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Impeachment of a Witness's Character in New Mexico

Jonathan B. Sutin

IMPEACHMENT OF A WITNESS'S CHARACTER IN NEW MEXICO

By statute, in New Mexico, the character of a witness may be impeached by showing either (1) that he was once convicted of a felony or misdemeanor,[1] or (2) that he has a reputation of bad moral character,[2] or both. Also, the Supreme Court of New Mexico has adopted the common law rule that a witness may be impeached by showing his prior specific misconduct not the subject of a conviction.[3]

Only in criminal actions, with the exception of one civil action,[4] have questions concerning these three methods of character-impeachment arisen. Yet neither the character-impeachment statutes, nor the common law rule, limit impeachment of a witness's character to criminal cases.[5]

These methods of impeachment, as they are allowed today in New Mexico, are outdated. In criminal actions, and even more so in civil actions, the usual purpose of character-impeachment can be only to prejudice the witness in the eyes of the judge or jury. Only when it may be reasonably inferred from the impeachment that the witness is likely to lie on the witness stand should character-impeachment be allowed. Our statutes and case law, as they stand, do not reasonably limit the extent to which a witness's character may be impeached, but, antithetically, unreasonably extend such impeachment to prejudicial limits.

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1. N.M. Stat. Ann. § 20-2-3 (1953), set out in text, p. 578 *infra*.

2. N.M. Stat. Ann. § 20-2-4 (1953), partially set out in text, p. 591 *infra*.

3. Discussion of impeachment by showing prior misconduct begins p. 583 *infra*. For articles on character-impeachment in other jurisdictions, see Oppenheim, *The Admissibility of Character Evidence for the Purpose of Impeaching Witnesses in Criminal Prosecutions*, 12 Tul. L. Rev. 628 (1938) (Louisiana); Kauffman, *Impeachment and Rehabilitation of Witnesses in Maryland*, 7 Md. L. Rev. 118 (1943); *Note, Impeachment and Rehabilitation of Witnesses in Minnesota*, 36 Minn. L. Rev. 724 (1952); Bishop, *Impeachment and Rehabilitation of Witnesses by Character Evidence in Missouri*, 20 Mo. L. Rev. 142, 273 (1955).

4. Mead v. O'Conner, 66 N.M. 170, 344 P.2d 478 (1959). The action was based on assault. The court, 66 N.M. at 174, 344 P.2d at 480-81, said: "It is also certain that the credibility of a witness may be impeached by *general evidence* of bad moral character. . . . It is certain that bad moral character of a witness may be shown by eliciting from the witness specifies acts of misconduct." (Emphasis the court's.)

5. The statutes, *supra* notes 1 and 2, contain no language limiting statutory impeachment to either civil or criminal actions. And a fair implication drawn from *Mead v. O'Conner, supra* note 4, at 170, 344 P.2d at 478, is that the statutory and the common law modes of impeachment may be employed in civil actions. *O'Conner* is a civil case. The court indicates that it would have allowed the tendered character-impeachment testimony had the testimony been non-collateral and material. *Id.* at 174, 344 P.2d at 480-81 *Cf.* Vargas v. Clauser, 62 N.M. 405, 311 P.2d 381 (1957), a civil action, wherein plaintiff sought to introduce into evidence the defendant's plea of guilty to a traffic offense. The purpose for which this evidence was offered is not given in the opinion, but it is unlikely that it was offered to impeach. The court said, 62 N.M. at 409:

> [A] plea of guilty and conviction based thereon is admissible under certain circumstances where the same act is involved in both criminal and civil proceedings.

I

PROOF OF SPECIFIC MISCONDUCT: PRIOR CONVICTIONS

In General

Any person convicted of an infamous crime was, at common law, incompetent to testify as a witness.[6] Incompetency was made a part of his punishment; he was forever without honor and unworthy of belief. This "primitive absolutism"[7] has been abolished, however, almost universally. Yet proof of conviction of crime to impeach credibility is allowed by the case law or statutes of nearly all jurisdictions in this country, including New Mexico.[8] Jurisdictions differ, however, on the types of crimes that may be proven. Some jurisdictions allow only the common law "infamous crimes"; others allow "felonies," "felonies and misdemeanors," or "any crime."[9]

The reasoning that underlies this method of impeachment has been expressed:

> ' . . . when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit'[10]

This reasoning has been attacked as unsound for two reasons: (1) Proof of

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6. "This strict rule of law included not only those crimes pertaining to dishonesty but to all infamous crimes under the laws of England, generally enumerated as treason, felony, and the *crimen falsi.*" Ladd, *Credibility Tests—Current Trends,* 89 U. Pa. L. Rev. 166, 174 (1940).

7. McCormick, Evidence § 43, at 89 (1954). In New Mexico, under N.M. Stat. Ann. § 20-1-8 (1953), no witness can be disqualified on account of a common law disqualification.

8. See 3 Wigmore, Evidence § 987, at 572-617 (3d ed. 1940), listing the law of each jurisdiction. In New Mexico, N.M. Stat. Ann. § 20-1-8 (1953), all disqualifications at common law may be used for the purpose of affecting the credibility of a witness.

9. McCormick, Evidence § 43, at 90 (1954). See Note, 42 B.U.L. Rev. 92 (1962), which sets forth the law on prior convictions in the New England jurisdictions.

10. Ladd, *supra* note 6, at 175-76, quoted by Dean Ladd from an opinion of Justice Holmes in the case of Gertz v. Fitchburg Ry. Co., 137 Mass. 77, 78 (1884). Or, perhaps, the argument could be made as it was made to the jury in the case of People v. Terry, 21 Cal. Rep. 1859, 370 P.2d 985 (1962), at 1000:

> The argument was made that since appellant had been previously convicted of robbery and robbery is stealing: 'it also involves this concept of honesty, so that a thief and liar are generally the same thing. You show me a thief and I will show you a liar, because it involves this concept of honesty.'

a felony or misdemeanor is not in itself a sufficient basis for the inference that the witness has a bad character and thus will lie. In order to infer lack of veracity from conviction of crime, the details and nature of the criminal act would have to be shown.[11] But in most jurisdictions, including New Mexico, the details and circumstances of the crime may not be shown on cross-examination.[12] Without such circumstances and details it is unreasonable to "take for granted that a man's conviction for a crime does have some bearing upon his ability to tell, 'the truth, the whole truth and nothing but the truth.' "[13] (2) Many crimes have no bearing upon the truthfulness of the offender. Consider the following example: Two men argue; one calls the other a liar. The latter, rather than have a stain upon his reputation for truth, offers to duel, risks his life to save his reputation, and kills the name-caller.[14] It is irrational to infer from this killing that the accused, who has defended his reputation for truth, will lie on the witness stand. Likewise, it is unreasonable to infer that each and every convicted offender is likely to be untruthful in the courtroom.

Thus, those opposed to the theory argue that the proof of crimes should be limited to proof of crimes involving dishonesty or false statement—perjury and forgery, for example—since only such crimes bear directly upon a witness's tendency to tell the truth.[15]

Moreover, if the accused be the witness,[16] proof of *any* crime to impeach

11. Ladd, *supra* note 6, at 177-78.

12. See State v. Roybal, 33 N.M. 540, 273 Pac. 919 (1928); State v. Conwell, 36 N.M. 253, 13 P.2d 554 (1932). Extrinsic evidence is generally not permissible to show particular acts of misconduct to prove the bad character of a witness. 3 Wigmore, Evidence § 979, at 532-38 (3d ed. 1940). Proof of conviction of crime, however, is an exception to this rule. The examiner is almost everywhere permitted to prove the fact of conviction by the record of conviction. In New Mexico, under § 20-2-3, if the witness refuses to answer or denies the fact of conviction, the examiner may introduce the record in evidence. The reasons for excluding extrinsic evidence, when particular acts are to be shown, are absent when a conviction is to be proven. There is no risk of confusion of issues, no danger of unfair surprise. A witness's convictions are normally few in number; the witness usually knows of what crimes he has been convicted. The record is quick, simple, and reliable proof, because it is held to be conclusive of the fact of conviction.

13. This quote is from an article by Spencer, "So You're Going to Be a Witness," 67 Case & Comment 16, 22 (Jan.-Feb. 1962). The paragraph from which the quote is taken reads as follows:

> It may seem to you that such convictions have no relevancy to the issues of the lawsuit, but the law takes it for granted that a man's conviction for a crime does have some bearing upon his ability to tell, "the truth, the whole truth and nothing but the truth."

14. Ladd, *supra* note 6, at 178-79. The example was taken by Dean Ladd, in turn, from Jeremy Bentham.

15. See McCormick, Evidence § 43, at 91 (1954), who seems to favor the proposal in the Uniform Rules of Evidence, Rule 21, which limits impeachment to proof of crimes of dishonesty or false statement. This rule is set out in the text at note 29 *infra*. And see Ladd, *supra* note 6, at 182.

16. A defendant was made competent to testify as a witness under N.M. Stat. Ann. § 41-12-19 (1953). For impeachment purposes, he is treated the same as any other witness. Territory v. De Gutman, 8 N.M. 92, 42 Pac. 68 (1895).

seems undesirable. Even if the crimes provable are limited to those involving dishonesty or false statement, the chances seem to be only one out of three that the evidence will not be highly prejudicial to the accused:

> Three possible effects from the introduction of the previous conviction of the accused who offers himself as a witness should be kept in mind . . . (1) The previous conviction may be taken for its intended purpose only, i.e., to test his credibility. (2) It may be used to show the propensity of the accused to commit the particular act charged. This is particularly true when the prior conviction was the same as the present charge and its nature is stated. (3) Proof of the former conviction may create a general prejudice against the accused causing the jurors to regard him as a bad individual and to consider it generally desirable that he be put away quite apart from whether the present proof of his guilt is sufficient under the law.[17]

With odds such as these, defense counsel will seldom put the defendant on the witness stand. But in so protecting him against exposure of a prior unrelated crime, defendant is exposed to prejudice by (1) not taking the stand and thus having the jury infer guilt from his silence, or (2) not taking the stand, and thus forfeiting the opportunity to persuade the jury of the truth of his story.

In New Mexico

The arguments against impeachment by showing conviction have had no effect upon the New Mexico legislature. Since 1880 we have had the following statute, N.M. Stat. Ann. § 20-2-3 (1953):

> A witness may be questioned as to whether he has been convicted of *any felony or misdemeanor,* and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, the substance and effect only, omitting the formal part, of the indictment and conviction for such offense, purporting to be signed by the clerk of court or other officer having the custody of the records of the court at which the offender was convicted, or by the deputy of such clerk or officer under seal of said court, shall, upon proof of the identity of the witness, as such convict, be sufficient evidence of his conviction. [Emphasis added.]

On its face, this statute imposes no limits on the type of crime that may be shown: "any felony or misdemeanor." The evils inherent in this mode of im-

17. Ladd, *supra,* note 9, at 187.

peachment are thus potentially present to their fullest extent in New Mexico. The statute, however, like others, is subject to judicial construction. And the manner in which the statute is construed can significantly affect the extent to which those potential evils are realized in practice. We turn, then, from the statute to the cases.

There are no New Mexico cases, at present, ruling on the question concerning the inquiry into whether the witness has committed a misdemeanor. And there is only one case, *State v. Knowles*,[18] that has raised the issue. In the *Knowles* case, counsel for defendant sought to impeach a state's witness. He asked the witness whether he used electricity without paying for it and was not under a suspended jail sentence therefor. The witness denied the fact. Counsel was not permitted to introduce the docket of the city police court to show the conviction. The Supreme Court affirmed the trial court's holding:

> '[T]he offense charged was that of violating a city ordinance. This is a civil matter. Under the law, it is not even a misdemeanor. But as stated, the trial was by a tribunal which had no authority in law to try anybody, and that was not a court, and the judgment is a nullity, and it is excluded from the testimony.'[19]

There is no reason to believe, however, that the Supreme Court would disallow impeachment by proof of *any* misdemeanor. Some felonies no more indicate untruth than does a traffic ticket; some do not even involve moral turpitude. Yet those felonies may be shown.[20] Hence, it is reasonable to assume that the court will impose no limits on the type of misdemeanor that can be shown.[21]

In *State v. Roybal*, [22] the leading case construing Section 20-2-3, the scope of inquiry into a witness's conviction was carefully limited. The *Roybal* Court said that only the fact of conviction, *i.e.*, a plea or verdict of guilty *and* judgment or sentence passed thereon, and the name of the particular felony or misdemeanor may be shown. The court then stated that evidence relative to an indictment, or a plea of guilty is immaterial under the statute, "the conviction

18. 32 N.M. 189, 252 Pac. 987 (1927).

19. *Id.* at 191, 252 Pac. at 987.

20. See *e.g.*, State v. Ocanas, 61 N.M. 484, 303 P.2d 390 (1956) (user of narcotics); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960) (drunk and disorderly); State v. Griego, 61 N.M. 42, 294 P.2d 282 (1956) (manslaughter).

21. Massachusetts and Rhode Island both expressly permit, by statute, impeachment by showing a misdemeanor. Mass. Ann. Laws ch. 233, § 21 (1956); R.I. Gen. Laws Ann. § 9-17-15 (1956). Neither jurisdiction limits proof of misdemeanors involving moral turpitude." See Note, 42 B.U.L. Rev. 91, 95-96 (1962).

22. 33 N.M. 540, 273 Pac. 919 (1928).

of crime being the material matter."[23] Also, neither the grade of the crime nor the term of punishment, the court said, could be proved.[24]

The *Roybal* discussion concerning the inquiry permissible under the statute laid a foundation for limitations that have been imposed by subsequent cases. For example, it was held in *State v. McCabe*[25] that the mere equivalent of a conviction, as where the witness "paid the costs of suit," could not be shown. And in *State v. Lobb*,[26] the court held that the witness could not be asked whether he had "been in custody of police officers," and by dictum announced:

> '[It is] generally not permissible for a party to bring out the fact that a witness has been accused of, or arrested or indicted, or that a warrant has been issued for his arrest, or information filed against him, or tried for, a crime of which he is not shown to have been convicted.'[27]

Furthermore, the details of a crime may not be inquired into or shown by the

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23. Defense counsel sought to impeach the credibility of the complaining witness, *id.* at 546, 273 Pac. at 921:

> 'Q. You were convicted in this court with assault with deadly weapons. . . . A. Yes, I was *indicted.*
>
> 'Q. You plead [sic] guilty and was [sic] fined $50.00, is that not a fact? A. No sir, I did not plead guilty, I arranged or fixed it up with him.' [Emphasis added.]

Objection to the question of conviction was sustained and the evidence was stricken. Counsel was permitted to introduce the record of conviction, however, later in the trial. On appeal, counsel contended that his questioning was proper to lay a foundation for proof of conviction; that he was denied the opportunity to show a contradiction in the witness's testimony because the evidence was stricken. The Supreme Court held that because counsel was permitted to introduce the record in evidence, he was not prejudiced by the striking of the testimony.

24. The following inquiry was made to the complaining witness in the *Roybal* case, and was stricken, *id.* at 549, 273 Pac. at 923:

> 'Q. In that cattle stealing case that you admitted you were convicted in you were sentenced to serve a term in the penitentiary and were fined $500.00?'

The court said, *id.* at 549, 273 Pac. at 923, that under Section 2179 of N.M. Code 1915 (now N.M. Stat. Ann. § 20-2-3 (1953)), there was attached ". . . [no] greater degree of opprobrium to the conviction of one offense than another." *But see* State v. Riley, 40 N.M. 132, 55 P.2d 143 (1936), where the court held it permissible to ask the accused whether he had been convicted of a felony and had served a term in the penitentiary.

25. 41 N.M. 428, 70 P.2d 758 (1937).

26. 41 N.M. 298, 67 P.2d 1006 (1937).

27. *Id.* at 299, 67 P.2d at 1007.

Other cases following the *Roybal* case are as follows: State v. Conwell, 36 N.M. 253, 13 P.2d 554 (1932) (held error to allow prosecutor to go into details of accused's sex crime); State v. McCabe, 41 N.M. 428, 70 P.2d 758 (1937) (not error to strike witness's testimony that he "paid the costs of suit" because it is not a "conviction"); State v. Griego, 61 N.M. 42, 294 P.2d 282 (1956) (not error to ask accused if his conviction of a prior felony was manslaughter); State v. Ocanas, 61 N.M. 484, 303 P.2d 390 (1956) (not error to ask accused as to prior crimes of (1) user of narcotics, (2) grand auto theft); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960) (not error to ask accused as to prior convictions of assault and battery, drunk and disorderly).

examiner on cross-examination.[28] Such inquiry, if the witness be the accused, would be much too prejudicial.

Conclusion

Because Section 20-2-3 allows proof of crimes that have no rational bearing upon a witness's truthfulness, it should be amended, or repealed. The New Mexico law of impeachment by showing a prior conviction is but a step away from the "primitive absolutism" of the common law. The criminal is still punished, and for irrational reasons.

The most desirable law on impeachment by showing a prior conviction is that set forth in the Uniform Rules of Evidence:

> Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissable for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissable for the sole purpose of impairing his credibility unless he first introduced evidence admissable solely for the purpose of supporting his credibility.[29]

This rule "logically limits evidence of conviction for impeachment purposes to crimes involving dishonesty and false statement."[30] In addition, it takes the accused out of his predicament. He will be encouraged to take the witness stand and give his story without danger of prejudicial determination of his guilt.

Yet the statute stands, and the Supreme Court in future cases should take steps to alleviate the effect of an obviously bad law.

Can a pardon be shown to rebut impeaching evidence? In *Territory v. Chavez*,[31] the court held that a pardon could not be shown by the witness in order to mitigate the evidence of his conviction. The pardon, however, was not based on an executive finding that the witness was innocent of his prior crimes. The witness had turned state's evidence; he was favored by the granting of a pardon. This sort of pardon, or one granted through political pressures, is not a valid mitigating circumstance for rebutting impeaching evidence. It would be wrong, however, to hold that a witness may not show that he was granted a pardon because he was mistakenly found guilty of a crime. The *Chavez* case, on its facts, does not so hold. The court, therefore, is free to reach a right result where a pardon was granted because of a person's innocence.

Can circumstances of the crime, or of the conviction, be shown by the wit-

28. State v. Conwell, 36 N.M. 253, 13 P.2d 554 (1932).
29. Uniform Rule of Evidence 21.
30. Comment to Uniform Rule of Evidence 21.
31. 8 N.M. 528, 45 Pac. 1107 (1896).

ness?[32] As a matter of policy, extrinsic evidence concerning the circumstances of the conviction or crime are excluded from evidence because of the risk of confusion of issues. Such evidence leads to collateral issues. Yet evidence that may lead to collateral issues is ofttimes necessary and should be allowed. In order to determine whether there is any correlation between crimes that do not involve dishonesty or false statement and the truthfulness of a witness, the circumstances and details of the crime would have to be shown.

The importance of evidence of the circumstances of the conviction or the crime should be considered in each particular case. Assuming that a witness who is not the accused should not be able to show circumstances of his crime or his conviction, where the accused is the witness the situation is much different. For if the witness be the accused, there is too great a danger that the jury will be prejudiced on the merits by virtue of the crime shown to impeach. Rebutting evidence is necessary to counteract the prejudice. Any risk of side issues is worth chancing. Because of the importance of these issues, the time required to present the evidence is justified.

In New Mexico, the law concerning the showing of circumstances by a witness is hollow. The New Mexico Statute, Section 20-2-3, is silent on the question. The statute sets forth only what the impeaching party may show.[33] There is but one case, *Territory v. Garcia*,[34] that considered the question. The *Garcia* Court held that a witness who was *not* the accused could not explain the circumstances of the crime.[35] Thus, this case is distinguishable, and could be placed on the ground that where the witness is not the accused, the evidence of circumstances is collateral and not admissable. Yet the Territorial Court seemed to recognize that the defendant may be entitled to more protection than the prosecution. In *Territory v. Chavez*,[36] the defense was allowed to go beyond the record of conviction to show circumstances and details of the crimes of witness-accomplices in order to show circumstances of atrocity and deliberation.[37]

Prior crimes may not be shown to imply that the accused committed the

32. Circumstances of the conviction would be such mitigating factors as a suspended sentence and probation, and possibly, within the discretion of the court, the fairness of the hearing. Circumstances of the crime would be such factors as intent, motive, maturity, etc. Of course, the extent to which a witness would be allowed to explain these circumstances should be controlled by the discretion of the court.

33. The prosecution can only show the "fact of conviction" as construed by the *Roybal* and *Lobb* cases. See text at notes 16-21 *supra*.

34. 15 N.M. 538, 110 Pac. 838 (1910).

35. The *Garcia* case has not been subsequently cited for this holding, and it is improbable that witnesses (including defendants) in our courts today are not allowed to explain circumstances surrounding their prior crime either on direct, cross, or redirect examination. *Cf.* State v. Edmondson, 26 N.M. 14, 188 Pac. 1099 (1920) (held error to disallow state's witness to explain facts that would otherwise discredit by showing bias).

36. 8 N.M. 528, 45 Pac. 1107 (1896).

37. The *Chavez* case, decided thirty-two years before *State v. Roybal*, held that where the witnesses were accomplices of the defendant, the latitude of proof of prior

offense for which he is on trial unless the crime is relevant to prove motive, intent, identity, etc.[38] Yet where the crime is shown in order to impeach the accused-witness, the effect is frequently the same as if the crime were introduced as circumstantial evidence of guilt. The court should recognize this, and, under the fundamental concept that the accused is entitled to a fair trial, should make an exception to the rule that the accused, when he takes the stand, is to be treated the same as any other witness. The prejudice to the accused that arises out of such impeachment could be avoided by the requirement that the prosecution come before the court, in the absence of the jury, and state the conviction so that the judge can first determine whether it will be prejudicial.

Although it seems too late to suggest that the court require the showing of something more than *any* felony or misdemeanor, the field is still open for the court to interpret the statute in favor of the accused in a criminal trial. This is the only way under our statute to inject logic and reason into the law governing impeachment of witnesses. It is the only way to prevent injection of prejudicial evidence of "bad character" that is wholly immaterial to the charge being tried. It is the only way to secure a "fair trial" to which the accused is entitled.

II

PROOF OF SPECIFIC MISCONDUCT: PRIOR MISCONDUCT NOT THE SUBJECT OF A CONVICTION

In General

At common law, counsel was permitted to inquire into the personal history of the witness, including particular acts of misconduct not the subject of a conviction.[39] And, in the early stages of the law specific misconduct could be proved by extrinsic evidence. Not until the late 1700's did the English courts forbid the use of extrinsic evidence to prove such acts.[40]

In this country most jurisdictions allow impeachment of witnesses by showing prior misconduct. Such impeachment is allowed, however, only through

crimes ". . . should [not be] confined so absolutely to the record of those crimes." *Id* at 534, 45 Pac. at 1109. Prior crimes and prior bad acts of the accomplices were inquired into by counsel for the defense. It was shown that one witness had been indicted for a crime. The misconduct occurred under circumstances of atrocity and deliberation. The court said, generally, *id.* at 533, 45 Pac. at 1108:

> The latitude in cross-examination is particularly necessary where spies, informers, and accomplices are used as witnesses, otherwise the life of the persons on trial must often be wrongfully endangered.

Inquiring into the indictment of a witness was also allowed in Borrego v. Territory, 8 N.M. 446, 46 Pac. 349 (1896).

38. State v. Bassett, 26 N.M. 476, 194 Pac. 867 (1921).

39. McCormick, Evidence § 42, at 87 (1954).

40. 3 Wigmore, Evidence § 979, at 532-33 (3d ed. 1940).

examination of the witness himself, not by the use of extrinsic evidence. This restriction partially meets the objection that the dangers of confusion of issues and unfair surprise are too great. The courts, however, are given wide discretionary control over the latitude of inquiry.[41]

Impeachment of a witness by showing specific acts of misconduct not the subject of a conviction is based on the same reasoning as impeachment by showing prior convictions: If the witness has committed particular acts of wrongdoing, it may be inferred that he has a bad character; since he has a bad character, he is likely to lie on the witness stand.[42] Yet the arguments against this reasoning, set out above under Part I,[43] apply equally here. There is no rational connection between the commission of one isolated bad act and the character of a witness; nor is it always reasonable to infer that one with a bad character will lie on the witness stand. In addition, many if not most specific acts of misconduct in no way bear upon a person's truthfulness.

In New Mexico

It was early established in New Mexico by two decisions of the Territorial Court that the witness could be examined concerning his prior acts of misconduct.[44] Under the rules laid down by the Territorial Court, trial courts were given a large discretionary control over the latitude of inquiry. The court said that "matters called for on cross-examination which *merely* excite prejudice against the witness or tend to humiliate him or wound his feelings" would not

41. McCormick, Evidence § 42, at 87 (1954); see 3 Wigmore, Evidence § 979, at 532-38 (3rd ed. 1940).

42. See Part I, note 10 *supra*, and accompanying text.

43. See Part I notes 11, 14 *supra*, and accompanying text.

44. Borrego v. Territory, 8 N.M. 446, 46 Pac. 349 (1896) and Territory v. Chavez, 8 N.M. 528, 45 Pac. 1107 (1896). The court in *Borrego* seemed to permit this mode of impeachment under the authority of Section 20-2-4 of N.M. Stat. Ann. (1953) allowing impeachment by general evidence of bad moral character. The court said:

> Section 2087 of the Compiled Laws [N.M. Stat. Ann. § 20-2-4 (1953)] authorizes the impeachment of the credit of a witness by evidence of his bad moral character, and the present tendency is to regard all facts as relevant which will enable the jurors to decide to what extent the testimony of the witness can be relied upon. Accordingly a witness may be asked with a view to show his character for truthfulness as to specific facts, not too remote in time, which may tend to disgrace him, and counsel will be bound by his answers. [8 N.M. at 482, 46 Pac. at 359].

The court was, however, following the common law tradition of allowing broad scope of inquiry into the personal history of the witness. The Territory was allowed to inquire into an indictment of a witness-accused on a murder charge.

In the *Chavez* case, the court held it error not to allow counsel to go beyond the record of conviction to show that the witness-accomplice was engaged in a conspiracy to commit a crime, and to show commission of a crime under circumstances of atrocity and deliberation.

be proper subjects of cross-examination.[45] Disgracing questions, however, would be proper so long as they concerned matters "which are calculated in an important and material respect to influence the credit to be given to [the witness's] testimony."[46] But extrinsic evidence to show a prior act of misconduct was not allowed.[47]

The general rule that a witness could be impeached by his prior misconduct, as set forth in the Territorial cases, is still followed today.[48] However, though the Territorial decisions have been neither overruled nor distinguished, the breadth of inquiry permitted by those cases has been limited to some degree by subsequent cases. The Territorial Court had permitted the cross-examiner to ask the witness whether he had been indicted.[49] Subsequently, however, in *State v. Lobb,*[50] the court held that the witness could not be asked whether he had been held in police custody, and, in dictum, said that inquiry concerning an indictment would also be improper. Similarly, in *State v. Roybal,*[51] a 1928 decision, the court held that the examiner could not go outside the fact of conviction to show that the witness committed a crime, even though an early Territorial case had permitted inquiry into the circumstances and details of the witness's crime.[52] A further limitation of inquiry under the Territorial cases was set forth in the case of *State v. Shults,*[53] in which the court held the following question improper: "And you had been taking things from different people

45. Territory v. Chavez, *supra* at 532, 45 Pac. at 1108 (Emphasis added). See Territory v. Garcia, 15 N.M. 538, 110 Pac. 838 (1910).

46. Territory v. Chavez, *supra* at 532, 45 Pac. at 1108.

47. Borregol v. Territory, 8 N.M. 446, 482, 46 Pac. 349, 358 (1896) (. . . counsel will be bound by [the witness's] answer.").

48. The rule was made explicit in the leading case of State v. Perkins, 21 N.M. 135, 153 Pac. 258 (1915), as follows:

> The law in this jurisdiction was settled by the territorial Supreme Court. . . . There is a sharp conflict in the authorities upon this question, but, as the territorial Supreme Court has adopted the rule that proof of a witness' particular overt acts of wrongdoing are ordinarily relevant as impeaching evidence, but that such acts can never be shown by any evidence outside the examination of the assailed witness, and that the extent of such examination rests largely in the discretion of the trial court, we can see no good reason to depart from the rule. . . . [*Id.* at 144, 153 Pac. at 261].

Extrinsic evidence is forbidden: State v. Ellison, 19 N.M. 428, 144 Pac. 10 (1914); State v. Clevenger, 27 N.M. 466, 202 Pac. 687 (1921); Mead v. O'Conner, 66 N.M. 170, 344 P.2d 478 (1959) (civil suit; ". . . the answer of the witness is conclusive of the matter under inquiry.").

49. See note 44 *supra,* the case of Borrego v. Territory, 8 N.M. 446, 46 Pac. 349 (1896).

50. 41 N.M. 298, 67 P.2d 1006 (1937).

51. 33 N.M. 540, 273 Pac. 919 (1928).

52. See note 44 *supra,* the case of Territory v. Chavez, 8 N.M. 528, 45 Pac. 1107 (1896).

53. 43 N.M. 71, 85 P.2d 591 (1938).

here in Alamagordo?"[54] No time, place, or circumstances was stated which would apprise the witness that the question was directed to any specific wrongful act of the witness. The implication of these limitations is that counsel cannot inquire generally into matters of impeachment. He is confined to a "particular overt act of wrongdoing," just as he is confined to the fact of conviction itself when seeking to impeach by prior convictions.

The specific acts of misconduct allowed in the discretion of our New Mexico Supreme Court have included the following: prior illicit relations,[55] murder,[56] conspiracy,[57] taking mortaged property out of the state,[58] and writing a threatening letter.[59]

Cases involving sex crimes present a unique problem. Here the pertinent inquiries are whether, to impeach credibility, prior unchaste or lewd acts of a prosecutrix may be (1) inquired into on cross-examination or (2) shown by extrinsic evidence. Wigmore says that in such cases the prosecutrix's prior chastity may have a direct bearing upon her truthfulness and that "no judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."[60] Wigmore thus advocates broad inquiry as well as the use of extrinsic evidence to show immoral character and particular acts of misconduct of the prosecutrix.[61] A majority of jurisdictions, however, do not allow extrinsic evidence to show prior promiscuous conduct by the prosecutrix, although they do allow such acts to be drawn from the witness on cross-examination.[62]

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54. *Id.* at 72, 85 P.2d 592. *But see* State v. Solis, 38 N.M. 538, 540, 37 P.2d 539, 540 (1934), decided four years before *Shults,* and allowing the question: "And as soon as you came here you became a law violator didn't you? . . . You became a law violator from the moment you got to Bernalillo?" The *Shults* case has not been cited for its holding by any later cases.

55. See Territory v. De Gutman, 8 N.M. 92, 42 Pac. 68 (1895); State v. Martinez, 57 N.M. 158, 255 P.2d 987 (1953); See also Territory v. Garcia, 15 N.M. 538, 110 Pac. 838 (1910) where inquiry into prior illicit relations was allowed for the purpose of showing interest of the witness.

56. See Territory v. Chavez, 8 N.M. 528, 45 Pac. 1107 (1896).

57. *Ibid.*

58. See State v. Schultz, 34 N.M. 214, 279 Pac. 561 (1929).

59. See State v. Holden, 45 N.M. 147, 113 P.2d 171 (1941).

In two cases it is impossible to tell from the opinions what was the impeaching question on cross-examination: See State v. Bailey, 27 N.M. 145, 198 Pac. 529 (1921); State v. Parks, 25 N.M. 395, 183 Pac. 433 (1919).

60. 3 Wigmore, Evidence § 924a, at 460 (3d ed. 1940). Wigmore emphasized his words.

61. 3 Wigmore, Evidence §§ 924a, 924b, 979, 980, at 459-68, 537, 543 (3d ed. 1940).

62. This is in keeping with the rule that extrinsic evidence cannot be used to show particular misconduct not the subject of a conviction. For jurisdictions allowing cross-examination as to a witness's sexual morality for the purpose of affecting credibility, see Annot., 65 A.L.R. 410 (1930).

In New Mexico, the prosecutrix in a forcible rape case may be cross-examined on prior acts of lewd conduct.[63] Extrinsic evidence may be introduced to prove that the prosecutrix had prior illicit relationships with the accused; extrinsic evidence is not admissible, however, to prove her prior acts of lewdness with others. Prior illicit conduct with the accused is relevant as bearing upon the issue of the prosecutrix's consent to the act charged. Illicit conduct with others has no bearing upon the issue of consent.[64]

In statutory rape cases, where consent is never at issue, prior lewd conduct as circumstantial evidence of consent is irrelevant.[65] Yet, although we have no case deciding the issue, there is no reason to believe that the Supreme Court would altogether disallow such evidence for impeachment purposes. In *State v. Armijo*,[66] the prosecuting witness said on direct examination that the accused penetrated her "just a little." Defense counsel asked her, on cross-examination, if she had intercourse prior to the alleged rape in order to lay a predicate for further inquiry as to whether penetration had in fact occurred. Objection to this question was sustained. Counsel alleged on appeal that the question was proper on the issue of penetration to attack the credibility of the witness. The Supreme Court upheld the trial court, and said:

> Here the sole reason advanced by defendant's counsel for admissibility of an answer to the inquiry whether the prosecuting witness had intercourse . . . was on the issue of penetration. . . . The prosecutrix had already testified . . . to the fact of penetration and it must have seemed to the court without reason to permit a breach of the doctrine against proof of prior unchaste acts, if any such there were, upon the pretense of testing credibility on an issue about which there was no genuine controversy.[67]

The court apparently thought that there was no issue of penetration present at trial. And the defense counsel's offer of proof of unchastity was not for the purpose of impeaching character, but for the purpose of discovering whether the witness knew what "intercourse" or "penetration" meant. Thus the court did

63. State v. Cruz, 34 N.M. 507, 285 Pac. 500 (1930). The court held it error to refuse to allow defense counsel to ask the prosecutrix whether she had given birth to an illegitimate child some time before the alleged rape.

64. State v. Ulmer, 37 N.M. 222, 20 P.2d 934 (1933). The court held that the chastity of the prosecutrix was relevant on the issue of consent, and therefore the rule excluding extrinsic evidence to be used for impeachment purposes was not applicable. The court, however, limited the purpose for which the extrinsic evidence could be used, saying that both a third-person witness and the accused could testify as to prior lewd conduct of the prosecutrix with the accused, but that neither could testify as to her conduct with the third-person witness.

65. 3 Wigmore, Evidence § 924b, at 467 (3d ed. 1940).

66. 64 N.M. 431, 329 P.2d 785 (1958).

67. *Id.* at 433, 329 P.2d, at 786.

not consider the admissibility of evidence of prior instances of unchastity for the purpose of impeaching the veracity of the witness. It would be a reasonable extension of the rule of *State v. Ulmer*,[68] to allow evidence of prior unchastity of the prosecuting witness in a statutory rape case for impeachment of veracity where there were genuine issues of penetration, identity of the accused as perpetrator of the rape, or whether the incident ever took place. Although consent is immaterial in statutory rape cases, penetration and identity may be material issues, and issues about which the prosecutrix may lie.[69]

Where there is no genuine controversy regarding the facts testified to by a witness, however, impeachment of that witness will not be allowed. Thus in *Mondragon v. Mackey*,[70] a bastardy proceeding, a witness testified that she had seen plaintiff and defendant together on different occasions. The defendant had previously admitted being with the plaintiff. Defense counsel sought to impeach the witness by asking her if she were not then living with a man not her husband. She declined to answer; the trial court refused to compel her to do so. The Supreme Court held such refusal proper, because the defendant was in no way prejudiced by her testimony. Assuming the sole testimony of the witness was that she had seen the plaintiff and defendant together on occasions, the rule of the court is sound. There is no basis for impeachment of a state's witness where the testimony of the defendant and that of the witness are in harmony.

A defendant in a criminal case can be impeached the same as any other witness under New Mexico law.[71] Thus, the prosecution may inquire into specific acts of misconduct of the accused but may not ask whether the defendant has merely been arrested or indicted.[72] There is an exception to the rule excluding evidence of arrest or indictment, however, where the accused testifies on direct examination in a manner that bolsters his credibility. In *State v. Moultrie*,[73] the accused testified as follows:

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68. 37 N.M. 222, 20 P.2d 934 (1930); see note 64 *supra*. The court held that the chastity of the prosecutrix was relevant upon the issue of consent, but limited the evidence to acts of the prosecutrix only with the accused.

69. See 3 Wigmore, Evidence § 924a, at 459 (3d ed. 1940).

There is . . . at least one situation in which chastity may have a direct connection with veracity, viz. when a *woman or a young girl testifies* as complainant against a man charged with a sexual crime,—*rape, rape under age, seduction, assault.* (Emphasis Wigmore's.)

70. 65 N.M. 175, 334 P.2d 706 (1958).

71. Territory v. De Gutman, 8 N.M. 92, 42 Pac. 68 (1895): "A defendant offering to testify is subject to cross-examination the same as any other witness." *Id* at 93 (Syllabus). Yet the accused apparently has the privilege of declining to answer an incriminating question. *Id.* at 98, 42 Pac. at 69-70.

72. See State v. Roybal, 33 N.M. 540, 273 Pac. 919 (1928); State v. Lobb, 41 N.M. 298, 67 P.2d 1006 (1937).

73. 58 N.M. 486, 272 P.2d 686 (1954).

> 'Q. Have you ever been in trouble before? A. No, sir. Q. You have never been in court before? A. No, sir, this is the first time.'[74]

On cross-examination the prosecution attempted to show that the accused had been in court previously on a larceny charge and questioned the accused as to his complicity in the larceny of a vehicle. The trial court allowed the reference to larceny to go to the jury and the Supreme Court affirmed saying:

> Whether the witness had stolen a motor, signed a written statement to that effect and had been brought into court charged therewith, was a proper subject of inquiry for impeachment purposes, after appellant had opened the door for the contradiction of such evidence.[75]

Similarly, in *State v. Brooks*,[76] the accused's admission that he had recently been engaged in a fight and had been arrested therefor was allowed in evidence because he had testified, on direct examination, that since his childhood he had not "been engaged in any fight." The Supreme Court cited the *Moultrie* case for the proposition that evidence of offenses other than that for which the defendant is on trial is admissable where the defendant "throws open to attack his credibility as a witness."

Although the rule allowing contradiction of bolstering testimony by showing an indictment of arrest is reasonable,[77] the *Moultrie* decision is questionable in part, for it is questionable whether the accused's statement that he had not been "in trouble" should have opened the door to inquiry concerning the accused's arrest for an offense for which no conviction is shown.[78] That a person is arrested does not necessarily mean he has been "in trouble." The mere accusation of misconduct, *e.g.*, the fact of arrest or indictment, "is quite consistent with innocence, and . . . such evidence is merely the reception of somebody's hearsay assertion as to the witness's guilt."[79]

The remoteness in time of the misconduct of the witness should be considered

74. *Id.* at 487, 272 P.2d at 687.

75. *Id.* at 488, 272 P.2d at 687.

76. 59 N.M. 130, 279 P.2d 1048 (1955).

77. As in State v. Moultrie, 58 N.M. 486, 272 P.2d 686 (1954), to contradict the testimony of the witness that he had not been "in court" before.

78. The court in the *Moultrie* case, 58 N.M. at 488, 272 P.2d at 687, said this:

> Of his own accord appellant went beyond the mere denial of the crime of which he was charged. He was not satisfied to limit the issue as to whether he had theretofore been convicted of a felony or misdemeanor but made the sweeping claim that he had never been in trouble of any kind previously. Clearly, he had full opportunity to deny the charge then pending without throwing open the subject of his good name, thereby giving leave to the state to introduce rebuttal evidence not otherwise available to it. Obviously, he wanted to impress the jury of his excellent character. By doing so, his credibility as a witness was thrown open to attack.

79. 3 Wigmore, Evidence § 980a, at 545 (3d ed. 1940).

when impeaching inquiry is to be made as to specific misconduct. New Mexico has only one case considering the time element. In *State v. Holden*,[80] the misconduct took place six years prior to trial. The Supreme Court held that six years was not too long a time to exclude evidence of the act. Whether the act is too remote in time to evidence the character of the witness is largely within the trial court's discretion. It is an important consideration, however, because character and conduct change. The age of the past offender, and his social and economic circumstances at the time of his misconduct may have prompted his prior misconduct; often, a person's character and conduct change as he matures and as his social and economic status improves.

Conclusion

The arguments against impeachment by showing particular acts of misconduct are best stated by Dean Ladd in his article, *Techniques of Character Testimony*:[81]

> [I]f the details of the past life of all witnesses were to be generally opened to investigation it would make the task of being a witness an unpopular one. There is also the question of the relation of particular acts to general tendencies. It may be reasonably contended that in most cases the general quality of the individual as an abstract observation is a more accurate basis of predicting human conduct than his occasional misdoings or good deeds. As regards the character of the accused in criminal cases there is the additional policy consideration against requiring the defendant to be prepared to defend all the events of his life rather than the particular charge against him, of which he has notice. Furthermore, if particular acts of misconduct were admitted generally as being an indication of his character there is danger that prejudice resulting from their proof might over balance the probative value of their character-testing qualities.

The mode of impeachment by showing prior instances of misconduct is a remnant of the common law. It furnished little probative value then; it has little probative value now. The Uniform Rules of Evidence recommend prohibiting proof of particular acts of misconduct to prove bad character. Rule 22 says:

> As affecting the credibility of a witness . . . (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissable.

80. 45 N.M. 147, 113 P.2d 171 (1941).

81. Ladd, *Techniques and Theory of Character Testimony*, 24 Iowa L. Rev. 498, 508-09 (1939).

If our present case law on impeachment by showing prior bad acts is not abrogated in the future, it should at least be modified. The Territorial cases should be expressly overruled, or distinguished. It should be made clear that cross-examination may be directed only to the specific act of misconduct itself, not to accusations of misconduct or details of the misconduct.

Counsel should be required to inform the court, in the absence of the jury, of the subject and purpose of the impeachment. The rule in the case of *State v. Shults* that a particular time, place, or circumstance must be shown to apprise the witness of the act being inquired into, should be the guiding rule of cross-examination.[82] These requirements are perhaps the only effective way of preventing counsel from asking questions lacking any factual basis and thus falsely implying by the question itself that the witness has engaged in misconduct. The prejudicial effect of cross-examination concerning prior misconduct may outweigh its probative value even when the misconduct has actually occurred. Such cross-examination is clearly unjustified where the questions are based wholly on the examiner's speculation.

III

PROOF OF CHARACTER TRAIT

In General

At early common law, the bad general character of a witness could be shown for impeachment purposes. By the 1800's however, the English courts began restricting evidence of character to the specific trait of veracity. This is the modern rule in England, and is the rule in a majority of jurisdictions in this country.[83]

In New Mexico

New Mexico still lives in the pre-Victorian era. Section 20-2-4 of N.M. Stat. Ann. (1953) provides:

> The credit of a witness may be impeached by general evidence of bad moral character not restricted to his reputation for truth and veracity. . . .

Generally, character is proved through a witness who testifies that another witness's reputation for truth and veracity or some other character trait is bad.

82. See note 53 *supra*, and accompanying text.

83. 3 Wigmore, Evidence § 923, at 450-51 (3d ed. 1940). McCormick, Evidence § 44, at 94-95 (1954). See Ladd, *Techniques and Theory of Character Testimony*, 24 Iowa L. Rev. 498 (1939), for a general discussion of character testimony.

Most jurisdictions limit all evidence to reputation evidence such as, "Do you know the general reputation at the present time of Jose Nadie in the community in which he lives, for truth and veracity?"[84] Few jurisdictions allow personal opinion evidence.[85]

The argument given for the use of evidence of bad moral character is that such character necessarily implies a disposition for telling falsehoods, and since moral character is more easily observable than character for truthfulness, it is a more adequate method of impeachment.[86]

The argument against the use of evidence of bad moral character seems to be more convincing. Wigmore sets forth three arguments:

> (1) that, as a matter of human nature, a bad general disposition does *not* necessarily or commonly involve a lack of veracity, and that therefore the former is of little or no bearing probatively; (2) that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part on the personal prejudice and on mere differences of opinion on points of belief or conduct . . . and (3) that the incidental unpleasant features of the witness-box are largely increased when the way is opened to this broad and loose method of abusing . . . witnesses.[87]

The dangers of prolonged proceedings, confusion of issues, and degeneracy of the trial are additional reasons for prohibiting evidence of bad moral character.[88] Only reputation evidence of a witness's character for truth and veracity should be allowed. The New Mexico statute, Section 20-2-4, goes beyond this salutory rule and the New Mexico Supreme Court has held that the statute means what it says.

In *State v. Perkins*,[89] several witnesses were produced by the defendants for the purpose of proving the general reputation of a witness for bad moral character in her neighborhood. The trial court refused the evidence and told counsel that only reputation for truth and veracity could be proven. The Supreme Court reversed, saying:

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84. McCormick, Evidence § 44, at 94 (1954).

85. See McCormick, Evidence § 44 (1954). Wigmore, however, strongly advocates this type of evidence where the witness is the prosecutrix in a sex case. See Wigmore, Evidence §§ 924a, 924b, at 459-68 (3d ed. 1940).

86. 3 Wigmore, Evidence § 922, at 447-50 (3d ed. 1940): "[T]hat [bad general character] necessarily involves an impairment of the truth-telling capacity, that to show general moral degeneration is to show an inevitable degeneration in veracity, and that the former is often more easily betrayed to observation than is the latter."

87. *Id.* at 449 (emphasis Wigmore's).

88. 3 Wigmore, Evidenc § 921, at 446 (3d ed. 1940).

89. 21 N.M. 135, 153 Pac. 258 (1915).

> In the absence of statute, this is the correct rule, but in this state we have a statute [N.M. Stat. Ann. § 20-2-4 (1953)] which expressly permits the credit of a witness to be impeached by general evidence of bad moral character.[90]

Evidence of reputation for truth and veracity is also admissible in New Mexico. In the *Perkins* case, the issue was raised whether prior reputation was relevant to show present character for truth and veracity. The trial court held that the prior reputation of a witness could not be shown. The Supreme Court held that it was error to refuse defense counsel the right to prove that a witness had a "bad reputation for truth and veracity in the neighborhood . . . at the time he left there, two years preceding trial."[91]

State v. Perkins, and the case of *State v. Gallegos,*[92] are the only two cases deciding issues of character impeachment arising under Section 20-2-4. In *State v. Gallegos,* defense counsel sought to impeach the dying declaration of the victim of the murder for which the defendant was on trial by evidence of the victim's bad community reputation for morality. The trial court did not allow such impeachment. The Supreme Court, however, held it error not to allow the defense to impeach the dying declaration.

In the case of *State v. Anderson,*[93] the question as to a witness's reputation for chastity was excluded because the examiner did not meet the procedural requirements in his interrogation.[94] Thus the court did not decide the issue of admissibility of a specific immoral character trait.

Although it has not been decided, it is probable that opinion evidence as distinguished from reputation evidence would not be allowed. And it seems

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90. *Id.* at 145, 153 Pac. at 261. The questions asked by defense counsel but rejected by the court were these:

> 'Do you know Mrs. Knapp's reputation, as to her moral character?'
>
> * * *
>
> 'Do you know Mrs. Knapp's reputation for morality in the neighborhood in which she resided?' [Questions taken from transcript of record.]

91. *Ibid.* The court cited Wharton on Criminal Evidence for the rule that prior character is relevant to show present character. The *Perkins* case is the only case concerning impeachment by showing a witness's character for truth and veracity. Counsel sought to show past character, but there is no doubt that present character would be allowed if the issue arose.

92. 28 N.M. 403, 213 Pac. 1013 (1923).

93. 24 N.M. 360, 174 Pac. 215 (1918).

94. The *Anderson* court said:

> The question asked in this case was whether the witness knew the reputation of [the witness sought to be impeached] for virtue and chastity—not what that reputation was. It was merely a preliminary question, calling for a yes or no answer. We are unable to tell whether the court erred or not, because no offer was made by appellant that the witness would answer yes to the question. . . . [*Id.* at 367-68, 174 Pac. at 217].

that the court allows impeachment by evidence of general bad moral character as well as evidence of a specific character trait, *e.g.*, non-truth and non-veracity, chastity.

No case has arisen in New Mexico in which a defendant has been impeached by general evidence of bad moral character. Yet it is the rule in New Mexico, as stated in *Territory v. De Gutman*,[95] that the accused-witness is to be cross-examined the same as any other witness. Thus the court is likely to allow the accused-witness to be impeached by general evidence of bad moral character, notwithstanding the rule that, unless the accused "opens up" the issue, the character of an accused cannot be attacked for the purpose of introducing circumstantial evidence of his guilt.[96] But if such impeaching evidence were to be allowed, its effect would be much the same as if it were introduced as the basis for an inference of guilt.

Conclusion

The reasoning that a bad character implies untruthfulness underlies the construction of Sections 20-2-3 and 20-2-4 of our statutes as well as the use of impeachment by showing prior misconduct not the subject of a conviction.[97] The reasoning, however, is itself a false premise upon which to base the application of the New Mexico statutory and case devised modes of impeachment.

The Uniform Rules of Evidence place "the same limitation on character testimony for impeachment purposes as . . . for evidence of conviction of crime, in that it must relate to honesty or veracity":[98]

> As affecting the credibility of a witness . . . (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible. . . .[99]

This rule is followed, in substance, by a majority of jurisdictions in this country. It would be desirable to replace Section 20-2-4 with the same rule.

New Mexico still lingers in the past; it has not broken away from the harsh and illogical rules of evidence that were once the common law.

> The modern tendency is to abandon the old notion (a mark of a

95. 8 N.M. 92, 42 Pac. 68 (1895).

96. See Michelson v. United States, 335 U.S. 469 (1948), which rules that the state cannot attack the character of the accused, as evidence of his guilt, unless the accused first puts on evidence of good character.

97. *See* notes 10, 42, 86 *supra* and accompanying text.

98. Comment on Uniform Rule of Evidence 22.

99. Uniform Rule of Evidence 22.

primitive stage of opinion) that a usually bad man will usually lie and a usually good man will usually tell the truth.

* * *

Hence, to the psychologist, the common law's reliance on character as an index of falsehood is crude and childish.[100]

JONATHAN B. SUTIN

100. 3 Wigmore, Evidence §§ 921, 922, at 446-47 (3d ed. 1940).