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PRIOR CRIME IMPEACHMENT OF CRIMINAL DEFENDANTS: A CONSTITUTIONAL ANALYSIS OF RULE 609

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The use of prior criminal convictions to impeach the credibility of a witness is an almost universally applied[1] and time-honored[2] tenet of our evidentiary jurisprudence. Past convictions may not be used substantively to demonstrate criminal propensity; *i.e.*, the likelihood that an individual will engage in criminal conduct based upon his past activities.[3] However any witness giving testimony in a court of law is deemed to have placed his credibility in issue. As a result, in almost all American jurisdictions, a witness' character for truth and veracity may be attacked by proof that he has been convicted of a crime.[4] This theory of impeachment and the myriad standards[5] adopted by various courts to implement it work no great mischief when applied to most witnesses. The use of prior crimes to impeach criminal defendants choosing to testify in their own behalf, however, is wrought with problems.

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[1] C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 43 (2d ed. E. Cleary 1972).

[2] Consider the following passage from Lord Castlemaine's Trial, 7 How. St. Tr. 1067, 1084 (1680), *reprinted in* 3A WIGMORE, EVIDENCE § 980 (Chadbourn rev. 1970).

> You may give in the evidence of every record of the conviction of any sort of crimes he has been guilty of, and they shall be read. They said last day there were sixteen; if there were a hundred, they should be read against him, and they shall go to all to *invalidate any credit* that is to be given to anything he may swear. (Emphasis added).

[3] Michelson v. United States, 335 U.S. 469 (1948).

[4] 3A WIGMORE, EVIDENCE § 980 (Chadbourn rev. 1970).

[5] *See* note 6 *infra*.

If the accused has a past record which may be used to impeach him, his decision whether or not to testify is problematic. If he testifies and is thereby impeached, there is a real danger that the jury will consider the defendant to be the kind of man who would commit the crime charged in the indictment. Jurors may naturally tend to relax the burden of proof commensurate with their distaste for the defendant's past activities. However, if the accused refuses to take the stand in order to avoid the introduction of his past crime, his silence alone may prompt the jury to believe him guilty.

Cognizant of the defendant's "dilemma," and against an extremely erratic background of state court guidelines,[6] Congress, in 1975, enacted rule 609 of the Federal Rules of Evidence. Certainly one of the most vigorously debated sections of the federal evidence code,[7] rule 609 represents a compromise between the common law felony-misdemeanor rule[8] and the so-called "Luck Doctrine,"[9] which delegates discretion to the trial court to weigh

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[6] Recognizing that not all convictions are equally relevant to the witness' propensity to lie, state courts have developed a wide panoply of tests to determine the admissibility of various crimes as impeachment tools. While some jurisdictions allow impeachment by any crime, others limit permissible convictions to felonies. *Compare* State v. Hurt, 49 N.J. 114, 228 A.2d 673 (1967) *and* Sullivan v. State, 333 P.2d 591 (Okla. Crim. App. 1958) *with* CAL. EVID. CODE ANN. § 788 (West 1972) *and* State v. Sorrell, 85 Ariz. 173, 333 P.2d 1081 (1959). Sacrificing ease of application for a perceived heightened relevance, other courts allow admission of only "infamous crimes." *See, e.g.*, People v. Bridette, 22 Ill. 2d 577, 177 N.E.2d 170 (1961); or ones involving "moral turpitude." Sims v. Callahan, 269 Ala. 216, 112 So. 2d 776 (1959); Smith v. State, 346 S.W.2d 611 (Tex. Crim. App. 1961); State v. Fournier, 123 Vt. 439, 193 A.2d 924 (1963). Even more uncertain is a rule, similar to the federal standard, allowing the trial court to exercise discretion in its determination of whether a particular conviction affects the credibility of a witness. *See, e.g.*, Johnson v. State, 4 Md. App. 648, 244 A.2d 632 (1968).

[7] *See* 120 CONG. REC. H309 (1974).

[8] The felony-misdemeanor rule allows the introduction of evidence of all felonies for the purposes of impeachment. Evidence of misdemeanor convictions is not permitted. *See* CAL. EVID. CODE ANN. § 788 (West 1972); State v. Sorrell, 85 Ariz. 173, 333 P.2d 1081 (1959); State v. Stein, 60 Mont. 441, 199 P. 278 (1921).

[9] Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). In *Luck* evidence of the defendant's prior confession to a charge of grand larcency was introduced for the purposes of impeachment. The court held that "the trial court is not *required* to allow impeachment by prior conviction every time the defendant takes the stand in his own defense." *Id.* at 768 (emphasis supplied). The trial judge was to exercise discretion in allowing the introduction of prior convictions to impeach the defendant's credibility. In exercising that discretion, the court identified the fol-

probative value against the prejudicial effect of all convictions. After a "tortured path"[10] through both committee and floor debate, conferees agreed on the bill's final version, which reads in pertinent part:

> (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 or established by public record during cross-examination but only if the crime (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 (2) involved dishonesty or false statement, regardless of the punishment.[11]

Since its enactment, both the operation and theory of rule 609 have been widely criticized.[12] More generally, the advisability of

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lowing relevant factors: "the nature of the prior crimes; the length of the criminal record; the age and circumstances of the defendant, and, above all, the extent to which it is more 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." *Id.* at 769. In *Luck* the court did not distinguish between the use of felony and misdemeanor convictions for impeachment purposes.

[10] *See generally* Tobias, *Impeachment of the Accused by Prior Convictions and the Proposed Federal Rules of Evidence: The Tortured Path of Rule 609: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the Comm. on the Judiciary*, H.R. Rep. No. 2, 93rd Cong., 1st Sess. 105-15 (1973). The "tortured path" which rule 609 followed was summarized by the Hon. Lawrence J. Hogan *reprinted in* K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 187-90 (1975). The first draft of rule 609(a) provided that for the purpose of attacking the credibility of a witness, evidence of a prior conviction was admissible only if the crime was punishable by death or imprisonment of greater than one year or if the crime involved dishonesty or false statement. The second draft of rule 609(a) added the requirement that the judge weigh the probative value of the evidence against the danger of unfair prejudice and allow the evidence of the prior crime only if the probative value substantially outweighed the prejudice. The third draft dropped the requirement of weighing the probative value against the prejudice. The Subcommittee draft of rule 609(a) automatically admitted evidence of prior crimes involving dishonesty or false statement but required the judge to balance the probative value against the prejudice for crimes punishable by death or imprisonment in excess of one year. The Judiciary Committee draft allowed only evidence of prior crimes which involved dishonesty or false statements to be admitted.

[11] FED. R. EVID. 609(a).

[12] Spector, *Impeaching the Defendant by His Prior Convictions and the Pro-*

using a prior conviction to impeach a testifying criminal defendant has been one of the most seriously debated issues of evidence law.[13] Despite such academic fervor, prior crime impeachment of criminal defendants continues essentially unabated.[14]

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posed Federal Rules of Evidence; A Half Step Forward and Three Steps Backward, 1 LOY. CHI. L.J. 247 (1970); *Symposium, Impeachment Under Rule 609(a): Suggestions for Confining and Guiding Trial Court Discretion*, 71 NW. U.L. REV. 655 (1977); 53 N.Y.U. L. REV. 1290 (1978).

[13] *See* Brooks, *The Treatment of Witnesses in the Proposed Federal Rules of Evidence for the United States District Courts: Article IV*, 25 RECORD N.Y.C. B. A. 632 (1970); Curran, *Federal Rules of Evidence 609(a)*, 49 TEMP. L.Q. 890 (1976); Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965); Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1 (1968); Spector, *Rule 609: A Plea for Its Withdrawal*, 32 OKLA. L. REV. 334 (1979); Note, *To Take the Stand or Not to Take the Stand: The Dilemma of a Defendant with a Criminal Record*, 4 COLUM. J. L. & SOC. PROB. 215 (1968); Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CINN. L. REV. 168 (1968).

[14] Two states severely limit the use of past convictions to impeach criminal defendant witnesses. In Hawaii the use of past convictions to impeach criminal defendant witnesses was declared to be violative of the state constitution's due process clause except when the defendant had put his character in issue. State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971). In so ruling, the Hawaii Supreme Court held that "[i]t is apparent . . . that prior convictions are of little real assistance to the jury in its determination of whether the defendant's testimony as a witness is credible." 53 Hawaii at 259, 492 P.2d at 611.

The West Virginia Supreme Court of Appeals in State v. McAboy, 236 S.E.2d 431 (W. Va. 1977), limited the use of evidence of the defendant's prior convictions for impeachment purposes to those crimes relating to perjury or false swearing where the probative value of such evidence outweighs the prejudice which results to the defendant. The West Virginia courts struggled with the problem of prior crime impeachment for many years. As early as 1925, West Virginia followed the minority (six states) rule which prohibited the use of unrelated prior crime to impeach the criminal defendant. State v. Webb, 99 W. Va. 225, 128 S.E. 97 (1925). In *Webb* the court was urged to adopt the majority rule which allowed the use of prior crimes to impeach the criminal defendant. In response, Justice Lively stated that:

> [w]e see no good reason for overruling our former cases adopting it [the minority rule]. Many persons have been convicted of crimes and misdemeanors engendered by heat of passion and inconsiderate action, infirmities in human nature which are more or less prevalent in all. We can see no reason why such convictions would affect the credibility or veracity of such a person who is being tried for a subsequent and wholly unconnected offense. Undoubtedly the evidence that the defendant had previously served a term in the penitentiary was prejudicial to him, and was influential in the finding of the verdict.

This article will explore the potential prejudice to which criminal defendants are subjected as a result of the impeachment dilemma and consider the extent to which constitutionally protected rights may be abridged in the process.

THE OPERATION OF RULE 609

Rule 609 requires the automatic admission of prior crimes, whether felony or misdemeanor, if the conviction relates to dishonesty or false statement.[15] Any other crimes, punishable by a prison term in excess of one year, are permissible impeachment

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99 W. Va. at 230, 128 S.E. at 99.

In 1931 the West Virginia Legislature adopted a revised code which provided that:

> [i]n any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise), be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by any one.

W. VA. CODE § 57-3-6 (1976 Replacement Vol.).

The courts interpreted this provision as permitting the impeachment of the criminal defendant by his prior convictions (felony or misdemeanor). State v. Friedman, 124 W. Va. 4, 18 S.E.2d 653 (1942); State v. McMillion, 127 W. Va. 197, 32 S.E.2d 625 (1944) (difference between a felony and a misdemeanor conviction was not relevant when impeaching a witness' credibility).

In 1975 the court again acknowledged the problems inherent in the use of unrelated prior convictions on collateral crimes to impeach the criminal defendant. State v. Ramey, 212 S.E.2d 737, 745 (W. Va. 1975). One year later, in State v. McGee, 230 S.E.2d 832, 837 (W. Va. 1976), the court held that the trial judge was not only required to weigh the probative value of the prior conviction against the risk of substantial danger of undue prejudice to the accused, but he must also rigidly adhere to limitations on cross-examination and "caution the jury in firm and unmistakable language as to the only purpose for which the jury is entitled to consider such evidence."

In *McAboy* the court reconsidered W. VA. CODE § 57-3-6 (1976 Replacement Vol.) to find that *Friedman, supra,* and the subsequent cases which had liberally permitted impeachment through the use of any prior conviction were based on a misconception of that provision. Troubled by the chilling effect such a practice had on the defendant's willingness to take the stand on his own behalf and cognizant of the highly prejudicial effect of such prior crime evidence, Justice Miller, without reaching the constitutional issues, returned the law to its status prior to *Friedman.*

[15] *See* FED. R. EVID. 609, Advisory Committee's Notes.

tools only if the court determines that the probative value outweighs the prejudicial effect to the defendant. Since prejudice is measured only as it relates to the defendant, a strict felony-misdemeanor rule apparently applies to all other witnesses.[16]

The primary change from prior federal practice is apparently a shift in the burden of demonstrating probative value. Under the Luck Doctrine, a prior conviction could be excluded only if the "prejudicial effect of impeachment *far* outweighs . . . "[17] the probative value of the crime. Under rule 609, such impeachment can occur "only if . . . the court determines that the probative value . . . outweighs its prejudicial effect . . . ,"[18] and this requires the prosecutor, not the defendant, to bear the burden of proof. Under the new federal approach, unless the crime relates to dishonesty, only felonies are subject to the balancing process. Therefore, rule 609 seems to be a limited attempt to balance the criminal defendant's right to a fair trial against the right of the jury to be made aware of the defendant witness's character for veracity. The desired result is that the benefit of the doubt is shifted somewhat in the favor of the criminal defendant.[19]

Despite the fact that rule 609 on its face requires a consideration of the prejudice inherent in the use of past offenses to discredit criminal defendants, such impeachment has been widespread under its provisions. Myriad criminal acts have been upheld as appropriate sources of impeachment,[20] running the

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[16] Note 8 *supra;* United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977), *cert. denied,* 100 S. Ct. 95 (1979); United States v. Ortega, 561 F.2d 803 (9th Cir. 1977); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976). Prejudice to other witnesses, however, arguably may be considered by the trial court under the general provisions of rule 403. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Advisory Committee's Note to rule 403 suggests that in deciding whether to exclude evidence on the grounds of unfair prejudice, "consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction."

[17] Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965) (emphasis added).

[18] FED. R. EVID. 609(a)(1).

[19] *See* Curran, *Federal Rules of Evidence 609(a),* 49 TEMP. L.Q. 890, 894 (1976).

[20] *See generally,* Annot. 39 A.L.R. FED. 570 (1978).

gamut from convictions for battery,[21] inciting a riot,[22] possession of stolen property,[23] to crimes more traditionally considered demonstrative of moral turpitude, such as burglary,[24] manslaughter,[25] and murder.[26] For the most part, appellate review of such permitted credibility attacks has been limited to cursory determinations that no abuse of discretion has occurred.[27]

The decisions under rule 609 indicate not only the continued extensive employment of prior crime impeachment, but some troubling specific patterns of analysis as well. Despite the rule's mandate to consider the potential prejudicial impact on the jury's mental processes, federal decisions repeatedly allow the use of heinous crimes to impeach defendants who testify.[28] No doubt the admission of a prior murder or manslaughter conviction has a devastating effect on the way in which the jury regards the defendant. Yet federal decisions assume a strong probative value for such convictions without giving serious consideration to the impact which the knowledge that the defendant is a convicted murderer is likely to have upon the average juror.

Decisions also commonly sustain the use of prior crimes which are the same or substantially similar to the offenses named in the indictment. In *United States v. Hall*,[29] for example, prior convictions for possession and distribution of heroin were ruled admissable to impeach a defendant charged with distribution of heroin. Since prior crimes are to be considered only for purposes of assessing credibility, jurors are placed in the anomalous posi-

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[21] United States v. Pratt, 531 F.2d 395 (9th Cir. 1976).

[22] United States v. Bennett, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 982 (1976).

[23] United States v. Wilson, 536 F.2d 883 (9th Cir. 1976), *cert. denied*, 429 U.S. 982 (1976).

[24] United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Hawley, 554 F.2d 50 (2d Cir. 1977).

[25] United States v. Oakes, 565 F.2d 170 (1st Cir. 1977).

[26] United States v. Carter, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976).

[27] *See* United States v. Hall, 588 F.2d 613 (8th Cir. 1978); United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978), *cert. denied*, 436 U.S. 950 (1978); United States v. Bennett, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 925 (1976).

[28] *See* United States v. Carter, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); United States v. Oakes, 565 F.2d 170 (1st Cir. 1977).

[29] 588 F.2d 613 (8th Cir. 1978).

tion of being able to consider past offenses for heroin distribution for purposes of determining whether the defendant is a liar, but not whether he is a heroin distributor. Similarly, *United States v. Seamster*[30] held that the use of a prior second degree burglary conviction to discredit a defendant on trial for second degree burglary did not constitute an abuse of discretion. These and other decisions since the enactment of rule 609 often demonstrate an unwillingness to realistically examine the prejudice which is the likely result of the use of such techniques.

Perhaps the most disconcerting examples of prior crime impeachment, however, surface in the use of past drug offenses. Federal decisions repeatedly allow serious drug crimes to be used to demonstrate a willingness to commit perjury.[31] There is serious doubt whether any criminal defendant can expect a fair trial after the jury has been informed that he has been convicted of selling heroin. Accordingly, the extensive use of such crimes to discredit is alarming enough. Yet the rationale for the rule is often even more troubling than its widespread use. For example, in *United States v. Ortiz*[32] the Second Circuit upheld the use of defendant's prior conviction for two separate heroin sales in a cocaine distribution prosecution. The court's rationale ran as follows:

> [h]ere, the District Judge in his discretion was entitled to recognize that a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie. From this he could rationally conclude that such activity in a witness' past is probative on the issue of credibility.[33]

This type of analysis fails to consider the actual character and probative value of the particular conviction being used to im-

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[30] 568 F.2d 188 (10th Cir. 1978).

[31] *See* United States v. Hall, 588 F.2d 613 (8th Cir. 1978); United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978), *cert. denied*, 436 U.S. 950 (1978); United States v. Ortiz, 553 F.2d 782 (2d Cir. 1977), *cert. denied*, 434 U.S. 897 (1977); United States v. Hayes, 553 F.2d 824 (2d Cir. 1977), *cert. denied*, 434 U.S. 867 (1977); United States v. Christophe, 470 F.2d 865 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

[32] 553 F.2d 782 (2d Cir. 1977).

[33] *Id.* at 784.

peach.[34] Instead, in *Ortiz*, the court embarked upon an exposé of the supposed lifestyle of a "narcotics trafficker," arguably crossing the fine line between prior crime impeachment and trial by character assassination.

Certainly there are numerous federal decisions in which careful consideration is given, pursuant to the balancing process required under rule 609, to the potential prejudice resulting from prior crime impeachment.[35] The admittedly selective discussion above, however, reveals that the use of prior crimes to discredit criminal defendants continues largely unabated under the provisions of the Federal Rules of Evidence. Such widespread use all too often continues without substantial concern for the almost certain detrimental impact resulting on the decisionmaking process of the jurors.

SOURCES OF PREJUDICE

The cases discussed above demonstrate in practical terms one side of the dilemma in which the criminal defendant with a record finds himself. If he elects to testify, he faces a high risk that his past conviction will come in to attack his credibility. If the prior crime is admitted, there is a substantial danger that the impeaching crime will prove too much in the eyes of the jury. If, however, the defendant exercises his fifth amendment privilege by declining to take the witness stand, the second horn of the dilemma appears. Despite instructions to the contrary, there is strong reason to believe that the jury will take cognizance of his silence.[36] That recognition by the jury is apt to take the form of a natural inference that since the accused does not deny or explain the evidence connecting him with the crime, he must be guilty. But for the use of prior convictions to impeach, the dilemma would not exist. Accordingly, if the validity of such impeachment as a trial procedure is to be thoroughly examined, full considera-

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[34] *See* Comment, *Prior Conviction Evidence and Defendant Witnesses*, 53 N.Y.U. L. REV. 1290 (1978).

[35] *See* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976); United States v. Cox, 536 F.2d 65, 66 (5th Cir. 1976); United States v. Bianco, 419 F. Supp. 507, 509 (E.D. Pa. 1976), *aff'd mem.*, 547 F.2d 1164 (3d Cir. 1977); United States v. Brown, 409 F. Supp. 890 (W.D.N.Y. 1976); United States v. Jackson, 405 F. Supp. 938, 942 (E.D.N.Y. 1975).

[36] See text accompanying notes 41-45 *infra*.

tion must be given to the prejudicial effects likely to be encountered by a criminal defendant with a past offense. Prejudice flowing from the dilemma may take several possible forms.

The Silent Defendant

Under certain circumstances, excessive timidity, nervousness or general apprehension of cross-examination may influence criminal defendants to forego the right to testify.[37] The primary factor, however, in the decision not to take the stand is undoubtedly fear of the use of prior crimes to impeach.[38] The fact that criminal defense lawyers so often counsel their clients not to testify is strong evidence that most attorneys do not believe the jury either capable or willing to limit its consideration of prior offenses to the issue of credibility as instructed. Extensive data supports the rationality of that belief.[39] Further, studies of wrongfully convicted defendants indicate that the innocent as well as the guilty may be induced in this manner to remain silent.[40]

There seems to be little real doubt that jurors tend to infer guilt from silence despite the use of appropriate instructions by the court and the prohibition of prosecutorial comment on the exercise of the privilege.[41] Statistical evidence strongly supports the belief that jurors see the failure to testify as an indication of guilt.[42] Even more disturbing are studies which demonstrate that defendants who fail to take the stand substantially reduce their

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[37] *See* Wilson v. United States, 149 U.S. 60, 66 (1893).

[38] Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record,* 4 COLUM. J. L. & SOC. PROB. 215, 220 (1968).

[39] See text accompanying notes 47-57 *infra.*

[40] Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime,* 78 HARV. L. REV. 426, 442 (1964).

[41] Griffin v. California, 380 U.S. 609 (1965).

[42] H. MEYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 21 (1959) citing a poll of the American Institute of Public Opinion which indicated that 71% of the persons questioned inferred guilt from failure to testify. Surveys reported in Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Criminal Defendant with a Criminal Record,* 4 COLUM. J. L. & SOC. PROB. 215, 221 (1968) revealed that 94% of the attorneys and judges responding believed that jurors noticed and inferred guilt from the defendant's silence even if no comment is made on his failure to testify.

chances of acquittal.[43]

Apart from objective data or scientific investigations, we are all aware that there is a mental presumption against the prisoner who stands mute which no law or charge to the jury can hope to totally overcome. That mental presumption flows undeniably from a juror's natural tendency to consider what indeed he or she would do if wrongfully charged with a crime. Silence in the face of a criminal accusation is too far removed from the expected conduct of an innocent person not to create a substantial hurdle to the impartiality of any juror. The reality of a defendant's silence has been aptly described by Arthur Train.

> The law humanely provides that if a prisoner does not wish to testify his failure to do so shall not be taken against him by the jury. But does anyone imagine that a defendant is not usually obliged to testify if he expects to be acquitted? The very first thing we want to know about a person charged with crime is what explanation he has to make. If he refuses to make any, we know that he has none worth making. A defendant in the old days was not permitted to testify. This was often very hard lines. In course of time he was "given the privilege of testifying"—which, in effect, compels him to testify. This new state of affairs has its own difficulties. Jurors have often said to me, regarding a defendant who did not take the stand, "Of course, we couldn't hold against him his failure to testify, but we knew he was guilty, because he was afraid to subject himself to cross-examination."[44]

Although an average lawyer might assume that a defendant's silence is motivated by fear of prior crime impeachment, as Train points out, such is not the case with the average juror. The jurors' natural psychological response to silence is to assume that the defendant is unwilling to be pointed up a liar by the prosecutor under cross-examination. That effect is probably inherent in any exercise of the fifth amendment privilege. Studies indicate, however, that a significant percentage of defendants would rather face

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[43] *See* A. TRAIN, THE PRISONER AT THE BAR 209-12 (1923). *See also* surveys reported in Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record,* 4 COLUM. J. L. & SOC. PROB. 215, 221 (1968) in which 88% of the attorneys and 89% of the judges responded that there is generally a greater likelihood of acquittal if the defendant testifies.

[44] A. Train, AM. MAG., Nov., 1924, at 148.

the likely inference of guilt from silence than allow prior offenses to be introduced for the consideration of the jury.[45]

The Defendant Impeached with Prior Convictions

A criminal defendant with a record, exercising his constitutionally protected right to testify, runs the risk that his past offenses will be introduced under rule 609 to attack his credibility. If such offenses are admitted, several potentially invidious sources of prejudice arise. The jury may, of course, consider the defendant to be of bad character and therefore likely to have committed the act charged. If the past conviction is sufficiently odious, the jurors may be willing to relax the burden of proof in the belief that even if the defendant did not commit the act charged, he is deserving of punishment. If impeachment occurs by the use of an offense similar in nature to the crime named in the indictment, there is an additional danger that the jury might believe that the prior conviction shows a character trait for committing certain types of crimes. Past heroin distribution convictions introduced against a defendant being tried for selling heroin, for example, will almost certainly be seen as indicative of more than a propensity to lie. Whatever the inference drawn by the jury in a particular instance, there is little doubt that the introduction of convictions significantly affects the verdict ultimately returned. As Clarence Darrow indicated in a discussion of the first trial of socialist George Bissett, "[o]ne conviction is generally all the evidence that is needed to justify a second one . . ."[46] Studies contained in one of the most comprehensive reports done on our jury system show that when the strength of evidence presented is constant, juries will convict 27% more often when they know that the defendant has a criminal record.[47]

Evidence law's traditional response to these potentialities of prejudice is, of course, the limiting instruction. Pursuant to the doctrine of multiple admissability, evidence permissible for one purpose yet incompetent for another is to be admitted pursuant

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[45] In H. KALVEN & H. ZIESEL, THE AMERICAN JURY 146, 160-69 (1966) the authors indicate that defendants without a record elect to testify 37% more often than defendants with a record of past convictions. It is likely that most of these defendants would testify if their past convictions were kept from the jury.

[46] C. DARROW, THE STORY OF MY LIFE 193 (1966).

[47] H. KALVEN & H. ZIESEL, THE AMERICAN JURY 160 (1966).

to appropriate instructions from the court. Accordingly, crimes introduced to discredit under rule 609 are admitted with an instruction to the jury that they are not to be considered substantatively, but only as they relate to the credibility of the defendant. Jurors are instructed that they may consider the defendant's past crimes in order to determine whether he is likely to lie on the witness stand, but not to determine whether he is likely to have committed the crime charged. The jury's willingness and ability to follow such an intricate "mental gymnastic,"[48] however, is at best questionable.

Skepticism that jurors realistically separate substance from credibility in this context is rampant. Noted jurists have repeatedly indicated that the limiting instruction, as a tool to eliminate prejudice, is little more than a judicial "placebo" which "undermines a moral relationship between the courts, the jurors, and the public."[49] Practicing attorneys almost universally concede that the limiting instruction fails to achieve its goal.[50] In fact, studies show that jurors have an "almost universal inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior record for impeachment purposes."[51]

For this reason, it has been suggested that prosecutors often use past conviction evidence hoping that jurors will be unable to follow the instructions of the court.[52] The Chicago Jury Project[53]

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[48] In a now classic case, Judge Learned Hand referred to the limiting instruction in such a context as a "mental gymnastic which is beyond, not only their powers . . ." but anybody else's as well. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

[49] Delli Paoli v. United States, 352 U.S. 232, 247-48 (1957) (Frankfurter, J., dissenting); Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); United States v. Grunewarl, 233 F.2d 556, 574 (2d Cir. 1956); People v. Aranda, 63 Cal.2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965) (Traynor, C.J.).

[50] A survey reported in Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record,* 4 COLUM. J. L. & SOC. PROB. 215, 218 (1968) revealed that 98% of the attorneys questioned believed that it was impossible for the limiting instruction to be effective.

[51] Letter from Dale W. Broeder to the *Yale Law Journal,* (Mar. 14, 1960), *reprinted in* 70 YALE L.J. 763, 777 (1961). *See also* Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744 (1959).

[52] Hoffman & Bradley, *Jurors on Trial,* 17 MO. L. REV. 235, 245 (1952).

[53] Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744 (1959).

reached the conclusion that limiting or curative instructions often served merely to sensitize the jury to the evidence in question.[54] In support of this premise is the frequent decision by defense attorneys *not* to request a limiting instruction for fear that the jurors will simply be reminded that the defendant is a convict.

In another context, even the drafters of the Federal Rules of Evidence demonstrated convincingly a mistrust of the jury's ability to heed a limiting instruction. Rule 103(c)[55] sets forth a general requirement that, when practical, offers of proof or the posing of potentially objectionable questions take place outside the presence of the jury. Explaining the basis for the provision, the Advisory Committee's Note indicates that the "subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury."[56]

Indeed, it is unrealistic to expect a juror to be either willing or able to follow such an instruction. Lawyers are trained for years with the hope that eventually they come to understand the inconsistency between allowing proof of criminal propensity through evidence of bad character and true trial on the merits. Assuming such an understanding, it is not clear that even a lawyer can consider evidence for one purpose and yet exclude it from his consideration of other issues. Is it reasonable to expect a juror, in the context of a single trial, to be able to make such a determination?[57] When evidence of a prior conviction is admitted against a criminal defendant, whether the proof is ultimately excluded or subjected to a limiting instruction, "it has entered the jurors consciousness with a mass of other matter, and altogether it has made an impression on his mind . . ., what particular thing made the impression, neither the juror nor anyone else can know."[58]

Unquestionably the ultimate effect of prior crime impeachment on the criminal defendant with a record is quite substantial.

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[54] *Id.* at 753-54.

[55] FED. R. EVID. 103(c).

[56] FED. R. EVID. 103(c), Advisory Committee Notes, Subdivision (c).

[57] A similar rationale led the Supreme Court to reject a New York procedure which allowed the jury to determine the voluntariness of the confession in Jackson v. Denno, 378 U.S. 368 (1964).

[58] DARROW, THE STORY OF MY LIFE 64 (1934).

Because his past crimes can be introduced to attack his credibility, evidence law puts the defendant with past offenses in the undesirable position of choosing between two strong sources of jury prejudice. Nor can the limiting instruction reasonably be expected to eliminate such prejudice. Whether the defendant chooses to remain silent and avoid impeachment, or testifies and suffers the resulting introduction of past crimes, his chances of being acquitted are significantly reduced.

RETHINKING THE PREMISE

The classic statement of the theoretical basis for prior crime impeachment was made by Justice 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 the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches the conclusion solely through the general proposition that he is of bad character and unworthy of credit.[59]

This analysis assumes that if an individual is willing to commit an act which is sufficiently antisocial, he will also be willing to disregard his oath. Theoretically then, past antisocial behavior is linked to credibility. Unfortunately, for the same reason that such evidence is thought to be probative as to credibility, its antisocial aspect, the proof of prior crimes is *inherently* prejudicial.

The introduction of crimes to discredit rests upon the theory that character evidence, offered in the form of proof of a specific instance of past criminal conduct, has significant probative value concerning a witness' propensity to lie. Willingness to step outside accepted modes of behavior in the past is seen as indicative of a likely willingness to commit perjury. Prior crime impeachment's claim to probative value is thus tied to a belief in the predictive value of some general criminal characteristic. A passage from Camus' *The Stranger* is illustrative:

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[59] Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

> "Gentlemen of the jury, I would have you note that on the next day after his mother's funeral that man was visiting the swimming-pool, starting a liaison with a girl, and going to see a comic film. That is all I wish to say."
>
> . . . .
>
> No sooner had he sat down than my lawyer, out of patience, raised his arms so high that his sleeves fell back showing the full length of his starched shirtcuffs.
>
> "Is my client on trial for having buried his mother, or for killing a man?" he asked.
>
> There were some titters in the court. But then the prosecutor sprang to his feet, and, draping his gown round him, said he was amazed at his friend's ingeniousness in failing to see that between these two elements of the case there was a vital link. They hung together psychologically, if he might put it so. "In short," he concluded, speaking with great vehemence, "I accuse the prisoner of behaving at his mother's funeral in a way that showed he was already a criminal at heart."
>
> These words seemed to make much effect on the jury and public. My lawyer merely shrugged his shoulders and wiped the sweat from his forehead. But obviously he was rattled, and I had a feeling things weren't going well for me.[60]

Theoretically, then, prior crime impeachment infers a propensity to lie from the demonstration of a "criminal heart." State impeachment standards, allowing only the introduction of crimes involving "moral turpitude," demonstrate this thesis more clearly. If indeed a past crime is sufficiently serious to support such a characterization, almost by definition the conviction will point the defendant as a possessor of a "criminal heart" in the eyes of the jury. While rule 609's balancing approach seeks to tie admissibility more closely to credibility, the use of convictions for inciting a riot, battery, manslaughter, murder, etc. have been regularly sustained under its provisions.[61] Such convictions have no link to credibility absent a dependence upon the general probative value of evidence of bad character.

In other contexts, evidence law repeatedly has rejected the probative value of character evidence. In both civil and criminal cases, evidence of a person's character is not admissible for the purpose of proving that he acted in accordance with that trait on

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[60] CAMUS, THE STRANGER 118, 121-22 (Vintage Books, Stuart Gilbert, trans. 1954).

[61] See notes 20-26 *supra*.

the occasion in question.[62] As a result, under rule 404 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."[63] Such proof is considered not only prejudicial, but lacking in relevance.[64] Proof of drunken driving in the past does not demonstrate that a party was drunk at the time alleged in the complaint. Nor does evidence of a past armed robbery conviction have probative value on the determination of whether a defendant committed the robbery charged in the indictment. Yet such a conviction would probably be admissible as proof that the defendant is lying on the stand.

The relationship between past criminal behavior and a present propensity to lie has come under significant attack. Based on psychological studies, a recent article concludes that specific character traits such as honesty or carefulness simply do not exist and can provide no basis to predict future actions.[65] Rather, predictability can be based only on the similarity between specific situations. The greater the similarity, the higher the possibility that a person will behave in the same way. Since there is no similarity between the past criminal act and the situation in which a criminal defendant finds himself on the witness stand, the lesson for evidence law is that character evidence as a basis for predicting human behavior is useless.[66]

Fears have traditionally been expressed that, absent the availability of prior crime impeachment, a criminal defendant will be able to unfairly portray himself as a model citizen and render the jury strongly favorable to his presentation of the facts. The need for such impeachment has been explained as follows:

> The object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life

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[62] FED. R. EVID. 404(a).
[63] FED. R. EVID. 404(b).
[64] FED. R. EVID. 404, Advisory Committee Notes.
[65] Spector, *Rule 609: A Plea for Its Withdrawal*, 32 OKLA. L. REV. 334 (1979).
[66] *Id.* at 349-52.

this is probably the first thing that they would wish to know.[67]

This belief in the *need* for prior crime impeachment evidence is misplaced. If a defendant took the stand and testified as to his past life, leaving the impression that he had suffered no prior encounters with the law, under general impeachment principles he would be deemed to have "opened the door" to the admission of his past convictions.[68] Besides, the testimony of a criminal defendant at trial in his own behalf is simply not analogous to the "transactions of everyday life."

The argument for prior crime impeachment implicitly assumes that jurors are not skeptical of a criminal defendant's testimony. A criminal defendant, however, is obviously on trial in jeopardy of his life or liberty. Under such circumstances, a witness hardly need rely on past criminal acts to acquire a propensity and motive to lie. Greater incentive to deceive can hardly be imagined and this motive and propensity are well understood and recognized by each member of the jury. That recognition alone infuses the jury with strong skepticism of a criminal defendant's testimony and eliminates the need to introduce past crimes to insure such scrutiny.

Consider the posture of the accused at trial. A criminal defendant is hardly analogous to an unknown individual dragged in from the street and presumed by all to be innocent. Jurors are generally aware that the accused sits before them because, after extensive investigation and screening, policemen, detectives, and the prosecuting attorney are convinced that he is guilty. Although the jurors are instructed that the defendant is presumed to be innocent and they will make every attempt to follow that instruction, jurors know that there is at least a substantial likelihood that the defendant committed the crime charged. The realities of the criminal justice system lead at least some jurors to a supposition of guilt.

> The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, . . . then all subsequent activity directed toward him is based on the view that he is proba-

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[67] State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956).

[68] *See* Atkinson v. Atchison, T. & S. F. Ry., 197 F.2d 244 (10th Cir. 1952).

> bly guilty. The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."
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> . . . .
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> The presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome. . . . [T]he presumption of guilt is descriptive and factual; the presumption of innocence is normative and legal.[69]

This presumption does not mean that jurors are apt to deny a criminal defendant the right to a fair trial under appropriate burdens of proof. It does mean, however, that jurors naturally tend to view testimony of a defendant with a careful eye, both because of his obvious motive to lie and because of the substantial possibility of his guilt. The result is that there is simply no need to introduce the past convictions of criminal defendants. Prior crime impeachment is prejudicial in the extreme, and serves no legitimate interest in the conduct of federal criminal trials.

THE CONSTITUTIONAL FRAMEWORK

The prejudice which results from the use of prior crimes to impeach a criminal defendant raises serious constitutional questions. Although various claims of constitutional infirmity have been made,[70] the ultimate issue is whether the procedure violates

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[69] PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160-62 (1968).

[70] The Supreme Court of Hawaii struck down the use of such impeachment modes against criminal defendants in Santiago v. State, 53 Hawaii 254, 492 P.2d 657 (1971). The Hawaii court held that prior crime impeachment constituted an impermissible burden on the accused's constitutionally protected right to testify. Such an argument is based on a perceived intolerable tension between constitutional rights as was invalidated in Simmons v. United States, 390 U.S. 377 (1968). The United States Supreme Court, however, has since upheld a state trial procedure which placed such a "tension" not only on the right to testify as to guilt or innocence, but also on the defendant's right to testify at the punishment phase. McGautha v. California, 402 U.S. 183 (1971).

It has also been suggested that prior crime impeachment denies the right of a criminal defendant with a prior record to equal protection of the laws. *See* Lowell v. State, 574 P.2d 1281, 1283 (Alaska 1978). Since the impeachment rules merely treat criminal defendents like other witnesses, it is not clear that an actual classifi-

the right of a criminal defendant to receive a fair trial by an impartial jury. The United States Supreme Court has not directly faced a constitutional challenge to rule 609, and is indeed unlikely to consider the question in the near future absent a declaration by one of the circuits that such impeachment violates the right to due process. Several analogous areas of constitutional adjudication, however, present guidelines under which the propriety of the procedure can be analyzed.

Spencer v. Texas

Several federal and state courts[71] have considered any attack on the use of prior crimes to discredit foreclosed by the 1967 decision of *Spencer v. Texas*.[72] In *Spencer*, the Supreme Court upheld a Texas criminal justice procedure dealing with repeat offenders. The Texas statute called for increased punishment for certain habitual criminals. Under its provisions, the prosecution could allege prior offenses in the indictment and prove the existence of the other crimes in its case-in-chief. The trial court was to instruct the jurors that prior convictions were not to be considered on the question of guilt or innocence. Over a strong dissent by Justices Brennan, Douglas, Fortas and Chief Justice Warren, the majority found the Texas procedure consistent with the due process requirements of the fourteenth amendment.[73] Speaking in dicta directly to the issue of prior crime impeachment, the majority assumed the constitutional propriety of the introduction of such evidence "when the defendant has testified and the State seeks to impeach his credibility . . . ."[74] It seems that the very holding of *Spencer*, that the introduction of past convictions in

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cation results. Assuming such a classification, however, equal protection analysis ultimately turns on the rationality of the trial procedure. Accordingly, it would appear more appropriate to analyze such impeachment under due process guidelines, which are constitutionally designed to assure the use of fair trial procedures by the government.

[71] *See* United States v. Belt, 514 F.2d 837, 849 (D.C. Cir. 1975); United States v. Bailey, 426 F.2d 1236 (D.C. Cir. 1970); Hubbard v. Wilson, 401 F. Supp. 495 (D. Colo. 1975); Lowell v. State, 574 P.2d 1281 (Alaska 1978); Dixon v. United States, 287 A.2d 89 (D.C. 1972), *cert. denied*, 407 U.S. 926 (1972); Parish v. State, 477 P.2d 1005 (Alaska 1978).

[72] 385 U.S. 554 (1967).

[73] *Id.* at 568-69.

[74] *Id.* at 561.

the prosecutor's case-in-chief pursuant to an habitual offender statute and appropriate limiting instructions does not violate due process, forecloses a claim that prior crime impeachment is unconstitutional. For several reasons, however, at least with respect to the constitutional validity of rule 609, *Spencer* cannot be read as a Supreme Court imprimatur for such impeachment.

First, the majority opinion placed considerable reliance on *Delli Paoli v. United States.*[75] There a conviction resulting from a joint trial was sustained despite the admission of a confession by one codefendant which implicated the remaining defendants. Although recognizing some problems with an instruction allowing the jury to consider a confession against one defendant but not the others, the *Delli Paoli* Court sustained the conviction based on the "faith that the jury will endeavor to follow the court's instructions. . . ."[76] Similarly, the majority in *Spencer,* noting that "the jury is expected to follow instructions in limiting this evidence to its proper function . . .," cited *Delli Paoli* in sustaining the Texas habitual offender procedure.[77]

The year after *Spencer* was decided, however, *Delli Paoli* was expressly overruled.[78] In *Bruton v. United States* the Court explicitly rejected the basic premise of *Delli Paoli:* that it is reasonable to assume that the jury would or could follow a proper limiting instruction to disregard a codefendant's confession.[79] Quoting the classic language of Mr. Justice Jackson, the Court indicated that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."[80] Accordingly, to the extent *Spencer* is based on the ability of the jury to comprehend and apply an instruction that past convictions are not to be considered on the issue of guilt, the holding itself may be questionable in light of *Bruton.*

A second and more obvious reason that *Spencer* provides no

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[75] 352 U.S. 232 (1957).

[76] *Id.* at 242.

[77] 385 U.S. at 562.

[78] Bruton v. United States, 391 U.S. 123 (1968).

[79] *Id.* at 126.

[80] *Id.* at 129 quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949)(Jackson, J., concurring).

answer to the constitutionality of rule 609 is because the decision represents an analysis of a *state* procedure under the due process clause of the fourteenth amendment rather than a challenge to a federal procedure directly under one of the provisions of the Bill of Rights. Accordingly, concerns of both federalism and the extent to which the guarantees of the Bill of Rights are incorporated within the fourteenth amendment were present in *Spencer.* Justice Harlan, writing for the majority, expressed the federalism issues as the primary motivation for the decision.

> [I]t has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure,
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> . . . .
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> . . . To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts . . .[81]

Obviously, concerns over intrusion by the federal judiciary into state trial process do not arise when a federal court examines the constitutional propriety of one of the federal rules of evidence.

Justice Harlan, the author of the five to four majority opinion in *Spencer,* viewed the procedural safeguards incorporated into the fourteenth amendment as a much more limited source of constitutional scrutiny than the specific provisions of the Bill of Rights which apply directly to the federal government.[82] The *Spencer* opinion specifically leaves open the possibility of a stricter standard of review for an analogous federal provision, either as a constitutional decision or "under what has been termed the supervisory power of this Court over proceedings in the lower federal courts . . . ."[83] It is clear, therefore, that the *Spencer* decision is not dispositive of the constitutionality of prior crime im-

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[81] 385 U.S. 554, 564-66 (1967).

[82] Justice Harlan described the "liberty" protected by the due process clause of the fourteenth amendment as encompassing only "those immutable principles of free government which no member of the Union may disregard." Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (dissenting opinion); Williams v. Florida, 399 U.S. 78 (1970) (Harlan, J., concurring opinion).

[83] 385 U.S. 554, 563 (1967).

peachment under rule 609.

It could, of course, be argued that deference similar to that afforded the state of Texas in *Spencer* would be appropriate in reviewing one of the Federal Rules of Evidence because of the careful consideration given to such provisions by Congress.[84] However, a review of rule 609, whether based on the Constitution or on the supervisory powers, would center on the infringement of the defendant's right to fair trial. The drafters of the Federal Rules of Evidence purposely chose to segregate evidentiary and constitutional issues, implicitly refusing to take a stand on the constitutionality of prior crime impeachment. In the Report of the Senate Committee on the Judiciary which accompanies rule 804 this position was explicitly stated: "[T]he basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles . . . . [C]odification of a constitutional principle is unnecessary and, where the principle is under development, often unwise."

While the majority opinion concentrated on questions of federalism, the dissenting justices in *Spencer* examined the prejudice encountered by a criminal defendant under the Texas procedure. Although the opinion obviously related to the introduction of prior crimes under the habitual offender statute, several observa-

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[84] This argument carries added weight in light of the procedure which was used in adopting the Federal Rules of Evidence. In 1965 Chief Justice Earl Warren appointed an advisory committee to formulate the Federal Rules of Evidence. In 1969 and 1971 preliminary drafts of the proposed rules were issued and circulated for commentary. 46 F.R.D. 161 (1969); 51 F.R.D. 315 (1971). In 1972 the Supreme Court reported to Congress a set of federal rules of evidence to take effect in 1974. In response, Congress passed Pub. L. No. 93-12, 87 Stat. 9 (1973) staying the effectiveness of the Federal Rules of Evidence (and the amendments to the Federal Rules of Civil and Criminal Procedure) until approved by an act of Congress. The preamble to the act stated that this action was "[t]o promote the separation of constitutional powers." *Id.* Furthermore, Congress postponed the effectiveness of these rules "in recognition of the importance of the evidentiary Rules and because the label 'substantive' [had been] persistently applied to several of the Rules." K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 4 (1975). In contrast, when the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure were issued, the Supreme Court draft was effective after 90 days without the express approval of Congress. *Id.*

In late 1974, after public hearings and revision, the final bill approving the Federal Rules of Evidence was passed by the House and Senate. Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. Rules 101-1103 (1976)).

tions made by Chief Justice Warren are particularly appropriate to a consideration of the validity of using prior crimes to impeach a criminal defendant. "Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him."[85] Given the likely inability of a jury to restrict its consideration of the prior convictions, the dissenting justices believed the Texas procedure violative of the principle "surely engrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions."[86]

The use of prior convictions to discredit criminal defendants appears to suffer from the same shortcomings present in the habitual offender statute considered in *Spencer*. The Texas statute allowed the introduction of past crimes pursuant to an instruction that they be considered only on the issue of punishment. Chief Justice Warren considered such an instruction to "flout human nature." An instruction that jurors are to consider prior convictions only on the issue of credibility similarly fails to take into account the realities of the jury system. Absent the federalism concerns present in the decision, *Spencer* supports, rather than forecloses, an argument that prior crime impeachment abridges the right to a fair trial of a criminal defendant with prior convictions.[87]

On other occasions the Supreme Court has demonstrated a healthy skepticism of the viability of the limiting instruction as a tool to eliminate potential prejudice. In *Jackson v. Denno*[88] the Court invalidated a New York trial procedure which required the judge to submit an arguably voluntary confession to the jury for the ultimate determination of admissibility. Under the New York

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[85] 385 U.S. 554, 575 (1967) (dissenting opinion).

[86] *Id.* (dissenting opinion).

[87] Chief Justice Warren's dissent in *Spencer* recognized that prior crimes are regularly used to impeach the credibility of criminal defendants. He specifically declined, however, to embrace the constitutional validity of such impeachment. "Although the theory justifying admission of evidence of prior convictions to impeach a defendant's credibility has been criticized, all that is necessary for purposes of deciding this case is to accept its theoretical justification and to note the basic difference between it and the Texas recidivist procedure." 385 U.S. at 577 (footnote omitted).

[88] 378 U.S. 368 (1964).

procedure, if the jurors found the confession involuntary, they were instructed to disregard it. The Court in *Jackson* held that a defendant is at least constitutionally entitled to have the trial judge first determine whether a confession was made voluntarily before submitting it to the jury. The opinion specifically rejected the proposition that a jury, when determining the confessor's guilt, could be relied upon to ignore his statement of guilt should it find the confession involuntary.[89]

Similarly, a limiting instruction was deemed insufficient to obviate the prejudice sustained by a defendant in a joint trial when the confession of codefendant, implicating both, was admitted pursuant to a directive that it be considered only against the confessor. Justice Brennan, writing for the majority in *Bruton v. United States*, refused to attribute unrealistic powers to the limiting instruction in such a context.

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose as a legal protection. . . . A jury cannot segregate evidence into separate intellectual boxes . . . .[90]

The basis of the *Bruton* decision was that there are simply 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."[91]

Both *Jackson* and *Bruton* dealt with the use of the limiting or curative instruction to alleviate the prejudicial effects of confessions. As the Court recognized in those cases, such circumstances push the "legal fiction" past the limits of reason. There is probably no more devastating offer of proof than a confession, whether voluntary or coerced, or made by the defendant or a

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[89] *Id.* at 388-89.

[90] 391 U.S. 123, 129-30 (1968) (quoting the dissent of Mr. Justice Frankfurter in Delli Paoli v. United States, 352 U.S. 232, 247 (1956), and Chief Justice Traynor in People v. Aranda, 63 Cal.2d 518, 528-29, 407 P.2d 265, 271-72 47 Cal. Rptr. 353, 360 (1965)).

[91] 391 U.S. at 135.

third party. As previously discussed,[92] however, the introduction of prior crimes to impeach also has a substantial effect upon the verdict which the jury is likely to return. An expectation that jurors will consider prior convictions only on the issue of defendant's credibility similarly ignores the "practical and human limitations of the jury system."

Free Press—Fair Trial Cases

The area of constitutional analysis which has most seriously examined the validity of various influences upon the mental processes of the jurors is the series of decisions weighing the competing claims of a defendant's right to a fair trial and the societal interest in a free press. Justice Black set forth the basic framework under which claims of a denial of the right to fair trial by impartial jury are to be considered.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But *our system of law has always endeavored to prevent even the probability of unfairness* . . . This Court has said . . . that "*every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.*"[93]

The right to fair trial by an impartial jury, as the doctrine has developed in such cases as *In re Murchison*,[94] *Irvin v. Dowd*,[95] *Estes v. Texas*,[96] and *Sheppard v. Maxwell*,[97] seeks to limit procedures and outside influences which might have a detrimental effect upon the jury's ability to reach a decision on the merits. As the doctrine has progressed, cases have discarded any requirement of actual prejudice, realizing that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[98] Con-

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[92] See text accompanying note 47-57 *supra*.

[93] *In re* Murchison, 349 U.S. 133, 136 (1954)(quoting Tumey v. Ohio, 273 U.S. 510, 532 (1926)) (emphasis added).

[94] 349 U.S. 133 (1954).

[95] 366 U.S. 717 (1961).

[96] 381 U.S. 532 (1965).

[97] 384 U.S. 333 (1966).

[98] Estes v. Texas, 381 U.S. 532, 542-43 (1965).

sidering the prejudicial effect on the jury as well as the minimal probative value of impeachment by conviction, it is indeed likely that rule 609 runs afoul of the sentiment of such fair trial cases.

The obvious goal of decisions seeking to limit outside and improper influence on the jury is to assure that criminal cases are actually tried on the merits. A fair trial, removed from prejudicial concerns such as the character of the parties has been called the most fundamental of all freedoms and must be maintained at all costs.[99] It is indeed "one of the rightful boasts of Western civilization" that the concept of fair trial requires that the government establish guilt "solely on the basis of evidence produced in court."[100]

The requirement that guilt be established solely from the evidence introduced in open trial bespeaks a demand that verdicts be based, to the extent possible, on properly admissible evidence linking the accused with the crime. Prior crimes used to impeach enter trials of criminal defendants solely on the issue of credibility. In reality, however, the effect of such evidence sweeps beyond the issue of a propensity to lie and has a demonstrable impact on the outcome of the case. If, as studies indicate, juries do not limit their consideration of such evidence to credibility, prior crime impeachment represents an improper outside influence upon the mental processes of the fact finder. Not unlike a published news account or a potential conflict of interest, the introduction of prior convictions runs a substantial risk and offers a "possible temptation to the average man . . . to forget the burden of proof required to convict the defendant." The procedure employed under rule 609, providing for the systematic admission of past crimes to impeach, may indeed be seen as "involving such a probability of prejudice . . . that it is . . . inherently lacking in due process."[101]

It is clear that the fair trial—free press cases involve substantial reasons to tolerate outside influence not present with regard to the impeachment of criminal defendants. The free press—fair trial decisions deal with the recurring conflict that arises when-

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[99] *Id.* at 540.

[100] Irvin v. Dowd, 366 U.S. 717, 729 (1961)(Frankfurter, J., concurring).

[101] *See* Sheppard v. Maxwell, 384 U.S. 333, 352 (1966); Estes v. Texas, 381 U.S. 532, 542-43 (1965).

ever "a defendant in a criminal case asserts that his right to a fair trial clashes with the right of the public in general, and of the press in particular, to an open proceeding."[102] The prejudice inherent in the introduction of past crimes against a criminal defendant is not suffered to protect any first amendment or other important interest. Nor, given its tenuous link to credibility, is the use of prior crimes closely tied to a search for the truth. Accordingly, it would seem that a federal court should be at least as willing to strike down the use of impeachment under rule 609 as it would be to prohibit the outrageous publicity involved in cases such as *Sheppard* and *Estes.*

The Court has spoken to the prior conviction issue in the fair trial context. A conviction was reversed in *Marshall v. United States*[103] because some jurors had seen and read newspaper articles alleging that the defendant had two prior convictions. Despite the jurors' claimed impartiality, the Court ruled that the "exposure . . . to information of a character so prejudicial it could not be offered as evidence" (the defendant had not taken the stand) required reversal.[104] The *Marshall* decision thus takes as its working premise the belief that jurors are apt to misuse the knowledge of prior convictions.[105]

The Due Process Directive

The free press—fair trial cases and the decisions of the Supreme Court concerning the effectiveness of the limiting instruction lend considerable credence to an argument that prior crime impeachment of criminal defendants is unconstitutional. Ulti-

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[102] Gannett Co., Inc. v. DePasquale, 99 S.Ct. 2898, 2921 (1979)(Blackman, J., concurring).

[103] 360 U.S. 310 (1958).

[104] *Id.* at 312.

[105] In Murphy v. Florida, 421 U.S. 794, 800 (1975), the Court refused to reverse a decision on the basis of knowledge by some jurors of a single prior conviction of the defendant. The Court acknowledged that the prior conviction had been widely publicized and was then well-known in the community. It was further noted that *Marshall* was a review of a federal decision under the supervisory powers, whereas *Murphy* was a state decision being contested under the fourteenth amendment. Justice Burger indicated in *Murphy* that he would not hesitate to reverse if this were under the Court's supervisory powers. 421 U.S. 799, 804 (1974) (concurring opinion). It is noteworthy, of course, that rule 609 would be subject to review absent the federalism concerns present in *Murphy.*

mately, however, a determination of whether rule 609 is violative of the due process clause must turn on its fairness as a trial procedure. An examination of the "fairness" of the trial accorded a criminal defendant with a record requires analysis of the various prejudicial effects resulting from prior crime impeachment.

An individual with a record is often a primary suspect for future arrest. If he is put on trial, he faces two almost hopeless alternatives. If he testifies and denies the charges, he can be impeached, which will substantially impair his chances for acquittal. If he exercises his constitutional privilege of silence, common sense indicates that his plight is even worse. In this way, such a procedure discourages criminal defendants from testifying and acts as a deterrent to the full development of the facts about the crime charged in the indictment. Full disclosure is sacrificed in return for testimony about an admittedly unrelated offense while the prejudice sustained by an impeached defendant is extreme. The trade is unacceptable.

Our traditional acceptance of prior crime impeachment of criminal defendants is troubling. Our continuing refusal to limit its use is unacceptable. The legal system seems content with a great deal of self-deception on this point. Juries are solemnly instructed to consider prior crimes only as they relate to a defendant's credibility, yet no one really doubts the impact of such testimony on the jury. No one can be reasonably expected to totally set aside the mental presumption which rises against a silent defendant seeking to avoid impeachment.

Judges and prosecutors commonly indicate that jurors need to know the kind of person who is on the stand asking them to believe his story. Knowing the "kind of person" a defendant is for purposes of credibility cannot be separated from the knowledge of character as applied to the determination of guilt or innocence. Do we really believe that a juror who is told what kind of person the defendant is in order to decide whether he should be believed on the stand is going to decide guilt or innocence without reference to that knowledge? The realities of prior crime impeachment, therefore, create a more lenient burden of proof in the trial of a defendant with a record. Rule 609, as applied to criminal defendants, results in a two-tiered criminal justice system. A bad man is afforded due process of one sort, and a defendant without a record receives due process of a different variety. Such a dichot-

omy is obviously an embarrassment to a legal system which purports to treat all defendants equally and solely upon the basis of evidence introduced at trial connecting him with the crime. To treat a defendant in a different fashion because of his bad character is fundamentally at odds with due process of law.

The temptation to relax procedural safeguards when dealing with past offenders is understandable. Yet, as indicated by the following passage from Robert Bolt's play, *A Man for All Seasons,* it is decidedly shortsighted:

> ROPER So now you'd give the Devil benefit of law!
> MORE Yes. What would you do? Cut a great road through the law to get after the Devil?
> ROPER I'd cut down every law in England to do that!
> MORE Oh? And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's — and you're just the man to do it — d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[106]

The content of the due process clause as it relates to criminal procedure takes on important societal ramifications. If we undermine due process of law for one segment of society, its protective force for all is diminished. The due process safeguards which we choose to guarantee in our legal system are in many ways indicative of the value which we attribute to ourselves and our fellow citizens. If we are to take procedural fairness seriously, we can hardly tolerate the use of a trial practice which subjects certain defendants to substantial prejudice without any real tie to relevance or probative value.

The due process clause has consistently been held to constitute "a broadly worded injunction capable of being interpreted by future generations in accordance with the visions and needs of those generations."[107] Clearly, then, prior crime impeachment of criminal defendants cannot withstand constitutional scrutiny merely because we have allowed it historically. As our legal sys-

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[106] BOLT, A MAN FOR ALL SEASONS 56 (1962).

[107] Oregon v. Mitchell, 400 U.S. 112, 278 (1970) (Brennan, J., dissenting in part, concurring in part).

tem has developed, concerted efforts have been consistently made to refine the accuracy of our judicial proceedings and yet retain the protections of personal liberties which mark us as a people. Prior to *Jackson v. Denno* and *Bruton v. United States*,[108] the use of prejudicial confessions pursuant to limiting instruction was commonly accepted. Yet, consistent with the development of due process of law, those decisions indicated that our dedication to the concept of fair trial required that such procedures be discarded. Similarly, we should no longer be willing to accept the "unmitigated fiction" supporting conviction impeachment of criminal defendants. The "vision and needs" of a modern judicial system cannot be based upon self deception.

Accordingly, rule 609, as applied to criminal defendants, is a damaging procedure which furthers no legitimate interest of the state. The widespread criticism of the provision is sound and will eventually be recognized by the Supreme Court. The procedure effectively allows the government "the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."[109] Such a "windfall" is inherently inconsistent with the right to a fair trial.

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[108] See text accompanying notes 88-91 *supra*.

[109] Delli Paoli v. United States, 352 U.S. 232, 248 (1956) (Frankfurter, J., dissenting).