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Impeachment by Past Conviction: What Hath Montgomery Wrought?

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The use of prior convictions in the impeachment process has been one of the most difficult and intractible problems of the law of evidence.\footnote{The area has generated a large volume of literature. See, e.g., Ladd, Credibility Tests — Current Trends, 89 U.PA.L. Rev. 166 (1940); Griswold, The Long View, 51 A.B.A.J. 1017 (1965); Spector, Impeachment Through Past Conviction: A Time For Reform, 18 DePaul L. Rev. 1 (1968); Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763 (1961); Note, Impeachment Under Rule 609(a): Suggestions for Confining and Guiding Trial Court Discretion, 71 Nw. U.L. Rev. 655 (1976).} The problem arose as a by-product of the traditional competency statutes enacted at the end of the nineteenth century.\footnote{1871-72 II. Laws 405.} Prior to that time any person convicted of a felony was considered incompetent to testify.\footnote{This disqualification was unnecessary until the seventeenth century. It was not until then that English law decided that juries should base verdicts only on in court testimony as opposed to their own prior knowledge. See 9 W. Holdsworth, A History of English Law 177-97 (1926).} By 1900 all states had enacted statutes making convicted felons competent to testify, but qualified the change by providing that those factors which formerly proved incompetency could be used to affect credibility. Those convictions which, in the past, had kept the witness off the stand were now admissible to show the witness should not be believed.

Three-quarters of a century’s experience with the use of past convictions for impeachment convinced most commentators that the process involved great risks.\footnote{See the discussion in Spector, supra note 1, at 3-8.} The first of these risks is prejudice. Assume a testifying criminal defendant is impeached with a past conviction. There is a risk that the jury will misuse the prior conviction, deciding that the defendant is a bad person who deserves conviction on that basis regardless of the evidence of guilt or innocence.\footnote{The strongest data to support this is still the classic study of the jury system of Kalven and Zeisel. Where the level of evidence is otherwise constant, they report an increase in the conviction rate of 27% when prior convictions are used for impeachment. H. Kalven & H. Zeisel, The American Jury 160 (1966).} This problem becomes acute when the defendant-witness is impeached by a conviction for the same crime for which he is being tried. The defendant then runs the risk that the jury will reason that
if he did it before, he did it again. The second problem is the “chilling-effect.” Since most defendants and their attorneys are extremely skeptical of the jury’s ability to relate the prior conviction only to credibility, they often refuse to testify.\(^6\) As a result, the fact-finder often loses crucial information necessary to a verdict. The third problem is the “associational effect.” This occurs when the defendant’s witnesses have criminal records. The jury may associate the defendant with his witness under a “birds of a feather” theory.\(^7\)

Traditionally evidence law has taken scant account of these problems. First, the law has presumed that prior convictions are relevant to credibility. Holmes expressed the traditional justification:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.\(^8\)

Secondly, evidence law has assumed that if any of the problems discussed above do appear, they can be dissipated by instructing the jury to use the prior conviction only for credibility. Presumably, the jury will follow the judge’s instruction and will not use the prior conviction substantively.\(^8\)

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\(^6\) Ninety-one percent of defendants without a record elect to testify, while 74% of defendants with a record elect to testify. *Id.* at 146.

\(^7\) J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE, § 609-02 at 59 (1977) [hereinafter cited as WEINSTEIN]; see People v. DeHoyos, 64 Ill. 2d 128, 355 N.E.2d 19 (1976).

\(^8\) Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

\(^9\) The debate over the use of limiting instructions is well known. While it is clear that the trial process could not effectively function without the doctrine of multiple admissibility and the limiting instruction, there are some areas where the risk of jury misunderstanding is too great. This idea was best expressed in Bruton v. United States:

> It is not unreasonable to conclude that in many . . . cases the jury can and will follow the trial judge’s instructions to disregard . . . information. Nevertheless, . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

391 U.S. 123, 135 (1968). According to one survey, 98% of the attorneys and 43% of the judges felt that jurors were unable to follow an instruction to use prior convictions for only credibility. Note, *To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968). It has been suggested that prosecutors use past convictions in the hope that jurors will misuse the evidence. Hoffman and Brodley, *Jurors on Trial*, 17 Mo. L. REV. 235, 245 (1952). Certainly, law enforcement
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Until 1971 Illinois followed the common law and admitted most convictions for impeachment purposes. The only limitation placed on admissibility was that the prior conviction had to be for an infamous crime, thus paralleling the common law incompetency rule. Illinois courts were fairly strict in adhering to this limitation, and all attempts to limit the type of past convictions which could be used were rebuffed. Normally appellate courts would hold that the competency statute mandated admissibility and that the trial court had no discretion to exclude any conviction of an infamous crime. Thus neither the age of a conviction, its pendency on appeal, a later pardon, or the actual guilt or innocence of the defendant in the prior proceeding, had an effect on admissibility.

In 1971, the Illinois Supreme Court in People v. Montgomery significantly changed the process by requiring a pre-admission finding that the probative value of a prior conviction is not significantly outweighed by its prejudicial effect. The defendant was convicted of unlawful sale of a narcotic drug in a trial where his twenty-one year-old robbery conviction had been admitted to impeach him. The supreme court overturned both the conviction and the longstanding interpretation of the Illinois competency statutes by reinterpreting the phrase "may be shown to affect credibility" to confer

attorneys have played a large part in preventing a reformation of the process. McDonough, The California Evidence Code: A Precis, 18 Hastings L.J. 89, 105 (1967).
12. Examples of non-infamous crimes were disorderly conduct, People v. Beard, 67 Ill. App. 2d 83, 88, 214 N.E.2d 577, 579 (1st Dist. 1966), and conspiracy to defraud, Lamkin v. Burnett, 7 Ill. App. 143 (3d Dist. 1880). If the conviction was from another jurisdiction, it would be admitted if it was similar to a crime listed in the statute. People v. Witherspoon, 27 Ill. 2d 483, 190 N.E.2d 281 (1963).
13. People v. Buford, 396 Ill. 158, 71 N.E.2d 340 (1947). This former lack of discretion has since been reaffirmed as to all cases tried before People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971). In People v. Ray, 54 Ill. 2d 377, 297 N.E.2d 168 (1973), the supreme court reversed an appellate court decision which had held that a trial court had discretion to exclude a 27-year-old armed robbery conviction. People v. Ray, 3 Ill. App. 3d 517, 278 N.E.2d 170 (3d Dist. 1972). The supreme court noted that prior to 1971, the trial court had to admit all evidence of prior infamous conviction whenever offered by the prosecutor.
17. Gallagher v. People, 211 Ill. 158, 71 N.E. 842 (1904). Only if the conviction were a complete nullity would it be excluded. People v. Shook, 35 Ill. 2d 597, 221 N.E.2d 290 (1966).
discretion on the trial judge to decide which convictions should be admitted. In order to guide the trial court in the exercise of its discretion, Proposed Federal Rule of Evidence 609 was adopted.\footnote{19} This Rule is basically a codification of the "Luck" doctrine as developed by the District of Columbia Court of Appeals.

In \textit{Luck v. United States},\footnote{20} a District of Columbia statute, identical to Illinois', was interpreted to allow the trial judge discretion in admitting past convictions for impeachment. The doctrine was refined in \textit{Gordon v. United States},\footnote{21} which listed factors to be considered by the trial judge in determining whether the probative value of the conviction is substantially outweighed by its prejudice. The factors are:\footnote{22}

1. \textit{The type of crime}. Generally those crimes involving dishonest conduct have probative value on the witness' credibility.

2. \textit{Time of conviction}. The more remote a conviction, the less probative value it has.

3. \textit{Subsequent history of the defendant}. If the defendant-witness has a clean record since the conviction, the conviction has less probative value.

4. \textit{Similarity of past conviction}. The greater the similarity between the past crime and the present charge, the greater the prejudice. As a general rule, such convictions should rarely be admitted.

5. \textit{Importance of the defendant's testimony}. In cases where the defendant has information unavailable through other witnesses, he

\footnote{19} The sections of proposed Federal Rule of Evidence 609 applicable to this article are:

Rule 609: Impeachment by Evidence of Conviction of a Crime (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of \textit{nolo contendere}, is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under which he was convicted, or (2) involved dishonesty or false statement regardless of punishment unless (3) in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. (b) Time Limit. Evidence. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or the release of the witness from prison, whichever is the later date.


\footnote{20} 348 F.2d 763 (D.C. Cir. 1965).

\footnote{21} 383 F.2d 936 (D.C. Cir. 1967).

\footnote{22} \textit{Id.}, at 940-41.
should be encouraged to take the stand. This may mean that the judge should exercise his discretion to exclude prior convictions.

6. Posture of the case. If the case turns on the credibility of opposing witnesses, prior convictions may be needed to assess the worth of each witness.

_Montgomery_ quoted extensively from the Comments to the Proposed Federal Rule, which in turn quoted extensively from the _Gordon_ opinion. It is reasonable to assume that Illinois adopted the _Luck-Gordon_ doctrine through its adoption of the Proposed Federal Rule. In _Montgomery_ the conviction was reversed because the defendant-witness’ past conviction was outside the ten year rule of subsection (b).

The issues raised in _Montgomery_ have been extensively litigated in the ensuing eight years. The remainder of this article examines the performance of Illinois courts in handling this problem.

**Applicability of Montgomery**

The _Montgomery_ doctrine is applicable when there is an attempt to impeach a witness by using a prior conviction to show that the witness is a bad person and therefore should not be believed. It is not applicable if the conviction is offered for another purpose. For example, if the defendant testifies that he has no prior convictions, any past conviction may be offered to show the defendant is biased. However, if the prior incident did not result in a conviction it is inadmissible regardless of the probative value of the underlying incident.

_Montgomery_ itself involved a testifying defendant, and initially there was some confusion as to whether the doctrine was applicable to other witnesses. Gradually _Montgomery_ was extended to the impeachment of a defendant’s witness, and a prosecution witness. In one rather unusual case the supreme court applied the doctrine to the prosecution’s attempt to reveal the prior convictions of its own witness. The prosecution’s witness had a long prior association with the defendant, and the court was concerned that the defendant

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24. There have been well over 80 cases interpreting and applying the _Montgomery_ standards.
might be tarred with the witness' prior convictions because of their past association.\textsuperscript{30} Montgomery is now also applicable in civil cases.\textsuperscript{31}

\textit{Time Limitations}

Montgomery placed certain convictions beyond the limit of the trial court's discretion. The doctrine excludes all convictions more than ten years old, measured from the date of conviction or the date of release from prison, whichever is later.\textsuperscript{32} Illinois courts have strictly adhered to this time limit, finding it crucial to prevent abuse of the limitation by trial courts.\textsuperscript{33}

There has been some litigation concerning the measurement of the ten year period. The applicable period is from conviction or release date to the moment when the conviction is offered into evidence. The fact that the crime for which the defendant-witness is being tried occurred within the ten year period is irrelevant.\textsuperscript{34} Occasionally a question arises as to the effect of probation or parole. In a 1971 case, a defendant-witness had a prior burglary conviction from 1958. Although initially granted probation, he was sentenced to the penitentiary when he violated his probation. He was released from prison in 1962. The court held his conviction admissible, relating the sentence for probation violation back to the original burglary conviction and reasoning that the defendant was released from

\textsuperscript{30} People v. DeHoyos, 64 Ill. 2d 128, 355 N.E.2d 19 (1976).


\textsuperscript{32} The use by the proposed Federal Rules of Evidence of the release date is puzzling. The feature continues in the current Federal Rules. No attempt has ever been made to justify it. Given the differences in parole practices and sentencing standards, the use of a prison release date as a terminus point makes little sense.

\textsuperscript{33} "We consider it clearly important that the use of convictions for impeachment purposes should be governed . . . by the 10-year limit established in Rule 609(b)." People v. Ray, 54 Ill. 2d 377, 383, 297 N.E.2d 168, 171 (1973). \textit{See also} People v. Cox, 8 Ill. App. 3d 1033, 293 N.E.2d 727 (4th Dist. 1972), where the court reversed when the prior convictions were more than 10 years old and there was no evidence that the defendant was released within the 10 year period. A court will not even presume that the witness served the minimum sentence on his prior conviction, if the date of the conviction is more than 10 years old. In one case the use of a 10 year, 11 month old conviction was held reversible error because the proponent of the conviction could not show that any time had been served. People v. Yost, ___ Ill. App. 3d ___, 382 N.E.2d 140 (3d Dist. 1978). \textit{See also} McIntyre v. Wood River Towing Co., 37 Ill. App. 3d 488, 346 N.E.2d 420 (5th Dist. 1976).

\textsuperscript{34} People v. Owens, 46 Ill. App. 3d 978, 361 N.E.2d 644 (1st Dist. 1977).
prison during the ten year period.\textsuperscript{35}

Beyond the ten year limitation, the date of the conviction is a factor which the trial judge should consider in determining whether the conviction has sufficient probative value to be admitted.\textsuperscript{36} Appellate courts have not generally considered this factor to be very important when reviewing an exercise of discretion by a trial court judge. Eight and nine-year-old convictions have frequently been admitted.\textsuperscript{37} So long as the conviction or release falls within the ten year period, an appellate court will not disturb the trial court’s ruling on the factor.\textsuperscript{38}

\textit{Nature of Conviction}

One of the factors that \textit{Montgomery}, by adopting Proposed Federal Rule of Evidence 609, directs the trial judge to consider is the nature of the past conviction. Within Rule 609 there are two classes of crimes that may be considered for admission: all crimes punishable in excess of one year in the penitentiary and all crimes involving dishonesty or false statement. However, no prior conviction is admissible if its probative value for credibility is substantially outweighed by its prejudice. According to \textit{Gordon v. United States},\textsuperscript{39} probative value must be measured by the relationship between the prior crime and testimonial veracity. Thus crimes involving violence have little value in measuring truthfulness, while crimes involving dishonest conduct have a close relationship to credibility.\textsuperscript{40}

\textsuperscript{35} \textit{People v. Overturf}, 12 Ill. App. 3d 441, 299 N.E.2d 34 (4th Dist. 1973). \textit{See also People v. Owens}, 58 Ill. App. 3d 37, 373 N.E.2d 848 (4th Dist. 1978). The defendant-witness had a 1962 conviction for burglary for which he received a sentence of a year's probation. He violated probation and was sentenced to a term of one to ten years. He was paroled twice and each time violated parole and was recommitted. He was released in 1968. The court reasoned that this was well within the ten year period at his 1976 trial. The defendant's argument that his resentencing was for a violation of probation and not for the original offense was rejected by the court.


\textsuperscript{38} \textit{E.g.}, \textit{People v. Ganter}, 56 Ill. App. 3d 316, 371 N.E.2d 1072 (1977). "Defendant also claims that since 5 years had passed between the prior conviction and the defendant's second trial, the trial judge should have ruled against use of the prior conviction. The 5-year interval satisfies the guidelines set forth in \textit{People v. Montgomery}. . . ." \textit{Id.} at 327, 371 N.E.2d at 1080.


\textsuperscript{40} \textit{Gordon v. United States}, 383 F.2d 936, 940 (D.C.Cir. 1967).
less of whether the conviction is for a crime punishable by more than one year in the penitentiary or involved dishonesty, the judge must still determine if it is the type of crime which has any probative value on the question of whether the witness is lying. Illinois courts have had great difficulty in determining this question. The cases indicate that reviewing courts have not only failed to supervise the type of crime admitted by the trial courts, but have encouraged wide admission of prior convictions to the point where the Montgomery guidelines have become practically meaningless.

The first problem faced by the appellate courts was whether the "infamous crime" standard of the common law was still applicable after Montgomery. While most courts concluded that it was not necessary for the prior conviction to be of an infamous crime, the issue was not resolved until 1977. In Knowles v. Panopoulos, the supreme court affirmed an appellate court opinion which had refused to allow a conviction for criminal trespass to an automobile to impeach a witness on the ground that Montgomery did not apply to a civil case. Therefore, the appellate court reasoned that the infamous crime standard controlled, excluding the misdemeanor conviction. Although it reached the same result, the supreme court disapproved of the appellate court's reasoning. The Montgomery rationale was applicable to all judicial proceedings and therefore the "infamous crime" standard was inapplicable. The conviction was excluded by the application of proposed Rule 609.

The major difficulty faced by Illinois courts is the determination of what crimes relate to the credibility of a witness. As stated by the Knowles court: "[T]he court must be more concerned with ascertaining the truth and should not allow into evidence a conviction which does not reasonably relate to testimonial deceit." Over the course of many opinions the appellate courts have gradually evolved a catalog of admissible prior convictions. As might be expected, any crime which involves some factor of dishonesty or taking of property is thought to satisfy the Montgomery guidelines. Thus courts have approved the admissibility of prior convictions for armed robbery.

42. 66 Ill. 2d 585, 363 N.E.2d 805 (1977).
44. 66 Ill. 2d at 589-90, 363 N.E.2d at 808.
45. Id. at 589, 363 N.E.2d at 808.
46. "Although robbery involves violence, it is violence employed to a dishonest end, that
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burglary, larceny, theft, forgery, possession of a car with altered serial numbers, attempted robbery, receiving stolen property, and conspiracy to perjure. The only crime involving dishonesty as to which there has been disagreement is misdemeanor theft. In People v. Rudolph, Justice McGloon dissented from a decision approving the use of misdemeanor theft for impeachment purposes. He suggested that crimes involving dishonesty refers only to those crimes committed by representational falsehoods. There is considerable support for this point of view. Those crimes listed as involving "dishonesty" by the Advisory Committee to the Federal Rules of Evidence are perjury, counterfeiting, and forgery. These crimes involve aspects of lying and not just stealing. It seems relatively clear that such crimen falsi have a considerably higher probative value on the question of credibility. The inquiry, however, is whether stealing crimes involving a punishment of less than one year have sufficient probative value to be admitted. The resolution of this question is unclear in federal courts. Justice McGloon's dissent has been adopted by the Fifth Appellate District, but has not been adopted by the First Appellate District in People v. Malone, __ Ill. App. 3d __, 385 N.E.2d 12 (1st Dist. 1978), where the court disagreed with the Rudolph majority.


Compare Virgin Islands v. Toto, 529 F.2d 278 (3rd Cir. 1976) (inadmissible) with United States v. Carden, 529 F.2d 443 (5th Cir. 1976) (admissible).

People v. Vaughn, 56 Ill. App. 3d 700, 371 N.E.2d 1248 (5th Dist. 1978). Recently, a different panel of the First Appellate District disagreed with the Rudolph majority. In People v. Malone, __ Ill. App. 3d __, 385 N.E.2d 12 (1st Dist. 1978), the court adopted the McGloon dissent and held that a conviction for misdemeanor theft was not admissible under Montgomery. The First District is now divided against itself. This division should be resolved.
been rejected elsewhere.\textsuperscript{60}

Unfortunately, Illinois courts have broadened the categories of admissible convictions far beyond those involving stealing or lying. In doing so they have either supplied no rationale or a rationale that seems inconsistent with \textit{Montgomery}. Drug-related crimes are an example. In \textit{People v. Sawyer},\textsuperscript{61} decided only three months after \textit{Montgomery}, the supreme court indicated that a conviction for possession of narcotics would be admissible to impeach, although it did not say how this crime related to truth-telling. Without citing \textit{Sawyer}, the First Appellate District and the Fifth Appellate District proceeded to split on the admissibility of narcotics convictions. The Fifth District affirmed a motion \textit{in limine} granted by the trial judge to exclude a four-year-old conviction for possession of heroin. It concluded that the prejudice to the witness was too great, since the jury might assume that once a person is an addict he remains an addict.\textsuperscript{62} In contrast the First District held that a conviction for possession of heroin was properly admissible.\textsuperscript{63} The reasoning in the case was less than adequate: “The offense of possession of heroin does indicate a disposition to place the advancement of individual self-interest ahead of principle or the interest of society, and such proof may suggest a willingness to do so again on the witness stand.”\textsuperscript{64} This reasoning would reverse the clock and take Illinois back to the pre-\textit{Montgomery} cases. Any conviction arguably shows an interest in placing the individual over society, and thus all convictions have probative value. The \textit{Montgomery} balancing standard would no longer be needed, since all convictions would reflect on credibility.

Other courts have approved decisions of trial courts which admitted evidence of violent crimes. Two First District cases approved denial of motions \textit{in limine} that sought to exclude prior rape convictions.\textsuperscript{65} Both cases indicated that the trial judge had considerable discretion in granting or denying the motion. One of the cases ac-

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  \item People v. Spates, 62 Ill. App. 3d 890, 379 N.E.2d 869 (2d Dist. 1978); People v. Thomas, 58 Ill. App. 3d 402, 374 N.E.2d 743 (1st Dist. 1978). This divergence between appellate districts is to be expected. Even under Federal Rule 609, which allows the federal trial courts less discretion, the circuits have differed as to which convictions are admissible.
  \item See \textit{Weinstein}, supra note 7, ¶ 609[03a] at 72.
  \item 48 Ill. 2d 127, 268 N.E.2d 689 (1971).
  \item Baldwin v. Huffman Towing Co., 51 Ill. App. 3d 861, 366 N.E.2d 980 (5th Dist. 1977).
  \item People v. Nelson, 31 Ill. App. 3d 934, 335 N.E.2d 79 (1st Dist. 1975).
  \item \textit{Id.} at 938, 335 N.E.2d at 83.
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cepted the State's argument that there was a definite relationship between the commission of an infamous crime and testimonial credibility. Neither case suggests any rationale which a trial judge could have used to find rape probative of credibility. In another First District opinion a prior rape conviction was actually admitted. It was a short step from that decision to applying the rationale of the heroin cases to other crimes. Thus the First District rationalized the admission of a prior conviction for aggravated battery on the ground that:

Prior convictions for crimes other than for an offense based on dishonesty or false statements have been held admissible on the theory that they establish a disposition on the part of the defendant to place the advancement of this individual self-interest ahead of the interest of society, and such proof may suggest a willingness to do so again on the witness stand.

This reasoning was vigorously criticized by Justice Craven of the Fourth Appellate District. In *People v. Wright*, the defendant was convicted of rape and attempted deviate sexual assault in a trial where his past convictions for aggravated battery were used for impeachment. The conviction was reversed although the two reversing judges could not agree on the reason. Justice Craven wrote that the prior convictions had no bearing on honesty or veracity:

We cannot conceive of what there is about the crime of aggravated battery which is at all probative of the defendant's honesty and veracity as a witness. Balancing zero probative value against the obvious danger of prejudice inherent when the jury is informed that the defendant is a convicted felon, we conclude that the danger of prejudice clearly outweighs the probative value of the two prior convictions.

Unfortunately both the specially concurring and dissenting justices disagreed with this interpretation of *Montgomery*. Justice Reardon said:

I view a witness in this posture — he comes before the jury after being sworn upon his solemn oath to tell the truth and he seeks to

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68. *People v. Kitchen*, 53 Ill. App. 3d 521, 523-24, 368 N.E.2d 528, 531 (1st Dist. 1977). The rationale is, of course, the same as that offered by Holmes for the pre-*Montgomery* common law approach. See note 8 supra.
70. *Id.* at 465, 366 N.E.2d at 1062.
have the jury believe that to which he is testifying. His credibility, therefore, is essential to a proper interpretation of every word that he utters. A failure to inform the trier of facts of the defendant’s previous disrespect for societal orders denies to the jury the basis upon which credibility can be weighed and evaluated.  

He thought that the proper interpretation of *Montgomery* is that any offense resulting in imprisonment for more than one year is presumed to relate to truthfulness and veracity. This approach was later adopted by another Fourth District case.  

Thus in the First and Fourth Appellate Districts we have come full circle. *Montgomery* was originally thought of as an opinion which restricted the number and type of admissible convictions. This was further emphasized by *Knowles*, which clearly indicated that unless the conviction related to testimonial deceit, it should not be admitted. It hardly seems appropriate to implement these holdings by saying that all convictions relate to testimonial deceit. If that was the case there would have been little reason for the *Montgomery* decision in the first place.  

The opinions of the First and Fourth Appellate Districts fail to comprehend the meaning of the term probative value. It is the tendency of an item of evidence to prove that for which it is introduced. In this area the evidence is offered to show the witness unbelievable. Thus that which is introduced must have some relation to the ability of the witness to tell the truth. If the prior conviction was not for a crime involving truth-telling, it is difficult to see that it has any probative value for impeachment. This relationship of character to the point being proved is well recognized in other areas. A defendant in a criminal case cannot just introduce evidence of his good character. He may only introduce evidence of a character trait which is pertinent to the crime charged. Evidence of other character traits is inadmissible since it lacks probative value. There is no reason why the same relevancy equation should not apply in the impeachment area.  

Justice Reardon’s comment, that a failure to inform the jury of the defendant’s disrespect for society denies it the basis upon which credibility can be evaluated, seems misplaced. It assumes that any

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71. *Id.* at 466, 366 N.E.2d at 1063.  
73. *See, e.g.*, *People v. Partee*, 17 Ill. App. 3d 166, 308 N.E.2d 18 (1st Dist. 1974). *See also* Federal Rules of Evidence 404(a)(1): “Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.”  
74. The difficulty of Justice Reardon’s argument was best pointed out by Bentham:  

Take homicide in the way of duelling. Two men quarrel; one of them calls the other
disrespect for societal order has a relationship to truth-telling. However, not every such disrespect for society is admissible; only convictions can be admitted. There may be clear and convincing evidence that the witness has defrauded the government, yet unless he has been convicted it is not admissible. Thus not everything that "helps" evaluate credibility can be admitted. These two appellate districts are headed in the wrong direction.

**Similarity of the Past Conviction**

According to Montgomery, the similarity of the prior conviction to the crime the defendant is charged with is a factor to be considered by the trial judge. This factor operates on the prejudice side of the balance. If the prior conviction is similar to the present charge, the jury may attribute to the defendant a character trait for 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, challenge 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 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (Browning ed. 1827), quoted in 2 Wigmore, Evidence, § 519 at 611 (3d ed. 1940).

75. E.g., Schoolfield v. Witkowski, 54 Ill. App. 2d 111, 203 N.E.2d 460 (1st Dist. 1964). This rule is very well established in Illinois. The proposed Illinois Rules of Evidence would continue this approach by rejecting Federal Rule 608(b) which allows cross-examination of a witness about prior instances of bad conduct which relate to truthfulness and veracity.

76. The First and Fourth District had articulated another line of reasoning which could be used to subvert the Montgomery guidelines. In People v. Blythe, 17 Ill. App. 3d 768, 308 N.E.2d 675 (4th Dist. 1974), the defendant was indicted for murder and claimed self-defense. The Fourth Appellate District affirmed a trial court decision admitting two prior Tennessee convictions for manslaughter and assault with a dangerous weapon. The court thought that the two convictions were probative because "the two Tennessee convictions, being crimes of violence, do have a bearing directly upon the credibility of the defendant's contention that he killed in self-defense and the credibility of his evidence supporting that defense." *Id.* at 770-71, 308 N.E.2d at 678. This reasoning was adopted by the First Appellate District in People v. Kitchen, 53 Ill. App. 3d 521, 368 N.E.2d 528 (1st Dist. 1977).

*Blythe* was limited to its own facts in People v. Wright, 51 Ill. App. 3d 461, 366 N.E.2d 1058 (4th Dist. 1977). Justice Craven correctly noted that while the statement in *Blythe* is couched in terms of credibility, it is really a case admitting past crime to show defendant's propensity to commit crime. Of course, this is highly improper. Neither the concurring nor the dissenting judge disagreed with this aspect of Justice Craven's opinion, and it seems fair to assume that the *Blythe* approach has been rejected in the Fourth Appellate District. However, this hardly seems of much importance given the tendency of the First and Fourth Districts to find any conviction probative of credibility. *Blythe* will remain a dead letter unless it is resurrected by another appellate district.

that type of crime. This greatly increases the risk that the jury will convict based on what it feels is the defendant's propensity to commit that type of crime." In *Gordon*, Judge Burger suggested that, "As a general guide, those convictions which are for the same crime should be admitted sparingly; . . . and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity."79

Unfortunately this aspect of the balancing process has not operated effectively in Illinois. Many cases have allowed impeachment by a conviction for the same crime or for a crime similar to the crime charged. While similarity is discussed in a number of cases,80 the courts always admit the past conviction if it relates to the veracity of the witness. Since the courts apparently believe that almost any felony relates to credibility, the similarity factor has completely failed to influence decisions in this area.81

**Other Factors**

All remaining considerations mentioned in the *Gordon* opinion appear to have had no effect on Illinois decisions. This is indeed strange, especially with respect to the factor of the need for defendant's testimony. The impetus to allow the jury more information was one of the main reasons for the *Luck-Gordon* doctrine in the first place.82 Yet whenever this point has been raised in Illinois, the

78. Prior conviction or acts are, of course, inadmissible to prove the defendant's propensity to commit crime. See, e.g., People v. Richardson, 17 Ill. 2d 253, 259, 161 N.E.2d 268, 271 (1959); Fed. R. Evid. 404(b).


81. Research has produced only one case where the trial judge's decision to admit a past conviction, within the ten year rule, has been reversed. In People v. Everhart, 22 Ill. App. 3d 727, 317 N.E.2d 720 (1st Dist. 1974), the defendant appealed his conviction for indecent liberties with a minor, contending the court erred in admitting his prior conviction for the same crime for impeachment purposes. The First Appellate District agreed, and, in view of the State's weak case, reversed the trial court. This decision is an anomaly among the many cases interpreting *Montgomery*. It has been somewhat isolated and it is questionable whether it survives more recent First District cases. See notes 63-76 supra and accompanying text.

82. Indeed, according to one version of the *Luck-Gordon* doctrine it was the *sine qua non* of its existence. Evans v. United States, 397 F.2d 675 (D.C. Cir. 1968), indicated that the defendant had to show a need for his testimony before the judge would consider the other factors. Later cases disagreed with the holding and the question was never fully resolved. See Davis v. United States, 409 F.2d 453 (D.C. Cir. 1969).
response has been the traditional argument that if the defendant chooses to take the stand he can be impeached like all other witnesses. The other factors, the subsequent history of the defendant and the posture of the case, have been barely mentioned in the opinions.

THE PROCESS OF PROOF

The Motion In Limine

Montgomery did not address the problem of when the trial judge was to decide whether a past conviction should be admitted. Obviously the judge could decide the question when an objection is made. Gordon suggested it would be preferable "for the District Judge . . . to have the accused take the stand in a non-jury hearing and elicit his testimony and allow cross examination before resolving the Luck issue." In Illinois an objection can be made when the prior conviction is introduced or the opponent of the conviction may make a motion in limine asking the trial judge to exclude the prior convictions. Decision of the motion is discretionary with the trial court judge. While most appellate courts seem to agree that the pre-trial ruling is the preferable way to handle the Montgomery problem, there appears to be no way to force the trial court to make the ruling. This is particularly unfortunate, since the decision of a criminal defendant to testify is one of the major decisions in planning a defense. In order to make the decision intelligently, the defendant must know what the consequences, if any, will be. There may well be cases where the trial judge will not be able to make a

83. People v. Austin, 37 Ill. App. 3d 569, 346 N.E.2d 166 (2d Dist. 1976). In one case the court said that the prejudice to the prosecutor would be obvious if it could not attack the defendant with evidence of past convictions. People v. Axeloson, 37 Ill. App. 3d 566, 346 N.E.2d 24 (2d Dist. 1976).

84. See People v. Vaughn, 56 Ill. App. 3d 700, 371 N.E.2d 1248 (5th Dist. 1978), where the court, while holding a conviction for misdemeanor theft inadmissible, noted that in this case the witness had a clean record for the past nine years. In the recent case of People v. Thomas, 58 Ill. App. 3d 402, 374 N.E.2d 743 (1st Dist. 1978), the court used the fact that the prosecution had consistently pitted the credibility of its chief witness against the defendant as a reason why the defendant should have been allowed to use a prior conviction for misdemeanor theft.

85. Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967). A full scale hearing eliciting the defendant's testimony can be quite time consuming. One case from the District of Columbia noted that the hearing took a day and half. Laughlin v. United States, 385 F.2d 287 (D.C. Cir. 1967).

86. "The trial court in its discretion may desire to grant such a motion, deny the same, or withhold its ruling until further evidence is heard. . . ." People v. Ray, 3 Ill. App. 3d 517, 523, 278 N.E.2d 170, 174 (3d Dist. 1972).

ruling until trial. These will be cases where the need for the defendant’s testimony and the posture of the case factors appear crucial. However, if neither of these considerations are present there is no reason why a trial judge should not make a ruling on the motion in limine. Most other jurisdictions that have discussed this problem suggest it is the rare case where the ruling should be reserved until trial.\textsuperscript{88}

Since most Illinois cases have not considered the need for the defendant’s testimony or the posture of the case important, they should decide the defendant’s motion prior to the defendant’s testimony. It seems particularly egregious to hold, as in \textit{People v. Barksdale},\textsuperscript{89} that the trial judge would have any additional information available to him at that point. Indeed, given that the defendant was being tried for rape and the prior conviction was also for rape there was every reason to decide to exclude the past conviction. The crime was a violent one and identical to the criminal charge. Reserving a ruling until the conclusion of the defendant’s testimony places him in an unconscionable dilemma. Relief of this dilemma was the original foundation of the \textit{Luck-Gordon} doctrine. The Fifth Appellate District has taken a more realistic approach:

\begin{quote}
[I]n some cases it may be necessary for the trial court, on proper motion, to make a ruling on the use of a prior conviction before the beginning of the trial, especially where good reasons are shown that defense counsel’s trial strategy will depend upon the ruling. However, under the circumstances of the instant case, in which defense counsel offered no such reasons, the refusal of the trial court to make the pretrial ruling was not error. \textit{Defendant could still have obtained an advance ruling on the matter by renewing his motion at some point during the trial.}\textsuperscript{90}
\end{quote}

Thus the trial judge should rule upon a proper motion and in any event, the defendant is entitled to some ruling before taking the stand. Once again the Fifth Appellate District’s views have made little headway with the other districts.\textsuperscript{91}

\begin{footnotes}
\item[89] 24 Ill. App. 3d 489, 321 N.E.2d 489 (1st Dist. 1974).
\item[90] \textit{People v. Hill}, 34 Ill. App. 3d 193, 206, 339 N.E.2d 405, 415 (5th Dist. 1975) (emphasis added). \textit{See also} \textit{Jones v. United States}, 402 F.2d 639, 643 (D.C. Cir. 1968). “[O]nce the defense has brought the issue before the judge, . . . there is a duty upon the judge to make sufficient inquiry to inform himself on the relevant considerations. . . .”
\item[91] \textit{People v. Spicer}, 44 Ill. App. 3d 200, 358 N.E.2d 104 (3d Dist. 1976); \textit{People v. Axelson}, 37 Ill. App. 3d 566, 346 N.E.2d 24 (2d Dist. 1976). If the trial judge grants the defendant’s motion to exclude prior convictions, it is error for him to reverse that ruling after the defen-
\end{footnotes}
Cross-Examination vs. Certified Copy

In Illinois there is an important distinction between the testifying defendant and all other witnesses. While a witness can be cross-examined about a prior conviction, a defendant-witness can only be impeached by introducing a certified copy of the past conviction. However, if the procedure is not followed, it is not clear whether error or reversible error has been committed. In People v. Neukom, the defendant was convicted of robbery and alleged that the court committed error when it allowed the State's Attorney to ask him on cross-examination whether he had been convicted of previous infamous crimes. In rebuttal the State introduced the record of defendant's past conviction. The supreme court held that the introduction of the record cured the error. This apparently invited prosecutors to go through the impeachment process twice: once on cross-examination and once in rebuttal to cure the error committed on cross-examination.

The court retracted slightly in People v. McCrimmon when it indicated that it did not intend to approve a double method of cross-examination. In People v. Madison, the court re-affirmed the rule allowing impeachment of a criminal defendant only by certified copy. Any indication to the contrary in People v. Neukom was to be given no effect. However, the court found only harmless error. The supreme court's disposition of the problem in Madison has not been lost on the appellate courts. The most often used expression of the process of proof is "that cross-examination of a defendant as to a prior conviction is not an approved practice but does not constitute reversible error when, in addition to the questioning, the record is also admitted. . . ." This whole question may be a mere quib-dant testifies. People v. Cooper, Ill. App. 3d, 383 N.E.2d 768 (5th Dist. 1978).

92. People v. Hoffman, 399 Ill. 57, 77 N.E.2d 195 (1948). Witnesses and parties in civil cases can be cross-examined concerning their past convictions. For this purpose habeas corpus and bastardy proceedings are regarded as civil cases. Hewes v. Michael, 189 Ill. App. 495 (1st Dist. 1914); Borelli v. Lohman, 13 Ill. 2d 506, 150 N.E.2d 116 (1958).

93. E.g., People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953). It is 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 (2d Dist. 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). If the trial judge presided at the previous trial he may take judicial notice of the prior conviction. People v. Davis, 65 Ill. 2d 157, 357 N.E.2d 792 (1976).

94. 16 Ill. 2d 340, 158 N.E.2d 53 (1959).

95. 37 Ill. 2d 40, 224 N.E.2d 822 (1967).

96. 56 Ill. 2d 476, 309 N.E.2d 11 (1974).

ble. If improper cross-examination will not result in a reversal, then perhaps it is not really error at all.

**The Record**

One problem raised with some consistency is whether the trial judge must give some affirmative indication that he has exercised his discretion. Defendants frequently contend that the trial judge has either failed to exercise his discretion, or failed to consider all the relevant factors enunciated by *Montgomery*. While appellate courts require some indication that the discretion was exercised, the exact methodology used by the trial court appears to be insulated from attack. In *People v. Washington*, the supreme court noted that "it would normally be assumed that a trial judge had given appropriate consideration to the relevant factors without requiring a specific evaluation in open court of each of them."

This approach seems particularly unhelpful and has probably contributed significantly to the erosion of the *Montgomery* balancing test. While *Montgomery* announced a number of factors for the trial court's consideration, there is no way to insure that the trial courts will follow the decision. If none of the factors need be enunciated on the record, it becomes impossible for an appellate court to adequately supervise this discretion. This may account for some of the outlandish rationales employed by appellate courts to justify upholding the lower court decision.

In the federal courts the requirement is exactly the opposite. The decision to admit or exclude is generally made at a hearing on the record. This does not mean that federal decisions under Rule 609

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98. 55 Ill. 2d 521, 304 N.E.2d 276 (1973).
99. *Id.* at 523-24, 304 N.E.2d at 277. See also *People v. Graham*, 27 Ill. App. 3d 408, 327 N.E.2d 261 (6th Dist. 1975). It appears that unless the record shows that the trial judge did not consider the prejudicial effect of the past conviction, the reviewing court will assume that the discretion was appropriately exercised. *People v. Owens*, 58 Ill. App. 3d 37, 373 N.E.2d 848 (4th Dist. 1978).
100. One would almost prefer that appellate courts use a "harmless" error rationale here. It seems that if appellate courts find a violation of *Montgomery*, a reversal is proper. Better direction to the trial courts could be provided if the appellate courts required that the determination be made on the record subject to review. The flaws in the reasoning could then be pointed out for correction in the future. If the *Montgomery* issue did not substantially affect the verdict, the appellate court could use a harmless error doctrine.
101. "In the future to avoid the unnecessary raising of the issue of whether the judge has meaningfully invoked his discretion under Rule 609, we urge trial judges to make such determinations after a hearing on the record, ... and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value."

are a model of uniformity. That can hardly be expected under a discretionary model of decision making. However, the bases of the trial court decision are fully expressed and are subject to critical evaluation by the reviewing court. Illinois should adopt this system. While it is generally agreed that relevancy problems, even in an impeachment context, must be handled in a discretionary format, trial courts cannot simply be turned loose to do "justice." It is necessary to define and limit the factors to be used by the trial court in exercising that discretion, if it is to be at all controllable. Montgomery attempted this. However, the Washington opinion undermines this effort. If trial judges need not account for how their decisions are made, there is no effective control over the discretionary process.

THE EFFECT OF MONTGOMERY

Montgomery's effect on the impeachment process has been variable at best. Occasionally, trial courts do an effective job, but other cases reveal that little thought is being given to these problems. Thus courts have widened the scope of admissible convictions and have freely admitted past convictions of crimes similar to the crime charged. In addition, there is little evidence that the full range of factors enunciated in Montgomery and Gordon is being considered. The trend of the cases seems to be bringing Illinois back to the pre-Montgomery era, without the "infamous crimes" limitation. If continued unabated this trend will allow admission of practically all convictions that fall within the ten year rule. This hardly accords with the spirit and rationale of Montgomery.

THE PROPOSED ILLINOIS RULE

The Illinois Supreme Court Committee on Evidence proposed a Rule 609 that would significantly change the Montgomery calcul-

102. See, e.g., the splendidly articulated differences by Judges Weinstein and Elfvin as to the weight of the different factors in the 609 calculus. Compare United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975) with United States v. Brown, 409 F. Supp. 890 (W.D.N.Y. 1976). Such opinions are impossible in Illinois. As long as there is no suggestion that trial courts place the rationale for their decisions on the record, the entire Montgomery balance will remain cloudy.


104. For example, occasionally a court indicates that of all prior convictions that could be used, only one or two will be admitted. See People v. Beltran, 51 Ill. App. 3d 810, 367 N.E.2d 273 (2d Dist. 1977), where the trial court admitted only one of the defendant's four prior convictions for robbery. However, in People v. Owens, 46 Ill. App. 3d 978, 361 N.E.2d 644 (1st Dist. 177), the court admitted multiple convictions to dispel any idea that the defendant had a clean record after the first conviction.
The Rule departs from the Proposed Federal Rule adopted in Montgomery in sections (a) and (b) and adds a new section (f).

One major change is in the ten year rule. No longer would there be an absolute bar against the use of any conviction over ten years old. While the Proposed Rule apparently contains a presumption against admissibility of such ancient convictions, the trial court may admit such a conviction if it finds that the probative value substantially outweighs its prejudicial effect. The section is somewhat puzzling. First, it retains the release from prison dating system without giving any reasons for its retention. Secondly, it uses the same balancing formulation as section (a), thus rendering subsection (b) almost unnecessary. Under the Federal Rule this section was designed to set a terminus date on prior convictions and to make it extremely difficult to use convictions over ten years old. Here, by using the same standard for convictions over and under ten years, the Committee’s Proposed Rule might well encourage use of these old convictions, which is hardly desirable.

Section (f) is also rather puzzling. It requires the proponent of the conviction to notify the opponent of his intent to use prior convictions. At first glance it seems as if this section is hardly necessary. It appears to have as its sole purpose the prevention of surprise to the witness. However, a witness or a party could hardly be taken by surprise when prior convictions are brought out, for surely a person knows if he or she has been convicted. Moreover, convictions are a matter of public record and can be found easily enough by anyone interested in looking.

However, it is possible that this section may have another pur-

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105. Proposed Ill. R. Evid. 609:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him during cross-examination or established by public record but only if the court determines that the probative value of admitting this evidence substantially outweighs its prejudicial effect to a party and the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(f) Fair Opportunity to Contest. Evidence of a conviction is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
pose. The reason for notice of intent to use past convictions is to make sure that the opposing party has a chance to contest its use. This implies an opportunity prior to trial to contest admissibility, since the proponent must disclose his intent before the trial. If this section is interpreted to require the trial judge to hold a hearing, on the record, and rule on a motion in limine, then it will be very beneficial. There is no reason why such a hearing could not be held. Adequate disclosure of a conviction would enable the opponent of the conviction’s admission to present all the relevant data to the trial judge at the in limine hearing. If all the information is available, a trial judge would only rarely be justified in withholding his ruling until trial.

It is section (a), however, which attempts the major change in Illinois practice. First it addresses itself to the method of proof, providing that an appropriate conviction shall be admitted if elicited from the witness during cross-examination or established by public record. This would eliminate the present Illinois dichotomy of proof between a criminal defendant-witness and all other witnesses. Under this provision a criminal defendant who testifies can be cross-examined about his prior convictions, instead of restricting proof to the introduction of a certified copy of the record. The use of the word “or” in the Rule suggests that the two methods are mutually exclusive. The proponent of the conviction may choose one method or the other, but may not use both. This clearly eliminates the problem of “double impeachment” which has haunted the Illinois cases.106

This change would be helpful in eliminating the presently existing confusion. Present case law’s finding of harmless error in “double impeachment” situations encourages overuse of the past conviction. There is no indication that eliciting the information from the defendant-witness is any more prejudicial than reading the record of conviction. Federal practice requires proof of conviction on cross-examination, either through questioning the witness or by certified copy.107 The federal procedure works quite well. There is no reason for Illinois to continue this split method.

The second change envisioned by section (a) is more important. It provides that no conviction should be admitted unless the proba-

106. See notes 92-97 supra and accompanying text. 107. Fed. R. Evid. 609(a) provides:

“General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination. . . .” See generally Weinstein, supra note 7, ¶ 609 [03a] at 80.2.
tive value substantially outweighs its prejudicial effect. This is the exact reverse of Montgomery, which held that the prejudicial effect had to substantially exceed the probative value to justify excluding the past conviction. Presumably this new provision would drastically cut back on the number of admissible past convictions. Under the Montgomery standard, the opponent of the conviction must show why it is prejudicial, but this proposal would require the proponent of the conviction and the trial judge to indicate why it is probative. This would require greater analysis by the trial court in relating the conviction to testimonial deception.\(^{108}\)

The dissenting members of the Committee attacked this Proposed Rule as illogical,\(^{109}\) but it is so only if the premise that past convictions relate to credibility is accepted. The majority obviously believed that only the exceptional conviction is probative of credibility. The focus of their disagreement is really the question of whether knowledge of character is at all useful in an evaluation of a person's actions, and particularly whether that knowledge can aid in determining if the witness will lie under oath.

Ultimately, the past convictions problem is a specific manifestation of the more general question of the role of character evidence in the trial process. Outside of the impeachment area, the law has taken a very skeptical attitude toward character evidence. It is rarely admitted in civil matters, except for those few cases where character is actually in issue. In criminal cases the defendant may introduce evidence of his good character, but proof of the commission of a crime by this method is forbidden unless the defendant takes the initiative. The reasons for this extreme reluctance to use character proof are well established. The inference from past conduct to present conduct is very weak, resting on the dubious assumption that because a person has acted in a certain way before, he will do so again. The inquiry is prejudicial and time consuming. Thus character evidence is normally excluded when offered substantively.

\(^{108}\). It is entirely possible, of course, that the change will have little effect on Illinois practice. The rationale of the Fourth and First Appellate Districts is that all convictions of crimes carrying a prison sentence of over one year are presumed to relate to veracity. See notes 64-76 supra and accompanying text. This rationale could easily justify continuing to admit all convictions, thus effectively nullifying any change in the balancing standard.

\(^{109}\). Whereas present Illinois law favors impeachment by evidence of prior conviction, the adopted rule strongly disfavors the use of such evidence. . . . Moreover, the adopted rule strongly disfavors for impeachment purposes even evidence of conviction of crimes which are reflective of dishonesty or false statement. This approach to evidence so peculiarly probative of credibility is illogical.

PROPOSED ILL. R. EVID. 609, Minority Discussion (Final Draft).
The extensive use of character evidence through past convictions in the impeachment process is a strange contrast. Its use for impeachment assumes that character evidence which tends to prove lying is probative. This is directly contrary to the general assumption that character evidence is not probative if offered substantively. Thus, character evidence offered to prove stealing is not probative and therefore inadmissible, while character evidence offered to prove lying is probative and is therefore admissible. There is absolutely no logical justification for such a view. The evidence is not more probative in the impeachment process. It is arguable that the evidence is actually less probative when related to credibility. When a defendant testifies in his own defense he can hardly be considered an objective witness. The defendant's interest in the outcome is sufficient impeachment. Furthermore, the other side of the relevancy equation is just as applicable when character evidence is offered for impeachment, since the evidence is just as prejudicial as when offered substantively. There is still a tremendous risk that the jury will misuse the evidence and convict the defendant because of the type of person he is.

Thus the formulation of Proposed Illinois Rule 609(a), insofar as it restricts the admissibility of prior convictions, is salutory. However, it does not go far enough. The admission of any past conviction assumes both that character traits exist and that people act in accordance with those traits. Psychologists have demonstrated that such traits do not exist. Therefore evidence of character to prove conduct can never have any probative value. However, most people assume the existence of such traits and expect people to act in accordance with them, so in psychological terms, the evidence is clearly prejudicial.

There can be no real argument that the trial process should include clearly prejudicial evidence with no probative value. The most effective reform for Illinois would be the complete abolition of Rule 609. The criminal trial process aims at a result determined by evidence concerning the commission of a crime, not by the people


111. One of the most enduring propositions discovered by psychologists is that most people attribute their own action to situational and environmental concerns. However, they attribute the same action in others to stable personality dispositions. See generally K. SHAVE, AN INTRODUCTION TO ATTRIBUTION PROCESSES (1975); A. HASTORF, D. SCHNEIDER, & J. POLEFIKA, PERSON PERCEPTION (1970).
involved. The continued existence of past convictions in the impeachment process thwarts that goal. Its elimination will considerably further the trial process. As one Illinois judge has cogently stated: "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."\footnote{\footnoterule