Why Modern Evidence Law Lacks Credibility

This essay by Professor Daniel D. Blinka is based on an article of the same name that appears at 58 *Buffalo Law Review* 357 (2010). Blinka has been a faculty member of Marquette University Law School for 25 years, before which he was a trial lawyer in the Milwaukee County District Attorney's office. Blinka has a Ph. D. in American history. He writes and teaches in the fields of evidence, trial advocacy, criminal law and procedure, legal history, and ethics.

The modern adversarial trial is at a crossroads. Curiously, it seems that trials, long a mainstay of popular culture, are better thought of by the general public than they are among legal professionals. The public embraces trials both real and fictional. Novels, television shows, and movies capitalize on the trial's inherent drama while celebrating its pursuit of the unvarnished truth. Strangely, the legal profession is less sanguine. "Alternative" dispute resolution is ever so fashionable, and the "vanishing trial" is bid good riddance as unreliable, if not capricious.

One's confidence in trials largely turns on how well they are believed to reveal the historical truth of "what happened." Trials are hailed as "crucibles of truth." And this is largely a function of witness credibility: Whom do we believe and why? Unsettling to some while a comfort to others, credibility is deliberately relegated to the amorphous realm of lay common sense and life experience. Put differently, the average person is deemed as skilled as any lawyer or judge in distinguishing accurate from inaccurate testimony. Evidence law itself provides no independent, meaningful standard of determining credibility.

Why does the law so sanguinely entrust the common person and her common sense with this difficult yet critical task? The answer is in part historical, but mostly it is the product of unacceptable alternatives. Religion plays virtually no role in trials, other than the largely ceremonial witness oath. Modern evidence rules explicitly hold that witnesses' religious beliefs do not affect their credibility. Yet with enlightened equanimity, those same rules also slam the door on science. Polygraphs, voice stress analyzers, and the like are routinely excluded from the courtroom, as are psychologists and psychiatrists who deign to offer their insights about whom a jury should believe and why. Harboring equally little faith in religion and science, the law is content with the jury's life experience and "common sense" as both sufficient and necessary. Common sense is sufficient because we reasonably rely upon it in our daily lives in judging the accuracy of what others tell us. And it is deemed necessary to the legitimacy (popular faith) of our judicial system.

I have long been intrigued by the central, yet largely unexplored, role played by popular thought and culture in both the doctrine governing impeaching witnesses generally and the determination of witness credibility in trials. Lurking in the background is the ever-present tension among legal rules and policy, the insights of modern psychology, and the community's common sense. The title of this essay, and a longer article on which it is based, is not intended to denigrate evidence law as such but merely to underscore its heavy debt to popular thinking and to better appreciate the complications this engenders.

Doubtless, popular assumptions about witness credibility strike many critics as naïve and perhaps invalid, yet these very assumptions form the core of the law of evidence and support the trial's legitimacy. More precisely, evidence law invokes four "testimonial assumptions" whenever a witness's testimony is believed accurate, and thus not a mistake or a lie: (1) the witness accurately perceived the event through her five senses; (2) she now accurately recalls those perceptions when testifying; (3) her words (testimony) accurately describe her

Orson Welles plays lawyer Jonathan Wilk in the 1959 courtroom drama *Compulsion*, a movie based on the Leopold and Loeb trial.

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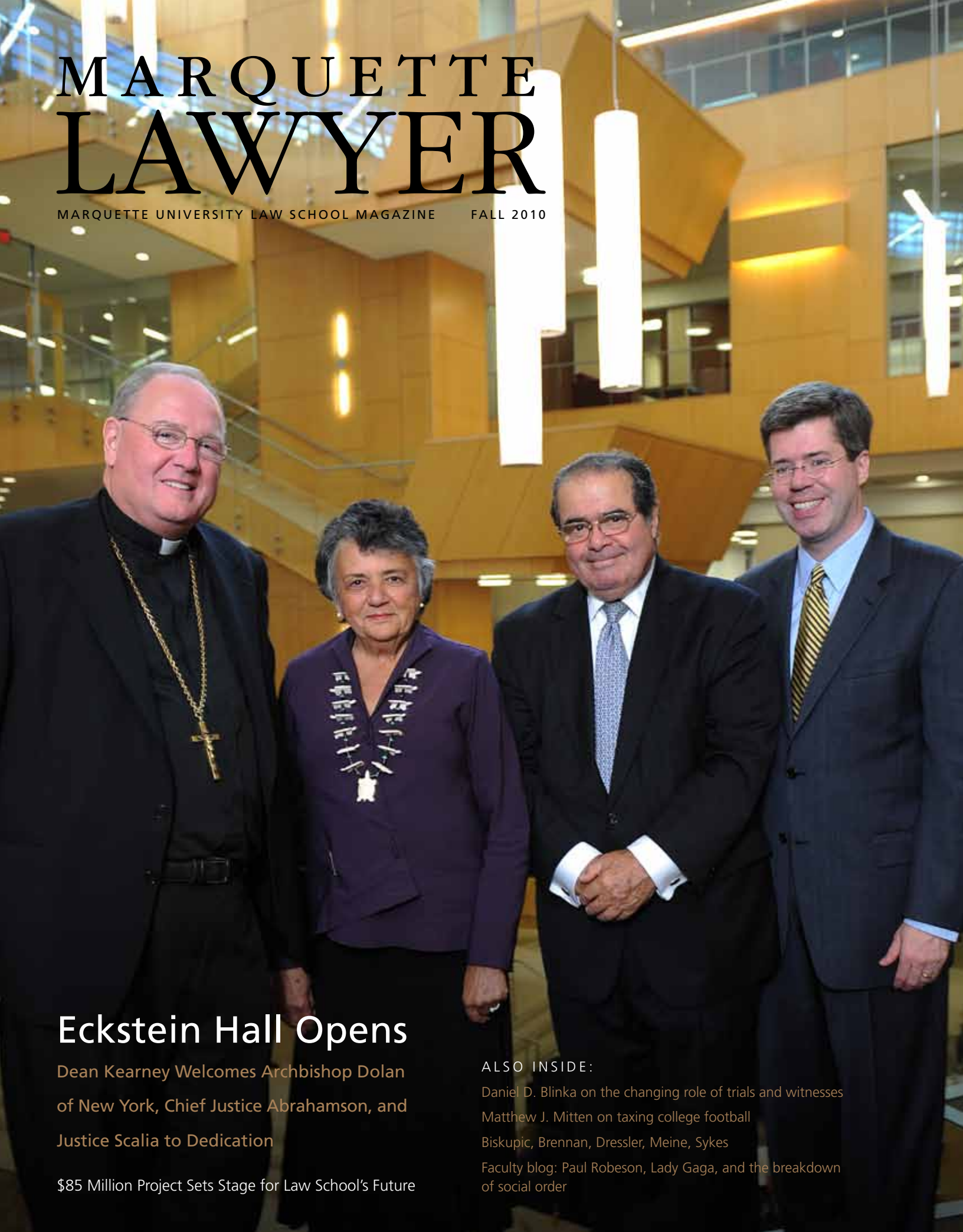

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memories; and (4) she is sincerely recounting those memories (and not lying). While the general public finds these assumptions familiar and reliable, the very essence of "common sense," critics are understandably skeptical in light of evidence law's wholesale abdication of credibility to popular thought. Impeachment law regulates various techniques for probing credibility at trial, yet provides no measure apart from popular beliefs. Although the eminent evidence scholar Mason Ladd once called credibility the "lawyer's problem," it is nonetheless a problem that a lay jury is ultimately expected to solve, drawing from its own experiences, insights, and beliefs.

Several critical themes emerge from the confluence of common sense and witness credibility. Most basic, the testimonial assumptions recognized by evidence law are products of mainstream thought and culture, not some refined philosophy of truth determination or a branch of modern psychology, at least not one recognizable as such today. It is somewhat ironic, then, that when modern evidence law was in its infancy in the early 19th century, it was heavily influenced by the Scottish school of common-sense philosophy, which dominated what we'd now call the psychological thinking of the time. The Scottish school firmly rejected other subjectivist theories, which questioned whether one could be certain about anything in the world; rather, the Scots extolled the reliability of human perceptions, memory, and communication. Simon Greenleaf, a devout evangelical Christian, Harvard law professor, and progenitor of modern evidence law, used the common-sense philosophy as the theoretical scaffolding for his landmark evidence treatise in the 1840s. So convinced was Greenleaf in the power of his methodology that he followed it with an influential 1847 essay that proved the truth of the New Testament by applying the law of evidence in a way that demonstrated the credibility of the gospel writers, Mathew, Mark, Luke, and John!

What gave common-sense thinking its power was that it resonated in 19th-century popular thinking as well as the professions and the sciences of the time. And while modern science found it wanting by the late 1800s, common sense's essence remained current in popular thinking about how people perceive, remember, and describe events, as well as their sincerity. The assumptions of evidence law merit brief consideration.

All testimony is either correct or incorrect. An incorrect answer means that the witness is lying or honestly mistaken—in his perception, memories, or narrative (description). A correct answer assumes that the witness accurately perceived an event and is now sincerely and accurately recalling and describing it. Thus, perception, memory, narrative accuracy, and sincerity are the keys to credibility.

Evidence law equates "sensory perception with knowledge," in the words of one commentator. More precisely, it assumes that people acquire information through their five senses: sight, hearing, touch, taste, and smell. Eyesight is especially prized, with hearing a close second, albeit heavily hedged by the hearsay rule. No witness, lay or expert, is allowed to testify about another person's state of mind because no such "sixth sense" is recognized.

Those same perceptions are "recorded" in one's memory. The dominant analogy today is the video camera, yet it should be remembered that common-sense thinking originated long before photography itself: the eye captures images which are stored in the brain. The key here is the law's assumption of stable, retrievable memories. The problem with analogizing memory to a video camera or, for that matter, a computer's hard drive is that such technology, when working properly, preserves all detail. The human memory does not.

Testimony is delivered orally before the jury—a live performance. Testimony is, or should be, largely extemporaneous responses to questions posed by the lawyers. The question for the trier of fact is how closely

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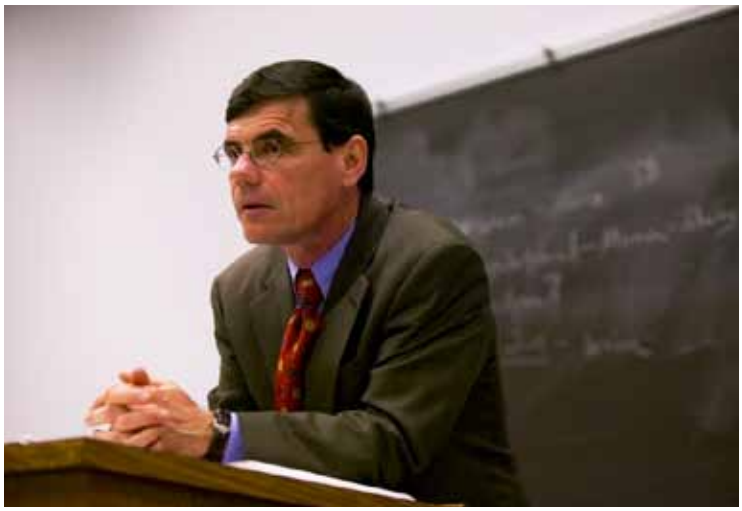
the witness's narrative (testimony) matches the recorded memories, and in turn how accurately those memories reflect what the witness saw in the first place. Leading questions are generally barred on direct examination so that the jury may hear the witness's own words; conversely, leading questions on cross-examination serve to test the witness's resolve to describe things one way and not another. Plainly, some people are just better at this than others. The witness's word choice and delivery are often determinative of how much weight a jury will give to his testimony. Seasoned trial lawyers understand that over-preparation of witnesses yields only stale, scripted testimony. Spontaneity of sorts is expected. Moreover, the witness's demeanor is often as critical as his word choice; how he testifies is as significant as what he says.



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The final concern is sincerity. Is the witness lying about what he knows? Perhaps because the darker side of the human condition is that all people lie at least some of the time, this unspoken sordid commonality equips us all with the ability to ferret it out.

These assumptions are embedded in various evidence rules that resonate in everyday life. Several examples will suffice. "Bias" is heavily favored by evidence law. Lawyers may cross-examine any witness about a potential interest or bias arising from any source—emotions, social relationships, or financial interest. Other witnesses may be called to prove the bias if needed. Not only is bias impeachment readily understood by all people from an early age (think of the "teacher's pet" in grade school), it potentially resonates in all four testimonial assumptions. It colors one's perceptions, memories, and word choices and may induce one to lie. It operates at the conscious and unconscious level. So too, a "defect" in a witness's capacity to perceive, remember, or narrate is deemed a noncollateral issue, as is bias. Poor eyesight, bad hearing, failing memory, or inarticulateness is fair game. A witness's capacity for sincerity, however, is measured by his character for truthfulness. The rules permit cross-examination about prior acts of deceit and falsehood. Prior criminal convictions are also admissible on the theory that convicted criminals are less enamored with telling the truth than noncriminals. In our daily lives, we are just as wary of nearsighted eyewitnesses as we are of entrusting secrets or valuables with disreputable persons.

Despite a plethora of esoteric rules, evidence law is strikingly bereft of any systematic approach to determining credibility. No master rule commands lawyers to explore a witness's potential bias, defective memory, etc. Rather, the law assumes that lawyers intuitively know to do this. Impeachment rules originated as ad hoc limitations on excessive cross-examination tactics that seemed unfair or overly demeaning, a provenance that explains their lack of coherence and rigor. Lawyers selected these very tactics based on their affinity with how ordinary people (the jury) thought about facts. Moreover, trial lawyers were then, and still are, far more concerned with blasting their opponent's evidence than pursuing the "truth" that the modern trial purports to be looking for. In sum, even today the rules exist more as tools to be used at the lawyer's discretion, the assumption being that lawyers are sufficiently adroit, knowledgeable, and experienced to draw out the strengths and weaknesses related to credibility. The techniques are also inordinately weighted toward exposing the willful liar (the perjurer) than they are navigating the far greater problem of the honestly mistaken witness, a regrettable artifact of history.

Evidence law's laissez-faire reliance on popular thinking poses some special problems for the modern trial. First, proof that contradicts the common-law testimonial assumptions, particularly social scientific or psychological evidence directed at popular "misconceptions," effectively diminishes the jury's role in fact finding and threatens the trial's legitimacy. Modern insights about the frailties of eyewitness identification or the phenomena of false confessions are usually excluded on grounds

that the jury (somehow) intuitively grasps such things or that the lawyers can expose the weaknesses without expert witnesses. Polygraphs are generally excluded, but what about newer neuro-imaging technology that purportedly measures truthfulness? While the topic is complex, for present purposes we should take note that often the real problem with such "insights" is that they conflict with popular thinking and would reduce juries to spectators if not render them altogether useless. One prominent psychologist, critical of "repressed" memory cases, has declared that there is "no reliable way to listen to a memory report and judge whether it is true or false." Proclamations like this threaten the taproot of the trial, not to mention history itself. The risk here is that trial law will become colonized by experts who will tell juries which witnesses to believe and why, thereby undermining the jury's autonomy to determine credibility and the legitimacy of trials themselves. Ironically, the jury is reduced to deciding only among the credibility experts themselves.

Second, evidence law assumes that its testimonial assumptions, as well as the rules governing credibility, remain consonant with current popular thought despite their nineteenth-century origins. The public's faith in the five senses and stable memories seems safe enough at present, but what about quaintly Victorian notions about one's "character trait for truthfulness"? Evidence that any human being has lied on a prior occasion (at least!) seems weirdly obvious and not the least helpful in determining her credibility today, so why permit it?

Third, the "vanishing trial" risks relegating the trial jury to history's museum of curiosities while breeding a generation of lawyers lacking fundamental trial skills and adept only at settlement. How does a fledgling trial lawyer learn how to distinguish among strong and weak cases without trying some herself? How else does a lawyer develop the skills needed to support or attack a witness's credibility? And will public confidence erode if our justice system, civil and criminal, lives only by the "deal"? The problem is particularly acute in the criminal justice system. For example, a prosecutor lacking trial skills may eschew charges in a circumstantial case or where witness testimony conflicts simply because he has no idea whether it is provable in the first place. At the other extreme, a prosecutor may overcharge a case to leverage a guilty plea by a defendant understandably reluctant to risk all at trial. Unseasoned criminal defense counsel are unlikely to recommend that a client take a marginal case to trial. Similar issues arise in the civil justice system, where lawyers' enchantment with expensive discovery and motion practice may mask a reluctance, or even an inability, to try cases in the first place.

Raising issues is easy; finding answers is hard. Evidence law is understandably reluctant to substitute its common-sense underpinnings for the infirmities of modern psychology. Nonetheless, it should strive to better understand its roots in mainstream thought and popular culture if only to better appreciate where and how cultural changes, and psychology's insights, might assist credibility determinations without undermining the trial's legitimacy. The trial itself must change, however, at least incrementally. Trial judges should play a more active role in the proof process, particularly to assure that juries are provided with information critical to assessing the accuracy of lay testimony.

Both perjury and mistaken testimony are "wrong" and distort fact finding, yet present rules and procedures are more oriented toward exposing the liar than the innocently mistaken witness. If lawyers lack the necessary seasoning to operate under the current laissez-faire system, evidence law should mandate (not permit) inquiry into a witness's potential biases or any defects in testimonial capacities. Other rules need to be rethought. If there is no popular consensus about what constitutes a "truthful character," it is difficult to justify the plethora of rules that permit and regulate evidence about such a dubious concept in the first place. The human propensity to lie is simply, and regrettably, not in need of evidence. As for prior criminal convictions, the judge might handle this by simply telling the jury not to speculate about this subject because the law will permit no such evidence, whether positive or negative, at least as relates to credibility. The key, then, is to assure that the trial's conception of credibility remains in tune with popular assumptions. And where popular thinking itself may be uninformed or naïve (e.g., the false-confession phenomena), then experts should educate the jury. We must assure that the jury receives the information it requires in determining credibility in a manner that does not undermine the legitimacy of the trial itself or the reliability of its outcomes.