 533, 536 (1963).

221. Section 781.13 of the *Code* provides: "When the defendant testifies in his own behalf, he shall be subject to cross-examination as an ordinary witness, but the state shall be confined therein to the matters testified to in the examination in chief." IOWA CODE § 781.13 (1975). *See* State v. Shipp, 184 N.W.2d 679, 680 (Iowa 1971) (cross-examination as to prior felony convictions is permitted). Such cross-examination is a permissible form of impeachment and does not violate the constitutional privilege against self-incrimination. State v. Hackett, 200 N.W.2d 493, 494-95 (Iowa 1972).

222. *See* IOWA CODE § 622.17 (1975). "The statute merely makes incompetent proof from sources other than the two specified [interrogation of the witness and the record]." Gaskill v. Gahman, 255 Iowa 891, 898, 124 N.W.2d 533, 537 (1963); State v. Friend, 210 Iowa 980, 993, 230 N.W. 425, 431 (1930).

223. 217 N.W.2d 536 (Iowa 1974).

inadmissible,[224] and that this unrestricted method of impeachment often provoked sharp criticism.[225] An earlier opinion by Chief Justice Warren Burger, then on the Court of Appeals for the District of Columbia, in *Gordon v. United States*,[226] was quoted at length and its rationale adopted.[227] In view of the concept behind impeachment, *i.e.*, to highlight the witness' dishonest character, the Iowa court narrowed the scope of allowable impeachment by use of prior felony convictions. Because "the relatively unlimited cross-examination of a witness as to prior felony convictions . . . is fraught with inequities . . .,"[228] the Iowa court established a basic framework into which the interrogation of a witness as to his or her prior felony convictions must fit:

> [E]vidence that he (the accused) has been previously convicted of a felony is admissible only if (1) the felony involved dishonesty or false statement, and (2) the judge determines any danger of unfair prejudice does not substantially outweigh the probative value of such prior felony conviction, taking into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors.[229]

Several caveats were devised by the court to retain some established rules and procedures.[230] The *Martin* opinion also suggests techniques which could be employed to assist the trial courts in their determination of the admissibility of prior felony conviction evidence for impeachment purposes.[231] One technique which was suggested is the use of a pre-trial hearing to weigh the various relevancy factors; another method of lessening the prejudicial effect is to hold a hearing during trial, but outside the presence of the jury.[232] Through the careful adherence to these guidelines and techniques, prior felony convictions can effectively be used without the great dangers which are normally attendant upon such evidence.

VIII. Conclusion

As can be divined from this discussion of the use of character and reputation evidence, the principles which govern the introduction of such evidence are multifarious. It is the author's hope that this Note will serve as a useful tool to students and practitioners dealing with character evidence.

Victoria L. Herring

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224. State v. Martin, 217 N.W.2d 536, 537 (Iowa 1974).
225. *Id.*; *see* McCormick, *supra* note 26, § 43, at 93-94.
226. 383 F.2d 936 (D.C. Cir. 1967).
227. State v. Martin, 217 N.W.2d 536, 540-41 (Iowa 1974).
228. *Id.* at 541.
229. *Id.* at 542.
230. The use of other crimes to prove an element of the present charge going to the issue of probable guilt was reaffirmed. The defendant is still permitted to place his good character in issue going to the question of his probable innocence. And, among other exemptions, the state is allowed to question a witness under section 781.13 of the *Code* where the defense has already "opened the door." *Id.* at 542, 544.
231. *Id.* at 544.
232. *Id.* at 544-45.