1970

Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward

Robert G. Spector
Assoc. Prof. of Law, Loyola University School of Law

Follow this and additional works at: http://lawecommons.luc.edu/luclj
Part of the Rule of Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol1/iss2/4

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
Impeaching The Defendant By His Prior Convictions And The Proposed Federal Rules Of Evidence: A Half Step Forward And Three Steps Backward

Robert G. Spector*

As long ago as 1942 the American Law Institute proposed a Model Code of Evidence which sought to blunt this weapon that prosecutors have—and invariably use. The Commissioners on Uniform State Laws did the same with their 1953 proposal of the Uniform Rules of Evidence. It is surely not to be supposed that any group currently engaged in a similar task would do less.¹ (Emphasis added.)

I. INTRODUCTION

Evidence reform in this country has a long and sad history of failure. Both the Model Code of Evidence and the Uniform Rules of Evidence were generally and unfortunately ignored outside of the legal periodicals. Now we have one more attempt at codifying and hopefully reforming the field in the proposed Federal Rules of Evidence. A perusal of the proposed rules finds many salutory reforms, several unanswered questions, and a few extremely disturbing points.²

---

¹ Mr. Spector is an Associate Professor of Law at Loyola University School of Law in Chicago.
2. The proposed Federal Rules of Evidence are an interesting amalgam. There are some reforms that really should have been put into effect long ago. For example, RULE 6-07 abandons the rule against impeaching one's own witness; RULE 6-01 and the comments following clearly indicate that there will be no Deadman's Act in the federal courts.
3. There are also some interesting points that need further explanation. For example, the husband-wife privilege is expanded to give one spouse a right to keep the other off the witness stand. The general qualification of a confidential communication has been abolished, RULE 5-05. Also the hearsay section contains some interesting classifications. Prior statements by a witness and admissions by a party opponent are classified as nonhearsay, RULE 8-01. Whether this will prove to be helpful or con-
Perhaps the most disturbing is Rule 6-09 which provides for the impeachment of witnesses by their past convictions. This method of character damnation when applied to a criminal defendant has been condemned by many and praised by none. Why then would the Committee continue this method of impeachment, and why would it explicitly reject the reform that has taken place in the District of Columbia, the so-called Luck Doctrine?

II. THE PROBLEM

It has long been recognized that the impeachment of a criminal defendant by evidence of his past convictions presents several very serious problems. The rationale for admitting the convictions was perhaps best stated by Holmes:

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

While it may be that the jury should know "what sort of person is asking them to take its word," the traditional position fails to take into account three serious problems which seem to compel the complete abandonment of this process of impeachment.

The Rules do contain a few points that are rather disturbing. One is the rejection of People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), cert. denied, 393 U.S. 1051 (1969), with regard to the constitutionality of the admission of prior inconsistent statements substantively, without really giving reasons. Another disturbing point is the subject of this comment.


4. So-called because it was first enunciated as dicta in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).


6. "What a person is often determines whether he should be believed . . . . No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transaction of everyday life this is probably the first thing they would wish to know." State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956).
Impeaching the Defendant

A. Relevancy

The most serious of these problems is relevancy. While there may be a logical connection between some criminal convictions and truth telling, most statutes fail to make a distinction between convictions which show a tendency to lie, i.e., perjury, and other crimes which do not. The typical statute either purports to make all past convictions admissible or distinguishes on the basis of the seriousness of the crime. The distinction seems meaningless. There is absolutely no connection between a conviction for rape and the willingness to tell the truth when on the witness stand.

Regardless of the logical relevancy of the past convictions, it would appear that the trial judge should exclude them on the ground that whatever probative value the conviction might have, it is far outweighed by the prejudice of such testimony. This prejudice to the defendant operates in two ways. First, this testimony clearly makes the defendant appear to be a "bad man". It is very likely that the jury will convict the defendant, not on the basis of evidence of his guilt or innocence, but on the basis of his past record. He is a "bad man" and ought to be put away. This effect is illustrated quite dramatically by the results of a study being made by the University of Chicago on the jury. The American Jury indicates that the introduction of the past convictions of the defendant tends to increase the rate of conviction by a rather startling 27 per cent.

7. The Illinois statute is a typical one. It provides that: "No person shall be disqualified as a witness in a criminal case by reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting credibility. ..." ILL. REV. STAT. ch. 38 sec. 155-1 (1969). The civil section is practically identical. See ILL. REV. STAT. ch. 51 sec. 1 (1969).

Illinois courts have consistently held that the word "crimes" refers to infamous crimes. People v. Kirkpatrick, 413 Ill. 595, 110 N.E.2d 519 (1953). What crimes are infamous is also set out in the statutes. See ILL. REV. STAT. ch. 38 sec. 124-1 (1969).

8. There may be a connection between a conviction for some misdemeanors and truth telling. However, misdemeanors are generally inadmissible.

9. See Uniform Rule of Evidence 45 (1955); Model Code of Evidence, Rule 303 (1942). Both require that evidence be excluded if the probative value of the evidence is outweighed by the prejudice that the evidence might arouse. This balancing, of course, is part of the entire relevancy concept. See James, Relevency, Probability, and the Law, 29 Calif. L. Rev. 689 (1941).


11. Id. at 160. The rise in conviction rates has led one author to conclude that allowing past convictions into evidence violates the defendant's right to fair trial. Note, Constitutional Problems Inherent in the Admissibility of Prior Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness, 37 U. Cinc. L. Rev. 168 (1968). However, the United States Supreme Court has, so far, refused to consider past conviction evidence as violative of due process. The Court has said that some "prejudicial effect is acknowledged to inhere in criminal practice." Spencer v. Texas, 385 U.S. 554, 562 (1967). It also indicated in dicta that the use of past convictions for impeachment was allowable. Id. at 561. However, in Burgett v. Texas, 389 U.S. 109, 115 (1967), the Court said that the use of prior convictions that did not
Secondly, often the conviction that is introduced for impeachment is for the same type of crime for which the defendant is on trial. Thus, the jury is likely to reason that if defendant robbed a gas station five years ago, he probably robbed this gas station too. The prevention of such evidence in the prosecutor's case-in-chief is the main reason behind the so-called "Other Crimes Rule". It seems rather ridiculous to prevent the prosecutor from using this evidence at one stage but allow it at another stage just because the defendant has elected to testify.

B. The "Chilling Effect"

The overwhelming prejudice caused by the introduction of these past convictions has caused its logical effect upon the defendant. Obviously, in order to avoid it, the defendant with a record will not take the stand. This failure to testify is itself prejudicial to the defendant. No amount of instruction on the defendant's privilege not to testify will erase the prejudice. The defendant is "damned if he does and damned if he doesn't."

This effect is also illustrated in The American Jury. This study indicates that defendants without criminal record elect to testify 37 per cent more often than defendants with a criminal record. Thus the trier of fact is prevented from receiving all of the information necessary for it to reach a just verdict. Often it will be much more important for the jurors to hear the defendant's story than to know what kind of criminal record he has.

C. The "Associational Effect"

This form of prejudice occurs not when the defendant is testifying but when someone else is testifying for him. The witness is, of course, subject to being impeached by the use of his prior convictions. Thus, affirmatively show, on their face, that the defendant had benefit of counsel, could not be used to support an increased penalty under a recidivist statute. Justice Douglas, speaking for the Court, said that the introduction of such convictions was "inherently prejudicial." At least one state has decided that Burgett requires exclusion of past convictions obtained without counsel when offered for impeachment. Johnson v. State, 263 A.2d 232 (Md. Spec. Ct. App. 1970).

The constitutionality of the impeachment process under discussion has been upheld in a number of states. E.g., People v. Robbins, 88 Ill. App. 2d 447, 232 N.E.2d 302 (1967); Nance v. State, 7 Md. App. 433, 256 A.2d 377 (1969). However, see Trimble v. United States, 369 F.2d 950 (D.C. Cir. 1966), where the court felt that in the absence of the discretionary standard adopted by that circuit there might be a constitutional problem.

even if the defendant does not have a criminal record, he will be associated in the jury's mind with his witnesses who do. The defendant could easily be condemned through guilt by association.

III. THE REMEDIES

The above problems are powerful factors calling for either abrogation or reform of this method of impeachment. Scholars and codifiers have been calling for reform; yet, few states have done anything. Opposing interests on the part of prosecutors and inertia by the rest of the Bar has prevented change.¹⁵

The traditional ameliorative device for softening the prejudice of the past convictions has been the limiting instruction. The jury is told that it is to consider the evidence only so far as it relates to the defendant's credibility and not as evidence to determine guilt. It seems relatively clear that jurors are incapable of so compartmentalizing their minds.¹⁶

As the Supreme Court said in a closely related situation:

"[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."¹⁷

Tests have disclosed that jurors have an "almost universal . . . unwillingness either to understand or follow the court's instructions on the use of defendant's prior criminal record for impeachment purposes."¹⁸ Clearly instructions have not served to alleviate the prejudices that arise.

Although most jurisdictions have ignored the problems or have preferred the traditional approach, some have made slight efforts to modify the procedure. One state requires that the past convictions may be proved only by the record of conviction,¹⁹ rather than by cross-examination. Several other states have given the trial judge the discretion to exclude a past conviction if it is too remote in time.²⁰

The Model Code of Evidence and The Uniform Rules of Evidence

¹⁵. There is some indication that some prosecutors purposely introduce past convictions in the hope that the jury will misuse them. Hoffman & Bradley, Jurors on Trial, 17 Mo. L. Rev. 235, 245 (1952). The problem is apparently serious enough to cause the American Bar Association's Advisory Committee on Prosecution and Defense Functions to condemn as unprofessional the indiscriminate use of past convictions not relating to truthfulness and veracity to discredit the witness. ABA, Project on Standards for Criminal Justice (Tent. Draft): The Prosecution Function and the Defense Function 123 (1970).

¹⁶. See Spector, supra note 3, at p. 5 n.17.


¹⁹. People v. McCrimmon, 37 IIl. 2d 40, 224 N.E.2d 822 (1967).

both make attempts to drastically alter the use of past convictions for impeachment. Both rules are substantially similar and are directed to remedy those aspects of the system that produce the most hardship. Both rules would limit past convictions to those involving a lack of veracity or fraud. Both would also prohibit the use of past convictions unless the defendant offers testimony of his good character for truth and veracity.

While this approach represents a distinct improvement over the traditional system, it still presents some difficulties. The probative value of so-called “lying” crimes is not that much higher than “non-lying” crimes. As one commentator put it: “At best [they] do no more than negative the possible assumption of some jurors that the particular witness could not lie with a straight face.” The jury is still likely to convict the defendant because he is a “bad man”.

The most salutary aspect of the approach taken by the Model Code and the Uniform Rules is to distinguish between a defendant-witness and an ordinary witness, and to prohibit the use of past convictions unless the defendant offers evidence of his good character. The former is an acknowledgement that when a criminal defendant is on the stand different problems are presented and, accordingly, the analysis should also be different. The latter, while helpful, still creates a dilemma for the defendant. Most juries expect the defendant to offer evidence of his good character. They are highly suspect when he does not. Why should the defendant be forced to choose between offering evidence of his good character and keeping out his past criminal record?

As a practical matter, of course, both the Model Code and the Uniform Rules stand little chance of being adopted. The Model Code has been a “dead letter” for years. The Uniform Rules never really got off the ground. It was used as a basis for evidence reform in New Jersey and California; however, Uniform Rule 21 was deleted by the legislature in both states.

21. Uniform Rule of Evidence 21; Model Code of Evidence, Rule 106. Both rules are similar. The Uniform Rule provides: “Evidence of the conviction of a witness for a crime involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.” The Model Code provision was called “...the most valuable recommendation made in the code. ...” Goodhart, A Changing Approach to the Law of Evidence, 51 Va. L. Rev. 759, 778 (1965).

22. Note, Other Crimes, supra note 3, at 778.

23. One commentator has suggested that the Attorney General and other law enforcement agencies played a large part in deleting Uniform Rule 21 from their evidence revision. McDonough, The California Evidence Code: A Precis, 18 Hastings L.J., 89, 105 (1967).
This author is on record as favoring complete abolition of the process as the most effective method of reform.\textsuperscript{24} Realistically, however, abolition is highly improbable. The process exists in most states through statutory warrant and would be very difficult to change. With this in mind, the most practical method for balancing the interests of both prosecutor and defense is that adopted by the District of Columbia Circuit in \textit{Luck v. United States}.\textsuperscript{25} It is this method that has been explicitly rejected by the proposed Federal Rules of Evidence.\textsuperscript{26} Just what is the \textit{Luck} Doctrine, and why has it been rejected by the proposed Federal Rules in favor of a more traditional approach?

IV. \textbf{THE LUCK DOCTRINE}

In \textit{Luck v. United States}\textsuperscript{27} (dicta) and \textit{Brown v. United States}\textsuperscript{28} the District of Columbia Circuit became the first court to attempt an analysis of the factors involved in the impeachment process. Prior to \textit{Luck}, the District of Columbia statute was interpreted, like practically all similar statutes, to mean that the prosecutor was always entitled to impeach a defendant-witness by showing his past convictions. The court focused on the word "may" in the statute and declared that the use of this term meant that the trial judge was to exercise his discretion in determining whether to admit the convictions: "There may well be other cases where the trial judge believes the prejudicial effect of impeachment value far outweighs probative relevance of the prior conviction to the issue of credibility."\textsuperscript{29} The court then directed the trial judge to take into account the following factors in exercising that discretion:

\begin{itemize}
\item the nature of prior crimes,
\item the length of the criminal record,
\item the age and circumstances of the defendant, and,
\item above all, the extent to which it is important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.\textsuperscript{30}
\end{itemize}

Due to some confusion as to exactly what \textit{Luck} and \textit{Brown} meant, the court, in \textit{Gordon v. United States},\textsuperscript{31} further spelled out the involved factors and worked out a procedure as to how the trial court was to determine these preliminary facts. The trial court is to look at six factors:

\begin{itemize}
\item Spector, supra note 3, at 22.
\item 348 F.2d 763 (D.C. Cir. 1965).
\item Proposed Federal Rules of Evidence at 127.
\item See note 25, supra.
\item 370 F.2d 242 (D.C. Cir. 1966).
\item Supra note 25, at 768.
\item Id. at 769.
\item 383 F.2d 936 (D.C. Cir. 1967).
\end{itemize}
1. **The type of crime.**
Crimes that involve dishonesty are more probative on credibility than those involving force, regardless of the penalty involved.

2. **Time of conviction.**
The more remote a conviction, the less its probative value.

3. **Subsequent history of the defendant.**
If the defendant has led an honest life since the prior conviction, that conviction will lose much of its probative value.

4. **Similarity between past convictions and present trial.**
If the past conviction is for the same type of crime for which the defendant is presently on trial, then the degree of prejudice is substantially increased.

5. **Importance of defendant's testimony.**
In some cases, particularly where the defendant is claiming an alibi, it is very necessary for the jury to hear the defendant's story. In those cases the trial judge should be more willing to exclude the past convictions.

6. **The posture of the case.**
In a situation where the case turns on the credibility of two opposing witnesses, the need for impeaching testimony is greater. In those cases the trial judge should be more willing to admit past convictions.

The court also set up a procedure that places the burden on the defense to show why the past convictions should be excluded. The defendant must raise the issue at an appropriate time. The trial judge should then hold a hearing at which the defendant must convince the judge that the convictions should be excluded. There appears to be some confusion as to exactly what the defendant must show in order to keep the testimony out. One case held that the need for defendant's testimony is the most important factor; indeed, it is the first hurdle that must be crossed before the defendant can argue the other factors. On the other hand, some judges seem convinced that all the factors are equal and that past convictions can be excluded if one factor, *i.e.*, the similarity of the past convictions, is so great as to cause extreme prejudice. One thing, however, is clear: once all of the factors are pre-

---

33. *Id.* at 683 (Bazelon, J., dissenting). It is still unclear in later cases whether the importance of the defendant's testimony is the most important factor or just one of many. See Davis v. United States, 409 F.2d 453 (D.C. Cir. 1969) applying Luck to witnesses other than the defendant. See also Weaver v. United States, 408 F.2d 1269 (D.C. Cir. 1969) where all cases involving the Luck doctrine are set out in an appendix to the court's opinion.
sented to the trial judge and he does exercise his discretion, he will not be reversed except for abuse.\textsuperscript{34}

The \textit{Luck} Doctrine has been explicitly rejected in some states.\textsuperscript{35} On the other hand, it has made considerable headway in the federal courts. A number of circuits have either adopted \textit{Luck} by name or have, while not mentioning the Doctrine, adopted a similarly flexible approach.\textsuperscript{36} Even in the federal courts, however, the Doctrine has not received unanimous support, having been rejected in at least one circuit.\textsuperscript{37} The division among the circuits could mean that the situation is ready for Supreme Court adjudication. Until now the Supreme Court has consistently denied certiorari in all these cases.\textsuperscript{38} Perhaps, the Court is waiting to see what the Federal Rules of Evidence will propose.

\section{V. The Proposed Federal Rule}

In spite of literature and court decisions to the contrary, the Advisory Committee took a traditional view towards the impeachment process. Rule 6-09 attempts to cover practically all aspects involving the admission of past convictions for impeachment. In general, all convictions are admissible, providing only that the punishment must have involved death or imprisonment for a minimum of one year.\textsuperscript{39} Convictions occurring prior to ten years before the witness was released from the penitentiary are inadmissible.\textsuperscript{40} The conviction is also inadmissible if the witness has been pardoned and the pardon was granted upon a "substantial showing of rehabilitation or based on innocence."\textsuperscript{41} Juvenile convictions are generally inadmissible, but may be admitted under some circumstances.\textsuperscript{42} The pendency of an appeal from a conviction does not render it inadmissible.\textsuperscript{43} The Rule is silent on the

\begin{thebibliography}{99}
\bibitem{34} E.g., Smith v. United States, 406 F.2d 667 (D.C. Cir. 1968).
\bibitem{35} E.g., Nance v. State, 7 Md. App. 435, 256 A.2d 577 (1969); State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1967). The New Jersey rejection is understandable in light of the fact that UNIFORM RULE 21 was dropped from their recent evidence revision.
\bibitem{36} See United States v. Allison, 414 F.2d 407 (9th Cir. 1969) explicitly adopting the \textit{Luck} rule. \textit{See also} United States v. Hildreth, 387 F.2d 328 (4th Cir. 1967) and United States v. Palumbo, 401 F.2d 270 (2nd Cir. 1968) citing \textit{Luck} with approval.
\bibitem{37} Id. (b).
\bibitem{38} Id. (c).
\bibitem{39} Proposed Federal Rules of Evidence 6-09(a) (1969).
\bibitem{40} Id. (b).
\bibitem{41} Id. (e).
\bibitem{42} Id. (d).
\bibitem{43} Id. (e).
\end{thebibliography}
method of proof; therefore, the prosecution probably has its choice as to method of proof, either by cross-examination or by introducing the record of conviction. Traditional rules in effect in various circuits would continue to control the extent of cross-examination about the past convictions, including such questions as to whether the prosecution can both cross-examine and introduce the past conviction record.

The proposed rules are clearly an improvement over traditional procedure in some ways. The ten-year limitation is one step towards placing the process in some kind of relevancy harness. Traditionally all past convictions were admissible; now, it is determined that those convictions over ten years old have no probative value. Of course, ten years is a rather arbitrary figure. The comments to the rule do not indicate why this particular figure was chosen. They do indicate that "practical considerations of fairness and relevancy demand that some boundary be recognized."44 While this is true, the same considerations also seem to indicate that what is needed is not an arbitrary figure, but rather, a flexible standard, based on probative value verses prejudice, that will work justice in each case.

The Committee Note indicates appreciation of the inherent dangers in the use of past convictions to impeach the defendant.45 However, the Committee felt unable to come up with any way to ameliorate this prejudice. The best it could do seems to have been section 6-09(b) which restricts usable convictions to those of the last ten years. All other approaches were specifically rejected. The Committee Note then indicates that five possible remedies were considered:

1. Allow no impeachment by conviction when the witness is the accused.
2. Allow only crimen falsi.
3. Exclude if the crime is similar.
4. Allow conviction evidence only if the accused first introduces evidence of character for truthfulness.
5. Leave the matter to the discretion of the trial judge.46

The Committee rejected all five. It rejected the fifth, the Luck Doctrine, on the basis that any guidelines that evolved for the exercise of the judge's discretion were basically the proposals one through four, which were found unsatisfactory. This is only partially correct. The guidelines laid down in the decisions following Luck purport to take

45. Id. at 126.
46. Id. at 126-27.
other things into account, especially the importance of the defendant's testimony.\textsuperscript{47} However, even if the analogy is correct, it is important to discuss why the Committee rejected numbers one through four and whether its reasons were valid. If all of these factors are aspects of the \textit{Luck} Doctrine, and they probably are, then should the Committee's reasons for rejecting these factors fail to stand up, the obvious response is that Rule 6-09 should be changed.

1. \textit{Allow no impeachment by conviction when the witness is the accused.} The Committee rejected this argument for several reasons. First, it felt that the only reason to suspend this type of impeachment in this situation is because it is not needed; \textit{i.e.,} that the jury knows that the defendant obviously has a strong interest in the case that will motivate him to slant his testimony toward himself. However, it determined that "the purpose of having the accused testify is the belief that he may be believed despite his self-interest. Consequently, anything which aids in appraising his credibility must be of value."\textsuperscript{48}

At this point there are two things slightly amiss. First, the reason for suspending this type of impeachment in this situation is not because it is not needed. Rather, it is because it is not wanted. The primary focus should not be on whether there is a need to impeach a witness. Any witness, even a defendant, should be subject to impeachment. The question is, how do you go about impeaching the witness. If it is attempted through past convictions, the focus should be on whether past convictions are necessary or proper to impeach a witness, particularly a defendant-witness. The question is essentially one of relevancy. The Committee fails to make its case under a relevancy standard. The danger of prejudice is an inherent part of the relevancy standard. It is submitted that the Committee's finding to the contrary overlooks a real problem. The Committee's comment that "a demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony"\textsuperscript{49} will not stand scrutiny. Those motivations that would impel a man to rape or murder will not impel him to lie upon the witness stand.\textsuperscript{50}

\textsuperscript{47} See text pp. 253-54 \textit{supra.}
\textsuperscript{48} Comments at 126.
\textsuperscript{49} \textit{Id.} at 125.
\textsuperscript{50} It seems appropriate to remember the words of Jeremy Bentham on the use of past convictions to affect truth telling: "Take homicide in the way of duelling. Two men quarrel; one of them calls the other liar. So highly does he prize the reputation of veracity, that rather than suffer a stain to remain upon it, he determines to risk his life, challenge his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear—and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it,—has made the
Secondly, the Committee does not really mean that anything which would aid the jury in appraising the defendant’s credibility must be of value. For example, Rule 6-08(c) specifies that specific instances of conduct may not be proved extrinsically. They may not be proved at all unless they are related to truthfulness. It may be extremely helpful to the juror to know about other instances of misbehavior by the defendant which were not the subject of a criminal conviction. Yet these are excluded because of the prejudices that would probably result and because of a tendency for specific instances to side track the jury. If the relevancy standard operates to exclude this type of evidence from the jury’s knowledge, there is no reason why it should not operate to exclude past convictions when offered for the same purpose.

The second reason given by the Committee for rejecting the proposition that past convictions should be excluded in cases where the defendant is the witness is that it allows the defendant to appear as a person “whose character is entitled to credence” and “denies a valuable argument to the witness-accused who has no prior record.” Why should not the defendant-witness be entitled to appear as such a person? This comment by the Committee assumes that the character of the person is highly probative of credibility, yet, normally such is not the case. The defendant ought to be entitled to a verdict based on evidence of guilt or innocence and not one based on the fact that he is a person of dubious character. Character evidence, except in certain situations where it is in issue, tends to clutter the record and distract the fact-finder from the main issue. The dangers are just too great that the jury will base its verdict on the character of the defendant rather than on evidence of his guilt or innocence.

The Committee’s point that failure to allow past convictions to impeach would deny a defendant-witness without a record a good argument also fails to hold water. Although the analogy is not completely accurate, the argument is reminiscent of the question as to whether any comment should be allowed on the failure of the defendant to testify. The testifying defendant always had a good argument in telling the jury that he testified because he had nothing to hide. The argument then went that the non-testifying defendant obviously did have something

---

51. Comments at 126.
to hide because he did not testify. Yet it was ultimately decided that the Fifth Amendment required that no comment could be made on the failure of a defendant to testify. The fact that this is a good argument for the defendant with no record hardly seems to justify admitting prejudicial evidence against other defendants who do have records.

The third argument of the Committee is that the abolition of the use of past convictions would prohibit the use of opinion evidence of character for truthfulness. It is hard to understand exactly why the Committee states this. If this means that the defendant cannot introduce opinion evidence of his good character for truthfulness and veracity, it seems untrue. Rule 6-08(a) indicates that an opinion for truthful character can only be shown when the witness’s character is attacked. However, an attack by past conviction is not the only method of impeaching a criminal defendant. The prosecutor could under Rule 6-08 offer opinion evidence of the defendant’s bad character for truthfulness. The defendant could then respond with opinion evidence of his good character for truthfulness. Later in the same note the Committee indicated that:

Any opinion testimony on behalf of the accused is totally unrealistic if insulated from cross-examination concerning his convictions. If the matter is allowed to be gone into on cross-examination, the prosecution could by presenting opinions of untruthful character confront the accused with the alternatives of allowing the testimony to go unrebutted or of presenting rebuttal witnesses on whose cross-examination the door would be opened.\(^5\)

The latter point seems slightly unrealistic. The Committee is not helping the defendant as it seems to indicate. The “horns of the dilemma problem” posed by the Committee is already present in a worse form. The dilemma for the defendant now is whether to testify, and thus allow the jury to be acquainted with his record, or to stay off the stand and take the risk that the jury will notice his silence and construe it to mean that the defendant has something to hide.

As to the first objection raised by the Committee, it is indeed true that an opinion on truthful character is unrealistic if shielded from cross-examination. However, this does not mean that the prosecutor ought to be able to cross-examine about past convictions. The rationale of Rule 6-08 should be followed and the prosecutor should only be allowed to cross-examine on specific instances relating to truthfulness. Since most convictions are not for crimes involving a lack of truth-telling, cross-examination on them should be excluded in the same way as cross-

---

\(^5\) Id. at 127.
examination is excluded about specific instances not the subject of a conviction. If Rule 6-08 were followed, it would allow the use of opinion testimony for truthfulness and still limit the indiscriminate use of past convictions.

2. Allow only *crimen falsi*

This answer to the past conviction problem limits the prosecutor to those convictions which involve truthfulness. It would, in fact, be a continuation of the policy behind Rule 6-08 from specific instances to past convictions. This policy was rejected by the Committee on the grounds that it would exclude convictions of most crimes regarded as having a substantial impeaching effect. Once again the basic disagreement with the Committee is the question of whether there is any probative value in convictions for crimes of violence on the issue of whether a witness is telling the truth. Once again it is submitted that these convictions have no probative value for truthfulness. They show only the character of a person for violence. When the Committee said that the convictions have a substantial impeaching effect, what it was really saying is that the convictions have a substantial effect on the jury. This is true; but what that actually means is that these convictions are very highly prejudicial.

3. Exclude if the crime is similar.

Under this approach the judge would exclude those convictions that are similar to the crime for which the defendant is being tried. The Committee rejected this as only a partial solution, and because "admission or exclusion would largely be a matter of random chance." The Committee was correct when it said that this is only a partial solution. It is really just one of the factors that a judge should consider when deciding whether to admit or exclude the past convictions. When the past conviction is for a crime similar to the crime the defendant is being tried for, there is an extremely potent possibility of prejudice. As pointed out above, there is a great danger that the jury will reason that if the defendant committed the same type of crime before, he probably committed the crime for which he is on trial. This danger far outweighs any probative value the past conviction might have.

4. Allow conviction evidence only if the accused first offers evidence of his good character for truthfulness.

53. *Id.*
54. See text p. 249 *supra.*
The Committee's sole objection to this proposal was, again, that it would effectively bar the use of opinion testimony for truthfulness and falsity for the same reasons advanced under the first proposal above. The same objections to the Committee's view, set out above, are applicable here.

5. Leave the matter to the discretion of the trial judge.

This is the Luck Doctrine. The Committee contended that this proposal consists of the above four proposals which are subject to the objections raised above. Therefore, it rejected the Doctrine. However, while most of the solutions proposed above are not panaceas in and of themselves, they are vast improvements over the traditional procedure. The objections that the Committee has made do not really seem to hold water. In addition the Committee overlooked one factor in the Luck-Gordon approach which seems crucial. This is the problem of the necessity, in many cases, for the defendant to testify. The "chilling" effect of these past convictions is an important factor in whether past convictions should or should not be admitted. As Gordon points out, there are cases where the importance of listening to the defendant's story outweighs any probative value of the past convictions. This consideration, plus the weakness of the Committee's reasons for rejecting the rest of the factors in the Luck-Gordon Doctrine, indicates that Rule 6-09 should not be adopted as written.

Some form of discretionary standard should be substituted for the traditional formula. In a day when the trend is away from fixed and unbending rules that cannot help but be arbitrary in some cases, it is incongruous that the proposed Federal Rules should retain this appendix-like vestige of the common law's rules on competence of witnesses to testify. This is contrary to the spirit of much of the rest of the proposed Rules. The Committee has said that it has failed to find an acceptable alternative and therefore adheres to the traditional rule. It is submitted that there is an "acceptable alternative" in the Luck Doctrine, and if the Committee is unhappy with the traditional rule, as perhaps it is, then the answer is "back to the drawing board" to find an "acceptable alternative".

55. See text pp. 257-60 supra.
57. For example the elimination of the Dead Man's Act and the freeing of the hearsay exceptions from pigeon hole categories. See Proposed Federal Rules of Evidence 6-01, 8-03, 8-04.
VI. THE PROBLEM AGAIN AND THE ULTIMATE SOLUTION

Discretionary admission of past convictions through a standard as exemplified in the Luck and Gordon decisions is probably just an intermediate step in the development of the impeachment process. The rule admitting such evidence is an historical vestige, and really has no reason for existing today. Originally, as every evidence student knows, conviction of an infamous crime barred a witness from testifying. Sporadic evidence reform in the nineteenth century transferred the use of past convictions of infamous crimes from a testimonial bar to a factor to be used by the jury in determining the credibility of a witness.

The question now is really whether the past conviction has any legitimate place in the impeachment process. There are two points that should be noted about past convictions: (1) it is a specie of character proof; and, (2) it is an attempt to prove character by a specific instance.

A. Character in the impeachment process.

We labor throughout the Anglo-derived legal world under something we call the adversary system. The late Judge Jerome Frank described it as a “fight theory” in that the facts will be brought out best if each attorney tries “... as hard as [he] can, in a keenly partisan spirit to bring to the court's attention the evidence favorable to [his] side.” The system also requires a fact-finder, judge or jury, and a system to orient and screen the information that the fact-finder receives, the rules of evidence. Because the system presents to the fact-finder two slanted stories which appear to be directly opposite, there must be some method for the fact-finder to determine which side to believe. There must also be some method for each adversary to present information to the fact-finder to convince it that the other side is unworthy of belief. That aspect of the law of evidence called impeachment and rehabilitation of witnesses is the system's attempt to regulate what information a fact-finder may hear on the question of which of the several conflicting witnesses it should believe. The entire body of rules and regulations on impeachment and rehabilitation is an attempt to strike a balance between two opposing viewpoints. On one hand, we could allow no impeaching testimony. This would require that the fact-finder determine credibility solely on the basis of its observation of the competing witnesses. However, we have decided that the fact-finder

58. 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 177-97 (1926).
60. J. FRANK, COURTS ON TRIAL 80 (1949).
needs more information in order to make up its mind. On the other hand, we could adopt the view that anything an adversary wishes to introduce, he may. We have rejected this alternative for two basic reasons: first, because time is precious and jury trial takes long enough as it is; and secondly, because there is some information that we just do not trust the fact-finder to listen to. The information offered may just be too prejudicial, in that the fact-finder will give it more weight than it really deserves, or confusing, in that the fact-finder will get too distracted from the main issue in the case. Our attempt to find this balance has resulted in such rules as a requirement for a foundation to be laid before extrinsic proof of a prior inconsistent statement is offered, and the rule that character be proved only by reputation when it is not in issue.

The question then is where does the character of the witness fall within this balancing system? How important is it for the jury to know the character of the person who is telling how something happened? Character testimony is generally considered to be a low order of proof, especially when it is used circumstantially. Indeed it has very little, if any, probative value when the general character of a person is offered on the question of the person’s truth telling ability. There are probably very few cases in which it is necessary for the jury to use character testimony. Very often it is simply not needed. If the witness is going to be impeached there are more probative ways of doing it. The impeaching techniques of prior inconsistent statement, specific contradiction, bias, and sensory incapacity are all highly probative on the question of credibility and are often available to the cross-examiner. It is not as if the witness will go unscathed. Even if none of the above means of impeaching the witness is available, it is probably still preferable to allow the witness to depart rather than to attack his character.

The use of general character testimony is normally an illegitimate attack on the witness. The jury is asked to disbelieve the witness because he is a “bad man” and “bad men” do not tell the truth. There is practically no relation between character in general and truth telling. Indeed this proposition is generally recognized in the laws of impeachment because normally it is only a witness’ character trait for truthfulness that can be attacked. This proposition holds until the attacking evidence comes in the form of a past conviction. There seems to be no reason for departing from the proposition simply because of the form of the evidence. If it is really necessary to attack the character of the witness, and it is doubtful if it ever is, then only that type of evidence showing a lack of truthfulness and veracity should be allowed.
B. The Method of character proof.

If evidence of character is acceptable as a way to prove a particular issue then the question still arises as to how it should be proved. When character is being used circumstantially, it is traditional that proof be limited to evidence of reputation, rather than opinion or specific instances. While reputation is the lowest of the three in probative value, it also arouses the least prejudice and creates the least distraction for the fact-finder. The proposed Rules of Evidence, Rule 6-08, would prohibit reputation and substitute opinion testimony. The Rule would also allow specific instances to be inquired into on cross examination of either the witness himself or of a witness who testifies to an opinion of another witness' character for truthfulness. However, the specific instances must relate to truthfulness. All in all this is probably a sound way to elicit character testimony. It eliminates the artificial reputation testimony in favor of realistic opinions. The discretion of the judge in controlling cross-examination can prevent the jury from becoming side-tracked on the specific instances.

The philosophy expressed in this rule seems directly contrary to that expressed in Rule 6-09 on impeachment through past convictions. A specific instance, not the subject of a criminal conviction, cannot be introduced for impeachment because it is recognized that its probative value is likely to be overbalanced by prejudice and by its tendency to distract the jury from the main issue in the case. However, if the instance has been the subject of conviction, then suddenly it no longer becomes prejudicial and no longer has a tendency to distract the jury. The mere fact of conviction does nothing to remove the prejudice or distraction problem. All that the conviction exception to the general character rule does is to give the prosecution an additional weapon. It allows him to blacken the defendant's character by the introduction of specific damning incidents. It does not allow the defendant to rebut with specific instances of good character.

VII. Conclusion

In sum, Rule 6-09 should be entirely stricken. Rule 6-08 covers the only legitimate use of character evidence in the impeachment process. Failing this, a rule on the order of the Luck Doctrine should be adopted as a half way measure. The traditional approach as exemplified by Rule 6-09 should entirely be abandoned as an unjust and arbitrary method of conducting a criminal trial. As one Illinois jurist said:

The rule, which has no historical sanctity serves no useful purpose
and is discriminatory and unfair and should be abolished. Its re-
tention in this day of supposedly enlightened jurisprudence is dis-
graceful.61