Impeachment through Past Convictions: A Time for Reform

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Formerly an attorney could practice law for a lifetime without ever having to appear in criminal court. That day is now past. Due to recent Supreme Court decisions that require practically all defendants to be represented, an attorney is quite likely to find himself appointed to represent a criminal defendant, thus practically all lawyers will soon become familiar with the following dilemma.

A court appointed attorney finds himself representing a defendant charged with robbing a gas station. The attorney is convinced the man is innocent and that he will make a good witness. Unfortunately, however, the man has previously been convicted of robbing a gas station. Thus the dilemma is posed. Should the defendant take the stand? If he does, will not that past record come in to bedevil him? Is there not some way to have the defendant testify and at the same time to keep that record out? Why should the defendant and his attorney have to put up with this situation? After all, the defendant is not afraid of incriminating himself. Is there really anything that can be done about it?

As every evidence student knows, persons convicted of "infamous crimes" at one time were prohibited from testifying. Today the student rather smugly wonders just how our ancestors could have been

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1 "Infamous crimes" is as good a term as any to describe the type of conviction which disqualified a witness. Nobody was ever positive about what type of criminal conviction fell into this category. Greenleaf, Evidence § 373 (1842). Quoted in 2 Wigmore, Evidence § 520 (3d ed. 1940) [hereinafter cited as Wigmore.]
so naive. How silly to believe that a convicted felon was so tainted that it would be a waste of time for the jury to hear him, since the man would presumably lie.\(^2\) Of course in our "enlightened" world, we allow practically anyone to testify; we have come to agree with Bentham that the character of the witness goes to the weight of his testimony and not to his competency.\(^3\)

One hundred years from now, will our descendents look back at us and conclude that we were just as naive in allowing the past conviction of an infamous crime to affect the witness' credibility? Will the evidence teacher of the twenty-first century explain to his class that the twentieth century rules of impeachment achieved much the same result as the nineteenth century rules of competency? In both situations, persons convicted of infamous crimes rarely took the witness stand.

The statutes in most states which abolished this testimonial disqualification also provided that persons convicted of infamous crimes could be impeached by showing their past convictions.\(^4\) For almost a century this has presented several problems which have plagued witnesses, especially defendants in criminal cases who wished to testify. The purpose of this article is to re-examine the basis for allowing past convictions to be used for impeachment and to discuss attempts to reform the process.

\(^2\) This disqualification did not appear in English law until the sixteenth century and did not become solidified until the seventeenth century. There was no need for separate rules concerning the competency of witnesses until it was finally decided that juries should render verdicts only on testimony sworn in court and not based on their own prior knowledge. Indeed, until that time there was really no need for any detailed rules of evidence. See 9 Holdsworth, History of English Law 177-97 (1926).

\(^3\) "Take homicide in the way of duelling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear—and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it,—has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie,—and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion." 7 Bentham, Rationale of Judicial Evidence 406 (Bowring's ed. 1827). Quoted in 2 Wigmore § 519 at 610. There is occasional interest in reviving perjury convictions as testimonial disqualifications. Note, The Effect of Perjury on Credibility of Witnesses in New York, 31 Ford. L. Rev. 797 (1963).

\(^4\) Mccormick, Evidence § 43 (3d ed. 1954) [hereinafter cited as McCormick]. The ban was removed in England in civil cases in 1843. See An Act for Improving the Law of Evidence, 6 & 7 Vict., c. 85 (1843).
The theory behind introducing evidence of past convictions to show the witness' credibility was stated by Justice Holmes:

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

Granted that in an adversary system it is proper to attempt to show that the opponent's witnesses are unworthy of belief, the question still remains whether it is proper to use past convictions for that purpose, especially with regard to a defendant-witness in a criminal prosecution. It is generally recognized that the use of past convictions in a criminal trial raises three distinct problems. First is the relevancy problem, particularly regarding the undue prejudice which the prior conviction may raise with the jury. Second is the so-called "chilling" factor. How often do innocent defendants refuse to take the stand for the express purpose of not allowing the prosecutor to introduce their criminal records? Third might be called the "associational" affect. Often a defendant is in the position where his only witnesses are people with criminal records. The question then arises whether it is

5 Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884). See also State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956), "What a person is often determines whether he should be believed. . . . No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know."


7 This article does not deal with the use of other offenses as part of the prosecutor's case-in-chief. It deals only with the impeachment process. Hence when the text discusses using past convictions it does so in that context.

8 Note, Impeaching the Accused, supra note 6, at 924.

9 It is, of course, axiomatic that the prosecutor cannot attack the character of the defendant unless the defendant takes the stand. E. Cleary, Handbook of Illinois Evidence § 12.6, at 210 (1963) (hereinafter cited as Cleary).
possible that the jury will automatically discount defendant's witnesses by identifying the defendant with the witnesses' past criminal records.

THE RELEVANCY PROBLEM

In order for any evidence to be introduced there must be some logical connection between it and that which it is intended to prove. It does not matter whether several inferences are necessary to arrive at the desired end. It is highly questionable, whether the logical relationship exists between all past convictions of infamous crimes and what it is offered to prove; namely, that the defendant-witness is not a man who ought to be believed. The relationship between assault and battery and armed robbery to truth-telling seems to be tenuous at best. However, the logical (or illogical) connection seems to be too well established to be disturbed.

A logical connection is not the only element of relevancy. An item of evidence may tend to prove what it is offered to prove but may still be rejected. Its probative value may be exceedingly low, or it may be accompanied by other considerations which militate against receiving the evidence. It may tend to raise too many collateral issues and confuse the jury; it may be too time consuming, or it may be too prejudicial. It is the duty of the trial judge to weigh these counter-factors against the probative value of the evidence in deciding whether to admit or exclude.

The obvious counter-factor involved in using past convictions to impeach witnesses is prejudice. This prejudice operates in two ways. The first and obvious prejudicial aspect is the possibility that the jury will convict the defendant on the basis of his past record, rather than on the basis of evidence of guilt or innocence. The jury's reasoning is generally that the defendant is a bad man; whether he is guilty or innocent of the crime charged, he ought to be "put away." The American

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10 James, Relevancy, Probability and the Law, 29 CALIF. L. REV. 689, 690 (1941). "If the proposition . . . forms a further link in a chain of proof the final proposition of which is provable in the case at bar, then the offered item of evidence has probative value in the case."

11 This is the Illinois standard. ILL. REV. STAT. ch. 38 § 155-1 (1967).

12 On the other hand there does seem to be a logical connection between misdemeanors involving false-swatching and truth-telling, although misdemeanors are generally not admissible for impeachment purposes. McCORMICK § 42, at 87.

13 UNIFORM RULE OF EVIDENCE 45 (1945); MODEL CODE OF EVIDENCE, RULE 303 (1942).
Jury, a study of the jury system, seems to lend scientific support to what common sense tells us would happen. The study divided defendants into two classes. The charge and all evidence was kept constant. The only difference was that in one class, evidence of the defendant’s past conviction was used for impeachment. When these past convictions were used, the rate of conviction increased twenty-seven percent.

While admitting that this type of prejudice occurs, the practice is condoned on two grounds; first, that the jury is entitled to consider evidence relating to the credibility of the witness, and second, that the jury is instructed not to use the evidence in determining whether the defendant is guilty, but to use it only to determine his credibility. As to the first ground it is well settled that the jury is not entitled to hear all types of evidence concerning the defendant’s character. The validity of the second as a rationale depends on the validity of judge’s instructions in general. The debate about how effective these instructions are is too well known to repeat here.

15 Id. at 160. This has raised some comments concerning whether the defendant may be receiving a fair trial. See McCormick, Some Highlights of the Uniform Evidence Rules, 33 Texas L. Rev. 559 (1955). The constitutionality of the procedure is discussed in 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. CinC. L. Rev. 168 (1968). The author feels that the conclusions of Kalven & Zeisel demonstrate that the accused is denied a fair trial in violation of the sixth amendment’s right to an impartial jury. However, the United States’ Supreme Court has refused to recognize that this is so prejudicial as to violate the Constitution. In Spencer v. Texas, 385 U.S. 554, 562 (1967), the Court said that some prejudicial effect is acknowledged to “adhere in criminal practice.” It also indicated in dicta that when the defendant has testified and the state seeks to impeach his credibility, it is proper to use past convictions. Id. at 561. While the process of impeachment under discussion has many defects, it is doubtful if it is unconstitutional. It is probably merely an outmoded and archaic method of conducting a trial. The constitutionality of the procedure in Illinois was challenged and upheld in People v. Robbins, 88 Ill. App. 2d 447, 232 N.E.2d 302 (1967).

16 Most states, for example, do not allow the use of bad acts not the subject of a conviction. McCormick, § 42.
17 The limiting instructions have been widely criticized. They have been called “a mental gymnastic,” Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); “a judicial placebo,” United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956); “a ritualistic counsel of psychologically impossible behavior,” United States v. Jacangelo, 281 F.2d 574, 576 (3d Cir. 1960). Most often quoted is a concurring opinion by Mr. Justice Jackson to the effect that: “[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion). This view of judicial instructions recently received additional support from the Supreme Court in Bruton v. United States, 391 U.S. 123 (1968). “It is not unreasonable to conclude that
However, the almost complete lack of agreement on how well this particular instruction operates destroys the main argument for keeping the process in its present form. The prejudice can be overwhelming, especially when there is no limitation on the type of felony introduced or its remoteness to the trial.

The jury may also be prejudiced by the type of conviction that is introduced. A number of defendants have prior convictions for the same type of offense that is being charged at trial.\textsuperscript{18} Thus the jury is quite likely to infer that because the defendant has committed similar crimes in the past, it is probable that he committed the crime for which he is being tried. The prohibition of such evidence is one of the main pillars of the "Other Crimes" exclusionary rule.\textsuperscript{19} If the defendant is charged with armed robbery of a gas station, the prosecution would be prohibited from introducing defendant's three prior convictions for armed robbery of a gas station by the "Other Crimes" rule. Yet, if the defendant testifies, the same evidence could be introduced during cross-examination of the defendant or in rebuttal in order to show the defendant's poor credibility. That juries will be able to compartmentalize their minds and use the evidence only to determine credibility and not guilt or innocence, has been termed "impossible even for berobed judges."\textsuperscript{20}

\textsuperscript{18} It has been estimated that about one-third of those persons released from prison will commit some new offense within five years. Burglary, car thieves, forgers, and narcotics offenders are the most frequent recidivists. \textit{See The President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society} at 45 (1967).

\textsuperscript{19} People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); Comment, Other Crimes, \textit{supra} note 6.

\textsuperscript{20} United States v. Banmiller, 310 F.2d 720, 725 (3d Cir. 1962).
THE "CHILLING" EFFECT

The criminal defendant with a record of past convictions is placed in the position that he is "damned if he does and damned if he doesn't." If he takes the stand, the prosecutor will bring out his record, which will prejudice him in the eyes of the jury. If he does not take the stand and tries to hide his record, the jury will also draw an adverse inference. No amount of instructions regarding the defendant's privilege not to take the stand will erase this adverse effect. This is especially true when it is obvious that the defendant can add something to the testimony that no one else is able to.21

The American Jury22 illustrates this effect. The defendants in the study were divided into two classes; those with, and those without a record. Those without a record elected to testify 37 percent more than those with a record. The study shows a relationship between a prior record and the willingness of the defendant to testify.23

If the policy of the administration of criminal justice is to arrive at the truth consonant with full protection to the defendant, this policy is not being furthered by allowing the defendant to be impeached in this manner. It appears that the reason many defendants refuse to take the stand is not because they wish to avoid incriminating themselves, but because they wish to keep their record from the jury. If this is the case, it would seem logical that in order to present the trier of fact with the most complete evidence possible, it would be better to abolish or modify the impeachment process.24

THE "ASSOCIATIONAL" EFFECT

The type of prejudice under this heading does not directly affect the defendant, but its indirect effect could be quite prejudicial. The defendant's witnesses are subject, of course, to the same method of impeachment as the defendant.25 However, the criminal defendant is

22 Kalven & Zeisel, supra note 14, at 146.
23 Kalven & Zeisel, supra note 14, at 160-61.
24 Ladd, supra, note 6, at 187.
25 In some states, including Illinois, a witness may be impeached more easily than the defendant. E.g., People v. Halkens, 386 Ill. 167, 53 N.E.2d 923 (1944); State v. Saunders, 14 Ore. 300, 12 P. 441 (1886).
likely to have witnesses with criminal records. This is especially true today when it is the rule rather than the exception for a person in an urban ghetto to have a police record. Thus the defendant not only runs the risk of having his witnesses disbelieved because of their previous convictions but is quite likely to be associated in the minds of the jury with them, as another criminal. The defendant is likely to be condemned through guilt by association instead of on evidence of guilt or innocence. This seems confirmed by the fact that almost one-third of the appeals in Illinois alleging improper impeachment were cases where the person impeached was one of the defendant's witnesses and not the defendant.26

It would seem that with all the above factors militating against the admissibility of impeachment evidence of prior convictions, that some jurisdictions would have modified or abrogated the process. Yet despite urging to do so from the commentators,27 the Model Code of Evidence,28 and the Uniform Rules of Evidence,29 few jurisdictions have attempted to modify the process.30 It seems that the interest by part of the Bar to keep the rule as it is, and inertia of the rest, has prevented change.31

THE RULE IN ILLINOIS

Illinois, like all other states, has abandoned the old common law disqualification for witnesses who have been convicted of infamous crimes. There are separate statutes for criminal and civil cases. The criminal statute provides:

No person shall be disqualified as a witness in any criminal case by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of effecting his credibility.32

26 E.g., People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957); People v. Roche, 389 Ill. 361, 59 N.E.2d 866 (1945).
27 See note 6, supra.
28 MODEL CODE OF EVIDENCE, Rule 106 (1942).
29 UNIFORM RULE OF EVIDENCE 21 (1953).
30 Infra note 72.
31 For a study of how legal norms are developed and maintained through the forces of inertia see HURST, LAW AND SOCIAL PROCESS IN THE UNITED STATES 28-76 (1960).
The statutes form the basis for impeachment by prior conviction in Illinois. The statutes are both restraining and ineffective. The courts have read distinctions into the process where none are mentioned in the statutes. They have refused to allow certain other distinctions on the ground that they were not mentioned in the statutes.

WHAT CAN BE SHOWN

Only convictions for infamous crimes may be used. The reason is that under the common law only infamous crimes could disqualify a witness, and therefore, according to the courts it was these crimes that the legislature allowed to be used to affect credibility when it removed the ban. The infamous crimes are set out by statute:

Infamous crimes . . . are the offenses of arson, bigamy, bribery, burglary, deviate sexual assault, forgery, incest or aggravated incest, indecent liberties with a child, kidnapping or aggravated kidnapping, murder, perjury, rape, robbery, sale of narcotic drugs, subornation of perjury, and theft if the punishment imposed is imprisonment in the penitentiary.

Thus it is improper to use misdemeanor convictions. Arrests or indictments for infamous crimes are also inadmissible. There must have been a conviction. After some minor confusion it seems that a con-

33 People v. Kirkpatrick, 413 Ill. 595, 110 N.E.2d 519 (1953); Bartholomew v. People, 104 Ill. 601 (1882); McLain v. City of Chicago, 127 Ill. App. 489 (1906); People v. Maas, 154 Ill. App. 11 (1910).

34 ILL. REV. STAT. c. 38, § 124-1 (1967). Examples of crimes held to be infamous are larceny by a bailee, Freeman v. Chicago Transit Authority, 33 Ill. 2d 103, 210 N.E.2d 191 (1965); receiving stolen property, People v. Füsgibbons, 346 Ill. 338, 179 N.E. 106 (1931); and rape, Clifford v. Pioneer Fireproofing Co., 232 Ill. 150, 83 N.E. 448 (1907). Examples of crimes held to be not infamous are disorderly conduct, People v. Beard, 67 Ill. App. 2d 83, 214 N.E.2d 577 (1966); conspiracy to cheat and defraud, Lamkin v. Burnett, 7 Ill. App. 143 (1880); and making false and fraudulent schedule of taxable property, Matsenbaugh v. People, 194 Ill. 108, 62 N.E. 546 (1901). It should be noted that the last two convictions mentioned are much more closely related to truth-telling and veracity and yet they are excluded. The same cannot be said for rape and yet it is admitted. If the conviction is from another jurisdiction the court will admit it if it is similar to one of the infamous crimes mentioned in the statute. A conviction of breaking and entering in Iowa is similar to the Illinois crime of burglary, People v. Trent, 85 Ill. App. 2d 157, 228 N.E.2d 535 (1967); a conviction of grand larceny in Michigan is the same as a conviction for grand larceny in Illinois even though the punishment is lighter in Michigan, People v. Witherspoon, 27 Ill. 2d 483, 190 N.E.2d 281 (1963). However, a Federal conviction for violation of the Dyer Act is not comparable to any Illinois infamous crime and cannot be admitted. People v. Kirkpatrick, 413 Ill. 595, 110 N.E.2d 519 (1953).

35 People v. Green, 292 Ill. 351, 127 N.E. 50 (1920); People v. Gore, 64 Ill. App. 2d 309, 211 N.E.2d 757 (1965). Arrests and indictments can, of course, be admitted when the purpose of the impeachment is not to show bad character but to show that defendant
This approach is a considerable improvement over the practice prevailing in other states which permit convictions of all crimes to be introduced.

THE PROCESS OF PROOF

Here the most important distinction is between a witness in either a civil or criminal action and the defendant in a criminal action, a distinction not mentioned in the statutes. A witness may be impeached either through cross-examination concerning previous convictions of infamous crimes or through the introduction of the record of conviction. He may be cross-examined only about convictions and the cross examiner should not inquire into details of the arrest, indictment, trial or punishment.

Until recently the process was quite different when a criminal defendant was involved. For a time it was definite that a defendant in a criminal case could be impeached only by introducing the record of conviction. He could not be cross-examined with regard to those convictions on the ground that it was too highly prejudicial. However, through an ingenious twisting of phrases the Supreme Court reversed itself without acknowledging that it was doing so.

In People v. Baker, a Court's witness was asked by the state's at-
torney whether he had ever been convicted of the infamous crime of robbery. The Supreme Court correctly refused to consider such a question error, and said: "While defendant may be impeached on the ground of his prior conviction of other infamous crimes only by introduction of the records of such prior convictions, a witness, not the defendant may be cross-examined as to his prior convictions of other infamous crimes." 42

Then in People v. Neukom, 43 the court pulled out its semantic rabbit. The defendant was convicted of robbery and alleged that the court committed error in allowing the state's attorney to ask him on cross-examination whether he had been convicted of previous infamous crimes. After cross-examination, in rebuttal, the state introduced the records of defendant's past convictions. The Supreme Court surprisingly affirmed and cited Baker for the proposition that error is committed when the state cross-examines the defendant about the previous crimes and does not introduce the record. The court held that introducing the record after cross-examination cures the error. 44 This is quite different from the Baker dictum that the accused could only be impeached by the introduction of the record. 45 This has led to some confusion in the appellate districts. Some of the appellate courts have applied the Neukom decision and have attempted to determine how much cross-examination is possible, while other courts have acted as if the Neukom case did not exist.

The Second District in People v. Smith 46 has attempted to handle the problem. The trial court had permitted the state's attorney to cross-examine the witness about his past convictions. Then on rebuttal the prosecution produced the Clerk of the Circuit Court of Winnebago County who testified as to the records of defendant's past convictions. The court upheld this method of producing the record and then went on to discuss the cross-examination.

"We are not condoning the practice . . . of examining the defendant as to such convictions any more than we believe the Supreme Court . . . was indicating approval of such practice . . . . It is conceivable that the examination of the defendant as to his prior conviction, in extremely close cases or in those in which

42 Id. at 525-26, 134 N.E.2d at 788 (emphasis added).
44 Id. at 348, 158 N.E.2d at 57.
45 The Supreme Court followed Neukom in People v. Squires, 27 Ill. 2d 518, 190 N.E.2d 361 (1963).
the nature of the offense elicited is revolting or heinous, may result in more than merely discrediting his testimony, and that the examination in such cases may constitute prejudicial error and grounds for reversal. In such case the error could not be cured by subsequently proving the conviction in the proper manner.47

In People v. Rojas,48 the same district held that it is not in error to impeach the defendant by both cross-examination and by producing the record. But it noted that in order to encourage the defendant to take the stand and because of the possibility of the cross-examination creating prejudice, "the accepted procedure of introducing the record only should be followed."49

At the same time in the Fifth District in People v. Ring,50 the defendant had been asked on cross-examination, "Have you ever been convicted of a felony?" Although an objection to the question was sustained the court still reversed the conviction. The court first stated that the only proper way to impeach the defendant was by the record. Then it stated:

The question . . . could have been very influential on the jurors. Although the objection was sustained, the objection could only indicate to the jurors that the reason for the objection was that the answer would be in the affirmative. . . . We believe that the question asked was reversible error that might have affected the jury's decision.51

The court cited neither the Supreme Court case nor the Second District cases on the point.

The commentators which have written on the subject since the Neukom case still assert that the only proper method of impeaching the defendant through the use of past convictions, is by introducing the record.52 It seems that what has developed is not a change in the rule regulating the impeachment process but a change in what con-

47 Id. at 381-82, 211 N.E.2d at 461.
49 Id. at 175, 215 N.E.2d at 142.
51 Id. at 167, 232 N.E.2d at 26.
52 Cleary, § 9.5 at 139; Gard, Illinois Evidence Manual, rule 478 at 605 (1963). The Supreme Court in People v. McRimmon, 37 Ill. 2d 46, 224 N.E.2d 822 (1967), cert. denied 389 U.S. 863 (1967), noted that in Neukom and Squires it had not intended to approve a double method of impeachment. It disapproved attempts to impeach the defendant through both cross-examination and through the introduction of the record of conviction. Yet it still seemed to indicate that the error of cross-examining the witness about his past convictions could be corrected through the introduction of the record. Thus while disapproving the double method the court did not seem to be changing anything.
stitutes reversible error. The Supreme Court has decided that not every violation of the rule will require reversal. The Fifth District appears to have rejected this while the Second District has evolved a balancing test to determine what is reversible error. The balancing test used by the Second District is a start in the right direction. However, it seems the court is applying the test in the wrong place in the proceedings. It could best be used to determine whether prior convictions should be admissible at all, not as to when they would cause a reversal. Probably the question of whether cross examining a defendant on his past convictions is error or reversible error is a mere quibble; if the cross-examination will not result in a reversal, then perhaps it is not really error at all.

The conviction is usually proved by having the state introduce the record or a certified copy of it. The conviction must have been before a competent tribunal and proof of the conviction need not be beyond a reasonable doubt. The actual guilt or innocence of the defendant in the prior conviction is immaterial. Also immaterial is the fact that the defendant has been pardoned, or his sentence commuted or suspended. The conviction may be used even though it is now pending on appeal. In one case the conviction was later reversed. Only if

53 People v. Flynn, 8 Ill. 2d 116, 133 N.E.2d 257 (1956); People v. Dougherty, 266 Ill. 420, 107 N.E. 695 (1914). It is also proper to produce the circuit court clerk to testify as to the fact that the record exists, People v. Smith, 63 Ill. App. 2d 369, 211 N.E.2d 456 (1966). If the record is lost, a judge's affidavit will be sufficient, People v. Rowland, 36 Ill. 2d 311, 223 N.E.2d 113 (1967). It is possible that if the record does not show that the accused was represented by counsel that it cannot be introduced on constitutional grounds. Cf. Burgett v. Texas, 389 U.S. 109 (1967), where the Court said that a conviction that did not show on its face that the defendant was represented by counsel could not be used as the basis for a habitual offender conviction. The Court went on to say that such convictions could not be used against the defendant "for any purpose...." Id. at 115.

54 People v. Kosearas, 408 Ill. 179, 96 N.E.2d 539 (1951).
56 Gallagher v. People, 211 Ill. 158, 71 N.E. 842 (1904), error dismissed, 203 U.S. 600. The defendant may, however, say a few words in extenuation of the conviction, Freeman v. Chicago Transit Authority, 50 Ill. App. 2d 125, 200 N.E.2d 128 (1964).
57 People v. Andrae, 295 Ill. 445, 129 N.E. 178 (1920). However, the defendant may show his pardon to mitigate the effect of the prior conviction on the jury. O'Donnell v. People, 110 Ill. App. 250 (1903).
59 Id.; People v. Webb, 80 Ill. App. 2d 445, 225 N.E.2d 679 (1967); People v. Scott, 89 Ill. App. 2d 413, 232 N.E.2d 478 (1967); People v. Ledford, 94 Ill. App. 2d 74, 236 N.E.2d 19 (1968). This particular aspect of the process has been described as "illogical and unfair." Campbell v. United States, 176 F.2d 45, 47 (D.C. Cir. 1949), which held contra.
the prior conviction is held to be a complete nullity will it be kept out.\(^6\) In addition, the remoteness of the conviction from the trial will not affect its admissibility.\(^6\) Thus a twenty-six year old conviction of a crime against nature is admissible,\(^6\) as is a twenty year old burglary conviction.\(^6\)

Although the process in Illinois is somewhat more favorable to the defendant than in many states, it still presents considerable problems. The courts have not been entirely consistent, especially in their interpretation of the statutes. They have distinguished between defendants and witnesses although such a distinction is not mentioned in the statutes. They have refused to allow the remoteness of the conviction to affect its admissibility on the ground that remoteness is not mentioned in the statutes. Dissatisfaction with the present situation is clearly evidenced by the number of appeals on this question within the past eighteen months.\(^6\) The attitude of the Illinois courts seems to be quite similar to that expressed by the Seventh Circuit Court of Appeals:

No good purpose could be served in discussing the defendant's contention that the court erred in permitting the impeachment of defendant by showing he had been convicted of a felony eleven years previously. 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.\(^6\)

THE REMEDIES

THE UNIFORM RULES

The *Uniform Rules*\(^6\) approach is directed to remedy those aspects of the system that produce the most hardship. Rule 21 provides that


\(^6\) There have been over fifteen such appeals.

\(^6\) United States v. Plata, 361 F.2d 958, 962 (7th Cir. 1966), *cert. denied* 385 U.S. 841 (1966). It seems appropriate to quote Holmes at this point to the effect that, "Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers have always followed it." *Holmes, Law in Science and Science in Law*, in *Collected Legal Papers* 225 (Laski ed. 1921), quoted in *Hurst, Justice Holmes On Legal History* 106 (1964).

\(^6\) *Uniform Rule of Evidence* 21: "Evidence of the conviction of a witness for a
only those criminal convictions showing a lack of truth and veracity

be introduced. The Rule further states that a defendant-witness

cannot be impeached by proving past convictions unless the defendant

has offered evidence of his good character. The defendant is not deemed

to have offered such evidence merely by taking the stand.

It is questionable whether the limitation of the Uniform Rules to

convictions involving a lack of truth and veracity is very helpful. While

it is an improvement over a standard that would allow convictions of

"all crimes" or "infamous crimes" to be introduced, it still does not

solve the entire relevancy problem. The logical connection between

convictions involving a lack of truth and veracity and the willingness

of a defendant to lie is present; and, it is arguable the connection is

not present in a conviction involving, for example, assault and battery.

However, the probative value of such convictions is not much higher.

The jury hardly needs such evidence when it is obvious that any de-

fendant is vitally interested in the outcome of his own case. A past
criminal record involving crimes of deceit "does not tell any more

about the accused's willingness to lie when faced with punishment

than does a record containing other kinds of crimes." In addition to

not increasing the probative value of the evidence, the Uniform Rule
does nothing to ameliorate most of the prejudices. The jury is still as

likely to convict the defendant because he is a "bad man" as it would

before. The only improvement the Uniform Rule does make is that

of limiting the type of conviction that can be introduced. The Rule

also limits the number of convictions that can be used. Thus if the

defendant has been lucky enough never to have been convicted of

"lying" crimes, he will be much better off. The one escape for tradi-
tionalists under the Uniform Rule is just what the courts will determine

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." The section is patterned after Model Code of Evidence,

rule 106, which has been characterized as "the most valuable recommendation made in

the code. . . ." Goodhart, A Changing Approach to the Law of Evidence, 51 VA. L. REV.

759, 778 (1965).

68 See McCORMICK, § 43, at 90 for the variety of tests used in different jurisdictions.

69 As one commentator put it: "At best . . . [they] do no more than negative the

possible assumption of some jurors that the particular witness could not lie with a

straight face." Comment, Other Crimes, supra note 6, at 778.

70 Ladd, Techniques and Theory of Character Evidence, 24 IOWA L. REV. 498, 532-35

(1939).
to be crimes involving dishonesty or false swearing. It would decimate the rule if the courts held that all crimes involving a *mens rea* qualified.

The other aspect of the *Uniform Rule* reform would limit the use of past convictions to impeach the defendant to those cases where he has expressly put his character in issue. The distinction between a defendant and an ordinary witness is relatively innovative, although some states do recognize it in prescribing one method of impeachment for a defendant and one for an ordinary witness.71 Few, however, have applied the distinction in the way prescribed by the *Uniform Rules*.72

The reform is salutory and serves to correct one of the main problems in the use of prior convictions. Under this ruling a defendant could take the stand and the jury would be allowed to hear his story without the defendant worrying about the introduction of his past record. This would especially help the innocent defendant who is afraid to take the stand because of his past record.73 The reform, however, stands little chance of being adopted. Statutes stand in the way in most states and even a strained interpretation of them could hardly produce a situation comparable to the *Uniform Rule*.74 In addition, both California and New Jersey, which have adopted the *Uniform Rules*, have done so without *Uniform Rule 21*.75

THE LUCK APPROACH

The District of Columbia circuit has attempted to handle the process by an evaluation of the type of conviction used with regard to its probative value and its counter-factors. It has evolved a balancing test

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71 See the discussion of the procedure followed in Illinois, *supra* notes 37-39, text and notes.


73 H. Borchard, *Convicting the Innocent* 121, 163 (1932), gives examples of innocent defendants who refused to testify because of their past record. See also J. Frank, *Not Guilty*, 106-07 (1957).


75 *Uniform Rule of Evidence 21* was recommended by the Commissioners in both states and rejected by the legislatures. California Law Revision Comm’n., 7 Reports: Recommendations and Solutions, 14-44 (1965); 1963 Report of the N.J. Sup. Ct. Comm’n on Evidence 66-68.
that determines on the basis of the facts of each case whether certain
convictions should or should not be admitted.

The balancing process had its genesis in \textit{Luck v. United States}.\textsuperscript{76} Luck was convicted of housebreaking and larceny. He claimed he had
an alibi and so testified at trial. Over objection, the government was
allowed to cross-examine the defendant concerning a past conviction
for grand larceny. This ruling was assigned as error. The court re-
versed the conviction on other grounds, but felt compelled to discuss
the impeachment problem.

The District of Columbia has a statute,\textsuperscript{77} practically identical to the
Illinois statute, which abolished the common law testimonial disqual-
ification for convicted felons but provided that such conviction may be
shown to affect credibility. The court focused on the word "may" in
the statute and said that this left room for judicial discretion in deter-
mining whether past convictions should be admitted. The government
had contended that under the statute the court must admit such evi-
dence. The Court, however, recognized that there would be cases where
the admission of evidence would run counter to the philosophy of
criminal justice. "There may well be cases where the trial judge believes
the prejudicial effect of impeachment far outweighs probative relevance
of the prior conviction to the issue of credibility."\textsuperscript{78} In deciding whether
to admit the evidence, the court said that the trial judge should consider
"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 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 convic-
tion."\textsuperscript{79}

\textsuperscript{76} 348 F.2d 763 (D.C. Cir. 1965).
\textsuperscript{78} Supra note 76, at 768. The court is clearly adopting the rationale of \textit{Uniform Rule of Evidence} 45, which provides: "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." This reasoning
process applies to all evidence. Thus the trial judge should always balance the probative
value of the evidence against its counter-factors. This is so even if the evidence is tech-
nically admissible under some evidence ruling.

\textsuperscript{79} Id. at 769. While the approach in the opinion was dictum, the court in later cases
referred to \textit{Luck} as indicating what the rule in the District of Columbia was. \textit{Hood v.
United States}, 365 F.2d 949 (D.C. Cir. 1966). The court also felt that the \textit{Luck} approach
The Luck approach became firmly imbedded in the District of Columbia jurisprudence in the case of Brown v. United States. Here for the first time the court reversed a lower court judge on the ground that he had improperly exercised his discretion. The lower court had admitted a two-year old conviction for assault with a deadly weapon. The trial judge did not base his decision on the factors mentioned in Luck but rather on an "abstract belief that those with prior convictions are likely to commit perjury." The court reversed, saying:

As is obvious, should such an abstraction be permitted to prevail Luck would be rendered meaningless; if we accept the view that prior convictions provided such an impetus to commit perjury as to outweigh any prejudicial effect of impeachment, then we will have returned to the automatic impeachment rule Luck sought to change.

The court stressed the extreme prejudicial nature of the past conviction, noting that the conviction was of the same type of crime that the defendant was then being tried for. The court also felt it was important for the jury to hear the defendant's testimony.

Due to some confusion about what the standards set out in Luck and Brown meant, the court in Gordon v. United States elaborated those elements that the trial judge should consider in deciding whether to admit or exclude past convictions. The court approved the trial court's admission of three past convictions on the grounds that it had validly exercised its discretion and the appellate court would not, therefore, upset it. The court then articulated what the trial court should consider.

1. The type of crime. In considering what convictions can be used, the court said that those involving acts of violence had little or no relationship to veracity. On the other hand, perjury, fraud, and cheating do have such a relationship. "A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas

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removed any possible constitutional objections to this method of impeachment. Trimble v. United States, 369 F.2d 950 (D.C. Cir. 1966).

80 370 F.2d 242 (D.C. Cir. 1966).
81 Id. at 244.
82 Id.
84 383 F.2d 936 (D.C. Cir. 1967).
those of violence or assaultive crimes do not; traffic violations however serious, are in the same category.\textsuperscript{185}

2. \textit{Time of conviction}. The remoteness or nearness of the prior conviction to the trial affects both its probative value and its prejudicial effect.\textsuperscript{86}

3. \textit{Subsequent history of the defendant}. Has the accused led a legally blameless life since the past conviction?\textsuperscript{87} If the accused has not been convicted of any crimes since the past conviction then the previous conviction loses much of its probative value. This is especially true when the time interval has been several years. This is, of course, closely related to the second consideration.

4. \textit{The similarity between the past crime and the one for which defendant is on trial}. "As a general guide, those convictions for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit 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."\textsuperscript{88} The greater the degree of similarity between the past crime and the present crime the greater the prejudice that is involved. Thus, as the degree of similarity increases, the court should be more willing to exclude the prior conviction.

5. \textit{Importance of defendant's testimony}. How important is it for the jury to hear the defendant testify? It becomes especially acute in cases where the defendant is claiming alibi, or innocent possession of stolen goods.\textsuperscript{89}

6. \textit{The posture of the case}. How great is the need for character testimony? In a situation where the case turns on the credibility of two opposing witnesses, the need for impeachment testimony may well be higher.

The court also recommended a procedure for the trial court to determine those preliminary facts necessary for it to exercise its discretion. "The best way for the district judge to evaluate the situation is to have

\textsuperscript{85} Id. at 940.

\textsuperscript{86} Id. There are some jurisdictions where the remoteness of the conviction will affect its admissibility. E.g., Sibley v. Jeffers, 76 Ariz. 340, 264 P.2d 831 (1953); Chandler v. State, 155 Tex. Crim. 41, 229 S.W.2d 71 (1950).

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} Id. at 941.
the accused take the stand in a non-jury hearing and elicit his testimony and allow cross-examination before resolving the Luck issue.\(^9\) The burden of presenting the court with enough evidence for the trial judge to exercise his discretion is the defendant's.\(^9\) Absent a clear invoking of the judge's discretion, there can be no error.\(^9\) Once the court thus exercises its discretion, the appellate court will not reverse except for abuse.\(^9\)

The Luck approach has passed almost unnoticed. While there have been a number of cases in the District of Columbia refining the doctrine, there are still a number of District of Columbia judges who are unfamiliar with the decision.\(^9\) The doctrine has not been debated in many other jurisdictions, and where it has, it has not made much headway. The ruling has been rejected explicitly in New Jersey,\(^9\) a state with a statute almost identical to that of the District of Columbia, and in California.\(^9\) It appears at first glance that it has also been rejected in New Hampshire in State v. Cote.\(^9\) Although that court affirmed its earlier opinion in State v. Duke,\(^9\) that all convictions of crimes are admissible to impeach a testifying defendant, it did say that cross-examination of the defendant should be controlled by the trial judge. It cited Luck to the effect that prior convictions are admitted only when their probative value outweighs the prejudice involved in introducing such convictions. The implication is that if the trial judge thought the balance lay in the opposite direction, he might exclude or restrict cross-examination. The Luck approach has also been ap-

\(^{90}\) *Id.*

\(^{91}\) *Id.* This is exactly opposite from the reform proposed in New Jersey. 1963 REPORT OF THE N.J. SUP. CT. COMM’N ON EVIDENCE 66. As noted previously the reform was not adopted.


\(^{93}\) Brooke v. United States, 385 F.2d 279 (D.C. Cir. 1967); Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967).

\(^{94}\) *E.g.,* Barber v. United States, 392 F.2d 517, 518 (D.C. Cir. 1968), "The trial court seemed somewhat unfamiliar with the Luck line of decisions. . . ."

\(^{95}\) State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1967).


\(^{97}\) 235 A.2d 111 (N.H. 1967).

\(^{98}\) 100 N.H. 292, 123 A.2d 745 (1956).
proved in *dicta* by the Fourth Circuit,\(^9\) and by one of the judges of the Supreme Court of Idaho.\(^{100}\)

The *Luck* approach has many desirable attributes. It meets rather effectively the problem of undue prejudice toward the defendant. The trial court can effectively limit the use of past convictions so as to prevent the jury from being overwhelmed by the defendant’s record. Also the trial judge is able to exclude such evidence entirely if he feels that the jury will be benefited more by hearing the defendant’s testimony than by hearing defendant’s record. However, in solving one problem, the District of Columbia circuit has, in effect, created another. The procedure for determining the admissibility of the past convictions is for the trial judge to hold a hearing out of the presence of the jury. While this is an effective method of determining whether the convictions would be too prejudicial to admit, it does take a great deal of time. In one case it was noted that this hearing took a day and a half to complete.\(^{101}\) With the backlog of jury trials reaching incredible proportions, even in criminal cases, this additional delay would hardly seem justified. The Court recognized the problem in *Gordon*. “Surely it would be much simpler if prior convictions of an accused were totally admissible or totally excludable as impeachment.”\(^{102}\) However, faced with the statute that allows past convictions to be used, the court felt that it had no choice in adding to the burden of trial judges. The administration of criminal justice is better served by having a longer delay than by indiscriminate use of past convictions.

The *Luck* approach has also been criticized on the grounds that it will provide irreconcilable results at the trial level and that it will deluge the appellate courts with appeals.\(^{103}\) This seems to be a specious argument. Historically, many evidentiary decisions have been left to the trial judge’s discretion and the trend of reform in evidence is to leave

\(^{9}\) United States v. Hildreth, 387 F.2d 328 (4th Cir. 1967) cites both *Brown* and *Luck* with approval.

\(^{100}\) State v. Dunn, 91 Idaho 870, 879, 434 P.2d 88, 96 (1967) (concurring opinion of Spear, J., suggesting that when the proper case presents itself the court should consider construing the Idaho statute as the District of Columbia has construed its statute).

\(^{101}\) Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967).

\(^{102}\) Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967).

even more decisions to his discretion. Although in some areas, such as the trial judge's control over the scope of cross-examination, the number of appeals have increased, the number of appeals arising from this impeachment process is already large. It seems doubtful that adopting the Luck approach will increase such appeals. Indeed the appeals in the District of Columbia seem to have tapered off with that court's announcement that once the trial judge's discretion has been meaningfully exercised, it will be extremely hesitant in reversing that discretion. It is possible that the Luck approach will not lend itself to uniform application, but even so, it is preferable to have such a flexible approach rather than a set rule which cannot help but be arbitrary in some cases. Indeed it appears as though the whole trend of recent developments in criminal procedure has been towards individualizing the administration of criminal justice.¹⁰⁴

ABOLITION

Perhaps the most effective answer to the problem would be to completely abolish this method of impeachment. The method has many faults, and few have had a good word to say in its behalf. It does not accomplish its avowed purpose (i.e., to test the credibility of the witness); and its side effects of prejudicially arousing the jury and keeping the defendant off the stand should alone be enough to condemn it. In addition, it is at odds with other aspects of evidence law.¹⁰⁵ Impeaching the defendant through his past convictions is impeachment through a single act. The jury is asked to base a determination of the defendant-witness' credibility on one incident, rather than on a series of incidents. Thus, while it would be useful for the jury to know how many times and under what circumstances the defendant has lied in the past, this is clearly forbidden. Past bad acts not the subject of a conviction are usually not admissible as impeachment, no matter how logically relevant they are.¹⁰⁶ The defendant in bolstering his good character is not entitled to show specific instances of good deeds or occasions when he was particularly truthful. He is limited generally to evidence of his reputation for truthfulness and veracity.¹⁰⁷

¹⁰⁵ For a good discussion of this problem see, Ladd, supra note 6, at 177-78.
¹⁰⁶ MCCORMICK, § 42, at 87; CLEARY, § 9.5, at 136.
¹⁰⁷ MCCORMICK, § 44, at 94.
With all these arguments against retaining this process of impeachment, why is it still in use? The most compelling reason for its continuance is that in most states to abolish the process would require the legislature to act. As mentioned, the basis of the process is in those statutes which while removing the testimonial disqualification from convicted felons, also permit the conviction to be shown to affect credibility. There seems to be little chance that these statutes will be repealed. It is always more difficult to repeal a law than to enact one. This is specifically true when there is no interested group that has a stake in repeal. Those persons who engage in criminal defense are generally unorganized and are not generally prominent in organized Bar Association activities. On the other hand, those attorneys who engage in criminal prosecution are organized, are influential, and usually work toward keeping this method of impeachment intact.\textsuperscript{108} The rest of the Bar, especially those not engaged in extensive trial work, are apathetic. Thus the rule continues from mere inertia.

CONCLUSION

The ameliorative device of limiting instructions has failed to solve the problem of this type of impeachment. Reform through the codification of the Uniform Rules does not seem to be a realistic possibility. In over fifteen years of its existence, very few jurisdictions have adopted the Uniform Rules, and two of them have struck out the provisions relating to this method of impeachment. Abolition also seems unlikely due to legislative inertia. The Luck approach, for all its problems of delay, seems to be the most effective means of reform.

The Luck approach, or a variant, should be adopted in Illinois. The supreme court could do so without any subversion of legislative intent. It seems relatively clear that those statutes which permit a witness to be impeached by showing his past convictions do not intend to regulate the mechanics of the process. The intent is merely to remove the testi-

\textsuperscript{108} It has been asserted that many prosecutors actually use past convictions in the hope that jurors will consider it as evidence of guilt and not as merely affecting defendant's credibility. They depend on the jury not being able to follow the judge's instructions. Hoffman & Bradley, \textit{Jurors on Trial}, 17 Mo. L. Rev. 235, 245 (1952). In California the Attorney General and other law enforcement agencies played a large part in deleting Uniform Rule 21 from their recent evidence revision. McDonough, \textit{The California Evidence Code: A Précis} 89, 105 (1967).
monial disability of convicted felons. The courts seem to have recognized this without actually articulating it. The distinction between witnesses and defendants is not mentioned in the statute.

Certain aspects of the Illinois process should definitely be retained. Proof by record rather than by cross-examination when a defendant is the witness should be continued. The court might also give consideration to shifting the burden to the party who intends the impairment. Thus, unless the party who wishes to introduce the past convictions convinces the trial court that they should be admitted, such convictions would be inadmissible.

The situation should be considered by the supreme court at its earliest opportunity. Most of the reform in criminal procedure has been at the constitutional level. However, merely because certain aspects of the criminal trial are constitutional does not mean that they are wise or just. A certain rule of criminal evidence may be constitutional and at the same time be unduly prejudicial. The rule allowing a defendant to be impeached by the use of his past criminal record falls into this category. It does seem clear that reform is needed. In the words of an Illinois jurist:

The rule, which has no historical sanctity serves no useful purpose and is discriminatory and unfair and should be abolished. Its retention in this day of supposedly enlightened jurisprudence is disgraceful.

See McLain v. City of Chicago, 127 Ill. App. 489, 491 (1906). “The purpose of the statute in relation to evidence . . . is only to remove the common law disability and allow witnesses to testify who were thereby excluded. It neither directly nor by implication enlarges or diminishes the class of cases wherein convictions discredit the witness.”