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James Alan Harris
West Virginia University College of Law

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STUDENT NOTES

The Use of Prior Convictions to Impeach the Credibility of the Criminal Defendant

INTRODUCTION

Under the early common law, conviction of an "infamous crime" disqualified one as a witness.[1] This rule was abolished by the legislatures of the various states, but in so doing, the legislatures generally provided that prior criminal convictions could be used to impeach the credibility of witnesses.[2] In many instances, these

[1] *See* C. MCCORMICK, EVIDENCE, § 43, at 89 (1954). Infamous crimes included treason, felonies and acts which involved falsehood.
[2] *Id.* 3 J. WIGMORE, EVIDENCE, § 980, at 538 (3d. ed. 1940).

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statutory provisions lead to practices which are as prejudicial to the accused when he testifies in his own behalf as the common law disqualification was unreasonable.

The courts recognize that evidence of prior criminal convictions is inadmissible for the purpose of establishing a defendant's guilt or to show that it is probable that the defendant committed the crime for which he has been indicted.[3] However, there are well established exceptions to this general rule. Such evidence is admissible when particularly probative in showing such facts as intent, an element in the crime, identity, malice, motive, a system of criminal activity, or when the defendant has raised the issue of his character or has testified and the prosecution attempts to impeach his credibility.[4] Although the possibility of prejudice resulting from the admission of such evidence is recognized, its admission is considered to be justified because of the validity of the state's purpose in presenting the evidence and the prospect that, on balance, the probative value of such evidence will outweigh any prejudicial effect it might have.[5] In addition, "the defendant's interests are protected by limiting instructions, . . . , and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of law."[6]

There is a wide diversity among the jurisdictions concerning the nature of the crimes that may be shown to impeach the credibility of a witness.[7] Some jurisdictions permit only the use of infamous crimes for the purpose of impeachment.[8] Others allow the prosecution to show felonies or misdemeanors,[9] while still others limit the crimes provable to felonies.[10] There are jurisdictions which permit only the use of crimes involving moral turpitude for impeachment, and this is true whether the crimes are classified as misdemeanors or felonies.[11] Finally, in some jurisdictions the trial court is vested with

[3] Lane v. Warden, Maryland Penitentiary, 320 F.2d 179, 181 (4th Cir. 1963); People v. Kelley, 57 Cal. Rptr. 363, 369, 424 P.2d 947, 953 (1967); State v. Cote, 108 N.H. 290, 294, 235 A.2d 111, 114 (1967); Whitty v. State, 34 Wis. 2d 278, 291, 149 N.W.2d 557, 563 (1967).

[4] Spencer v. Texas, 385 U.S. 554, 560 (1967); People v. Molineaux, 168 N.Y. 264, 61 N.E. 286 (1901); State v. Lewis, 133 W. Va. 584, 596-97, 57 S.E.2d 513, 522 (1949).

[5] Spencer v. Texas, 385 U.S. 554, 560 (1967).

[6] *Id.* at 561.

[7] C. McCORMICK, *supra* note 1, at § § 89-90 (collecting authorities).

[8] *E.g.*, People v. Thomas, 393 Ill. 573, 67 N.E.2d 192 (1946).

[9] *E.g.*, State v. Friedman, 124 W. Va. 4, 18 S.E.2d 653 (1942).

[10] *E.g.*, State v. Sorrell, 85 Ariz. 173, 333 P.2d 1081 (1959).

[11] *E.g.*, Nutter v. Dearing, 400 S.W.2d 346 (Tex. Civ. App. 1966).

the discretion to determine whether any particular criminal conviction affects the credibility of a witness.[12]

The rationale for admitting a prior criminal conviction for impeachment purposes is that the jury should have some information concerning the defendant's character to aid it in evaluating and determining the weight to be accorded to his testimony.[13] One court has stated the proposition in this manner: "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."[14] It seems, however, that the natural distrust which members of a jury undoubtedly have for one who is charged with a criminal offense would assure that they would act with restraint in determining the weight to be given a defendant's testimony, whether or not they are made aware of his past wrongdoing.[15]

OBJECTIONS

The major objection to the present procedure of admitting prior convictions to impeach a witness results from the diverse nature of the crimes that may be used for impeachment purposes.[16] Many of these crimes have no special relevancy to the question of the veracity of a witness.[17] Thus, in view of the admitted prejudice aroused by the admission of prior convictions to impeach an accused

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[12] Taylor v. State, 226 Md. 561, 174 A.2d 573 (1961).

[13] State v. Cote, 108 N.H. 290, 235 A.2d 111 (1967); State v. Duke, 100 N.H. 292, 123 A.2d 745 (1956).

[14] State v. Duke, 100 N.H. 292, 293-94, 123 A.2d 745, 746 (1956). *See* Ladd, *Credibility Tests—Current Trends,* 89 U. PA. L. REV. 166, 176-76 (1940); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters,* 70 YALE L.J. 763, 776 (1961).

[15] In Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966), the court stated that

> one need not look for prior convictions to find a motive to falsify, for certainly that motive inheres in any case, whether or not a defendant has a prior record. What greater incentive is there than the avoidance of conviction? We can expect jurors to be naturally wary of a defendant's testimony, even though they may be unaware of his past conduct.

[16] Ladd, *Credibility Tests—Current Trends,* 89 U. PA. L. REV. 166, 178 (1940).

[17] *E.g.,* State v. Webb, 99 W. Va. 225, 128 S.E. 97 (1925). In the *Webb* case the court recognized that crimes of violence have very little probative value regarding the credibility of a witness. The court stated that

> many persons have been convicted of crimes and misdemeanors engendered by the heat of passion and inconsiderate action, infirmities in human nature that 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. *Id.* at 230, 218 S.E. at 99; *See* C. MCCORMICK, EVIDENCE, *supra* note 1, at 157.

who testifies in his own behalf, it would seem patently unfair to permit proof of convictions of crimes which serve only to prejudice the accused in the minds of the jurors while failing entirely to accomplish the purpose for which they are admitted.

One of the precautions which the trial court takes to eliminate or minimize any prejudice that may result from the introduction. into evidence of prior criminal convictions of an accused is the use of limiting instructions which caution the jury to consider the evidence not as proof of the accused's guilt of the crime presently charged, but only as such evidence affects the credibility of the accused as a witness.[18] There are grave doubts about the effectiveness of such a protective measure.[19] Studies indicate that such an instruction operates to sensitize the jury to credibility evidence and that the jury either cannot or will not restrict its use to the question of a defendant's credibility.[20] Many jurists recognize that it is unrealistic to suppose that an individual can "compartmentalize" his mind and consider such evidence only in regard to the question of credibility and not allow it to affect his determination of the guilt or innocence of the defendant.[21] Such a limiting instruction has been characterized as "the recommendation to the jury of a mental

[18] People v. Smith, 48 Cal. Rptr. 382, 409 P.2d 222 (1966). In the *Smith* case the accused testified in his own behalf and on cross-examination was questioned about prior convictions. The Supreme Court of California found no merit to the defendant's contention that the limiting instruction given by the court did not protect him adequately from prejudice and held that the following limiting instruction was adequate to protect the defendant's substantive rights: "You must not use this evidence in determining the defendant's guilt or innocence of the other charges, nor must you permit yourself to be influenced against the defendant because he may have suffered a prior felony conviction." *Id.* at 390, 409 P.2d at 230. *See* Note, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264 (1966).

[19] *See* Note, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264 (1966).

[20] *See* Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744. Results of studies of juries indicated that when the jury became aware that a defendant was insured, the verdicts rendered were greater than those when the jury was not aware that a defendant was insured. Significantly, verdicts returned were the highest when the jury became aware of the fact that a defendant was insured, and the court instructed the jury to disregard such knowledge in determining the amount of the judgment. It is reasonable to believe that the same kind of reaction would occur in the analogous situation of an instruction to disregard evidence of a prior offense except as it might bear on the credibility of the accused. *See* Note, *Other Crimes Evidence,* 70 YALE L.J. 763, 777 (1961).

[21] *E.g.,* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); Stevens v. United States, 370 F.2d 485 (D.C. Cir. 1966) (Fahy, J., dissenting); Awkard v. United States, 352 F.2d 641 (D.C. Cir. 1965) (Washington, J.); Harrison v. State, 217 Tenn. 31, 394 S.W.2d 713 (1965).

gymnastic which is beyond, not only their powers, but anybody's else."[22]

As a result of the inadequacy of measures available to a trial judge for protecting the defendant from prejudice, the defendant finds himself in a dilemma.[23] He faces the almost certain prospect of prejudice whether he testifies in his own behalf or refrains from doing so. If the defendant elects to testify in his own behalf, he opens the door to proof of his prior criminal convictions and the resulting prejudice which arises in the minds of the jurors. This prejudice arises because of the inclination of the jury to conclude that past convictions of crime tend to establish a defendant's guilt of the crime presently charged and from the jury's tendency to punish a defendant presently for crimes committed in the past.[24] Thus, although a defendant's testimony may provide useful information, the threat of the exposure of his criminal record may keep him from testifying.[25] If the defendant, fearing the consequences of the impeachment of his credibility, does not testify in his own behalf, the jury will undoubtedly infer that he is attempting to conceal information that would be unfavorable to him.[26] Studies have tended to show that this threat of prejudice does in fact influence defendants not to take the stand.[27] It has likewise been indicated that the defendant's fear that prejudice may result from the disclosure of his prior criminal convictions is not unfounded. In a survey reported in *The American Jury*,[28] an attempt was made

[22] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.).

[23] Brown v. United States, 370 F.2d 242, 243 (D.C. Cir. 1966).

[24] *See* Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).

[25] Brown v. United States, 370 F.2d 242, 243 (D.C. Cir. 1966).

[26] For a more detailed discussion of this problem see Note, *Impeaching the Accused by His Prior Crimes—A New Approach to an Old Problem*, 19 HASTINGS L.J. 919 (1968).

[27] H. KALVEN and H. ZEISEL, THE AMERICAN JURY (1966). As part of a jury study done under the auspices of the University of Chicago and reported in *The American Jury*, defendants were divided into two classes—those with no criminal record and those with a criminal record. The object of the study was to determine what effect, if any, the existence of a prior criminal record would have on a defendant's decision to testify in his own behalf. The study revealed that in cases in which the evidence was considered to be clear for an acquittal, defendants with a criminal record testified in only 53 percent of the cases while defendants with no criminal record elected to testify 90 percent of the time. The explanation of these results appears to be that counsel for a defendant with a prior criminal record does not wish to jeopardize the favorable position in which he and his client find themselves, and thus he refuses to allow his client to testify and undergo damaging cross-examination during which the client might be forced to testify concerning his prior criminal convictions.

[28] *Id.*

to determine what effect, if any, the jury's awareness of a defendant's prior record might have on his chances of an acquittal. The results of the studies seemed to demonstrate that a defendant with a prior criminal record of which the jury was aware had a substantially smaller chance of acquittal than did a defendant without a prior criminal record.[29]

Considering the results of the foregoing surveys, it would seem, and it has been suggested,[30] that the practice of using prior criminal convictions to impeach a defendant is subject to attack on at least two constitutional grounds. If a defendant with a prior criminal record is less likely than a first offender to take the stand, and, if he does, to be acquitted, it can plausibly be argued that he is thereby being denied equal protection of the laws. While a defendant with a prior criminal record is subject to this prejudice, a defendant without such a record may testify freely without fear of being adversely affected in any manner by such prior convictions. In both cases the defendants are before the court for the same purpose—to have their guilt or innocence of the present crime determined; but they are not accorded equal protection against the adverse effect of cross examination. Another constitutional question arises when a defendant testifies in his own behalf and is compelled to answer questions about prior criminal convictions. The fifth amendment provides that a defendant in a criminal case shall not be compelled to be a witness against himself. If in fact the jury's knowledge of a

[29] *Id.* at 160-61. For the purposes of the survey defendants were classified in two categories. One group of defendants included those who had no criminal record or were able to conceal it from the jury. Another group of defendants included those who either had a criminal record of which the jury was aware, or who were suspected by the jury of having a criminal record. Under these circumstances when the strength of the prosecution's case was "normal" the first class of defendants, those who had no criminal record or who were able to conceal it from the jury, received acquittals in 65 percent of the cases surveyed; while defendants in the second class, those who either had a criminal record of which the jury was aware or who were suspected of having a criminal record, received acquittals in only 38 percent of the cases surveyed. Since the juries gave an acquittal in the same circumstances to almost twice as many defendants who to their knowledge were first offenders, it seems that the jury's knowledge of a defendant's prior criminal record is so prejudicial that it may deprive the defendant of a fair trial.

[30] *See, e.g.*, Stevens v. United States, 370 F.2d 485, 486 (1966) (Fahy, J., dissenting). "A serious question of fundamental unfairness arises when an evidentiary rule may deter a defendant from testifying in his own behalf or, if he does testify, subjects him to evidence highly prejudicial on the issue of guilt although inadmissible for that purpose." *See*, 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. CIN. L. REV. 168 (1968) [hereinafter referred to as *Constitutional Problems*].

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defendant's prior criminal convictions does diminish his chances for an acquittal, it appears that when a defendant, with a prior criminal record, is compelled to answer on cross examination whether he has been previously convicted of crime, his privilege against self-incrimination has been abridged.[31]

SOLUTIONS

As was observed earlier, the most objectionable feature of the rule that allows the use of prior convictions to impeach a witness is the wide range of crimes that may be shown for the purpose of impeachment.[32] A provision in the Model Code of Evidence[33] is

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[31] *Constitutional Problems, supra* note 30. An analogous situation in which the practice of permitting the jury to be apprised of a defendant's prior criminal convictions has been questioned is the common law method of determining the guilt of an alleged multiple offender under an habitual criminal statute. Under the common law method, the prosecution presents evidence in its case-in-chief on both the issue of the defendant's guilt of the crime presently charged and on the issue of his status as a habitual criminal. Thus the jury is informed, before making a determination of the defendant's guilt or innocence of the present crime, of the defendant's past criminal record. Although the constitutionality of the common law method was sustained in Spencer v. Texas, 385 U.S. 554, 575 (1967), Chief Justice Warren writing for the minority recognized that the danger of introducing evidence of other crimes is that the "jury might punish the accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a bad man without regard to his guilt of the crime currently charged." The minority also refused to be swayed by the argument that limiting instructions offered by the trial court afford the defendant adequate protection from prejudice. Because the conviction of crimes in the past is totally irrelevant to the question of a defendant's guilt or innocence of a crime currently charged, the minority opinion suggests that a habitual criminal prosecution is not an instance in which the court is called on to balance the probative value of prior convictions against the probable prejudicial effect they will have on a defendant if introduced into evidence. Likewise it is submitted that although some crimes may be relevant in impeaching credibility, most are so irrelevent to the question of guilt, they should not be admitted for impeachment purposes. Many courts and legislatures recognizing the prejudice inherent in the common law procedure have made efforts to devise methods which will protect the accused from prejudice. Thus, many courts have by judicial decision adopted the so-called Connecticut method under which the jury is not informed of the defendant's prior criminal convictions until they have returned a verdict on the offense presently charged. State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921); State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963); Harrison v. State, 217 Tenn. 31, 394 S.W.2d 713 (1965). The legislatures of several states have adopted statutes which provide a procedure in habitual criminal prosecutions similar to the Connecticut method. A complete list of statutes and decisions can be found in Spencer v. Texas, 385 U.S. 554, 586 (1967). The West Virginia legislature has evidenced its disapproval of the common law method by the enactment of a statute which provides for separate hearings on the issue of a defendant's guilt of the crime presently charged and his status as an habitual criminal. W. VA. CODE ch. 61, art. 11, § 19 (Michie 1966).

[32] Note 16 and accompanying text, *supra*.

[33] MODEL CODE OF EVIDENCE rule 106 (1942).

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designed to eliminate this objection. It specifies that for the purposes of impeaching the credibility of any witness, only crimes involving dishonesty or false statement are admissible.[34] This rule recognizes that many crimes which are now admitted for the purpose of affecting the credibility of a defendant have, in fact, no tendency to show lack of veracity on behalf of the witness. Other commentators have taken this same position and suggest that "there is no justification for the use of crimes in the omnibus."[35] Further, since it is the nature of a crime, rather than the length of a sentence imposed for the commission thereof, which indicates lack of veracity, both felonies and misdemeanors involving dishonesty or false statement should be admissible for purposes of impeachment.[36]

The Model Code also attempts to protect the defendant from any prejudice which might result from the introduction of prior criminal convictions to impeach his credibility. Rule 106(3) puts the defendant in control of the impeachment process by providing that when the accused testifies in his own behalf no evidence concerning his commission or conviction of crime may be introduced for the purpose of impeaching his credibility unless the accused first introduces evidence for the purpose of supporting his credibility.[37] Under a rule such as this, a defendant should not be deterred from testifying because he fears impeachment by the use of prior criminal convictions.

The court of appeals for the District of Columbia has by judicial decision established a new technique for determining the admissibility of prior crimes evidence for the purpose of impeaching a witness. In *Luck* v. *United States,*[38] the court, operating under a statute that

[34] *Id.*

[35] Ladd, *supra* note 14.

[36] *Id.*

[37] MODEL CODE OF EVIDENCE rule 106(3) (1942). Rule 201(3) of the *Model Code* provides that "[i]f an accused in a criminal action does not testify, judge and counsel may comment on accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom." The purpose of the drafters of the *Model Code* was to encourage the accused to testify in his own behalf without being unduly prejudiced by the introduction of a cross examination concerning prior criminal convictions. However, Rule 201(3) appears to do more than merely encourage the accused to testify in his own behalf; it is coercive in nature. It would seem that such a provision is unnecessary. The accused's failure to testify in his own behalf will seldom go unnoticed by the jury, and is most cases this failure will cause the jury to make an adverse inference regarding the defendant's guilt. The drafters of the *Uniform Rules of Evidence* adopted the provisions of the Model Code. UNIFORM RULES OF EVIDENCE rules 21, 23(4). *See* McCormick, *High Lights of the Uniform Evidence Rules,* 33 TEXAS L. REV. 559, 568-69 (1955).

[38] 348 F.2d 763 (D.C. Cir. 1965).

provided that conviction of a crime would not render one incompetent to testify but that "such fact may be given in evidence to affect his credibility as a witness . . . ,"[39] held that the statute did not give the prosecution an absolute right to introduce evidence of prior convictions of an accused for the purpose of impeaching his credibility.[40] Rather, the court held that in all cases the admissibility of prior convictions for impeachment purposes is a discretionary decision to be made by the court.[41] The court stated the proposition in this manner:

> The trial court is not required to allow impeachment by prior conviction everytime a defendant takes the stand in his own defense. The statute, in our view, leaves room for the exercise of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury have the defendant's story than by defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. That is, of course, a standard which trial judges apply every day in other contexts, and we think it has both utility and applicability in this field.[42]

What the court suggests is a balancing procedure whereby prejudicial effect of impeachment will be weighed against the probative relevance of the prior conviction to the issue of credibility.[43] If the

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[39] In relevant part, D.C. CODE 14-305 (1967) provides:
A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers to such matters.

[40] Luck v. United States, 348 F.2d 763, 767 (D.C. Cir. 1965).

[41] *Id.*

[42] *Id.* at 768.

[43] *See Gordon v. United States,* 383 F.2d 936, 939 (D.C. Cir. 1967), in which the court states that
> the defendant who has a criminal record may ask the court to *weigh* the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of the past crimes will cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility. (Emphasis added).

court finds that the former "far outweighs" the latter, such evidence will not be admissible.[44] In making this decision the court should consider "the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is 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."[45] In addition, one court has suggested that crimes which involve dishonest conduct may have probative value on the issue of credibility, but crimes of violence generally do not.[46] The remoteness of a prior conviction also has a bearing on its relevance in regard to the credibility of a witness.[47] Prior convictions for the same crime for which a defendant is currently being tried have an extremely prejudicial effect on a defendant's chances for a fair and impartial trial and should be admitted sparingly. When a defendant has been convicted several times of the same crime for which he is currently charged, impeachment should be limited to the admission of only one conviction when the circumstances indicate strong reasons for disclosure and the conviction directly relates to veracity.[48] Finally, the court must consider the effect of a defendant's failure to testify due to his fear that his credibility will be impeached by the introduction of evidence of prior convictions.[49]

The burden of showing that the prejudicial effect of prior crimes evidence outweighs its probative value lies with the defendant. In the absence of such a showing, evidence of prior convictions will ordinarily be admissible.[50] Because the *Luck* procedure for determining

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[44] "This is a classic illustration of a case in which the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility." Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966).

[45] Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965).

[46] Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

[47] *Id.*

[48] *Id. See* Payne v. United States, 392 F.2d 820 (D.C. Cir. 1968).

[49] Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

[50] *Id.* at 939. There is dicta in a case decided by the Court of Appeals for the District of Columbia before the decision in *Gordon* which suggests that the trial court has an obligation to apply the *Luck* procedure when a defendant is cross examined concerning prior criminal convictions even though the defendant's counsel does not invoke the *Luck* doctrine. Lewis v. United States, 381 F.2d 894 (D.C. Cir. 1967) (dictum). The court implied that the failure of both counsel for the defendant and the trial court to invoke the *Luck* procedure in appropriate circumstances would not preclude the court of appeals from considering such a failure as a ground for reversal. However, it now appears to be settled "that unless defense counsel seeks to invoke the trial court's discretion in rejecting evidence of prior convictions, there can be no abuse of discretion in admitting such evidence." Blakney v. United States, 225 A.2d 654, 655 (D.C. Ct. App. 1967).

the admissibility of evidence of prior conviction is designed to make the question of admissibility turn on the one consideration of major importance—whether the probative value of a prior conviction will outweigh its prejudicial effect—it seems preferable to other techniques of determining admissibility.

However, the *Luck* approach has not been widely adopted, nor has it gone uncriticized. Judge Donaher of the District of Columbia Circuit Court dissented from the majority opinion in the *Luck* case,[51] stating that he felt the court had misconstrued the language of the statute in question and that the statute in question "tells the trier the fact of conviction is evidence, and it *is* to be received."[52] The prosecution has the option of introducing the evidence if it desires.[53] This

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[51] Luck v. United States, 348 F.2d 763, 771 (D.C. Cir. 1965). (Donaher, J., concurring in part and dissenting in part.)

[52] *Id.*

[53] This would appear to be in accord with the construction given to W. VA. CODE ch. 57, art. 3, § 6, by the West Virginia Supreme Court of Appeals. In the syllabus of the case of State v. Friedman, 124 W. Va. 4, 18 S.E.2d 653 (1942) the following statement is found: "Code 57-3-6, *requires* an accused who voluntarily becomes a witness in his own behalf to state in response to questions propounded on cross-examination, whether or not he has been convicted of other offenses." (Emphasis added). It is interesting to note that the mandatory language of the syllabus does not appear in the opinion of the court. However, this rule has been adopted in many later cases. *See* States v. Riss & Co., 139 W. Va. 1, 80 S.E.2d 9 (1953); State v. Blankenship, 137 W. Va. 1, 69 S.E.2d 398 (1952); State v. La Rosa, 129 W. Va. 634, 41 S.E.2d 121 (1946). The court has admonished prosecutors, as well as the trial courts, to limit questions to the accused on cross-examinations concerning prior criminal convictions to matters which are relevant to the matter in issue. In addition, it appears that when the prosecution fails to limit its questions to relevant matters, the trial court, on request should require it to do so. State v. La Rosa, 129 W. Va. 634, 41 S.E.2d 121 (1946); State v. McMillion, 127 W. Va. 197, 32 S.E.2d 625 (1944). Although the rule laid down by the court in the *Friedman* case has been followed by later cases, the cases of States v. Riss & Co., 139 W. Va. 1, 80 S.E.2d 9 (1953), contains language which seems to misinterpret or disregard completely the decision in *Friedman*. In *States v. Riss & Co.* the court considered the question of whether a witness in a civil case should be subject to cross-examination as to prior criminal convictions for the purpose of impeaching his credibility. The court in answering the question in the affirmative recognized that it was a question of first impression in West Virginia. The court referred to its decision in the *Friedman* case and then made the following statement:

> This Court sees no reason why the rule applicable to criminal cases should not apply to civil proceedings. However, we do not propose to enlarge the rule as to civil cases beyond that now prevailing in criminal proceedings. We hold that the admissibility of such evidence to attack the credibility of a witness in civil cases rests in the sound discretion of the trial court. *States v. Riss & Co.*, 139 W. Va. 1, 16, 80 S.E.2d 9, 17 (1953).

This statement does indicate some confusion on the part of the court concerning the right to cross-examine the accused as to prior criminal convictions when he testifies in his own behalf.