



1970

Impeachment of Witness Credibility by Use of Past Conviction Evidence--Kentucky Court of Appeals Adopts a New Rule

James T. Hodge
University of Kentucky

Kenneth Gregory Haynes
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Evidence Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Hodge, James T. and Haynes, Kenneth Gregory (1970) "Impeachment of Witness Credibility by Use of Past Conviction Evidence--Kentucky Court of Appeals Adopts a New Rule," *Kentucky Law Journal*: Vol. 59 : Iss. 2 , Article 12.
Available at: <https://uknowledge.uky.edu/klj/vol59/iss2/12>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@sv.uky.edu.

for in Rule 42(b) which provides the trial court with broad discretion to grant separate trials.⁴⁰

W. Stokes Harris, Jr.

IMPEACHMENT OF WITNESS CREDIBILITY BY USE OF PAST CONVICTION EVIDENCE—KENTUCKY COURT OF APPEALS ADOPTS A NEW RULE.—Over seventy years ago James Thayer laid the foundation for the modern trends in evidence law. Thayer proposed that “unless excluded by some rule or principle of law, all that is logically probative is admissible.”¹ Since that time, courts have moved steadily toward an open door policy of admissibility, closing that door only when confronted with irrelevant or prejudicial material.² The effect of this liberalization of admissibility has been to place a greater burden on the trial judge to define relevancy and to instruct on the weight of evidence, and a greater burden on the whole system to assure witness credibility.

Most crucial to our judicial system is the assumption that judges and juries can believe what witnesses say. To assure this critical element of credibility, a number of devices have evolved within the judicial system.³ The most effective of these is the operation of cross-examination as a part of the advocacy tradition.⁴ Cross-examination is particularly suited for credibility testing since it inevitably probes the weaknesses and inconsistencies in the fabric of testimony. It is this effectiveness as a credibility test which partially accounts for the trend toward liberality in the scope of cross-examination.⁵

The most serious test of witness credibility occurs when cross-examination is used as a vehicle for impeachment. As the Thayer-initiated trend toward greater admissibility has spread, the methods

⁴⁰ Rule 42. Consolidation; Separate Trials

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

¹ J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 265 (1898).

² See Ladd, *Credibility Tests-Current Trends*, 89 U. PA. L. REV. 166, 167 (1940).

³ The most obvious of these is the requirement that witnesses be sworn to tell the truth and the development of sanctions to be applied in the event of perjury. For a discussion of other credibility tests, see Ladd, *supra* note 2, at 167-71.

⁴ Ladd, *supra* note 2, at 167-71.

⁵ *Id.*

of impeachment on cross-examination have expanded accordingly. It is now possible in Kentucky⁶ and most other states, as well as in the federal courts,⁷ to impeach a witness by demonstrating existence of prior contradictory or inconsistent statements, by offering evidence regarding the general reputation for truth and veracity of a witness, or by proving the existence of prior criminal convictions. This latter method of impeachment is the major concern of this comment. Increasing criticism of impeachment by past conviction evidence has focused on the contentions that as a credibility test it is ineffective or misleading and often is incurably prejudicial to a defendant-witness.⁸

Our purpose here is to examine the traditional approach to past conviction evidence and to give special attention to criticism of the technique of impeachment by past conviction evidence. The result of this examination will be the realization that the Kentucky Court of Appeals has recently adopted a much needed change in the operation of this traditional method of impeachment.

Under the earliest common law, convictions for infamous crimes completely disqualified one as a witness.⁹ This rule was eventually abolished by the states in favor of the general rule that prior criminal convictions could be used to impeach the credibility of a witness.¹⁰ The traditional rationale in defense of allowing this method of impeachment is that the jury is entitled to any information it can use in evaluating witness credibility.¹¹ Past convictions are ideally suited since, as Wigmore suggests, there is no risk of confusion of issues and there is no danger of unfair surprise to the witness.¹² Summarizing this traditional rationale, several courts have noted:

The object of a trial is not solely to surround the accused with legal safeguards, but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his

⁶ KY. R. CIV. P. 43.07. Previously an identical provision was found in Ky. CIV. CODE PRAC. § 597.

⁷ FED. R. CIV. R. 23.

⁸ See Note, *The Use of Bad Character and Prior Convictions to Impeach a Defendant—Witness*, 34 *FORDHAM L. REV.* 107 (1965); Note, *Impeachment of the Defendant—Witness by Prior Convictions*, 12 *ST. LOUIS L.J.* 277 (1967); Note, *The Use of Prior Convictions to Impeach Credibility of the Criminal Defendant*, 71 *W. VA. L. REV.* 160 (1969).

⁹ C. McCORMICK, *EVIDENCE* [hereinafter McCORMICK] § 43 (1954). The so-called "infamous crimes" were treason, felonies, and acts involving falsehood.

¹⁰ *Id.*; 3 J. WIGMORE, *EVIDENCE* [hereinafter WIGMORE] § 980 (3d ed. 1940).

¹¹ *State v. Cote*, 108 N.H. 290, 235 A.2d 111 (1967); *State v. Duke*, 100 N.H. 292, 123 A.2d 745 (1965).

¹² 3 WIGMORE § 980.

word. In transactions of everyday life this is probably the first thing that they would wish to know. . . . Lack of trustworthiness may be evidenced by his abiding and repeated contempt for laws which he is legally and morally bound to obey. . . .¹³

It is a fundamental rule in the law of evidence that the prosecution may not introduce evidence solely for the purpose of showing that the defendant has a criminal disposition.¹⁴ Such evidence is inadmissible on the basis that it is highly prejudicial, *i.e.* that it is highly probable that the defendant will be convicted because of his character rather than his guilt. However, once the defendant testifies in his own behalf, his previous convictions generally are admissible to impeach his credibility as a witness. "Thus with a wave of the evidentiary wand, what previously was too prejudicial to be heard by the jury becomes reliable [and] valid evidence."¹⁵ It is submitted that in order to justify the traditional rationale, two assumptions are necessary: first, that all criminal convictions relate to veracity; second, that a juror can distinguish between impeaching evidence and substantive evidence.¹⁶

As the rationale underlying use of prior convictions indicates, the admission of such convictions is supposed to aid the jury in evaluating witness credibility. To accomplish this, the prior convictions admitted should have some relationship to witness motivation or inclination to tell the truth.¹⁷ Herein lies the biggest objection to the present procedure for admitting prior convictions into evidence. There has been widespread disagreement as to what types of crimes could be shown to impeach the credibility of a witness. Some jurisdictions allow impeachment only for the so-called "infamous crimes,"¹⁸ while others limit impeachment to "felonies."¹⁹ A few jurisdictions, more careful in applying the basic rationale, admit only those convictions for crimes of moral turpitude, whether felonies or misdemeanors.²⁰ A fourth group of jurisdictions would allow evidence of any conviction regardless of degree of seriousness or degree of relatedness to moral turpitude.²¹

The objection most commonly made to the traditional rationale is

¹³ *State v. Duke*, 100 N.H. 292, 293-94, 123 A.2d 745, 746 (1956).

¹⁴ *McCORMICK* § 43; 1 *WIGMORE* §§ 57, 193.

¹⁵ 12 *ST. LOUIS L.J.*, *supra* note 8, at 278.

¹⁶ 15 *S.D. L. REV.* 160, 163 (1970).

¹⁷ *Ladd*, *supra* note 2, at 174-84.

¹⁸ *E.g.*, *People v. Dilella*, 52 Ill. App. 2d 403, 202 N.E.2d 77 (1964); *People v. Thomas*, 393 Ill. 573, 67 N.E.2d 192 (1946).

¹⁹ *E.g.*, *State v. Mangrum*, 98 Ariz. 279, 403 P.2d 925 (1965); *State v. Sorrell*, 85 Ariz. 173, 333 P.2d 1081 (1959).

²⁰ *E.g.*, *Nutter v. Dearing*, 400 S.W.2d 346 (Tex. Civ. App. 1966).

²¹ *E.g.*, *State v. Friedman*, 124 W. Va. 4, 18 S.E.2d 653 (1942).

based on simple considerations of relevancy. Clearly not every crime reflects upon the credibility or veracity of one convicted of that crime.²² Crimes of passion (murder) or negligence (involuntary manslaughter) are obvious examples.²³ An equally forceful example is statutory rape. One commentator gives this illustration of the possibility of absurd and irrational use of a past conviction:

Take homicide in the way of duelling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear—and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it,—has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie,—and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion.²⁴

There are of course many felony crimes not traditionally defined as involving moral turpitude which do have a direct relationship to witness credibility. Robbery, burglary, or larceny certainly indicate a type of dishonesty related to a willingness to falsify for personal gains.²⁵ The point of criticism is that to admit all felony convictions is to admit into evidence many irrelevant and possibly prejudicial crimes.²⁶ On the other hand, to restrict admissions to convictions of

²² *State v. Webb*, 99 W.Va. 225, 128 S.E. 97 (1925), where the court notes that crimes of violence often have little relationship to credibility. See McCORMICK; Ladd, *supra* note 2.

²³ *State v. Webb*, 99 W. Va. 225, 128 S.E. 97 (1925).

²⁴ 7 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 407 (Bowling ed.), *quoted in* 2 WIGMORE § 519; Ladd, *supra* note 2, at 178-79; Note, 12 ST. LOUIS L.J., *supra* note 8, at 280.

²⁵ Ladd notes:

If the witness had no compunctions against stealing another's property or taking it away from him by physical threat or force, it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony. Furthermore, such criminal acts, though evidenced by a single conviction, may represent such a marked breach from sanctioned conduct that it affords a reasonable basis of future prediction upon credibility. It is quite possible that with each other the robber class hold to some code of honor, but it is unlikely that it would express itself in court proceedings if there were a motive to falsify. Ladd, *supra* note 2, at 180.

²⁶ In *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), Chief Justice Warren Burger, while on the Court of Appeals for the District of Columbia, stated: Acts of violence . . . which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no

(Continued on next page)

"*crimen falsi*" is equally unsatisfactory since such a restriction excludes many crimes which are related to witness credibility.²⁷

The only real solution to this problem is sincere effort to categorize types of crimes according to their relationship to credibility.²⁸ This is not as difficult as it might seem since every crime is composed of a set of elements which can be analyzed and related to credibility. If such an analysis were attempted there would be a definite category of admissible felonies (robbery, burglary, larceny, etc.) and a category of admissible "*crimen falsi*" (perjury, forgery, bribery, etc.) which are not ordinarily classified as felonies.²⁹ In addition there would be a list of crimes admissible at judicial discretion.³⁰ This list of "possible admissions" would include crimes which under special circumstances might relate to credibility—murders,³¹ sex crimes,³² etc.³³ Such a categorization would not only aid in confining impeachment by prior conviction to crimes related to credibility, but would also eliminate the prejudice inherent in unrestricted admission of past convictions.

It is clear that the basic rationale for allowing impeachment by prior convictions finds little logical support due to the frequent irrelevance of a conviction to witness credibility. However, even if a significant relationship *can* be found between conviction and credibility in a given instance, the court is still faced with the problem of prejudice. The problem is particularly acute when the defendant with a record of prior convictions testifies in his own defense.³⁴ The judge must assure that the evidence of the prior conviction is used only as an aid in evaluating credibility and *not* as a factor establishing guilt or innocence. The jury also cannot be allowed to infer from the

(Footnote continued from preceding page)

direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of a violent or assaultive crime generally do not. . . .

Id. at 940; see note 22 *supra*.

²⁷ *Supra* note 25. Such crimes as robbery, burglary and larceny, are not generally included in the category of "*crimen falsi*." Thus a restriction to *crimen falsi* would result in elimination of these crimes whose probative value is the greatest.

²⁸ Such an effort to categorize is proposed by the MODEL CODE OF EVIDENCE rule 106 (1942) which recognizes for impeachment purposes only those crimes involving dishonesty or false statement. These crimes are admissible regardless of their designation as felony or misdemeanor since it is the nature of the crime, rather than the type of sentence imposed, which reflects on the credibility of the witness. See Ladd, *supra* note 2, at 176-77.

²⁹ Ladd, *supra* note 2, at 180-82.

³⁰ This concept of judicial discretion in admission of prior conviction evidence will be treated at length *infra*.

³¹ See notes 22-26 *supra*, and accompanying text.

³² 3 Wigmore § 924a; see Ladd, *supra* note 2, at 180-81.

³³ *Id.*

³⁴ *Supra* note 8.

prior conviction that an accused has criminal tendencies or a bad character.³⁵

The traditional method of "assuring" that the jury will use evidence of prior conviction for the proper purpose is the limiting instruction:³⁶

The jury will consider the evidence of the defendant that he has been convicted of a felony only in so far as it may affect his credibility as a witness, if it does so, and for no other purpose. It neither proves nor disproves his guilt or innocence on this charge.³⁷

Needless to say, there is a serious question regarding the effectiveness of such an instruction.³⁸ As Justice Jackson noted in *Krulewitch v. United States*,³⁹ "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."⁴⁰ The ineffectiveness of such an instruction may result in the jury's drawing either of two legally impermissible inferences from prior conviction evidence. First is the tendency toward the logical fallacy of inferring from past conviction that an accused has a criminal disposition and is, in effect, an addict of crime. From this faulty logic the jury may conclude that the defendant probably is guilty of the current charge.⁴¹ A second common tendency is noted by Wigmore:

The deep tendency of human nature to punish, not because our victim (defendant) is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in and out of court.⁴²

³⁵ Of course, impeachment of credibility is not the only way in which prior convictions can be used against the defendant. Previous convictions can be used to establish that the accused has committed other crimes using a similar method of operation, or to establish intent, motive or malice. *State v. Cote*, 108 N.H. 290, 235 A. 2d 111 (1967); *McCORMICK* § 157. Here again the judge must assure that the evidence of past convictions can be used by the jury only for the specific purpose for which it is received. See Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1966).

³⁶ 51 MINN. L. REV., *supra* note 35.

³⁷ *Hunt v. Commonwealth*, 273 Ky. 806, 817, 117 S.W.2d 1010, 1015 (1938). For other versions of limiting instructions, see *State v. Heusack*, 189 Mo. 295, 88 S.W. 21 (1905); *Leftwick v. State*, 55 Tex. Crim. 204, 116 S.W. 817 (1909).

³⁸ In *Harrison v. State*, 217 Tenn. 31, 394 S.W.2d 713 (1965) the court stated:

There are limits to the human mind. We think to say to any jury, there is evidence here the defendant . . . has been guilty of several prior crimes but you are not to consider this in determining his guilt or innocence of the present crime, is at best to severely test the ability of the mind to remove all prejudice therefrom. *Id.* at 35, 394 S.W.2d at 717.

³⁹ 336 U.S. 440 (1949).

⁴⁰ *Id.* at 453 (Jackson, J., concurring).

⁴¹ See *United States v. Banmiller*, 310 F.2d 720 (3d Cir. 1962).

⁴² 1 WIGMORE § 57. See Ladd, *supra* note 2, at 187; 51 MINN. L. REV., *supra* note 35, at 281.

The repeated assertions that prior conviction evidence is unduly prejudicial and that the so-called limiting instructions are ineffective in eliminating this prejudice are verified by jury studies undertaken at the University of Chicago Law School and reported in *The American Jury*.⁴³ In analyzing the problem, defendants who testified in their own defense were divided into two groups. The first was composed of defendants with no prior record⁴⁴ or who were able to conceal their record from the jury. The second group included all defendants who had a record of which the jury was aware or defendants whom the jury suspected of having prior convictions.⁴⁵ Given a prosecution case of "normal" strength, it was discovered that the first group of defendants, for whom no prior conviction evidence was admitted, received acquittals in sixty-five per cent of the cases surveyed. However, the second group of defendants, those whom the jury knew or suspected of prior convictions, received acquittals in only thirty-eight percent of the cases surveyed.⁴⁶ Of the limited number of such studies conducted, this project most dramatically illustrates the extreme prejudicial effect which admission of prior convictions may have on a defendant's chance for acquittal—in spite of the "safeguard" afforded by an admonitory instruction.

One result of this obvious prejudice against an accused with a criminal record is that many such defendants are afraid to testify in their own defense.⁴⁷ *The American Jury* studies indicated that in cases in which the evidence was "clearly for acquittal," only fifty-three percent of the defendants with prior convictions elected to testify, while ninety percent of the defendants with no prior record did testify. The same study showed that in all cases surveyed, regardless of the weight of the evidence, defendants with prior records testified in seventy-four percent of the cases, which defendants without a prior record testified in ninety-one percent of the cases.⁴⁸ The obvious conclusion is that defendants with criminal records (and more im-

⁴³ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* [hereinafter KALVEN & ZEISEL] (1966). This book is the result of an extensive survey of all aspects of jury psychology and methodology. It contains statistics which were compiled from the results of elaborate questionnaires submitted by trial judges from all over the country and which report the details of jury behavior in thousands of criminal cases of every type.

⁴⁴ KALVEN & ZEISEL at 145. The study indicated that 53% of defendants are first offenders with no prior record of conviction, leaving a substantial 47% minority of all defendants who are subject to the dangers and prejudice inherent in having a prior conviction revealed to the jury.

⁴⁵ For this latter group, a typical admonitory instruction was given in most cases.

⁴⁶ KALVEN & ZEISEL at 160-61.

⁴⁷ See 12 ST. LOUIS U.L.J., *supra* note 8, at 278-80.

⁴⁸ KALVEN & ZEISEL at 146-47.

portantly, their lawyers) would rather give up their right to testify in their own behalf than risk the prejudice which will result from admission of their prior convictions. Such intimidation seems inexcusable, especially in light of the dubious value of admitting prior convictions as an aid to evaluating credibility.⁴⁹

Another factor that proponents of traditional defense ignore is the obvious distrust that any jury has for any criminal defendant. A leading case recognizing this element of distrust is *Brown v. United States*.⁵⁰ In *Brown* the court noted:

One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive is there than the avoidance of conviction? We can expect jurors to be naturally wary of the defendant's testimony, even though they may be unaware of his past conduct.⁵¹

If the court in *Brown* is correct, then this natural suspicion should more than compensate for any lack of knowledge of the prior convictions of a witness.⁵²

The more realistic appraisal of the rationale for the rule admitting prior-conviction evidence is simple—dishonest men cannot be relied upon to tell the truth. As Justice Holmes observed:

[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.⁵³

Thus it may be seen that the traditional rationale rests on the two assumptions previously discussed, plus the dubious supposition that conviction of a crime signifies bad character which in turn signifies a propensity to testify falsely.

Several solutions to the problem have been proposed. In 1942, the

⁴⁹ Closely related to this problem of intimidation and its tendency to dissuade a defendant from testifying are a number of constitutional problems. See Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CON. L. REV. 168 (1968); 71 W. VA. L. REV., *supra* note 8, at 165-66.

⁵⁰ 370 F.2d 242 (D.C. Cir. 1966).

⁵¹ *Id.* at 244.

⁵² See also Ladd, *supra* note 2, at 184-91.

⁵³ *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884).

American Law Institute's Model Code of Evidence proposed limitations on the use of evidence of prior convictions for impeachment of a witness. The Model Code provides that the only evidence of prior convictions admissible to the issue of the credibility of any witness is proof of crimes involving "dishonesty or false statement."⁵⁴ The Code also provides that when a defendant testifies in his own behalf, admission of prior convictions for impeachment is precluded unless the accused first introduces evidence for the sole purpose of supporting his credibility.⁵⁵ Rule 21 of the Uniform Rules of Evidence is essentially identical to the ALI proposed Model Code.⁵⁶

The United States Court of Appeals for the District of Columbia has taken a different approach for determining whether evidence of prior convictions is admissible for the purpose of impeaching a witness. In *Luck v. United States*,⁵⁷ that court held that the statute allowing impeachment by prior conviction evidence⁵⁸ did not give the prosecution an absolute right to introduce a defendant-witness' past convictions but left its admission to the discretion of the trial judge. The court proposed that the judge weigh the possible prejudicial effect of such evidence against the "probative relevance of the prior conviction to the issue of credibility."⁵⁹ If the result of this balancing is the probability of undue prejudice, then the prior conviction evidence should be excluded.⁶⁰

In *Luck* the court outlines the criteria to be considered by a trial judge in exercising this discretion:

In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length

⁵⁴ MODEL CODE OF EVIDENCE rule 106(1)(b) (1942).

⁵⁵ MODEL CODE OF EVIDENCE rule 106(3) (1942).

⁵⁶ Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has just introduced evidence admissible solely for the purpose of supporting his credibility. UNIFORM RULES OF EVIDENCE 21 (1953).

⁵⁷ 348 F.2d 763 (D.C. Cir. 1965).

⁵⁸ D.C. CODE § 14-305 (1961) read in pertinent part at that time:

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters.

See *Luck v. United States*, 348 F.2d 763, 768 n.6 (D.C. Cir. 1965).

⁵⁹ *Luck v. United States*, 348 F.2d at 768.

⁶⁰ "This is a classic illustration of a case in which the prejudicial effect of impeachment far outweighs the probative relevance of the prior convictions to the issue of credibility." *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965).

of the criminal record, the age and circumstances of the defendant, 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. The goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between the interests of the defendant and of the public.⁶¹

In addition, the court accurately notes that the exercise of such discretion in following the criteria offered is certainly the type of standard which trial judges are commonly asked to apply in a number of other contexts.⁶²

Since the original *Luck* proposal, numerous cases have refined,⁶³ explained and improved⁶⁴ the concept. In *Williams v. United States*,⁶⁵ it is suggested that the *Luck* issue is best raised before the defendant testifies so that the decision to testify or not can be made in light of the court's ruling. The defendant would also benefit, since "such a rule would insulate the trial judge's discretion from the influence of his own impressions as to the accused's credibility."⁶⁶

Naturally, the *Luck* decision has not escaped criticism. In his dissent from the majority opinion in *Luck*, Judge Danaher criticized the discretionary approach as being clearly against the legislative intent behind the impeachment statute which, he says, "tells the trier [that] the fact of conviction is evidence, and it is to be received"⁶⁷ if the prosecution wishes to introduce it.⁶⁸ Responding to this criticism, Judge McGowan, the author of the *Luck* decision, notes:

⁶¹ *Luck v. United States*, 348 F.2d at 769. These criteria are discussed at length in *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

⁶² *Luck v. United States*, 348 F.2d at 768. In *Hood v. United States*, 365 F.2d 949 (D.C. Cir. 1966), the court notes:

The alert and experienced trial judge presiding over a criminal case has a grasp of how the interests of justice are best served in the case taking shape before him. He may conclude that the defendant's story should be heard by the jury; and *Luck* gives him some flexibility in this regard. *Id.* at 951.

⁶³ *E.g.*, *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), in which the court proposes a "rule of thumb" excluding past convictions for crimes of violence.

⁶⁴ *E.g.*, *Brooke v. United States*, 385 F.2d 279 (D.C. Cir. 1967); *Brown v. United States*, 370 F.2d 187 (D.C. Cir. 1966).

⁶⁵ 394 F.2d 957 (D.C. Cir. 1968) (concurring opinion).

⁶⁶ *Id.* at 964.

⁶⁷ *Luck v. United States*, 348 F.2d at 771 (emphasis original).

⁶⁸ *See State v. Hawthorne*, 49 N.J. 130, 228 A.2d 682 (1967) (concurring opinion), for elaboration on the points raised in the *Luck* dissent.

Prosecutors today urgently need greatly expanded resources to investigate and present criminal cases effectively. But the legislature should face up to these needs rather than to remain content with cut-rate convictions gotten with the aid of prior criminal records.⁶⁹

The only other important criticism of the *Luck* decision is the argument that allowing this judicial discretion will result in a flood of appellate controversy.⁷⁰ Why this is necessarily true is unclear—certainly there is no reason to suspect that trial judges are more likely to abuse their discretion in a *Luck* issue determination than they are in ruling on any other issue requiring judicial discretion. The *Luck* opinion itself makes it clear that the trial judge's determination calls for "the exercise of discretion and, as is generally in accord with sound judicial administration, that discretion is to be accorded a respect appropriately reflective of the inescapable remoteness of appellate review."⁷¹ Thus the fear that a *Luck* approach will open the floodgates of appellate litigation has no real foundation, and is no more likely than the possibility of appellate review of any other discretionary ruling.

The Preliminary Draft of Proposed Rules of Evidence for the United

⁶⁹ *Blakney v. United States*, 397 F.2d 648, 650 (D.C. Cir. 1968) (concurring opinion). In *Blakney*, Judge McGowan gives an excellent presentation of the whole basis for criticism of admission of prior conviction evidence. The following quotation of the *Blakney* facts exemplifies a case in which admission of such evidence was obviously a critical prejudicial factor:

Appellant in the case before us was indicted under two federal narcotics statutes ostensibly directed against drug trafficking but which permit a finding of guilt if there is evidence of possession which is unexplained. 26 U.S.C. § 4704(a) and 21 U.S.C. § 174. Conviction under each statute entails a mandatory minimum sentence of imprisonment. The case against appellant consisted solely of testimony by one police officer that he saw appellant throw a vial containing heroin on the floor. Another police officer with as good or better an opportunity to observe appellant testified only that, although this could have happened without his having seen it, he had not in fact seen appellant throw away anything. This left appellant under the necessity of responding to the evidence that he had possessed narcotics. He asked that a prior conviction for robbery (eleven years before when, as was revealed for the first time at the argument before us, he was 18) be not brought out upon his taking the stand to testify that he had not had the narcotics but had seen another person in the room throw them on the floor. The trial court refused this request. The jury came in with the surprising and unusual verdict of guilty under one statute and not guilty under the other.

These facts need only to be recited to suggest what the impact in this case of the jury's knowledge of the robbery conviction might well have been. They speak more eloquently than words of the hollowness of the pretense that juries can and do heed the formal instruction that they must regard the prior criminal conviction as relevant only to appellant's propensity to tell the truth rather than to commit crime. *Id.*

⁷⁰ *State v. Hawthorne*, 49 N.J. 130, 141, 228 A.2d 682, 690 (1967) (concurring opinion).

⁷¹ *Luck v. United States*, 348 F.2d at 769.

States District Courts and Magistrates also sets forth a solution. Its recommendation reads:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime 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.⁷² [Emphasis added.]

In effect, the only convictions which are not admissible are misdemeanors that do not involve dishonesty or false statement, thus the proposal broadens the old common law rule in that it includes all felonies and some misdemeanors, also. In view of the extensive and valid criticism of impeachment by prior conviction evidence, it is disappointing that the *Proposed Rules* expand rather than contract the rule of admissibility.

In the past the Kentucky Court of Appeals has faced all of the previously discussed problems in trying to cope with the admissibility of prior convictions for the purpose of impeachment. Impeachment of witnesses in Kentucky is governed by Rule 43.07 of the Kentucky Rules of Civil Procedure.⁷³ Traditionally the Court interpreted this rule to mean that it was not allowable to impeach a witness by evidence of, or to question him as to, particular acts or crimes or as to whether or not he had been indicted. However, it was deemed proper to impeach a witness, including a defendant in a criminal trial, by any prior felony conviction.⁷⁴ Furthermore, historically the Kentucky Court had allowed the cross-examiner to go into detail concerning the prior conviction.⁷⁵ But in an effort to protect the witness from the

⁷² COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 6-09 (1969).

⁷³ A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, by showing that he had made statements different from his present testimony, or by evidence that his general reputation for untruthfulness renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony. Ky. R. Crv. P. 43.07.

Some of the Kentucky Rules of Civil Procedure are applicable to criminal cases; Rule 43.07 is one of these. Ky. Crim. P. 13.04.

⁷⁴ *Cowan v. Commonwealth*, 407 S.W.2d 695 (Ky. 1966); *Hannah v. Commonwealth*, 220 Ky. 368, 295 S.W. 159 (1927); *Hayden v. Commonwealth*, 140 Ky. 634, 131 S.W. 521 (1910); *Britton v. Commonwealth*, 123 Ky. 411, 96 S.W. 556 (1906); *Howard v. Commonwealth*, 110 Ky. 356, 61 S.W. 756 (1901); *Powers v. Commonwealth*, 110 Ky. 386, 61 S.W. 735 (1901); *Baker v. Commonwealth*, 106 Ky. 212, 50 S.W. 54 (1899).

⁷⁵ *Hannah v. Commonwealth*, 220 Ky. 368, 295 S.W. 159 (1927). The Court

(Continued on next page)

prejudice of disclosure to the jury of the details of a prior conviction, the Court in 1966 in *Cowan v. Commonwealth*⁷⁶ overturned this long standing practice and stated:

It is our opinion that the original purpose of the impeachment statute (now CR 43.07) in referring to proof by the record was to provide against instances in which the witness might deny that he had been convicted of a felony. When he admits it, there is no reason to prove the record of conviction and, perforce, no reason for such further details as may otherwise have been disclosed by it. Henceforth the rule will be so construed. A witness may be asked if he has been convicted of a felony. If he says "Yes," that must be the end of it with the usual admonition. If he says "No," refutation by the record will be limited to one previous conviction, again with the admonition.⁷⁷

Then in the spring of 1970, in *Cotton v. Commonwealth*,⁷⁸ the Court formulated what appears to be the best of the many proposed solutions as to the use of prior felony convictions for impeachment. In this case defendant Gilbert Cotton was found guilty by a jury of attempted armed robbery and armed robbery. During the trial the prosecutor had asked the defendant on cross-examination if he had been in the penitentiary six times. The trial judge instructed the prosecutor to ask only if the defendant had been convicted of a felony. Contrary to the instruction, the prosecutor then said: "Tell the jury how many times. . . ."⁷⁹ The trial judge thereupon repeated his instruction that the defendant simply be asked if he had been convicted of a felony. The defendant then admitted a prior felony conviction. The trial judge gave the customary instruction to the jury that this evidence could only be used by the jury to determine the credibility of the defendant as a witness and not substantively as evidence of guilt of the crime for which he was charged. Cotton appealed, asserting that

(Footnote continued from preceding page)

in *Cowan v. Commonwealth*, 407 S.W.2d 695 (Ky. 1966), commented upon the historical rule as follows:

It is a procedural rule of evidence that a witness, including a defendant who testifies for himself in a criminal case, may be impeached by proof that he has been convicted of a felony. CR 43.07, formerly Civil Code § 597; RCr 13.04. Because the rule expressly allows it to be accomplished by introduction of the record, this Court has always conceded the Commonwealth's right to elicit from the witness such details as would be disclosed by the record of conviction if it were introduced. Cf. *Hannah v. Commonwealth*, 220 Ky. 368, 295 S.W. 159, 160 (1927). This is the technical theory through which the prosecution is able to escape being confined to a mere showing that the witness has been convicted of a felony, without further elaboration. *Id.* at 697-98.

⁷⁶ 407 S.W.2d 695 (Ky. 1966).

⁷⁷ *Id.* at 698.

⁷⁸ 454 S.W.2d 698 (Ky. 1970).

⁷⁹ *Id.* at 701.

the line of questioning employed by the prosecutor constituted prejudicial error. The Court of Appeals reversed, holding that "prior felony convictions involving dishonesty or false statements are the only convictions that can be used to impeach a witness, including a criminal defendant."⁸⁰

Since Kentucky, from the time of the adoption of the Kentucky Rules of Civil Procedure, has allowed impeachment only by evidence of the witness' general reputation for truthfulness, and not by evidence of his reputation for any other characteristic,⁸¹ the decision in *Cotton* produces a greater degree of consistency in the Kentucky case law of impeachment.⁸² Furthermore, it is a compromise between the extremes of the Proposed Rules, which are substantially the same as prior Kentucky law, and the Uniform Rules and the Model Code, but assures that if a defendant's prior conviction is admitted, there is a valid interest served. The defendant can now approach his trial without facing the dilemma of prejudicial jury inferences from his failure to testify and the prejudicial effect of "impeachment of his credibility" by use of prior convictions that have no rational bearing on his truthfulness.⁸³

By giving the trial judge limited discretion in admitting this evidence a flexible approach to these problems is assured. The Court in *Cotton* noted that the *Cowan* ruling should be modified to the extent of

⁸⁰ *Id.*

⁸¹ *McHargue v. Perkins*, 295 S.W.2d 301 (Ky. 1956). The Court in construing Rule 43.07 of the Kentucky Rules of Civil Procedure stated:

This rule effects a significant change in Kentucky practice. It supplants Civil Code Sections 596 and 597.

The latter Civil Code section provided for impeachment of a witness 'by evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief.' The right to impeach by evidence that one's general reputation for untruthfulness renders the witness unworthy of belief has been retained in CR 43.07. This is essentially the same as the corresponding portion of Civil Code Section 597. The companion right to impeach by showing the general reputation for immorality was not included in the new rule. Thus, the trial court was correct in rejecting the reputation testimony as to the morality of appellee, but was in error in refusing to admit the evidence as to her general reputation for untruthfulness. *Id.* at 301.

⁸² Professor Wigmore in his treatise stated:

In those jurisdictions in which veracity-character alone is allowed to be used to impeach, it would logically follow that when particular instances of misconduct are allowed to be used as throwing light on credibility—that is to say, conviction of crime, when shown by extrinsic evidence, and other misconduct, when brought out on cross-examination—only such instances should be used as are relevant to show a lack of truthfulness of disposition, — for example, forgery, cheating, and the like. 3 WIGMORE § 926.

⁸³ For a clear and concise presentation of the problems faced by a defendant with a prior criminal record, in determining whether or not to testify, see 4 COLUM. J. LAW & SOC. PROB. 215 (1968).

... allowing impeachment of a witness, including a defendant in a criminal case, by proof of conviction of felonies that rest on dishonesty, stealing, and false swearing, subject, however, to *vested discretion*, although limited in scope, in the trial judge to limit such evidence. The exercise of discretion by the trial judge in this area should primarily consist of weighing the interest of society in the prosecution of criminal defendants to provide the trial jury with relevant evidence of the witness' untrustworthiness to be believed against the possible prejudice to the witness, particularly in the case of a criminal defendant, in being convicted not of the crime for which he is charged but of some other crime for which he has been convicted and punished on some prior occasion.⁸⁴ (Emphasis added.)

In addition, the Court noted that the "nearness or remoteness of the prior conviction is a relevant factor to consider in exercise of this discretion."⁸⁵ The Court also recommended that the age and circumstances of the defendant-witness be considered in ruling on the admissibility of past conviction evidence.⁸⁶

By formulating the standard that the prior conviction must rest on dishonesty or false statement,⁸⁷ there will be more consistency in the decisions of trial judges than there would be if the *Luck* doctrine were adopted. When the prior conviction is deemed admissible by the trial judge, allowing the prosecution to disclose the nature of crime and the number of convictions⁸⁸ will provide reliable assistance to the jury and will not unduly prejudice the defendant.⁸⁹ Thus, in *Cotton*, the

⁸⁴ *Cotton v. Commonwealth*, 454 S.W.2d at 701.

⁸⁵ *Id.* at 701-02.

⁸⁶ *Id.* at 702.

⁸⁷ While discussing what convictions involve dishonesty or false statement the Court in *Cotton* stated:

By crimes involving dishonesty, stealing, and false swearing, we mean such felonies as perjury, subordination of perjury, obtaining money or property under false pretenses, forgery, embezzlement, counterfeiting, fraudulent alterations, misappropriation of funds, false personation, passing checks without sufficient funds or on nonexistent banks, fraudulent destruction of papers or wills, fraudulent concealment, making false entries, and all felonies involving theft or stealing. 454 S.W.2d at 702.

Finally, noting that the list of crimes is not all-encompassing, the Court reaffirmed its earlier confidence "that trial judges are capable of determining whether the particular prior felony involves a crime of dishonesty, stealing or false swearing." *Id.*

⁸⁸ Concerning disclosure of the nature of the crime and the number of convictions, the Court in *Cotton* noted:

Under our modification of the Cowan rule, once the question of admissibility is determined the witness may be asked on cross-examination if he has been convicted of the specific offenses. If he denies such convictions, proper documentary proof, without restriction to the number of prior convictions, may be then introduced, controlled, however, by the sound discretion of the trial judge in the particular case. 454 S.W.2d at 702.

⁸⁹ Concerning a Florida statute identical to the Kentucky rule in *Cowan*

(Continued on next page)

court has balanced the prejudicial effect of prior convictions against their probative value to elicit the soundest of presently proposed rules.

James T. Hodge
*Kenneth Gregory Haynes*⁹⁰

FAMILY LAW—CUSTODY OF CHILDREN.—Randall Floyd James, age seven, was taken by his divorced father to live with Randall's aunt and uncle due to the illness of Randall's grandparents, with whom the son and father were living. Randall's father later advised the aunt and uncle that he was going to remarry. This news upset the aunt and uncle and they asked Randall's father to sign a contract relinquishing custody of Randall to them. The father refused to sign the contract. After repeated efforts to regain custody, during which time he was prevented on numerous occasions from seeing his son, the father instituted this proceeding in December of 1966. The Jefferson Circuit Court, Chancery Division, awarded custody to the aunt and uncle. The father appealed. *Held*: Reversed.¹ The natural parent is entitled to the custody of his child unless it is shown that the natural parent is unsuitable to have custody. *James v. James*, 457 S.W.2d 261 (Ky. 1970).

Deborah Mandelstam, age six, was placed in the custody of a rabbi of a local Jewish temple, as a result of divorce proceedings in Fayette Circuit Court between her parents. The chancellor found that the mother was of such a mental condition that it would not be

(Footnote continued from preceding page)

that limited the prosecution to only disclosing whether the defendant had been convicted of a felony and nothing more, it has been said:

The aim of protecting the witness from needless exposure of his past is sought to be accomplished in Florida by means of imposing restrictions upon the examination procedure, rather than upon the definition of crimes within the rule. If the witness admits the bare fact of his past conviction at the outset, he is shielded from further questioning. In practical effect, however, this procedure neither aids the jury nor protects the witness. Mere knowledge that the witness has been convicted of a crime—perhaps murder, perhaps a traffic violation—will more probably mislead than assist the jury. At the same time, the reputation of the witness is subjected to doubts and suspicions that may be more damaging than full revelation of his actual record. 15 FLA. L. REV. 220, 228 (1962).

⁹⁰ Mr. Haynes is a former staff member of the *Kentucky Law Journal*, and is a 1970 graduate of the University of Kentucky College of Law.

¹ The record did not contain any specific finding of fact as to whether the natural parent was fit. The case was remanded on the procedural issue of burden of proof, and findings as to the fitness of the parent or the best interests of the child were left to the lower court.