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## Impeaching the Accused by His Prior Crimes--A New Approach to an Old Problem

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## NOTES

### IMPEACHING THE ACCUSED BY HIS PRIOR CRIMES— A NEW APPROACH TO AN OLD PROBLEM

In former times a person convicted of an "infamous crime" was thereafter disqualified from testifying as a witness.<sup>1</sup> This rigid rule has passed into history,<sup>2</sup> but its imprint lingers in the law. For the statutes which abrogated the older rule usually provided that, although the witness could speak, his prior convictions would still be available to assail his credibility.<sup>3</sup> Hence the modern rule permits the impeachment of any witness by disclosing to the jury his past convictions of crime.<sup>4</sup>

This note is concerned with the effect of this kind of credibility test on one kind of witness—the defendant in a criminal prosecution. When applied to him this practice has created serious problems which have sent many writers<sup>5</sup> and some courts<sup>6</sup> in quest of a solution. The search has not been fruitful, for the problems are buried deep in the nature of the evidence and are often perpetuated by statute. It is the ultimate purpose of this note to examine the movement of one court toward a solution which may eventually go far in diminishing the abuses of the current practice. First, however, it is necessary to see just what this practice is and what special problems it has created when applied to the criminally accused.

#### Impeachment by Prior Conviction of Crime Generally

##### The Prior Crime and the Inference of Falsehood

The fact that a witness has been convicted of a crime is offered, of course, to afford a basis for the jury to disbelieve his testimony.<sup>7</sup> It is helpful to ask: In what respect does the past conviction, or more accurately, the misconduct which brought it about, impair his credibility? It obviously has no tendency to prove him forgetful

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<sup>1</sup> 2 J. WIGMORE, EVIDENCE § 519 (3d ed. 1940) [hereinafter cited as WIGMORE].

<sup>2</sup> C. McCORMICK, EVIDENCE § 43, at 89 (1954) [hereinafter cited as McCORMICK].

<sup>3</sup> E.g., 14 D.C. CODE ANN. § 14-305 (1966); OKLA. STAT. ANN. tit. 12, § 9-381 (West 1961).

<sup>4</sup> 3 WIGMORE § 980, at 538.

<sup>5</sup> E.g., E. BORCHARDT, CONVICTING THE INNOCENT 158-64 (1932); 1 H. UNDERHILL, CRIMINAL EVIDENCE § 163, at 301 (5th ed. 1956); Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 184 (1940); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 440-42 (1964); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 774-78 (1961).

<sup>6</sup> E.g., *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965).

<sup>7</sup> Ladd, *supra* note 5, at 176.

or biased, or lacking the capacity to observe and relate the subject of his testimony.<sup>8</sup> In fact the object of the evidence is nothing less than to show him a liar.<sup>9</sup> From it the jury is asked to infer that he has willfully falsified his testimony.

By what process does the prior crime prove the present misstatement? Since, in point of logic, one act never proves directly the commission of another,<sup>10</sup> an intermediate inference must be called to action. This inference, it is clear, involves the character, disposition and tendencies of the witness.<sup>11</sup> From the fact of his criminal past it may be inferred that he is the sort of man who would disregard the obligations of the oath.<sup>12</sup> It is from this that the jury may draw the ultimate inference of falsehood.<sup>13</sup>

The principal difficulty with this kind of impeachment, from the standpoint of relevancy, lies in the fact that most crimes fail to display this specific proclivity to lie. Thus when crimes of violence or passion are employed for this purpose, yet another intermediate inference is required. For all that these crimes can reveal about the witness is that he is possessed of a generally unsavory nature.<sup>14</sup> From this showing of general bad character the jury is entitled to infer a specific tendency to falsify, and thence that he is lying in fact.<sup>15</sup>

### The Weakness of the Evidence

The use of general bad character to prove the tendency of a witness to falsify marks this form of impeachment as an exception to an important evidentiary proposition.<sup>16</sup> In general the law regards with disfavor attempts to prove through a man's character his conduct on a specified occasion.<sup>17</sup> Such evidence is always relevant as tending to show that he has acted in accordance with his disposition, but this probity is regarded as insufficient to overcome the disadvantages involved.<sup>18</sup> It is feared that a character inquiry would consume too much time, or that it would divert the tribunal from more crucial issues.<sup>19</sup> Most important, since character would often be shown by conduct, is the danger that the evidence would come in bemisted in prejudice which would obscure and darken more than it would clarify and illuminate.<sup>20</sup> The chain of relevancy, while present, is strained by the passage from conduct to character and thence to conduct again, and cannot withstand the weight of these considerations. Hence, the law, while conceding the relevance, usually excludes the evidence.

<sup>8</sup> *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884) (Holmes, J.).

<sup>9</sup> *Id.*

<sup>10</sup> 1 WIGMORE § 192, at 641.

<sup>11</sup> *See Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1966).

<sup>12</sup> *See Ladd*, *supra* note 5, at 176.

<sup>13</sup> *Id.*

<sup>14</sup> *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884).

<sup>15</sup> *Ladd*, *supra* note 5, at 176.

<sup>16</sup> McCORMICK § 161.

<sup>17</sup> *Id.* § 155; 1 WIGMORE § 64.

<sup>18</sup> McCORMICK § 155.

<sup>19</sup> *See* 2 WIGMORE § 64, at 474-75.

<sup>20</sup> *See* McCORMICK § 155, at 325.

The forces of history and inertia largely account for the exemption from the general prohibition of this kind of credibility test. The current practice is often sanctioned by the same statutes which abolished the older rule of incompetency.<sup>21</sup> Through long usage it has acquired such dignity that, at least as applied to the ordinary witness, it is seldom called into question. This does not mean, however, that evidence of prior convictions used for this purpose is any stronger than other evidence which tends, through character, to prove conduct. The crucial inferences from general bad character to a specific propensity to lie, and thence to the fact of falsehood, are precisely the kind which are generally regarded as too weak to bear the weight of the countervailing danger involved.<sup>22</sup>

### Limitations on the Use of Prior Convictions for Impeachment Purposes

Many of the disadvantages associated with character evidence are alleviated to some degree by the imposition of statutory or judicial limitations on this kind of impeachment. The most common limitation restricts the class of prior convictions which may be shown to felonies or at least to more serious misdemeanors.<sup>23</sup> This avoids the consumption of time on trivial offenses which have no bearing upon credibility. Additional safeguards are designed to guard against the danger of abuse even when the impeaching crime is a proper one. The trial judge is usually vested with discretion to limit the inquiry and particularly to prevent questioning which will only harass and degrade the witness with little corresponding benefit to the jury.<sup>24</sup> When the witness, on cross-examination, denies the prior conviction, the opponent must prove by reliable documents that it occurred.<sup>25</sup>

### Criticisms of the Current Practice

While these limitations undoubtedly help to strengthen the evidence, they are regarded by many observers as insufficient. The most potent objection to the current practice is to the breadth of the class of crimes which may be shown.<sup>26</sup> It has been observed<sup>27</sup> that

<sup>21</sup> *E.g.*, OKLA. STAT. ANN. § 9-381 (West 1960).

<sup>22</sup> Wigmore was critical of the assumption that the considerations of undue prejudice, time consumption and confusion of issues, which usually operate to exclude such evidence, are not controlling when character evidence is offered to impeach a witness: "Judges have often protested against the abuses of this kind of evidence. They concede the comparative triviality of its value . . . . It would seem desirable to consider the expediency of restricting the resort to this feeble and petty class of evidence." 3 WIGMORE § 921, at 446.

<sup>23</sup> *E.g.*, CAL. EVIDENCE CODE § 788; *State v. Jenness*, 143 Me. 380, 62 A.2d 867 (1948); *Rylee v. State*, 131 Tex. Crim. 127, 96 S.W.2d 988 (1936); McCORMICK § 43, at 90; *see Glover v. United States*, 147 F. 426, 429-30 (8th Cir. 1906).

<sup>24</sup> *See, e.g.*, *Powers v. State*, 156 Miss. 316, 126 So. 12 (1930); *Finch v. State*, 103 Tex. Crim. 212, 280 S.W. 597 (1926).

<sup>25</sup> *See, e.g.*, *State v. English*, 132 Conn. 573, 46 A.2d 121 (1946); 4 WIGMORE § 1269.

<sup>26</sup> Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 182 (1940).

<sup>27</sup> *See note 14 supra* and accompanying text.

the principal difficulty with this form of impeachment lies in the fact that most of the crimes which today may be shown have no special tendency to display a propensity to falsehood. They show only general bad character, and the link between this and the particular disposition to lie is the weakest in the inferential chain. The common limitation to felonies and more reprehensible misdemeanors is of little advantage here, since the gravest of felonies, murder, reveals less about a man's honesty than many lower crimes.

The proposed Uniform Rule<sup>28</sup> would meet this objection by restricting this form of impeachment to convictions of crimes involving dishonesty or false statement. This would eliminate general bad character and would bring the evidence immediately to bear upon the tendency of the witness to falsify. This limitation has gained some support<sup>29</sup> and more will be said of it later.<sup>30</sup> But the old practice dies hard, especially when embedded in statutes which classify permissible crimes without reference to their tendency to reflect the dishonesty of the witness.<sup>31</sup>

Conceding the disadvantages of the current practice, it may perhaps be justified as to the ordinary witness by its value to the jury. It is of transcending importance that the jury have access to facts bearing upon the credibility of the witnesses they hear, and this value may ordinarily offset the imperfections in the practice. When, however, the witness is the accused testifying in his own behalf, the weakness of this evidence may be fatal to its value, because a veritable mountain of prejudice is then imposed against it.

### Effect of Impeachment on the Accused as a Witness

When the accused is testifying, or contemplating testifying as a witness, the application to him of this form of impeachment affects him adversely in two closely related ways. If he testifies it exposes him to a grave danger of prejudice which the law has, for strong reasons of policy, sought to lift from his shoulders. In consequence, the threat of this prejudice operates to keep him from testifying, thus exposing him to other formidable hazards. Both of these incidents of the application of this credibility test to the accused run counter to the general policy of the law in criminal cases.

### The Overwhelming Danger of Prejudice

The well-known rule that the prosecution in a criminal case may now show the bad character of the accused, by prior crimes or other-

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<sup>28</sup> 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."

<sup>29</sup> *United States v. Haynes*, 81 F. Supp. 63, 68 (W.D. Pa. 1948), *aff'd*, 173 F.2d 223 (3d Cir. 1949); *United States v. Katz*, 78 F. Supp. 435, 439 (M.D. Pa. 1948), *aff'd*, 173 F.2d 116 (3d Cir. 1949); *Hunter v. State*, 193 Md. 596, 605, 69 A.2d 505, 509 (1949).

<sup>30</sup> See note 64 *infra* and accompanying text.

<sup>31</sup> *E.g.*, CAL. EVIDENCE CODE § 788; see also Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 775 (1961).

wise, to prove his guilt<sup>32</sup> is a consequence of the heretofore mentioned weakness of character evidence generally. It may safely be said that, whenever the past misconduct of the accused is brought to the attention of the jury, he is exposed to a great danger of prejudice. This danger consists in the natural tendencies of the jury to accept his criminal past as conclusive of guilt on the present charge, or to consider the vile nature thereby exhibited as deserving of punishment without due regard to the question of innocence.<sup>33</sup> Either tendency would run counter to the policy that the accused is entitled to be judged on the basis of the evidence concerning the crime now charged, and not on the strength of his unsavory past. This danger of prejudice, however, does not necessarily decree exclusion of the prior crimes from evidence. For example, when the identity of the accused,<sup>34</sup> or his motive<sup>35</sup> or intent<sup>36</sup> are genuinely in issue, prior offenses relevant thereto are commonly received.<sup>37</sup> On these issues the probative value of the evidence is considered sufficiently strong to overcome the danger of prejudice.<sup>38</sup> When, however, the prior crimes are relevant only as they tend to prove guilt through bad character, this balance is upset. The probity is slight for the same reasons that evidence of character is always deficient when offered to show conduct, and is overcome by the danger of prejudice. Thus only when their relevance is spent upon the character of the accused do prior crimes encounter this rule of exclusion.<sup>39</sup>

When the accused is impeached as a witness by evidence of his prior convictions of crime his sordid past is laid bare to the jury with all the danger attendant on such a disclosure. What is unique in this use of the defendant's former crimes is that they are brought to bear upon his character. In theory, all that separates this evidence from the exclusionary rule is the object of the bad character which is shown. As has already been seen, that object is to prove him a liar, and not a criminal.<sup>40</sup> The jury is instructed that they may draw from the bad character exhibited to them an inference of falsehood,<sup>41</sup>

<sup>32</sup> *People v. Molineux*, 168 N.Y. 264, 291-93, 61 N.E. 286, 293-94 (1901); *McCORMICK* § 157.

<sup>33</sup> 1 *WIGMORE* § 194, at 646.

<sup>34</sup> *State v. Boch*, 229 Minn. 449, 39 N.W.2d 887 (1949); *State v. King*, 11 Kan. 140, 206 P. 883 (1922); 1 E. *WHARTON*, *CRIMINAL EVIDENCE* § 348 (11th ed. 1935).

<sup>35</sup> *Commonwealth v. Heller*, 369 Pa. 457, 87 A.2d 287 (1952); *State v. Gaines*, 144 Wash. 446, 258 P. 508 (1927); 2 *WIGMORE* § 390.

<sup>36</sup> *Copeland v. United States*, 152 F.2d 769 (D.C. Cir. 1945), *cert. denied*, 328 U.S. 841 (1946).

<sup>37</sup> *McCormick* cites a number of other instances where prior crimes do not encounter the rule of exclusions, such as when they are relevant to prove the existence of a plan or design, of which the present crime is a part, or to negative the existence of an innocent mistake on the part of the accused. *McCORMICK* § 157. Because the danger of prejudice still exists, however, courts have often insisted that these other issues be sharpened by dispute or uncertainty before admitting the evidence. *State v. Gilligan*, 92 Conn. 526, 103 A. 649 (1918); *State v. Goebel*, 36 Wash. 2d 367, 218 P.2d 300 (1950).

<sup>38</sup> *Quarles v. Commonwealth*, 245 S.W.2d 947, 948-49 (Ky. 1951).

<sup>39</sup> *McCORMICK* § 157, at 327.

<sup>40</sup> *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884).

<sup>41</sup> See Seventh Circuit Judicial Conference Comm. on Jury Instructions, *Manual on Jury Instructions in Federal Criminal Cases* § 6.06-2, in 33 F.R.D. 525, 576 (1964).

but must reject the inference of guilt. Upon this distinction this form of impeaching the accused is said to fall beyond the compass of the rule.

The trouble with the distinction lies in its failure to comport with the limitations of the human mind.<sup>42</sup> Once bad character is shown it is surely too much to expect the jury to select therefrom a disposition for falsehood and yet ignore the propensity to crime. This is particularly true when, as under the current practice, the impeaching crime need not display a dishonest nature, for in the case of many crimes the forbidden inference of guilt will be far more natural than the permissible one of falsehood. That a man has murdered in the past is not sufficiently probative of his present guilt to outweigh the prejudice that would flow from its disclosure, but it has a greater tendency to prove him a criminal of almost any sort than a liar. Thus the very weakness of evidence which reveals conduct through general bad character contributes to this subversion of the rule. Studies<sup>43</sup> have generally confirmed the strong suspicion of many observers that juries are unable to honor the court's instruction, and that they accept this evidence that the accused is a bad man for what it is worth on the issue of his guilt.<sup>44</sup>

Thus the primary effect of this kind of impeachment on the accused as a witness is that it subjects him to the great prejudice which inevitably must flow from a revelation of his criminal record, and it accomplishes this in the face of the rule that this record may not be shown where its only relevance to guilt is through character.

### The Chilling Effect on Testimony

The accused, of course, can avoid the risks discussed in the foregoing section by simply remaining off the witness stand. He alone among all persons cannot be compelled to become a witness and any comment, however oblique, upon his claim of privilege will likely be fatal to the prosecution's case.<sup>45</sup> Thus a secondary effect of this kind of impeachment will often be to keep the defendant with a record of crime from the witness stand.<sup>46</sup>

In encouraging the accused not to testify, this credibility test runs counter to the general policy of the law and exposes the defendant to other dangers. The jury will usually want to hear the defendant, and often only his testimony will complete their knowledge of the incident involved.<sup>47</sup> From the defendant's viewpoint, there will be many cases where his testimony is vital to refute or explain inferences arising from the evidence against him. Even

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<sup>42</sup> See Note, *Procedural Protections*, *supra* note 5, at 441.

<sup>43</sup> See authorities collected in Note, *Other Crimes Evidence at Trial—Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 & n.89 (1961).

<sup>44</sup> See *Stephans v. State*, 252 Ala. 183, 186, 40 So. 2d 90, 93 (1949); *State v. Lindsey*, 27 Wash. 2d 186, 177 P.2d 387, *aff'd on rehearing*, 27 Wash. 2d 193, 181 P.2d 830 (1947).

<sup>45</sup> *Griffin v. California*, 380 U.S. 609 (1965).

<sup>46</sup> See Ladd, *supra* note 5, at 184.

<sup>47</sup> See *Brown v. United States*, 370 F.2d 242, 245 (D.C. Cir. 1966).

where he could, by speaking, add little to his cause, the risks of quiescence are formidable, for the jury needs no one to tell them of his failure to testify.<sup>48</sup> The accused, if he wishes, may have the jury cautioned against drawing from his silence an inference of guilt,<sup>49</sup> but this will serve only to emphasize what already is obvious. His silence may ring in their ears as a resounding admission of guilt.

Thus this form of impeachment, when applied to the accused, casts him between the horns of a grave dilemma, both of which pierce not only his safety, but a basic legal policy. If he testifies, his darkened past will be illuminated in the face of the rule of exclusion. If in response to this threat he seeks refuge among the comparable hazards of silence, the tribunal will be deprived of his testimony.

### Commonly Advanced Solutions and the Impediments to Reform

#### Exemption of the Accused from this Credibility Test

These adverse effects have led many observers to conclude that, when the accused is the witness, the disadvantages of this practice far outweigh its value as a credibility test.<sup>50</sup> The subversion of the character rule and the resulting encouragement of the accused to remain silent seem a very high price to pay for evidence of a kind so weak that it is generally excluded elsewhere in the law. Even when an ordinary witness is involved, the probative value of general bad character to credibility is so slight as to be in precarious balance with the danger of abuse.<sup>51</sup> When the accused is the witness the extreme likelihood of prejudice would seem to overturn the scales. It has been forcefully argued that it will always be more worthwhile for the jury to hear the defendant than to know of his criminal record.<sup>52</sup> Whatever value this evidence would have in helping the jurors to assess his credibility would be more than compensated for by their natural tendency to regard with suspicion a witness so vitally concerned with the outcome as the accused on trial.<sup>53</sup> Thus this kind of other crimes evidence is said to be not only weak in probity and heavy with prejudice, but unnecessary as well.

These considerations appear persuasive, but they have not prevailed and there is little immediate likelihood that they will. Most important, perhaps, in perpetuating the present practice have been the statutes which provide for this kind of impeachment without distinguishing the accused from other witnesses. But even in the federal courts, which are bound by no evidence code, there has been no movement to exempt the accused from the credibility test. Courts have been sympathetic to the plight of the accused, but in the main

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<sup>48</sup> McCORMICK § 43, at 93.

<sup>49</sup> See Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, in 27 F.R.D. 39, 73 (1961).

<sup>50</sup> See, e.g., McCORMICK § 43, at 94; Ladd, *supra* note 5, at 191; Note, *Procedural Protections*, *supra* note 5, at 442.

<sup>51</sup> Ladd, *supra* note 5, at 176-77.

<sup>52</sup> See McCORMICK § 43, at 94.

<sup>53</sup> Note, *Procedural Protections*, *supra* note 5, at 440.

they have felt that, if he elects to testify, his credibility should not be immune from this form of attack.<sup>54</sup> Perhaps there has been some overconfidence in the ability of the jury to avoid giving the evidence its forbidden significance.<sup>55</sup>

Much of the same can be said for the proposal of the Uniform Rule<sup>56</sup> that the credibility of the defendant remain immune from assault by prior convictions until he has first introduced evidence to support it. This has many of the features of complete exemption, since the accused with a criminal past could avoid the harsh effects of the current practice simply by refraining from affirming his credibility. Such abstinence would involve none of the hazards which attend a failure to testify, since the jury is very unlikely to draw from it any adverse inferences. A few jurisdictions have embraced this proposal,<sup>57</sup> but otherwise it has gained no more support than exemption, probably for the same reasons.

Somewhat ironically, the only development which promises to treat the accused specially with regard to this form of impeachment is not based on the disadvantages of the practice, but upon the protections afforded him by the Federal Constitution. It has been held that a conviction obtained in violation of the defendant's right to counsel is not available to impeach him in a later prosecution.<sup>58</sup> The United States Supreme Court has not passed upon the precise question, but a recent decision indicates that the Court will confirm this limitation.<sup>59</sup>

Aside from this constitutional restriction, there is every indication that this kind of credibility test will continue to be applied to the accused along with other witnesses. For this reason, the focus of reform has been on minimizing the disadvantages of the current practice. The crucial deficiency in this practice is the definite imbalance between the legitimate probative value of the evidence on

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<sup>54</sup> See *United States v. Plata*, 361 F.2d 958, 962 (7th Cir.), *cert. denied*, 385 U.S. 841 (1966): "No good purpose could be served in discussing defendant's contention that the Court erred in permitting the impeachment of defendant by showing [a prior crime]. On numerous occasions we have heard the argument that such evidence is unfair to a defendant and in some cases works a great hardship. We have sympathy with the argument but, even so, we do not feel disposed to abruptly strike down a rule so long embedded in the law."

<sup>55</sup> See Note, *Other Crimes Evidence at Trial—Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961).

<sup>56</sup> UNIFORM RULE OF EVIDENCE 21: "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."

<sup>57</sup> GA. CODE ANN. § 38-415 (1963); PA. STAT. ANN. tit. 19, § 711 (1964).

<sup>58</sup> *People v. Coffey*, 67 A.C. 145, 159-60, 430 P.2d 15, 25, 60 Cal. Rptr. 457, 467 (1967).

<sup>59</sup> In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that the prosecution could not use a prior conviction obtained in violation of the defendant's right to counsel against him for the purpose of increasing his punishment under a recidivist statute. The language of the opinion casts doubt on the validity of using such a conviction against the accused for any purpose. 389 U.S. at 114-15.

one side and the likelihood of prejudice on the other.<sup>60</sup> The reforms which follow should be evaluated according to how well they operate to correct this imbalance.

### Limitation to Crimes Involving Dishonesty

It has been heretofore emphasized that, from the standpoint of relevancy, the crucial weakness of this mode of impeachment as presently constituted lies in the breadth of the class of crimes which may be shown.<sup>61</sup> For many crimes display only general bad character, and the link between this and the specific tendency to falsify is exceedingly feeble.<sup>62</sup> When the accused is the witness this objection goes also to the prejudice engendered by the evidence. It is this proof of general bad character that causes the current practice to subvert the exclusionary rule. The broad class of permissible convictions also permits the showing of violent and atrocious crimes which may be similar to the one involved in the instant trial, thus increasing the danger of prejudice.<sup>63</sup>

From this it is plain that one way to strike a single blow for relevancy and against prejudice would be to eliminate general bad character altogether by a restriction to crimes showing a tendency to falsify. As has previously been noted, the Uniform Rule<sup>64</sup> proposes, in the case of an ordinary witness, that only convictions for crimes involving "dishonesty or false statement" be available for impeachment. The framers of the Rule felt that even this would afford insufficient protection to the accused as a witness, and thus they would provide him with immunity divested only by his affirmative support of his credibility.<sup>65</sup> There is undoubtedly something to the argument that disclosure of any prior conviction might convince the jury that the accused must be guilty again.<sup>66</sup> With no present prospect of total or even conditional exemption from this practice, however, this reform would seem to arrive at the adjustment of probity and prejudice best suited to the interests of the accused and the tribunal.

While some courts have espoused this reform,<sup>67</sup> most have adhered to the older practice. Here again, statutes loom large as an impediment to progress.<sup>68</sup> In the main they do not make this classification of permissible crimes, and courts are loath to depart from the

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<sup>60</sup> See McCORMICK § 43, at 94.

<sup>61</sup> See Ladd, *supra* note 5, at 182.

<sup>62</sup> *Id.*

<sup>63</sup> *E.g.*, Ferguson v. State, 170 Tex. Crim. 58, 338 S.W.2d 454 (1960) (prosecution for fondling a girl under the age of 14; defendant impeached by disclosure of prior conviction for raping his own 12-year-old daughter).

<sup>64</sup> UNIFORM RULE OF EVIDENCE 21.

<sup>65</sup> *Id.* A similar provision is made in MODEL CODE OF EVIDENCE rule 106(3) (1942).

<sup>66</sup> Note, *Other Crimes Evidence At Trial—Of Balancing and Other Matters*, 70 YALE L.J. 763, 778 (1961).

<sup>67</sup> *E.g.*, United States v. Haynes, 81 F. Supp. 63, 68 (W.D. Pa. 1948), *aff'd*, 173 F.2d 223 (3d Cir. 1949).

<sup>68</sup> See McCORMICK § 93, at 90, where the author notes the variety of crimes which may be shown under various statutes.

classification provided by the legislature. What is called for, then, at least as a short-term solution, is a principle under which courts can mitigate the abuses of this credibility test without departing from the controlling statute.

### Discretionary Relief—The Rule of Remoteness

Before examining the most recent and significant judicial movement in this direction, it is of interest to view an older judicial limitation on this form of impeachment which grew up in the states of Texas and Arizona. Long ago these courts concluded that a prior conviction could be so remote in time from the present trial that its probative value was entirely dissipated.<sup>69</sup> On the theory that the trial judge was best situated to determine when this had come to pass, they vested in him discretion to exclude "remote" convictions, subject to guidelines developed by the appellate courts.<sup>70</sup>

The development of these guidelines has not been free from difficulty. The courts realized that passage of time alone would not cause a prior conviction to grow stale;<sup>71</sup> the question is whether the witness has "reformed."<sup>72</sup> Thus the trial judge must consider not only the passage of time, but also whether it has been marred by more recent misconduct. In addition, he is to consider the age and circumstances of the witness at the time of the offense,<sup>73</sup> presumably to determine what relevancy the prior crime had to credibility originally. Some courts have thrown another wrinkle into the law of "remoteness" by requiring that the time be computed from the release of the witness from confinement,<sup>74</sup> rather than from the prior offense or the ensuing conviction. There has occasionally been talk of "presumptions" of remoteness after the uneventful passage of a certain number of years, followed often by expressions that no such simple criterion can be trusted.

The principle of remoteness has not been a very satisfactory addition to the law governing the impeachment of witnesses by prior convictions of crime. Not only has it proved very confusing to trial and appellate judges alike, but as a rule of relevancy it misses its mark. For the most important single factor in the relevancy of a prior conviction is the nature of the impeaching crime, for it is this that determines the strength or weakness of the ultimate inference of falsehood. This vital factor is not included in the determination of remoteness. Nor does this judicial restriction involve any consideration of the element of prejudice; the accused is treated no differently from any other witness.

Nevertheless, the development of this concept is not without sig-

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<sup>69</sup> *E.g.*, *Sibley v. Jeffers*, 76 Ariz. 340, 264 P.2d 831 (1953); *Harmon v. State*, 119 Tex. Crim. 426, 45 S.W.2d 583 (1932).

<sup>70</sup> *See Chandler v. State*, 155 Tex. Crim. 41, 229 S.W.2d 71 (1950); *Dillard v. State*, 153 Tex. Crim. 134, 218 S.W.2d 476 (1949); *Bunch v. Texas Employers' Ins. Ass'n*, 209 S.W.2d 657 (Tex. Civ. App. 1948); *Lott v. State*, 123 Tex. Crim. 591, 60 S.W.2d 223 (1933).

<sup>71</sup> *Chandler v. State*, 155 Tex. Crim. 41, 229 S.W.2d 71 (1950).

<sup>72</sup> *Dillard v. State*, 153 Tex. Crim. 134, 218 S.W.2d 476 (1949).

<sup>73</sup> *Vaughn v. State*, 143 Tex. Crim. 150, 157 S.W.2d 894 (1942).

<sup>74</sup> *Dillard v. State*, 153 Tex. Crim. 134, 218 S.W.2d 476 (1949).

nificance, for it indicates a way in which courts, without the aid of legislation, can work to redress the critical imbalance between the relevancy of the evidence and the danger of prejudice. It remained for another court to formulate principles of judicial discretion which can bring this to pass.

## The Balancing Principle of *Luck v. United States*<sup>75</sup>

### The Origin of the Principle

As a general principle it has long been recognized that a trial judge has considerable discretion to exclude even relevant evidence if he finds its probative value outweighed by the countervailing factors of time consumption, misleading of the jury and prejudice.<sup>76</sup> This principle, which has been applied in many and varied contexts,<sup>77</sup> finds expression in situations where the imbalance between the relevance of the evidence in question and the countervailing factors is not sufficiently pronounced or constant to call for a rule of exclusion.<sup>78</sup> This is a case by case approach, calling for a balancing by the trial judge of the various factors in the particular circumstances involved.

### The Luck Case

In *Luck v. United States*,<sup>79</sup> the Court of Appeals for the District of Columbia Circuit applied this principle to evidence of prior convictions offered to impeach the accused as a witness. The defendant was accused of housebreaking and testified in his own behalf. Over his objection the Government was allowed to show a prior conviction for grand larceny. The court of appeals reversed his conviction on another ground, but devoted a large part of its opinion to the impeachment question. The Government contended that the local statute permitted it to impeach any witness in this manner as a matter of right.<sup>80</sup> This statute,<sup>81</sup> typical of many others, abolished the old rule that persons convicted of crime were incompetent to testify, but provided that "such fact may be given in evidence to affect his credit as a witness." Judge McGowan, writing for the majority of the court, found that this language "leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case."<sup>82</sup> In a significant passage, the court continued:

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<sup>75</sup> 348 F.2d 763 (D.C. Cir. 1965).

<sup>76</sup> See McCORMICK § 152, at 319. This principle is embodied in CAL. EVIDENCE CODE § 352.

<sup>77</sup> See *United States v. Kennedy*, 291 F.2d 457, 459 (2d Cir. 1961); *Utah State Farm Bureau Federation v. National Farmers Union Service Corp.*, 198 F.2d 20, 24-25 (10th Cir. 1952); *Burch v. Reading Co.*, 140 F. Supp. 136 (E.D. Pa. 1956), *aff'd*, 240 F.2d 574 (3d Cir. 1957), *cert. denied*, 353 U.S. 965; *Rogers v. Rogers*, 80 N.H. 96, 97, 114 A. 270, 271 (1921); McCORMICK § 152.

<sup>78</sup> See McCORMICK § 152, at 320.

<sup>79</sup> 348 F.2d 763 (D.C. Cir. 1965).

<sup>80</sup> *Id.* at 767.

<sup>81</sup> 14 D.C. CODE ANN. § 14-305 (1966).

<sup>82</sup> 348 F.2d at 768 (dictum).

There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field.<sup>83</sup>

It is clear from this passage that the principle of the *Luck* case is very different from the old rule of remoteness. Here too the judge is vested with discretion, but he is not narrowly limited to the matters of time and reformation. His discretion embraces the crucial balance of relevance and prejudice based on a consideration of the elements that go into each of these factors. It embraces even more, as the following language indicates:

In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length 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.<sup>84</sup>

Thus the judge is to weigh not only the probative value of the prior conviction against the likelihood of prejudice; he must also throw into the scales the probable effect of the evidence in keeping the accused from the witness stand, and the importance to the jury of his testimony.

#### Application of the Luck Principle

The dictum of *Luck* became law in *Brown v. United States*.<sup>85</sup> In this case the defendant, accused of assault with a dangerous weapon, decided not to testify after the trial judge had ruled that his 2-year-old conviction for a similar assault would be available to impeach him. The judge had purported to exercise discretion in favor of admissibility, but the stated ground for this conclusion was that the prior offense provided the defendant with a motive for perjury since it would probably increase his punishment if he were convicted. The court of appeals reversed the conviction, holding this to be an improper exercise of discretion.<sup>86</sup> The court went on to say that the facts in *Brown* presented "a classic example of a case in which 'the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility'."<sup>87</sup> The prior crime was so similar to the offense charged as to be extremely prejudicial, and, as a crime of violence, its relevance to credibility was very slight. The court also stressed the importance of the defendant's testimony in the circumstances of the case.<sup>88</sup>

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 769. The *Luck* guidelines were recently illuminated in *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967).

<sup>85</sup> 370 F.2d 242 (D.C. Cir. 1966).

<sup>86</sup> *Brown v. United States*, 370 F.2d 242, 245 (D.C. Cir. 1966). See *Jackson v. United States*, 232 A.2d 577 (D.C. 1967).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

Neither bench nor bar in the District of Columbia has fully recognized the implications of the *Luck* principle. In a series of cases<sup>89</sup> the court of appeals has declined to hold "clear error" the failure of trial judges to exercise discretion when *Luck* was not called to their attention.

Outside the District the *Luck* principle has received little attention. It was recently rejected by the Supreme Court of New Jersey in an opinion that seemed to confuse it with the rule of remoteness.<sup>90</sup> The New Jersey court concluded that a statute nearly identical to the provision involved in *Luck* left no room at all for the operation of judicial discretion. Aside from this, no federal or state court has considered this approach to the problem.

### The Possibilities of the *Luck* Approach

One interesting aspect of these developments in the District of Columbia is the emergence of what may eventually become a close approach, through another door, to a restriction to crimes involving dishonesty or false statement. The court of appeals has repeatedly cited with approval this provision of the Uniform Rule,<sup>91</sup> and it has indicated that the judge's determination of the relevance of a prior crime might well turn upon the extent to which it shows a tendency to falsify.<sup>92</sup>

Of course there are limitations to a principle of discretion. As long as discretion is exercised along the lines drawn by the appellate court, it "is to be accorded a respect appropriately reflective of the inescapable remoteness of appellate review."<sup>93</sup> But the fact that these lines are drawn as they are will serve to focus the attention of trial judges upon the serious problems that arise when this kind of impeachment is applied to the accused as a witness. By exercising his discretion in this case by case approach, the trial judge can do much to redress the critical imbalance between relevance and prejudice that lies at the heart of these problems.

William L. Osterhoudt\*

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<sup>89</sup> *Covington v. United States*, 370 F.2d 246 (D.C. Cir. 1966); *Stevens v. United States*, 370 F.2d 485 (D.C. Cir. 1966); *Hood v. United States*, 365 F.2d 949 (D.C. Cir. 1966); *Walker v. United States*, 363 F.2d 681 (D.C. Cir. 1966); *cert. denied*, 386 U.S. 922 (1967). In a recent case, however, the court, while adhering to this position, added that "in the fair administration of justice some obligation is imposed by *Luck* upon the trial court and the prosecution, and the time may come when we shall not feel bound to ignore its principles merely because the defense does so." *Lewis v. United States*, 381 F.2d 894 (D.C. Cir. 1967).

<sup>90</sup> *State v. Hawthorne*, 49 N.J. 130, 228 A.2d 682 (1967).

<sup>91</sup> *E.g.*, *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965).

<sup>92</sup> *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967): "A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; . . ." See *Brown v. United States*, 370 F.2d 242, 244-45 (D.C. Cir. 1966).

<sup>93</sup> *Luck v. United States*, 348 F.2d 763, 769. See *Ginyard v. United States*, 232 A.2d 590 (D.C. 1967).

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