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EVIDENCE—CREDIBILITY IMPEACHMENT AND THE DRUG-USING WITNESS—*State v. Renneberg*, 83 Wn. 2d 735, 522 P.2d 835 (1974).

In chambers before the grand larceny trial of Milton and Virginia LaVanway, the court apparently ruled that testimony about the defendants' prior drug use[1] was inadmissible in the state's case. When the defendants subsequently testified to their good character, however, the trial court admitted such evidence for purposes of impeachment. On appeal of their convictions defendants challenged the admission of the evidence. The Washington Supreme Court affirmed the convictions, holding that once a defendant's character has been placed in issue, evidence of drug use is admissible to attack his or her character on cross-examination. The plurality opinion also stated in dictum that such evidence is inadmissible to attack a defendant's capacity,[2] absent medical or scientific proof "connecting addiction to a lack of veracity."[3] *State v. Renneberg*, 83 Wn. 2d 735, 522 P.2d 835 (1974).

Assuming a defendant is competent to testify and has taken the stand,[4] his or her credibility may be impeached on cross-examination by attacking either (1) capacity, or (2) character.[5] *Capacity* is attacked by the introduction of evidence of a defect in the defendant's

1. The defendants were not addicted to drugs either at the time of the alleged crime or at the time they testified at trial. State v. Renneberg, 83 Wn. 2d 735, 737, 522 P.2d 835, 836 (1974).

"Drug use" as employed in this note refers to use of any drug to which a high degree of social opprobrium and prejudice attaches. A representative listing is contained in WASH. REV. CODE §§ 69.50.203–.212 (1974). Such "use" may or may not include addictive usage.

2. Although the plurality opinion in *Renneberg* spoke in terms of "credibility or veracity," 83 Wn. 2d at 737, 522 P.2d at 836, it undoubtedly intended to refer only to "capacity." Otherwise, the court's holding that evidence of drug use is inadmissible to attack "credibility" absent expert testimony, but admissible to attack character, would make little sense because character is a subcategory of credibility. *See* note 5 *infra*. This is also the view adopted by the dissenting opinion in restating the holding of the case. *See* text accompanying notes 21–23 *infra*.

3. 83 Wn. 2d at 737, 522 P.2d at 836.

4. "When a defendant in a criminal case takes the stand, he is subject to all the rules relating to the cross-examination of other witnesses." State v. Jeane, 35 Wn. 2d 423, 431, 213 P.2d 633, 638 (1950). *See also* State v. Etheridge, 74 Wn. 2d 102, 443 P.2d 536 (1968); State v. Robideau, 70 Wn. 2d 994, 425 P.2d 880 (1967); WASH. REV. CODE § 10.52.040 (1974).

5. It is important to distinguish competency, credibility, capacity and character. *Competency* is defined as a witness's ability to perceive, remember and communicate the subject of his or her testimony, *i.e.*, the witness's qualification to testify. *See generally* State v. Moorison, 43 Wn. 2d 23, 259 P.2d 1105 (1953); C. MCCORMICK, EVIDENCE §§ 45, 62 (Cleary ed. 1972) [hereinafter cited as MCCORMICK]; Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648,

ability to perceive, remember or communicate the subject matter of testimony.[6] If a defendant's *character*[7] is placed in evidence, either by the introduction of a character witness or by his or her own testi-

649 (1960). In Washington, a party attacking a witness's competency pursuant to WASH. REV. CODE § 5.60.050 (1974), is asking the trial court to disqualify the witness from testifying at all:

> The following persons shall not be competent to testify:
>
> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
>
> (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

A specific factual determination as to the individual witness's ability to perceive, remember and communicate is prerequisite to determining whether a witness is "of unsound mind" under subsection (1) of the statute, because of the absence of any readily ascertainable general rules. *See* State v. Wyse, 71 Wn. 2d 434, 429 P.2d 121 (1967); State v. Hardung, 161 Wash. 379, 297 P. 167 (1931); McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868 (1970). Should a witness's competency be challenged by showing that he or she is "intoxicated" under subsection (1) of the statute, however, there is authority that no factual determination as to ability to perceive, remember or communicate is necessary; merely because the witness is within the enumerated class of intoxicated witnesses, he or she may be disqualified. Benson v. Town of Hamilton, 34 Wash. 201, 75 P. 805 (1904); Fox v. Territory, 2 Wash. Terr. 297, 5 P. 603 (1884). Because of the possibility that a drug-using witness may be classified as either "of unsound mind" or "intoxicated," the differentiation between the two types of witnesses may be important.

Credibility is defined generally as believability or worthiness of belief. *See In re* Gallinger's Estate, 31 Wn. 2d 823, 829, 199 P.2d 575, 579 (1948) (emphasizing the breadth of the term credibility); Note, *Psychiatric Examinations of Witnesses: Standards, Timing, and Use by Indigents,* 55 IOWA L. REV. 1286, 1289 (1970). Two subcategories of credibility are capacity and character. *Capacity,* like competency, is attacked by introducing evidence of an inability to perceive, remember or communicate the subject matter of a witness's testimony. Nevertheless, issues of competency and capacity are treated quite differently. A witness's competency is challenged before the trial court to completely disqualify the witness; a witness's capacity is challenged before the trier of fact to impeach the witness's credibility. The question of competency goes to the testimony's admissibility; the question of capacity goes to the testimony's believability. Proof of a mere deficiency in a witness's perception, for example, would probably not render the witness incompetent to testify, whereas proof of a total lack of perception would render the witness incompetent. The Washington court has held competent to testify witnesses: who were "backward in mental development" and "at times seemed incapable of understanding the most simple questions," State v. McMullen, 142 Wash. 7, 8, 252 P. 108, 109 (1927); whose testimony was unconnected, incoherent and discredited by expert medical testimony, Sumerlin v. Department of Labor & Indus., 8 Wn. 2d 43, 111 P.2d 603 (1941); who were insane, State v. Moorison, 43 Wn. 2d 23, 259 P.2d 1105 (1953), or mentally ill, State v. Allen, 67 Wn. 2d 238, 406 P.2d 950 (1965); or who were drug users and former inhabitants of mental institutions, State v. Thach, 5 Wn App. 194, 486 P.2d 1146 (1971). *See generally* MCCORMICK, *supra* § 45; 3A J. WIGMORE, EVIDENCE §§ 931–38 (Chadbourn rev. 1970).

Finally, *character,* as a subcategory of credibility, is defined as some ethical trait affecting one's propensity for truth or falsehood in the matter being litigated. *See generally* MCCORMICK, *supra* §§ 41–44; WIGMORE, *supra* §§ 920–30. Thus, proof of a witness's past criminal conviction, reputation or prior misconduct would reflect on the witness's character and, therefore, arguably on his or her credibility.

6. *See* note 5 *supra.*
7. *Id.*

mony,[8] cross-examination is allowed regarding specific acts of misconduct unrelated to the crime charged.[9]

Prior Washington cases enunciated several rules concerning the relationships between drug use and competency, capacity and character. First, drug users have generally been found competent to testify.[10] Second, evidence of drug addiction has been held admissible to attack capacity.[11] *Lankford v. Tombari* extended this rule by admitting evidence of addiction to, or mere use of, narcotics to attack a witness's "propensity for veracity."[12] Third, although early cases established the admissibility of expert testimony linking drug use to incapacity, prior

8. *See* Part II *infra*. It is unclear whether the introduction of a character witness places a defendant's character in evidence, or whether the defendant must also broach the subject of character on his or her direct examination before it is "in evidence." In State v. Donaldson, 76 Wn. 2d 513, 458 P.2d 21 (1969), the defendant introduced a character witness, then took the stand himself and placed his character in evidence on direct examination. The court initially stated that "[a]ppellant chose to put *his own* character in issue by calling character witnesses to testify on his own behalf." *Id.* at 515, 458 P.2d at 23 (emphasis added). In its holding, however, the court stated: "When appellant took the stand in his own behalf in the instant action, he testified as to his own past good behavior [and] . . . opened the door for legitimate cross-examination of his testimony . . . ." *Id.* at 517, 458 P.2d at 24.

9. State v. Donaldson, 76 Wn. 2d 513, 458 P.2d 21 (1969); State v. Emmanuel, 42 Wn. 2d 1, 253 P.2d 386 (1953); State v. O'Donnell, 195 Wash. 471, 81 P.2d 509 (1938).

10. State v. Concannon, 25 Wash. 327, 65 P. 534 (1901), is the first case in which the Washington Supreme Court explicitly approved the admission of a drug-using witness's testimony, although in an earlier case, State v. Robinson, 12 Wash. 491, 41 P. 884 (1895), the court seems to have assumed the admissibility of such testimony. *See also* State v. Thach, 5 Wn. App. 194, 486 P.2d 1146 (1971).

11. State v. Smith, 103 Wash. 267, 174 P. 9 (1918); State v. Robinson, 12 Wash. 491, 41 P. 884 (1895).

12. 35 Wn. 2d 412, 421, 213 P.2d 627, 632 (1950). Subsequent cases have equated "propensity for veracity" with credibility. *See* United States v. Kearney, 420 F.2d 170 (D.C. Cir. 1969); State v. Renneberg, 83 Wn. 2d 735, 740, 522 P.2d 835, 838 (Hale, C.J., concurring); State v. Kimbriel, 8 Wn. App. 859, 510 P.2d 255 (1973). Because of the brevity of the opinion, it is impossible to determine whether the *Lankford* court was referring to credibility or, more specifically, capacity. Wigmore, upon whom the court relied, *see* 35 Wn. 2d at 421, 213 P.2d at 632, speaks in terms of capacity: "Any diseased impairment of the testimonial powers, arising from whatever source, ought also to be considered [in impeaching the witness] . . . . [A]ccordingly, the *morphine* or other *drug habit*, in that it may have had such an effect, should be received." 3 J. WIGMORE, EVIDENCE § 934, at 481–82 (3d ed. 1940).

There is also evidence that a statement as to the credibility or capacity of a drug-using witness was not a necessary element of the *Lankford* holding. The wife of respondent in *Lankford* had worked in appellant's pharmacy while respondent was in the military. In order to prove alienation of affection, respondent was required to show that appellant was in fact the procuring cause in drawing the wife's affections away from her husband. As a defense, appellant introduced a number of witnesses who testified that they had on numerous occasions taken the wife home from the pharmacy late in the evening. On cross-examination, respondent intimated that the reason for the witnesses frequenting the pharmacy was their drug use. This discussion of drug use was apparently what prompted the *Lankford* court's holding that evidence of drug use was admissible to demonstrate lack of "propensity for veracity." Yet neither party urged this on the court.

to *Renneberg* the court had not required such testimony to justify the admission of evidence of drug use to impeach capacity.[13] Finally, no prior Washington cases dealt expressly with the admissibility of drug use to impeach a witness's character.[14]

This note examines the effect of *State v. Renneberg* on impeachment of testimonial capacity and character by introduction of evidence of drug use. The court's finding that both defendants placed their character in evidence potentially conflicts with prior case law and creates doubt as to the appropriate criterion for determining whether a defendant has placed his or her character in evidence. More importantly, the decision introduces two different criteria for determining the admissibility of evidence of drug use: (1) if the evidence is introduced to attack capacity, it must be accompanied by expert testimony; but (2) if it is introduced to attack character, it is admissible whenever the defendant's character has been placed in evidence. Unfortunately, such a differentiation is difficult to justify in light of the complex interrelationship between capacity and character, and the inability to determine the effect of drug use on capacity or character except on a case-by-case basis. A more tenable standard would preclude the introduction of drug use to attack either capacity or character, absent expert testimony establishing some discernible adverse effect of drug use upon capacity or character. Such a view, recognizing the highly prejudicial nature of evidence of drug use, would call for a case-by-case expert determination of the effect of drug use on a witness's capacity or character.

See Brief for Appellant at 33, Brief for Respondent at 75–78, Lankford v. Tombari, 35 Wn. 2d 412, 213 P.2d 627 (1950). Furthermore, "according to the jurors' own affidavits, the jury did not believe that any such thing [drug use] went on at the drug store." Brief for Respondent at 77–78. Thus it is plausible that any statement as to the "propensity for veracity" of a drug-using witness was unnecessary to the *Lankford* decision.

13. Dictum in State v. Robinson, 12 Wash. 491, 41 P. 884 (1895), established the admissibility of expert testimony regarding the effect of drug use on a witness's "mental faculties." *Id.* at 497, 41 P. at 886. The expert testimony was properly excluded in *Robinson*, however, because the expert witness had been asked his opinion as to the "veracity" of another witness. *Id.* The court's differentiation seems to go the proper scope of the expert's opinion testimony rather than any capacity/character dichotomy.

In State v. Smith, 103 Wash. 267, 174 P. 9 (1918), involving a prosecution for the sale of morphine, the court held that expert testimony *could be* introduced to prove the effect of the drug on the "mind and memory" of the user. *Id.* at 269, 174 P. at 9.

14. In State v. White, 10 Wash. 611, 613, 39 P. 160, 161 (1895), although admitting that it knew of no valid reason for excluding a drug-addicted witness, the court noted that "the authorities agree that the testimony of such persons is very unreliable, and juries should be carefully cautioned as to the credence to be given it [citations omit-

I. THE *RENNEBERG* COURT'S REASONING

Six justices[15] in *Renneberg* held evidence of drug use admissible to attack defendants' characters even though no expert testimony was introduced to establish the relation of drug use to defects in character. Stating no reason for the court's holding, the plurality simply suggested that, "if a defendant puts his prior conduct into issue by testifying as to his own past good behavior, he may be cross-examined as to specific acts of misconduct unrelated to the crime charged."[16] Without revealing its determining criteria, the *Renneberg* court then held the testimony of both husband and wife codefendants sufficient to place their characters in evidence.

In dictum the plurality, joined by the three justices dissenting from the court's holding,[17] modified *Lankford v. Tombari*[18] by stating that

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ted]." While it is evident that the court was referring to a drug-addicted witness's credibility, it is unclear whether it referred to capacity or character.

State v. Concannon, 25 Wash. 327, 65 P. 534 (1901), is a better example of the court at least implicitly considering the character, as opposed to the capacity, of a drug-using witness. One witness in *Concannon* was administered opium while on the stand when he could not proceed without it. *Id.* at 330, 65 P. at 535. While stating that habitual use of opium "is known to utterly deprave the victim and render him unworthy of belief," the supreme court left the question of the admissibility and credibility of a drug user's testimony to the trial court and jury, respectively. *Id.* at 335, 65 P. at 537. If "depravity" be considered a moral character trait rather than a physiological inability to perceive, remember or communicate, the *Concannon* court was speaking in terms of character rather than capacity.

The character of a drug-using witness also seemed at issue in Lankford v. Tombari, 35 Wn. 2d 412, 213 P.2d 627 (1950), in which respondent stated that his questions as to the witnesses' drug use were not related to their believability, but were merely an attempt to find out why they were at the pharmacy. Brief for Respondent at 77. *See* note 12 *supra*. His actual purpose, however, may have been to demonstrate the witnesses' collective character and attack it to discredit their credibility by showing why the witnesses "seemed 'afraid of questions as to why they were always at the drug store' and 'acted as though the defendant had something on them.' " Brief for Respondent at 75.

State v. Renneberg represents the first time the Washington court expressly differentiated in any meaningful way between a drug user's capacity and character.

15. Brachtenbach, Hunter, Stafford and Wright, JJ. (plurality opinion); Hale, C.J., and Hamilton, J. (concurring opinion).

16. 83 Wn. 2d at 738, 522 P.2d at 837 (1974), *quoting* State v. Emmanuel, 42 Wn. 2d 1, 14, 253 P.2d 386, 393 (1953).

17. Brachtenbach, Hunter, Stafford and Wright, JJ. (plurality opinion); Finley, Utter and Rosellini, JJ. (dissenting opinion).

18. 35 Wn. 2d 412, 213 P.2d 627 (1950). In *Lankford*, the court admitted evidence of drug addiction to attack veracity without requiring expert testimony. *See* note 12 *supra*.

In that *Renneberg*, a criminal case, modifies *Lankford*, a civil case, it seems apparent that the Washington Supreme Court did not wish to distinguish criminal from civil cases in this area of the law. Thus, any question raised by dictum in State v. Kimbriel, 8 Wn. App. 859, 510 P.2d 255 (1973), suggesting that *Lankford* might be inapplicable to a criminal proceeding, is laid to rest by *Renneberg*.

evidence of drug use is inadmissible to attack capacity unless expert testimony is introduced to demonstrate a causal connection between drug use and impairment of the witness's faculties.[19] Absent expert testimony, evidence of drug use is to be excluded from attacks on capacity because of its highly prejudicial nature.[20]

Justice Finley, dissenting from the holding, preferred to exclude in all cases evidence of drug use proffered to attack character.[21] To him, the plurality had "proven too much" by conceding that without expert testimony, evidence of drug use is to be excluded from attacks on witness' proclivity for truth-telling,"[22] yet failing to require the necessary showing of causation between addiction and lack of moral character. Furthermore, Justice Finley found the introduction of evidence of drug use to attack character to be overly prejudicial: "Unscientifically established admissions of this nature place before the jury evidence of unrelated misconduct which will inevitably tend to prejudice the defendant in the eyes of jurors."[23]

Because of the differentiation made between capacity and character in the *Renneberg* opinion and the rule that character can be impeached only after being placed in evidence, it is critical to determine precisely when a defendant's character is in evidence. Unfortunately, *Renneberg* confuses any determination as to the point at which a defendant's testimony is sufficient to place his or her character in evidence.

19. 83 Wn. 2d at 737, 522 P.2d at 836. Concurring Chief Justice Hale, joined by Justice Hamilton, objected to this dictum and would leave *Lankford* "well enough alone." *Id.* at 743, 522 P.2d at 839. Hale emphasized that since evidence of drug addiction was clearly admissible in the instant case to attack the defendants' characters, there was no need to rule on its admissibility regarding their capacity. *Id.* at 741, 522 P.2d at 838. He also criticized the court's transformation of the admissibility of evidence of drug addiction from a question of law (uniformly determined by the trial court) to a question of fact (determined on a case-by-case basis by the trier of fact), suggesting that such a rule would produce lack of uniformity in trial court rulings. *Id.*

20. Writing for the plurality, Justice Brachtenbach stated:

> In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds [*sic*] of the average juror. Additionally there is no proof before the court connecting addiction to a lack of veracity. If such medical or scientific proof were made, it might well be admissible as relevant to credibility. Absent such proof its relevance on credibility or veracity is an unknown factor while its prejudice is within common knowledge.

Id. at 737, 522 P.2d at 836.

21. *Id.* at 748–49, 522 P.2d at 842, and cases cited therein.

22. *Id.* at 748, 522 P.2d at 842.

23. *Id.* at 748–49, 522 P.2d at 842.

II. PLACING CHARACTER "IN EVIDENCE"

In *Renneberg,* defendant wife testified as to her work and college experience, and her participation in a beauty pageant, glee club, drill team, pep club and science club.[24] Defendant husband testified[25]

> as to his occupation as a professional photographer, as to his physical dress on the day in question, as to his somewhat lengthy engagement and subsequent marriage to the defendant wife whose character had been so vividly pictured, as to his working in his garden at home and as to the planned attendance at a family barbecue on the day of the alleged crime.

The *Renneberg* court concluded without explanation that both defendants placed their characters in evidence by so testifying. This conclusion raises interpretive problems regarding the interrelationship between *Renneberg* and *State v. Bauman,*[26] in which the court held that a defendant could testify to the events leading to and surrounding the crime without placing his or her character in evidence, and therefore without fear of cross-examination as to unrelated misconduct.[27] These interpretive shortcomings in turn lead to constitutional problems.

The *Renneberg* court's failure to explain how it determined that defendant husband had placed his character in evidence suggests that the court did not adequately consider *Bauman.* That *Bauman* was modified by *Renneberg* is implied by the court's intimation that the husband's character was placed in evidence because the wife placed *her* character in evidence. In describing the husband's testimony, the court stated that he testified about his lengthy engagement and marriage "to the defendant wife *whose character had been so vividly pictured . . . .*"[28] This language implies a "guilt by association" analysis by which one codefendant may waive or secure another's evidentiary rights. Fundamental fairness requires that the introduction of character evidence by one codefendant not be imputed to the other.

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24. *Id.* at 738, 522 P.2d at 836.
25. *Id.*
26. 77 Wn. 2d 938, 940, 468 P.2d 684, 685 (1970).
27. *Bauman's* chief attribute was the consistency it brought to an area of the law that previously lacked any tenable criterion to determine the permissible scope of a defendant's testimony. *Compare* State v. Emmanuel, 42 Wn. 2d 1, 253 P.2d 386 (1953), *with* State v. Hollister, 157 Wash. 4, 288 P. 249 (1930).
28. 83 Wn. 2d at 738, 522 P.2d at 836 (emphasis added).

The importance of retaining *Bauman* or establishing a similarly definitive standard is heightened by constitutional problems that arise in the absence of such a rule.[29] In *State v. Hill*,[30] decided just two months prior to *Renneberg*, the Washington Supreme Court reversed defendant's conviction because the trial court had erroneously ruled that two prior convictions that had been reversed and dismissed on appeal were admissible to impeach the defendant should he take the stand.[31] After noting that the defendant viewed the introduction of such evidence as so prejudicial that he decided not to testify, the court stated:[32]

> [Defendant] was entitled by constitutional and statutory provision to give his version of the events if he wished. The trial court's unfortunate ruling, which would have saddled the defendant's testimony with the taint of the two reversed convictions, prejudicially deprived him of a free and voluntary choice in the matter and literally compelled him to remain silent.

Similarly, a defendant with highly prejudicial misconduct in his or her background is "literally compelled to remain silent" if there is a substantial ambiguity as to the events to which he or she can testify without fear of raising the past misconduct. The ambiguity inherent in *Renneberg* is potentially sufficient to violate the principles of *State v. Hill*.[33]

Any interpretation of *Renneberg* which fosters such an ambiguity should be avoided if possible. A more acceptable explanation is that the court retained the *Bauman* rule by finding that each defendant

29. Both the state and federal constitutions guarantee a defendant's right to refrain from being a witness against him or herself. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Conversely, the state constitution and a state statute guarantee a defendant's right to testify on his or her own behalf. WASH. CONST. amend. 10; WASH. REV. CODE § 10.52.040 (1974).

30. 83 Wn. 2d 558, 520 P.2d 618 (1974).

31. Under the Washington rule, the defendant should have been able to testify without cross-examination regarding past criminal proceedings not resulting in conviction. *See* WASH. REV. CODE § 5.60.040 (1974) (civil cases); *id.* § 10.52.030 (criminal cases); State v. Mack, 80 Wn. 2d 19, 490 P.2d 1303 (1971); State v. Tate, 2 Wn. App. 241, 469 P.2d 999 (1970).

32. 83 Wn. 2d at 565, 520 P.2d at 621.

33. Although the *Renneberg* court failed to address this constitutional issue, it seems unlikely that the court was unaware of it. *Hill* was decided less than two months prior to *Renneberg*. Moreover, Justice Finley makes note in his dissent of the possible constitutional ramifications of the *Renneberg* holding in light of *Hill*. *Renneberg*, 83 Wn. 2d at 745 n.3, 522 P.2d at 840 n.3.

individually placed his or her own character in evidence.[34] Defendant wife clearly surpassed the bounds of *Bauman* by testifying as to her lifetime activities. Defendant husband, by testifying as to his engagement and marriage, also testified to events clearly unrelated to the circumstances surrounding the crime and thus outside the *Bauman* standard.[35] This interpretation retains the *Bauman* rule and prevents infringement of a defendant's constitutional rights to testify or remain silent. It also allows a defendant some foreknowledge of the permissible scope of testimony: If the defendant testifies only to the events leading to and surrounding the crime, only his or her capacity may be impeached; any additional testimony, however, as to unrelated past conduct or behavior, opens the door to character impeachment.[36]

III. CREDIBILITY IMPEACHMENT OF A DRUG-USING WITNESS AFTER *RENNEBERG*

Assuming the court properly determined that both defendants placed their characters in issue, *Renneberg* reveals further shortcomings concerning attacks on a drug user's capacity and character. The immediate effect of the plurality opinion is to introduce two different

34. While it is fairly clear that testimony as to the husband's engagement and marriage was outside the bounds established by *Bauman*, evaluation of the remainder of the husband's testimony is difficult because of the *Renneberg* opinion's brevity. The court states that the husband testified about his occupation, his garden work and his planned attendance at a family barbecue. *See* note 25 and accompanying text *supra*. If defendant husband was attempting to characterize himself as a hard-working, industrious member of the community, whose activities included gardening and attending family outings, the court would be justified in holding that this testimony contributed to the determination that the defendant had placed his character in evidence. If, on the other hand, this testimony was an integral part of the husband's description of the events of the day in question, and if the court was utilizing the *Bauman* rule, it likely played no role in the court's determination of whether the defendant had placed his character in evidence.

35. After describing the manner in which defendant husband had placed his character in evidence, the *Renneberg* plurality concluded unequivocally: "The state was entitled to complete the tapestry with his admitted drug addiction." 83 Wn. 2d at 738, 522 P.2d at 836.

36. Although refusing to testify may seem a viable alternative for defendants faced with the *Bauman-Renneberg* ambiguity, this course of action is also fraught with difficulties. For example, a poll conducted in 1958 by the American Institute of Public Opinion revealed that 71% of those questioned indicated that the defendant's exercise of the right to remain silent was an indication of guilt. H. MEYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 21 (1959). For a criticism of the poll's validity, however, see Note, Griffin v. California: *Comment on an Accused's Failure To Testify Prohibited by the Fifth Amendment*, 70 DICK. L. REV. 98, 115 (1965). *But see* Note, *To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J. LAW & SOCIAL PROBLEMS 215, 221 n.47 (1968). In another survey, 94% of de-

criteria for determining the admissibility of evidence of drug use. Evidence introduced to attack *capacity* must be accompanied by expert testimony;[37] evidence introduced to attack *character* must be preceded by the defendant placing his or her character in evidence. *Renneberg* thus highlights the trial court's determination of whether drug use is sought to be admitted to impeach capacity or character. If character has been placed in issue, the defendant may still object to the introduction of evidence of drug use, arguing that the evidence goes to capacity rather than character. If successful, such an objection will make expert testimony necessary. On the other hand, if a defendant does not put his or her character in evidence, any attempt on cross-examination to introduce evidence of drug use must be both related to the issue of capacity and accompanied by expert testimony.

The *Renneberg* court's analysis is open to several criticisms. Initially, the plurality fails to justify its differing treatment of capacity and character, both of which bear on credibility.[38] After establishing in dictum the prejudice and irrelevance of evidence of drug use to a defendant's capacity,[39] the plurality's unsubstantiated holding that such evidence is neither irrelevant nor prejudicial to an attack on character lacks any rational foundation.

The plurality also fails to recognize contemporary views of the effect of drug use on capacity or character. Most medical authorities

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fense attorneys questioned believed that jurors inferred guilt from the defendant's failure to testify despite the absence of comment on the defendant's silence. When asked if there is a greater probability of a defendant's acquittal if he or she testifies, 88% of all defense attorneys and 89% of all trial judges answered in the affirmative. When asked in what percentage of cases a defendant is convicted if he or she fails to testify, the trial judges answered 86%, and the defense attorneys 74%. *Id.* at 221–22.

37. *Renneberg* did not expressly involve attacks on competency. However, since *Renneberg* requires expert testimony to attack capacity, and the same type of evidence is introduced to attack competency, *see* note 5 *supra,* the case impliedly requires expert testimony to attack competency as well. Although earlier Washington cases established the admissibility of expert testimony to attack competency, *see* State v. Wyse, 71 Wn. 2d 434, 429 P.2d 121 (1967); State v. Moorison, 43 Wn. 2d 23, 259 P.2d 1105 (1953); McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868 (1970), *Renneberg* is the first Washington case that *requires,* albeit impliedly, such evidence as a prerequisite to any such attack.

38. The court suggested that "the alternative *and more restrictive* ground of character impeachment dictates admissibility here." 83 Wn. 2d at 737, 522 P.2d at 836 (emphasis added). What this means is most uncertain. Arguably, the court meant that character impeachment is more restricted in that it is available only after the requisite *type* of testimony by defendant, *i.e.*, testimony as to character. Yet this should have little bearing on the requirement that the impeaching evidence's probative value be maximized, and its prejudicial quality minimized. As a practical matter, the evidence would be no less prejudicial to the jury if introduced to attack character rather than capacity.

39. *See* note 20 *supra.*

agree that the effect of a drug on one's capacity depends on a number of variables, including the type of drug and the length and frequency of usage.[40] For example, while a cocaine addict suffers marked physical and mental deterioration,[41] an opium addict's abilities to perceive, remember and communicate are at a maximum when under the influence of the drug.[42] A small dose of a barbiturate or bromide ingested by a nonaddict will produce calm and sleep, and not affect the user's credibility.[43] If larger doses are ingested over a period of time, the "intellectual processes are disturbed, thought and speech are impaired, perception is dulled and memory is faulty."[44]

Similarly, a drug user's character traits may depend on a variable factor, *i.e.*, the type of underlying personality disorder from which the drug user suffers.[45] One commentator, after noting that a large number of addicts manifest psychopathic or psychoneurotic personality types, states:[46]

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40. *See* Davidson, *Testimonial Capacity*, 39 B.U.L. REV. 172 (1959); Juviler, *supra* note 5; Mack, *Forensic Psychiatry and the Witness—A Survey*, 7 CLEV.-MAR. L. REV. 302 (1958); Comment, *Testimonial Reliability of Drug Addicts*, 35 N.Y.U.L. REV. 259 (1960) [hereinafter cited as *Testimonial Reliability*]; Note, *Drug Addiction Held To Go to Credibility Rather Than To Determine Competency of Witness*, 1966 UTAH L. REV. 742.

41. *Testimonial Reliability*, *supra* note 40, at 269.

42. *See* A.B.A.–A.M.A. JOINT COMMITTEE ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE? 46–50 (1961), and medical authorities cited therein.

43. *Testimonial Reliability*, *supra* note 40, at 271, and medical authorities cited therein.

44. L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 157 (2d ed. 1958), *quoted in Testimonial Reliability*, *supra* note 40, at 271.

45. A.B.A.–A.M.A. JOINT COMMITTEE ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE? 51 (1961); L. KOLB, DRUG ADDICTION: A MEDICAL PROBLEM 38 (1962); Chein & Rosenfeld, *Juvenile Narcotics Use*, 22 LAW & CONTEMP. PROB. 52, 59 (1957); Clausen, *Social and Psychological Factors in Narcotics Addiction*, *id.* at 34, 43; Winick, *Narcotics Addiction and Its Treatment*, *id.* at 9, 19; *Testimonial Reliability*, *supra* note 40, at 273–76.

46. *Testimonial Reliability*, *supra* note 40, at 276 (citations omitted). This comment provides a well-documented study of the effects of differing types of drug use on an individual's capacity and character, and of the differing types of personality disorders which may affect a drug user's credibility.

Another author summarizes credibility-affecting drugs as follows:

> There are five major categories of drugs that the courts normally classify as narcotics:
>
> a. *Opiates*. Opium, heroin, morphine, and other synthetic morphine substitutes are included in the opiate group. These drugs have the effect of depressing some parts of the central nervous system while stimulating others. The use of these drugs by a nonaddict produces inability to concentrate, reduced visual acuity, and general lethargy. The body quickly builds up a tolerance to the opiate so that the user becomes physically dependent on the drug. Abstinence by the addict brings on severe withdrawal symptoms. Prolonged use of opium or its derivatives produces no direct physical or mental deterioration.

> Although the psychoneurotic is in relatively close touch with reality and knows the difference between truth and falsehood, a consensus of medical opinion is to the effect that he is much more likely to lie than a normal person. . . . Though most of his lying constitutes a benign, defensive or compensatory feature of his neurosis, he may, nevertheless, resort to more malignant lying when his behavior is motivated by hostility . . . .
>
> Psychopaths . . . often are monstrous liars. In fact, medical consensus is that if a witness is a psychopath, there is a likelihood that he will falsify on the stand. It is in this group that the most dangerous of all witnesses, the pathological liar is encountered.

That author concludes: "Because of the psychological antecedents of addiction, regardless of the particular drug, addicts may be prone to lie."[47] Thus a drug user's character, like capacity, is dependent on variable factors. These variables render any generalizations concerning a drug user's capacity or character suspect.

Compounding the complexity of the situation is the difficulty of demonstrating some causality between drug use and a particular individual's incapacity or lack of character. The difficulty lies in demonstrating whether a personality disorder is capacity- or character-related, and determining whether the disorder led to the drug use, or the drug use to the personality disorder.[48] The complexity of the situation demands the aid of expert testimony.

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b. *Cocaine.* This drug is a powerful stimulant causing euphoria and hallucinations. The body does not build up a tolerance to the drug, so there is no physical addiction. The effect of cocaine on a nonaddict is to produce an unreal or dream world. Long-term use of cocaine causes mental and physical deterioration; visual, auditory, and reasoning powers are impaired, and often the cocaine addict becomes paranoiac.

c. *Marihuana.* This drug is like cocaine in that it is not physically addicting. It acts on the central nervous system, but its effect is determined by the personality of the individual user. Marihuana can act as both a depressant and a stimulant causing hallucination, stupor, and in some cases, true psychosis.

d. *Barbiturates and bromides.* These drugs act as depressants on the central nervous system. A small dose produces calmness and sleep, while a large dose can produce the effects of intoxication. Extended use of barbiturates or bromides impairs the sensory, motor, and reasoning faculties of the individual. Hallucinations and paranoiac behavior are typical symptoms of the barbiturate addict.

e. *Amphetamine.* Amphetamine is a powerful stimulant often taken to keep the user alert. But the ability to perceive and relate is dependent upon the size of the dose taken. Overdose or repeated medication may cause dizziness, delirium, hallucinations, and vasomotor disturbances.

Note, *Drug Addiction Held To Go to Credibility Rather Than To Determine Competency of Witness,* 1966 UTAH L. REV. 742, 744 n.14 (citations omitted).

47. *Testimonial Reliability, supra* note 40, at 277.

48. *See* note 45 *supra.*

In effect a majority of the *Renneberg* court acknowledged the modern medical view insofar as capacity is concerned. By requiring expert testimony as a prerequisite to introduction of evidence of drug use to attack capacity, the majority rejected the reasoning of cases conclusively linking drug use to incapacity.[49] In its next breath, however, the court ignored its own dictum by holding that drug addiction conclusively reflects on a witness's character. On the one hand, a trial court is to consider all possible variables in determining the admissibility of evidence of drug addiction to attack capacity; on the other hand, it need not consider any extraneous matters in determining the admissibility of evidence of drug addiction to attack character. In light of the differing factors which may alter the effect of drug use on a particular witness's testimonial powers, the court's position regarding attacks on character is untenable.

The dissent's position is also difficult to justify. After agreeing with the plurality that evidence of drug use is both highly prejudicial and irrelevant to a witness's capacity, the dissent utilized both factors to support its absolute prohibition of such evidence to attack character. This view, however, assumes that the prejudice and irrelevance of evidence of drug addiction to a witness's character will always outweigh the probative value of such evidence. In short, the dissent advocated a conclusive rule of law prohibiting evidence of drug addiction to attack character, while the plurality advocated a similar rule admitting such evidence. Both views suffer from a failure to consider all factors which may affect a drug user's credibility.

IV. A SUGGESTED APPROACH

As an alternative to the approaches adopted by the plurality and dissent, a more rational approach would require expert testimony as a

49. *See, e.g.*, State v. Concannon, 25 Wash. 327, 65 P. 534 (1901) (the "depravity" theory: drug-addicted witnesses are depraved and unworthy of belief); State v. Fong Loon, 29 Idaho 248, 158 P. 233 (1916) (the "dream state" theory: drug-addicted witnesses enter a "dream state" where they are unable to differentiate between illusion and reality, and therefore are notorious liars); Chicago & N.W. Ry. Co. v. McKenna, 74 F.2d 155 (8th Cir. 1934) (endorsing *Fong Loon's* "dream state" theory); Effinger v. Effinger, 48 Nev. 209, 239 P. 801 (1925) (evidence admitted establishing that the witness was an addict, and that addicts as a class are unworthy of belief); Beland v. State, 217 S.W. 147 (Tex. Crim. App. 1919) (evidence of drug use admissible to aid jury in determining a witness's mental condition). Chief Justice Hale and Justice Hamilton, concurring in part in *Renneberg*, suggested reliance on these older cases. *See* note 15 *supra*.

prerequisite to admission of evidence of drug use to attack *either* capacity *or* character.[50] In light of the highly prejudicial nature of evidence of drug use,[51] the fluctuating relevance of drug use to either capacity or character,[52] and particularly the complex interrelationship of a witness's personality, drug use, capacity and character,[53] such a rule is the only means of reasonably determining the effect of drug use on an individual's credibility. Absent expert testimony establishing the relevance of drug use to capacity or character, evidence of that use should be precluded.[54]

This solution to the problem posed by *Renneberg* is open to three criticisms. The first is that this approach would make the issue of a drug-using witness's credibility a "battle of the experts," unduly protracting the trial by introducing a collateral issue.[55] Such an argument fails to consider, however, that the introduction of expert testimony is a matter within the trial court's discretion.[56] Judicious exercise of that discretion can alleviate most of the shortcomings of using expert testi-

50. Such a rule would comport with the accepted view as to the admissibility of expert testimony generally:

> If the inferences to be drawn from physical facts are not a matter of such general knowledge as to be within the common experience of laymen, opinion evidence by a *qualified* expert is admissible to assist the jury in the proper understanding of the physical facts. [Citations omitted.] ". . . If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion. There are many matters, however, about which the triers of fact may have a general knowledge, but the testimony of experts would still aid in their understanding of the issues. . . ." [Citation omitted.]

Gerberg v. Crosby, 52 Wn. 2d 792, 795, 329 P.2d 184, 185–86 (1958), *quoting* Ladd, *Expert and Other Opinion Testimony,* 40 MINN. L. REV. 437, 443 (1956). *See also* Knight v. Borgan, 52 Wn. 2d 219, 324 P.2d 797 (1958); MCCORMICK, *supra* note 5, at § 13.

51. *See* note 20 *supra.*

52. *See* notes 40–48 and accompanying text *supra.*

53. *Id.*

54.
> [T] he probative value of the evidence must be weighed and balanced against any prejudice which it may entail; this is to say, evidence, however competent, is rarely admissible when its relevancy is entirely engulfed by the prejudice which it may engender.

State v. Golladay, 78 Wn. 2d 121, 142, 470 P.2d 191, 204–05 (1970). This rule applies despite the normally broad discretion vested in the trial court to determine both the scope of cross-examination and the admissibility of relevant evidence. *Id.*

55. For an excellent discussion of this problem, see People v. Williams, 6 N.Y.2d 18, 27, 159 N.E.2d 549, 554, 187 N.Y.S.2d 750, 757 (1959); *see also* McCormick, *Science, Experts and the Courts,* 29 TEXAS L. REV. 611 (1951); Myers, *"The Battle of the Experts": A New Approach to an Old Problem in Medical Testimony,* 44 NEB. L. REV. 539 (1965).

56. State v. Richardson, 197 Wash. 157, 84 P.2d 699 (1938); State v. Smails, 63 Wash. 172, 115 P. 82 (1911); MCCORMICK, *supra* note 5, at §§ 13–18.

mony. For instance, the trial court can determine the necessity of expert testimony in light of the importance of the drug-using witness's testimony. If the testimony relates to a clearly collateral issue, questions concerning the witness's drug use need not be considered; the probative value of such evidence is minimal and irrelevant to the principal issues of the case. If the testimony is vital to a party's case, there is more reason to consider the effect of drug use on the witness's credibility. While this approach will require the court to determine the relative importance of a witness's testimony, such a determination is more within the province of a court than deciding if drug use has affected a witness's capacity or character. Moreover, the trial court can limit the number of experts testifying for each party[57] or call an independent expert witness to consider the drug-user's credibility.[58] By exercising its discretion in such a manner, the trial court can greatly reduce the possibility of an unmanageable "battle of the experts" while assuring maximum access to all facts relevant to a drug-using witness's credibility.

A second objection to the proposed solution might be that the ex-

57. Power to limit the number of expert witnesses is part of the trial court's general discretionary power over admission of expert testimony. *See* State v. Butler, 27 N.J. 560, 143 A.2d 530, 553 (1958) (court suggests three alternatives: (1) a court-appointed, impartial expert; (2) one expert selected by each party, and one chosen by the court, for a joint examination of the witness; and (3) an independent expert engaged by each party); People v. Hudson, 341 Ill. 187, 173 N.E. 278, 279 (1930) (court suggests that three experts, one chosen by each party and one chosen by the court, examine the witness); Note, *The Mentally Abnormal Witness: Challenges to his Competence and Credibility*, 13 RUTGERS L. REV. 330, 344 (1958).

An expert is required to possess special skills beyond those of the average person. State v. J-R Distributors, Inc., 82 Wn. 2d 584, 512 P.2d 1049 (1973); State v. Nelson, 72 Wn. 2d 269, 432 P.2d 857 (1967). The competency of the expert witness is a matter within the trial court's discretion, and is subject to review only for manifest abuse. State v. J-R Distributors, Inc., *supra;* State v. Nelson, *supra;* State v. Liles, 11 Wn. App. 166, 521 P.2d 973 (1974); State v. Parker, 9 Wn. App. 970, 515 P.2d 1307 (1974). In the case of drug use a medical doctor, psychiatrist or any other person experienced in dealing with drug users would potentially qualify as an expert witness.

58. "The existence of the judge's power to call witnesses generally and expert witnesses particularly seems fairly well recognized in this country." MCCORMICK, *supra* note 5, at § 17. *See generally* Myers, *supra* note 55; Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases,* 48 MICH. L. REV. 961, 964 n.8 (1950); Note, *Judicial Authority to Call Expert Witnesses,* 12 RUTGERS L. REV. 375 (1957). This power has been recognized by the Washington court regarding the valuation of real property by expert witnesses called by the trial court. Gilmartin v. Stewart Inv. Co., 43 Wn. 2d 289, 261 P.2d 73 (1953); Ramsey v. Mading, 36 Wn. 2d 303, 217 P.2d 1041 (1950).

On introduction of expert testimony regarding drug use, see generally Juviler, *supra* note 5; Weihofen, *Testimonial Competence and Credibility,* 34 GEO. WASH. L. REV. 53 (1965); Note, *Psychiatric Evaluation of the Mentally Abnormal Witness,* 49 YALE L.J. 1324 (1950).

tent of medical and scientific knowledge as to the effect of drug use on one's credibility is so limited that expert testimony is simply not helpful.[59] Yet this objection apparently did not persuade the *Renneberg* court with respect to impeachment of a defendant's capacity, and has not precluded the introduction of similar expert testimony to determine the issue of criminal insanity.[60]

Finally, the suggested approach may be criticized because, if a defendant has not placed his or her character in issue, experts still must determine whether evidence is introduced to attack the defendant's capacity or character.[61] This criticism is refuted by noting that this shortcoming will inhere in *any* approach which retains the capacity/character dichotomy, because an attack on character requires that the defendant have first placed his or her character in evidence, while an attack on capacity does not. The only means of avoiding this predicament is to abrogate the capacity/character dichotomy—an action which would unjustifiably deter a defendant from taking the stand.[62] Furthermore, the problem can be minimized by interpreting "capacity" as narrowly as possible to include only the physiological traits of perception, memory and communicative ability, and interpreting "character" broadly to include all other factors that might affect a drug-using witness's credibility. Thus, unless expert testimony clearly identifies the evidence of drug use as relating to capacity, the admissibility of such evidence must be preceded by: (1) the defendant having placed his or her character in evidence according to the *Bauman* rule; and (2) expert testimony establishing a causal link between the drug use and the witness's character.[63]

59. *See* Tonkovich v. Department of Labor & Indus., 31 Wn. 2d 220, 195 P.2d 638 (1948); McCormick, *supra* note 5, at § 13.

60. *See, e.g.*, State v. Tyler, 77 Wn. 2d 726, 466 P.2d 1200 (1970), *vacated in part*, 408 U.S. 937 (1972); State v. Welsh, 8 Wn. App. 719, 508 P.2d 1041 (1973); State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971).

61. If the defendant's character has been placed in evidence, under the suggested approach there will be no need to determine whether the evidence of drug addiction goes to capacity or character. In either case all that will be necessary is expert testimony establishing the relevance of drug use to incapacity or a lack of character.

62. Were there no capacity/character dichotomy, and therefore no requirement that the defendant place his or her character in evidence prior to introduction of evidence of an unrelated act of misconduct, a defendant with some highly prejudicial misconduct in his or her background would be loathe to testify even to events surrounding the alleged crime. To testify would be to expose oneself to cross-examination as to the highly prejudicial matter, regardless of the scope of the testimony.

63. The court could require that a party demonstrate the relevance of drug use to incapacity or a lack of character by a preponderance of the evidence, which is the burden of proof utilized in criminal insanity. *See* State v. Tyler, 77 Wn. 2d 726, 466 P.2d 120 (1970) *vacated in part*, 408 U.S. 937 (1972); State v. Collins, 50 Wn. 2d 740, 314 P.2d 660 (1957); State v. Putzell, 40 Wn. 2d 174, 242 P.2d 180 (1952).

While no approach will be faultless, the requirement that expert testimony be required to connect evidence of drug use to either capacity or character seems preferable to that proposed by any of the three opinions in *Renneberg*. The suggested approach not only recognizes accepted views regarding the effect of drug use on credibility, but also insures that the defendant may testify without fear of cross-examination as to an unduly prejudicial matter which may have little bearing on his or her credibility in the matter being litigated. Ultimately this approach accommodates what should be the court's objectives: encouragement of all testimony which may aid the trier of fact in its deliberation, with minimum prejudice to the defendant.

V. CONCLUSION

Several conclusions can be drawn as to the impact of *State v. Renneberg* on Washington evidence law. The case can and should be interpreted as retaining the *Bauman* rule, allowing a defendant to testify concerning the events leading to and surrounding the crime without fear of cross-examination as to unrelated misconduct. This view minimizes the possibility of impairment of a defendant's constitutional right to freely decide to remain silent or testify. It also provides trial courts some guidelines in determining whether a defendant has placed his or her character in issue.

The *Renneberg* court's dictum, requiring expert testimony as a prerequisite to introduction of evidence of drug use to attack capacity, properly recognizes both the highly prejudicial nature of evidence of drug use and the fluctuating relevance of drug use to a lack of credibility. Unfortunately the court's holding, requiring only that the defendant's character be placed in issue prior to introduction of evidence of drug use, fails to recognize either of these factors. A more desirable approach would require expert testimony to establish the effect of drug use on a witness's capacity or character and, absent such a showing, preclude the introduction of evidence of drug use because of its highly prejudicial nature. This approach recognizes the highly prejudicial nature of evidence of drug use, but allows the introduction of such evidence when it demonstrably bears on the witness's capacity or character.

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