Volume 42 | Issue 1 Article 1

1997

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Alan D. Hornstein

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Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 Vill. L. Rev. 1 (1997).
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VILLANOVA LAW REVIEW

VOLUME 42 1997 NUMBER 1

BETWEEN *ROCK* AND A HARD PLACE: THE RIGHT TO TESTIFY AND IMPEACHMENT BY PRIOR CONVICTION

ALAN D. HORNSTEIN*

I. INTRODUCTION

IN *Rock v. Arkansas*,[1] the United States Supreme Court declared for the first time what theretofore it had only suggested or assumed: The defendant in a criminal case has a constitutional right to testify in his or her own behalf. For many defendants, however, that right is illusory. If the defendant has been convicted of one or more offenses prior to the trial at which he or she wishes to testify, the price of exercising the right to testify may be that the jury will be informed of those prior convictions.[2] If the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically.[3] Typically, the defendant may

* Professor of Law, University of Maryland School of Law. The work for this Article was supported by a grant from the University of Maryland School of Law. I am grateful for the very able research assistance of Jessica Collins and Catherine McCallie. Permission is given to reproduce this Article in whole or in part for classroom use.

1. 483 U.S. 44 (1987) (holding that Arkansas's ban on hypnotically refreshed testimony was impermissible given defendant's constitutional right to testify in her own defense).

2. *See, e.g.*, Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967) (holding that trial court did not abuse its discretion by permitting government to use prior conviction evidence to impeach defendant's testimony); Luck v. United States, 348 F.2d 763, 768-69 (D.C. Cir. 1965) (holding that criminal defendant may be impeached with evidence of prior convictions), *superseded by statute as stated in* Molovinsky v. Fair Employment Council of Greater Wash., 683 A.2d 142, 148 & n.11 (D.C. 1996) (recognizing that Congress amended statute to require admission of prior conviction evidence offered to impeach witness); Edward E. Gainor, Note, *Character Evidence By Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 769-70, 789-800 (1990) (suggesting revision of Rule 609). For a discussion of the evolution of Federal Rule of Evidence 609, see *infra* notes 24-45 and accompanying text.

3. *See* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 160 tbl.52 (1966) (reporting that probability of acquittal in otherwise evenly balanced case decreases from 65% to 38% in face of jury's knowledge of defendant's prior convictions); *see also* MCCORMICK ON EVIDENCE § 43, at 99 (Edward W. Cleary et al. eds., 3d ed. 1984) [hereinafter MCCORMICK] (noting that jury will pay close attention to prior

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keep the jury from learning of prior convictions only by waiving the right to testify.[4]

It is a long-standing principle of the law of evidence that a defendant's character for law breaking may not be used as evidence that the defendant committed the particular offense for which he or she is being tried.[5] Moreover, even if character evidence were

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conviction despite contrary instructions); James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMPLE L.Q. 585, 592-93 (1985) (noting prejudice caused by admission of prior conviction); Robert G. Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247, 249 (1970) (discussing Kalven and Zeisel's study).

4. Of course, if the defendant elects not to testify, the probability of conviction also increases dramatically. Instructions to the jury that it may draw no inference from the defendant's failure to testify are widely regarded as ineffective. Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 667 (1991) (arguing character impeachment of criminal defendants should be prohibited, yet some character impeachment of other witnesses should be permitted). Professor Friedman stated:

> [T]he accused's failure to testify affirmatively raises the jurors' probability assessment of guilt from the baseline level. No matter how vigorously the court instructs the jurors not to take into account that failure to testify, they are almost certain to do so. This proposition is hardly novel, but it warrants close examination. Jurors consider the failure to testify not merely because they might lack the sophistication to follow the judicial instruction, or even because they are disposed to ignore the instruction so that they can implement their own sense of justice. Rather, . . . jurors tend to disregard the instruction because it is virtually incoherent.

Id. 677-88 (footnote omitted); *see* LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 21 (1959) (stating that 71% of poll respondents inferred guilt from defendant's refusal to testify); *see also* MCCORMICK, *supra* note 3, § 43, at 99 (discussing dilemma regarding whether accused should testify); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 400-01 (1980) (noting "undeniable" presumption against individual who stands mute).

5. *See* FED. R. EVID. 404(a) ("Evidence of a person's character . . . is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ."); *see also* United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975) (stating that inference that accused is likely to commit crime again is not permitted). There are exceptions to this general rule. *See, e.g.*, FED. R. EVID. 404(a)(1) (allowing admission of "pertinent" character evidence for purpose of proving action in conformity with character when "offered by an accused, or by the prosecution to rebut the same"); Michelson v. United States, 335 U.S. 469, 475-82 (1948) (ruling that where defendant puts his character in issue, prosecution may inquire into prior arrests as well as convictions); Sparks v. Gilley Trucking Co., 992 F.2d 50, 51-53 (4th Cir. 1993) (holding that under facts of case, evidence of prior speeding tickets could not be admitted to prove negligence in automobile tort action); United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (holding that trial court's failure to sever charges for bank robbery and possession of firearm after felony conviction and admission of evidence of prior felony at trial did not unfairly prejudice defendant); Friedman, *supra* note 4, at 641-42 (noting and discussing limitation on admissibility of character evidence); Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816, 821-22 (1994) (responding to Uviller's article, *infra*); H. Richard

admissible, it could not be established by specific acts of misconduct.[6] These rules exist because such evidence would be unduly prejudicial to the defendant,[7] might consume too much time[8] and might confuse the issues the jury is called upon to decide.[9]

Yet, if the defendant elects to testify, the conventional view holds that prior convictions (for at least some offenses) have substantial value in determining whether the defendant is testifying truthfully on the particular occasion.[10] Indeed, this value is perceived as sufficiently great to warrant the risk that despite limiting instructions the jury will misuse the evidence of prior convictions[11]

Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 831 (1993) (concluding that Federal Rules of Evidence do not provide jury with adequate "instrument" with which to assess credibility). *But see* Friedman, *supra* note 4, at 677 (stating that ban on admissibility of character evidence is not too restrictive and should only be relaxed under "very narrow circumstances").

6. FED. R. EVID. 405(a). If, however, the character trait is an essential element of the crime or defense, character may be proven with evidence of specific acts. FED. R. EVID. 405(b); *see also* United States v. Waloke, 962 F.2d 824, 826, 830 (8th Cir. 1992) (affirming decision to allow evidence of victim's reputation of violence but not evidence of specific acts of violence to support defendant's claim of self-defense in prosecution for assault with dangerous weapon and assault resulting in serious bodily injury); United States v. Beverly, 913 F.2d 337, 353 n.23 (7th Cir. 1990) (stating, in dicta, that testimony was inadmissible in narcotics case because testimony of defendant's dentist that he never witnessed defendant buy or sell cocaine was not essential element of charge, claim or defense).

7. Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 223-24 (1996); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985); *see also* David P. Brydan & Roger C. Park, *"Other Crimes" Evidence in Sex Offenses Cases*, 78 MINN. L. REV. 529, 566-83 (1994) (discussing proposed amendments of rule prohibiting evidence of prior misconduct in cases of sex offenses); Friedman, *supra* note 4, at 642-43 (suggesting that character evidence affects jurors powerfully).

8. *See* Mendez, *supra* note 7, at 223 (noting potential complications associated with character evidence, including consumption of time); Uviller, *supra* note 5, at 800 (discussing time burden).

9. FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues, or misleading the jury, . . . undue delay, [or] waste of time . . . ."); *see also* Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 240-43 (1976) (discussing confusion of issues, misleading of jury and wasting of court time as factors in Rule 403 calculus for unfair prejudice); Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 (1983) (same); Mendez, *supra* note 7, at 223 (noting confusion of jurors where prior bad acts are admitted).

10. *See* Mendez, *supra* note 7, at 225 (noting that "[m]ost jurisdictions permit parties to impeach witnesses with evidence of convictions . . . and prior bad acts . . . that are probative of a witness' lack of veracity"); Uviller, *supra* note 5, at 831 ("Indeed, the Federal Rules may have stood common sense on its head, for the inference of disposition is more readily and reasonably drawn in the instance of primary criminal conduct than in the instance of testimonial perjury.").

11. *See* Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 763 (1961) (noting tendency of jury to infer guilt of defendant be-

and will apply it to the inadmissible inference of guilt rather than the permissible inference of prevarication.[12]

Before the Supreme Court's ruling in *Rock*, most challenges to the admissibility of prior conviction evidence to impeach the criminal defendant were based upon the prejudicial effect such evidence would have on the jury's determination of guilt or innocence.[13] More sophisticated analyses also considered the low probative value prior conviction evidence held on the veracity of the testifying defendant.[14] To the extent that constitutional values were implicated in such challenges, the claim was a general denial of due process arising from this prejudice.[15] These challenges were rarely successful, however, and impeachment by prior conviction seemed to hold a secure place in the arsenal of the prosecutorial cross-examiner.[16] The Supreme Court appeared to have approved the use of prior

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cause he or she was found guilty of different offense in past) [hereinafter *Balancing*]; Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968) (stating that many practicing attorneys and scholars believe jurors cannot "capably" separate character evidence "according to its permissible uses") [hereinafter *To Take the Stand*].

12. For a discussion of scholarly studies showing that jurors tend to misuse prior misconduct evidence, see *supra* note 3.

13. *See, e.g.*, United States v. Bailey, 426 F.2d 1236, 1237-39 (D.C. Cir. 1970) (challenging, unsuccessfully, admissions of prior convictions for house-breaking and larceny); United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969) (stating that denial of request for immunity from impeachment by criminal record may have adverse effect on criminal defendant); Gordon v. United States, 383 F.2d 936, 939-40 (D.C. Cir. 1967) (noting concern of jury prejudice arising from introduction of evidence of any prior criminal conviction).

14. *See, e.g.*, Friedman, *supra* note 4, at 665 (suggesting that jury's assessment of defendant's "ability to bring off the lie" would not be rationally affected by evidence of prior convictions).

15. *See, e.g.*, McGautha v. California, 402 U.S. 183, 230 & n.8 (1971) (Douglas, J., dissenting) (discussing challenges to existing procedure of admitting prior conviction evidence as involving due process claims), *vacated sub nom.* Crampton v. Ohio, 408 U.S. 941 (1972); United States v. Webster, 522 F.2d 384, 385 (8th Cir. 1975) (per curiam) (finding that accused who takes stand in own defense may be cross-examined as to prior felony convictions for impeachment purposes without violation of due process rights); Trimble v. United States, 369 F.2d 950, 952 (D.C. Cir. 1966) (discussing challenge to admission of prior conviction evidence as violative of due process protections); Lane v. Warden, 320 F.2d 179, 181 (4th Cir. 1963) (same).

16. For a discussion of cases in which defendants challenged the admissibility of prior conviction evidence on due process grounds, see *supra* note 15. *But see* State v. Santiago, 492 P.2d 657, 661 (Haw. 1971) (holding that evidence of prior convictions used to impeach defendant's credibility is unreasonable burden on defendant's rights).

conviction evidence[17] and the lower courts more or less routinely admitted it for impeachment.[18]

This Article addresses whether the Court's decision in *Rock* changes the calculus of admissibility of prior conviction evidence to impeach the criminal defendant who elects to exercise the now-recognized constitutional right to testify. To establish context, the Article first explores the question of impeachment by prior conviction from the standpoint of the policies underlying the law of evidence.[19] Part II then examines the bases for the conclusion that prior convictions are valuable data in ascertaining the credibility of a testifying defendant. Part II also includes a discussion of a series of cases from the District of Columbia which exemplifies the struggle between fairness to the defendant and the traditional allowance of prior conviction evidence to impeach.[20]

Part III of this Article explores the development of the right to testify culminating in *Rock v. Arkansas*.[21] Part IV then returns to the question of impeachment of the criminal defendant who elects to testify in light of *Rock*.[22] This Part also explores the appropriate balance between the exercise of constitutional rights and burdens imposed on that exercise in the service of other legitimate governmental interests. Before concluding in Part V, the Article suggests a test for the admissibility of impeaching evidence against the criminal defendant.[23]

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17. For a discussion of cases in which the Supreme Court has discussed permitted uses of prior conviction evidence, see *infra* notes 160-77 and accompanying text.

18. *See* United States v. Lipscomb, 702 F.2d 1049, 1070-71 (D.C. Cir. 1983) (allowing prosecution to use prior conviction evidence to impeach defendant); United States v. Lamb, 575 F.2d 1310, 1314 (10th Cir. 1978) (same); United States v. Bailey, 426 F.2d 1236, 1239 (D.C. Cir. 1976) (same); United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969) (same).

19. For a consideration of the policies underlying the laws of evidence as they affect use of impeachment by prior conviction, see *infra* notes 24-86 and accompanying text.

20. For a discussion of those District of Columbia cases that have considered the propriety of admitting prior convictions for impeachment purposes, see *infra* notes 103-58 and accompanying text.

21. 483 U.S. 44 (1987). For a discussion of the Supreme Court's analysis in *Rock*, see *infra* notes 208-20 and accompanying text.

22. For a discussion of cases leading up to *Rock*'s analysis regarding the criminal defendant who chooses to testify on his or her own behalf, see *infra* notes 223-326 and accompanying text. For an analysis of accepted modes of impeachment of the defendant who takes the stand, see *infra* Part IV, Section C.

23. For the presentation of a test aimed at determining the admissibility of impeachment evidence against the criminal defendant, see *infra* text following note 330.

II. IMPEACHMENT BY PRIOR CONVICTION: EVIDENTIARY ANALYSIS

A. *Background*

The decision whether to testify at the cost of having the jury learn of the defendant's prior convictions or not to testify and have the jury draw an impermissible inference of guilt from the defendant's silence, presents among the most difficult choices in the criminal justice system.[24] Courts and legislatures have struggled over the appropriate balance to be struck between admitting prior convictions of testifying criminal defendants to impeach their testimony and excluding the use of prior convictions because of their prejudicial impact on the question of guilt or innocence.[25] The issue is perhaps one of the most controversial in the law of evidence. At one extreme, all prior felony convictions might be deemed admissible to impeach.[26] At the other, by decision[27] or rule,[28] prior convictions may be barred as impeaching evidence against an accused who elects to testify in his or her own behalf.

Federal Rule of Evidence 609 is an important contributor to the ongoing discussion of impeachment by prior conviction.[29] The fierce debate surrounding adoption of the rule as well as its subsequent history evidences some of that controversy.[30] As originally proposed, the rule would have required admission of any felony conviction[31] or any conviction for a crime involving dishonesty or

24. *See, e.g.*, Gainor, *supra* note 2, at 762 (noting defendant's dilemma between testifying and facing prior conviction impeachment evidence and remaining silent while jurors draw impermissible inferences); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 554-55 (1992) (discussing studies showing that convictions are more likely where defendant does not testify).

25. *Cf.* Old Chief v. United States, 117 S. Ct. 644, 655-56 (1997) (reversing conviction where trial court admitted evidence of prior conviction because admission of name and nature of offense unfairly prejudiced defendant).

26. For a discussion of efforts directed at making all prior felony convictions admissible for impeachment purposes, see *infra* notes 34, 40 and accompanying text.

27. State v. Santiago, 492 P.2d 657 (Haw. 1971).

28. *See, e.g.*, MONT. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.").

29. The Federal Rules of Evidence is the predominant model for a substantial majority of state evidence codes (38 states in 1996, plus the military), making it even more important than its use in all federal trials.

30. *See* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2296 (1995) (noting that Rule 609 "was the subject of fierce debate, sparking repeated revision during its drafting and while it was under consideration by Congress").

31. *See* H.R. REP. NO. 93-650, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7084 (stating that Rule 609, as originally submitted by Supreme Court, permitted

false statement[32] offered to impeach any witness, including the criminal defendant. No distinction was made between felonies generally and so-called *crimen falsi*,[33] or between the criminal defendant and other witnesses.

The initial draft was criticized, principally because of its failure to provide the trial court any discretion to exclude prior convictions whose prejudicial impact exceeded their probative value.[34] This discretion was provided in the next iteration of the rule[35] and applied to both categories of convictions—felonies and *crimen falsi*.[36] Between the promulgation of the two drafts, however, Congress had amended the D.C. Code, disapproving *Luck v. United States*[37] that had recognized trial court discretion to exclude prior

impeachment by prior conviction evidence of "crimes punishable by death or imprisonment in excess of one year.").

32. *Id.*

33. *Crimen falsi* crimes involve dishonesty or false statement. The debate over which crimes constitute *crimen falsi* has been a continuing controversy under Rule 609 as adopted. *See* McHenry v. Chadwick, 896 F.2d 184, 188-89 (6th Cir. 1990) (holding shoplifting not offense involving dishonesty or false statement; concealing stolen goods is such offense); *see also* United States v. Whitman, 665 F.2d 313, 320 (10th Cir. 1981) (holding that larceny may involve dishonesty or false statement when committed by fraudulent or deceitful means). *Compare* Medrano v. City of Los Angeles, 973 F.2d 1499, 1507 (9th Cir. 1992) (holding that shoplifting is not crime of dishonesty or false statement within meaning of Rule 609(a)(2)), *and* Virgin Islands v. Toto, 529 F.2d 278, 281 (3d Cir. 1976) (rejecting government's argument that petit larceny, absent special circumstances, was *crimen falsi*, defined by court as "crimes involving, or at least relating to, communicative, often verbal, dishonesty"), *with* State v. Ray, 806 P.2d 1220, 1229 (Wash. 1991) (holding that theft is crime of dishonesty and therefore per se admissible for impeachment purposes), *and* United States v. Barnes, 622 F.2d 107, 109 (5th Cir. 1980) (finding that shoplifting may be probative of veracity).

34. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 515 (1989) (stating that committee found none of initial drafts acceptable); *see also* Luck v. United States, 348 F.2d 763, 767-68 & n.6 (D.C. Cir. 1965) (holding that admission of evidence of prior grand larceny conviction to impeach defendant was not reversible error under applicable rule of evidence). For a discussion of the D.C. Circuit's holding in *Luck*, see *infra* notes 103-09 and accompanying text.

35. Angelucci v. Continental Radiant Glass Heating Corp., 51 F.R.D. 314, 391-92 (E.D. Pa. 1971). In *Angelucci*, the court stated:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of *nolo contendere*, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment, unless, (3) in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

Id.

36. The Advisory Committee based this iteration of the rule on the court's holding in *Luck*. For a discussion of the court's ruling in *Luck*, see *infra* notes 103-09 and accompanying text.

37. 348 F.2d 763 (D.C. Cir. 1965).

conviction impeachment evidence.[38] Adverse congressional reaction to the revised draft[39] led to a return to the original provision, removing any discretion to exclude prior conviction impeachment evidence.[40]

As the rule worked its way through Congress, various iterations were suggested, each providing the trial court with a different degree of discretion. For example, one version would have permitted the trial court to exclude non-*crimen falsi* crimes.[41] Another version required exclusion unless the predicate conviction was *crimen falsi.*[42] Yet another proposal would have distinguished between the criminal defendant and other witnesses by permitting only the admission of *crimen falsi* convictions against the accused, but allowing any prior felony conviction against other witnesses unless the prejudicial effect of the felony convictions outweighed their probative value.[43] By the time the rule was considered by the Conference Committee, the House had adopted its Judiciary Committee's recommendation that only *crimen falsi* crimes were to be admissible, and the Senate had adopted a version making all felony convictions admissible.[44] The compromise reached by the Conference Committee and adopted by Congress mandated the admissibility of *crimen falsi* convictions, but permitted other felony convictions to be admitted to impeach only if the probative value of any conviction outweighed the prejudice to the defendant. Although the rule has since been amended, no substantive changes have been made with respect to the admissibility of prior convictions to impeach a criminal defendant who elects to testify on his or her own behalf.[45]

38. For a discussion of how Congress's amendment of the D.C. Code modified the analysis of the D.C. Circuit in *Luck*, see *infra* notes 105-09 and accompanying text.

39. *See, e.g., Proposed Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the Comm. on the Judiciary*, 93rd Cong. 29 (1973) (testimony of Professor Cleary) ("[W]e got rather an adverse reaction to the refusal to recognize something along the line of the *Luck* [doctrine].").

40. *See* FED. R. EVID. 609(a) (providing strict guidelines for use of prior conviction impeachment evidence).

41. S. REP. NO. 93-1277, at 14-15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060-61.

42. H.R. REP. NO. 93-650, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7085.

43. S. REP. NO. 93-1277, at 14-15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060-61.

44. For a discussion of the House and Senate's recommendations, see *supra* notes 41-43 and accompanying text.

45. In 1990, Congress amended Rule 609, making two changes. FED. R. EVID. 609. First, Congress abolished the limitation specifying that prior conviction evidence could be elicited only on cross-examination. *Amendments to Federal Rules of Evidence—Rule 609*, 129 F.R.D. 347, 353 (1990). Second, Congress amended the

B. *Prejudice and Probative Value*

Most challenges to the admissibility of prior convictions to impeach the criminal defendant focus on the prejudice side of the probativity/prejudice balance. As we have seen, a testifying defendant with prior convictions runs the risk that a jury will misuse the convictions in determining not just the credibility of the defendant *qua* witness, but also his or her guilt.[46] The defendant having previously sinned, a jury may well conclude either that the defendant is more likely to have sinned on this occasion or that the defendant should be removed from society regardless of her guilt of the instant offense.[47] So great can this prejudicial impact be that "[i]mproper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself."[48]

But it is also the case that prior convictions admitted to impeach present serious problems on the probativity side of the balance. Typically, assessments of the probative value of prior convictions to impeach credibility address the strength or weakness of the inference from the prior conviction to the veracity of the defendant/witness on the occasion of his or her testimony. Hence, the more the prior conviction implicates veracity-related conduct, the more likely it is to be admitted on the question of credibility. Federal Rule of Evidence 609 and most of the analogous provisions

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rule to clarify that courts only have discretion regarding the admission of prior conviction evidence when determining whether to admit evidence of prior felonies of defendants only in criminal trials. *Id.* at 353-54.

46. *See also* Gainor, *supra* note 2, at 791 (noting tendency of jurors to misuse prior conviction evidence); *Balancing, supra* note 11, at 762 (same); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime,* 78 HARV. L. REV. 426, 440 (1964) (same); *To Take the Stand, supra* note 11, at 218 (stating that many scholars and practitioners believe that jury cannot capably separate evidence); Comment, *Use of Bad Character and Prior Convictions to Impeach a Defendant Witness,* 34 FORDHAM L. REV. 107, 109 (1965) (stating that prior conviction testimony serves only to hurt defendant). For a discussion of studies that reveal the impact impeachment by prior convictions has on jury determinations of a testifying defendant's guilt, see *supra* note 3 and accompanying text.

47. *See, e.g.*, Old Chief v. United States, 117 S. Ct. 644, 650 (1997) ("Such improper grounds [for conviction] include . . . generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the other bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)."); Mendez, *supra* note 7, at 223-24 (noting that jury may overestimate value of character evidence).

48. United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1979) (citing United States v. Gilliland, 586 F.2d 1384 (10th Cir. 1978); United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972)).

of the state evidence codes modeled on the Federal Rules reflect this analysis of probative value.

But such an assessment of probative value leaves out too much.[49] It is not simply that one infers from a prior conviction that the witness is more likely to be prevaricating on this occasion than would be the case without the prior conviction. The inferential chain is longer, and it is worth examining each of the links in that chain if we are to assess more accurately the value of the prior conviction as evidence of credibility. It is not that one has been convicted of an offense that supports the inference that the witness is unworthy of belief; rather it is that the witness in fact committed the offense for which he or she was convicted.[50] The conviction is a surrogate for the underlying conduct and serves to increase the probability (because of the standard of proof necessary to sustain a conviction) that the witness in fact engaged in that conduct.[51] Thus, we infer backwards from the conviction to the conduct underlying it.[52] Yet, there is a real question about whether the reasonable doubt standard serves to assure the integrity of the underlying convictions that may be used to impeach when a very substantial majority of all criminal convictions are not the result of trial determinations, but of plea bargains.[53]

Consider: A crime has been committed. Zoltan is arrested for it. Assume, as is often the case, that Zoltan is poor, African-Ameri-

49. *See* Friedman, *supra* note 4, at 646-47 ("Researchers differ as to how disparate the situations may be before the correlation between a person's behavior in one situation and in another diminishes to insignificance.").

50. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 848 (1982) (stating that law on character evidence is "uncertain, inconsistent and ill-defined").

51. *See* United States v. Werbrouck, 589 F.2d 273, 277 (7th Cir. 1978) (prior convictions used to impeach are based on "a finding of guilty beyond a reasonable doubt in a forum which abides by specific rules . . . designed to protect the defendant"); Friedman, *supra* note 4, at 644 ("[A] criminal conviction represents a determination by the judicial system, after its most painstaking type of proceeding, that a given fact—the defendant's guilt of a crime—is true.").

52. *See* Uviller, *supra* note 5, at 805-06 (exploring interaction between Federal Rule of Evidence 609 regulating admission of prior convictions, and Federal Rule of Evidence 608 regulating inquiry into prior conduct whether or not evidenced by conviction).

53. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 462-63 tbl.5.28 (Kathleen Maguire & Ann L. Pastore eds., 1994) (stating that in 1994, 75% of criminal defendants entered plea of guilty in federal district courts); *see also* Robert E. Scott & William S. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 n.1 (1992) (stating that in 1989, 86% of all federal criminal cases were disposed of without trial); Tung Yin, Comment, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 419-20, n.1 (1995) (noting that in 1990, 90% of all federal criminal cases were disposed of without trial).

can and from the inner city.[54] Assume as well that Zoltan has not been in trouble with the law before. Zoltan's case is likely to be assigned to a public defender. The public defender will have an enormous backlog of cases and little time or resources. The case for the Government will be assigned to an equally overworked and understaffed assistant district attorney. Unless the crime is quite serious or carries a mandatory minimum sentence, the prospect of a jail sentence for Zoltan is slim. The jails are already overcrowded, and first offenders are not routinely incarcerated.[55] Under such circumstances, the overwhelmingly likely scenario is a plea bargain. Zoltan may not understand the consequences of a conviction; he is likely to be most concerned about not going to jail. So, if Zoltan is told that he need only "confess" and he can go home, that is precisely what he is likely to do. If the jails are badly overcrowded, as they often are in major metropolitan areas, the same scenario may be repeated, and this time Zoltan is more likely to be arrested and charged as he already has one conviction.[56]

When Zoltan is arrested and charged the third time, he is more likely to face imprisonment. At that point, Zoltan may wish to plead "not guilty" and go to trial. If he does so, he will have two choices: (1) He may elect to testify and deny his guilt, in which case his prior convictions may be used to impeach and he will likely be convicted;[57] or (2) He may elect to forego his right to testify in order to prevent his prior convictions from coming before the jury, in which case he is likely to be convicted.[58] (If this scenario has any ring of truth, it ought to lead us to question the validity of such

54. *See* Michael Tonry, *Sentencing Reforms and Racial Disparities*, 78 JUDICATURE 118, 118-19 (1994) (citing arrest rates of African-Americans for violent crimes).

55. *See generally* Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 989 (1995) (stating 1992 plea bargaining ban created fear of prison overcrowding); Martin Fox, *Problems Seen with Johnson's End to Plea Bargains*, N.Y.L.J., Nov. 25, 1992, at 1 (declaring Bronx lacked sufficient court resources to try large number of additional cases).

56. *See* Carl McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOC. ORD. 1, 12 (discussing problems in criminal justice system in major metropolitan cities such as prison overcrowding and prevalence of repeat offenders within system); *see also* Friedman, *supra* note 4, at 672 n.85 ("It is . . . conceivable that a conviction-hungry prosecutor would tend more readily to bring a weak case against a person with a prior record . . . .").

57. For a discussion of studies that have shown the correlation between prior conviction impeachment evidence used against a testifying criminal defendant and the conviction of that defendant, see *supra* note 3 and accompanying text.

58. *See* KALVEN & ZEISEL, *supra* note 3, at 160 tbl.52 (illustrating increased probability that defendant will be convicted if jury becomes aware of prior convictions).

statistical studies as recidivism rates.) Now, Zoltan may have been guilty of each of the offenses with which he was charged; he may deserve to be incarcerated for a long time. But he may not, and under the circumstances described, we cannot know.

It would be unrealistic to expect the legal system to question the integrity of convictions based on plea bargains, especially in the context of their use merely as impeaching evidence.[59] Nonetheless, we ought not close our eyes to the reality of the process, which provides further support for the proposition that the use of prior convictions to impeach criminal defendants/witnesses is of questionable probative value. In *Gordon v. United States*,[60] then-Circuit Judge Burger noted: "The relevance of prior convictions to credibility may well be different as between a case where the conviction of the accused was by admission of guilt by a plea and on the other hand a case where the accused affirmatively contested the charge."[61]

For the sake of continuing the analysis, however, let us put these doubts aside for the moment. Having satisfied ourselves that the witness once engaged in dishonest conduct, we must then infer that such conduct evidences a trait of character that makes it more probable that the witness would be less than candid on other occasions—specifically, the witness's current testimony. For without this inference of character, there is nothing to connect the prior instance of dishonesty with the present occasion.[62] Consequently, the probative value of the prior conviction can be no stronger than the inference that the single act or, at best, the small number of acts evidenced by the conviction(s) are reliable indicators of a particular character trait of mendacity. The validity of such an inference from one or a few acts to the character of a person is surely not obvious.[63]

59. *But cf.* Harris v. New York, 401 U.S. 222, 224 (1971) ("It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, *provided of course that the trustworthiness of the evidence* satisfies legal standards." (emphasis added)).

60. 383 F.2d 936 (D.C. Cir. 1967).

61. *Id.* at 940 n.8; *cf.* Loper v. Beto, 405 U.S. 473, 483 (1972) (holding that uncounseled convictions are inadmissible to impeach).

62. Mendez, *supra* note 7, at 225-26 ("In the absence of a stable personality, character evidence is devoid of a valid predictive base and cannot be probative of an individual's conduct across diverse situations.").

63. *See* Brydan & Park, *supra* note 7, at 561-62 nn.147-51 (stating that there is relatively no probative value of any inference from prior conduct to current conduct at issue during trial); Friedman, *supra* note 4, at 652-54 (same); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981) ("[T]he probative value of the inference from conduct on other occasions to conduct on the occasion in question may be relatively weak."); Uviller, *supra* note 5, at 792 ("Neither truthtelling nor lying can be called a perva-

Indeed, without consideration of the particular circumstances surrounding the earlier conduct, it is reasonable to entertain substantial doubts about the inference sought to be drawn.[64] And, if the prior conviction is the result of a guilty plea, as is typically the case, its probative value on the defendant/witness's credibility is even more strained. The prior guilty plea is some evidence that the defendant was truthful about her legal misadventure and, hence, ought to be more worthy of belief rather than less. Of course, the plea bargaining process suggests that either inference is problematic.

Nevertheless, if we are prepared to draw this inference of character from prior conduct, we must still infer from this character trait that the witness is more likely to prevaricate in his or her current testimony.[65] Whether character has so consistent an effect on behavior is a matter far from clear.[66] Yet, the probative value of prior conviction evidence can be no stronger than the inference from character to conduct. This, of course, is precisely the inference the law of evidence forbids when the question is whether the defendant committed the charged offense.[67]

Thus, there are several inferences we must draw for the evidence of prior conviction to be probative of credibility of the witness's present testimony: (1) that the defendant in fact committed the acts that were the subject matter of the conviction; (2) that those acts are a valid indicator of the defendant's character for mendacity; and (3) that the defendant is acting in conformity with that supposed trait of character in the instance of his or her current

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sive trait like a quick temper or a pessimistic outlook."); *cf.* FED. R. EVID. 405(a) (barring use of specific acts to prove character except as permitted on cross-examination); Mendez, *supra* note 7, at 227-28 (noting inadequate predictive value of personality traits and stating that behavior is actually shaped by specific situations).

64. *See* Friedman, *supra* note 4, at 654 ("[A] person so characterized will not necessarily lie more readily than other people, and a person not so characterized will not necessarily lie less than others. There are, presumably, honest muggers and gentle perjurers.").

65. Uviller, *supra* note 5, at 813. Uviller stated:

> Testifying as a witness is such rare behavior, the trial such a unique occasion, that the honesty or dishonesty of the witness's testimony cannot be said to be consistent with a pattern of predictable behavior. Simply put, it is extremely unlikely that any person testifies dishonestly because of a trait of dishonesty . . . .

Id.

66. *See* Gold, *supra* note 30, at 2312 nn.81-83 (citing several studies indicating that personality does not have such consistent effect on behavior); Mendez, *supra* note 7, at 228 (stating that assumption behind trait personality construct appears to be false).

67. *See* FED. R. EVID. 404(a) (disallowing, generally, introduction of character evidence for purpose of proving action in conformity therewith).

testimony. The probativity of the evidence of the prior conviction can be no stronger than the weakest link in that inferential chain. Indeed, the probative value of the evidence of prior conviction is the product of the probabilities of each inference necessary to support the conclusion, and that product is perforce lower than the lowest probability of each of the several inferences to be drawn.[68]

With respect to character evidence on the question of guilt, rather than credibility, we recognize these problems, as well as the problem of prejudice to the defendant that is all but certain to arise from the jury's awareness that the defendant has previously been convicted of one or more crimes. Hence, the government is not permitted to introduce evidence that the defendant has two prior convictions for bank robbery, and therefore is more likely to have committed the bank robbery for which she is now being tried.[69] Yet, courts are often prepared to admit evidence of a prior conviction for some crime involving false statement on the question whether the defendant is testifying falsely on this occasion. There is no reason to suppose that prior false statement convictions are any more probative of current veracity than are prior bank robberies of a current bank robbery.

Even more problematic are prior convictions for offenses more attenuated from the question of veracity. However probative a prior perjury conviction might be on the question whether the defendant/witness is testifying truthfully on this occasion, a prior conviction for burglary,[70] drug offenses[71] or other crimes bearing less

68. *See generally* Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977) (showing utility of mathematical models to serve as heuristic devices in weighing evidence).

69. *See* FED. R. EVID. 404(b) (stating that evidence of prior convictions and bad acts may not be admitted to prove action in conformity therewith, but may be introduced for other purposes, such as to establish proof of motive, opportunity, intent, preparation, plan and knowledge).

70. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (finding no error in admission of prior felony conviction); United States v. Jacobs, 44 F.3d 1219, 1224-25 (3d Cir.) (finding independent basis for admitting prior burglary conviction), *cert. denied*, 115 S. Ct. 1835 (1995); United States v. Key, 717 F.2d 1206, 1209 (8th Cir. 1983) (holding that trial court did not commit abuse of discretion in admitting prior burglary, forgery and escape convictions); United States v. Rosales, 680 F.2d 1304, 1306 (10th Cir. 1981) (finding no abuse of discretion in admitting prior burglary and forgery convictions of witness); United States v. Portillo, 633 F.2d 1313, 1323 (9th Cir. 1980) (remanding case for failure of trial judge to make findings required by Rule 609(b)). For a discussion of Rule 609, see *supra* notes 24-45 and accompanying text.

71. *See, e.g.*, United States v. Rein, 848 F.2d 777, 783 (7th Cir. 1988) (ruling that admission of prior drug conviction was not abuse of discretion); Linskey v. Hecker, 753 F.2d 199, 202 (1st Cir. 1985) (holding that admission of prior larceny, burglary and robbery convictions did not constitute abuse of discretion of trial

directly on veracity[72] perforce are even less probative of the truth of the current testimony. Indeed, prior convictions may add less probative value on the question of credibility than on the question of guilt or innocence. For with respect to the credibility question, there is already substantial doubt about the defendant's veracity arising from his or her interest in the outcome.

In balancing probativity against prejudice (and the other relevant counterfactors), it is important to distinguish two different possible weights: The first we might call "absolute probative value" and the second, "marginal probative value."[73] The absolute probative value of a piece of evidence is the extent to which that item of evidence would increase the probability of the proposition for which it is offered if there were no other evidence for that proposition. The analysis of probative value just completed was addressed to the absolute probative value of prior convictions on the question of credibility. Marginal probative value, on the other hand, is the extent to which that item of evidence would increase the probability of the proposition for which it is offered beyond whatever other evidence there is to support that proposition.[74] Thus, the absolute probative

judge); Murr v. Stinson, 752 F.2d 233, 234 (6th Cir. 1985) (holding that admission of prior drug conviction was not abuse of discretion); United States v. Pedroza, 750 F.2d 187, 201 (2d Cir. 1984) (ruling that admission of prior drug conviction was not abuse of discretion).

72. *See, e.g.*, United States v. Nururdin, 8 F.3d 1187, 1191 (7th Cir. 1993) (holding that defendant in handgun violation case was rightly impeached with four prior convictions for robbery, attempted robbery and aggravated battery); United States v. Givens, 767 F.2d 574, 580 (9th Cir. 1985) (holding that defendant was properly impeached with prior conviction for assault with deadly weapon); United States v. Booker, 706 F.2d 860, 863 (8th Cir. 1983) (finding prior conviction for possession of firearm by convicted felon was impeachable offense); United States v. Fountain, 642 F.2d 1083, 1092 (7th Cir. 1981) (holding that defendant could be impeached with prior conviction for premeditated murder); United States v. Bryan, 591 F.2d 1161, 1163 (5th Cir. 1979) (holding defendant was properly impeached with prior conviction for escape).

73. Old Chief v. United States, 117 S. Ct. 644, 651 (1997). In *Old Chief*, the Court noted:

> An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made.

Id.

74. MCCORMICK, *supra* note 3, § 265, at 782; 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE 546-47 (1978); *see also Old Chief*, 117 S. Ct. at 652 (concluding that Advisory Committee Notes on Federal Rule of Evidence 404 "leave no question that when Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by plac-

value of a particular piece of evidence in a particular case never changes, though its marginal probative value may decrease as other evidence for the same proposition is admitted. Of course, marginal probative value may never exceed absolute probative value and will often be lower.

An example may help to illustrate these notions. Assume the defendant in an assault case offers the testimony of a witness to the effect that the defendant has a pacific character. Assume further that there is only the one character witness. The testimony of that witness will have a particular probative value on the pacific quality of the defendant (though we may not be able to say with any precision exactly what that value is, nor will all persons—or all jurors—agree on that value). Now, assume another witness of precisely equal credibility to the first witness offers precisely the same testimony. Plainly, the probative value of the testimony of the two witnesses taken together does not possess twice the probative value of either alone. As we add more and more substantially equally credible character witnesses, the marginal probative value of each witness on the question of the defendant's pacific character is diminished, though the absolute probative value of each witness's testimony, taken alone, remains constant. Twenty character witnesses of equal credibility are not twenty times more probative than one or ten times more probative than two.

The commonly accepted notion of "cumulative evidence" is a recognition of just this point about marginal probative value. It recognizes that in evidence, as in life, there reaches a point of diminishing returns in which additional evidence does not yield a corresponding increase in probative force.

Typically, when we speak of cumulative evidence, we have in mind the sort of instance just described, in which the same kind of evidence is offered to prove a particular point—for example, multiple character witnesses offering essentially the same testimony. But evidence may suffer the same disadvantages of this pure sort of cumulativeness even if the evidence is not of precisely the same sort, so long as it is offered for the same proposition. In the example of a defendant's use of character evidence, it should make no difference to the analysis that some of the evidence offered is in the form of reputation while some is in the form of opinion, so long as both go to the question of character.

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ing the result of that assessment alongside similar assessments of evidentiary alternatives").

A similar analysis is appropriate when, for example, interest in the outcome and reputation are offered on the question of credibility—or when impeachment by prior conviction is offered in the face of the defendant's interest in the outcome. It is important to note that I am not suggesting that such evidence has no probative force, simply that it has considerably less marginal probative force given other strong evidence on the same point.

When the criminal defendant elects to testify, the prosecution may seek to offer evidence of the defendant's prior convictions in order to impeach that testimony, to cast doubt on the defendant/witness's veracity, to show that the defendant is unworthy of belief. It is critical to bear in mind that this evidence of prior conviction is not offered on the question of the defendant's guilt—for that is prohibited by the rules against using character to prove conduct[75] and the rules preventing the use of prior specific acts to prove character,[76] but only on credibility. Let us assume, despite the demonstrable weaknesses of the connecting inferences, that the absolute probative value of this evidence on the question of credibility is reasonably high. That is, in the absence of another reason to doubt the credibility of a particular person, knowledge that the person had been convicted of a qualifying crime would lower our assessment of that person's credibility, despite the several inferences necessary to support that conclusion.

The relevant concern, however, is not absolute probative value, but marginal probative value. If we know, as we do in the case of the testifying defendant, that the witness has a substantial interest in the outcome of the matter on which he or she is testifying, our assessment of the credibility of that testimony will be substantially diminished.[77] Indeed, at common law, criminal defendants—and

75. FED. R. EVID. 404(a). For a discussion of cases that have addressed the rules regarding admission of prior conviction evidence, see *supra* note 5 and accompanying text.

76. FED. R. EVID. 405.

77. *See* Friedman, *supra* note 4, at 659 (stating that rational jury will typically conclude that accused "has a strong interest in lying"). The testimony of the defendant in a criminal case is uniquely subject to doubt because the defendant's specific interest in the outcome is unlike that of any other witness in any other case. *Id.* The criminal defendant's unique position is recognized in the Federal Rule of Evidence 609(a)(1), but that recognition is limited largely to the prejudicial impact that evidence of prior convictions are likely to possess. It is also true, however, that prior conviction evidence has less marginal probative value on the credibility of the criminal defendant because of that party's uniquely strong interest in the outcome. *See* Beaver & Marques, *supra* note 3, at 614-15 (stating that jury has adequate reason to doubt defendant's self-interested testimony, even without evidence of prior conviction); Gainor, *supra* note 2, at 783-85 (discussing jury's natural distrust of criminal defendant and his self-interested testimony); Gold,

even parties to civil actions—were barred from testifying for this very reason: Their interest in the outcome cast so large a doubt on the credibility of their testimony that they were deemed incompetent.[78] The question we must ask about the probative value of prior convictions, then, is how much such evidence adds to our assessment of credibility in light of the defendant/witness's strong interest in the outcome.[79] However much that might be, it is necessarily less than the evidence of prior convictions standing alone.

Indeed, the Supreme Court has gone further in determining the context in which the probative value of a particular piece of evidence is to be assessed. *Old Chief v. United States*[80] was a prosecution for possession of a firearm by a defendant with a prior felony conviction. The defendant had sought to prevent the Government from introducing evidence of the nature of the prior felony by offering to stipulate to the existence of the prior felony conviction element of the offense. In deciding that the Government was not entitled to introduce the particulars of prior conviction evidence under the circumstances, the Court noted that the balance between probative value and the risk of unfair prejudice was to be struck not merely in light of other evidence of the same proposition actually

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supra note 30, at 2326 (discussing juror belief that defendant is interested witness who, if guilty, would not hesitate to commit perjury).

78. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989) ("At common law a person who had been convicted of a felony was not competent to testify as a witness."); *see also* MCCORMICK, *supra* note 3, § 43, at 99 (discussing fact that criminal defendant could not testify in own defense at common law because of belief that defendant's motive to lie was so strong); Mason Ladd, *Credibility Tests: Current Trends*, 89 U. PA. L. REV. 166, 174-76 (1940) (same); Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 335 (1979) (same).

79. *See generally* Gainor, *supra* note 2, at 799. Gainor notes:

> [A]n accused who testifies in his own defense faces a great disadvantage in the credibility contest between himself and his accuser. "[W]hen a criminal defendant testifies jurors are quite aware that he has a unique concern with the outcome of the trial and is more likely to have fabricated his testimony than any other witness. His testimony is therefore likely to be given diminished weight irrespective of impeachment."

Id. (quoting People v. Allen, 420 N.W.2d 499, 520 (Mich. 1988)). By contrast, although the absolute probative value of prior conviction evidence to impeach may be the same for witnesses other than the criminal defendant, everything else being equal, the marginal probative value should be higher. Thus, there is greater justification for permitting prior conviction impeachment of defense witnesses other than the defendant as well as of prosecution witnesses than impeachment of the defendant herself. *But cf. id.* at 785 (arguing that prohibiting prior conviction impeachment of criminal defendant while permitting it for prosecution's witnesses would "greatly increase the imbalance," disadvantaging prosecutors who must rely on testimony of convicted criminals).

80. 117 S. Ct. 644 (1997).

introduced in the case, but other evidence of that proposition that might have been introduced.[81]

Finally, although the defendant/witness's interest in the outcome may be the most important factor in assessing the credibility of his or her testimony,[82] it is worth noting that other avenues of impeachment are open to the prosecution as well. Thus, even if impeachment by prior conviction is not permitted, impeachment by prior inconsistent statement, for example, will remain available.[83] To the extent that other modes of impeachment are employed, the marginal probative value of prior convictions decreases even further. Thus, the marginal probative value of evidence of prior convictions on the question of the defendant/witness's credibility is not terribly high; it adds comparatively little to our assessment of whether the witness is telling the truth.

But our assessment of probative value is not yet complete. For in addition to adding little on the question of credibility, the effect of permitting impeachment by prior conviction of the criminal defendant *qua* witness is often to keep the defendant off the stand entirely. If the only way to avoid the prejudicial impact of evidence of prior convictions is by not testifying, many defendants will choose to "waive" the right to testify.[84] In such cases, whatever evidence the defendant has to offer will not be heard. The factfinder will be denied the opportunity to hear from a witness who may have the best access to the facts embraced by the charge. "When confronted with the fact that his testimony would enable the prosecution to introduce otherwise inadmissible evidence of his criminal

81. *See id.* at 651 (explaining that in proper Rule 403 balancing analysis, judge should "evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well").

82. *See* Friedman, *supra* note 4, at 659 ("[A] criminal defendant, whatever his character or prior record, has a very strong interest in avoiding conviction."). Unlike Professor Friedman, I believe that this proposition is independent of any assumption the jury might make about the defendant's guilt. Indeed, this seems to put the cart before the horse. "For virtually all—novice and experienced criminal—acquittal is the overriding, intensely desired, goal . . . ." Uviller, *supra* note 5, at 813.

83. United States v. Opager, 589 F.2d 799, 801-02 (5th Cir. 1979) (finding that rule barring extrinsic evidence of misconduct to impeach is inapplicable to evidence that contradicts witness's testimony as to material fact).

84. *See also* Friedman, supra note 4, at 666 ("Some defendants who would otherwise take the stand do not do so because they do not want to face character impeachment evidence."). For an analysis of the concerns that arise where a criminal defendant chooses to waive his or her right to testify due to a fear of being confronted by evidence of prior convictions, see *infra* notes 85-86 and accompanying text.

past, a defendant frequently remains silent, even though his testimony may be highly relevant to the issue of guilt or innocence."[85]

Thus, there are two aspects to the effect on the probativity side of the scale of a rule permitting impeachment by prior conviction. First, little of probative value is added to the determination of the credibility of the witness being impeached beyond whatever assessment has been made on the basis of the witness's interest in the outcome of the case. Second, important evidence will be sacrificed by the refusal of the witness to submit to such impeachment.[86]

C. *The Authorities*

Despite this demonstrable cost a defendant must bear if asserting his or her right to testify, the clear weight of judicial authority supports the admissibility of prior convictions to impeach the testifying defendant.[87] Most of these decisions, however, rely on Supreme Court authority admitting a defendant's prior convictions for purposes other than impeachment, and thus do not implicate the defendant's right to testify. In other cases, the admissibility of prior convictions did not depend on the defendant's exercise of an established constitutional right because those cases in which the particular court assumed the propriety of using prior convictions to impeach a testifying criminal defendant predate the Supreme Court's declaration of the constitutional right to testify in one's own behalf.[88] Yet these cases continue to be relied upon for the idea that if a criminal defendant elects to exercise the right to testify, otherwise inadmissible prior convictions may be introduced ostensibly to impeach credibility.

At early common law, persons who had been convicted of committing a crime were disqualified from testifying. The disqualification, however, had a limited effect as most felons were hanged.[89]

85. United States v. Hairston, 495 F.2d 1046, 1050 (D.C. Cir. 1974); *see* United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969) ("[A]s a practical matter an adverse ruling [on a motion to exclude prior convictions to impeach the defendant] may effectively foreclose a defendant from taking the witness stand . . . .").

86. *See* Friedman, *supra* note 5, at 825 (suggesting that threat of character impeachment evidence deprives truth-determining process of valuable information).

87. For a discussion of cases holding that evidence of prior convictions is admissible to impeach a testifying defendant, see *infra* notes 103-77 and accompanying text.

88. For a discussion of the Supreme Court's holding in *Rock*, in which the Court ruled that criminal defendants have a constitutional right to testify in their own behalf, see *infra* notes 208-20 and accompanying text.

89. 9 WILLIAM S. HOLDSWORTH, HISTORY OF THE COMMON LAW 191 (3d ed. 1923).

Although the original basis of the rule—having its roots in Roman and Germanic law[90]—is shrouded in the past, by the seventeenth century the rule was firmly established. It was justified on a theory of moral turpitude. Simply put, the convicted felon's testimony was to be excluded because "from such a moral nature it [was] useless to expect the truth."[91]

Jeremy Bentham was a principal opponent of the rule of disqualification of felons, as he was of other testimonial disqualifications.[92] Bentham noted that the disqualification rested on the inference of perjury to be drawn from the character of the proffered witness as evidenced by that person's prior conduct.[93] Moreover, Bentham emphasized that it was not the felon who suffered the punishment of testimonial incompetence, but those in need of the testimony.[94]

Perhaps as a result of Bentham's influence, the rule of incompetence of convicted felons gradually eroded. By 1918, the Supreme Court, finding the testimony of a convicted forger competent, noted:

> [T]he disposition of courts and of legislative bodies to remove disabilities from witnesses has continued . . . under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons . . . who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury.[95]

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90. *Id.*

91. 2 WIGMORE ON EVIDENCE § 519, at 609 (3d ed. 1940 & Supp. 1979) [hereinafter WIGMORE].

92. *Id.* at 610-11 (citing 7 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (Bowring's ed. 1827)). Bentham wrote:

> In such a state of things . . . the legislator has this option, and no other: to open the door to all witnesses or to give license to all crimes. For all purposes, he must take men as he finds them: and, for the purpose of testimony, he must take such men as happen to have been in the way to see, or to say they have been in the way to see, what, had it depended upon the action, would have been seen by nobody.

7 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (Bowring's ed. 1827).

93. BENTHAM, *supra* note 92, at 406 ("[The witness] has violated the obligations of morality in some sorts of ways; therefore it is more or less probable that he will, upon occasion, violate them in this sort of way.").

94. *Id.*

95. Rosen v. United States, 245 U.S. 467, 471 (1918).

Some states continued to apply a rule of incompetency, at least with respect to certain felonies—typically perjury and the like.[96] Generally, however, the disqualification of convicted felons was abolished in most jurisdictions.

Typically, when a jurisdiction abolished the disqualification of witnesses who had been convicted of a crime, it permitted the conviction to be used to impeach the testimony of the witness.[97] No distinction was made between the garden variety witness and the criminal defendant testifying in her own behalf, despite what now seems the obviously greater prejudicial impact on the latter. Interestingly, the original draft of the American Law Institute's proposed *Model Code of Evidence* would have prohibited impeachment by prior conviction of the criminal defendant/witness unless the defendant introduced evidence to bolster his or her credibility.[98] Even then, prior conviction evidence was limited to crimes involving dishonesty or false statement.[99] Even more interesting, the avowed rationale for the proposed rule was "the policy of encouraging the accused in criminal cases to take the stand."[100] Sometime thereafter, the National Conference of Commissioners on Uniform State Laws proposed a similar rule.[101] More recently, both bodies changed their positions to one more congruent with what was to become Federal Rule of Evidence 609.[102]

Meanwhile, the courts, too, had been considering the appropriate use of prior convictions to impeach the criminal defendant/witness. Perhaps the most influential of these decisions was *Luck v.*

96. *See, e.g.*, ALA. CODE § 12-21-162(a) (1996) ("No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury."); MD. CODE ANN., CTS. & JUD. PROC. § 9-104 (1995) ("A person convicted of perjury may not testify."). *But see* Woods v. State, 90 So. 2d 91, 92 (Ala. Ct. App. 1956) (holding that exclusion of defendant's testimony from consideration by jury violated defendant's due process rights under state constitution); 42 PA. CONS. STAT. § 5912 (1996) ("No person shall be deemed incompetent . . . as a witness in any criminal proceeding by reason of the person's having been convicted of perjury . . . .").

97. 3A WIGMORE, *supra* note 91, § 980, at 835.

98. CODE OF EVID. Rules 306, 311 (Proposed Final Draft 1942).

99. *See id.* at Rule 106 ("[E]xtrinsic evidence shall be inadmissible (a) of traits of his character *other* than honesty or veracity, or (b) of his conviction of crime *not* involving dishonesty or false statement or (c) of specific instances of his conduct relevant only as tending to prove a trait of his character." (emphasis added)).

100. *Id.* at cmt.

101. UNIF. R. EVID. 21 (1953).

102. *See* UNIF. R. EVID. 609 (1974) ("For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime . . . (2) involved dishonesty or false statement . . . .").

United States.[103] Luck had been charged with house-breaking and larceny. He testified in his own behalf, offering an alibi defense. Ostensibly to attack the defendant's credibility, on cross-examination the Government elicited from the defendant, over objection, that he had pleaded guilty to grand larceny a few years earlier.[104] On appeal, the defendant argued that the prior conviction should not have been admitted because he was a juvenile at the time. The Government responded that because Luck had been tried as an adult, the statutory limitations on the use of the results of adjudications in the juvenile court were inapplicable, and the court agreed.[105]

Although the D.C. Circuit affirmed the conviction, the opinion includes strong dicta, over the disagreement of Judge Danaher, that prior convictions are not necessarily admissible to impeach the criminal defendant who elects to testify.[106] The court interpreted the relevant statute to vest a sound discretion in the trial court whether to admit or exclude prior conviction evidence aimed at attacking the credibility of a testifying defendant.[107] Interestingly, among the court's reasons was that "[t]here may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."[108] The court went on to identify a number of factors that ought to inform the exercise of the trial court's discretion: the nature of any prior offense, the number of prior convictions, the age and circumstances of the defendant (the court was not clear whether it meant at the time of the prior convictions or the time of trial for the instant offense) and, "*above all,* the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction."[109]

A year and a half later, in an opinion by then-Circuit Judge Burger, the same court, again in dicta, spelled out in greater detail the factors a trial court should consider in determining the admissi-

103. 348 F.2d 763 (D.C. Cir. 1965).

104. *Id.* at 766.

105. *Id.*

106. *See id.* at 767-68 ("The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute . . . leaves room for the operation of a sound judicial discretion . . . .").

107. *Id.*

108. *Id.* at 768 (footnote omitted).

109. *Id.* at 769 (emphasis added).

bility of a testifying defendant's prior convictions for impeachment purposes.[110] Morris Gordon had been convicted of robbery and assault after a trial that turned on the jury's resolution of the conflict between the testimony of the complainant and that of the defendant.[111] The defendant's claim on appeal, in *Gordon v. United States*, was that the trial court had abused its discretion in permitting his testimony to be impeached by evidence of his prior convictions. The court used the occasion to clarify and expand the law of prior conviction impeachment after *Luck*.[112]

As the court explained, evidence of prior convictions may have probative force in the jury's assessment of a defendant/witness's testimony.[113] On the other hand, making the jury aware of such convictions also presents the potential for prejudice.[114] *Luck* contemplated a discretionary determination whereby the trial court would weigh these competing considerations.[115] Thus, under *Luck*, some convictions would be admitted while some would be excluded. *Gordon* attempted to formulate a set of factors that should guide that exercise of discretion.

Under *Gordon*, prior convictions are presumptively admissible on the question of credibility.[116] It is up to the defendant to persuade the court in any particular instance that any conviction should be excluded. Moreover, the burden on the defendant is not light. It is only when the defendant can demonstrate that the prejudicial impact of the prior conviction "far outweighs" its probative value on the question of credibility that the impeaching conviction should be excluded.[117]

The court iterated that the defendant/witness's prior convictions may not be used to prove the accused's bad character, but rather, may be used only to assist the jury in assessing whether to believe his or her testimony.[118] Convictions for crimes involving

110. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (discussing fear of prejudice and impeachment).

111. *Id.* at 938.

112. *Id.* at 939. The defendant had not raised the issue at trial as *Luck* required, and the court found no plain error. *Id.* at 941. Thus, the case easily could have been disposed of without the extended discussion of impeachment by prior conviction. *Id.*

113. *Id.* at 939.

114. *Id.*

115. *See id.* (stating that court weighs probative value of convictions against degree of prejudice).

116. *Id.* at 940.

117. *Id.* at 939.

118. *Id.* at 940.

dishonesty or deceit—such as fraud and cheating—are more probative of credibility than crimes of violence. Thus, the court suggested a "'rule of thumb' . . . that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not."[119]

On the prejudice side of the probativity/prejudice balance, the court noted the especially difficult problem that arises from prior convictions for offenses similar to that for which the defendant is currently being tried.[120] In that instance, any prior conviction is especially likely to be misused by the jury on the question of guilt rather than be limited to consideration of credibility. Thus, such convictions should be admitted "sparingly."[121] The remoteness of a prior conviction might also counsel against admissibility.[122]

Among the other factors to be considered by the trial court in determining whether to admit or exclude prior convictions, the court singled out the effect of the defendant's failure to testify out of fear of prejudice resulting from the jury's awareness of the prior convictions.[123] The court stated:

> Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.[124]

The *Luck-Gordon* approach to the problem of impeachment by prior conviction eventually found its way into what became Rule 609 of the Federal Rules of Evidence, despite some tinkering in the details.[125] The principles underlying *Luck-Gordon* continue to inform decisions about the admissibility of prior crimes evidence to impeach the criminal defendant who elects to testify in his own behalf.[126] Nevertheless, soon after these cases were decided, Congress

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. For a discussion of the evolution of Rule 609, see *supra* notes 24-45 and accompanying text.
126. *See, e.g.*, United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir.) (en banc) (concluding that prior robbery conviction was admissible under balancing test of Rule 609(a)(1)), *cert. denied*, 116 S. Ct. 210 (1995).

amended the D.C. Code to deny courts the discretion to exclude evidence of an accused's prior convictions if the accused elected to testify, an approach mirrored in the initial draft of the Federal Rules of Evidence.[127]

The District of Columbia Court Reform and Criminal Procedure Act of 1970[128] removed the trial court's discretion to exclude certain prior convictions offered to impeach the testimony of a criminal defendant. The new rule on impeachment required the admissibility of certain prior convictions without regard to the *Luck-Gordon* analysis or to the prejudicial effect of the prior conviction. It denied the trial court any discretion with respect to the admission or exclusion of such evidence.

The D.C. Circuit was faced with a number of challenges to the new rule. In most cases, however, the court declined to address the evidentiary question squarely. For example, in *United States v. Henson*,[129] the court of appeals decided, en banc, that to apply the new rule in trials for offenses committed prior to its enactment would operate as an impermissible ex post facto law.[130] The court did not consider the constitutionality of the provision simpliciter, though there is much in the opinion suggesting the court's unhappiness with the policy underlying the new rule.[131] In determining whether the procedural change wrought by the new rule amounted to a prohibited ex post facto law, the court considered its effect on any substantial right of the accused. The denial of the accused's right to invoke the court's discretion, informed by the *Luck* factors, was of

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127. For a discussion of Congress's amendment of the D.C. Code and the effect such amendment had on *Luck-Gordon*, see *supra* notes 38, 103-24, *infra* notes 128-58 and accompanying text.

128. D.C. CODE ANN. § 14-305 (1970). The statute stated, in relevant part:

> (b)(1) [F]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered . . . but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment).

Id. § 14-305(b)(1). Subsection (b)(2)(A) of § 305 stated as follows:

> Evidence of a conviction of a witness is inadmissible under this section if (i) the conviction has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence, or (ii) the conviction has been the subject of a certificate of rehabilitation or its equivalent and such witness has not been convicted of a subsequent criminal offense.

Id. § 14-305(b)(2)(A).

129. 486 F.2d 1292 (D.C. Cir. 1973) (en banc).

130. *Id.* at 1305.

131. *See id.* at 1308 ("[I]ts effect is self-evident even if it may not be unconstitutional.").

sufficient magnitude to implicate the ex post facto clause. The court explained that impeaching the accused by prior conviction prejudices the accused in two distinct ways. First, the evidence of past convictions is likely to be misused despite limiting instructions, in effect lowering the burden of proof on the prosecution.[132] Second, the court recognized the effect of the admission of past offenses on the accused's right to testify in his own behalf: "[W]hile he had the right to testify in his own behalf, it may nonetheless be a significantly diluted right if the risk of the above-described prejudice . . . is so high that he is deterred from invoking that right."[133]

The rule challenged in *Henson* denied the trial court discretion to exclude prior convictions offered to impeach the accused. The court seemed to assume, for purposes of its analysis, that there were circumstances in which impeachment by prior conviction would be constitutionally permissible. Indeed, *Luck* is grounded on such an assumption.[134] The challenged rule itself *might* pass constitutional muster apart from the ex post facto issues present in the case. The court noted that Congress "presumably may have concluded that the governmental interest [in the admission of prior convictions to impeach the accused] should in any event prevail."[135] But it also noted the existence of prejudice to the accused "whether or not the judgment is otherwise constitutionally permissible."[136]

The *Henson* court did suggest that impeachment by prior conviction would survive a constitutional challenge based on balancing the prejudicial impact of the prior conviction evidence against the governmental interest in admitting the evidence for its impeaching effect. But the court did not decide that issue. More important, the court did not consider the impact of the admissibility of prior convictions on the defendant's right to testify. The court's suggestion of constitutionality relied on *Spencer v. Texas*,[137] which, as we shall see, did not address the problem of the effect of prior conviction evidence on the right of the defendant to testify.[138]

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132. *Id.* at 1307.

133. *Id.* at 1308.

134. *See id.* at 1307 (noting that under *Luck* approach, rule aimed at protecting defendant from unfair prejudice arising from admission of prior convictions, "may be overborne by the governmental interest in admitting the evidence for impeachment purposes, but that prejudice exists nonetheless").

135. *Id.*

136. *Id.*

137. 385 U.S. 554 (1967).

138. For a consideration of the effect the admissibility of prior conviction evidence has on a defendant's right to testify in his or her own defense, see *supra*

Following *Henson*, the D.C. Circuit decided two cases it had held in abeyance pending its en banc disposition of *Henson*. Both *United States v. Hairston*[139] and *United States v. Belt*[140] also presented challenges to the new D.C. Code rule mandating the admission of prior convictions to impeach. In neither case, however, were the offenses committed prior to the adoption of the new rule; hence, the ex post facto analysis of *Henson* was inapplicable.[141]

In *Hairston*, the court expressed the same policy fears as it had in *Henson*: The effect of admitting prior convictions might be to lower the Government's burden of proof and the right of the accused to testify in his own behalf might be diluted.[142] As in *Henson*, however, the court did not reach the question of the defendant's right to testify free of the fear that his prior convictions would be revealed to the jury.

The defendant in *Hairston* had been tried for violations of federal narcotics laws. At trial, the Government had argued successfully for the application of the new D.C. Code provisions mandating the admission of prior convictions against testifying defendants. The court of appeals distinguished prosecutions for violations of the D.C. Code from those for violations of the U.S. Code, holding that the D.C. Code impeachment provisions were applicable only in trials for D.C. Code offenses.[143] Because the defendants were charged with U.S. Code offenses, the D.C. Code evidence provisions were inapplicable.[144] Anticipating future cases, the court indicated that the result should be the same in cases in which both D.C. Code offenses and U.S. Code offenses were charged.[145] Thus, once again, the court avoided the question of the constitutionality of a rule requiring the admission of prior convictions to impeach a testifying defendant, while noting the possibility of "due process limitations" on such a rule.[146]

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notes 84-86 and accompanying text. For a discussion of *Spencer v. Texas*, see *infra* notes 160-69 and accompanying text.

139. 495 F.2d 1046 (D.C. Cir. 1974).

140. 514 F.2d 837 (D.C. Cir. 1975).

141. *Hairston*, 495 F.2d at 1048.

142. *Id.* at 1050.

143. *Id.* at 1054-56.

144. *Id.* at 1056.

145. *Id.* at 1054 n.13. Thus, only where D.C. Code offenses are charged does the D.C. evidence provision apply, denying the trial court discretion to exclude evidence of prior convictions to impeach the testifying defendant. *Id.*

146. *See id.* at 1051 ("That is a judgment which, subject possibly to due process limitations, Congress is fully capable of making . . . .").

Finally, in *Belt*, the D.C. Circuit decided the constitutional question it had managed to avoid in the earlier cases. *Belt* was an en banc consideration of four cases consolidated on appeal. In one of these cases the defendant was charged with both D.C. Code and U.S. Code offenses. The en banc court adopted the view held by the panel in *Hairston*, holding that in cases in which both D.C. Code offenses and U.S. Code offenses were charged, the D.C. Code evidence provision requiring admission of a testifying defendant's prior convictions to impeach would not apply.[147] Because the D.C. Code provisions were inapplicable to the U.S. Code offense, it would foster confusion to apply them to other offenses being tried simultaneously. Thus, both offenses were to be tried under federal evidence law as articulated in *Luck-Gordon*.[148]

The remaining three cases considered in *Belt* involved prosecutions only under the D.C. Code. The defendants argued that the D.C. Code evidentiary rule should not apply to any trial in the United States District Court of the District of Columbia, but only to trials in the District of Columbia Superior Court.[149] The court distinguished *Hairston* on the ground that it involved only U.S. Code offenses, while only D.C. Code offenses were involved in the instant cases.[150] Thus, if constitutional, the D.C. Code evidentiary rule applied, requiring the admission of prior convictions to impeach a testifying defendant.

The court then, at last, turned to the constitutional question.[151] As presented in *Belt*, the question was whether requiring admission of prior convictions to impeach the testifying defendant

147. United States v. Belt, 514 F.2d 837, 844 (D.C. Cir. 1975); *see also Hairston*, 495 F.2d at 1054 n.13 ("[I]t would appear that the federal forum's evidentiary law would govern impeachment by prior conviction.").

148. For a consideration of federal evidence law as discussed in *Luck* and *Gordon*, see *supra* notes 103-26 and accompanying text.

149. *Belt*, 514 F.2d at 842. Section 11-502(3) of the D.C. Code provides that the United States District Court has jurisdiction over "[a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense." D.C. CODE ANN. § 11-502(3) (1981). Section 23-311(b) of the D.C. Code states:

> Two or more offenses may be charged in the same indictment or information . . . even though one or more is in violation of the laws of the United States and another is in violation of the laws applicable exclusively to the District of Columbia and may be prosecuted as provided in Section 11-502(3).

Id. § 23-311(b). *See generally* Joan E. Hartman, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292 (1982) (discussing alternative bases for jurisdiction of district courts over joined D.C. Code offenses).

150. *Belt*, 514 F.2d at 843.

151. *Id.* at 846.

violated the fair trial guarantees embodied in the Fifth and Sixth Amendments.[152] A panel of the court had decided earlier that it was not per se unconstitutional to permit a testifying defendant to be impeached by prior convictions.[153] Thus, if *Belt* were to uphold the D.C. Code's mandatory admission of prior convictions to impeach the testifying defendant, the panel decision in the earlier case would be reaffirmed *a fortiori*. That earlier decision found the claim of unconstitutionality "not insubstantial," but foreclosed by *Spencer v. Texas*.[154] *Belt* was a more difficult case because the admissibility of the prior convictions was mandated rather than permitted; the trial court in *Belt* lacked discretion to exclude the prior convictions.

Moreover, there was some language in *Spencer* suggesting that "'[t]he defendants' interests [were] protected by limiting instructions . . . and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence . . . .'"[155] Precisely this argument had been made in an earlier case, *Dixon v. United States*,[156] before the District of Columbia Court of Appeals. The court in *Dixon*, as in *Belt*, concluded, essentially, that the *Spencer* language with respect to the importance of discretion was mere dictum and that:

> [It] could not bear the weight sought to be attributed to it, that is to say, it cannot be characterized as a conscious and purposeful assertion by the Supreme Court that a statute permitting impeachment by prior conviction is bad on its face if it makes no provision in terms for the exercise of discretion.[157]

Thus, the court in *Belt* found no constitutional bar to the rule requiring admission of prior convictions to impeach the defendant who elects to testify in his or her own behalf, in part because the court gave little weight to the qualifying language in *Spencer*.

A fortiori, then, the same court's earlier panel decision in *United States v. Bailey*[158] was reaffirmed en banc. Bailey had argued both that the admission of his prior convictions was an abuse of the trial

152. *Id.*

153. *Id.* (citing United States v. Bailey, 426 F.2d 1236 (D.C. Cir. 1970)).

154. 385 U.S. 554 (1967); *Belt*, 514 F.2d at 846.

155. *Belt*, 514 F.2d at 848 (quoting Spencer v. Texas, 385 U.S. 554, 561 (1967)).

156. 287 A.2d 89 (D.D.C. 1972).

157. *Belt*, 514 F.2d at 848 (citing *Dixon*, 287 A.2d at 94-95).

158. 426 F.2d 1236 (D.C. Cir. 1970).

court's discretion and that it violated the defendants' constitutional rights to due process. The due process argument essentially mirrored the abuse of discretion argument, both being based on the notion that the probative value of the prior conviction evidence on the question of the defendants' credibility was so far overwhelmed by its prejudicial effect as to undermine the fairness of the trial.

Bailey, Belt and other cases[159] permitting impeachment of the testifying defendant by prior conviction, relied heavily on the Supreme Court's decision in *Spencer v. Texas.* Yet a close reading of *Spencer* reveals that it is not dispositive. *Spencer* did not involve impeachment by prior conviction. In each of the three cases before the Court, the petitioner challenged the Texas procedure under which he was convicted and sentenced. Under Texas law, the jury was to be informed of the defendants' prior convictions and either enhance each defendant's punishment based thereon or make a finding of the prior conviction on which the court would base enhanced punishment.[160] In each case the jury was instructed that prior convictions should not be used as evidence of guilt of the crime for which each petitioner was being tried.[161] The Court rejected the petitioners' claim that the evidence of prior convictions unconstitutionally prejudiced them because a less prejudicial procedure might have been employed and because the jury instruction might have been ineffective to correct the prejudice.[162]

In affirming the convictions, the Court noted a number of instances in which evidence of prior convictions had been found admissible despite its obvious prejudicial effect.[163] On the Court's list of examples was impeachment of a defendant who elects to testify.[164] This dictum—that impeachment of the testifying defendant

159. *E.g.,* Leno v. Gaughan, 664 F.2d 314, 315 (1st Cir. 1981) (per curiam) ("*[S]pencer* is dispositive of defendant's claim.").

160. *Spencer,* 385 U.S. at 556.

161. *Id.* at 555-56.

162. *Id.* at 563. The Court stated:

> We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which evidence is introduced. We do not think this distinction should lead to a different constitutional result.

Id.

163. *Id.* at 560 (citing Nye & Nissen v. United States, 336 U.S. 613 (1949) (showing intent); Moss v. State, 364 S.W.2d 389 (Tex. Crim. App. 1963) (showing malice); Chavira v. State, 319 S.W.2d 115 (Tex. Crim. App. 1958) (showing identity)).

164. *Id.* at 561 (citing Giacone v. State, 62 S.W.2d 986 (Tex. Crim. App. 1933)).

by prior convictions is constitutionally permissible—can hardly be "characterized as a conscious and purposeful assertion by the Supreme Court."[165]

Moreover, *Spencer* addressed the question whether the admission of evidence of prior convictions against a criminal defendant simpliciter violated a general due process right to fair procedure.[166] Indeed, the Court distinguished *Jackson v. Denno*,[167] relied on by the petitioners, in part on just this ground. In *Jackson*, the Court had held it impermissible to introduce a defendant's confession with no prior judicial finding of voluntariness and to instruct the jury to consider the confession if, but only if, it found the confession to have been given voluntarily.[168] In distinguishing *Jackson*, the *Spencer* Court noted that the *Jackson* procedure, designed to insulate the jury from prejudicial evidence, was aimed at "protection of a specific constitutional right . . . . In the procedures [in *Spencer*], in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach."[169]

The Court's most recent pronouncement on the admissibility of evidence of prior convictions against a criminal defendant, *Old Chief v. United States*,[170] is instructive. The petitioner had been convicted of violating a federal statute that prohibited the possession of a firearm by a person who had previously been convicted of a felony. He had sought to prevent the prosecution from introducing the nature of his prior felony conviction by offering to stipulate to the existence of that element of the offense—an offer the prosecution refused to accept, arguing that it was entitled to prove its case in its own way. Both the trial court and the court of appeals agreed. The Supreme Court reversed Old Chief's conviction on the theory that his willingness to stipulate to the prior conviction rendered unfairly prejudicial the Government's introduction of the name and nature of that conviction.[171]

The Court recognized the prosecution's interest in developing its case with full evidentiary force. Typically, a defendant may not stipulate his way out of the "fair and legitimate weight" of the Government's evidence by a bare admission.[172] But the Government's

165. United States v. Belt, 514 F.2d 837, 848 (D.C. Cir. 1975).
166. *Spencer*, 385 U.S. at 559.
167. 378 U.S. 368 (1964).
168. *Id.* at 393-94.
169. *Spencer*, 385 U.S. at 565.
170. 117 S. Ct. 644 (1997).
171. *Id.*
172. *Id.* at 653 (citing Parr v. United States, 255 F.2d 86 (5th Cir. 1958)).

interest in "telling a colorful story with descriptive richness" is less pressing when the element of the offense to be proved is some status independent of the particular criminal behavior charged.[173] Thus, Old Chief's status as a previously convicted felon did not require the kind of evidentiary context as would proof of the current behavior in which he had engaged in committing the offense. In effect, the Court found the question of the defendant's status as a previously convicted felon to be a collateral element of the offense, for which proof of the bare fact was sufficient; the offered stipulation served that purpose.[174]

The dissent argued that it is not unfairly prejudicial "for the Government to directly prove an essential element" of the offense with which the defendant has been charged.[175] Noting that Federal Rule of Evidence 404(b) permits evidence of prior crimes for a number of purposes, the dissent urged:

> The list is plainly not exhaustive, and where, as here, a prior conviction is an element of the charged offense, neither Rule 404(b) nor Rule 403 can bar its admission. . . . Because the Government bears the burden of proof on every essential element of a charged offense, it must be accorded substantial leeway to submit evidence of its choosing to prove its case.[176]

In short, the dissent did not accept the distinction drawn by the majority of a collateral element of the offense.

Old Chief turned on the Court's interpretation of the Federal Rules of Evidence. It was not of constitutional dimension. Nevertheless, the opinion recognized that there are circumstances in which it is unfairly prejudicial to a criminal defendant to allow the jury to learn of prior convictions unless some substantial legitimate purpose is served by such evidence. Moreover, the opinions suggest a different standard of admissibility for prior convictions that are an essential element of the offense for which the defendant is being tried and other uses less central to the case. Whatever may be said of the differences between the majority's and the dissent's analyses, the use of prior convictions as an impeachment tool plainly is more attenuated than its use to prove an element of the offense for which the defendant is being tried. Yet, even in the latter circumstance,

173. *Id.* at 654-56.

174. *Id.* at 655.

175. *Id.* at 657, 660 (O'Connor, J., dissenting).

176. *Id.* at 657-60 (O'Connor, J., dissenting).

prior conviction evidence may be unfairly prejudicial. *A fortiori*, prior conviction impeachment raises substantial issues of unfair prejudice.

Given *Spencer*'s disavowal of a "general fairness approach" to prohibit the admission of prior conviction evidence, it is unlikely that the Court would find constitutional underpinnings to its decision in *Old Chief*. Nevertheless, the case suggests the underlying values at stake. Moreover, a rule permitting the introduction of prior convictions against a criminal defendant conditioned on the defendant's election to testify stands on a quite different footing from the generalized right not to have prior conviction evidence introduced. Indeed, a rule permitting prior convictions or other character evidence to be considered even on the determination of the defendant's guilt of the crime charged,[177] while it would raise serious policy questions, might present a weaker constitutional case than conditioning admissibility on the defendant's assertion of the right to testify.

It is not simply the protection of the defendant from the prejudicial effect of prior convictions that is at stake.[178] At stake is the quite specific right of the defendant to take the stand to testify in his or her own behalf. That right, of course, was not at issue in *Spencer*. In *Spencer*, the defendants' prior convictions were admissible under the challenged Texas procedure regardless of whether the defendants' elected to testify. Indeed, it is especially noteworthy that the defendant's right to testify in his or her own behalf had not been formally recognized at the time *Spencer* was decided. The Supreme Court announced that right twenty-two years later, in *Rock v. Arkansas*.[179]

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177. *See* Friedman, *supra* note 4, at 677 n.99 (noting that Justice Department recognizes that it is improper "to penalize any defendant who has previously committed acts suggesting dishonesty for exercising his right to testify"); *cf.* FED. R. EVID. 413-415 (permitting introduction of defendant's prior acts of sexual assault or child molestation in criminal and civil cases in which defendant is accused of either act).

178. Most of the cases challenging the admissibility of prior convictions to impeach treat the prejudicial effect of the prior conviction evidence as primary. Consequently, the failure of a defendant to testify, which precludes the admission of the prior conviction evidence, deprives the defendant of standing to raise the issue on appeal. Luce v. United States, 469 U.S. 38, 42 (1984). The theory of this Article is that it is precisely the defendant's constrained decision *not* to testify that is the constitutional injury.

179. 483 U.S. 44 (1987).

III. THE RIGHT TO TESTIFY

A. *History*

Although perhaps taken as a matter of course today, the constitutional right to testify came to be recognized only relatively recently. Despite ambiguous English antecedents—a defendant was permitted to make a case before the jury, though not to offer sworn testimony—before the adoption of the Constitution, criminal defendants were disqualified from testifying based on their interest in the outcome, both in England and in the Colonies.[180] When the Constitution was adopted, the defendant still had no right to testify.[181]

By the mid-nineteenth century—largely due to the influence of Bentham's *Rationale of Judicial Evidence*—both England and the United States had abolished incompetency on grounds of interest in civil cases.[182] Nonetheless, criminal defendants were still barred from testifying in their own behalf. It was not until 1864 that any jurisdiction in the English-speaking world permitted the criminal defendant to testify generally in his or her own behalf.[183] In that year, Maine adopted a statute ending the incompetency of criminal defendants to testify,[184] although an earlier provision permitted the defendant to testify in certain cases.[185] The general statute can probably be attributed to the influence of Maine's Chief Justice, John Appleton, who argued for the right of parties, civil or criminal, to testify.[186]

By the turn of this century, every state, except Georgia, had recognized the right of the criminal defendant to testify.[187] Further, Congress had also adopted a federal statute recognizing the

180. The King v. Lukens, 1 U.S. (1 Dall.) 5, 6 (1762), *quoted in* Ferguson v. Georgia, 365 U.S. 570, 574-75 (1961); 2 WIGMORE, *supra* note 91, § 575, at 809.

181. *See* McGautha v. California, 402 U.S. 183, 214 (1971) ("Inasmuch as at the time of the framing of the First Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf . . . .").

182. 2 WIGMORE, *supra* note 91, § 576, at 686-89 & n.1.

183. *See* Ferguson, 365 U.S. at 577 (noting Maine's decision in 1864 to enact general competency statute for criminal defendants); Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT L. REV. 809, 815 (1990) (same).

184. 1964 Me. Laws 280.

185. 1859 Me. Acts 104.

186. JOHN APPLETON, APPLETON ON RULES OF EVIDENCE 123-24 (1860); *see also* Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L.Q. 454, 460-63 (1962) (discussing Appleton's influence in promoting change that allowed criminal defendants to testify in own behalf).

187. O'Neill, *supra* note 183, at 815.

competency of criminal defendants to testify.[188] The right recognized, however, typically was a creature of statute. It was not of constitutional dimension.

B. Rock *and its Progenitors*

As late as a year before the Court declared in *Rock* that a criminal defendant had a constitutional right to testify, the Court had recognized that it had not theretofore "explicitly held that a criminal defendant has a due process right to testify in his own behalf."[189] Although no such explicit holding may have existed, then-recent history was replete with suggestions of such a right. As early as 1948, in *In re Oliver*,[190] the Court spoke of the defendant's "right . . . to offer testimony" as part of the due process right to be heard that the Court had recognized earlier.[191]

By 1961, Georgia still had not recognized the defendant's right to testify, though it did permit the defendant the statutory right to make an unsworn statement to the jury (and thus to remain insulated from cross-examination).[192] Billy Ferguson wanted his lawyer's assistance in making his unsworn statement to the jury during his trial for murder in Georgia.[193] Specifically, he wanted his lawyer to be permitted to question him so he could make his statement in the form of answers to these questions. The Georgia trial court refused to permit the requested procedure, and Ferguson was convicted. The case seemed a likely vehicle for the Supreme Court to recognize the constitutional right of a defendant to testify in his own behalf. Unfortunately, Ferguson had not challenged Georgia's incompetency statute, nor had he sought to be sworn as a witness.[194] Consequently, there was no occasion for the Court to rule on the right to testify. The Court ruled the Georgia procedure violated the defendant's right to have counsel assist in his defense.[195]

188. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (codified at 18 U.S.C. § 3481 (1994)).

189. Nix v. Whiteside, 475 U.S. 157, 164 (1986).

190. 333 U.S. 257, 273 (1948).

191. *Id.*; *see also* Holden v. Harvey, 169 U.S. 366, 390-91 (1898) ("Recognizing the difficulty in defining . . . 'due process of law,' it is certain that these words imply . . . that no one shall be condemned in his person . . . without an opportunity to be heard in his own defence."); Hovey v. Elliot, 167 U.S. 409, 417 (1897) ("Can it be doubted that due process of law signifies a right to be heard in one's defence?").

192. GA. CODE ANN. § 38-415 (Harrison 1933).

193. Ferguson v. Georgia, 365 U.S. 570 (1961).

194. *Id.* at 572 & n.1.

195. *Id.* at 596.

Justice Brennan, writing for the Court, noted that Georgia's rule of incompetency may have been the last rule of its kind in the common law world.[196] The concurring Justices Frankfurter[197] and Clark[198] would have found it unconstitutional to hold the criminal defendant incompetent to testify in his own behalf.

Not long after *Ferguson*, Georgia recognized the defendant's right to testify.[199] With every state and the federal government recognizing a defendant's (statutory) right to testify, it seemed unlikely that the Supreme Court would have the opportunity to consider whether the right was of constitutional magnitude. Yet, in subsequent cases, the Court seemed to assume that it was. For example, in *Harris v. New York*,[200] both the majority and the dissenting opinions found common ground in the notion that the defendant's choice whether to remain silent or to testify was of constitutional significance. Similarly, in *Brooks v. Tennessee*,[201] the Court noted that "[w]hether the defendant is to testify is . . . a matter of constitutional right."[202] The Supreme Court's decision in *Faretta v. California*,[203] upholding the defendant's right to refuse counsel and "to make his defense,"[204] also suggested a constitutional right to testify.[205] Despite some exceptions,[206] the clear trend in the lower courts also favored a constitutional basis for the right to testify.[207]

196. *Id.* at 570.

197. *Id.* at 600-01.

198. *Id.* at 602.

199. GA. CODE ANN. § 38-415 (Harrison 1962) ("In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense.").

200. 401 U.S. 222 (1971).

201. 406 U.S. 605 (1972).

202. *Id.* at 612; *see also* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf . . . .").

203. 422 U.S. 806 (1975).

204. *Id.* at 819 & n.15.

205. *See* United States v. Grayson, 438 U.S. 41, 56 n.2 (1978) (Stewart, J., dissenting). In his dissenting opinion, Justice Stewart stated:

> The accused in a federal case has an absolute right to plead not guilty, and if he does elect to go to trial an absolute statutory right to testify in his own behalf. I cannot believe that the latter is not also a constitutional right, for the right of a defendant under the Sixth and Fourteenth Amendments "to make his defense" surely must encompass the right to testify in his own behalf.

Id. (Stewart, J., dissenting).

206. O'Neill, *supra* note 183, at 819 n.75.

207. *See id.* at n.74 (listing collected cases that signify trend among lower courts favoring constitutional right to testify).

The right to testify was perhaps most fully elaborated by the Supreme Court in *Rock v. Arkansas*.[208] The question for the Court in *Rock* was the validity of Arkansas's rule excluding all hypnotically refreshed testimony when applied to the criminal defendant. Rock wished to offer her hypnotically refreshed recollection of the events surrounding her shooting of her husband, which would have supported the contention that the gun had fired accidentally.[209] There was expert testimony that the gun was defective in a way that might have caused it to fire when dropped or hit, even if the trigger had not been pulled. The trial court refused to permit the defendant to testify based on her hypnotically refreshed recollection and limited her testimony to her recollections prior to the hypnosis.[210] The Arkansas Supreme Court affirmed Rock's manslaughter conviction, adopting a per se rule against hypnotically induced testimony over the defendant's claim that such a rule violated her constitutional right to testify in her own behalf.[211]

The Supreme Court held the application of a per se rule excluding hypnotically refreshed testimony of a criminally accused violated the defendant's right to testify.[212] The Court began its analysis by recognizing the undoubted right of a criminal defendant "to take the witness stand and to testify in his or her own defense."[213] The Court recognized that at common law, criminal defendants, like all other parties to litigation, were incompetent to testify because their interest in the outcome rendered their testimony untrustworthy. Nevertheless, by the time of its holding in *Ferguson v. Georgia*, the Court had noted that "decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused."[214]

In *Rock*, the Court found the constitutional right of a criminal defendant to testify rooted in several provisions of the Constitution.

208. 483 U.S. 44 (1987).

209. *Id.* at 46-49.

210. *Id.* at 47.

211. *Id.* at 48-49.

212. *Id.* at 61-62. During oral argument, counsel for the State of Arkansas repeatedly referred to one of the witnesses, a neuropsychologist, as a "psycho-psychologist." Justice Scalia interrupted the argument, asking "What is a psycho-psychologist? A psychologist with a stutter?" RODNEY JONES & GERALD UELMEN, SUPREME FOLLY 154 (1990). Although this bit of information has virtually no relevance to the thesis of this Article, the author believes that the diligent footnote reader is entitled to what little entertainment can be smuggled in.

213. *Rock*, 483 U.S. at 49.

214. Ferguson v. Georgia, 365 U.S. 570, 582 (1961).

The Compulsory Process Clause of the Sixth Amendment guarantees the defendant the right to call witnesses in his or her behalf. "Logically included in the accused's right to call witnesses . . . is the right to testify himself . . . ."[215] Moreover, the Court recognized that "the most important witness for the defense in many criminal cases is the defendant himself."[216] The Court relied on its prior holding in *Faretta*, which concerned the right of a criminal defendant to represent himself, to assert *a fortiori* the defendant's right to testify. Citing *Faretta*, the Court in *Rock* stated that "[e]ven more fundamental to a personal defense than the right of self-representation . . . is an accused's right to present his own version of events in his own words."[217]

The Court also found a right to testify implicit in the Fifth Amendment's right to remain silent: "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony."[218] Just as criminal defendants have a right not to testify in their own behalf,[219] they also have a right to testify. Indeed, one might think that the right to testify is even more important than the right to remain silent. Finally, and perhaps most telling, the Court found the right to testify in one's own behalf among the rights essential to due process of law.[220]

Of course, to establish a right to testify is not to say that the right is without limit. Like most other rights, the right to testify can be waived. There is some controversy, however, over just what is necessary to constitute such a waiver.[221] Although a number of arti-

215. *Rock*, 483 U.S. at 52.

216. *Id.*

217. *Id.* (citing Faretta v. California, 422 U.S. 806, 819 (1975)).

218. *Id.*

219. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892) (holding that criminal defendant was entitled to refuse to testify).

220. *Rock*, 483 U.S. at 51.

221. *Compare* People v. Curtis, 681 P.2d 504, 514-15 (Colo. 1984) (en banc) (holding that trial court should advise and warn defendant on record of right not to testify and ramifications of decision in order to ensure informed waiver and prevent post-conviction disputes), *and* State v. Neuman, 371 S.E.2d 77, 82 (W. Va. 1988) (adopting *Curtis* rule), *with* United States v. Martinez, 883 F.2d 750, 760 (9th Cir. 1989) (holding that court has no duty to ensure that on-the-record waiver has occurred); State v. Allie, 710 P.2d 430, 438 (Ariz. 1985) (holding that *sua sponte* inquiry by trial court as to whether defendant desires to testify is neither necessary nor appropriate); State v. Paradise, 567 A.2d 1221, 1230 (Conn. 1990) (holding that trial judge had no duty to canvass defendant regarding his waiver of right to testify on his own behalf); Torres-Arboledo v. State, 524 So. 2d 403, 410-11 (Fla. 1988) (ruling that right to testify does not have to be waived on record); Aragon v. State, 760 P.2d 1174, 1179 (Idaho 1988) (same); Commonwealth v. Hennessey, 502 N.E.2d 943, 946-48 (Mass. App. Ct. 1987) (same), *and* People v. Simmons, 364 N.W.2d 783, 785 (Mich. 1985) (same).

cles have investigated the appropriate procedural safeguards coincident with a finding of waiver,[222] there has been scant attention paid to the degree to which the defendant's choice whether to testify is unfairly weighted by making assertion of the right prohibitively costly. If the price of exercising the right to testify is that the jury learns of a defendant's prior criminal record—evidence that would otherwise be inadmissible—defendants are often likely to "waive" the right. Waiver is a likely consequence of imposing such a burden on the exercise of the right.

IV. THE CONSTITUTIONAL ANALYSIS: BURDENING THE RIGHT TO TESTIFY

A. *Burdening the Exercise of Constitutional Rights*

The counterpart of a defendant's right to testify is his or her right to refuse to testify—to remain silent. The courts have long recognized that the accused in a criminal proceeding has a constitutional right to refuse to testify.[223] *Griffin v. California*[224] recognized that it was impermissible to burden a defendant's assertion of the constitutional right without some governmental interest at stake.[225] In *Griffin*, the Supreme Court struck down a provision of the California Constitution that permitted the prosecution to comment on an accused's exercise of the right not to testify and authorized a jury instruction that an adverse inference could be drawn from the defendant's failure to testify in his or her own behalf. The Court reasoned that allowing comment on the defendant's failure to testify, thus encouraging the jury to draw an adverse inference from that failure, would impose an unwarranted penalty on the defendant's exercise of the right to remain silent.[226] *Griffin* itself addressed prosecutorial comment and judicial instructions on the

222. *E.g.*, O'Neill, *supra* note 183, at 826-29 (discussing federal mechanisms used to ensure that defendants understand their rights and that waiver of rights are matters of record); Marjorie Rifken, *The Criminal Defendant's Right to Testify: The Right to Be Seen But Not Heard*, 21 COLUM. HUM. RTS. L. REV. 253, 266 (1989) ("Given the lack of uniform judicial procedures for establishing waiver at criminal trials, defendants are generally unaware that their silence and failure to assert the right to testify may constitute waiver.").

223. *Counselman*, 142 U.S. at 586. The right is applicable in state as well as federal courts. Malloy v. Hogan, 378 U.S. 1, 3 (1964).

224. 380 U.S. 609 (1965).

225. *Id.* at 613-14.

226. *See id.* at 614 ("[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws.") (citation omitted).

adverse inference from the defendant's refusal to testify.[227] Subsequent cases, however, make it clear that the constitutional right to silence goes beyond *Griffin*'s limited holding.[228] Not only are the court and the prosecutor precluded from commenting adversely on the defendant's failure to testify, but the defendant is entitled, on request, to an instruction that the jury may draw no inference from the defendant's silence.[229] In the absence of a legitimate governmental interest, the prosecution may not erect barriers to the assertion of the right to remain silent.

If, as *Griffin* declares, it is unconstitutional to exact a penalty in exchange for the exercise of the right to remain silent, one would expect, *a fortiori*, a similar result if the defendant were to be penalized for his or her election to testify. Yet, that is precisely the consequence of a rule permitting the jury to learn of a defendant's prior convictions only if the defendant elects to testify, but not otherwise. The testifying defendant pays the heavy price of the revelation of prior convictions—a burden not borne by the defendant who refuses to testify.[230]

Not all burdens on the exercise of constitutional rights are per se unconstitutional, but the Government must demonstrate, at least, that some legitimate governmental purpose is served by the

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227. *See id.* ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.").

228. Carter v. Kentucky, 450 U.S. 288, 300 (1981) (holding that upon request defendant is entitled to jury instruction that jury may draw no inference from defendant's silence); Brooks v. Tennessee, 406 U.S. 605, 610-11 (1972) (finding state statute unconstitutional that required defendants choosing to testify to take stand before calling any other witnesses on own behalf, and holding that statute "'cuts down on the privilege (to remain silent) by making its assertion costly'" (quoting *Griffin*, 380 U.S. at 614)). In *Brooks* the Court observed:

> [A] defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." [The Tennessee rule] exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand.

Id. (footnote omitted).

229. *Carter*, 450 U.S. at 305.

230. *See* Friedman, *supra* note 4, at 678-80 (proposing abolition of all character impeachment of criminal defendants who elect to testify and suggesting that such a rule might justify eliminating protection afforded defendant by *Griffin*). Professor Friedman suggested: "The inhibiting effect of anticipated character impeachment evidence is probably the principal factor supporting the rule of *Griffin v. California* . . . ." *Id.* at 639.

burden. For example, *Corbitt v. New Jersey*[231] reaffirmed earlier plea bargaining cases[232] in which, apodictically, the defendant forgoes the exercise of a constitutional right in exchange for some reward, or to put it conversely, suffers some detriment for the exercise of a constitutional right, typically the right to a trial. Corbitt had been convicted of first degree murder by a jury and was sentenced to a mandatory term of life imprisonment. Under New Jersey law, he could have avoided the mandatory life sentence by pleading *non vult*—the sentencing judge would then have had the discretion to impose a lesser term.[233] Corbitt relied on the Court's decision in *United States v. Jackson*.[234] In *Jackson*, the Court held unconstitutional the death penalty provision of the federal antikidnapping statute because only the jury could impose the death penalty, and this might discourage defendants from exercising their right to trial by jury.[235] Because the Government's interest could be served without this cost to the accused, the statutory scheme was held unconstitutional.

Relying on *Jackson*, Corbitt argued that the New Jersey procedure was unconstitutional because it burdened his right to a jury trial by subjecting him to the risk of a mandatory life sentence, a risk that could be avoided if he chose to forego the right. The Court distinguished *Jackson* on two grounds, though neither was determinative. First, unlike *Jackson*, *Corbitt* did not involve the death penalty, "'unique in its severity and irrevocability.'"[236] Second, the statutory scheme in *Jackson* permitted the defendant to avoid the death penalty entirely by waiving his right to a jury trial. The New Jersey statutory scheme at issue in *Corbitt*, by contrast, permitted a sentence of life imprisonment even on a plea of *non vult*. All that the defendant could avoid by foregoing his trial rights was a mandatory life sentence.

More important, however, the Court made clear, "[t]he cases in this Court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right, and not every pres-

231. 439 U.S. 212 (1978).

232. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973); Santobello v. New York, 404 U.S. 257, 260-61 (1971); North Carolina v. Alford, 400 U.S. 25, 31-32 (1970); Parker v. North Carolina, 397 U.S. 790, 793 (1970); McMann v. Richardson, 397 U.S. 759, 769 (1970).

233. *Corbitt*, 439 U.S. at 215-16.

234. 390 U.S. 570 (1968).

235. *Id.* at 572.

236. *Corbitt*, 439 U.S. at 217 (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

sure or encouragement to waive such a right is invalid."[237] Indeed, it is impossible to imagine that a system that includes plea bargaining could survive were this not the case. It is noteworthy that most of the cases in which the Court has rejected the argument that it is unconstitutional to impose burdens on a defendant's exercise of a constitutional right have arisen in the plea bargaining context.[238] It is tempting to limit the reach of these cases by the needs of a system that depends on the plea bargaining process. There are, however, a number of cases in which similar arguments were made outside the context of plea bargaining.

Chaffin v. Stynthcombe[239] furnishes an example. In *Chaffin*, the habeas corpus petitioner had been convicted of robbery and sentenced by the jury to fifteen years imprisonment. The conviction was reversed, and the jury in the petitioner's second trial imposed a sentence of life imprisonment. The second jury was unaware of the sentence imposed by the first jury. After the state courts had denied his appeal,[240] the petitioner sought habeas corpus relief in the federal courts. The petitioner claimed that the imposition of a higher sentence after a successful appeal violated his rights under *North Carolina v. Pearce*.[241] *Pearce* had held it unconstitutional for a judge to impose a higher sentence on retrial as punishment of the accused for having appealed successfully.[242] The district court denied the writ, and the court of appeals affirmed. To resolve a conflict among the courts of appeals,[243] the Supreme Court granted certiorari.[244] The Court affirmed, distinguishing sentences imposed by juries from those imposed by judges. In the former situation, there is nothing to suggest that the second, higher sentence is vindictively imposed. So long as the higher sentence is not deemed a punishment for the exercise of the right to appeal the former conviction, due process is satisfied.[245] After considering and denying the petitioner's contentions that the Double Jeopardy Clause and the Due Process Clause prohibited a more severe sentence on retrial, the Court addressed the claim that a higher sentence was

237. *Id.* at 218.

238. The plea bargaining cases in which the Court has rejected arguments concerning the unconstitutionality of imposing burdens on the exercise of a constitutional right by a criminal defendant, see *supra* note 232 and *infra* note 247.

239. 412 U.S. 17 (1973).

240. Chaffin v. Georgia, 180 S.E.2d 741 (1971).

241. 395 U.S. 711 (1969).

242. *Id.* at 725.

243. *Chaffin*, 412 U.S. at 21 n.6.

244. Chaffin v. Stynchcombe, 409 U.S. 912 (1972), *aff'd*, 412 U.S. 17 (1973).

245. *Chaffin*, 412 U.S. at 35.

impermissible because it would have a "chilling effect" on the exercise of the "right to challenge [a] first conviction either by direct appeal or collateral attack,"[246] a claim quite similar to the chilling effect that impeachment by prior conviction might have on the right of the criminal defendant to testify in his or her own behalf.

Relying on a number of subsequent decisions upholding plea bargains despite their obvious discouragement of the defendant's choice to stand trial,[247] the Court again distinguished *Jackson*, declaring that the Constitution does not prohibit "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[248] In the post-*Jackson* plea bargaining cases, "the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[249] These cases can be taken as supporting the notion that an otherwise legitimate practice that requires the defendant to risk harsher treatment for the exercise of his or her constitutional right is not for that reason alone rendered impermissible.[250] The Court in *Chaffin* applied the standard it found in the plea bargaining cases and upheld the harsher sentence imposed by the jury after retrial. Critical to the decision was the legitimacy of jury sentencing and the majority's finding of the complete absence of any hint of vindictiveness toward the defendant for his earlier, successful appeal.

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246. *Id.* at 29.

247. *See* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970) (finding guilty plea that represents voluntary and intelligent choice among alternatives available to defendant is not compelled merely because it is entered to avoid possibility of death penalty); Parker v. North Carolina, 397 U.S. 790, 795 (1970) (recognizing that otherwise valid plea may not be involuntary simply because it is induced by defendant's desire to limit possible maximum penalty to less than that authorized if there is jury trial); Brady v. United States, 397 U.S. 742, 749 (1970) (holding plea bargain constitutional even if motivated in part to avoid possible death sentence).

248. *Chaffin*, 412 U.S. at 30.

249. *Id.* at 31.

250. The dissenting Justices addressed a somewhat different issue: the difference in treatment accorded defendants retried before a jury and those who waive a jury in favor of a bench trial. If *North Carolina v. Pearce*, 395 U.S. 711 (1969), limits judicial sentencing on retrial, but a jury may impose a harsher sentence, defendants are likely to be inhibited from exercising their constitutional right to a jury determination on retrial. *Chaffin*, 412 U.S. at 36-38 (Stewart, J., dissenting); *see also id.* at 43-44 (Marshall, J., dissenting) ("[B]y establishing one rule for sentencing by judges and another for sentencing by juries, the Court places an unnecessary burden on the defendant's right to choose to be tried by a jury after a successful appeal."). Justice Stewart, in dissent, also challenged the majority's premise that vindictiveness was necessarily eliminated if the jury remained uninformed about the defendant's earlier conviction and successful appeal. *Id.* (Stewart, J., dissenting).

Crampton v. Ohio,[251] furnishes another example, this one implicating a defendant's right to present evidence to a jury on the question of punishment. In *Crampton*, the defendant had been convicted of murder and sentenced to death after a trial in which the jury determined guilt and punishment in a single verdict after a single proceeding.[252] Crampton argued that the Constitution required a bifurcated proceeding. Under Ohio's unitary proceeding, in order to testify on the question of punishment, he would have had to subject himself to examination on the question of guilt.[253] Thus, the cost of asserting the right to be heard on punishment was the waiver of his right against self-incrimination; conversely, the cost of asserting the right against self-incrimination by refusing to testify was the inability to be heard on the question of punishment.

Rejecting Crampton's claim, the Court found nothing in the privilege against self-incrimination that would allow a defendant to limit the evidence he or she chooses to present.[254] That the defendant was put to a difficult choice did not in itself implicate constitutional values. The choice whether to testify is often replete with consequences. There is no constitutional impediment, for example, to subjecting a criminal defendant to cross-examination should he or she elect to testify, examination that could be avoided by the choice to remain silent. Relying on *Spencer v. Texas*, the Court noted other consequences attendant on the election to testify, among which, of course, was impeachment by prior conviction.[255] Yet, the Court also suggested, through a "*but cf.*" citation to *Luck v. United States*,[256] that there may be limits to the use of prior conviction evidence to impeach.[257] Moreover, as we have seen, *Spencer* furnishes less than compelling support for the proposition that criminal defendants may be routinely impeached by evidence of prior convictions.[258]

Interestingly, one branch of Crampton's argument was not concerned with preventing him from testifying. Instead, it was concerned with compelling him to do so in order to reach the jury on

251. 402 U.S. 183 (1971) (consolidated with McGautha v. California).

252. *McGautha*, 402 U.S. at 210-11.

253. *Id.*

254. *Id.* at 213-14.

255. *Id.* at 209-10.

256. For a discussion of the Court's holding in *Luck*, see *supra* notes 103-09 and accompanying text.

257. *McGautha*, 402 U.S. at 215.

258. For a discussion of the Court's holding in *Spencer*, see *supra* notes 159-69 and accompanying text.

the question of punishment. The extent to which the defendant was prohibited from presenting evidence to the jury on the question of punishment was problematic. His counsel could argue for leniency without implicating the defendant's right to remain silent. Evidence relevant to punishment could also be presented. The only "right," therefore, the defendant sought to vindicate was the right to be heard in his own voice limited to the question of punishment, a right the Court refused to recognize.

B. *Burdening the Right to Testify*

The right to testify, like other rights guaranteed by the Constitution, is not without limits. The lessons of the plea bargaining cases, as well as the other cases discussed above, make it plain that not all costs assessed for the assertion of a defendant's rights are constitutionally impermissible.[259] If the practice that results in the assessment of the cost is otherwise legitimate—plea bargaining or jury sentencing, for example—the incidental cost to the assertion of the defendant's right may be tolerable. Presumably, such a standard involves the balancing of the state's interest in the practice against the cost to the right in question.

Thus, whatever may be the limits of the right to testify, there must be some valid governmental purpose served by requiring a defendant to bear a substantial cost for asserting that right. Perhaps the most obvious purpose would be that the cost to the defendant is necessary to serve the purpose of ascertaining truth. More specifically, a defendant's right to testify may be limited by the need to prevent false testimony.

For example, in *United States v. Dunnigan*,[260] the defendant was tried for conspiracy to distribute cocaine. She was the only witness in her own behalf, denying the testimony of the Government's witnesses and testifying that she had never possessed or dealt cocaine. Government rebuttal witnesses testified that they had purchased cocaine from the defendant. The defendant was convicted, and her sentence was enhanced pursuant to the federal sentencing guidelines, based on the trial court's finding that she had committed perjury during the trial.[261] On appeal, the United States Court of Appeals for the Fourth Circuit held that enhancing a defendant's

259. For a discussion of plea bargaining cases, see *supra* note 247.

260. 507 U.S. 87 (1993).

261. *Id.* at 96. Her perjurious testimony "'willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense.'" *Id.* at 92 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (1989)).

sentence because of her perjurious trial testimony was unconstitutional because it would inhibit defendants from testifying in their own behalf, especially when combined with other disincentives to testify—including the risk of impeachment by prior convictions.[262]

The Supreme Court reversed.[263] The Court noted the defendant's right to testify in her own behalf, but went on to declare: "Respondent cannot contend that increasing her sentence because of her perjury interferes with her right to testify, for we have held on a number of occasions that a defendant's right to testify does not include a right to commit perjury."[264] That point—that the right to testify may be cabined by the search for truth—is perhaps most strongly made in the Supreme Court's opinion in *Nix v. Whiteside*,[265] upon which the Court relied in *Dunnigan*.

Although decided before *Rock* announced a constitutional right to testify, *Nix* is undoubtedly still good law, as *Dunnigan* makes clear.[266] *Nix* involved the Sixth Amendment right to effective assistance of counsel. Nonetheless, it sheds light on the scope of the defendant's right to testify in his or her own behalf. In *Nix*, the defendant, charged with murder, pleaded self-defense.[267] He had consistently told his counsel that he believed the victim was reaching for a gun when he stabbed the victim, though he had not actually seen the gun.[268] As the trial drew near, however, in preparation for his direct examination, the defendant changed his story, telling counsel for the first time that he had seen "something metallic" in the victim's hand.[269] When pressed by counsel, the defendant said, "If I don't say I saw a gun, I'm dead."[270]

Counsel concluded that the gun was a product of the defendant's mendacity and advised the defendant that he would not permit him to testify perjuriously.[271] Counsel threatened to advise the court if Whiteside testified falsely, to impeach the testimony and to withdraw from the representation.[272] Whiteside testified that he believed the victim had a gun, but on cross-examination admitted that

262. United States v. Dunnigan, 944 F.2d 178, 183-84 (4th Cir. 1991), *rev'd*, 507 U.S. 87 (1993).
263. *Dunnigan*, 507 U.S. at 98.
264. *Id.* at 96.
265. 475 U.S. 157 (1986).
266. *Dunnigan*, 507 U.S. at 96-97.
267. *Nix*, 475 U.S. at 160-61.
268. *Id.* at 160.
269. *Id.* at 161.
270. *Id.*
271. *Id.*
272. *Id.*

he had seen no weapon.[273] Whiteside was convicted, and the conviction was affirmed by the state courts.[274] He sought habeas corpus relief in federal district court, claiming that his right to effective assistance of counsel had been violated by his lawyer's refusal to permit him to testify as he wished.[275] The district court denied the writ, but the United States Court of Appeals for the Eighth Circuit reversed.[276]

Treating as a factual finding that Whiteside's proposed testimony would have been perjurious, the Supreme Court reversed the Eighth Circuit's holding.[277] The Court began its analysis with the assumption that a criminal defendant has a right to testify in his or her own behalf.[278] Nonetheless, that right does not include the right to commit perjury.[279] Much of the remainder of the opinion considered the question whether Whiteside's lawyer had the right or duty to behave as he did or whether that conduct denied Whiteside the right to effective assistance, as the court of appeals had held. The Court determined that the conduct of Whiteside's lawyer fell within accepted norms of professional conduct and thus did not deprive Whiteside of his Sixth Amendment right to counsel.[280]

Moreover, Whiteside suffered no constitutionally cognizable injury from his lawyer's conduct because it "at most, deprived Whiteside of his contemplated perjury."[281] The Court added that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely."[282] At the heart of the Court's opinion was the notion "that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence."[283] Thus, one might expect that evidence from which a jury might infer the defendant was testifying falsely should be admissible to impeach the defendant's testimony.

The Court's reliance on *Harris v. New York*[284] and *United States v. Havens*[285] might be seen as lending additional support to such a

273. *Id.* at 161-62.
274. *Id.* at 162.
275. *Id.*
276. *Id.* at 163.
277. *Id.*
278. *Id.* at 164.
279. *Id.* at 173.
280. *Id.* at 174.
281. *Id.* at 172.
282. *Id.* at 173.
283. *Id.*
284. 401 U.S. 222 (1971).
285. 446 U.S. 620 (1980).

proposition. In *Harris*, the defendant had been convicted of selling narcotics. After his arrest, the defendant had made certain statements to the police without having been advised of his right to appointed counsel during questioning, in violation of *Miranda v. Arizona*.[286] The prosecution did not seek to introduce these statements during its case-in-chief, but when the defendant testified inconsistently with these uncounseled out-of-court statements, the defendant was cross-examined about whether he had made the statements.[287] The jury was instructed that the out-of-court statements attributed to the defendant could not be used as evidence of guilt, but might be considered as prior inconsistent statements on the question of the defendant's credibility as a witness.[288]

The Supreme Court, over a strong dissent, affirmed the defendant's conviction. As in *Nix*, the Court's concern was with the prevention of perjurious testimony. Noting, in dicta, the accused's privilege to testify or remain silent, the Court declared: "[T]hat privilege cannot be construed to include the right to commit perjury."[289] Hence, though the defendant's out-of-court statements might have been obtained in violation of *Miranda*, they were admissible to impeach the defendant by prior inconsistent statement. Plainly, had the defendant not testified these statements would have been inadmissible. Again, one might conclude that the admission of these statements, conditioned on the defendant testifying, made the assertion of the right costly, and therefore that the Court's approval of such use implies that there is no constitutional impediment to the introduction of inculpatory evidence if the defendant chooses to testify. As in *Nix*, however, the Court's concern was whether the particular testimony offered by the accused was perjurious. It is worth noting that these cases involved the specific content of the defendant's testimony, rather than some more general basis for questioning the defendant's credibility. This inculpatory evidence was not admitted against the defendant merely because he elected to testify. Rather, it was what the defendant said when he did testify that was critical to the admissibility of the impeaching evidence.

In *Oregon v. Hass*,[290] the Court considered a variation of the situation in *Harris*. Hass had made inculpatory statements after hav-

286. 384 U.S. 436 (1966).
287. *Harris*, 401 U.S. at 223.
288. *Id.*
289. *Id.* at 225.
290. 420 U.S. 714 (1975).

ing been given his *Miranda* warnings and requesting a lawyer. Thus, the defendant's statements were inadmissible on the question of his guilt. Nevertheless, the trial court permitted a police officer to testify to the defendant's statements during the State's rebuttal case, and instructed the jury that it might consider the officer's "testimony only as it bears on the [credibility] of the Defendant as a witness when he testified on the witness stand."[291]

The Oregon appellate courts held the statements inadmissible, and the Supreme Court reversed. The Court concluded that *Harris* controlled. As in *Harris*, "'the shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'"[292] Like *Harris*, the Court in *Hass* was not concerned with whether anything the defendant said was worthy of belief—it was not the defendant's general credibility to which the disputed evidence was directed. Rather, the Court was concerned with whether particular testimony offered by the defendant was true or perjurious, and the inferences that a jury might draw from the defendant's otherwise inadmissible prior inconsistent statements bore directly on that question.[293]

Jenkins v. Anderson[294] was similar to *Harris*, except that the evidence introduced to impeach the defendant was not a prior inconsistent statement taken in violation of *Miranda*, but the defendant's pre-arrest silence claimed by the prosecution to be inconsistent with his claim of self-defense.[295] Two weeks after Jenkins stabbed Redding to death, he surrendered himself to the police. He claimed that his actions were taken in self-defense and so testified at his trial for murder. The prosecution was permitted to use his pre-arrest silence and his failure to come forward for two weeks to impeach his testimony that he had acted in self-defense. Interestingly, the Supreme Court understood that Jenkins's silence might not have been an invocation of his Fifth Amendment right to remain silent, but considered that distinction irrelevant.[296] The Court declared that the applicable rule permitted impeachment by silence whether or not the silence was constitutionally protected.[297]

291. *Id.* at 717.

292. *Id.* at 721-22 (quoting *Harris*, 401 U.S. at 226).

293. *Id.* at 722.

294. 447 U.S. 231 (1980).

295. *Id.* at 235.

296. *Id.* at 236 n.2.

297. *Id.* at 238-39. The Court distinguished *Doyle v. Ohio*, 426 U.S. 610 (1976), which held that a defendant's silence following his arrest and receipt of *Miranda*

The Court considered and rejected the argument that permitting the use of a defendant's silence to impeach his testimony might make it less likely that a defendant would choose to remain silent.[298] In essence, the argument was that the evidentiary use of a defendant's silence would burden the choice to remain silent. Whatever burden the rule might impose on the Fifth Amendment right to remain silent was not sufficiently substantial to warrant constitutional protection.[299] It is noteworthy that the constitutional right at issue in *Jenkins* was the right to remain silent and not the right to testify in one's own behalf. Indeed, that right had not yet been recognized by the Court.[300]

Nevertheless, much of the Court's reasoning might be thought to apply to the question whether particular forms of impeachment impermissibly burden the defendant's right to testify in his or her own behalf. The choice to testify or remain silent may have any number of consequences that influence a defendant's decision. As the Court noted, "It is not thought overly harsh in such situations to require that the determination whether to waive the privilege [and take the stand] take into account matters which may be brought out on cross-examination."[301]

The question of which matters might be brought out on cross-examination, however, is not an easy one.[302] Under *Jenkins*, *Harris* and similar cases, matters that bear directly on the defendant's testimony are fair game for impeachment purposes.[303] The Court in *Jenkins* noted: "It is also generally recognized that a defendant who

warnings was not admissible to impeach his credibility. *Jenkins*, 447 U.S. at 239. In *Doyle*, according to the Court, governmental action induced the petitioner to remain silent. *Id.* at 240 (citing *Doyle*, 426 U.S. at 619). In *Jenkins*, by contrast, the defendant's silence had nothing to do with any governmental action. *Id.* Consequently, it was not a denial of the fundamental fairness guaranteed by the Fourteenth Amendment to impeach the defendant with his pre-arrest silence. *Id.* at 238-40; *see also* Grunewald v. United States, 353 U.S. 391, 420 (1957) (finding defendant's silence before grand jury inadmissible to impeach exculpatory trial testimony because probative value on issue of credibility was so negligible as to be far outweighed by its possible impermissible impact on jury).

298. *Jenkins*, 447 U.S. at 236.

299. *Id.* at 238.

300. For a discussion of *Rock v. Arkansas*, in which the Court recognized a consitutional right to testify in one's own behalf, see *supra* notes 208-20 and accompanying text.

301. *Jenkins*, 447 U.S. at 236 n.3.

302. *See generally* James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 STAN. L. REV. 1301 (1992) (analyzing doctrines and policies courts employ to set boundaries for impeachment exception to exclusionary rule).

303. *Id.* at 1349 & n.218.

takes the stand in his own behalf may be impeached by proof of prior convictions."[304] That issue, however, plainly was not before the Court. Moreover, the right to testify had not yet been recognized. Finally, the Court, like most other courts that have noted the point, relied upon *Spencer v. Texas* for support.[305] As we have seen, however, the issue in *Spencer* did not address the question of impeachment by prior conviction. *Spencer* was concerned with the use of prior convictions to enhance a defendant's sentence.[306] Thus, all we can be reasonably certain of is that impeaching evidence that addresses the content of a defendant's testimony may be admissible without impermissibly burdening the defendant's right to testify in his or her own behalf.

Walder v. United States,[307] on which the Court in *Harris* relied, makes the same point. In *Walder*, the Government had illegally obtained physical evidence of defendant's involvement with narcotics in a case unrelated to the one in which the defendant was being tried.[308] The evidence or testimony about the physical evidence, inadmissible in the Government's case-in-chief, was held admissible to impeach the defendant's testimony that he had never possessed narcotics. Had the defendant not testified in his own behalf, testimony about the illegally obtained evidence of his earlier possession of narcotics would have been inadmissible. But, more precisely, even if the defendant had chosen to testify in his own behalf, the testimony about this illegally obtained evidence would have remained inadmissible unless the content of the defendant's testimony had triggered its use.

Like *Walder*, *United States v. Havens*[309] involved physical evidence unlawfully obtained. *Havens*, like *Harris*, was one of the bases of the decision in *Nix*, and like both of those cases, the Court's concern was with the prevention of particular perjurious testimony by the accused. *Havens*, however, went beyond *Harris* and *Walder* in permitting the use of illegally obtained evidence to impeach testimony the defendant had given on cross rather than on direct examination.

Havens and McLeroth traveled from Peru to Miami, Florida. At the Miami Airport, McLeroth was searched by customs officials

304. *Jenkins*, 447 U.S. at 236 n.3.

305. 385 U.S. 554 (1967).

306. For an analysis of the Court's holding in *Spencer*, see *supra* notes 159-69 and accompanying text.

307. 347 U.S. 62 (1954).

308. *Id.* at 64.

309. 446 U.S. 620 (1980).

and was found to be carrying cocaine sewn into a makeshift pocket on a tee shirt McLeroth was wearing under his shirt. McLeroth implicated Havens, who was arrested. A warrantless search of Havens's luggage revealed a tee shirt from which pieces had been cut matching the pieces used to construct the makeshift pocket in McLeroth's tee shirt.[310] At a pre-trial hearing the tee shirt found in Havens's luggage was suppressed as the fruit of an unlawful search and seizure.[311]

At trial, Havens testified in his own behalf, denying that he had "taped or draped" material around McLeroth's body. On cross-examination, the Government inquired about Havens's involvement with the makeshift pocket on McLeroth's tee shirt, and when the defendant denied sewing the patches on the tee shirt, the Government was permitted to inquire, over objection, about the tee shirts that had been obtained as a result of the unlawful search of Havens's luggage. In its rebuttal case, the Government was permitted to introduce the fruits of the search as an exhibit.[312]

Havens's conviction was reversed by the court of appeals, which held that "illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination."[313] The Supreme Court reversed.[314] Although the Government is not entitled to introduce illegally obtained evidence after having "smuggled in" the impeaching opportunity by raising an issue for the first time on cross-examination, the situation is different where the cross-examination that provides the impeaching opportunity is on matters fairly raised by the defendant's direct examination.[315] Presumably, had the cross-examination gone beyond the scope of the direct, the illegally obtained impeaching evidence would not have been admissible. Thus, although *Havens* goes beyond *Harris* and *Hass* in allowing the introduction of otherwise inadmissible evidence to impeach a defendant's assertedly false testimony on cross-examination as well as on direct, the Court's focus remains on "the defendant's obligation to speak the truth in response to proper questions."[316] Critical to the decision in *Havens* was the impeachment of particular statements offered by the defendant, as witness,

310. *Id.* at 621-22.
311. *Id.* at 622.
312. *Id.* at 623.
313. *Id.*
314. *Id.* at 629.
315. *Id.* at 628.
316. *Id.* at 626.

that the impeachment was aimed at attacking; the evidence was not designed or offered to impeach the defendant's credibility more generally, but to impeach the testimony. The Court's concern appears substantially the same as in *Nix*, *Hass* and *Harris*: the prevention of perjurious testimony.[317]

How far that concern extends is not entirely clear. In *Jones v. United States*,[318] the Supreme Court had developed a rule of automatic standing on the part of criminal defendants to challenge the legality of searches the fruits of which were to be used against them at trial. Under *Jones*, it was not necessary for the defendant to claim a possessory interest in the fruits of the search.[319] The rationale for the *Jones* ruling was that requiring the defendant to claim an interest in the fruits of the search would be incriminating on the merits if the motion to suppress the evidence were denied.

In *United States v. Salvucci*,[320] the Court overruled *Jones*, eliminating the automatic standing of criminal defendants to challenge the illegality of searches the fruits of which were to be used against them.[321] Under *Salvucci*, defendants are required to establish that it was their own Fourth Amendment rights that were violated by the search.[322] *Salvucci* was based, at least in part, on the elimination of the danger that a defendant's testimony at the suppression hearing might be used to inculpate him or her at trial, for in *Simmons v. United States*,[323] the Court had held that a defendant's testimony in support of a motion to suppress was inadmissible as evidence of the defendant's guilt at trial.

The defendants in *Salvucci*, however, argued that the automatic standing rule remained necessary because such testimony might be used to impeach a defendant's trial testimony. The Court was quite careful to leave to another day the question whether a defendant's testimony at a suppression hearing might be used to impeach his or her testimony at trial.[324] At the same time, the Court made it abundantly clear that when that day came, it would find such testimony, inadmissible on the question of the defendant's guilt, admissible to

317. *See* Kainen, *supra* note 302, at 1349-51 (criticizing anti-perjury rationale behind Court's use of impeachment exception).

318. 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

319. *Id.* at 266-67.

320. 448 U.S. 83 (1980).

321. *Id.* at 84-85.

322. *Id.* at 85.

323. 390 U.S. 377 (1968).

324. *Salvucci*, 448 U.S. at 94.

impeach the defendant should he or she choose to testify. The Court declared: "A number of courts . . . have held that such testimony is admissible as evidence of impeachment."[325] The Court further noted that it "ha[d] held that 'the protective shield of *Simmons* is not to be converted into a license for false representations.'"[326]

Thus, once again the Court has expressed its concern that the prevention of perjurious testimony by a criminal defendant is of greater value than any prejudicial effect or inhibition on the right to testify caused by the admission of the defendant's inculpatory inconsistent statements used for impeachment purposes. But, once again, it should be noted that the nature of the impeachment is directed at specific testimony offered by the defendant and not at the character of the defendant/witness.

C. *Modes of Impeachment: A Proposed Standard*

Even apart from clearly perjurious testimony, a defendant who elects to testify subjects himself or herself to impeachment of that testimony. And there are occasions when evidence that would not be admissible absent the defendant's election to testify becomes admissible to impeach. But not all evidence offered to impeach is of equal moment, and not all such evidence is problematic. For example, evidence that merely seeks to neutralize the defendant's testimony by showing that it is unworthy of belief does not affirmatively penalize the defendant. Thus, impeachment directed at misperception, poor memory or failure to communicate does not present the problems of prejudice that arise when a jury is asked to conclude that the defendant/witness is lying. When, however, impeachment is directed at the defendant/witness's sincerity, the defendant may be said to have been affirmatively penalized for asserting the right to testify; the defendant pays a price—the admission of adverse evidence that may be used on the question of guilt—that the defendant would not have had to pay had he or she remained silent. Nevertheless, as the foregoing cases demonstrate, where the search for truth—the jury's ability to evaluate the defendant's specific testimony—warrants the admissibility of such evidence, there is no constitutional infirmity in requiring the defendant to bear this cost. Difficult choices are not necessarily constitutional violations. A defendant's prior convictions generally are thought of as belonging to this category of evidence, though, as we have seen, prior convictions are different in important respects

325. *Id.* at 93 n.8.

326. *Id.* at 94 n.9 (quoting United States v. Kahan, 415 U.S. 239, 243 (1974)).

from the other kinds of evidence recognized as belonging to this category.

In the case of impeachment by prior conviction, the ostensible governmental purpose, presumably, is that the evidence of prior convictions would assist the jury in assessing the credibility of the defendant/witness's testimony, and hence to reach a more accurate verdict. In the absence of that justification, the revelation of prior convictions would seem to serve no purpose that would justify the burden it imposes on the defendant's right to testify in his or her own behalf. And, as we have seen, the bases for that justification are, at best, problematic.[327]

One suggested standard for determining when to admit evidence offered to impeach the criminal defendant who elects to testify that is inadmissible in the prosecution's case-in-chief is "whether that evidence will tend, as its primary effect, to prove guilt. If it so tends, it should be excluded as an impermissible burden on the right to testify."[328] Such a test focuses on the prejudice side of the probativity versus prejudice balance. A more appropriate consideration might be that suggested by the plurality in *Loper v. Beto*:[329] Impeachment evidence used "for the purpose of directly rebutting a specific false statement made from the witness stand" stands on a different footing from impeachment evidence "used, rather, simply in an effort to convict [the defendant] by blackening his character and thus damaging his general credibility in the eyes of the jury."[330] The *Loper* approach focuses more on the probativity side of the probativity versus prejudice balance. Specifically, it addresses the probative value of the evidence on the question of the credibility of the defendant/witness's testimony. Everything else being equal, the more focused the impeaching evidence on the specific testimony offered, the more probative the impeaching evidence is likely to be on whether the primary evidence is worthy of belief.

Perhaps one way of conceptualizing this standard is to hold that the test for the admissibility of impeachment evidence on the question of the defendant's sincerity should be whether the evidence would be admissible in a plenary trial of the defendant for perjury. Thus, evidence inadmissible in the prosecution's case-in-chief might be admitted if the defendant elects to exercise his or

327. For a discussion of the justifications given for admitting evidence of prior convictions, see *supra* notes 87-158 and accompanying text.

328. Craig M. Bradley, Havens, Jenkins, *and* Salvucci *and the Defendant's "Right" to Testify*, 18 AMER. CRIM. L. REV. 419, 430 (1981).

329. 405 U.S. 473 (1972).

330. *Id.* at 482 n.11 (citations omitted).

her right to testify and the evidence is offered as specific impeachment. Yet, such evidence would not be admitted if offered merely as general impeachment that carries with it some stigma that a jury is likely to consider on the question of guilt. The difference between the former and the latter is that specific impeachment attempts to demonstrate that some particular thing to which the defendant testified is untrue, while general impeachment attempts to demonstrate that the defendant/witness is simply unworthy of belief, regardless of the particular content of the testimony.

There are two reasons that such a distinction makes sense. First, when a defendant testifies to some specific fact and there is conflicting evidence that the prosecution wishes to introduce, it may fairly be said that the defendant has opened the door to the impeaching evidence. The defendant should not be entitled to create a false picture of reality before the jury. This is perhaps more clearly illustrated in the analogous situation of character evidence. The Government may not introduce evidence of the defendant's bad character in its case-in-chief to show that the defendant is more likely to have committed the charged offense.[331] Yet, if the defendant introduces evidence tending to show his good character as evidence that he or she is less likely to have committed the charged offense, the prosecution is entitled to rebut with its evidence of bad character.[332] In this instance, the defendant is said to have opened the door.

So, where a defendant testifies to the existence of some particular fact, the prosecution is entitled to inquire (at least) about statements the defendant had made on other occasions inconsistent with his or her statements on the stand, though these earlier statements may not have been admissible in the absence of the defendant's testimony.[333] Similarly, with respect to impeachment by prior

331. FED. R. EVID. 404(a).

332. FED. R. EVID. 404(a)(1).

333. *See, e.g.*, Anderson v. Charles, 447 U.S. 404, 407-08 (1980) (finding no violation of defendant's due process rights where prosecutor questioned defendant about his failure to tell officers same story he was telling jury); California v. Green, 399 U.S. 149, 158 (1970) (holding that Confrontation Clause is not violated by admission of declarant's out-of-court statements if defendant is testifying and is subject to cross-examination); United States v. Higa, 55 F.3d 448, 451-52 (9th Cir. 1995) (finding offered testimony admissible against defendant because testimony related to something defendant had said in past); United States v. Rogers, 549 F.2d 490, 495-96 (8th Cir. 1976) (stating that requirements for use of prior inconsistent statements were met when defendant's prior statements were inconsistent with his denial of recollection at trial); United States v. Sisto, 534 F.2d 616, 622 (5th Cir. 1976) (holding testimony of prosecution witness admissible because it directly contradicted defendant's testimony and was evidence of prior inconsistent statement).

conviction, were the defendant to testify that he or she had never been convicted of an offense, the Government should be entitled to rebut with evidence of prior convictions.[334]

So, too, if the defendant were to testify to some particular fact and a prior conviction cast doubt on the truth of the particular testimony, the prior conviction would be admissible. For example, in *United States v. Lopez*,[335] the defendant had been convicted of marijuana offenses. The trial court permitted the Government to impeach Lopez's testimony with the record of a seventeen year-old conviction for possession of marijuana. The United States Court of Appeals for the Fifth Circuit ruled that the conviction was appropriate impeachment evidence despite the ten year limit in Federal Rule of Evidence 609 and the prohibition of extrinsic evidence of prior specific instances of conduct of Federal Rule of Evidence 608.[336] Indeed, the court found both rules inapplicable because possession of marijuana does not go to the witness's character for veracity. The record of conviction was admissible to impeach on a different theory entirely: The defendant had testified that he had never seen marijuana personally, and the prior conviction for possession contradicted that testimony.[337] Hence, the impeachment was governed by Federal Rule of Evidence 403. The court relied on *United States v. Opager*,[338] which held Rule 608 inapplicable to impeachment by contradiction,[339] and *United States v. Johnson*,[340] which held Rule 609 inapplicable to impeachment by contradiction.[341]

United States v. Norton[342] makes a similar point. Norton was convicted of unlawful possession of a firearm. Before Norton decided whether to testify, the trial court reviewed a number of prior convictions and ruled that the Government could inquire about only two of them if Norton elected to testify. While on the stand Norton testified that he had never had a gun in his hand "in all my

334. *See, e.g.*, United States v. Johnson, 542 F.2d 230, 234-35 (5th Cir. 1976) (holding evidence of prior conviction admissible to contradict defendant's testimony even though conviction was over ten years old).

335. 979 F.2d 1024 (5th Cir. 1992).

336. *Id.* at 1033-34 ("Federal Rule of Evidence 403 controls the admission of contradiction evidence, and the remote conviction, if admissible, was admissible under Rule 403 in preference to Rules 608 and 609.").

337. *Id.* at 1034.

338. 589 F.2d 799 (5th Cir. 1979).

339. *Id.* at 802.

340. 542 F.2d 230 (5th Cir. 1976).

341. *Id.* at 234-35.

342. 26 F.3d 240 (1st Cir. 1994).

life."[343] Over a defense objection, the Government was permitted to ask Norton about a 1963 conviction for unlawful possession of a firearm—a conviction not admissible under the trial court's earlier ruling. On appeal, the court held the inquiry appropriate impeachment by contradiction. The inquiry into the prior conviction was not designed to impeach the defendant's character for veracity, but "to contradict material false testimony injected into the trial by Norton himself."[344] Again, the defendant may be said to have "opened the door."

Second, and perhaps more important, specific impeachment—evidence directed at showing that testimony of some particular fact is unworthy of belief—advances the truth-finding purpose of the trial to a greater extent than evidence tending to show that a witness's character for veracity renders him or her less worthy of belief. We might think of the various impeachment devices as falling along a continuum from the most specific to the most general.[345] Impeachment by contradiction—where the impeaching party introduces evidence that directly contradicts some material fact to which the defendant has testified—is the most specific form of impeachment.[346] It is directed at a particular and important point in the defendant's direct testimony. It points to the defendant's character only incidentally, in the sense that one who would lie about a particular fact is more likely to be a bad person than one who is always truthful. Its primary purpose, however, is to cast doubt not on the defendant's character for veracity (or anything else), but on the truth of the particular fact.[347] Such evidence would plainly be admissible in a trial of the defendant for perjury committed during his testimony.

Impeachment by prior inconsistent statement falls a bit further along the continuum.[348] The prior inconsistent statement has dual purposes. First, it casts doubt on the particular testimony with

343. *Id.* at 243.

344. *Id.* at 244; *see also* Gee v. Pride, 992 F.2d 159, 161-62 (8th Cir. 1993) (holding defendant's prior conviction for possession of PCP admissible after defendant's testimony that he had never used PCP).

345. *See* Uviller, *supra* note 5, at 781-93 (suggesting somewhat different classification).

346. *Cf.* United States v. Opager, 589 F.2d 799, 801-02 (5th Cir. 1979) (holding that rule barring extrinsic evidence of misconduct to impeach is inapplicable to evidence contradicting witness's testimony as to material fact).

347. For a discussion concerning impeachment by contradiction, see *supra* notes 333, 346 and accompanying text.

348. *See* FED. R. EVID. 613 (setting out rules for examination of witness as to prior statement and for use of extrinsic evidence of prior inconsistent statement).

which it is inconsistent. Second, it provides the basis for an inference that the defendant is unworthy of belief more generally. *Harris, Hass* and *Jenkins* are illustrative.[349] Prior inconsistent statements also would be admissible in a prosecution of the defendant alleging perjury during the course of his or her testimony.

Impeachment by bias, interest or prejudice falls roughly midway on the continuum. It tends to show that the witness's testimony generally is unworthy of belief, but not necessarily because the witness is a bad person. Rather, while this category of impeachment is not statement-specific, it is trial-specific. Thus, the context of distrust is wider than impeachment directed at a particular statement, but considerably narrower than impeachment offered to show that nothing said by the defendant/witness is worthy of belief. It is noteworthy that a defendant who elects to testify is always subject to impeachment by his or her interest in the outcome, whether or not the Government undertakes cross-examination in this vein. The jury is obviously aware of the defendant's interest and will surely take that into account in assessing the credibility of the defendant *qua* witness. Indeed, no other witness is likely to have the same motive to testify favorably as the defendant in a criminal case. If the defendant were to be tried for perjury committed during his or her testimony, evidence of bias, interest or prejudice would be admissible to show the defendant's motive to testify falsely.

It is when we come to impeachment directed at the character of the witness that the cross-examiner's aim is at its widest.[350] Impeachment by evidence that the witness's character for veracity is poor suggests that the witness, not merely the witness's testimony, is unworthy of belief. It is an impeachment device divorced from any particular context, divorced from the particular testimony offered by the witness, divorced even from the context of the particular trial. It suggests that the witness is unworthy of belief regardless of the circumstances. As other generalities, it is inherently less probative than more specifically aimed impeachment. Evidence of the defendant's character for mendacity plainly would be inadmissible as evidence that he or she committed perjury on a particular occa-

349. For a discussion of the Court's holdings in *Harris, Hass* and *Jenkins*, see *supra* notes 284-301 and accompanying text.

350. In a sophisticated analysis of character impeachment, Professor Friedman also suggests elimination of this mode of impeachment of the criminal defendant. Friedman, *supra* note 4, at 678-80. Friedman also suggests that such reform might be coupled with a re-evaluation of the rule of *Griffin v. California*, barring comment on a defendant's failure to testify. *Id.*

sion.[351] And evidence of prior specific acts involving dishonesty or false statement even more plainly would be inadmissible to show the defendant's character for mendacity.[352]

But impeachment by prior conviction presents even greater problems on this probativity-prejudice continuum, and, consequently, less justification for burdening the defendant's right to testify. As impeachment by evidence of the defendant/witness's poor character for veracity, it is the most general form of impeachment, tending to show that the defendant is unworthy of belief regardless of context. Beyond that, however, it requires that the factfinder draw an inference from prior conduct to the defendant's character, an inference our jurisprudence generally forbids.

V. CONCLUSION

The defendant in a criminal case has a constitutional right to testify in his or her own behalf. For defendants with a record of prior convictions, the right to testify may amount to little more than a paper guarantee, for if the defendant chooses to exercise the right to testify the jury may learn about those prior convictions. It is only by "waiving" the right to testify that the defendant may keep such prejudicial information from the jury.

Of course, choosing to testify subjects the defendant to any number of consequences he or she might rather avoid. After all, as any other witness, the defendant is subject to impeachment of his or her testimony, and evidence that might otherwise be inadmissible on the merits may become admissible if offered to impeach. Much of this evidence presents no serious difficulty. If the impeaching evidence is directed at the witness's lack of memory or ability to perceive, it does the testifying defendant no affirmative harm. Such evidence serves primarily to neutralize the testimony.

Where the evidence is offered as an attack on the witness's sincerity, however, the possibility of prejudice makes admissibility problematic. Even then, where the evidence is directed at demonstrating that some particular assertion of the defendant/witness is false, the evidence should be admissible as a long series of Supreme Court cases makes clear.[353] The governmental interest in preventing perjurious testimony is sufficiently weighty to warrant the risk to

351. FED. R. EVID. 404.

352. FED. R. EVID. 405.

353. For a discussion of Supreme Court cases regarding the admissibility of evidence aimed at impeaching by contradiction or by prior inconsistent statement, see *supra* notes 260-326 and accompanying text.

the testifying defendant. Thus, impeachment by contradiction and impeachment by prior inconsistent statement should remain permissible impeachment devices even when used against a testifying defendant. In both instances, the evidence is directed at the testimony offered by the defendant rather than at the defendant personally.

Because it is the risk of perjurious testimony that provides the governmental interest in impeaching the sincerity of the testifying defendant, the most appropriate test for the admissibility of such evidence is whether the evidence would be admissible in a subsequent trial of the defendant for perjury. Thus, evidence contradicting the defendant's testimony would be admissible, as would evidence that the defendant had made prior inconsistent statements. Similarly, evidence of a defendant's motive for offering false testimony, including the defendant's interest in the outcome, would be admissible to impeach.

But where evidence ostensibly offered to impeach has a greater impact on the assessment of the defendant's character than on the question of the truthfulness of the defendant's testimony, the burden on the defendant's constitutional right to testify can become intolerable. That is precisely the case when a defendant is sought to be impeached by evidence of prior convictions. Just as evidence of character for mendacity would be inadmissible in a subsequent trial for perjury, it should be inadmissible as impeachment evidence if the defendant elects to testify.

Little of value would be lost by such a limitation. Prior conviction evidence is not especially probative of the witness's credibility. The probative value of such evidence rests on a number of inferences: (1) that the conviction, often the result of a plea bargain rather than a finding of guilt beyond a reasonable doubt, demonstrates that the witness committed the offense; (2) that the commission of the particular offense demonstrates a continuing trait of character for mendacity (though some predicate offenses may be quite attenuated from speaking falsely); and (3) that a general character trait of mendacity is acontextual—manifesting itself regardless of the particular context in which the subject may find himself or herself. Moreover, whatever probative value prior conviction evidence may have on the believability of a defendant's testimony, it is likely to pale in the face of the defendant's obvious interest in the outcome of the case, an interest that will cause the jury to be cautious in its assessment of the defendant's testimony.

Most important, permitting impeachment by prior conviction is likely to deprive the jury of whatever evidence a defendant might offer on the question of guilt or innocence by compelling the defendant to "waive" the constitutional right to testify on pain of suffering the prejudice of having the jury learn of his or her criminal past.