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Recommended Citation

Richard Wimmer, *Evidence - The Use of Prior Uncounseled Convictions for Impeachment*, 22 DePaul L. Rev. 680 (1973)

Available at: <https://via.library.depaul.edu/law-review/vol22/iss3/6>

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EVIDENCE—THE USE OF PRIOR UNCOUNSELED CONVICTIONS FOR IMPEACHMENT

Appellant Loper was arrested and convicted in 1947 on a charge of statutory rape of his eight-year old step-daughter. The alleged victim was the sole witness for the prosecution. Loper, the only witness for the defense, testified he had not committed the crime. The prosecution, in an effort to impeach Loper's testimony, established on cross-examination of Loper that he had been convicted of four previous felonies in the states of Mississippi and Tennessee. The jury found Loper guilty as charged and sentenced him to 50 years in the state penitentiary.

Loper petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Texas. At the habeas corpus proceeding, Loper testified that he did not know of and was not informed of his right to counsel and, in fact, was not represented by counsel at any of the four felony trials relied upon by the prosecution to impeach his testimony at the trial which led to his statutory rape conviction. In an unreported decision, the district court denied Loper's petition for habeas corpus relief and this decision was affirmed by the court of appeals.¹ On appeal, the United States Supreme Court held that the use of uncounseled prior convictions to impeach a defendant's credibility deprives him of due process of law. *Loper v. Beto*, 405 U.S. 482 (1972).

The purpose of this note is to provide an historical analysis of significant cases leading up to the *Loper* decision, and to discern the impact of the case on the area of law concerned with the impeachment of a defendant-witness' testimony.

From the common law rule which renders a person incompetent to testify if that person had previously been convicted of an "infamous" crime² has evolved the modern day impeachment rationale; to wit: "that those with prior convictions are likely to commit perjury because they fear the effect the prior conviction will have on their sentence should they be

1. *Loper v. Beto*, 440 F.2d 934 (5th Cir. 1971).

2. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 43 (1954). "Infamous" crime convictions include those for treason or any other felony, or misdemeanors involving dishonesty or the obstruction of justice. This common law rule has been abolished by nearly all jurisdictions as it relates to preventing a witness from testifying, but prior criminal convictions may still be used to impeach a witness' credibility.

convicted again."³ This rationale was directly attacked on a very pragmatic basis in *Brown v. United States*:⁴

The reason for exposing the defendant's prior record is to attack his *character*, to call into question his reliability for truth-telling by showing his prior, relevant anti-social conduct. One need not look for prior conviction to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive is there than the avoidance of conviction?⁵

Under what circumstances a prosecutor may use the prior uncounseled convictions of a defendant-witness to impeach his testimony has been the subject of both dispute and confusion in recent years.

The American Jury,⁶ a book based on a University of Chicago Law School study, evidences the prejudicial effect the introduction of prior convictions has on the jury. One aspect of the study correlates the rate of conviction with the jury's knowledge of a defendant's prior conviction. The often-cited results of the study were as follows: in those cases where the jury knew the defendant had been previously convicted of a crime, the defendant was convicted 62 percent of the time, while in those cases where the defendant had no criminal record (or if he did, the jury was not aware of it) the rate of conviction dropped to 35 percent.⁷ Those who would allow the introduction of prior convictions for impeachment purposes, while admitting that certain injustices may occur by focusing the jury's attention on the defendant's prior convictions rather than on the case at hand, contend that the court's instructions direct the jury to consider the evidence only in terms of the defendant's credibility and to ignore the evidence when considering the defendant's guilt. In *Delli Paoli v. United States*,⁸ the Court stated:

It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions . . . the jury system makes little sense.⁹

Whether the jury system "makes little sense" or not, Mr. Justice Jackson has stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."¹⁰

3. *Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1966).

4. *Id.* at 242.

5. *Id.* at 244.

6. H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966).

7. *Id.* at 160.

8. 352 U.S. 232 (1957).

9. *Id.* at 242.

10. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (concurring opinion);

Thus recognizing the practical effect that one or more convictions will have as impeachment evidence in a subsequent criminal proceeding, representation by competent legal counsel at those earlier trials becomes all the more significant. In *Gideon v. Wainwright*,¹¹ the Supreme Court of the United States posited a simple constitutional rule: in the absence of a valid waiver, the right of an indigent defendant to have the assistance of counsel is a fundamental right essential to a fair trial, and a conviction without the assistance of counsel violates the sixth amendment as applied to the states by the fourteenth amendment. Mr. Justice Black said, "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."¹²

The constitutional rule announced in *Gideon* has been given retroactive application.¹³ This retroactivity was inevitable since the Supreme Court has said that the right to counsel goes to "the very integrity of the fact-finding process" in criminal trials, and that a conviction of a defendant who is denied the right of counsel at the trial lacks "reliability."¹⁴ In *Tehan v. United States ex rel. Shott*,¹⁵ the Supreme Court further elaborated on this theme when it said:

The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial . . . is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent.¹⁶

The essential question then raised was the significance of the *Gideon* principle with respect to other aspects of the criminal proceeding where an uncounseled prior conviction may have an impact.

accord, United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (limiting instruction is a judicial placebo).

11. 372 U.S. 335 (1963), *overruling* *Betts v. Brady*, 316 U.S. 455 (1942). In *Betts*, the petitioner was indicted for robbery in Maryland. Financially unable to afford his own counsel, petitioner requested that the court appoint counsel for him. The request was denied, after which the petitioner, defending himself, was convicted and sentenced to eight years in prison. *Betts* filed a petition for writ of habeas corpus alleging that he had been denied the right to assistance of counsel guaranteed by the fourteenth amendment of the Federal Constitution. In denying the habeas corpus relief, the court held: "It is not necessary that in every case, whatever the circumstances, one who is unable to obtain counsel must be furnished counsel by the State." *Betts v. Brady*, *supra*, at 462.

12. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

13. *Kitchens v. Smith*, 401 U.S. 847 (1971); *Burgett v. Texas*, 389 U.S. 109 (1967); *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963).

14. *Linkletter v. Walker*, 381 U.S. 618, 639 & n.20 (1965).

15. 382 U.S. 406 (1966).

16. *Id.* at 416.

In *Burgett v. Texas*,¹⁷ the prosecution offered evidence that the petitioner had been convicted of four prior felonies, once in Texas for burglary, and three times in Tennessee for forgery. It appeared that the petitioner had not been represented by counsel in at least one of the prior convictions. The petitioner was convicted and he appealed. In reversing the Texas judgment the Court stated:

To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.¹⁸

Thus, the Court expressed in broad terms the areas in which evidence of prior uncounseled convictions could not be introduced. The Court's concern with preventing judicial limitations from being put on the *Gideon* rule was evident, and yet, the Court did not speak directly to the issue of whether prior uncounseled convictions could be used to impeach a defendant-witness' testimony. The result was that in the few years following *Burgett*, the permissible use of convictions, invalid under the *Gideon* rule, to impeach a defendant-witness' credibility received divided support in both the federal system and in the state courts.

In *Gilday v. Scafati*,¹⁹ for example, the petitioner was convicted of armed robbery. During the trial, the prosecution introduced evidence of five prior felony convictions to impeach the defendant's testimony. At three of these trials the defendant did not have the assistance of counsel. In affirming the district court's decision to grant the defendant's petition for a writ of habeas corpus, the first circuit held:

[T]he *Burgett* rule against use of uncounseled convictions 'to prove guilt' was intended to prohibit their use 'to impeach credibility,' for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use 'to prove guilt or enhance punishment.'²⁰

Furthermore, *Gilday* went on to apply retroactively the constitutional safeguards established in *Burgett*,²¹ in accordance with the factors relevant

17. 389 U.S. 109 (1967).

18. *Id.* at 115 (emphasis added).

19. 428 F.2d 1027 (1st Cir.), cert. denied, 400 U.S. 926 (1970).

20. *Id.* at 1029 (emphasis added).

21. See also *Tucker v. United States*, 431 F.2d 1292 (9th Cir. 1970), *aff'd* 404 U.S. 443 (1972); *Oswald v. Crouse*, 420 F.2d 373 (10th Cir. 1969); *Losieau*

to the question of retroactivity as reiterated in *Desist v. United States*.²²

Nevertheless, the first circuit went on to conclude that the introduction of prior convictions, under the facts of the case, was "harmless error beyond a reasonable doubt"²³ under the doctrine established in *Chapman v. California*.²⁴ The "harmless error" conclusion, however, did not lessen the impact of its holding regarding the use of uncounseled prior convictions. The position of the first circuit was clear.

Upon substantially the same facts as in *Gilday*, the ninth circuit reached a similar result in *Tucker v. United States*.²⁵ Citing the *Gilday* decision, the court stated: "The *Burgett* rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness."²⁶ Also, as in *Gilday*, the court concluded that the reception of the

v. Sigler, 406 F.2d 795 (8th Cir.), *cert. denied*, 396 U.S. 988 (1969); Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968).

22. 394 U.S. 244, 249 (1969). Essentially, the Court in *Desist* enumerated three principles to be considered when retroactive application is at issue: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

See also Stovall v. Denno, 388 U.S. 293, 297 (1967); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1965).

The Court in *Gilday* then said: "Obviously the purpose of *Burgett* was to prevent the use of possibly unreliable convictions obtained at a trial whose fairness is constitutionally suspect. Secondly, while there had undoubtedly been reliance on a different rule, the importance of counsel at a criminal trial had been recognized in the 1930's and established in 1963 . . . [*see* *Gideon v. Wainwright*, 372 U.S. 335 (1963).]—a relevant factor in assessing retroactivity. . . . Thirdly, . . . the Court has observed that even a significant impact must be accepted 'when the issue of guilt or innocence may not have been reliably determined.'" 428 F.2d 1027, 1030 (1st Cir.), *cert. denied*, 400 U.S. 926 (1970).

23. *Gilday v. Scafati*, 428 F.2d 1027, 1032 (1st Cir. 1970). This conclusion was based on the fact that three witnesses positively identified *Gilday* as one of the robbers, and the petitioner's own testimony was damaging. Further, *Gilday's* testimony was also attacked by the proper admission of two more recent felony convictions. *See also* Howard v. Craven, 466 F.2d 586 (9th Cir. 1971).

24. 386 U.S. 18 (1967). In *Chapman*, the Court was urged by the petitioner to hold that all federal constitutional errors must always be deemed harmful . . . a holding which would require automatic reversal of convictions. Mr. Justice Black, speaking for the Court, said: "We decline to adopt any such rule. . . . [T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman v. California*, *supra* at 22. *See also* 28 U.S.C. § 2111 (1965).

25. 431 F.2d 1292 (9th Cir. 1970), *aff'd* 404 U.S. 443 (1972).

26. *Id.* at 1293.

prior convictions may, under certain circumstances, be "harmless error."²⁷

The important aspect of *Tucker* revolved around the fact that in addition to allowing the prior convictions to impeach Tucker's testimony, the trial judge, after the verdict, requested information from the Federal Bureau of Investigation concerning the uncounseled prior convictions *for use in determining the defendant's sentence*. In affirming the conviction, but remanding the case to the district court for resentencing without consideration of the uncounseled prior convictions, the court held that allowing the invalid convictions was *not* harmless error regarding the defendant's sentence. The court stated: "There is a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed."²⁸

On the other hand, in *United States ex rel. Walker v. Follette*,²⁹ the second circuit decided contrary to *Gilday* and *Tucker*. In this case, petitioner Walker was serving a sentence of 15 to 35 years for a 1963 conviction of the crimes of rape, attempted robbery, grand larceny, and possession and use of a dangerous weapon. Walker petitioned for a writ of habeas corpus alleging that he was denied a fair trial as guaranteed by the fourteenth amendment when he was cross-examined about two prior convictions in which he allegedly was without counsel.

At the 1963 trial, the defendant's credibility was of substantial importance and his testimony was at direct variance to that of the prosecution's chief witness. On direct examination, Walker stated that he had never been convicted of a crime. On cross-examination, the prosecution elicited from the petitioner that in fact he had previously been convicted of possession of an unlicensed firearm and of disorderly conduct. The second circuit allowing the admission of the evidence, based its decision, by analogy, on decisions which have allowed the use of illegally obtained evidence to contradict the defendant's testimony.³⁰

In *Harris v. New York*,³¹ for example, the prosecution was allowed to use statements made by the defendant without benefit of the *Miranda v. Arizona*³² warnings to impeach the defendant's credibility. The Court said:

The shield provided by *Miranda* cannot be perverted into a license to use perjury

27. *Id.*

28. *Id.* at 1294.

29. 443 F.2d 167 (2d Cir. 1971).

30. *Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954).

31. 401 U.S. 222 (1971).

32. 384 U.S. 436 (1966).

by way of a defense, free from the risk of confrontation with prior inconsistent utterances.³³

The Court in *Harris* relied primarily on *Walder v. United States*.³⁴ In *Walder*, the defendant was arrested for sale of narcotics. When defendant denied on direct examination that he had ever possessed narcotics, the prosecution was permitted (for purposes of impeachment only) to prove that defendant had previously possessed heroin. This heroin had been obtained by government agents by means of an illegal search. The Court stated:

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.³⁵

Viewing the *Harris* and *Walder* cases as favorable toward the disposition of its case, the *Follette* court concluded:

It can make no difference that the constitutional infirmity in *Harris* and in *Walder* was a violation of *Miranda* whereas here it was a violation of *Gideon*. The principle is the same in either event. If a defendant testifies, he puts his credibility in issue. If he lies in the course of his testimony, he lays himself open to attack by means of illegal evidence which otherwise the prosecution could not use against him.³⁶

Similar to the *Gilday* and *Tucker* courts, the majority of state courts have held invalid the use of uncounseled prior convictions for impeachment purposes. In *Spaulding v. State*,³⁷ the Supreme Court of Alaska held that the *Burgett* decision precludes the use of invalid convictions to impeach the defendant's testimony, stating:

While the states are free to provide such procedures as they choose in criminal cases, including rules of evidence, they may not adhere to any procedure which violates any of the guarantees of the United States Constitution.³⁸

In *Johnson v. State*,³⁹ and *In re Dabney*,⁴⁰ the Supreme Courts of both Maryland and California held in accordance with *Spaulding*. Unlike

33. *Harris v. New York*, 401 U.S. 222, 226 (1971).

34. 347 U.S. 62 (1954).

35. *Id.* at 65.

36. *United States ex rel. Walker v. Follette*, 443 F.2d 167, 170 (2d Cir. 1971).

37. 481 P.2d 389 (Alaska 1971).

38. *Id.* at 392.

39. 9 Md. App. 166, 263 A.2d 232 (1970).

40. 76 Cal. Rptr. 636, 452 P.2d 924 (1969). See also *People v. Coffey*, 60 Cal. Rptr. 457, 430 P.2d 15 (1967) (prior to *Burgett*); *People v. Shook*, 67 Ill. App. 2d 492, 214 N.E.2d 546, *rev'd on other grounds*, 35 Ill.2d 597, 221 N.E.2d 290 (1966) (prior to *Burgett*); *Subilosky v. Commonwealth*, 265 N.E.2d 80 (Mass. 1970).

Spaulding, however, the courts in *Johnson* and *In re Dabney* decided that, under the facts, the introduction of prior uncounseled convictions for impeachment purposes did not require automatic reversal under the "harmless error" doctrine.⁴¹

Contrary to *Spaulding*, *Johnson* and *In re Dabney*, the Texas Court of Criminal Appeals in *Simmons v. State*⁴² held valid the use of uncounseled prior convictions to impeach a defendant's testimony.⁴³ The holding in *Simmons* was seemingly limited to situations where the defendant, upon taking the stand, specifically denied any prior convictions. Nevertheless, the court stated that even if *Burgett* did apply in the case, under the facts, it was harmless error and the result would be the same.

The Supreme Court in *Loper* dealt only with the aspect of *Burgett* which barred the use of prior uncounseled convictions "to support guilt."⁴⁴ Specifically, *Loper* became the first Supreme Court case to decide the question of whether the *Burgett* decision included within its scope the prohibition of the use of prior uncounseled convictions to impeach the defendant-witness' testimony. While the language of the ninth circuit in *Tucker v. United States*⁴⁵ was broad,⁴⁶ the Supreme Court in affirming the decision⁴⁷ addressed itself only to that aspect of *Burgett* which precluded the admission of prior uncounseled convictions to "enhance punishment," saying:

Erosion of the *Gideon* principle can be prevented here only by affirming the judgment of the Court of Appeals remanding this case to the trial court for reconsideration of the respondent's sentence.⁴⁸

Soon thereafter, however, the Supreme Court granted certiorari to *Loper* on the "impeachment" issue.⁴⁹

In *Loper*, the Court noted that the case was not one where the prior conviction was used for the purpose of directly rebutting a false statement made from the witness stand⁵⁰ as was the case in *United States ex rel. Walker v. Follette*.⁵¹ The sole purpose for which the prior uncounseled

41. See *Chapman v. California*, 386 U.S. 18 (1967). In *Johnson*, the court remanded the case, and in *In re Dabney*, the court ordered a new trial.

42. 456 S.W.2d 66 (Tex. Crim. App. 1970).

43. *Id.* at 68.

44. *Loper v. Beto*, 405 U.S. 473, 482 (1972).

45. 431 F.2d 1292 (9th Cir. 1970).

46. See *supra* n.26 and accompanying text.

47. *United States v. Tucker*, 404 U.S. 443 (1972).

48. *Id.* at 449.

49. 404 U.S. 821 (1971).

50. 405 U.S. at 482 n.11.

51. 443 F.2d 167 (2d Cir. 1971). See also *Harris v. New York*, 401 U.S. 222

convictions were used was to destroy Loper's credibility at the trial and the Court proceeded on that basis. Concluding that the *Burgett* decision was sound, Mr. Justice Stewart, speaking for the Court, stated:

Unless *Burgett* is to be forsaken, the conclusion is inescapable that the use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law.⁵²

The Court went on to adopt expressly the reasoning of *Gilday v. Scafati*.⁵³

Mr. Chief Justice Burger, in dissent, said:

The rule implicit in the result reached by the Court today does violence both to common sense and to society's interest in the finality of judgments. Only if trial judges were soothsayers could they adhere to it. For under that rule, a prior conviction, admissible for impeachment purposes under state law and fully valid under the Constitution as explicitly interpreted by this Court at the time the conviction is sought to be introduced, becomes retroactively inadmissible if, years after the trial, a decision of this Court renders that prior conviction constitutionally infirm It is a distressing example of pressing the sound doctrine of retroactivity beyond the outer limits of its logic.⁵⁴

To this effect, Mr. Justice Stewart stated:

On the contrary, our decision in this case follows directly from the rationale under which *Gideon v. Wainwright* . . . was given retroactive application. . . . It would surely be unreasonable . . . to have expected the judge at Gideon's trial to have forseen our later decision in that case. But a necessary result of applying any decision retroactively is to invalidate rulings made by trial judges which were correct under the law prevailing at the time the judges made them.⁵⁵

Finally, consideration must be given to the "harmless error" doctrine of the *Chapman* decision. The Court in *Loper* noted that under the circumstances of the case, there was "little room for a finding of harm-

(1971) and *Walder v. United States*, 347 U.S. 62 (1954). Should such a distinction make any significant difference? Why should a defendant-witness be expected to disclose prior uncounseled convictions which have been held to "lack reliability," when any prior conviction will have at least some effect on the jury's determination of guilt or innocence? This is not to say that the defendant should falsify information concerning such prior convictions. Instead, it seems feasible that a pre-trial determination could be made as to which, if any prior convictions are valid under the *Gideon* principle. At the trial, then, the prosecution would be allowed to introduce only those prior convictions held to be valid, and the defendant-witness would not be put in a position of deciding whether or not to admit to the invalid convictions.

52. 405 U.S. at 483.

53. *Id.*

54. *Id.* at 494. (Mr. Chief Justice Burger was referring to the fact that at Loper's trial, under the doctrine of *Betts v. Brady*, 316 U.S. 455 (1942), indigents did not have a right to court-appointed counsel in state trial courts).

55. *Id.* at 483-84 (emphasis added).

less error.”⁵⁶ It may be inferred from the Court’s statement that the use of uncounseled prior convictions for impeachment purposes is not a per se violation calling for automatic reversal of a conviction; but, that such use is to be subjected to a further “harmless error” test.

Under *Chapman*, “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”⁵⁷ In *Burgett*, the Court stated: “The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is *inherently prejudicial*. . . .”⁵⁸ This language has *not* been previously construed so as to impose a per se violation requiring automatic reversal,⁵⁹ and the Court in *Loper* did not directly address itself to that issue.

To the extent, then, that the decision in *Loper* is subject to possible future circumvention by a finding of “harmless error,” the decision leaves open any inquiry into its prospective impact. Factors such as the number of valid prior convictions, the defendant’s own testimony, the testimony of other witnesses, and other evidence tending to show the lack of defendant’s credibility will be of probative value in determining whether the admission of invalid convictions is harmless.

Hopefully, if the “harmless error” test is to be the determinative focal point as to the validity of the use of uncounseled prior convictions, it will only be used in the *most* compelling and unavoidable situation.

To foster in the minds of jurors the notion that the defendant is falsifying information, using only the rationale that the defendant has previously committed a crime, is a harmful practice at best. Admittedly, the defendant’s credibility must be under the scrutiny of the jury simply because of the person’s status as the defendant. But a line of demarcation must be drawn between legitimately questioning the credibility of a witness because the person is the defendant, and questioning the credibility of a defendant because that person has previously been convicted of some offense—and using that as the basis for attack.

56. 405 U.S. at 483 n.12.

57. *Chapman v. California*, 386 U.S. 18, 24 (1967). *But see* *Harrington v. California*, 395 U.S. 250 (1969), where the *Chapman* standard seems to have been lessened to some degree. In *Harrington*, the Court allowed the use of “overwhelming” untainted evidence to support a conviction although the tainted evidence in question may have some influence on the conviction. *Harrington v. California*, *supra* at 254.

58. *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (emphasis added).

59. *Tucker v. United States*, 431 F.2d 1292, 1293 (9th Cir. 1970); *Gilday v. Scafati*, 428 F.2d 1027, 1030 (1st Cir. 1970); *In re Dabney*, 76 Cal. Rptr. 636, 639, 452 P.2d 924, 927 (1969); *Johnson v. State*, 9 Md. App. 166, 175, 263 A.2d 232, 241 (1970).

The social stigmatization of criminals is sufficiently overwhelming without the need to perpetuate it in the courts. To say that the use of prior uncounseled convictions for the purpose of impeaching the defendant's testimony is "harmless error" is, at least to some degree, to say that the evidence need not have been introduced in the first place. At least to the extent that the prior conviction is without the benefit of counsel, the determination of that fact could be resolved before the trial.

It goes without dispute that certain practices utilized in the past to effect a conviction would hardly prevail under present standards. The question then becomes whether a conviction obtained under one such practice (*i.e.*, where the defendant was not represented by counsel) should ever be considered "harmless error."

Richard Wimmer