University of Michigan Journal of Law Reform

Volume 5

1972

An Eclectic Approach to Impeachment by Prior Convictions

Lawrence A. Margolis
University of Michigan Law School

AN ECLECTIC APPROACH TO IMPEACHMENT BY PRIOR CONVICTIONS

Almost every state permits persons convicted of a crime to testify in either their own or another person's behalf.[1] Nonetheless, these states allow evidence of a person's prior criminal conviction to be used to impeach his credibility.[2] The use of this method of impeachment in criminal trials has been the subject of substantial adverse criticism;[3] yet, the practice remains widespread.[4] This article first will discuss the problems that arise from the use of prior conviction evidence for impeachment purposes in criminal trials and then will examine several proposals that would restrict the use of such evidence. Finally, the article will propose an alternative rule to regulate the use of prior conviction evidence.

I. THE ANOMALOUS USE OF PRIOR CONVICTION EVIDENCE FOR IMPEACHMENT PURPOSES

The impeachment capacity of prior conviction evidence rests upon the assumption that a person who has been willing to con-

---

[1] C. MCCORMICK, LAW OF EVIDENCE § 43, at 89 (1954) [hereinafter cited as MCCORMICK]. Some states bar persons who have been convicted of certain types of crimes from testifying. Pennsylvania, for example, disqualifies persons convicted of perjury or subornation of perjury. PA. STAT. ANN. tit. 28, § 315 (1963). *See also* ALA. CODE tit. 7, §§ 434-435 (1960).

[2] The Michigan statute, MICH. COMP. LAWS ANN. § 600.2158 (1968), is typical:

> No person shall be excluded from giving evidence on any matter, civil or criminal, by reason of crime or for any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit or proceeding, in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime may be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided.

See also COLO. REV. STAT. ANN. § 154-1-1 (1963); MO. REV. STAT. § 491.050 (1969); N.Y. CIV. PRAC. § 4513 (McKinney 1963).

[3] *E.g.*, Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166 (1940); Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1 (1968); 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 (1964) [hereinafter cited as *Procedural Protections*]; Note, *Impeaching the Accused by his Prior Crimes—A New Approach to an Old Problem*, 19 HAST. L. REV. 919 (1968) [hereinafter cited as *A New Approach*]; Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).

[4] Even where impeachment with prior convictions is not expressly authorized by statute, it is recognized by judicial decision. *See, e.g.*, State v. Foggy, 101 Ariz. 459, 463, 420 P.2d 934, 938 (1967).

travene societal norms imposed by law will be willing to contravene those norms on the witness stand. Put in more practical terms, the jury is asked to infer that the witness with a criminal record possesses a generally evil character, that persons of such character are likely to lie under oath, and, finally, that the witness has in fact lied.[5]

These inferences, however, are merely conclusions about conduct based on the alleged character of a witness. In this respect, the use of prior conviction evidence for impeachment purposes contradicts the well-established rule that where character is not an ultimate issue in the case,[6] evidence of character will not be admissible to prove conduct.[7] The widely accepted rationale for this exclusionary rule is that the dangers of prejudice, distraction from material issues, time consumption, and surprise outweigh the probative value of the evidence.[8]

Concern over some of these same factors militates against the use of prior convictions to impeach credibility. Although the factors of surprise and time consumption do not justify the exclusion of impeachment evidence,[9] there is a substantial possibility that this evidence will shift the jury's attention from the material issue of the guilt of the defendant to the collateral issues of the character of a witness. The major concern, however, is not that distraction will confuse the jury, but that the jury will give

---

[5] Justice Holmes formulated this rationale in Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884), an appeal of a personal injury case in which the plaintiff had been impeached with evidence of a prior conviction of impersonating a United States revenue officer. *See* Ladd, *supra* note 3, at 175-76.

[6] Substantive law may make a party's character the crucial issue in the case. Thus, in a slander case a defendant's allegedly slanderous charges of plaintiff's bad character may be proved in pursuit of a defense of truth. *See, e.g.*, Talmadge v. Baker, 22 Wis. 625 (1868) (evidence of prior theft improperly excluded where alleged defamation was that plaintiff had a habit of taking things).

[7] Phinney v. Detroit United Ry., 232 Mich. 399, 405, 205 N.W. 124, 126 (1925); Rich v. Cooper, 234 Or. 300, 308, 380 P.2d 613, 615 (1963) (dictum); Sims v. Sole, 238 Or. 329, 336-37, 395 P.2d 133, 136 (1964) (dictum). The conduct sought to be proved with impeachment evidence is that the witness is lying on the stand. The rule is generally applied to the use of character evidence to prove the conduct subject to the current proceeding. For example, it would be error to admit evidence of a defendant's carefulness in a negligence action. Harriman v. Pullman Palace-Car Co., 85 F. 353, 354 (8th Cir. 1898).

[8] *See* Love v. Wolf, 226 Cal. App. 2d 378, 388, 38 Cal. Rptr. 183, 188 (1964) (evidence of defendant's wealth too prejudicial); Lombardi v. Simko, 3 Conn. Cir. Ct. 363, 367-69, 214 A.2d 911, 915-16 (1965) (evidence of plaintiff's previous negligence suits collateral, speculative and too confusing); Baker Pool Co. v. Bennett, 411 S.W.2d 335 (Ky. Ct. App. 1965) (collateral and prejudicial); Matta V. Welcher, 387 S.W.2d 265, 269 (Mo. Ct. App. 1965) (evidence of road conditions and speed limits in vicinity of accident was collateral and conjectural).

[9] Counsel will generally be aware of the backgrounds of his witnesses and will thus be unable to claim surprise upon the introduction of past crimes. Time consumption is also negligible, for proof of a prior conviction can be quickly achieved by official record.

impeachment evidence too much weight.[10] This is the problem of prejudice which is discussed below.

II. THE DANGERS OF IMPEACHMENT WITH PRIOR CONVICTION EVIDENCE

A. Relevance and Probative Value

Evidence of a person's prior criminal convictions may not be relevant to his credibility on the witness stand. Despite their relevance to general character, few criminal acts indicate a specific propensity to lie.[11] Nevertheless, most states permit the prosecution to introduce evidence of felonies and varying classes of misdemeanors for impeachment purposes.[12] Convictions for crimes like murder, assault or robbery may indicate that the offender has a tendency toward violence, but they do not indicate that he will lie under oath. Even prior convictions for fraud or perjury indicate only that the witness has found sufficient justification to lie in the past; they do not indicate present motivation. If it strains reason to infer a tendency toward falsity from several prior convictions, certainly it does so to infer this from a single offense.[13] This reasoning supports, in part, the law's requirement that when character is at issue it must be proved by general reputation in the community rather than by opinion evidence or evidence of specific misconduct.[14]

When the additional means of impeaching credibility are examined, the necessity for using prior conviction evidence becomes even more questionable. For example, the demeanor of the witness may in some instances serve as a reliable indicator of his honesty.[15] The prosecutor may always cross-examine the witness concerning weaknesses of his testimony in an attempt to induce

---

[10] Distraction and time consumption take on more importance when the prosecution seeks to introduce the details of the prior misconduct. The trial court is likely to disallow such digressions. *See* note 38 and accompanying text *infra*.

[11] *See* Ladd, *supra* note 3, at 180, where the author attempts a brief catalogue of crimes relevant and irrelevant to credibility. *See also* Ladd, *Techniques of Character Testimony*, 24 IOWA L. REV. 498, 532-34; Spector, *supra* note 3, at 4; *Procedural Protections* at 441; *A New Approach* at 919-20.

[12] MCCORMICK § 43, at 90-91. The Michigan statute permits the introduction into evidence of any conviction. *See* note 2 *supra*.

[13] *See* Ladd, *supra* note 3, at 176-80. The author notes that a conviction may, nevertheless, be indicative of a course of conduct; for example, the accused may have committed crimes that were never discovered and thus for which he was never convicted. *Id.* at 178.

[14] *Id.* at 177.

[15] In some instances, of course, demeanor may be misleading: a nervous or frightened witness may appear to be lying when actually telling the truth; a confident witness with a forceful personality may appear honest when in fact he is lying.

him to contradict statements that he made on direct examination. Similarly, the differing testimony of others may be introduced to contradict statements made by the witness. If the witness's story changes at trial, his prior inconsistent statements may be used to discredit him. By testing the witness's memory, vision, or ability to estimate time, the prosecution may cast doubt on the accuracy of his statement.[16] In short, excluding evidence of prior convictions for impeachment purposes would not leave the prosecution without other recognized means to challenge the credibility of a witness.

In any event, when the defendant testifies in his own behalf, the jury is generally aware of the time he has had to prepare a story as well as his interest in preserving his freedom.[17] The weight given to his testimony is therefore likely to be reduced. In this instance, for the jury to know that the defendant has been convicted of prior crimes adds little to its knowledge that the accused has a motive to lie.

B. Direct and Indirect Prejudice

A danger of direct prejudice arises when the prosecution introduces a defendant's prior criminal record. The jury may conclude not only that the defendant is a man of vicious character but also that he is more likely to be guilty of the crime with which he is charged.[18] Moreover, a jury may punish a defendant with prior convictions not because of his guilt but because it thinks society needs protection from a man of such character.[19] A University of Chicago study illustrates the point. The study shows that when the prosecutor's evidence is of "normal strength,"[20] the conviction rate is 27 percent higher for defendants with a prior criminal record than it is for those without.[21] These dangers have long been deemed sufficient to establish the rule that the prosecutor may not initially introduce evidence of a defendant's bad character, through prior conviction or otherwise, unless he employs such evidence to prove something other than defendant's

---

[16] MCCORMICK § 33, at 62; *Procedural Protections* at 441.

[17] *Procedural Protections* at 440, 450.

[18] 1 J. WIGMORE, EVIDENCE § 57, at 456, § 194, at 650 (3d ed. 1940); MCCORMICK § 43, at 93; Ladd, *supra* note 3, at 187; Spector, *supra* note 3, at 4.

[19] *Id.*

[20] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160 (1966). The prosecutor's evidence is of normal strength when there is no confession and no eye-witnesses have testified.

[21] *Id.*

guilt.[22] Nevertheless, the prosecution may introduce the defendant's criminal record under the guise of impeachment, for the purpose then is to show a lack of credibility. Thus the prosecution may cross-examine the defendant as to his prior crimes if he takes the stand. Also, character witnesses for the accused may be cross-examined concerning their awareness[23] of his prior crimes.[24] In some jurisdictions the prosecution is given even greater leeway. Once the accused puts his credibility in issue, a prosecutor may prove his criminal record in rebuttal rather than by cross-examination.[25]

The state may also impeach a third party witness on cross-examination by questioning him about his own criminal record. When witnesses are brought in by a defendant, the dangers of undue prejudice to the defendant reappear. The initial danger is that a third party witness will simply be disbelieved because of his criminal record. However, a more important danger may result from a jury associating an accused with his impeached witness. If discredit of a witness spreads to the defendant, this indirect prejudice will unjustifiably harm his case.[26]

C. Consequences of the Fear of Prejudice

Whether prejudice be direct or indirect, its consequences can be severe. The fear of direct prejudice is likely to convince a defendant not to call witnesses to testify to his good character, since the prosecution would then be able to cross-examine them

---

[22] *See* Lovely v. United States 189 F.2d 386, 388-89 (4th Cir. 1948). The case most often cited discussing this principle and its exceptions is People v. Molineux, 168 N.Y. 264, 291-94, 61 N.E. 286, 293-94 (1901). A compilation of some of the valid non-impeachment uses of prior convictions evidence may be found in MCCORMICK § 157, at 327-31. The rule itself is actually a corollary to the rule that excludes evidence of character to prove conduct. *See* text accompanying note 7 *supra*.

[23] It has been held improper to ask a witness testifying to a defendant's good character if he knows of the defendant's previous convictions. However, a character witness may be asked if he has heard of such prior misconduct. This is because the character witness is testifying to the defendant's reputation in the community; thus what he has heard, not what he knows personally, is relevant to his estimation of reputation. *See, e.g.*, Commonwealth v. Becker, 326 Pa. 105, 191 A. 351 (1937).

[24] This type of impeachment is authorized by the statutes cited in note 2 *supra*. *See also* Michelson v. United States, 335 U.S. 469 (1948) (sustaining the practice of impeaching character witnesses); Commonwealth v. Becker, 326 Pa. 105, 191 A. 351 (1937) (holding that in murder trial prosecutor may cross-examine defendant's character witnesses concerning their having heard of fact that defendant had previously been accused of murder). This type of cross-examination is sometimes used even to elicit the arrest record of the accused. Awkard v. United States, 352 F.2d 641 (D.C. Cir. 1965).

[25] The jurisdictions are split concerning the admissibility of prior conviction evidence in rebuttal. MCCORMICK § 158, at 337. *Compare* State v. Deboard, 116 Ohio App. 2d 108, 114, 187 N.E.2d 83, 87 (1962) *with* Ely v. United States, 117 F.2d 526, 529 (6th Cir. 1941).

[26] *See* Spector, *supra* note 3, at 7-8.

concerning their awareness of the accused's prior record. Even where the prejudice would be indirect, a defendant may be inclined to forego using the testimony of witnesses who might prove vulnerable to attack because of their own prior crimes.

The fear of prejudice is most severe and the pressure to restrict testimony the strongest when the accused himself wishes to testify and yet has a record. By electing not to take the stand the accused can avoid the possibility of impeachment, for then the prosecutor would be unable to cross-examine him. Therefore, even though a defendant's testimony is crucial to his case, fear of impeachment prejudice may induce him not to testify.[27] When a defendant fails to testify, not only is the jury's view of the evidence restricted, but the jury is likely to interpret his silence as an admission of guilt.[28] Thus a defendant with a record faces a dilemma: he may testify and risk being convicted because of his record; or he may remain silent and risk being convicted by his silence.[29] These consequences have led one commentator to argue that the use of impeachment evidence results in both a denial of due process and of a fair trial.[30]

III. EXISTING RESPONSES TO THE DANGERS OF IMPEACHMENT WITH PRIOR CONVICTION EVIDENCE

A. The Traditional Response

The limiting instruction is the traditional protection afforded to defendants confronted with possible prejudice from prior convictions.[31] This instruction directs the jury to consider a defendant's previous offences only as they affect the issue of his credibility and not with respect to the issue of his present guilt.[32] These instructions generally call for a distinction jurors cannot or will not make.[33] Indeed, one court has described limiting instructions as a "ritualistic counsel of psychologically impossible behavior."[34]

---

[27] MODEL CODE OF EVIDENCE rule 106, Comment on Paragraph (3) (1942). The Kalven and Zeisel studies, *supra* note 20, at 146, indicate, that, on the average, defendants testify 17 percent more often if they have no prior record. This figure increases to 37 percent when the case is clear for acquittal.

[28] MCCORMICK § 43, at 93; Spector, *supra* note 3, at 7.

[29] *A New Approach* at 925.

[30] 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. CIN. L. REV. 168 (1968).

[31] Spector, *Impeaching the Defendant by his Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOYOLA U.L.J. (CHICAGO) 247, 251 (1970).

[32] *Id.*

[33] *Id.* at 5 n.17.

[34] United States v. Jacangelo, 281 F.2d 574, 576 (3rd Cir. 1960).

In answer to these problems, some states have narrowed the kinds of information the prosecutor may bring to the jury's attention to impair credibility. One familiar approach is to limit the class of crimes conviction of which is admissible for impeachment purposes or to infamous crimes, to felonies, or to felonies or misdemeanors involving moral turpitude.[35] Such limitations, however, fail to respond to the problem of relevancy. Rather these limitations seem to be based on the seriousness of the offence. They reflect a form of continuing, post-institutional punishment for prior misconduct,[36] and exemplify the second class citizenship to which society relegates its criminals.[37]

Another common limitation governs the extent to which the prosecution may examine witnesses in detail about their prior convictions.[38] Frequently, a prosecutor may elicit only the name of the crime, the time and place of the conviction, and the punishment imposed. The effect of these restrictions is questionable, since the jury's knowledge of conviction alone causes prejudice. Silence with regard to the details of the prior crime may only stimulate a jury's imagination. Consequently, some jurisdictions allow a witness to make a brief statement in explatation or mitigation of his conduct.[39]

Other rules further limit the methods by which prior conviction evidence may be elicited. Illinois, for example, requires such

---

[35] MCCORMICK § 43, at 90-91. Until recently Michigan allowed even evidence of prior arrests without conviction for impeachment purposes. People v. Hoffman, 1 Mich. App. 557, 137 N.W.2d 304 (1965). However arrest evidence is now inadmissable, People v. Brocato, 17 Mich. App. 277, 301-03, 169 N.W.2d 483, 495-96 (1969).

[36] At common law these continuing effects of conviction were even harsher, for persons convicted of a felony were absolutely barred from testifying. This is not surprising, since almost all felonies were punishable by death. One considered unworthy of life itself could hardly be considered worthy of belief. 1 S. GREENLEAF, EVIDENCE § 373 at 513-14 (16th ed. 1899).

[37] *See* McIntosh v. Pittsburgh Ry., 432 Pa. 123, 125, 247 A.2d 467, 468 (1968). In a trespass suit plaintiff 's prior conviction for pandering was admitted to impeach his credibility. By reversing, the court in effect refused to impose second class citizenship on the plaintiff-appellant:

> Certainly it is unfair to handicap him in an attempt to make a damage recovery which might properly be due him. Appellant has been punished once for his crime. If that is not sufficient, and should appellant once again violate the law, the criminal process is quite capable of dealing with his misconduct.

[38] People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1959) (repeated questions covering prior felony held within permitted limits since witness was uncooperative); State v. Adams, 257 Wis. 433, 43 N.W.2d 446 (1950) (error for trial court to allow cross-examination to go beyond the fact of conviction).

[39] MCCORMICK § 43, at 92-93; 4 J. WIGMORE, EVIDENCE § 1117, at 190-91 (1940). Michigan permits introduction of a statement in mitigation. Wagman v. United States, 269 F. 568 (6th Cir. 1920), *cert. denied*, 255 U.S. 572 (1920); People v. DeCamp, 146 Mich. 533, 109 N.W. 1047 (1906). However, the court, in its discretion, may allow the prosecutor to elicit details of the offense. People v. Childers, 20 Mich. App. 639, 651-52, 174 N.W.2d 565, 571-72 (1969).

information to be proved by introduction of the witness's criminal record rather than by his admissions under oath on cross-examination.[40] Finally, many courts, in the exercise of their discretion, deny admissibility if the crime is too remote in time.[41] This technique rests on the assumption that a conviction is relevant to veracity, but that a witness may have reformed since the time of his conviction.

B. The Model Code and Uniform Rules Approach

The Model Code of Evidence[42] and the Uniform Rules of Evidence[43] approach the problem of impeachment evidence in a manner that offers greater protection to defendants than do the traditional devices. The most helpful rule, which both codes adopt, appears to be based in part on the English Criminal Evidence Act, 1898.[44] The English Act prevents the use of evidence of prior convictions for impeachment purposes unless an accused has introduced evidence of his good character, or his defense presentation impugned the character of the prosecutor or his witnesses. Like the English statute, the Model Code and Uniform Rules propose that evidence of prior convictions used solely for impeachment purposes is inadmissible, unless the defendant first introduces evidence solely to support his good character.[45] Under

[40] For a discussion of Illinois law on this point *see* Spector, *supra* note 3, at 10–14.

[41] MCCORMICK § 43, at 93; *A New Approach* at 928–29.

[42] MODEL CODE OF EVIDENCE rule 106 (1942):

> (1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any party . . . may examine him and introduce extrinsic evidence . . ., except that extrinsic evidence shall be inadmissible
>
> (a) of traits of his character other than honesty or veracity or their opposites, or
>
> (b) of his conviction of crime not involving dishonesty or false statement
>
> . . . .
>
> (3) If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him; if he introduces evidence for the sole purpose of supporting his credibility, all evidence admissible under Paragraph (1) shall be admissible against him.

[43] UNIFORM RULE OF EVIDENCE 21:

> 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 first introduced evidence admissible solely for the purpose of supporting his credibility.

[44] The Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1f.

[45] Notes 42–43 *supra*. The Model Code and Uniform Rules do not provide for an accused's defense presentation impugning the character of the prosecutor or his witnesses.

such a rule the defendant can testify to the facts as he knows them without risking the introduction of his criminal record, or having to remain silent.[46] Obviously, this rule substantially encourages an accused to testify.

In two respects, however, the rule may not go far enough. First, the impeachment rule itself provides no protection to an accused when his witnesses take the stand. Under the impeachment provision, third party witnesses may be discredited with their own prior records and, if they testify to the accused's good character, they may be cross-examined concerning their having heard of the defendant's prior convictions. However, both Model Code of Evidence rule 303[47] and Uniform Rule of Evidence 45[48] do respond to this deficiency. These provisions allow a trial judge to exclude evidence the probative value of which he finds to be outweighed by the possibility of prejudice. Repeating this general balancing rule in the impeachment provision would clarify the availability of this test. It would then be clear to both judges and counsel that prior conviction evidence must be considered in the light of possible prejudice to a defendant even if the witness on the stand is not the accused.[49]

In order to avoid a jury's inference of guilt, a defendant is not only under great pressure to testify to assert his innocence, but he is also subject to substantial pressure to assert his credibility and good character.[50] However, neither the Model Code nor the Uniform Rules will allow him to do this without risking the prejudice

---

[46] MODEL CODE OF EVIDENCE rule 106, Comment (1942).

[47] *Id.* rule 303:

> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
>
> (a) necessitate undue consumption of time, or
>
> (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
>
> (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.
>
> (2) All Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated.

[48] UNIFORM RULE OF EVIDENCE 45:

> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

[49] Repeating the general balancing rule in the impeachment provision might suggest that the rule is applicable only when specifically restated. On the other hand, a comment to the impeachment provision emphasizing the applicability of the general balancing rule, in this particular setting, would not restrict its broader impact, and thus would be more appropriate.

[50] Spector, *supra* note 31, at 252.

which the introduction of his criminal record is likely to cause. Admittedly, to allow an accused the opportunity to assert his credibility while denying the prosecution the opportunity to rebut it could be both unfair[51] and misleading, since an accused could appear righteous when his record, were it disclosed, would indictate the contrary. It can be further argued that by introducing character evidence, a defendant recognizes the relevancy of the issue and waives the opportunity to foreclose inquiry into his past crimes.

Nevertheless, denying the prosecution the opportunity to cross-examine or rebut credibility by evidence of prior convictions may be justifiable. Most jurors reason that the state's authority will not be brought to bear on an accused nor the time for trial invested unless the government has a good case. Additionally, an accused is likely to be disbelieved since jurors generally recognize the pressure on a defendant, whether guilty or innocent, to lie in order to enhance his case.[52] An accusation itself thus places a defendant's character and innocence in doubt. Since a defendant in a criminal trial labors under this considerable handicap, while a prosecutor usually appears upstanding, the state has a definite initial advantage. Consequently, allowing a defendant to bring in evidence of his credibility merely grants him an opportunity to counteract the stigma associated with being a criminal defendant. Moreover this restriction does not leave the state defenseless; other more probative means of impeachment remain available.[53]

The response of the Model Code of Evidence to these considerations is manifested in the general balancing test of rule 303.[54] Under rule 303 even if the defendant introduces evidence solely to support his credibility, he may have evidence of his prior convictions excluded if he can convince the trial judge that the danger of prejudice outweighs the probative value of the evidence. The burden of proof as to this issue is placed on the defendant.[55] A similar balancing test is provided in Uniform Rule of Evidence 45. However, the test may not be applicable to evidence of a defendant's prior convictions once he has introduced evidence solely to support his credibility.[56] If the general balancing test of rule 45 does not apply, then the evidence appears admissible

[51] MCCORMICK § 43, at 94.

[52] *See* note 17 and accompanying text *supra*.

[53] *See* text accompanying note 16 *supra*.

[54] *See* note 47 and accompanying text *supra*.

[55] MODEL CODE OF EVIDENCE rule 11(b)(ii) (1942).

[56] This is apparent when Uniform Rule of Evidence 45, *supra* note 48, is read in conjunction with Uniform Rule of Evidence 21, *supra* note 43.

without further qualification. If rule 45 does apply, the assignment of the burden of proof is left to the trial court.[57]

Both the Uniform Rules and the Model Code allow only the introduction of evidence of convictions involving dishonesty or false statements for impeachment purposes.[58] This limitation responds to the relevancy problem involved in using prior conviction evidence. By allowing only the use of crimes indicating a past tendency to lie, the jury is prevented from disbelieving a witness because of his conviction of crimes displaying manifestations of bad character other than falsity.

Arguably, even this limitation is unsound for it ignores the question of whether the witness has a motive to lie. The fact that a witness has perjured himself in the past indicates no more of his present motive than prior convictions of other crimes.[59] Nevertheless, the possibility of pressures upon the accused to lie is obvious, and third party witnesses may also be shown to have interests or biases which would incline them to lie. When these factors are considered, the fact that one has previously submitted to pressure to lie is relevant to the probability of his again succumbing to such pressure. Prior convictions of crimes other than perjury, however, do not necessarily indicate the same weakness.[60]

IV. THE PROPOSED FEDERAL RULES

A. Proposed Rule 609

Rule 609 of the Proposed Federal Rules of Evidence[61] takes a different approach from that of the Model Code and Uniform Rules. It permits the introduction of evidence of conviction of crime, not obtained on a plea of nolo contendere, for impeach-

---

[57] UNIFORM RULE OF EVIDENCE 8.

[58] Notes 42-43 *supra*.

[59] Spector, *supra* note 3, at 15.

[60] *See* note 11 and accompanying text *supra*.

[61] Proposed Federal Rule of Evidence 609:

> (a) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea on *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 is substantially outweighed by the danger of unfair prejudice.

Section 609(b) provides that convictions over ten years old are inadmissible; 609(c) bars the use of convictions subject to a pardon, annulment, or other procedure indicating rehabilitation or innocence; 609(d) disallows the use of juvenile proceedings for impeachment; and 609(e) declares that the pendency of an appeal does not bar the use of a prior conviction.

ment purposes if the crime was punishable by death or imprisonment for more than a year, or if the crime involves false statement or dishonesty. The trial judge may, moreover, exclude such evidence if he determines that its probative value is "substantially outweighed" by the danger of unfair prejudice.[62] By integrating a probative value versus unfair prejudice standard into the impeachment provision applicable to both third party witnesses and defendants regardless of their assertions of credibility, the Proposed Federal Rules may prove more helpful than the Model Code and Uniform Rules in alleviating the problems of indirect prejudice from impeachment with prior conviction evidence.[63] However, at the same time proposed rule 609 may offer less protection for defendants, since it permits the introduction of all felony convictions for impeachment purposes, subject only to the trial judge's balancing of prejudice versus probative value. Allowing the introduction into evidence of all felonies is a questionable departure from the Model Code and Uniform Rules approach which restricts admissibility to crimes involving false statements or dishonesty.

B. The Luck *Doctrine*

Proposed rule 609 emerged from dicta in *Luck v. United States*,[64] which were further clarified in *Gordon v. United States*.[65] Since the comments to the rule refer specifically to the *Luck* and *Gordon* cases,[66] courts are likely to look to those cases to determine its meaning and application. The *Luck* case interpreted the District of Columbia statute to vest the trial court with discretion to rule on the admissibility of evidence of prior convictions for impeachment purposes.[67] If the judge finds that "the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility," prior conviction evidence should be excluded.[68]

---

[62] *Id.*

[63] *See* text accompanying notes 47-48 *supra*. *See also* Davis v. United States, 409 F.2d 453 (D.C. Cir. 1969), which expands the *Luck* doctrine to third party witnesses. *See* text accompanying notes 64-72 *infra*, for a discussion of the *Luck* doctrine.

[64] 348 F.2d 763 (D.C. Cir. 1965).

[65] 383 F.2d 936 (D.C. Cir. 1967).

[66] PROPOSED FEDERAL RULE OF EVIDENCE 609, Advisory Committee's Note (rev. draft 1971).

[67] D.C. CODE ANN. § 14-305 (1966). This statute, like the Michigan statute, *supra* note 2, eliminates the testimonial ban on convicted persons and simulatenously indicates that such a conviction may be used for impeachment purposes. Judge McGowan focused on the word "may" and determined its use meant that the trial judge was not required to admit such testimony, but should exercise his discretion. 348 F.2d at 767-68.

[68] *Id.* at 768.

In *Gordon,* Judge, now Mr. Chief Justice, Burger set out several factors to guide a trial judge in determining whether the prejudice of prior convictions "far outweighs" the probative value of the evidence:

> A "rule of thumb" should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category. The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.
>
> A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity. . . .
>
> One [further] important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. 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.[69]

At the same time, however, if the verdict can be expected to turn on the credibility of the witnesses, the need for impeachment becomes more crucial and the trial judge should be more willing to admit the evidence.[70]

Significantly, the *Gordon* and *Luck* cases clearly place the burden of showing sufficient unfair prejudice on the defendant.[71] Apparently, inadmissibility becomes the exception rather than the

[69] 383 F.2d at 940–41 (footnotes omitted).
[70] *Id.* at 941.
[71] *Id.* at 939.

rule since placing the burden of proof on the defendant may rest on the assumption that prior conviction evidence is generally more probative than prejudicial.[72]

C. Deficiencies of Proposed Rule 609

Under proposed rule 609, once a defendant takes the stand, prior conviction evidence can be used regardless of whether he puts his credibility in issue. This approach clearly provides less encouragement for an accused to testify than the Model Code and Uniform Rules procedures. Under proposed rule 609, in order to bar prior conviction evidence a defendant must obtain a favorable ruling from the court on the inadmissibility of his record. A defendant will want to obtain such a ruling in a pre-trial proceeding so that he can plan his trial strategy accordingly.[73] If successful in obtaining a favorable pre-trial order, a defendant can prevent the prosecution from asking any questions at trial concerning the accused's record. However, in the light of *Luck* and *Gordon*,[74] proposed rule 609 places on the defendant the burden of proof in a pre-trial hearing on the exclusion of prior conviction evidence. These hearings, required whenever counsel seeks to have his witness's record excluded, will substantially increase the work load of trial judges.[75] An approach is needed which would require fewer such hearings, yet protect the interests of the defendant.

Another flaw with the approach of proposed rule 609 is its heavy reliance on the proper exercise of discretion by trial judges. This reliance may be misplaced, for judges, in the light of their past experience of allowing impeachment with prior conviction evidence as a matter of course, are apt to apply the rule somewhat restrictively. To many trial judges, prior conviction evidence may appear relevant as a matter of habit rather than as a result of analysis. Although judges must weigh the probative value of evidence against the possibility of prejudice whenever they consider the admissibility of relevant circumstantial evidence,[76] they are granted wide discretion, and clear abuse must be shown in order to obtain reversal.[77] Thus, proposed rule 609 may prove ineffectual in alleviating the problems of the use of prior con-

---

[72] Ordinarily, one assumes that the burden of proof is placed on the party asserting the improbable.

[73] In Gordon v. United States, 383 F.2d at 941, Judge Burger discusses the propriety of pre-trial hearings.

[74] *Id.* at 939.

[75] *Id.* at 941. *See also* Spector, *supra* note 3, at 21.

[76] MCCORMICK § 152, at 319-20.

[77] Luck v. United States, 348 F.2d at 769; Gordon v. United States, 383 F.2d at 939.

viction evidence for impeachment purposes.[78] Certainly a lack of uniform results can be expected from the application of the balancing test by numerous judges.[79]

V. AVENUES OF REFORM

A. An Eclectic Approach

A more complete approach to the problems arising from the use of prior conviction evidence for impeachment purposes can be achieved by borrowing from the approach of the Model Code and Uniform Rules as well as proposed Federal Rule 609. The new rule should provide that only evidence of prior convictions which involve dishonesty or false statement may be used for impeachment purposes. Furthermore, when a defendant testifies, no prior conviction evidence should be admissible for the purpose of impairing credibility unless a defendant brings his character into issue by introducing evidence solely to support his credibility. Once an accused has asserted his credibility, the question of the admissibility of his prior criminal record should be decided in a hearing outside of the jury's presence and before any questions are asked at trial.[80]

Before admitting evidence of past crimes, a trial court should determine at the hearing that the probative value substantially outweighs the dangers of prejudice. Due regard should be taken of the *Luck* doctrine factors,[81] the alternative means of impeachment, and the stigma associated with being a criminal defendant.[82] Contrary to the *Luck* doctrine,[83] the Model Code[84] and the Uniform Rules[85] when this approach requires a hearing, the burden of proof should be placed on the prosecution to show that the probative value of the prior conviction evidence outweighs the dangers of prejudice to the defendant. The presumption of innocence is

[78] In *Luck*, itself a larceny case, the court clearly indicates that the trial court would not have been reversed for admitting a recent conviction of the accused for grand larceny. 348 F.2d at 769.

[79] Spector, *supra* note 3, at 21-22.

[80] This procedure was recommended by Judge Burger in *Gordon*, 383 F.2d at 941. Both Model Code of Evidence rule 11(a) (when read in connection with rule 303, *supra* note 48) and Uniform Rule of Evidence 8 (when read in conjunction with rule 21, *supra* note 49) allow such hearings.

[81] *See* text accompanying note 69 *supra*.

[82] There will generally be some alternative means of impeachment but their effectiveness will vary with the circumstances of each case. So too, the weight to be given the stigma may vary with the sophistication of the jury. The relevance and possibile prejudicial impact will vary in each case, as will the need for credibility testimony in general.

[83] *See* text accompanying note 71 *supra*.

[84] *See* note 55 and accompanying text *supra*.

[85] *See* note 57 and accompanying text *supra*.

central to our criminal justice system and it is therefore appropriate that the prosecution bear the burden of proof. Moreover, the prosecution is in the better position to show the inadequacy of other means of impeachment and the importance of the issue of credibility to his case.[86] This hearing should occur irrespective of whether the prosecution seeks to impeach by proving an accused's prior criminal record on cross-examination of a defendant himself, by cross-examination of a third party witness vouching for a defendant's credibility, or by direct testimony in rebuttal of an accused's assertions of credibility. A similar approach again should be used when the prosecutor wishes to impeach a third party witness by the use of that witness's past crimes.

This eclectic approach has the advantage of: (1) eliminating the introduction into evidence of the conviction of any crime not involving dishonesty or false statement; (2) barring the use of prior conviction evidence to impeach a defendant unless he introduces evidence solely to support his credibility; and (3) emphasizing the balancing of probative value against prejudice in all remaining circumstances where impeachment with prior conviction evidence might be attempted. Although the burden of proof is placed on the prosecution in admissibility hearings, the state is nevertheless given the opportunity to protect its interest in rebutting the alleged credibility of the defendant. Furthermore, by severely restricting the class of crimes admissible for impeachment purposes, fewer hearings will be required under this approach than under the Proposed Federal Rules. By barring the introduction of prior convictions to impeach until the defendant asserts his credibility, the defendant has sole control over the introduction of his prior record. If he chooses to rebut the stigma of being an accused by asserting his credibility, he enables the prosecution to urge the admission of his prior record. However, he may testify without incurring this risk by choosing not to assert his credibility. Even if he does assert his credibility, he may still prevail during the pretrial hearing at which the admissibility of his past crimes will be determined.

B. Procedural Power of Courts

One explanation frequently advanced for the lack of reform of impeachment procedures is that courts are bound by statute to

---

[86] *See* Comment, *Evidence—Illinois Adopts Rule 609 of the Proposed Federal Rules of Evidence on Impeachment of a Defendant—Witness by his Prior Crimes*, 2 LOYOLA U.L.J. (CHICAGO) 362 (1971), where the author details how close the Illinois Supreme Court is to taking such a position.

admit evidence of prior convictions.[87] However, rules of evidence are generally recognized to be procedural,[88] and the rules regulating procedure are generally considered to be judicial matters.[89] Therefore, courts may be able to reform their own rules without waiting for legislative action.

The power of courts to govern their own procedure is variously established by constitution,[90] enabling legislation,[91] or inferred as a matter of inherent judicial power.[92] Although the judiciary thus has the power to promulgate rules of evidence, the problem remains as to the effect of such a promulgation when there is a specific statute regulating the matter.[93] Where a court's power in this area is granted by constitution or is deemed inherent in the judiciary, a court should not feel constrained by any such statute.[94] However, where a court's power over procedure is granted by enabling legislation that is not merely declarative of the common law, a court may have difficulty in justifying an impeachment rule contrary to one enacted by the legislature.[95] This difficulty would arise if enabling legislation is interpreted to be a delegation to the courts of what is primarily legislative power. Under such an interpretation the legislative enactment of a specific procedural rule might be deemed to preempt and prevent any judicial action to the contrary.[96]

An example of the judiciary creating a rule of evidence contrary to one established by statute is seen in Michigan. In *Perrin v. Pueler*,[97] the state supreme court held that evidence of prior traffic convictions could be used in a negligent entrustment suit despite a statute expressly barring the use of such evidence in civil actions.[98] The opinion set forth a proposed court rule, later adopted, allowing full cross-examination for credibility, the sta-

---

[87] Spector, *supra* note 3, at 23.

[88] Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 468, 483 (1957).

[89] Joiner & Miller, *Rules of Practice and Procedure: Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 650-51 (1955).

[90] *Id.* at 625.

[91] *Id.*

[92] *Id.* at 624.

[93] *See* note 2 and accompanying text *supra*.

[94] Gertner, *The Inherent Power of the Courts to Make Rules*, 10 U. CIN. L. REV. 32, 47-48 (1936).

[95] *Id.* at 47.

[96] *Id.* Some enabling statutes provide that courts have rulemaking authority in the absence of contrary legislation. The absence of this limitation in enabling legislation could be interpreted to give power to the courts to overrule legislative enactments.

[97] 373 Mich. 531, 130 N.W.2d 4 (1964).

[98] *Id.* at 543, 130 N.W.2d at 11.

tute barring the use of traffic convictions to the contrary notwithstanding.[99]

In a jurisdiction where the judiciary's power over procedure is granted by enabling legislation, courts might still circumvent a statutory rule of evidence. One means of doing so is exemplified by the *Luck* case. The District of Columbia statute[100] declares that evidence of prior convictions *may* be used to impeach a witness's credibility. The court focused on the permissive language of the statute, interpreting it to vest the trial court with discretion to resolve questions of the admissibility of such evidence.[101] The court thereby enabled exclusion of prior conviction evidence while ostensibly acting within the confines of the statutory rule. Even if a statutory rule is phrased in imperative language,[102] a court could conceivably interpret it as establishing not an absolute rule of admissibility, but merely a rule of relevancy. The statute would be viewed as establishing only that a prior conviction is, to some degree, probative of credibility. Under this interpretation, a judge would be able to exclude the evidence if he found that its probative value was outweighed by the dangers of prejudice and distraction from the essential issues. Thus, whether a statutory rule of evidence is permissive or imperative, a court may be free to fashion its own standards for the admissibility of prior conviction evidence.

VI. CONCLUSION

The dangers inherent in the use of prior conviction evidence necessitate reform of the law in states generally allowing such evidence for impeachment purposes. While the Model Code and Uniform Rules present alternatives which would improve the present status of the law, both contain inadequacies. In any event, neither has been widely adopted.[103] Although enactment of the Proposed Federal Rules may have a unifying effect on state

---

[99] *Id.* at 543 n.6, 130 N.W.2d at 11 n.6. The rule was formally adopted that same year. MICH. CT. R. 607 (1965).

[100] D.C. CODE ANN. § 14-305 (1966).

[101] Luck v. United States, 348 F.2d at 767-68.

[102] *E.g.*, the Arkansas statute provides: "No person shall be disqualified to testify . . . by reason of having been convicted of any felony or other crime whatsoever, but evidence of his former conviction of any crime . . . *shall be* admissible for the purpose of going to his credibility or the weight to be given to his testimony." ARK. STAT. ANN. § 28-605 (1962) (emphasis added).

[103] Spector, *supra* note 3, at 16. Some states have adopted law based on Uniform Rule 21: GA. CODE ANN. § 38-415 (Supp. 1971); KAN. STAT. ANN. § 60-421 (1964); PA. STAT. ANN. tit. 19, § 711 (1964); V.I. CODE tit. 5, § 835 (1967).

law,[104] their approach to the problems of impeachment with prior conviction evidence is also inadequate. The eclectic approach proposed in this article corrects these inadequacies and affords a defendant a greater opportunity for an unprejudiced verdict. It therefore presents a preferable means of alleviating the dangers of current impeachment practices.

—*Lawrence A. Margolis*

[104] This was the case with the Federal Rules of Civil Procedure. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 62, at 260 (1970).