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Evidence - Illinois Adopts Rule 609 of the Proposed Federal Rules of Evidence on Impeachment of a Defendant-Witness by His Prior Crimes

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EVIDENCE—Illinois Adopts Rule 609 of the Proposed Federal Rules of Evidence on Impeachment of a Defendant-Witness by His Prior Crimes.

Ruth Bennett agreed to cooperate with Officer Kenneth Burt of the Chicago Police Department in arranging for the arrest of her marijuana supplier. In exchange for this cooperation, charges against her for unlawful possession of marijuana were to be dropped. That evening she accompanied Officers Burt and Leonard Lawrence to the Melody Lane Tavern. Ruth Bennett was searched, given $20 in marked money, and entered the tavern. She returned a short time later, and handed the officers two envelopes containing marijuana. The officers entered the tavern, and subsequently had Ellis Montgomery, the night manager, empty his pockets. The marked $20 was found among the contents. Montgomery was thereupon arrested for the unlawful sale of a narcotic drug.

At Montgomery's trial, Ruth Bennett testified that the defendant, whom she had known for over a year, had agreed on November 14, over the telephone, to sell her some marijuana that evening at the tavern. She also described how the marijuana was sold to her by the defendant in exchange for the marked money. The officers then testified that upon entering the tavern, they immediately recognized the defendant from Ruth Bennett's description, discovered the marked money on his person, and arrested him. The defendant testified that on that evening he had not talked to Ruth Bennett, but that she did talk to the bartender. The defendant further testified that the bartender afterwards had given him $135 in cash, including the $20 in marked money, so that he could purchase some whiskey for the tavern. He also maintained that he had had a whiskey list in his pocket when arrested. The offficers, on the other hand, could recall neither a whiskey list nor any additional money in the defendant's possession. The tavern's bartender did not testify.

For purposes of impeaching the defendant's credibility, the prosecution read into evidence a certified copy of a prior conviction for robbery. The defendant made no objection, even though the conviction was in 1947, when he was only 18 years of age. The jury subsequently found the defendant guilty, and he was sentenced to ten years imprisonment.

In his motion for a new trial the defendant contended that the prior conviction, because of its type and remoteness in time, was unrelated to his credibility. The trial judge denied the motion on the ground that under Illinois law he was without discretion to exclude any prior conviction offered by the prosecution. On a direct appeal, the Supreme Court of Illinois reversed[1] the conviction and remanded the case for a new trial. The court found that the 21 year old conviction for robbery bore no "rational relationship" to credibility and should not have been admitted.[2] The court also construed the relevant Illinois statute,[3] which provides that a conviction "*may*" be shown to impeach credibility, as conferring discretion upon the trial judge as to the admissibility of such a prior conviction of a defendant.[4]

People v. *Montgomery* is significant because it overturns the rule in Illinois that a trial judge must admit a prior conviction of an infamous crime whenever it is introduced by the prosecution for purposes of impeaching a defendant-witness. Judges instead will be allowed to consider the prejudicial effect of the evidence, and its probative value in ruling upon the prior conviction's admissibility.

Of perhaps greater significance is the court's rationale in *Montgomery*. It indicates that Illinois will adopt neither of the established approaches to determining the admissibility of prior convictions. Rather, it adopts the proposed federal rule, a third approach which may contain elements of the other two.

The Two Existing Approaches

The admission of prior convictions for purposes of impeaching a witness has long been the rule in most jurisdictions.[5] This practice of admission, virtually unlimited by the type or severity of the past crime, has been recently attacked on two grounds. The relevancy of a past crime to present truth-telling has been attacked, particularly where that crime is not limited to one involving dishonest conduct.[6] Where

1. People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).
2. *Id.*
3. Ill. Rev. Stat. Ch. 38, Sec. 155-1 (1969). The statute provides: "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction *may* be shown for the purpose of affecting his credibility. . . ." (Emphasis supplied). Only "infamous" crimes may be used to impeach, Bartholomew v. People, 104 Ill. 601, 44 Am. Rep. 97 (1882), Ill. Rev. Stat. Ch. 38, Sec. 124-1 lists "infamous" crimes.
4. People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).
5. *See* III Wigmore on Evidence Sec. 488 (3rd ed. 1940) for a collection of the relevant state statutes.
6. Ladd, *Credibility Tests—Current Trends*, 89 V.P.A. L. Rev. 166 (1940).

the witness is the accused, the more subtle problem of possible jury prejudice appears. A defendant with prior convictions is faced with the difficult choice of telling his story and risking prejudicial inferences of guilt from the jury's learning of his past crimes, or not testifying, losing the opportunity to explain his version of the case, and risking the inference that he has something to hide.[7] This risk of prejudice would have the result of causing a defendant who was convicted of a crime of violence, logically remote from the issue of credibility, to face the same dilemma as one who was a convicted perjurer. Attempts to solve these problems resulted in two very different approaches: the *Luck-Gordon* rule and Model Code of Evidence Rule 106.

In those jurisdictions which have a statute providing that prior convictions "may" be introduced to impeach a witness, "may" has been consistently held to vest discretion to introduce those convictions in the prosecution.[8] Once a witness had testified, the prosecution could, and invariably did, introduce evidence of a prior conviction of the witness to attack his credibility.[9] There was no question of the trial judge not admitting such evidence, for the statute had already determined that evidence of prior "infamous crimes" were always relevant to the issue of credibility.

In *Luck* v. *United States*,[10] however, the Court of Appeals for the District of Columbia construed the word "may" in the District of Columbia statute[11] as conferring discretion upon the trial judge to exclude evidence of prior convictions introduced solely to impair the credibility of a defendant-witness. The court felt that Congress would have provided that past convictions "shall" be admitted if the intent was to provide that the trial judge was obligated to admit any conviction that the prosecution saw fit to introduce. In exercising this discretion, the judge was to balance the probative value of past convictions for purposes of impeaching the accused against the prejudice that might result from such evidence.[12] If the resultant prejudice would "far outweigh"

7. Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965).
8. *See, e.g.*, People v. Buford, 396 Ill. 158, 71 N.E.2d 340 (1947).
9. ". . . notwithstanding the urgent need of prosecutors for expanded resources to investigate and present criminal cases effectively, the legislature should face up to such needs rather than to remain content with 'cut-rate convictions gotten with the aid of prior criminal records.'" U.S. v. Bailey, 426 F.2d 1236, 1241 (D.C. Cir. 1970) quoting Blakney v. U.S., 397 F.2d 648, 649-50 (D.C. Cir. 1968).
10. 348 F.2d 763 (D.C. Cir. 1965) (dictum).
11. The District of Columbia is much like Ch. 38 Sec. 155-1 Ill. Rev. Stat. The statute provides in part: "A person is not incompetent to testify . . . 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. . . ." 14 D.C. Code 305 (Emphasis supplied).
12. The *Luck* construction of the statute has by no means become unanimous.

the probative value of the convictions or if the need to hear the defendant was great, the trial judge, in his discretion, could exclude the convictions as evidence for impeachment.[13] The nature of the past crimes, the length of the criminal record, and the "age and circumstances" of the defendant were listed by the court as possible factors to be considered in the trial judge's determination.

In *Gordon* v. *United States*,[14] the court supplemented these factors with a "rule of thumb."[15] A conviction based upon dishonest conduct, the court reasoned, would generally relate to the veracity of the individual, while violent crimes would generally be more indicative of a short temper than of dishonesty.[16] The court also indicated that the degree of remoteness in time of the prior conviction was proportionate to that conviction's bearing on veracity.[17] Coupled with a consideration of the remoteness of the prior conviction, should be an examination by the judge of the accused's conduct since the conviction.[18] The relation of a conviction for a crime involving dishonesty apparently could be blunted by intervening time and a legally blameless life.[19]

Finally, the *Gordon* court cautioned against the extreme possibilities for prejudice if the accused's prior crime was the same, or substantially the same, as the crime for which he was on trial.[20] It was suggested these prior convictions should be admitted sparingly, and only when the conviction was one related to veracity.[21] The court stated that a non-jury hearing would often be necessary to enable the trial judge to make a reasoned decision.[22] In this kind of hearing, the accused would testify, and the prosecution would be allowed to cross-examine before a decision about the admissibility of the conviction was made.[23]

Although the doctrine of *Luck* has subsequently been applied by the

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In State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1967), the court reversed the ruling of a trial judge who relied on the *Luck* discretion in holding a prior conviction inadmissible. The Court found the *Luck* construction of the statute "strained" and unacceptable. Justice Weintraub (concurring) pointed out that the New Jersey legislators by passing the statute had already determined that the probative value of prior conviction outweighed any possible prejudice. Thus, the court held the trial judge had no discretion to exclude proffered past convictions. *Hawthorne* has attracted a following of its own. *See*, e.g., Commonwealth v. West, 258 N.E.2d 22 (Mass. 1970).

13. 348 F.2d at 768.
14. 383 F.2d 936 (D.C. Cir. 1967).
15. *Id.* at 940.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 941.
23. *Id.*

District of Columbia Court of Appeals to *all* witnesses,[24] the doctrine has not been significantly extended. In fact, the cases since *Luck* and *Gordon* have demonstrated that the applicability of *Luck* is the distinct exception rather than the rule. Furthermore, the burden is upon the defendant not only to raise the *Luck* issue, but to persuade the trial judge that in his particular case the facts justify excluding a prior conviction pursuant to the mandate of *Luck*.[25] As then Judge Burger said in *Evans v. United States*:

> [I]t is not enough merely to refer to the *Luck-Gordon* standards and then to sit back. The defense must show how and why this case calls for a discretionary "exemption" from the impeachment permitted by statute. Nor, by the same token, will merely stating that it is important for the defendant to testify be sufficient to meet this burden.[26]

If the defendant does meet the burden of demonstrating his particular need for testifying, he still must demonstrate the possibility of undue prejudice which might result if his prior conviction was introduced.[27] Even assuming that the dual burdens of *Evans* are met, the judge may still consider the *Gordon* "rule of thumb" and disallow the *Luck* request.

Despite periodic proposals that *Luck* be broadened,[28] any extension of that doctrine was unlikely in view of the position on impeachment by prior convictions taken by rule 6-09 of the preliminary draft of the Federal Rules of Evidence.[29] This proposed rule allowed admission of *any* prior conviction for purposes of impeaching a witness, so long as the conviction was punishable by at least one year in prison, and the witness' release from prison had occurred within the past ten years.

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24. Davis v. U.S., 409 F.2d 453 (D.C. Cir. 1969). Although many of the same reasons may exist for extending the rule to include all witnesses, the prejudicial effect of impeaching a non-defendant witness has been largely ignored in judicial and academic circles.

25. *See* Evans v. U.S., 397 F.2d 675 (D.C. Cir. 1968).

26. *Id.* at 679.

27. *Id.*

28. In U.S. v. Bailey, 426 F.2d 1236, 1240-43 (D.C. Cir. 1970), Judge Fahy stated that an expansion of *Luck-Gordon* might very well be in order. He suggested that an approach similar to Model Code of Evidence Rule 106 be considered, but that such consideration should only be undertaken by the court *en banc*. To date, *Luck-Gordon* has not been expanded.

29. Proposed Federal Rule 6-09 provided:

> (a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible 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, or (2) involved dishonesty or false statement regardless of the punishment.
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> (b) *Time Limit.* Evidence of conviction under this rule is inadmissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date.

Thus, Rule 6-09 necessarily rejected *Luck*.[30] Correspondingly, support for *Luck* in other circuits eroded. The Court of Appeals for the Seventh Circuit, for example, in *United States v. Escobedo*[31] discussed the dichotomy between Rule 6-09 and *Luck*. The court said that it would probably follow the proposed Federal Rules, but at any rate, *Luck* would certainly not be applied as a "rule of thumb."[32]

However, the Advisory Committee's recent extensive revision of Rule 609[33] appears to have given the *Luck-Gordon* rule a new vitality. This version of the rule prohibits impeachment evidence of a prior crime, unless the crime involved dishonesty or false statement, or unless it was punishable by imprisonment in excess of one year. Furthermore, the determination of the admissibility of such a prior crime is within the trial judge's discretion, based upon a determination of whether or not the danger of prejudice substantially outweighs the probative value of the evidence. The provision which prohibits the admissibility of a conviction obtained more than ten years previously has been retained from the earlier draft of Rule 609. The guidelines propounded by the rule provide an ample framework for the application of *Luck-Gordon*.

An approach which, unlike proposed Rule 609, provides definitive answers rather than leaving the matter of the impeachment of a witness by prior convictions to the court's discretion was taken by the Model Code of Evidence Rule 106.[34] Rule 106 allows *only* the admission of crimes involving dishonesty or false statements to attack the credibility of a witness. If, however, the witness is the defendant, no crimes

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30. *See* Spector, *Impeaching the Defendant by His Prior Convictions And the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 Loyola L.J. 247 (1970). The author finds the rationale of Rule 6-09 unconvincing, particularly as it relates to Rule 6-09's rejection of *Luck-Gordon*.

31. 430 F.2d 14 (7th Cir. 1970). The court refused to apply *Luck-Gordon* even though the prior crime was substantially similar to the one for which the defendant was on trial.

32. *Id.* at 19.

33. The rule provides in relevant part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime . . . is admissible 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, or (2) involved dishonesty or false statement regardless of the punishment unless (3) in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.
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> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.

34. Rule 106 provides in part: "(3) If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, . . . no evidence shall be elicited on his cross examination or be otherwise introduced against him. . . ." Uniform Rule of Evidence 21 is substantively identical: ". . . If the witness be the accused . . . no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility."

may be introduced to impugne his credibility unless the defendant first offers evidence on that issue.[35]

Rule 106, then, presupposes a slight degree of relevance to past convictions not involving dishonest conduct. The rule also presupposes that an inordinate amount of prejudice would result from introduction into evidence of a past conviction of the testifying defendant, irrespective of the probative value of this conviction. The presupposition is evident from the official comment on Rule 106(3):

> It is generally believed that evidence of conviction of an accused whether elicited on cross-examination or otherwise introduced, though received only as affecting his credibility as a witness, is constantly misused by juries to prejudice him on the merits. Reports of public defenders assert that the admissibility of such evidence is a chief reason for the failure or refusal of the accused to take the stand.[36]

In light of the fear of jury prejudice, the policy of Rule 106 is to encourage a defendant who has previously been convicted of any crime to testify without fear of impeachment by his prior conviction. The defendant will thus have the opportunity to tell the jury his version of an incident, or perhaps establish a vital fact. However, the prosecution will not be completely overlooked. The State will still have the opportunity to introduce convictions for crimes most relevant to veracity if the defendant first introduces evidence to support his credibility. Most important to the prosecution, however, is the fact that if because of his lack of impeachment by prior convictions, the defendant takes the stand, the prosecution will then have the opportunity to cross-examine the defendant concerning any part of his testimony.[37]

The rationale of *Luck* differs basically from that of Model Code Rule 106. A defendant seeking to get the benefit of the *Luck* rule must raise the issue and then meet the burden of persuading the trial judge

35. ". . . Under the former rule he laid his past record open for inquiry when he became a witness, with the result that the defendant hardly dared take the stand because of the risk that he was shown to have been a bad actor in the past. By not testifying, the defendant did not have the benefit of his own denial of guilt. . . . The policy of the new rule is that it is better to remove the fear of conviction on past record by imposing the restriction that evidence of former conviction cannot be received except in answer to evidence which the defendant introduces to support his character. . . .", State v. Motley, 199 K. 335, 430 P.2d 264, 267 quoting from Gard, *Kansas Code of Civil Procedure Annotated*, P. 393. Kansas has adopted Uniform Rule 21 verbatim, K.S.A. 60-421.

36. Model Code of Evidence Rule 106(3), P. 128.

37. ". . . The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. . . . The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is very often hid, is among the very strongest bulwarks of justice." McClesky v. Leadbetter, 1 Ga. 551, 555 (1846) quoted in V Wigmore on Evidence Sec. 1367 (3rd ed. 1940).

that the *particular* circumstances justify an *exception* from the general rule of admissibility of prior convictions for impeachment purposes.[38] This view of *Luck* is concomitant with the general assumptions that evidence of virtually all convictions is relevant to veracity, and that juries will not be unduly prejudiced by the introduction of such evidence.

Another indication that the rule of *Luck* requires a distinct exception to the general rule of admissibility of prior convictions is the *Luck* court's construction of the District of Columbia statute. The court, in effect, says that the phrase "conviction may be given in evidence"[39] confers discretion upon the trial judge to *exclude* evidence of a prior conviction. In *Gordon* the court refers to its construction of the statute in *Luck*, implying that this construction was the only possible meaning which could be given to the statute short of either admitting or excluding all prior convictions.[40]

It is submitted that the court could have just as easily, and perhaps more correctly in a semantic sense, construed the statute to vest discretion in the trial judge to *admit* evidence of a prior conviction. In other words, the *Luck* decision could have announced that as a general rule, prior convictions would be inadmissable for the sole purpose of impeaching the defendant-witness. The court could have then added that upon a proper demonstration of particular circumstances (*i.e.* where the probative value on the impeachment issue was very high), the trial judge could admit evidence of prior convictions. One such example of high probative value would be a perjury conviction. The prosecution could also be given the right to introduce such evidence if the defendant-witness offered testimony to support his credibility.

Implicit in *Luck* is the court's faith in the ability of limiting instructions given to the jury to remedy any prejudice toward the defendant witness. If the defendant cannot meet his burden of showing the possibility of particular jury prejudice, or demonstrate that he has a particular need to testify, evidence of his prior conviction is admissible. The jury is then cautioned that the evidence is not being received as substantive evidence, but rather only as it bears on the defendant's veracity.

On the other hand, Model Code Rule 106 totally prohibits the very admission of prior convictions for purposes of impeaching the accused.

38. *See* note 25, *supra.*
39. 14 D.C. Code 305.
40. 383 F.2d 936, 941. Although the primary purpose of the statute was to remove the common law provisions which disqualified as a witness anyone who had been convicted of a crime, the traditional construction of the statute has focused on the part which qualifies the removal. This construction assumes that the legislature intended to counterbalance the common law disqualification. The assumption seems arbitrary.

This prohibition cannot be based upon notions of the lack of probity in any prior conviction, for the Rule allows impeachment of witnesses other than the accused by the introduction of past convictions involving dishonesty or false statements.[41] Therefore, by totally restricting such attack when the witness is the accused, Rule 106 necessarily implies that limiting instructions often are ineffective.[42]

Upon a first reading, the court's adoption of Proposed Federal Rule 609 in *People* v. *Montgomery* seems to be tantamount to Illinois' espousal of the *Luck* rule. *Montgomery* and *Luck* construed similar statutes as conferring discretion on the trial judge to control the admission of the evidence of past crimes. In fact, as the Advisory Committee stated in its notes following Rule 609, that subsection (a)(3), the discretion conferring provision, found its genesis in the *Luck* decision. In the sense that *Montgomery* and *Luck* involved similar statutory constructions and that Rule 609 is grounded upon the *Luck* and *Gordon* decisions, it can indeed be claimed that Illinois has adopted *Luck*. However, it must be noted that Rule 609 is merely a shell, within which very different policies and assumptions can be placed.

One of the more important considerations is whether under Rule 609 as applicable in Illinois, the rule of *Evans* that it is the defendant-witness's burden to establish that the conviction should not be admissible will be followed. An initial indication that *Montgomery* may not adopt

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41. Model Code of Evidence, Rule 106(1)(b).

42. The effectiveness of limiting instructions has been the object of much skepticism. In *Bailey*, supra note 29, Judge Fahy questioned the adequacy of this practice and indicated that possibilities for prejudice were the primary reason for considering an expansion of *Luck-Gordon*. The United States Supreme Court, in Bruton v. U.S., 391 U.S. 123 (1968), considered the effectiveness of the trial judge's instruction that the confession of one defendant was inadmissible as hearsay against a second defendant. The court reversed the second defendant's conviction. It held that there are certain situations in which limiting instructions will not sufficiently obviate the extreme risk of jury prejudice. Many commentators have suggested that the impeachment of a defendant witness is such a situation, and that only by denying the admission of all past convictions will this risk of prejudice be avoided. See, e.g., Ladd, *Credibility Tests*, supra note 6, Griswald, *The Long View*, supra note 7, Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DePaul L. Rev. 1 (1968), Note: *Impeachment of the Defendant-Witness by Prior Convictions*, 12 St. Louis U.L.J. 277 (1967). "Is there anyone so naive who could maintain that juries are endowed with superior powers of sifting impeachment evidence from substantive evidence? One may consciously accept impeachment evidence for what it is worth, but the barbs of prejudice possess an uncanny faculty for impressing the unconscious self. Warning judicial instructions may carefully distinguish the uses to which particular items of proof may be put, yet it is highly improbable that cold, judicial analysis will temper or control the juror's very human propensity to take all things into account." Slough, *Impeachment of Witnesses: Common Law Principles and Modern Trends*, 34 Indiana Law. Rev. 1 (1958). One study indicates that jurors almost always ignored the court's instruction on the use of prior convictions and concluded that because of his record the defendant was more likely than not guilty of the crime with which he was charged, Letter from Dale W. Broeder in Note: *Other Crimes Evidence At Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763, 777 (1961).

the *Evans* burden rule is the two courts' divergent views of their respective prerogatives concerning the admission of prior convictions for impeachment purposes. Prior to *Evans* the Court of Appeals for the District of Columbia, in *Gordon*,[43] quoted from *Hood* v. *United States*[44] explaining that:

> *Luck* establishes only that Congress, in legislating to the effect that prior convictions may be used to impeach, left some room for the the play of judicial discretion over the unfolding circumstances of the immediate trial.[45]

It is obvious, then, that the *Luck-Gordon-Evans* court clearly views its doctrine as an exception made available to the judiciary solely through lack of exercise of legislative prerogative. The Supreme Court of Illinois, on the other hand, seems to indicate that even the language of the statute might not be all-determinative. The court quotes from Wigmore's discussion of the rule that only facts having probative value are admissible:

> Among its innumerable indirect effects . . . is the doctrine that even the Legislature cannot establish a rule of decision which will deprive the Judiciary of its power to investigate the facts by rational methods.[46]

The court then reviewed the probative value of Montgomery's prior conviction for purposes of his credibility and concluded that there was no "factual or psychological" support for the proposition that it was relevant to his veracity.[47] The quotation from Wigmore[48] and the subsequent determination by the court of the prior conviction's lack of probity could be interpreted to imply that even if the Illinois statute[49] had stated "shall" instead of "may", the court, nonetheless would have reached the same result. At the very least, the court's divergence in view from that of the *Luck-Gordon-Evans* court suggests a possibility that Illinois, in adhering to "[T]he rules directed to prevent the jury from substituting passion and prejudice, instead of reasoning, as the foundation of their conclusion . . . ."[50] will consider equally an evaluation of possible jury prejudice and the probity involved in admitting a prior conviction. However, the thrust of *Montgomery* is not merely to make probity and prejudice twin factors to be considered when the

43. 383 F.2d at 939 n.5.
44. 365 F.2d 949, 951 (D.C. Cir. 1966).
45. *Id.*
46. I Wigmore on Evidence, Sec. 9 (2nd ed. 1940), at 260.
47. People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).
48. *Supra* note 47.
49. *See* note 3, *supra.*
50. *Supra* note 44.

accused seeks to testify. The court quoted with approval the comments of Dean Griswold that the effectiveness of instructions limiting evidence of a defendant's prior crimes solely to the issue of credibility is a fiction in which the courts indulge.[51] The court also referred to the trial judge's statement that Montgomery would be convicted by the jury on the basis of his 21 year old conviction if the other evidence was of equal weight. Finally, the Illinois Supreme Court agreed with the trial judge that the prejudicial effect of the prior conviction was "unmistakable". This implies that, limiting instructions notwithstanding, evidence of the accused's past crimes is inherently prejudicial on the issue of guilt. Thus, *Montgomery* repudiates the notion that proper limiting instructions generally protect against the possibility of undue jury bias arising from such evidence. The ten year limitation on the admissibility of all prior convictions which is imposed by the adopted version of Rule 609 does not involve the issue of jury prejudice. The Rule's time limitation merely fixes an outer limit, beyond which the probity of any conviction is considered negligible. It should be noted, however, that the court still found "unmistakable" the prejudical effect of a conviction more than twice the age of the "outer limit" for probative value.

A corollary of the court's concern with jury prejudice is a policy which will encourage the defendant to testify. Hence, the court appeared concerned about the possible "constitutional difficulties" created by the requirement that, at the prosecution's discretion, all past convictions be admitted to impeach the defendant. The prejudice or potential prejudice, of a jury can affect the defendant's case whether he ultimately decides to testify or not. If the defendant chooses to testify, and is impeached, the danger is that the jury will view the impeachment as evidence of guilt, not lack of credibility.[52] Conversely, when the defendant chooses not to testify, fearing the possibility of prejudice stemming from his impeachment, he faces an important but more subtle danger. The non-testifying defendant has lost his only opportunity to deny directly the testimony of other witnesses and tell *his* version of the story. Thus, the danger exists that false testimony will go uncontroverted merely because the defendant fears the potential jury prejudice flowing from his impeachment. The defendant also faces the possibility of a conscious or unconscious inference of guilt by the jury solely because he has not elected to testify. The strong possibility of prejudice

51. *Supra* note 7.
52. Note, *Procedural Protection of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and Rule Excluding Evidence of Propensity to Commit Crime*, 78 Harv. L. Rev. 426, 441 (1964).

facing the defendant with a record of prior convictions has caused one author to suggest that their introduction as impeachment evidence is unconstitutional.[53] It was contended this method of impeachment might violate the equal protection clause of the Fourteenth Amendment. Further, it may deny the accused the privilege against self-incrimination and the right to trial by an impartial jury, guarantees afforded by the Fifth and Sixth Amendments, and made applicable to the states by the Fourteenth.[54] Whether or not this method of impeaching the accused is unconstitutional, it is important to note the concern of the *Montgomery* court in protecting the defendant from extreme jury prejudice.

The Court of Appeals for the District of Columbia, in applying the *Luck-Gordon-Evans* standard, has considered the possibility of unfair jury prejudice to be but one of the factors which the trial judge must weigh. However, before the issue of prejudice could be considered the defendant was required to present sufficiently cogent reasons for his testimony to warrant an "exemption" from the permitted impeachment.[55] Absent special circumstances, then, the Court of Appeals for the District of Columbia must assume that there is insufficient likelihood that a jury will be unfairly influenced by prior crimes evidence. Thus, *Montgomery* and *Luck-Gordon-Evans* differ on the incidence and scope of unfair jury prejudice. Once this difference is recognized, it becomes evident that the burden which is placed upon the accused of demonstrating that the possibility of prejudice outweighs probity will similarly differ. A burden of showing that prejudice outweighs probity is more easily met where, as in *Montgomery*, the court assumes that prejudice is virtually inherent under such circumstances. Therefore, the "rule of thumb" of *Gordon* that crimes involving dishonest conduct are generally highly probative may be too broad for the *Montgomery* rationale.

Conversely, the approach of Model Code Rule 106 is too narrow. The inadmissibility of all prior convictions if the defendant offers no evi-

53. Note, *Constitutional Problems Inherent in the Admissibility of Prior Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. Cin. L. Rev. 173 (1968).

54. *Id.* Although the question has not been decided by the Supreme Court, Chief Justice Warren's dissent in Spencer v. Texas, 385 U.S. 554, 577-78 (1967), seems to indicate there is no constitutional violation. In *Spencer* the court held constitutional a Texas recidivist statute which allows a jury to consider the defendant's prior convictions for purposes of sentencing but not for purposes of determining guilt. The dissenting Warren thought the statute to be violative of the Due Process Clause of the Fourteenth Amendment. He contrasted the prejudicial-probative balance in the recidivist case with that of impeachment by prior convictions and suggested that the probative value of prior convictions to credibility outweighed any prejudice. While this pronouncement has been interpreted to bar Fourteenth Amendment arguments, it has not been read as giving approval to the existing rule, *Bailey, supra* note 29 at 1242. Thus, *Spencer* should be limited to the constitutional issue.

55. *Supra* note 26 at 679.

dence to support his credibility assumes that no conviction can ever be more probative than prejudicial. Under any construction, however, both the Illinois statute and proposed Federal Rule 609 do state that there can be circumstances where prior convictions are admissible on the issue of a defendant-witness' credibility. Thus, the Illinois court could not totally adopt the Model Code's complete ban upon such convictions. Furthermore, had the court felt that all prior convictions were inadmissible on the issue of credibility, its determination that "may" conferred discretion upon the trial judge would be a *non sequitur*. Finally, any analysis of Rule 106's concern with jury prejudice must be tempered by an additional provision allowing the trial judge or the prosecutor in his summation to comment upon any failure of the defendant to testify.[56] This allowance of comment was thought to serve as an added factor to induce the defendant to appear on the witness stand.[57] It follows then, that the Model Code is concerned with jury prejudice only as it is relevant to discouraging a defendant from testifying. On the other hand, *Montgomery* implied a policy which seeks to avoid jury bias whether or not the defendant does choose to testify.

CONCLUSION

Since both the *Luck-Gordon-Evans* doctrine and Model Code of Evidence Rule 106 are inapposite, a middle ground is in order. It is submitted that a rule opposite to that of *Evans* is particularly indicated. The rule would operate as a presumption, in effect, that all prior convictions are sufficiently prejudicial to a defendant-witness to warrant their exclusion. However, the trial judge could exercise his discretion by admitting those convictions which were so probative as to compel an exception from the general rule of inadmissibility. *Montgomery* does not state which conviction might warrant such an exception.[58] Crimes bearing directly upon testimonial deception should be normally admissible

56. Model Code of Evidence, Rule 201(3). The rule permitting comment upon defendant's failure to testify was found to violate the defendant's privilege against self-incrimination in Griffin v. California, 380 U.S. 609 (1965). Without the countervailing force of this rule, the likelihood that Rule 106 will be adopted by a state legislature is almost non-existent. See, e.g. *Hawthorne,* supra note 12 at 687-88, n.1.

57. This was the official reason given by the Model Code, p. 106. At least one author of Uniform Rule 21, thinks the Rule is warranted in its own right and should be adopted even without the provision for comment, McCormick, *Some Highlights of the Uniform Evidence Rules,* 33 Tex. L. Rev. 559, 569 (1955).

58. In People v. Sawyer, 48 Ill. 2d 127, 268 N.E.2d 689 (1971), the Illinois Supreme Court held that under the *Montgomery* rationale a prior conviction for prostitution would not afford a basis for impeaching a witness of the State, but that a prior conviction for possession of narcotics would afford such a basis. However, since the witness in *Sawyer* was not the accused or even a witness testifying on behalf of the accused, the admission of a prior conviction could not prejudice the accused on the issue of his guilt. Thus *Sawyer's* pronouncements should not be extended beyond impeachment of a prosecution witness.

to impeach a defendant-witness.[59] The logic of admitting such crimes is unassailable, for they are by definition the most relevant to credibility. Sufficient flexibility could then be retained to enable the trial judge to make other exceptions. Regardless of the eventual guidelines established by the court, the decision of *Montgomery* offers an opportunity to create a doctrine which will far surpass *Luck-Gordon-Evans* in limiting the use of prior convictions for impeaching a defendant.

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59. The author of *Montgomery* is already on record as favoring this rule: "When the accused takes the stand in his own behalf, he should, in my opinion, be subject to impeachment only by proof of past crimes which directly bear on testimonial deception, such as perjury. Past convictions not in this category should not be admissible unless they are relevant for some purpose other than impeachment. . . . The contrary and current practice lies close to the borders of the due process clause, and it should be eliminated." Shaefer, *Police Interrogation and The Privilege Against Self-Incrimination*, 61 N.W.U. L. Rev. 506, 512 (1966).