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COMMENTS

USE OF BAD CHARACTER AND PRIOR CONVICTIONS TO IMPEACH A DEFENDANT-WITNESS

Not infrequently in criminal proceedings, after the State has carried its burden of going forward with proof of guilt,[1] a defense attorney is faced with the task of deciding whether or not to permit the accused to testify in his own behalf. Once the defendant takes the stand, the prosecutor has a right to impeach the defendant's testimony by parading the unsavory aspects of his past life before the jury. The defense counsel must assume the risk, therefore, that this exposure may far outweigh any advantage to be gained from the testimony. Although an accused cannot be forced to give evidence against himself,[2] this protection is, of course, of little value if his own evidence is vital to counter the State's evidence.[3] When the defendant becomes a witness, the rules of impeachment often compel him to give evidence, directly or indirectly, which cannot help his cause and may irreparably harm it.

The issue is thus framed: Is this exposure of the defendant's past life solely to discredit his testimony before the jury relevant, and, if so, should it be disallowed, regardless of relevancy, because of its overwhelming prejudicial effect?

I. History

The dilemma is of comparatively recent origin for the elementary, though unsatisfactory, reason that an accused has not always been competent to testify in his own behalf.[4] The defendant's ineligibility was rooted in the common-law concept, prevalent in both civil and criminal cases, that, because human nature dictates that a partisan will falsify or at least unconsciously twist the truth, statements of an accused were totally unreliable.[5] This situation was remedied by statute in 1869[6] which permitted the accused to speak.[7] It was unclear at this

1. See generally McCormick, Evidence § 306 (1954).

2. U.S. Const. amend. V; N.Y. Const. art. I, § 6; N.Y. Code Crim. Proc. § 10; People v. Ferola, 215 N.Y. 285, 109 N.E. 500 (1915); Fisch, New York Evidence § 694 (1959); 8 Wigmore, Evidence § 2268 (McNaughton rev. ed. 1961).

3. N.Y. Code Crim. Proc. § 393 states that the refusal by the accused to testify shall create no presumption against him. Furthermore, neither the prosecutor (People v. Leavitt, 301 N.Y. 113, 92 N.E.2d 915 (1950)) nor the trial judge (People v. McLucas, 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965)) may comment on the failure to testify. Nevertheless, the jury is certain to ponder on such failure to the accused's detriment. See 8 Wigmore, Evidence § 2272 (McNaughton rev. ed. 1961). This has recently been made a matter of federal constitutional law in Griffin v. California, 380 U.S. 609 (1965).

4. 2 Wigmore, Evidence § 576 (3d ed. 1940).

5. Ibid.

6. N.Y. Sess. Laws 1869, ch. 678, § 1.

7. Of all common-law jurisdictions, only Georgia, until recently, retained the common-law rule that a person charged with a crime was incompetent to testify in his own behalf. Ga. Code Ann. § 38-416 (1954). The defendant could make a statement but could not be

juncture whether proof of past convictions or bad character could be used to discredit the defendant-witness. In 1876, however, *Adams v. People*[8] held that the statutory change allowing the accused to testify did not affect the common-law rule which permitted a witness' bad character to be introduced to impeach him. The *Adams* rule was codified in the 1879 amendment to the New York Code of Criminal Procedure[9] which allowed a felon to testify in all actions, civil and criminal,[10] but also provided: "[T]he conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question."[11] So the law stands today.[12]

II. The Present Law in New York

A. *Where Defendant Has Not Taken the Stand*

Continental systems of law generally permit the introduction of character evidence in the prosecutor's case-in-chief "in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a

questioned on the stand because he could not take an oath. Ga. Code Ann. § 38-415 (1954). In Ferguson v. Georgia, 365 U.S. 570 (1961), the United States Supreme Court held that § 38-415 was unconstitutional because it deprived the defendant, here convicted of murder, of the right to have his counsel question him, thus violating the due process clause of the fourteenth amendment. In their concurring opinions, Justices Frankfurter and Clark stated that, logically, § 38-416 should also be declared unconstitutional. Id. at 600-02. The majority, however, held that as this question was not raised by the defendant, the Court was not constrained to pass on that question. In 1962, Georgia amended both of these sections, thus joining the rest of the common-law world in allowing the accused to testify. Ga. Code Ann. §§ 38-415 to -416 (Supp. 1962).

8. 9 Hun 89, 96 (N.Y. App. Div. 3d Dep't 1876).

9. N.Y. Sess. Laws 1879, ch. 542, § 832.

10. Prior to this, a person convicted and sentenced for a felony in New York could not testify in *any* action. See National Trust Co. v. Gleason, 77 N.Y. 400 (1879). This disqualification stemmed from the common-law belief that a man who has committed a heinous crime cannot be trusted in any respect. See 2 Wigmore, Evidence § 519 (3d ed. 1940). This belief was incorporated by statute in New York. 2 N.Y. Rev. Stat. 701, § 23 (1829). An exception was allowed to enable a convict to testify against a fellow inmate for any offense committed while in prison. N.Y. Sess. Laws 1847, ch. 460, §§ 150-51.

11. N.Y. Sess. Laws 1879, ch. 542, § 832.

12. N.Y. Pen. Law § 2444 is almost identical, adding "except that a witness in a criminal cause or proceeding shall not be required to disclose a conviction for a traffic infraction as defined by the vehicle and traffic law, nor shall conviction therefore affect the credibility of such witness in any cause or proceeding." The rule for civil proceedings, governed by N.Y. Civ. Prac. § 4513, is identical. For a good statement of the modern view, see William J. Conners Car Co. v. Manufactures & Traders Nat'l Bank, 124 Misc. 584, 209 N.Y. Supp. 406 (Sup. Ct.), aff'd mem., 214 App. Div. 811, 210 N.Y. Supp. 939 (4th Dep't 1925).

human being."[13] Conversely, the common law[14] has evolved what has been called "a much more merciful doctrine,"[15] namely, that the defendant is presumed innocent until the prosecution has proven his guilt beyond a reasonable doubt.[16] It is evident that the exclusion of evidence of defendant's past life stems from this presumption. Challenging, in effect, the continental approach, a Pennsylvania court has pointed out that:

> It is not proper to raise a presumption of guilt, on the ground, that having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offence is not proof, in itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief, that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty.[17]

New York has always followed the common-law view,[18] justifying it in terms of prejudice rather than in terms of logic or mercy. As Judge Peckham stated in a concurring opinion in *People v. Sharp*,[19] admission of such evidence "gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice instead of by evidence showing the actual commission of the crime for which the defendant is on trial."[20] Over forty years later, in *People v. Zackowitz*,[21] Chief Judge Cardozo, citing Wigmore,[22] rejected "the endeavor . . . to generate an atmosphere of professional criminality"[23] which induces triers of fact to give excessive weight to the history of crime before them, and either allow it to bear too strongly on the instant charge or take proof of it as proof of the instant charge.[24] In theory, the general rule casts the defendant as an embryo, with no past except as determined by the crime

13. People v. Shea, 147 N.Y. 78, 99, 41 N.E. 505, 511 (1895). See generally Mannheim, Trial by Jury in Modern Continental Criminal Law, 53 L.Q. Rev. 388 (1937).

14. E.g., The Trial of John Hampden, Esq., 9 Howell, St. Tr. 1035, 1103 (1684).

15. People v. Shea, 147 N.Y. 78, 99, 41 N.E. 505, 511 (1895).

16. N.Y. Code Crim. Proc. § 389.

17. Shaffner v. Commonwealth, 72 Pa. 60, 65 (1872). In a similar comment, the highest court of Massachusetts suggested that, if the prosecution were able to display the defendant's record ab initio, "such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defence, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to be a knave on other occasions, creates a prejudice which may cause injustice to be done to him." Commonwealth v. Jackson, 132 Mass. 16, 20-21 (1882).

18. E.g., Coleman v. People, 55 N.Y. 81, 89 (1873); accord, Uniform Rule of Evidence 55.

19. 107 N.Y. 427, 14 N.E. 319 (1887).

20. Id. at 471, 14 N.E. at 346 (concurring opinion).

21. 254 N.Y. 192, 172 N.E. 466 (1930).

22. 1 Wigmore, Evidence § 194 (3d ed. 1940).

23. 254 N.Y. at 198, 172 N.E. at 468.

24. Ibid.; cf. 1 Underhill, Criminal Evidence § 180 (5th ed. 1956).

charged.[25] So deeply is this concept rooted in New York jurisprudence that, if proof of defendant's bad character[26] is erroneously exhibited in the prosecutor's case, it will not be purged by the defendant's later taking the stand.[27]

There are, however, three important exceptions to the general rule. First, where the accused, whether or not he becomes a witness,[28] offers evidence of his good character,[29] the prosecution may introduce countervailing evidence of his bad character,[30] including proof of previous convictions.[31] Second, if the defendant has been adjudicated an "habitual criminal," the Code of Criminal Procedure provides that "the prosecution may introduce . . . evidence as to his previous character, in the same manner and to the same extent as if he himself had first given evidence of his character and put the same in issue."[32] Third, notwithstanding the rules of exclusion, it is generally agreed in common-law jurisdictions, including New York, that the prosecution may always offer evidence of the prisoner's past where "it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime . . . ."[33] Here, the substantive value of such proof as tending to directly establish the crime charged clearly outweighs any prejudicial effect which it may generate. However, introduction of evidence of previous convictions, merely because it affects the degree of the crime charged in the indictment, is not permitted.[34]

The rule excluding evidence of defendant's character, unless he chooses to make it an issue himself has been sanctioned by time and practice.[35] Whether

25. People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 468 (1930).

26. The term character, which is usually used interchangeably with reputation, connotes "the sum of all . . . traits of personality, temperament, behavior and skills . . . ." Fisch, New York Evidence § 171 (1959). On the other hand, reputation is the estimate or opinion which the community has of an individual, regardless of whether such reputation is warranted or not. Id. § 171 n.1.

27. People v. Nuzzo, 294 N.Y. 227, 234, 62 N.E.2d 47, 50 (1945).

28. Character evidence is only placed in issue when the accused, or any witness called by him, introduces evidence of his good character, and not when the defendant merely takes the stand. People v. Hinksman, 192 N.Y. 421, 85 N.E. 676 (1908).

29. The accused has the absolute right in any criminal action, whether or not he takes the stand, to offer evidence of his good character for the purpose of raising the inference that he did not commit the crime of which he is charged. People v. Conrow, 200 N.Y. 356, 93 N.E. 943 (1911).

30. People v. Hinksman, 192 N.Y. 421, 85 N.E. 676 (1908).

31. N.Y. Code Crim. Proc. § 393-c.

32. N.Y. Code Crim. Proc. § 513. The constitutionality of this statute has never been tested. But see Speiser v. Randall, 357 U.S. 513, 523-24 (1958).

33. People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).

34. N.Y. Code Crim. Proc. § 275-b. Affected by this section are certain misdemeanors which are designated felonies if the accused has been previously convicted of that crime. See, e.g., N.Y. Pen. Law § 1308 (receiving stolen goods). In such a case, the indictment must list the crime as a felony without reference to the prior conviction.

35. See Michelson v. United States, 335 U.S. 469, 475-76 (1948).

couched in terms of logic, mercy or prejudice, should it be abandoned because the defendant has exercised his constitutional right to take the stand in his own defense?

B. *Where Defendant Has Taken the Stand*

1. In General

When a defendant takes the stand in his own behalf, in the eyes of the law, he becomes just an ordinary witness.[36] Therefore, for purposes of impeaching his testimony, the prosecutor may cross-examine him about "any immoral, vicious, or criminal act of his life which may affect his character and tend to show that he is not worthy of belief . . . [as well as show] that he has been convicted of a crime . . . ."[37] It has been pointed out that evidence elicited upon cross-examination, unlike similar evidence which is inadmissible in the prosecutor's own case, "is not for the purpose of showing that he [the defendant] was the kind of person who would be willing to commit the offense charged, but solely for the purpose of diagnosing his conscience and thereby enabling the jury to determine the extent of his veracity and credibility as a witness."[38] The same court which drew this distinction warned, however, that "testimony which does not tend legitimately to discredit his evidence is irrelevant and should be excluded."[39]

2. Bad Acts

The examiner, although permitted "to delve into past misdeeds"[40] of the defendant which exhibit moral turpitude[41] for the purpose of impeach-

36. Therefore, it appears that the accused may be impeached by testimony as to his bad community reputation for truth and veracity. See People v. Hinksman, 192 N.Y. 421, 85 N.E. 676 (1908).

37. Richardson, Evidence § 505 (Prince 9th ed. 1964).

38. People v. Richardson, 222 N.Y. 103, 107, 118 N.E. 514, 516 (1917).

39. Ibid.

40. People v. Sorge, 301 N.Y. 198, 200, 93 N.E.2d 637, 639 (1950); People v. Webster, 139 N.Y. 73, 84, 34 N.E. 730, 733 (1893).

41. Fisch, New York Evidence § 455 (1959). Acts of prostitution (People v. Fritz, 279 App. Div. 1020, 111 N.Y.S.2d 734 (2d Dep't 1952) (memorandum decision)), abortion (People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950)), driving without a license (Phass v. MacClenathen, 274 App. Div. 535, 85 N.Y.S.2d 643 (3d Dep't 1948)), and the disbarment of an attorney (Batease v. Dion, 275 App. Div. 451, 90 N.Y.S.2d 851 (3d Dep't 1949)), have been held to exhibit moral turpitude; but gambling (People v. Hyman, 284 App. Div. 347, 131 N.Y.S.2d 691 (1st Dep't 1954), aff'd mem., 308 N.Y. 794, 125 N.E.2d 597 (1955)), pugnacious conduct as a police officer (People v. Bilanchuk, 280 App. Div. 189, 112 N.Y.S.2d 414 (1st Dep't 1952)), infraction of police department regulations (People v. Sullivan, 5 App. Div. 2d 847, 170 N.Y.S.2d 933 (2d Dep't 1958) (memorandum decision)), and the revocation of a driver's license (Tryon v. Willbank, 234 App. Div. 335, 255 N.Y. Supp. 27 (4th Dep't 1932)), have been held not to exhibit this degree of immorality. Drug addiction may be asked about to discredit the witness, and may be proved by other evidence because of the "well-known properties [of the drugs] . . . to . . . induce mental confusion . . . ." People v. Webster, 139 N.Y. 73, 87, 34 N.E. 730, 734 (1893). But see People v. Berrios, 3 App. Div. 2d 382, 160 N.Y.S.2d 532 (1st Dep't 1957) (per curiam). Finally, it is

ment,[42] is nonetheless bound by defendant's answer since the facts inquired about are collateral to the main issue.[43] Therefore, it has been held reversible error to introduce into evidence fingerprint records,[44] a purported confession[45] or passionate love letters[46] which would have contradicted the defendant's testimony.[47] Only if the misconduct is directly relevant to a substantive fact in issue, under the standards of relevancy enunciated in *People v. Molineux*,[48] may such proof also be introduced to impair credibility regardless of defendant's denials.[49]

a. *Good faith*

While the prosecution is bound by the answer of the witness, the binding refers only to the introduction of extrinsic evidence, and is not meant to dampen the prosecutor's zeal in his examination of the defendant.

In *People v. Sorge*,[50] the leading case in New York on the impeaching power of prior bad acts, defendant was charged with abortion. The district attorney

> interrogated her about abortions which she had allegedly performed upon four other women and, after she had answered his questions in the negative, pressed her further as to whether she had not signed a statement admitting that she had aborted one of the women, as to whether that particular operation had not furnished the predicate for her plea of guilty to the crime of practicing medicine without a license, and as to whether she had not also been present while a fifth abortion had been performed.[51]

When the defendant denied these allegations, the district attorney repeated them and asked if she now had further recollections on these matters. It was held that "a negative response will not fob off further interrogation of the witness himself, for, if it did, the witness would have it within his power to

also error to ask the defendant why he did not answer questions when interrogated by the police (People v. Hyman, supra), or to show on cross-examination that the accused claimed privilege against self-incrimination in testifying before the grand jury (People v. Luckman, 254 App. Div. 694, 3 N.Y.S.2d 864 (2d Dep't 1938) (memorandum decision)).

42. Hyman v. Dworsky, 239 App. Div. 413, 417-18, 267 N.Y. Supp. 539, 544-45 (3d Dep't 1933).

43. Fisch, New York Evidence § 458 (1959).

44. People v. Duncan, 13 N.Y.2d 37, 191 N.E.2d 888, 241 N.Y.S.2d 825 (1963).

45. People v. McCormick, 278 App. Div. 410, 105 N.Y.S.2d 571 (1st Dep't 1951), aff'd mem., 303 N.Y. 403, 103 N.E.2d 529 (1952).

46. People v. Brown, 265 App. Div. 153, 38 N.Y.S.2d 89 (2d Dep't 1942), aff'd mem., 290 N.Y. 830, 50 N.E.2d 236 (1943).

47. People v. McCormick held, inter alia, that N.Y. Code Crim. Proc. § 8-a, which governs the admission of prior inconsistent statements, is not applicable in proving collateral statements. 278 App. Div. 410, 412-13, 105 N.Y.S.2d 571, 574 (1st Dep't 1951), aff'd mem., 303 N.Y. 403, 103 N.E.2d 529 (1952).

48. 168 N.Y. 264, 61 N.E. 286 (1901); see text accompanying note 33 supra. See also People v. Rosenthal, 289 N.Y. 482, 487-88, 46 N.E.2d 895, 899 (1943).

49. See, e.g., In re Herbster's Estate, 121 N.Y.S.2d 360, 362 (Surr. Ct. 1953).

50. 301 N.Y. 198, 93 N.E.2d 637 (1950).

51. Id. at 199-200, 93 N.E.2d at 638.

render futile most cross-examination."[52] The hope is that the defendant, like any other witness, can be goaded into recanting an untruthful statement. The trial judge must use discretion in determining the prosecutor's *good faith* in this attempt, but, in the absence of " 'plain abuse and injustice,' "[53] he will not be overruled.

Prior to *Sorge*, there had been several cases where discretion had been found wanting in the trial judge. Although defendant's conviction of murder was affirmed in *People v. Slover*,[54] the court stated that it was improper for the district attorney to "multiply questions as to acts of collateral misconduct when no purpose is served except to prejudice the jurors. . . . A weak case thus fortified might result in a conviction on the strength of collateral matters, insinuated and not proved."[55] In another murder case, *People v. Buzzi*,[56] the prosecution repeatedly asked the defendant whether she had been having an affair with a man named Peck. Even though she denied it, "the constant repetition of such questions may well have introduced into the minds of the jurors a doubt as to whether they were not based upon actual fact and a suspicion and prejudice which the defendant could not counteract."[57] The conviction was reversed.

Although these decisions have not been overruled by *Sorge*, there are indications that the *Sorge* holding has served to remove some of the restraints theretofore placed on the prosecutor's conduct of the cross-examination. In *People v. Du Byk*,[58] defendant's conviction for robbery was upheld in spite of the fact that the district attorney had cross-examined the defendant "at greater length and with greater vigor" about similar unsolved robberies than about the robbery charged in the indictment.[59] In the similar but pre-*Sorge* case of *People v. Redmond*,[60] a reversal resulted. There, on a trial for arson, the prosecutor was permitted to examine the defendant in great detail about the burning of three other buildings. It was held that this line of questioning "clearly had the effect of showing that defendant was guilty of other crimes equally heinous with the one for which he was being tried. The whole purpose of the examination was to raise a presumption of defendant's guilt, the effect of which must have seriously predisposed the jury against him."[61]

Dissenting in *Du Byk*, Mr. Justice Botein stated that the good faith requirement of *Sorge* does not mean that the prosecutor must in good faith believe that the defendant is guilty, but rather that the questions relating to prior crimes must

52. Id. at 200-01, 93 N.E.2d at 639.

53. Id. at 202, 93 N.E.2d at 640, citing La Beau v. People, 34 N.Y. 223, 230 (1866).

54. 232 N.Y. 264, 133 N.E. 633 (1921) (per curiam).

55. Id. at 268-69, 133 N.E. at 635.

56. 238 N.Y. 390, 144 N.E. 653 (1924).

57. Id. at 401, 144 N.E. at 657.

58. 285 App. Div. 1025, 139 N.Y.S.2d 577 (1st Dep't) (per curiam), aff'd mem., 309 N.Y. 833, 130 N.E.2d 621 (1955).

59. Id. at 1027, 139 N.Y.S.2d at 581 (dissenting opinion).

60. 265 App. Div. 307, 38 N.Y.S.2d 727 (3d Dep't 1942).

61. Id. at 309, 38 N.Y.S.2d at 729. See also People v. Freeman, 203 N.Y. 267, 96 N.E. 413 (1911).

be founded upon fact and not fancy.[62] Here, the district attorney had asked: "Isn't it a fact that just before Mrs. Weiss . . . opened the door to admit these police officers . . . that at the first sound you threw a black automatic under the bed?"[63] Although there was no suggestion in the record from anyone but the prosecutor that such act ensued, good faith was found. Justice Botein noted that the jury should not be permitted to infer, from their confidence in the district attorney's office, that such an act actually transpired. Moreover, in the instant case, the jurors may also have surmised that "if the District Attorney pressed defendant so closely about the two extraneous crimes he must have had good and sufficient reasons for so doing."[64] The spirit of *Sorge* led to an affirmance of the conviction, however, and may well do so in similar cases in the future.[65]

b. *Constitutional privilege*

If the act in question constitutes a crime and the prosecution has not yet been barred by the statute of limitations,[66] a defendant may claim his constitutional privilege against self-incrimination.[67] Dictum in *People v. Johnston*[68] indicates that by taking the stand, the accused has probably waived this privilege only as to acts relevant to proving the crime charged and not to collateral acts raised solely to affect credibility.[69] Thus, unless he is guaranteed immunity,[70] the defendant may refuse to comment on the collateral act. If he

62. 285 App. Div. at 1028, 139 N.Y.S.2d at 583 (dissenting opinion).

63. Id. at 1027, 139 N.Y.S.2d at 581 (dissenting opinion).

64. Id. at 1029, 139 N.Y.S.2d at 584 (dissenting opinion).

65. Cf. People v. Clemente, 136 N.Y.S.2d 779 (Sup. Ct. 1954) (cross-examination on prior convictions). Bad faith will be found, however, where the prosecution cross-examines defendant about acts for which he had been acquitted. People v. Santiago, 15 N.Y.2d 640, 204 N.E.2d 197, 255 N.Y.S.2d 864 (1964) (memorandum decision).

66. N.Y. Code Crim. Proc. §§ 141–44–a.

67. N.Y. Const. art. I, § 6. Malloy v. Hogan, 378 U.S. 1, 8 (1964), held that this right is guaranteed to the accused in state as well as in federal prosecutions. Thus, the defendant may claim this right under the United States as well as under the New York Constitution. In People v. McLucas, 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965), the New York Court of Appeals applied Malloy where the trial judge erroneously commented on the defendant's refusal to take the stand, and held that defendant's state and federal constitutional rights were both violated. Id. at 172, 204 N.E.2d at 848, 256 N.Y.S.2d at 802. Although the defendant did not take the stand in this case, it would appear that, where he does take the stand, but claims his privilege against self-incrimination as to collateral acts, it is as though he had not taken the stand as to those matters, and, therefore, neither the judge nor the district attorney may comment on the fact that the accused has claimed such privilege. Cf. People v. Leavitt, 301 N.Y. 113, 92 N.E.2d 915 (1950).

68. 228 N.Y. 332, 127 N.E. 186 (1920). See Richardson, Evidence § 533 (Prince 9th ed. 1964).

69. 228 N.Y. at 340, 127 N.E. at 188.

70. N.Y. Pen. Law § 2447 confers power on the trial judge to grant immunity to the witness when expressly authorized by statute. The Penal Law confers such authority with respect to certain crimes, e.g., abortion (§ 81-a); anarchy (§ 166); bribery of labor representatives (§§ 380(3), 381(2)), bucket shop offenses (§ 395); conspiracy (§ 584); corruption of agents, employees or servants (§ 439(2)); election offenses (770(2)); gambling

chooses this course, however, silence will reflect adversely on his credibility and is hardly cured by the trial judge's instruction to the jury to disregard defendant's failure to comment.

This situation may have produced an anomalous result. An accused may be willing to perjure himself rather than claim his constitutional privilege. The prosecution would be bound by a negative answer which would not adversely influence the jury, avoiding, thereby, any ill effects which might occur if he remained silent.

3. Prior Convictions

The mandate of the statute enabling the convicted felon to testify is clear: any prior conviction may be proved, and the witness must answer any proper question relevant to those crimes.[71] It is evident from the statute that this method of impeachment is of such importance in the eyes of the legislature that it is not deemed a collateral issue. Therefore, the examiner is not precluded by the denial of the defendant,[72] but may introduce the record of the convic-

(§ 996(1)); kidnapping (§ 1256); narcotic drug offenses (§ 1752-a); resisting execution of process (§ 1787(3)); rioting (§ 2097). For additional statutes providing for immunity, see Fisch, New York Evidence § 704 n.44 (1959). If immunity is granted to a defendant by New York State, he may not be prosecuted by the federal government on the basis of that incriminating evidence. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79-80 (1964).

71. N.Y. Pen. Law § 2444; see notes 9-12 supra and accompanying text.

72. Perhaps it is because the prosecution is not bound by the witness' answer that New York has been conservative in defining a conviction. See Fisch, New York Evidence § 460 (1959). An adjudication of defendant as a youthful offender (N.Y. Code Crim. Proc. § 913-n; People v. Sarra, 283 App. Div. 876, 129 N.Y.S.2d 201 (2d Dep't 1954) (memorandum decision), aff'd, 308 N.Y. 302, 125 N.E.2d 580 (1955)), wayward minor (N.Y. Code Crim. Proc. § 913-dd; People v. Sarra, supra), or juvenile delinquent (N.Y. Family Ct. Act §§ 781, 783-84; People v. Peele, 12 N.Y.2d 890, 188 N.E.2d 265, 237 N.Y.S.2d 999 (1963) (per curiam)) may not be inquired about. The prosecution may, however, question the defendant as to the acts which led to these adjudications. See, e.g., People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950). But see Fisch, op. cit. supra at § 460. See also Comment, Use of Adjudications of Juvenile Delinquency and Specific Acts of Misconduct Committed by Juveniles, 33 N.Y.U.L. Rev. 406, 410 (1958).

Traffic violations (N.Y. Pen. Law § 2; Walther v. News Syndicate Co., 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949); People v. Molnar, 16 Misc. 2d 174, 184 N.Y.S.2d 23 (Jefferson County Ct. 1959) (by implication)) and public intoxication (People v. Brown, 2 App. Div. 2d 202, 153 N.Y.S.2d 744 (4th Dep't 1956) (per curiam)) are not crimes. Therefore, the acts behind are questionable only if they involve moral turpitude. If, however, the defendant had been convicted of driving while intoxicated, it is a misdemeanor under N.Y. Vehicle and Traffic Law § 1192(2) and may be proved. Knibbs v. Wagner, 14 App. Div. 2d 987, 222 N.Y.S.2d 469 (4th Dep't 1961) (memorandom decision).

A conviction before an administrative agency is not a crime within the meaning of N.Y. Pen. Law § 2444; hence, the prosecution will be bound by the witness' answer. People v. Sullivan, 34 App. Div. 544, 54 N.Y. Supp. 538 (1st Dep't 1898) (determination by police commissioner of officer's dereliction of duty); People v. Dorthy, 20 App. Div. 303, 46 N.Y. Supp. 970 (4th Dep't 1897), aff'd, 156 N.Y. 237, 241, 50 N.E. 800, 801 (1898) (defendant disbarred for acts of larceny). Similarly, court-martial convictions for breach of military

tions[73] of the defendant or further interrogate the witness in the hope that his answer will be changed.[74]

Judicial restraints on inquiry

The statute, however, has been given a restrictive construction.[75] As a result, a conviction may be used *only* insofar as the moral turpitude it exhibits affects the weight of the defendant's testimony.[76] Where it is evident that the conviction is being used not to impeach, but rather to prejudice the accused by attempting to show a disposition to commit the crime charged, such interrogation must, under the rule of *People v. Zackowitz*,[77] be concluded by the trial judge. If evidence tending to show an inclination to commit a crime were allowed, the prosecution would be cloaking the accused with a presumption of guilt. This tactic is prohibited whether or not the defendant takes the stand.

Thus, in *People v. Russell*,[78] a conviction of murder was reversed when the court found that evidence that the accused had been previously convicted of robbery was introduced, not to discredit the defendant's testimony, but to show " 'the temperament of the witness and what his inclinations and habits were . . . .' "[79] In this case the victim was allegedly murdered by an armed man

discipline may not be proved by the prosecution to impeach a witness. People v. Joyce, 233 N.Y. 61, 134 N.E. 836 (1922).

In addition, a witness may not be questioned as to steps in a criminal proceeding short of conviction. See, e.g., People v. Bloodgood, 251 App. Div. 593, 600, 298 N.Y. Supp. 91, 99 (3d Dep't 1937) (charges filed before grievance committee of the bar); People v. Segal, 13 App. Div. 2d 1033, 217 N.Y.S.2d 264 (2d Dep't 1961) (memorandum decision) (sought for questioning in other jurisdictions); People v. Brown, supra (arrested); People v. Malkin, 250 N.Y. 185, 197, 164 N.E. 900, 905 (1928) (dictum) (indicted); People v. Cascone, 185 N.Y. 317, 334, 78 N.E. 287, 293 (1906) (tried). It is also error to ask the defendant if he has ever been in jail (People v. Hawley, 285 App. Div. 1009, 139 N.Y.S.2d 489 (4th Dep't 1955) (memorandum decision)); to use a jury verdict upon which no judgment was entered (People v. Marendi, 213 N.Y. 600, 107 N.E. 1058 (1915)); or to use a conviction which has subsequently been reversed (People v. Malkin, supra (by implication)). Nevertheless, a conviction for which sentence has been suspended may be proved. N.Y. Code Crim. Proc. § 470(b)(2); Webb v. Dale & Cain, Inc., 190 App. Div. 916, 179 N.Y. Supp. 957 (2d Dep't 1919) (memorandum decision). The theory behind the exclusion is that only a conviction discredits the witness. The fact that he has experienced various stages of a criminal proceeding, therefore, is irrelevant. People v. Cascone, supra. See also People v. Anderson, 31 Misc. 2d 863, 222 N.Y.S.2d 270 (Westchester County Ct. 1961), where it was held that where the prosecution validly uses a conviction, the fact that this conviction is later overthrown is not grounds for a new trial.

73. The manner of proof is regulated by N.Y. Code Crim. Proc. § 482-a, providing that, if no record of the judgment has been filed, the prosecution may introduce certified minutes of the conviction along with the indictment on which the conviction was had.

74. People v. Sorge, 301 N.Y. 198, 201, 93 N.E.2d 637, 639 (1950).

75. Fisch, New York Evidence § 460 (1959).

76. People v. Sorge, 301 N.Y. 198, 201, 93 N.E.2d 637, 639 (1950).

77. 254 N.Y. 192, 172 N.E. 466 (1930). See text accompanying notes 21-24 supra.

78. 266 N.Y. 147, 194 N.E. 65 (1934).

79. Id. at 151, 194 N.E. at 66.

accompanied by several accomplices. In the prior robbery, the defendant had also been armed and aided by an accomplice. By such questioning, the prosecution was trying to infer from the first conviction that the defendant and the murderer operated in the same manner.

An identical error was cause for reversal in the recent case of *People v. Moore*.[80] The defendant was convicted of manslaughter. It was alleged that he had stabbed his victim in the groin while the deceased was backed up against a fence. On cross-examination, it was brought out that the defendant had been formerly convicted of manslaughter and that the two crimes were executed in precisely the same fashion. It was held that defendant's testimony was sufficiently impeached by his admission of the prior conviction, and that the details of the crime "could serve no purpose other than to show an inclination or tendency on the part of defendant which might impel him to commit the crime . . . ."[81]

The admission of evidence concerning convictions of the type of crime charged, for the purposes of impeachment, is not necessarily error. The court of appeals in *People v. Goldstein*[82] accepted the view of *People v. Peckens*[83] that, "while evidence of the commission of one crime is not admissible to *establish* a party's guilt of another, [it is admissible even though] . . . it tends to prove another crime if it is otherwise material and relevant."[84]

This was the case in *People v. Sorge*,[85] where the prosecution was allowed to ask the defendant about the nature of the offense which led to her conviction for practicing medicine without a license, namely, an abortion. Here, the intent of the district attorney was not to show propensity to commit abortions, but rather to exhibit moral turpitude. If practicing medicine without a license evidenced the same turpitude as commiting acts of abortion, it is likely that the district attorney's cross-examination would have been terminated after an admission of the former, for any further questioning could be attributed to an intent to establish propensity. These are reasonable guide lines which a trial judge can follow without fear of reversal on a finding of plain abuse and injustice.

III. The Law in Other Jurisdictions

A. *State*

Certain jurisdictions in the United States, while accepting the New York rationale as to the admission of evidence to attack the defendant's credibility, are generally more restrictive as to the type of evidence that will be admitted.[86]

80. 20 App. Div. 2d 817, 248 N.Y.S.2d 739 (2d Dep't 1964) (memorandum decision).

81. Id. at 817, 248 N.Y.S.2d at 741.

82. 295 N.Y. 61, 64-65, 65 N.E.2d 169, 170 (1946).

83. 153 N.Y. 576, 47 N.E. 883 (1897).

84. Id. at 594, 47 N.E. at 888. (Emphasis added.)

85. 301 N.Y. 198, 93 N.E.2d 637 (1950); see text accompanying notes 50-53 supra.

86. For the law in various jurisdictions, see Comment, Prior Criminal Convictions To Impeach Credibility in New England, 42 B.U.L. Rev. 91 (1962); Use of Prior Conviction and Reputation To Show Defendant's Bad Character, 1 Idaho L. Rev. 90 (1964); Note, The Circumstantial and Impeachment Uses of a Prior Conviction, 22 Md. L. Rev. 244

Illinois, for instance, while allowing questioning as to bad acts,[87] limits the introduction of convictions to crimes of an infamous nature.[88] Pennsylvania disallows all questions with reference to bad acts[89] and admits convictions only of felonies and misdemeanors in the nature of *crimen falsi, i.e.*, deeds which would disqualify a person as a witness at common law.[90] Pennsylvania has a long history of concern with the protection of defendant-witnesses from over-zealous prosecutors who question the witness about crimes drawn from the penal law index rather than from the defendant's record, thereby leading the jury to convict the defendant on the basis of a fictitious past.[91] In 1911, Pennsylvania passed a statute, patterned closely after a similar English act,[92] which provided:

> Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless,—
>
> One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or,
>
> Two. He shall have testified at such trial against a co-defendant, charged with the same offense.[93]

For all practical purposes, the prosecutor is restricted to introducing the record of the prior conviction itself.[94]

B. *Federal*

The attitude of the Second Circuit in federal criminal cases demonstrates an interesting progression away from the liberal application of the rule in New

(1962); Comment, Admissibility of Prior Crimes Evidence To Impeach a Witness in Florida, 15 U. Fla. L. Rev. 220 (1962); Comment, Impeachment of a Witness' Credibility by Proof of a Prior Criminal Conviction, 1959 Wis. L. Rev. 312; 23 Ohio St. L.J. 144 (1962). See generally 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 (1964).

87. See People v. Miller, 13 Ill. 2d 84, 108, 148 N.E.2d 455, 468, cert. denied, 357 U.S. 943 (1958), cert. denied, 363 U.S. 846 (1960); People v. Halpin, 276 Ill. 363, 376, 114 N.E. 932, 937 (1916).

88. See, e.g., People v. Witherspoon, 27 Ill. 2d 483, 190 N.E.2d 281 (1963) (per curiam).

89. See Commonwealth v. Williams, 209 Pa. 529, 58 Atl. 922 (1904).

90. E.g., perjury, bribery to suppress testimony, or conspiracy to procure the absence of a witness. Commonwealth v. Schambers, 110 Pa. Super. 61, 167 Atl. 645 (1933).

91. Commonwealth v. Racco, 225 Pa. 113, 73 Atl. 1067 (1909); see Comment, The Use of Prior Convictions to Impeach the Credibility of the Defendant in Pennsylvania, 66 Dick. L. Rev. 339, 341 (1962); Note, Use of Prior Crimes To Affect Credibility and Penalty in Pennsylvania, 113 U. Pa. L. Rev. 382 (1965).

92. Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36.

93. Pa. Stat. Ann. tit. 19, § 711 (1964).

94. Commonwealth v. Anthony, 91 Pa. Super. 518, 521 (1927).

York to the more restrictive view prevalent in most federal jurisdictions.[95] In 1943, the court accepted the New York view that the defendant could be questioned about any crime.[96] Reaffirming itself six years later,[97] the court stated that "while the adoption of Rule 26 of the Federal Rules of Criminal Procedure . . . may give the United States courts some mandate to re-examine their rules of evidence, we are not convinced of the desirability of a change in this rule or repudiation of our former decision."[98] The tide began to turn two years later. In *United States v. Schiller*,[99] Judge Frank took the opportunity to state in a concurring opinion that he did not believe that *ordinarily* "the prosecution, on the sole pretext of attacking credibility, may fairly use an objectionable question to suggest the past acts of the accused were criminal when he has not been convicted for those past acts."[100] Judge Frank's observation became law three years later when, in *United States v. Provoo*,[101] a defendant's conviction for treason was reversed on the ground that he had been asked at trial about alleged homosexual acts. The court rejected the New York view in favor of the "impressive unanimity of view"[102] in the federal courts that "specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes."[103]

IV. Conclusion

Because of the incalculable harm which may result from the admission of character evidence to impeach, a crucial question is whether the hyphen will insulate the defendant-witness from the devastating effects of interrogations reserved for ordinary witnesses. In attempting to strike a balance between the right of the accused to retain his presumption of innocence and the right of the People to impair his credibility, it is inevitable that neither can be sustained without diminishing the other to some extent. It is also evident that the rules of

95. E.g., Gideon v. United States, 52 F.2d 427, 430 (8th Cir. 1931).

96. United States v. Minkoff, 137 F.2d 402 (2d Cir. 1943).

97. United States v. Cohen, 177 F.2d 523 (2d Cir. 1949), cert. denied, 339 U.S. 914 (1950).

98. Id. at 525. (Citation omitted.)

99. 187 F.2d 572 (2d Cir. 1951).

100. Id. at 576 (concurring opinion).

101. 215 F.2d 531 (2d Cir. 1954).

102. Id. at 536.

103. Ibid. The procedure in military courts-martial tends to be less restrictive than the federal view, but more restrictive than the New York view. Paragraph 153g of the Manual for Courts-Martial, United States, 1951, provides: "If the accused takes the stand as a witness, his credibility may be attacked as in the case of other witnesses. For this purpose, it may be shown that he has been convicted of a crime involving moral turpitude or otherwise affecting his credibility." United States v. Britt, 10 U.S.C.M.A. 557, 28 C.M.R. 123 (1959). However, in United States v. Gibson, 5 U.S.C.M.A. 699, 18 C.M.R. 323 (1955), it was held that convictions of military infractions, such as refusing to "pull extra duty," could not be used to impeach a defendant in a prosecution for using disrespectful language to an officer.

admission with respect to bad acts and convictions in practice in New York have proved inadequate.

Although it may be argued that a man should not escape responsibility for his past acts merely because he has escaped conviction for them, it cannot be denied that the practice of permitting extensive questioning in this area has led to suggestions of guilt without any actual proof and may also have encouraged perjury. Since the examiner is bound by a witness' answer, the accused can boldly deny all of the prosecutor's allegations without injuring himself in the eyes of the jury. If, however, the defendant regards his oath and admits his bad conduct, the jury will interpret this as reflecting poorly on his capacity for truth and veracity. A sounder approach to the problem, and one which would put New York in the mainstream of thinking on the subject, would completely exclude any examination with respect to bad acts which have not resulted in convictions of crimes admissible in their own right as relevant to the question of veracity.

The Model Code[104] and Uniform Rule of Evidence[105] advocate the complete exclusion of all prior convictions unless the defendant has opened the door by introducing evidence of good character. This position is questionable since, by the very act of taking the stand, the accused does put his character in evidence insofar as it is relevant to the question of veracity. However, in order to justify the admission of convictions for the limited purpose of impeachment, it is necessary to assume two things. First, those convicted of a crime have little regard for an oath, and, hence, their word is not worthy of the same weight as that of another witness. Second, a juror can distinguish between impeaching evidence and substantive evidence. If the former is untrue, the evidence is irrelevant. If the latter is untrue, the possibility of injustice far outweighs any residual benefit to be gained for the purpose of impeachment. Therefore, if either were untrue, the solution offered by the modern codifications would be mandatory. Yet, there is no evidence erasing the traditional belief underlying the first assumption, or, for that matter, warranting an assumption that the jury is incapable of making one of the many subtle distinctions necessary to a finding of guilt or innocence.

At the same time, because of the potential harm resulting from improper use of this type of evidence, it is essential that only those crimes which are directly relevant to credibility be admissible. Uniform Rule 21 provides a safeguard for an ordinary witness by excluding all convictions "not involving dishonesty or false statement . . . for the purpose of impairing . . . credibility."[106] If this rule were applied to a defendant-witness, the result should be a moderate and satisfactory solution.

104. Model Code of Evidence rule 106(3) (1942).
105. Uniform Rule of Evidence 21.
106. Ibid.