Character Evidence in Illinois: Dissipating the Mist?

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[Evidence] of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.¹

JUDGE LEARNED HAND

INTRODUCTION

The function of the jury in the American legal system is frequently described as being that of a “trier of fact.”² A critical factor in the outcome of any lawsuit is the jury’s perception and evaluation of the demeanor, credibility and character of the participants. In the context of the litigation process, the word “character” is a shorthand expression for who and what a person is, predicated on that person’s external manifestations of personality traits, such as virtues, habits, values, and prejudices.³ Arguably, these traits can be reliable barometers for predicting or explaining conduct.⁴ The presentation of evidence of such traits at trial, however, may pose relevancy hazards, since prejudice, confusion, and time consumption frequently outweigh the probative value of such evidence. Nonetheless, there are a variety of situations in which the judicial process allows evidence of character to be introduced to supplement the observational powers of the jury.

The common law rules governing who may present evidence of character, when, for what purpose, and in what manner, are the result of a careful balancing of the relevancy factors by common law courts over hundreds of years of adjudication. This ad hoc winnowing process has culminated in a welter of complex standards subject to misinterpretation and misapplication by American courts, including those of Illinois.⁵ The enactment of the Federal Rules of Evidence simplified and clarified this area of the law, and provided the benchmark for the character evidence standards formulated by

1. Nash v. United States, 54 F.2d 1006-07 (2d Cir. 1932).
2. Of course, judges also act as triers of fact in bench trials. This article, however, will concentrate on the situation where the jury is the sole trier of fact.
4. Id. at 506.
5. See generally 7 J. WIGMORE, TREATISE ON EVIDENCE §§1981-86 (3d ed. 1940) [hereinafter cited as WIGMORE (3d ed.)].
the Illinois Supreme Court Committee on Rules of Evidence in proposed Illinois rules of evidence 404, 405, 608, and 609. Generally, the federal and proposed Illinois rules codify the common law character evidence rules, and address the situations in which the judicial process allows evidence of character to be introduced.

Modern Illinois common law provisions are in general accord with the rules governing character evidence in the majority of state jurisdictions. This article will examine the major categories and policies of the common law of character evidence, delineate variations in Illinois law, and evaluate the potential impact of models for change, such as the Proposed Illinois Rules of Evidence and the Federal Rules of Evidence.

**Substantive Use of Character Evidence**

There are two principal categories and uses of character evidence. Character evidence may be employed either in a substantive fashion, to prove or disprove a factual issue, or for impeachment purposes, to attack or support the credibility of a witness. Where evidence of character is offered substantively, character itself may be an ultimate issue in the case. For example, in an action against an employer based on the negligent hiring of an incompetent employee, the character of the employee for competence and care is necessarily “in issue” and may be proven in the same manner as any other issue.

In a case where character is not an ultimate issue, character evidence may be circumstantially relevant to suggest that a person with a particular propensity or trait acted in conformance with that trait on the occasion in question. Where this circumstantial inference is the only objective behind the introduction of such evidence,
the common law sets forth a general rule excluding character evidence. The rule applies to both criminal and civil suits, and is premised on the policy that cases should not be decided on facts other than those directly relevant to the immediate suit. Rule 404(a) of the Federal Rules of Evidence and the Proposed Illinois Rules codifies the common law.

13. Id.

14. The traditional position excludes character evidence in civil cases when offered to imply conduct, basically for the same reasons which justify its exclusion in the criminal situation. See generally Ladd, supra note 3, at 504-05; 1 WIGMORE (3d ed.), supra note 5, § 64. This policy seems sound when applied in the average "non-moral" lawsuit, since character evidence there is clearly irrelevant. Where, however, the case revolves around a "moral" trait, there appears to be no good reason not to follow the pattern of the criminal rule and allow the defendant to broach the issue of his character. For example, the present system would allow the defendant in a criminal assault trial to introduce evidence of the victim's violent character to bolster a plea of self-defense, but would forbid the same evidence if the victim brought a civil suit for assault. This result has led many eminent commentators and scholars to criticize the rule, and the policy seems likely to be subject to hot debate for many years.

Professor Falknor argues that character evidence should be admissible in a civil case to refute a claim of criminal or immoral conduct:

My own view, then, is that if evidence of good character is able to free itself from the claim that it comes with too much "dangerous baggage" of prejudice, distraction from the issues, time consumption, and hazard of surprise when offered for the accused in a criminal action, there is no sufficient basis upon which to keep it out in a civil action involving a charge of criminal conduct.

Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 582-83 (1956). The Advisory Committee Note to Federal Rule 404 rejects the circumstantial use of character evidence, based in part on the report of the California Law Revision Commission:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. IV, Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 615 (1964). It should be noted, however, that Professor Chadbourn, as a member of the Commission, strongly endorsed the approach of equating the treatment of character evidence in civil and criminal actions. Id. at 657-58.


16. Fed. R. Evid. 404 and Proposed Ill. R. Evid. 404 (Final Draft) provide:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
The circumstantial use of character evidence, and the justification for the exclusionary policy, is best demonstrated in the context of a criminal case. The rule precludes the prosecution from introducing past misconduct by the defendant to show that he has an "evil propensity" toward a proscribed mode of conduct, is therefore a "bad person," and is thus probably guilty of the offense charged.\(^7\) Evidence of prior misconduct, although arguably probative of a defendant's character propensities, is excluded to prevent confusion of the issues, distraction of the jury from the issues, time consumption, and prejudice to the defendant.\(^8\) It would be fundamentally unfair to compel a defendant who is on trial for one particular crime to defend his entire life.\(^9\) To avoid the substantial danger that a jury will misuse evidence of prior bad acts, the prosecution is generally forbidden to present such evidence in its case in chief.\(^10\)

Nevertheless, evidence of other crimes and bad acts may be properly offered for certain limited purposes under the common law. Federal and proposed Illinois rule 404(b) codify these exceptions.\(^2\) Permissible purposes include proof of motive,\(^2\) knowledge,\(^2\) identity,\(^2\) existence of a common pattern or scheme,\(^2\) and intent.\(^2\)

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(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

17. As Judge Cardozo said in People v. Zackowitz, 254 N.Y. 192, 194, 172 N.E. 466, 468 (1930):

> The principle back of the exclusion is one, not of logic, but of policy. . . . There may be cogency in the argument that a quarrelsome defendant is more likely to start an argument than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime.

See also 1 Wigmore (3d ed.) supra note 5, § 194.


21. See note 16 supra for the text of rule 404(b).


These exceptions to the general exclusionary rule create a critical danger of prejudice to the defendant. Accordingly, McCormick and others\textsuperscript{27} have forcefully urged courts to eschew the mechanical, pigeonholing approach to admissibility in favor of a careful balancing of probative worth versus unfair prejudice. Such factors as the necessity of using "other crimes" evidence to prove the issues in the immediate case, the relative strength or weakness of this evidence in proving these issues, and the danger that the jury will be unduly influenced by the evidence should be considered in the exercise of judicial discretion.\textsuperscript{28}

\textit{Exceptions to the Character Exclusionary Rule and Methods of Proof}

There are several major exceptions to the general common law rule excluding the circumstantial use of character evidence. These exceptions have been codified by the federal and proposed Illinois evidence codes, and are set out in rule 404(a).

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

\textsuperscript{26} See generally People v. Lehman, 5 Ill. 2d 337, 125 N.E.2d 506 (1955); 2 Wigmore (3d ed.), supra note 5, §§ 300-76; McCormick (2d ed.), supra note 18 § 190 at 447; Louisell & Mueller, supra note 20, § 140 at 113.

\textsuperscript{27} McCormick (2d ed.), supra note 18, § 190 at 453; Louisell & Mueller, supra note 19, § 140 at 119.

\textsuperscript{28} See People v. Hodges, 20 Ill. App. 3d 1016, 314 N.E.2d 8 (1974). McCormick strongly recommends that the trial judge should exercise his discretion in favor of excluding the other crimes evidence:

[Even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. Discretion implies not only leeway but responsibility.

McCormick (2d ed.), supra note 18, § 190 at 453-54.
(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608 and 609.39

Character evidence deemed admissible under one of these exceptions is provable by three possible methods: testimony of specific acts, testimony relating the personal opinion of a witness, and testimony concerning reputation.30 Traditionally, common law in the United States has permitted proof of character only by reputation testimony.31 The prohibition of testimony of personal opinion has been criticized by such authorities as Wigmore, McCormick, and Ladd as being an historical and practical anomaly.32 These commentators note that early common law uniformly allowed personal opinion testimony.33 This viewpoint was adopted by the drafters of the Federal Rules of Evidence in federal rule 405.34 In addition,

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29. FED. R. EVID. 404(a) and PROPOSED ILL. R. EVID. 404(a) (Final Draft).
30. See generally MCCORMICK (2d ed.), supra note 18, § 186 at 443.
31. Testimony about specific actions on prior occasions may be the most probative evidence of a person's actual character, but it is also the form most likely to distract, confuse, or prejudice the jury, and is therefore inadmissible except where character is "in issue."
32. 7 WIGMORE (3d ed.), supra note 5, §§ 1881-86. Dean Wigmore's criticism is classic: "Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, "the warm, affectionate testimony" of those few whose long intimacy and trust have made them ready to demonstrate their faith to the jury, than any amount of colorful assertions about reputation. Take the place of a jury man, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term reputation occurs. Look at it from the point of view of the prosecution, and apply the principle in such a case as R. V. Rowton (a trial for indecent assault upon a young boy, where a prosecution witness would have testified that although he did not know the defendant's reputation he had known the defendant when he was his teacher, and considered him capable of 'the grossest indecency and the most flagrant immorality'), and then decide whether the witness who was there excluded was not, if believed, worth more than forty opposing witnesses testifying to that intangible, untestable creation called 'reputation'. The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.'
Id., § 1986 at 243. See also MCCORMICK (2d ed.), supra note 18, § 191 at 456; Ladd, supra note 3, at 509-13.
33. See, e.g., 7 WIGMORE (3d ed.), supra note 5, § 1985 n. 8, where Dean Wigmore states that early Illinois cases permitted testimony in the form of personal opinion.
34. FED. R. EVID. 405 READS: Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
a majority of the states that have enacted evidence codes have followed the federal lead in this area. Illinois courts and the majority of common law jurisdictions, however, have consistently rejected opinion evidence. Although the minority report of the Illinois Supreme Court Committee on Rules of Evidence recommended adoption of the federal position, proposed Illinois rule 405 continues the common law prohibition on opinion evidence.

The rationale for allowing the admission of reputation evidence at common law is that a person's reputation is considered to be the product of community evaluation, arrived at after years of observation. The justification advanced for the preclusion of personal opinion has been that such testimony generates distracting cross-examination into the specific bases of the opinion, and thus raises "innumerable collateral issues which . . . complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation." Further, it is feared that a witness's personal opinion of a defendant's character may be distorted by his own feelings of bias or prejudice.

The reasons advanced for excluding opinion evidence, although apparently logical, do not withstand close analysis. First, cross-examination certainly can reveal whether an opinion that is expressed is predicated upon an unreliable foundation. Second, it is highly doubtful that any reputation testimony can be given which is not influenced heavily by the personal conclusions of the witness. As a practical matter, it is obvious that a party would not call as a witness a person who would express a judgment adverse to that desired by the proponent. It is difficult to imagine that a jury faced with this type of testimony would be able to separate the report of

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

37. McCormick (2d ed.), supra note 18, § 186 at 442.
38. Proposed Ill. R. Evid. 405, Minority Discussion (Final Draft).
39. Proposed Ill. R. Evid. 405 (Final Draft) provides:

Methods of Proving Character

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

41. Ladd, supra note 3, at 516.
the reputation from the opinion of the person relating that report. In that context, the need for a legal distinction between the two types of testimony is unnecessary.

Evidence of Defendant’s Character Offered by Defendant

The major common law exception to the general rule of exclusion is codified in federal and Illinois rule 404(a)(1). This exception allows a criminal defendant to introduce affirmative, substantive evidence of his good character to imply that he is innocent of the charged offense.42 The justification for allowing this means of proof to the defendant, while precluding its initial use by the prosecution, is to enable the defendant, particularly in a factually close case, to raise reasonable doubt as to his guilt.43 The relevancy dangers supporting the exclusionary policy are outweighed in this situation by the fact that the accused faces possible criminal penalties; the defendant therefore may “open the door” to evidence of his character.

The affirmative evidence of good character presented by a defendant must relate to the trait involved in the charged offense.44 For example, a defendant who is charged with rape may present character witnesses to testify concerning his good character for chastity, while testimony that he is attentive to his job and sober-minded is rejected as irrelevant.45 A witness, before he may testify, must be qualified properly through preliminary questioning. Such questioning establishes the witness’s familiarity with the defendant’s reputation in a “relevant social group,”46 at or near the time the alleged crime occurred.47

42. FED. R. EVID. 404(a)(1) and PROPOSED ILL. R. EVID. 404 (a)(1) (Final Draft); see text at note 16, supra. The manner and scope of prosecutorial rebuttal is addressed infra at notes 102 to 169 and accompanying text.

43. In a close case, evidence of a defendant’s good character may be enough to raise a reasonable doubt and justify acquittal. People v. Drwal, 27 Ill. 2d 184, 188 N.E.2d 688 (1963); see Edgington v. United States, 164 U.S. 361, 366 (1896); United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950). McCormick notes: “It is a merciful dispensation to the accused of hitherto blameless life to allow him to open this door of character.” MCCORMICK (2d ed.), supra note 18, § 191 at 456. The Advisory Committee of the Federal Rules of Evidence characterized the criminal rule as being “so deeply imbedded in our jurisprudence as to . . . override doubts of the basic relevancy of the evidence.” FED. R. EVID. 404, Advisory Comm. Notes.

44. 1 WIGMORE (3d ed.), supra note 5, § 59; JONES (6th ed.), supra note 19, § 4.46, at 477.

45. People v. Celmars, 332 Ill. 113, 163 N.E. 421 (1928).

46. People v. Dorn, 46 Ill. App. 3d 820, 361 N.E.2d 353 (1977). Traditionally, common law had required that the reputation be that obtained in the community in which the accused lived. Today, recognition of changing social and living patterns has broadened the scope of the “relevant community” to include the workplace and other environments frequented by the accused. See MCCORMICK (2d ed.), supra note 18, § 191 at 456.
Evidence of Character of the Victim Offered by Defendant

A second common law exception to the general exclusionary doctrine permits the accused to introduce evidence of the character of the victim of the crime.48 For example, where a defendant pleads self-defense to a charge of murder, he is entitled to introduce evidence of the victim’s violent nature, to allow the jury to infer circumstantially that the victim was the first aggressor.49 Federal and proposed Illinois rule 404(a)(2) codify this second exception.50

A particularly controversial facet of this exception involves the character of the rape victim. Illinois has recently enacted a “rape-shield” law,51 which provides that in prosecutions for rape or deviate sexual assault the prior sexual activity or the reputation of the

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47. People v. Willy, 301 Ill. 307, 133 N.E. 859 (1922). In that case, the defendant was charged with murder. The court stated: “[a]s a general proposition, the evidence of character should relate to the time when the character of the person will tend to illustrate the act in question.” Id. at 318, 133 N.E. at 864.
48. 1 WIGMORE (3d ed.), supra note 5, § 63.
50. FED. R. EVID. 404(a)(2) and PROPOSED ILL. R. EVID. 404(a)(2) (Final Draft). See text at note 16 supra. The manner and scope of prosecutorial rebuttal is addressed infra at notes 102 to 169 and accompanying text.
51. ILL. REV. STAT. ch. 38, § 115-7 (1978) provides:
   a. In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.
   b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Unless the court finds that such evidence is available, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim and the defendant.

This statute greatly alters the common law in Illinois. Previously, where the defense to a rape charge was consent by the victim, the defendant was permitted to show the general reputation of the prosecutrix for immorality. The testimony had to be confined to the general reputation before the act charged, and evidence of specific acts was not permitted. See People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30 (1962); People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 573 (1954); People v. Dorn, 46 Ill. App. 3d 820, 361 N.E.2d 353 (1977). There was an exception to this rule, however, which allowed evidence of specific prior acts between the defendant and complainant to establish the familiarity between the parties. See People v. Kraus, 395 Ill. 233, 69 N.E.2d 885 (1946); People v. Burke, 152 Ill. App. 2d 159, 201 N.E.2d 636 (1964).

The plight of the rape victim has received a great deal of attention and comment in the last several years, and a number of states have enacted so-called “rape shield laws.” The controversy surrounding this area is beyond the scope of this article. For more complete discussion, see: Comment, Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?, 3 HOFSTRA L. REV. 403 (1975); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 CAL. L. REV. 919 (1973); Hibey, The Trial of a Rape Case: An Advocate’s Analysis of Corroboration, Consent, and Character, 11 AM. CRIM. L. REV. 309 (1973).
alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused. Before the trial judge can allow any such evidence, he must hold an in camera hearing to determine whether this evidence is actually available to the defendant. Similarly, the Federal Rules of Evidence have been amended to include a new provision for the protection of the privacy of rape victims. New federal rule 412 excludes evidence of the past sexual behavior of an alleged rape victim, subject to certain very limited exceptions.52

52. Fed. R. Evid. 412 provides:

Rule 412, Rape Cases; Relevance of Victim’s Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim’s past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is —

(1) admitted in accordance with subdivisions (c) (1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim’s past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall
Evidence of Witness Character

The third exception to the general exclusionary rule deals with the character of witnesses. The common law exception is codified in federal and proposed Illinois rule 404(a)(3) and allows the character of witnesses to be examined as provided in rules 607, 608.

be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term ‘past sexual behavior’ means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

Sec. 3. The amendments made by this Act shall apply to trials which begin more than thirty days after the date of the enactment of this Act.


54. Fed. R. Evid. 607 provides: "Who May Impeach: The credibility of a witness may be attacked by any party, including the party calling him." The Federal Rule is different from Proposed Ill. R. Evid. 607 (Final Draft) which provides:

The credibility of a witness may be attacked by any party, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. The foregoing exception does not apply to impeachment by means of a prior inconsistent statement admitted pursuant to 801(d)(1)(A), Rule 801(d)(2) or 803.

The Committee Comments make it clear that the proposed rule codifies the present Illinois common law requirements of affirmative damage and surprise. Proposed Ill. R. Evid. 607 Committee Comments (Final Draft). Rule 607 will not be considered any further since this article is concerned with methods and subject matter of character impeachment, and assumes that the party seeking to impeach has proper standing to do so.

55. Fed. R. Evid. 608 provides:

Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Proposed Ill. R. Evid. 608 (Final Draft) provides:

Evidence of Character of Witness.

The credibility of a witness may be attacked or supported by evidence of reputation, but subject to these limitations: (1) The evidence may refer only to character
and 609. These rules address the manner, scope, and subject matter of witness impeachment and are in general harmony with the common law. This area will now be discussed by examining the common law, the proposed Illinois rules, and the federal rules.

**USE OF CHARACTER EVIDENCE FOR IMPEACHMENT OF WITNESSES**

*Attacking or Supporting Witness Veracity: Rule 608*

Character evidence may be used for impeachment purposes as well as substantive purposes. For example, if a criminal defendant calls a supporting character witness under the first exception to the exclusionary rule, the prosecution may attack the witness's own character for veracity. One of the methods by which this may be accomplished is by calling an impeaching witness, whose testimony must be directed at and confined to the prior witness's reputation for truthfulness in the community.

Courts differ in their interpretation of what constitutes an attack on the truthfulness of a witness, but the general consensus is that mere contradiction is not enough. Rather, an impeaching witness must directly testify that the prior witness has a bad reputation for truthfulness. After such testimony, the impeaching witness may be asked one further question: "Knowing that reputation, would you believe him under oath?" It has long been recognized that this

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for truthfulness or untruthfulness, and (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

For discussion of the differences between these two similar rules, see notes 60 to 69 and 84 to 86 and accompanying text infra.

56. See note 100, infra, for the text of Fed. R. Evid. 609. See also note 94, infra, for the text of PROPOSED ILL. R. Evid. 609 (Final Draft).

57. McCORMICK (2d ed.), supra note 18, § 44 at 90.


59. Frye v. Bank of Illinois, 11 Ill. 367 (1849). The court stated the rules as follows: The proper question to be put to a witness called to impeach another is, whether he knows the general reputation of the person sought to be impeached among his neighbors, for truth and veracity. If this question be answered affirmatively, the witness may then be inquired of as to what that reputation is, and whether from that reputation he would believe him on oath.

Id. at 379. Cf. People v. Lehner, 328 Ill. 216, 157 N.E. 211 (1927), where the impeaching witnesses, after testifying that the general reputation of the defendant for truth and veracity was bad, were asked: "Based on that reputation, would you believe (the defendant) under oath in any matter in which he was personally interested?" The court held that it was error to allow the witness to consider in the question the matter of the personal interest of the defendant. See also Burke v. Zwick, 299 Ill. App. 558, 20 N.E.2d 912 (1939); 7 WIGMORE (3d ed.), supra note 5, §§ 1895, 1986.

The prior witness being impeached could, of course, be the defendant in a criminal action.
question abrogates any meaningful distinction between opinion and reputation testimony. This recognition served as one of the strongest arguments in favor of allowing opinion evidence under the federal rules. Federal rule 608 therefore permits the impeaching witness to testify as to his own opinion of the prior witness's truthful character. Proposed Illinois rule 608, however, would continue to prohibit the use of opinion testimony.

A direct attack on the character witness's reputation for truthfulness allows the proponent of the impeached witness to bolster the witness's credibility. This may be accomplished by calling a witness to rehabilitate the character witness through testimony regarding the truthful reputation of the impeached witness. It is only after the character witness's truthful reputation is directly impugned that a rehabilitation witness may be called. The rehabilitation witness may be impeached by cross-examination, but it is not permissible for the opponent to call a further impeaching witness to directly attack the character of the rehabilitation witness. Once again, the common law and proposed Illinois rule 608 forbid opinion evidence in this situation while federal rule 608 allows the use of such testimony.

Prohibition on Impeachment by Prior Bad Acts

Evidence that a witness has been arrested, indicted, or accused

It should be noted that by taking the witness stand and testifying generally the defendant does not "open the door" to questioning about his character for the particular trait involved in the alleged crime; rather, he has placed only his credibility "in issue," and impeachment, whether by cross-examination or by an impeaching witness, is restricted to evidence concerning his reputation for truth and veracity. The policy behind this limitation is to encourage the defendant to testify in his own behalf without fear of attack through "other crimes" evidence. See generally LOUIsELL & MUELLER, supra note 20, § 138 at 103.

63. 7 Fed. R. Evid. 608. See note 55, supra for the text of federal rule 608.
64. Proposed Ill. R. Evid. 608 (Final Draft). See note 55, supra for the text of proposed rule 608.
65. The general test for the admissibility of such testimony is whether evidence supporting the impeached witness's character is logically relevant to the impeaching fact. "The wall, attacked at one point, may not be fortified at another and distinct point." McCormick (2d ed.), supra note 18, § 49 at 103.
68. Proposed Ill. R. Evid. 608 (Final Draft). See note 55 supra for the text of proposed rule 608.
69. Fed. R. Evid. 608. See note 55, supra for the text of federal rule 608. See also notes 84 to 86 infra for a discussion of the use of specific instances of conduct to attack or support the character of a witness.
of any unsavory conduct which has not resulted in a conviction, offered for the purpose of impairing credibility, is prohibited by the majority of common law jurisdictions,\(^7\) including Illinois.\(^7\) Furthermore, inquiries on cross-examination concerning such allegations are prohibited.\(^7\) If evidence of bad acts were tolerated, the resultant cycle of charge counteracted by refutation would mire every trial in wholly immaterial, irrelevant, and time consuming side issues. Additionally, cross-examination of witnesses as to their character, reputation, and past activities when not relevant or material exposes them to unjustifiable and unnecessary ridicule and embarrassment.\(^7\)

It is proper, however, on cross-examination to bring out the witness’s unlawful or disreputable occupation and activity as a matter affecting credibility.\(^7\) For example, in *People v. White*\(^7\) a defense witness testified on direct examination that he was a bartender; on cross-examination it was disclosed that the witness operated a gambling house. The Illinois Supreme Court stated:

The law does not permit proof of other offenses not connected with the charge upon which the defendant is being tried, but the prosecution could not be hampered nor restrained in perfectly legitimate cross-examination because an inference unfavorable to defendant might arise. Surely the prosecution was not required to permit this witness to appear before the jury as a man of high character and worthy of confidence when he was disreputable and his chief occupation that of a law-breaker.\(^7\)

\(^{70}\) *McCormick* (2d ed.), *supra* note 18, § 42 at 83.

\(^{71}\) *People v. Mason*, 28 Ill. 2d 396, 192 N.E.2d 835 (1963); *People v. Soto*, 64 Ill. App. 2d 94, 212 N.E.2d 353 (1965); see generally *Ladd*, *supra* note 3, at 508-09.

\(^{72}\) *People v. Mason*, 28 Ill. 2d 396, 192 N.E.2d 835 (1963). The court stated:

The rule prevailing in most jurisdictions and supported by the great weight of authority is that it is not permissible to show that a witness has been arrested, charged with a criminal offense, or confined in prison, or to inquire as to such fact upon cross-examination, where no conviction is shown, for the purpose of impairing his credibility.

*Id.* at 401-02, 192 N.E.2d at 837.

\(^{73}\) *Ladd*, *supra* note 3, at 508-09.


\(^{75}\) 251 Ill. 67, 95 N.E. 1036 (1911).

\(^{76}\) *Id.* at 73-74, 95 N.E. at 1039 (case cites omitted). In *People v. Bond*, 281 Ill. 490, 118 N.E. 14 (1917), the court held it was proper for the state to cross-examine a defense witness as to whether or not she was the keeper of a house of ill fame, saying: “If a witness is engaged in an unlawful and disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character who is engaged in a lawful and respectable occupation.”

*Id.* at 493, 118 N.E. at 18. See also *People v. Crump*, 5 Ill. 2d 251, 125 N.E.2d 615 (1955) (state’s principal witness had been a jointly indicted codefendant; held that defendant should
Furthermore, the fact that a witness has been charged with or arrested for a crime may be brought out when it reasonably tends to show that his testimony might be influenced by bias, prejudice, interest, or a motive to testify falsely. Thus, the defendant may cross-examine a state’s witness to show that recent criminal charges pending against the witness have been dropped or reduced; such cross-examination impairs the credibility of the witness by showing that he has something to gain by testifying against the defendant. As a rule, the defendant is allowed the widest latitude in this area. Because the court must be alert to protect the witness from harassment, evidence offered to show bias or prejudice must be truly probative of these traits in order to be admissible.

In a situation where the cross-examination of a witness reveals bias or prejudice, the party offering the witness is entitled to rehabilitate him on re-direct examination. If, in the exercise of judicial discretion, the reasons for the bias or prejudice have a genuine tendency to rehabilitate, then such reasons are clearly a proper and relevant subject of re-direct examination. The trial judge should prohibit such questioning, however, if its rehabilitative tendency is not apparent, and the justification for inquiry into the source of the bias or prejudice appears to serve as a pretext to inject extraneous or inflammatory issues into the case.

Present Illinois common law is codified in proposed Illinois rule 608; the rule is directed specifically at evidence of witness character and omits all mention of prior specific instances of witness conduct. In contrast, federal rule 608(b) permits cross-examination of a witness concerning specific incidents of conduct, other than

have been able to show witness was or had been a drug addict or had used narcotics on the day of the alleged crime); People v. Gibson, 133 Ill. App. 2d 722, 272 N.E.2d 274 (1971) (reviewing cases).

82. People v. Burke, 52 Ill. App. 2d 159, 201 N.E.2d 636 (1964). In that case the defendant was prosecuted for incest with his sixteen-year-old daughter. On cross-examination the prosecutrix admitted that she hated the defendant before the incident for which he was charged took place. On re-direct, she was permitted, over strenuous objection, to state that the basis for her hatred was that the defendant had on previous occasions performed unnatural sexual acts upon her.
83. Id.
84. PROPOSED ILL. R. EVID. 608 (Final Draft). See note 55 supra for the text of proposed rule 608.
85. FED. R. EVID. 608(b). See note 55 supra for text of federal rule 608(b).
criminal convictions, if, in the discretion of the court, such inquiry would be probative of truthfulness or untruthfulness. Under the federal rule, the witness also may be examined concerning the character for truthfulness or untruthfulness of an individual to whose character that witness has testified. The deliberate omission by the Illinois drafters of a counterpart to federal rule 608(b) demonstrates an intent to foreclose questioning about specific instances of prior conduct of witnesses. 86

Impeachment Through Prior Convictions: Rule 609

A witness’s credibility also may be impaired by evidence of his criminal conduct. Illinois common law therefore permits evidence of prior felony convictions or of prior convictions for offenses involving dishonesty or false statements. 87 However, should the court determine that “the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice” to the defendant, such evidence will not be admitted. 88 This standard applies to both civil and criminal cases. 89 Where the witness is a defendant in a criminal case, evidence of a conviction cannot be elicited from him on cross-examination but must be proven by the record of conviction. 90 This restriction does not apply to any other witnesses. 91

86. See Proposed Ill. R. Evid. 405, Committee Comments (Final Draft).
88. Id. In Montgomery, the court adopted the proposed rule 609 of the Federal Rules of Evidence and held that a 21-year-old conviction was too remote in time to affect the credibility of the accused who took the stand and that the trial court does have discretion to prevent admission into evidence of a prior conviction where “the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.” 47 Ill. 2d 510, 516, 268 N.E.2d 695, 698.

At common law in Illinois only an “infamous” crime (defined in the Code of Criminal Procedure of 1963, Ill. Rev. Stat. ch. 38, §124-1(1977)) could be introduced into evidence to impeach the testimony of a witness, whether a party or not. See, e.g., People v. Lehner, 326 Ill. 2d 216, 157 N.E. 211 (1927). Montgomery eliminates the distinction between infamous crimes and misdemeanors for impeachment purposes in criminal cases.

89. The Montgomery rule was extended to civil cases in Knowles v. Panopoulos, 66 Ill. 2d 585, 363 N.E. 2d 805 (1977). In that case decedent, a passenger on a motorcycle driven by his stepbrother, Rigby, was killed as a result of a collision with defendant’s vehicle. At the trial, on cross-examination and over objection, the court allowed evidence of the prior conviction of Rigby for criminal trespass to a vehicle, a misdemeanor. Plaintiff contended that only infamous crimes (as defined by the Code of Criminal Procedure of 1963, Ill. Rev. Stat. ch. 38 § 124-1 (1977)) could be introduced to impeach a witness in a civil proceeding. The court held that the standards announced in Montgomery were applicable to civil cases and that, for the purposes of impeachment of testimony, there is no distinction between misdemeanors and infamous crimes when introducing prior convictions in civil and criminal proceedings.

90. People v. Dye, 23 Ill. App. 3d 453, 319 N.E. 2d 102 (1974). In that case, the prosecution offered in evidence the original court file containing the record of the defendant’s prior burglary conviction. The court upheld this method of proof:
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Convictions over ten years old are generally inadmissible.\textsuperscript{92} When evidence of a conviction is allowed, questioning is limited to the name of the crime and the punishment imposed.\textsuperscript{93}

Proposed Illinois rule 609\textsuperscript{94} would significantly alter the foregoing

In criminal cases conviction of any crime may be shown for the purpose of affecting the credibility of a witness (Ill. Rev. Stat. 1971, ch 38, par. 155-1), but there is no comparable provision relating to the method of proof. However, case law has developed to encourage a defendant to take the stand by avoiding the prejudicial effect of the proof of the prior conviction coming from a defendant's own testimony on cross-examination and requiring the State to prove the conviction by the record.

\textit{Id.} at 455, 319 N.E.2d at 103.


91. People v. Halkens, 386 Ill. 167, 53 N.E.2d 923 (1944). In that case, a witness for defendant was cross-examined concerning his prior robbery convictions. After a lengthy review of the history and policy of the impeachment-by-conviction rule, the court concluded that it was proper for a witness, who was not a defendant, to be questioned about his prior conviction on cross-examination.


93. MCCORMICK (2d ed.), supra note 18, § 43 at 88.

94. PROPOSED ILL. R. EVID. 609 (Final Draft) reads:

\textit{Impeachment by Evidence of Conviction of Crime}

(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.

(c) Effect of pardon, annulment or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(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.
standards. First, before a conviction could be introduced, the court would have to decide that the probative value of the evidence substantially outweighs the prejudicial effect to a party.\textsuperscript{95} Rule 609's reversal of the present standard reflects the view of the majority of the Illinois Supreme Court Committee on Rules of Evidence that "as to the issue of credibility the probative value of a prior conviction is slight in comparison with its prejudicial effects and should generally be excluded."\textsuperscript{96} Secondly, evidence of conviction would not be admissible unless the proponent gave the adverse party advance written notice sufficient to provide the adverse party with a fair opportunity to contest the use of such evidence.\textsuperscript{97} The rule, however, would permit evidence of a conviction to be brought out on cross-examination of the defendant, as well as by the record of conviction.\textsuperscript{98}

The minority of the Illinois Supreme Court Committee strongly criticized the requirement put forth in proposed rule 609 that evidence of a conviction may be used to impeach only if the court determines that the probative value "substantially" outweighs its prejudicial effect to a "party."\textsuperscript{99} The minority urged the Illinois Supreme Court to adopt the standard of federal rule 609.\textsuperscript{100} The

\begin{itemize}
\item \textsuperscript{95} PROPOSED ILL. R. EVID. 609(a) (Final Draft).
\item \textsuperscript{96} PROPOSED ILL. R. EVID. 609, Majority Discussion (Final Draft).
\item \textsuperscript{97} PROPOSED ILL. R. EVID. 609(f) (Final Draft).
\item \textsuperscript{98} PROPOSED ILL. R. EVID. 609(a) (Final Draft).
\item \textsuperscript{99} PROPOSED ILL. R. EVID. 609, Minority Discussion (Final Draft).
\item \textsuperscript{100} FED. R. EVD. 609 provides:
\end{itemize}

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\item \textsuperscript{(1)} was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or
\item \textsuperscript{(2)} involved dishonesty or false statement, regardless of the punishment.
\end{itemize}
\item \textsuperscript{(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. However, evidence of a conviction more than 10 years old as calculated herein 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.
\item \textsuperscript{(c)} Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if \begin{itemize}
\item \textsuperscript{(1)} the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure
federal rule provides that this evidence shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. The admissibility of conviction evidence is thus determined by judicial discretion under the federal rule. By recommending that the probative value "substantially" outweigh the prejudicial effect to a "party," the proposed Illinois rule would virtually eliminate the court's exercise of discretion.\footnote{01}

PROBLEMS AND DANGERS PRESENTED BY CHARACTER EVIDENCE

In a case where the criminal defendant "opens the door" to character evidence based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

101. PROPOSED ILL. R. EVID. 609, Majority Discussion (Final Draft). Impeachment through evidence of prior convictions has been severely criticized, see Spector, Impeaching The Defendant By His Prior Convictions And the Proposed Rules Of Federal Evidence: A Half Step Forward And Three Steps Backward, 1 Loy. Chi. L.J. 247 (1970); Note, Impeaching the Accused by His Prior Crimes—A New Approach to an Old Problem, 19 Hastings L.J. 919 (1968). Evaluation of the wisdom or folly of this mode of impeachment is beyond the scope of this article; however, it should be noted that the Illinois Supreme Court, in People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971), stated that it is within the sound discretion of the trial court to refuse to allow a defendant to be impeached by a prior criminal conviction if the trial judge believes the prejudicial effect of impeachment outweighs the probative relevance of the prior conviction to the issue of credibility. Citing Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), the court noted the various factors the Gordon court had suggested be considered in making the determination, including the nature of the crime, nearness or remoteness, the subsequent career of the person, and whether the crime was similar to the one charged. Gordon pointed out the tendency of a lay jury to reason: "If he did it before, he probably did it this time." Impeachment by conviction for the same crime, the Gordon court therefore concluded, should be used "sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of 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." 383 F.2d at 940. See Spector, Impeachment By Past Convictions: What Hath Montgomery Wrought?, 10 Loy. Chi. L.J. 339 (1979).

See also People v. Jacobs, 51 Ill. App. 3d 455, 366 N.E.2d 1064 (1977), where the court points out that there is less possibility of unfair prejudice when a prior conviction is used to impeach a witness than when it is used to impeach a defendant, because a defendant who has committed a previous crime may be convicted because of his prior offense, rather than because of the lack of credibility in his defense.
acter evidence by presenting evidence of his past character, the prosecution is permitted to counteract the defendant's favorable evidence in several ways. As previously discussed, the prosecution can attack the defendant's character witness by calling its own witnesses to impugn the character witness's reputation for veracity. Furthermore, the defendant's witness may be impeached by questioning designed to impair the witness's credibility, for example, by cross-examining the witness about a prior inconsistent statement.

The prosecution may also rebut the defendant's evidence by calling its own witnesses to testify to the defendant's bad character reputation. Here, the prosecution witnesses are not attacking the defendant's character witnesses, but rather are directly contradicting them. In the event this method is employed, the prosecution must initially establish that the rebuttal witness is familiar with the defendant's reputation for the trait in issue. The witness may respond that the reputation is bad, but in Illinois he may neither testify as to specific acts nor from his personal knowledge.

Finally, the prosecution may cross-examine the defendant's character witnesses in an effort to test the witness's knowledge of the trait to which he has just testified, and the factual basis supporting that testimony. In Illinois, however, the permissible manner and scope of this type of cross-examination has been the subject of a long line of confusing and conflicting supreme court opinions; as a result, it is unclear what procedure should be followed in this area. This problem will now be analyzed by discussing the prevailing majority practice, contrasting Illinois case law to the majority rule,

102. See note 57 supra and accompanying text.
106. People v. Wendt, 104 Ill. App. 2d 192, 244 N.E.2d 384 (1969). That case involved a defendant charged with taking indecent liberties with a child. The principal of the school attended by the complainant was called by the defense to testify about the complainant's reputation for truth and veracity in the community. During the direct examination of the witness it became apparent that he was basing his testimony on his own personal opinion and knowledge, rather than the complainant's reputation. The court therefore struck the witness's testimony and held: "A witness may testify concerning his knowledge of another witness's general reputation in a particular community for truth and veracity. However, the testimony may not be based upon the personal opinion of the witness, and must not be concerned with specific instances as opposed to general reputation." Id. at 210, 244 N.E.2d at 390.
107. Louisell & Mueller, supra note 20, § 138 at 98.
108. See notes 132 to 167 infra and accompanying text.
and examining how this facet of Illinois character law would be affected by the proposed rules.

**Majority Practice Regarding Cross-Examination of Character Witnesses**

The prosecution may question the character witness concerning the basis of his expressed judgment, his opportunities for forming that judgment, his acquaintance with the defendant, and the number of persons he has heard relate opinions of the defendant. In nearly all jurisdictions, the witness may also be asked whether he has heard rumors or reports of prior associations, vices, or acts by the defendant that are inconsistent with the good character to which he has just testified. For example, if the defendant is charged with robbery, the character witness may be asked whether he has heard that the defendant was previously arrested for burglary, even though this prior charge did not result in a conviction. In those jurisdictions that forbid “personal knowledge” testimony and allow only “reputation” testimony, the questions must be couched in the form of “have you heard” rather than “do you know.” The question must be asked in “good faith”; in other words, the prosecution must demonstrate to the court that there is indeed a factual basis underlying the inquiry. In a case where the witness denies having

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112. Udall, *supra* note 15, at 291; *McCormick* (2d ed.), *supra* note 18, § 191 at 458; *Louselle & Mueller*, *supra* note 20, § 138 at 100. See also *Michelson v. United States*, 335 U.S. 469 (1948). The *Michelson* Court, after noting that the trial judge satisfied himself that counsel was not merely engaged on a fishing expedition, but had an actual event as the target of his question, stated:

This procedure was recommended by Wigmore. But analysis of his innovation emphasizes the way in which law on this subject has evolved from pragmatic considerations rather than from theoretical consistency. The relevant information that is permissible to lay before the jury is talk or conversation about the defendant’s being arrested. That is admissible whether or not an actual arrest had taken place; it might even be more significant of repute if his neighbors were ready to arrest him in rumor when the authorities were not in fact. But before this relevant and proper inquiry can be made, counsel must demonstrate privately to the court an irrelevant and possibly unprovable fact—the reality of arrest. From this permissible inquiry about reports of arrest, the jury is pretty certain to infer that defendant had in fact been arrested and to draw its own conclusions as to character from that fact. The Wigmore suggestion thus limits legally relevant inquiries to those based on legally irrelevant facts in order that the legally irrelevant conclusion which the jury probably will draw from the relevant questions will not be based on unsupported or untrue innuendo. . . Yet, despite its theoretical paradoxes and deficiencies, we
heard of the particular incident alleged by the rumor or denies hav-
ing heard the rumor, the prosecution must “take the answer” and extrinsic evidence to substantiate the rumor is not permitted. If, however, the witness admits being familiar with these rumors or incidents, he may then be asked whether, assuming the reports were true, he would still regard the defendant’s reputation favorably.

Theoretically, inquiries concerning prior bad acts are made to test the knowledge and credibility of the character witness. If the wit-
ness has never heard the rumors that such alleged conduct would generate, the jury may reasonably question the witness’s actual familiarity with the defendant’s reputation. Conversely, should the witness admit to having heard these damaging reports but still assert that the defendant’s reputation for the particular trait is good, his credibility is ruined and his value to the defendant as a character witness is negligible.

Thus, under the guise of testing the knowledge of the character witness, the jury receives indirectly the very information the general exclusionary policy is designed to suppress. The prosecution, by questioning the character witness about a report of the defendant’s arrest, leads the jury to the almost certain conclusion that the arrest has in fact been suffered; the question itself does the damage, regard-
less of the response. The jury is solemnly instructed that the damming innuendo inherent in the query is to be considered only in the context of the witness’s credibility, not as a substantive reflec-
tion on the character of the accused. Yet almost certainly the jury is incapable of such mental gymnastics, and of course the prosecu-
tion is fully cognizant of this fact.

In this area, the United States Supreme Court’s decision in Michelson v. United States is generally acknowledged to be the definitive judicial pronouncement on the operation and rationale of the majority practice in criminal cases. In Michelson, the defendant was convicted in 1947 of bribing a federal revenue agent. The

approve the procedure as calculated in practice to hold the inquiry within decent bounds.

Id. at 481 n.18.


114. Id.

115. LOUSSELL & MUELLER, supra note 20, § 138 at 98-99.

116. Id.

117. Ladd, supra note 3, at 531.


119. 335 U.S. 469 (1948).

120. LOUSSELL & MUELLER, supra note 20, § 138 at 86.

defendant admitted payment, but claimed it was done in compliance with the demands and threats of the agent. The case turned on whether the jury believed the agent or the accused.\(^\text{122}\)

On direct examination, the defendant acknowledged a misdemeanor conviction in 1927, twenty years earlier.\(^\text{123}\) Five character witnesses then were called by the defendant; each testified to his good reputation for honesty and truthfulness. On cross-examination, four of these witnesses were asked whether they had ever heard that the defendant had been arrested “on October 11, 1920 . . . for receiving stolen goods?”\(^\text{124}\) Each answered, no. The propriety and usefulness of this cross-examination directed at rumors of past misconduct was challenged vehemently by the defendant. The prosecution privately assured the trial court that there was factual basis to the question, and the jury received careful instructions concerning the limited purpose for which the questions were allowed.\(^\text{125}\)

The Court, in an opinion by Justice Jackson, noted the general rule excluding the initiation of “prior bad acts” evidence by the prosecution,\(^\text{126}\) and went on to review, evaluate, and approve the "unique practice concerning character testimony" prevailing in common law courts.\(^\text{127}\) The Supreme Court also stated that the Second Circuit Court of Appeals had asked it specifically to adopt the "Illinois rule," a rule that the Court characterized as one "which allows inquiry about arrest, but only for very closely similar if not identical charges . . . ."\(^\text{128}\) However, the Court recognized that the good character which the defendant in "Michelson" had sought to establish was broader than the crime charged and included the traits of "honesty and truthfulness" and "being a law-abiding citizen:"

Possession of these characteristics would seem as incompatible with offering a bribe to a revenue agent as with receiving stolen goods. The crimes may be unlike, but both alike proceed from the same defects of character which the witnesses said this defendant was reputed not to exhibit. It is not only by comparison with the crime on trial but by comparison with the reputation asserted that a court may judge whether the prior arrest should be made subject

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\(^{122}\) Id. at 471.

\(^{123}\) Id.

\(^{124}\) Id. at 472.

\(^{125}\) Id.

\(^{126}\) Id. at 475-76.

\(^{127}\) Id. at 486.

\(^{128}\) Id. at 483.
of inquiry. By this test the inquiry was permissible. It was proper
cross-examination because reports of his arrest for receiving stolen
goods, if admitted, would tend to weaken the assertion that he was
known as an honest and law-abiding citizen. The cross-
examination may take in as much ground as the testimony it is
designed to verify. To hold otherwise would give defendant the
benefit of testimony that he was honest and law-abiding in reputa-
tion when such might not be the fact; the refutation was founded
on convictions equally persuasive though not for crimes exactly
repeated in the present charge. 129

On this basis, the suggestion by the Second Circuit was rejected as
"inexpedient." 130 The Court concluded that the substantive differ-
ences between Illinois and the majority were so slight that adoption
of the Illinois rule was not worth the "confusion and error it would
engender . . . for an almost imperceptible logical improvement, if
any . . . ." 131

Illinois Practice Regarding Cross-Examination of Character
Witnesses

It is doubtful that the Supreme Court and the Second Circuit
were correct in their characterization of Illinois law as "allow[ing]
inquiry about arrest, but only for very closely similar if not identical
charges. . . ." 132 The Illinois Supreme Court has failed to articulate
a consistent standard in this area, and Illinois case law simply does
not lend itself to such definitive summarization. The court's failure,
and the confusion it has fostered, is demonstrated by both Professor
Cleary and Dean McCormick in their discussions of the court's deci-
sions on this subject.

Professor Cleary first notes that in People v. Celmars, 133 the Illi-
nois Supreme Court held that specific instances of misconduct may

129. Id. at 483-84.
130. Id. at 483.
131. Id. at 487. At the conclusion of its opinion the Court made an oft-quoted statement:
We concur in the general opinion of courts, textwriters and the profession that much
of this law is archaic, paradoxical and full of compromises and compensations by
which an irrational advantage to one side is offset by a poorly reasoned counterpri-
vilege to the other. But somehow it has proved a workable even if clumsy system
when moderated by discretionary controls in the hands of a wise and strong trial
court. To pull one misshapen stone out of the grotesque structure is more likely
simply to upset its present balance between adverse interests than to establish a
rational edifice.

Id. at 486.
132. Id. at 483.
133. 332 Ill. 113, 163 N.E. 421 (1928).
not be brought out in cross-examination or shown in rebuttal.\textsuperscript{134} Cleary continues, however, that the court in \textit{People v. Hannon}\textsuperscript{135} and \textit{People v. Greeley}\textsuperscript{136} suggested that the "policy of this limitation may be circumvented by asking on cross-examination, under the guise of testing knowledge of reputation, whether the witness has heard rumors of misconduct of a kind to negative the character in question."\textsuperscript{137} Similarly, Dean McCormick begins by stating: "[T]here are indications (in Illinois) of a practice forbidding questions which specify particular acts or rumors thereof."\textsuperscript{138} McCormick goes on to conclude, however, that in \textit{Greeley} the Illinois Supreme Court approved the majority rule in dicta.\textsuperscript{139} Remarkably, the Illinois Supreme Court Advisory Committee completely omits any mention of this conflict; in the Comment on Proposed Rule 405, the committee, without discussion or dissent, cites \textit{Celmars} as authority for its view that cross-examination into specific instances of conduct is \textit{flatly} prohibited under present Illinois law.\textsuperscript{140}

A thorough analysis of the historical development of Illinois case law indicates that the confusion surrounding this subject is the result of several early, fundamental errors committed by the supreme court. \textit{Frye v. Bank of Illinois},\textsuperscript{141} an 1849 decision, represents the genesis of the character witness cross-examination problem. There, the defendant called a witness to testify that the mortgage in issue had been properly recorded. The complainant attacked the witness's credibility through evidence of specific acts that were unrelated to the general reputation of the witness for truth and veracity. The court held that the only proper method of witness impeachment was by inquiry confined to the general reputation of the witness for truth and veracity among his neighbors.\textsuperscript{142}

The Illinois Supreme Court next faced the issue of witness impeachment in \textit{McCarty v. People}.\textsuperscript{143} There, a defendant charged with murder offered evidence of his general reputation for good character; however, the defendant's character witnesses were not cross-examined on this point. The prosecution subsequently pre-

\textsuperscript{134} E. Cleary, \textit{Handbook of Illinois Evidence} § 12.8, at 212 (2d ed. 1963) [hereinafter cited as Cleary].
\textsuperscript{135} 381 Ill. 206, 44 N.E.2d 923 (1942).
\textsuperscript{136} 14 Ill. 2d 428, 152 N.E.2d 825 (1958).
\textsuperscript{137} Cleary, supra note 134, § 12.8 at 212.
\textsuperscript{138} McCormick (2d ed.), supra note 18, § 191 at 456 n.73.
\textsuperscript{139} Id.
\textsuperscript{140} Proposed Ill. R. Evid. 405, Committee Comments (Final Draft).
\textsuperscript{141} 11 Ill. 367 (1849).
\textsuperscript{142} Id. at 379.
\textsuperscript{143} 51 Ill. 231 (1869).
sented rebuttal evidence of rumors of the defendant’s specific acts of misconduct. In a cryptic opinion, the Illinois Supreme Court held that the trial judge erred in allowing this evidence to be presented; the court reasoned that no one would put his good character in issue “if it could be rebutted by proof of rumors or reports of particular aberrations.” It should be noted that the court’s ruling was addressed to the impermissible nature of the rebuttal evidence; the permissible method of character witness cross-examination was never considered. This important distinction was overlooked by the court in subsequent decisions.

Perhaps the most troublesome of these later decisions is Gifford v. People. There, the defendant was accused of rape. On cross-examination, the prosecution did not question the defendant’s character witness about the defendant’s reputation for chastity. Rather, the witness was asked, “Have you not heard people say that he was a gambler or gambled?” Later, after the defendant himself testified, he was compelled to state during cross-examination that he had visited houses of prostitution, and also that he had played cards for money. The court, citing McCarty, overturned the conviction, stating that particular acts of misconduct are never admissible to rebut evidence of a defendant’s good character. In addition, the court, relying on Frye, held that the questioning by the prosecution was improper to impeach the defendant’s reputation as a witness, since a witness’s reputation could only be impeached by proving that he has a poor reputation for truth and veracity, not by proof of specific acts.

A close reading of Gifford reveals that the court reached its decision without engaging in any significant analysis of the issues presented by the case. As a result, the court made three important conceptual errors. First, it applied McCarty, a case which had prohibited the introduction of specific bad acts during rebuttal, to a situation where specific bad acts were being inquired into on cross-examination of a defendant. The court thus apparently adopted a broad rule prohibiting inquiry into relevant prior bad acts of a defendant during cross-examination, even after a defendant has placed his own character in issue.

Secondly, the court applied Frye, where it had held that a witness’s credibility could be tested on cross-examination only by
evidence attacking his reputation for truthfulness, to an instance where the prosecution was attempting, through cross-examination, to use prior bad acts to refute the defendant's favorable character evidence. In effect, the court took a rule originally designed to protect a witness from irrelevant inquiries about his character and extended it to protect a defendant who had deliberately opened the door to such questioning.

Finally, the fact that the cross-examination of both the defendant and his character witness raised the issue of the defendant's prior gambling activities was never addressed by the court. By failing to take notice of this improper and irrelevant line of questioning, the court overlooked the only legitimate basis for reversal.148

Twenty-two years later, in 1899, the Illinois Supreme Court reinforced the Gifford errors in Aiken v. People.149 There, the defendant, a physician, was accused of performing an abortion which led to his patient's death. The physician introduced numerous witnesses who testified to his favorable reputation as a "peaceable and law-abiding" man. On cross-examination, several of these witnesses were asked whether they had ever heard rumors linking the defendant to the burning of some farm property years before; several answered that they had heard such reports. The witnesses, however, all gave negative responses when asked similar questions concerning the defendant's involvement in other abortions. Each of the questions asked of the character witnesses on cross-examination were in the acceptable "have you heard" form. Moreover, the questions were propounded to test the knowledge of the character witnesses. The prosecution neither offered evidence of specific bad acts nor queried the defendant himself about his past misconduct.

Clearly, under the majority rule this questioning was proper. The court, however, adhering to its decision in Gifford, reversed the defendant's conviction. Once again the court failed to properly analyze the evidentiary issues at hand. The court believed that the prosecution, by cross-examining the character witnesses about the defendant's prior bad acts, had introduced improper evidence about the defendant's character in rebuttal. Here, as in Gifford, the court misapplied McCarty, ignoring the distinction between the improper

148. It is interesting to note that the court could have reversed the defendant's conviction solely on the basis of this irrelevant and improper line of questioning. In essence, it appears that the court recognized that some type of reversible error had occurred, but failed to perceive the precise nature of the error. Striving to find some basis on which to rest a reversal, the court misapplied two prior cases in a related area and, fortuitously, reached a proper result.
149. 183 Ill. 215, 55 N.E. 695 (1899).
introduction of specific bad acts during direct examination of rebuttal witnesses, and the legitimate cross-examination of a reputation witness concerning events which reflect poorly on the defendant's reputation. The court's decision is even more remarkable in light of the lucid dissent by Chief Judge Cartwright:

I understand the rule to be that on cross-examination the sources and the nature of [the character witness's] information may be inquired into, for the purpose of showing the grounds of the estimate given by the witness, and testing his credibility. It is not proper to prove in rebuttal specific acts of misconduct. . . . Such cross-examination is not permitted for the purpose of proving the particular fact, but to weaken the force of direct testimony. Under this rule, a witness who testifies to good reputation may be cross-examined concerning specific facts and rumors which are inconsistent with his direct testimony.\textsuperscript{150}

Judge Cartwright's dissent provided a basis for the court's ruling in a later encounter with this evidentiary problem. In \textit{People v. Willy},\textsuperscript{151} twenty-one witnesses attested to the peaceful reputation of the murder defendant. Nine witnesses testified to the defendant's bad reputation during the prosecution's case in rebuttal. On cross-examination, the defense counsel showed that the rebuttal witnesses had based their estimation of defendant's reputation solely on their own knowledge of a twenty-five-year-old arrest for indecent exposure. The court ruled that, due to the personal opinion and time attenuation involved, this testimony should have been stricken. For the first time, the Illinois Supreme Court systematically reviewed and analyzed the character evidence rules; the court stated that "a witness to good character may be asked, on cross-examination, if he has heard rumors or conversations of particular charges of the commission of acts inconsistent with the character which he is called upon to prove."\textsuperscript{152} This holding is in direct accord with the majority rule.

The Illinois Supreme Court again reversed course, however, in the case of \textit{People v. Celmars}.\textsuperscript{153} In \textit{Celmars}, a defendant charged with rape called his supervisor, the head waiter of the club at which the defendant worked, as a character witness. The supervisor was questioned about the defendant's general reputation for truth and veracity; he replied that the defendant was "attentive to duty and sober-

\textsuperscript{150} \textit{Id.} at 220, 55 N.E. at 698.
\textsuperscript{151} 301 Ill. 307, 133 N.E. 859 (1922).
\textsuperscript{152} \textit{Id.} at 319, 133 N.E. at 864.
\textsuperscript{153} 332 Ill. 113, 163 N.E. 421 (1928).
minded.” On cross-examination the state’s attorney asked the witness, “Did you make it your business to learn whether he had ever been in any penal institutions?” and “Well, did you know about his being in the reformatory?”

The court stated that the trait of being “attentive to duty and sober-minded” was irrelevant to the true inquiry involving the defendant’s reputation for chastity. Although this finding was correct, the court overlooked the improper form of the subsequent cross-examination. No mention was made of the fact that the prosecutor’s questions were propounded in the “do you know” rather than the “have you heard” form. Instead, without foundational development or analysis, the court, citing Aiken, Gifford, and McCarty, held: “On cross-examination or in rebuttal of proof of good character, particular acts of misconduct may not be shown.”

In reaching this singular conclusion, the court made no attempt to distinguish between cross-examination directed at the foundation of witness testimony, witness credibility, rebuttal testimony, and personal opinion testimony. Furthermore, the court totally omitted any mention of the Willy ruling, a considered analysis made only eight years before.

The Illinois Supreme Court again confronted the problems and inconsistencies of this line of cases in People v. Hannon. In Hannon, the defendant, charged with assault with intent to murder, produced two character witnesses who testified to his reputation as a peaceful and law-abiding citizen. On cross-examination, the state asked these witnesses if they knew of the defendant’s arrests for

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154. Id. at 117-18, 163 N.E. at 423.
155. Id.
156. This confusion continued in subsequent decisions by the court. For example, in People v. Anderson, 337 Ill. 310, 169 N.E. 243 (1929), the defendant’s character witnesses were asked such questions as, “Do you know of your own knowledge whether the defendant . . . was in any police trouble prior to this? Do you know whether or not, of your own knowledge at that time, whether or not he was in trouble?” Again the court failed to comment on the form of these questions, and made no mention of Willy or its statement approving cross-examination directed at the witness’s familiarity with rumors. Furthermore, the court confused witness impeachment with cross-examination of the witness respecting the character of the defendant. Citing Celmars and Aiken, the court held:

The reputation of a witness cannot be impeached by proof of particular acts. It must be by proving his general reputation, for the particular crime with which he is charged, to be bad. On cross-examination or in rebuttal of proof of good character particular acts of misconduct may not be shown.

Id. at 332, 169 N.E. at 251. This litany was repeated several years later in 1937 in People v. Page, 365 Ill. 524, 6 N.E.2d 845 (1937). This time, however, the defendant’s character witnesses were asked if they had heard of defendant being arrested. Again the court failed to discuss either the form of the question or the Willy case.

157. 381 Ill. 206, 44 N.E.2d 923 (1942).
disorderly conduct and for running a gambling house. The court stated that, under existing Illinois precedent, such cross-examination should not be permitted. It recognized that the majority rule permitted cross-examination directed at rumors of particular acts, and observed that this practice differed sharply from the improper inquiry directed at personal knowledge. In addition, the court noted that it was particularly objectionable to cross-examine concerning irrelevant acts of misconduct. Here, the questions asked of the defendant's character witnesses on cross-examination had assumed that the defendant had been arrested more than once for disorderly conduct and had operated a gambling house. The court reversed the defendant's conviction based on the fact that the witnesses were not questioned about rumors of the defendant's misconduct, but were interrogated as to their own knowledge of such assumed misconduct. The court emphasized that while in many jurisdictions character witnesses may be cross-examined as to rumors or reports of specific acts generically related to the trait in issue, in this instance the prosecution had questioned the character witnesses about acts which "were in no way connected with nor related to the commission of the crime of assault with intent to murder."  

Although the analysis by the Hannon court was superficial in many respects, the decision implicitly adopts the majority doctrine. Interestingly, the Hannon case was held out to the United States Supreme Court in Michelson v. United States as representing an alternative to the majority practice. The Supreme Court recognized, however, that there was no perceptible difference between the putative "Illinois Rule" of Hannon and the majority rule approved in Michelson.  

The Hannon ruling should have resolved any remaining conflicts in Illinois case law. Unfortunately, this was not to be. In People v. Stanton, the court handed down a vague opinion which once again obscured this area. In Stanton, the defendant, charged with the rape of a twelve-year-old girl, called his former wife as a character witness to testify to his good reputation for chastity. On cross-

158. Id. at 211-12, 44 N.E.2d at 926.
159. Although the court discussed the problems presented by character witness cross-examination, and mentioned the major Illinois cases dealing with the subject, it failed to recognize the inconsistencies and misconceptions evident in its early decisions. As noted above, several of these decisions have sharply divergent holdings. Additionally, many are based on unsound premises. The Hannon court, however, made no analytical attempt to harmonize the rationales of such cases as McCarty, Gifford, Aiken, Celmars, or Willy.
160. 335 U.S. 469, 474 n.4, 483 n. 21, 486-87 (1948).
161. Id. at 486-87.
162. 1 Ill. 2d 444, 115 N.E.2d 630 (1953).
examination she was asked by the prosecutor whether she had told the police that two other women were pregnant by the defendant; the witness replied, "No. I didn't say that. Just one woman was pregnant by him. The other girl did not have sexual intercourse with him. The other woman was pregnant." The court, reaching back to the holding in the antiquated Aiken case, held that this line of cross-examination constituted reversible error: "The law is clear that particular acts of misconduct cannot be shown, either on cross-examination or in rebuttal of proof of good character." 163

The Stanton holding is perplexing for several reasons. First, the court revived the obsolete Aiken holding to state that inquiries on cross-examination into specific bad acts of the defendant were impermissible. In so doing, the court ignored the Hannon decision, which had implicitly permitted such inquiries if framed in the "have you heard" form. Although the court recognized that the question asked by the prosecution should have been excluded, it failed to analyze why the trial court's decision was wrong. On direct examination, the character witness had been questioned about the general reputation of the defendant, not about her personal opinion or personal knowledge of the defendant's chastity. Thus, the only proper method of cross-examination would have been to ask the witness whether she had heard of rumors or acts inconsistent with her reputation testimony. For example, it would have been proper for the prosecution to have asked the witness, "Have you heard that two other women were pregnant by the defendant?" At that point, if the witness had said no, it would have been proper to impeach her with the prior inconsistent statement she had made to the police. However, the prosecution failed to do this. Instead, the question that the prosecution had asked attempted to impeach the witness on a point to which she had not testified—her personal knowledge. The question was premature, and since it referred to specific bad acts of the defendant, clearly it was impermissible. By reversing the defendant's conviction, the court reached the correct result, but for the wrong reasons. In this case, the court thus reinstated the rule which prohibits inquiries about specific bad acts on cross-examination.

In People v. Greeley, 164 however, the court returned once again to the rule it had promulgated in Willy and Hannon. There, the defendant, sixty-one years old, was charged with the statutory rape of a fifteen-year-old girl. Eight witnesses testified as to defendant's good

163. Id. at 446, 115 N.E.2d at 631.
reputation in the community for chastity and morality. On cross-
examination, seven of the eight were asked whether they could state
under oath that the defendant did not have sexual intercourse with
the prosecutrix on the date in question. Five of the witnesses were
also asked whether their opinion would have changed had they
known the charges to be true.

The court, in reversing the defendant's conviction, held that this
cross-examination was impermissible; the prosecution's questions
were improper because they were directed at the witness's own
knowledge and also because they encompassed the ultimate issue in
the case. The court, citing People v. Willy, approved the majority
position, stating that such cross-examination must be confined to
disparaging rumors and conversations the witnesses had heard in
the community.

Greeley represents the last authoritative Illinois Supreme Court
decision regarding cross-examination of character witnesses. As
such, it places Illinois in accord with the majority of jurisdictions
which have dealt with this issue.

**Effect of Proposed Illinois Rule 405**

Simply stated, proposed rule 405 allows inquiries into rumors or
reports of specific instances of relevant conduct on cross-
examination of a character witness. The rule codifies the holding of
the Illinois Supreme Court in Greeley and Willy, and the United
States Supreme Court in Michelson. The rule would thus end, once
and for all, the confusion that has been created in this area by the
Illinois Supreme Court.

Rule 405, however, is deficient in that it would continue the un-
realistic ban on opinion evidence. Clearly, once a cross-examiner is
allowed to ask about particular relevant acts there is no real differ-
cence between the questions "have you heard" and "do you know."

165. 301 Ill. 307, 133 N.E. 859 (1921).
167. People v. Dorn, 46 Ill. App. 3d 820, 361 N.E.2d 353 (1977). This case holds:
Where evidence of a person's character is introduced at a trial, such evidence is
confined to proof of that person's general reputation. This general reputation is not
established by the personal knowledge of the witness but by what some relevant
social group (e.g., people in the community), as a whole, thinks of the person. For
that reason, it is improper to cross-examine a character witness as to the witness'
own knowledge of particular acts of misconduct on the part of the person whose
character is being testified about. Such cross-examination is limited to disparaging
rumors and conversations which the witness has heard in the community.

46 Ill. App. 3d at 823, 361 N.E.2d at 355-56 (citations omitted).
168. See note 39 supra for the text of rule 405.
It should be noted that this entire line of inquiry is one that is particularly subject to a relevancy analysis and thus to the discretion of the trial court. Therefore, where that discretion is well exercised, there is little danger that allowing opinion testimony will turn the trial into a swearing contest between the parties and their witnesses.169

CONCLUSION

The rules and procedures governing the use and presentation of character evidence are an important aspect of nearly all trials. This is particularly true in criminal cases. The general exclusionary rule which prevents the prosecution from introducing evidence of the past misdeeds of a criminal defendant to imply circumstantially that the defendant acted in accordance with a particular trait is a sound one. The rule is premised on the policy that irrelevant past bad acts by the defendant should not influence the determination of guilt or innocence in the case before the jury. The defendant should not be prejudiced by having to defend his entire past life when there is only one charge properly at issue.

The exception to the general exclusionary rule which allows the criminal defendant to “open the door” to evidence of his character is also well founded. A defendant, particularly one who has previously led a blameless life, should be afforded every opportunity to raise reasonable doubt in the minds of the jury members. Favorable evidence offered by the defendant may not include specific acts, but generally is confined to evidence of the defendant’s reputation for the particular trait in issue. The Federal Rules of Evidence, and several state jurisdictions, permit this evidence to be presented by personal opinion testimony as well as reputation testimony. However, Illinois common law, and the proposed Illinois Rules of Evidence, continue the traditional common law ban on personal opinion testimony. This prohibition is outmoded and unrealistic and should be abandoned.

The initial advantage provided the defendant is sharply offset by the rebuttal methods available to the prosecution. Although the means by which the defendant is allowed to introduce character evidence are carefully circumscribed, the prosecution’s response is

169. See Louisell & Mueller, supra note 20, § 149 at 183. Louisell & Mueller consider opinion testimony to have great potential, especially in opening up the character field to expert psychiatric testimony about the defendant. See also Advisory Committee Note to Federal Rules of Evidence Rule 405; Green, Highlights of the Proposed Federal Rules of Evidence, 4 GA. L. REV. 1 (1969); Green, Proof of Mental Incompetency and the Unexpressed Major Premise, 53 YALE L.J. 271 (1944).
not so limited. Besides calling rebuttal witnesses to contradict the prior reputation testimony, the prosecution may also cross-examine the defendant’s character witnesses concerning specific prior bad acts inconsistent with their favorable testimony. The prosecution thus effectively “backdoors” the exclusionary policy by eliciting information the general rule was designed to prohibit—evidence which is guaranteed to prejudice the defendant in the eyes of the jury.

Although allowing this weapon to the prosecution may at first appear to unfairly favor the prosecution, on close examination this process is not as illogical as it may seem. The practical effect of the threat of cross-examination concerning prior bad acts is probably to prevent the defendant with a vulnerable background from opening this area of inquiry, since such a defendant would not wish to risk exposing himself to such a devastating counterattack. Conversely, a defendant with an unblemished record probably would utilize the exclusionary rule exception to initiate character evidence. Thus, the present system strikes a fair balance by discouraging the use of character evidence in situations where there is little to be gained from such evidence and by encouraging it in circumstances where it may serve a justifiable and beneficial purpose.

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