CREDIBILITY TESTS—CURRENT TRENDS

MASON LADD †

With the modern tendency of enlarging the realm of admissibility of evidence, most of the technical refinements of method and many of the major historic obstructions will be eliminated. Indeed, it has long been recognized by all scholars in the field as well as those engaged in the every day practice before the courts that there is a need for a re-examination of the rules of evidence with a view of simplification and of the elimination of historical oddities so as to bring the law of evidence closer to reality in its truth finding function.[1] The able work now being done by the American Law Institute in drafting a model code of evidence for legislative adoption will go far in accomplishing these ends. Even now, through the multitude of exceptions to various rules of exclusion, much new evidence is being admitted which was formerly barred with almost a religious sanction.[2] The major emphasis of the future will undoubtedly be on the test of relevancy to the issues accompanied by considerations of probative values as to the quality of proof. The modern view is but an expression of the basic approach of the great Thayer that all evidence logically relevant is admissible unless in conflict with some specific rule of exclusion.[3] What occurred in the development of the law of evidence was the shutting out by the courts from time to time of one thing or another until the law of evidence became a study of a great mass of

† A. B., 1920, Grinnell College; J. D., 1923, University of Iowa; S. J. D., 1935, Harvard University; Dean, University of Iowa College of Law; co-editor, FEDERAL JURISDICTION AND PROCEDURE (1934); author of numerous articles in legal periodicals.

1. The names of Bentham, Thayer and Wigmore stand out as leading critics of the strict law of evidence. In the twentieth century Wigmore in his treatise, now in its third edition, has had a marked influence upon the courts in changing their attitude toward reconsideration of evidence rules. At first, the courts were skeptical of the changes advocated in his works, but they soon became the chief source of improvement in the law. Morgan and Maguire, commenting on the work of Thayer and Wigmore, stated, "It can definitely be said that in the last half century these two men, aided by their admirers and imitators in law schools, on the bench and at the bar, have made a lawsuit look appreciably more like a rational investigation of disputed questions of fact." Morgan and Maguire, *Looking Backward and Forward at Evidence* (1937) 50 HARV. L. REV. 909.

The attitude today is well expressed by Justice Sutherland in Funk v. United States, 290 U. S. 371, 381 (1933), in which he states, "The fundamental basis upon which all rules of evidence rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And, since experience also is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule." See also Benson v. United States, 146 U. S. 325 (1892).

2. See Ladd, *Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof* (1934) 18 MINN. L. REV. 506.

3. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 265.

exclusionary rules. So extensive became the principles of exclusion that a study of admissibility developed into almost an analysis of exceptions to the exclusion. The current trend is to approach the problem upon the original premise of Thayer which is to be accomplished through abandonment of unreasonable exclusionary rules. Rather than creating fantastic exceptions to the exclusion of evidence, modern rules should be designed to admit all proof which has a logical relationship to the issues involved and to issues upon the truthfulness of testimony given by witnesses. The pertinence of evidence to the points in dispute and the testimonial reliability of witnesses are the basic elements of any system of evidence designed to make available the maximum opportunity for solving factual controversies. What has been admitted in the past under an exception justified by fictitious grounds or by astute rationalization should come in on its real basis of simple usefulness in determining the factual dispute. Except where policy may still justify privilege, establish incompetency or recognize exclusion, the recent open door tendency in the law of evidence will require greater attention to be given to relevancy, to the weight of evidence, and to the credibility of witnesses. The accuracy and truthfulness of witnesses and the worth of testimony will continue to be a problem of every trial tribunal on disputed facts no matter what the future in broadening the admissibility of evidence may be. Thus, along with the improvement of the law of evidence generally, the problems pertaining to credibility of witnesses must also be adjusted to present demands.

The Interrelation of Principles of Examination of Witnesses to Credibility Tests

The credibility of witnesses in most instances is best determined through the ordinary process of examination and cross-examination. The specific character tests usually perform an auxiliary aid to discover the truthfulness of a witness. Character evidence standing alone may be of but little value in determining truthfulness. It becomes significant only when accompanied by the simple devices employed in the examination of nearly every witness showing his opportunity to perceive facts and the consistency of his testimony as a connected narrative. Indeed, the mendacious type of witness may give truthful testimony and generally be given credit unless other elements presented in a trial disclose a cause for the unreliable witness to falsify. Thus general principles for examination of witnesses, not usually thought of in connection with the tests of credibility, are important in permitting the triers of fact to have ample opportunity to judge

the truthfulness of testimony. The direct examination of a witness conducted so as to bring out his testimony as a continuous narrative is a method which in itself assists in judging credibility. It should undoubtedly be pursued much more than it is as a means of presenting a clear story of the events and of giving strength to the testimony. A witness, to be sure, must be guided by the questions of counsel because many things which might appear significant to the witness may be logically irrelevant or otherwise inadmissible. However, the effort of counsel to ask questions which show only the nature of the intended answer and of the witness to testify only to the question as asked has been frequently carried to an extreme so that the witness becomes frozen into rigid lines and has less opportunity to give a truthful expression of the facts as he knows them. The rule permitting a motion to strike the testimony of a witness by the examining party because it is unresponsive is helpful in that it prevents an unfriendly witness from volunteering damaging and often inadmissible testimony against the examiner.[4] A process of questioning the witness as a means of bringing out testimony is necessary in order that opposing counsel may object before answer to inadmissible testimony which if heard by the triers of fact would cause prejudice.[5] But too frequently a simple narrative on the part of the witness is broken by unnecessary questioning with a result of confusion of the witness and the jury in its judgment of his testimony and its weight upon the issues. The modern tendency is to encourage examination to bring out a continuous narrative both as a means of supporting and testing credibility.

The form of questions permitted upon direct and cross-examination affords in a real sense a means of determining credibility. It eliminates the suggestions to a friendly witness to be given through questions and yet permits a true story to be well told. It is assumed in our adversary system of trial that a party calls witnesses who he believes will be favorable to his cause and in turn that the witness will be unfavorable to the adversary. Thus the leading question rule is simply a guide to obtain truthful testimony and to preclude the false.[6]

4. People v. Carson, 341 Ill. 11, 173 N. E. 97 (1930); Buckley v. Frankel, 262 Mass. 13, 159 N. E. 459 (1928); Sorenson v. Smith, 65 Ore. 78, 129 Pac. 757, 131 Pac. 1022 (1913).

5. Marinoni v. State, 15 Ariz. 94, 136 Pac. 626 (1913); Hanson v. City of Anamosa, 177 Iowa 101, 158 N. W. 591 (1916); Jacobs v. Cromwell, 216 Mass. 182, 103 N. E. 383 (1913). See Ladd, *Common Mistakes in the Technique of Trial* (1937) 22 IOWA L. REV. 609, 623.

6. Kirschman v. Pitt Pub. Co., 318 Pa. 570, 178 Atl. 828 (1935), 100 A. L. R. 1062. In the case of Steer v. Little, 44 N. H. 613 (1863), the various forms of leading questions are set out. Much discretion is allowed the trial judge in determining the propriety of leading questions and in determining whether or not questions are leading. Sullivan v. State, 200 Ind. 43, 161 N. E. 265 (1928); State v. Karri, 84 Mont. 130, 276 Pac. 427 (1929); Nickell v. State, 205 Wis. 614, 238 N. W. 508 (1931); (1917) 65 U. OF PA. L. REV. 303; (1928) 37 YALE L. J. 387.

The party calling a witness shall not frame questions suggesting the desired answer upon significant points in dispute unless the witness desires to avoid testifying about the matter or to give only testimony injurious to the party calling him. For the same reason the form of questions on cross-examination may be such as to suggest answers unless the witness has disclosed his desire to help the cross-examining party or to harm the adverse party. If these rules guiding the form of questions are constantly thought of in their relationship to the problem of credibility, their administration becomes much simpler and provides a way to a correct decision upon the facts.

Closely associated to the form of questions which may be asked a witness is the scope of cross-examination. If the court is alert in observing the attitude of witnesses toward the parties in the trial as disclosed by their conduct and other evidence indicating it, there should be little difficulty in determining when leading or nonleading questions should be asked whether in direct or cross-examination. If this be true, then the dangers urged against a wide scope of cross-examination concerning any material matter whether or not inquired about on direct examination could be easily avoided. All courts now allow cross-examination to go into the whole subject of credibility of witnesses whether the points were raised in the examination in chief or not.[7] Other matters although not directly pertaining to credibility may be important in judging the truth of the testimony given. Thus, the adoption of the modern rule in permitting a wide scope of cross-examination upon any material matter will not only expedite the trial by bringing out the whole story as known by the witness but will also serve as a credibility test.[8]

More directly related to credibility are those common tests derived from human experience as elements controlling the conduct of people generally. Relevant matters of personal history including conduct, occupation, place of abode, environment and associations are telling factors in the perception of a witness which will produce accuracy of testimony and also are among the most important considerations in determining the tendency to falsify.[9] The courts in the past have generally recognized the importance of this type of evidence in the exam-

7. In Stevens v. Beach, 12 Vt. 585, 587 (1840) the court states that "it is no doubt competent for the party to put almost any question, upon cross-examination which he may consider important to test the accuracy or veracity of the witness", and in the case of Perkins v. Adams, 5 Metc. 44, 48 (Mass. 1842) the court says that "a witness may always be subjected to a strict cross-examination, as a test of his accuracy, his understanding, his integrity, his biases, and his means of judging".

8. For careful discussion of the history and different rules applied on the scope of cross-examination, see Note (1939) 24 IOWA L. REV. 564.

9. Alford v. United States, 282 U. S. 687 (1931); Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41 (1890); People v. White, 251 Ill. 67, 95 N. E. 1036 (1911); Wilbur v. Flood, 16 Mich. 40 (1867); Kirschner v. State, 9 Wis. 140 (1859).

ination of witnesses as to credibility, and in the future it will continue to serve as a commonly used trial device. With the use of this type of testimony modern rules of evidence should permit examination of the witness concerning his earlier relevant statements at variance with testimony given in court to impair credibility, whether called by the party or not.[10] What in the past has been admitted by the courts under the device of refreshing recollection by calling to the attention of a party or witness his past inconsistent statements should be frankly admitted for its impeachment value. If the witness admits making the former statement, it serves to discredit his testimony although he definitely stays by the testimony given in court which he may insist is the correct statement. This is the practical effect and should be given legal recognition. It is not extending the rule very far if at the proper time in the course of trial the party who called the witness would be given permission to prove the earlier inconsistent statement if the witness denies making it. The rule denying a party the right to impeach his own witness has been assailed by nearly every authority, and the current trend in the law of evidence warrants complete abolition of the rule. With twenty-two jurisdictions having removed the rule by statute, the future of the law of evidence is bound to eliminate this obstruction to the discovery of truth.[11]

Many subjects of examination of a witness usually regarded as necessary foundation testimony are as much related to credibility as they are to the establishment of the qualifications of the witness. Basic to the qualification of a witness to testify to any matter is his opportunity to know the facts whereof he speaks. The conception that the function of a witness is to tell what he knows rather than what he thinks or has heard others say is built upon the idea of credibility, and out of this, at least indirectly, arises the hearsay and the opinion rule.[12] Even the elimination of these rules of exclusion would not dispense with the idea that the statement received in court must be founded upon perceived knowledge of the witness dclaring the facts. Although largely thought of in terms of admissibility, the foregoing principles are essentially related to credibility. Thus for the purpose of impairing or sustaining the credibility of a witness either party may examine

10. Ladd, *Impeachment of One's Own Witness—New Developments* (1936) 4 U. OF CHI. L. REV. 69.

11. *Ibid.*; 3 WIGMORE, EVIDENCE (3d ed. 1940) § 905.

12. State v. Flanders, 38 N. H. 324 (1859). In 1621 Lord Coke, in Adams v. Canon, 1 Dyer 53b, 73 Eng. Rep. R. 117 (1621), stated: ". . . it is not satisfactory for the witness to say, that he thinks or persuadeth himself; and that for two reasons by Coke: 1st, Because that the Judge is to give an absolute sentence, and therefore ought to have more sure ground than thinking; 2dly, The witness cannot be prosecuted for perjury; . . ."

him in respect to his capacity for accurate perception, recollection and communication. Also his opportunity and incentive for perceiving matters stated in testimony as well as the likelihood of his remembering what he has perceived are proper subjects of examination. Evidence upon these matters performs the dual function of truth testing and of showing the qualification of the witness to testify.

Inquiry as to motive, bias, interest, corruption, or his willingness to be corrupted or to corrupt others in the pending litigation, as in the past, will continue to be decisive factors in judging truthfulness of testimony. Evidence showing a prejudicial attitude of a witness is not only a test of credibility in itself but is an almost indispensible foundation to make effective other evidence of a general propensity to falsify. This type of evidence is intangible in its effect and yet gives the clearest insight to an understanding or explanation of testimony given in court. Obviously it should be just as available to a party calling a witness as to the adversary, although not so considered by some of the courts denying the right of a party to impeach his own witness.[13] These evidences of prejudice are helpful guides in discovering the mistakes of the honest witness as well as showing the fabrication of the falsifier.

Character as a Test of Veracity—Methods of Proof

The character of an individual is important in the business world. It is a significant factor in the extension of credit, the selection of employees, the formation of various business associations, the determination of qualifications of those admitted to the professions and in almost every relationship of social living. As intangible as the source of the estimation of character may be, and although indefinite as a basis of the prediction of future conduct, it is nevertheless commonly relied upon in the affairs of every day life. It is, therefore, not surprising that the courts have made use of character testimony in criminal trials upon the issue of probability or improbability that the accused committed the crime charged against him, and in all cases as a test of credibility of witnesses. While truth is true whether it comes from a polluted or a pure source, when facts are in dispute the source of the conflicting testimony may cast light in determining what the truth is.[14] In judging credibility the courts in the past have permitted use

13. Babcock v. People, 13 Colo. 515, 22 Pac. 817 (1889); Sturgis v. State, 2 Okla. Cr. 362, 102 Pac. 57 (1909); *cf.* Stanley v. Sun Ins. Office, 126 Neb. 205, 252 N. W. 807 (1934); Crago v. State, 28 Wyo. 215, 202 Pac. 1099 (1922).

14. Johnson v. Johnson, 81 Neb. 60, 115 N. W. 323 (1908); State v. Alverson, 214 N. C. 685, 200 S. E. 410 (1939), 120 A. L. R. 1441, 1443; State v. Wingard, 92 Wash. 219, 158 Pac. 725 (1916).

of character evidence and in the future may be expected to use this proof in appropriate cases. The means, however, of testing character and applying it are in need of revision.

The courts are in conflict on the question as to whether in proving character the inquiry is limited to the witness's character for truthfulness, or whether his general moral character may be shown. While the totality of the personality of an individual is undoubtedly significant in predicting many types of things which he may be expected to do, including the making of false statements, general qualities of character are regarded by the majority of courts as too broad to afford a reliable credibility test.[15] What is good and what is bad generally in a person's make-up would depend in a large measure upon the environment and attitudes of the particular person judging character, whereas all persons are responsive in singling out qualities related to truthfulness.[16] Consequently as a practical measure, it is believed desirable to limit testimony upon the character of a witness to test his credibility to the specific traits of honesty and veracity. The test as usually applied has been to truth and veracity, but the broader expression of honesty and veracity would seem to encompass more nearly the traits of an individual which would show his regard for the truth or his propensity to falsify when it would be to his advantage. Therefore, the future of the law of evidence in its trend toward realism may be expected to permit impeachment of a witness only by proof of his character for honesty or veracity.[17]

---

15. 3 WIGMORE, EVIDENCE (3d ed. 1940) §§ 922-924; extensive note collecting authorities (1934) 90 A. L. R. 870.

16. For excellent discussion of the problem of determining character see Carter v. Cavenaugh, 1 Greene 171 (Iowa, 1848), holding only character for truth and veracity was available for impeachment. The legislature of Iowa later provided that general moral character of a witness may be proved for the purpose of testing his credibility. IOWA CODE (1939) § 11271. At first the court interpreted the statute to permit only general moral character to impeach a witness, State v. Gregory, 148 Iowa 152, 126 N. W. 1109 (1910), but later in the case of Hunt v. Waterloo, C. F. & N. Ry., 160 Iowa 722, 728, 141 N. W. 334, 337 (1913) the court, in an opinion by the same judge, held that impeachment could be made by both character for truth and veracity and general moral character.

17. In the Pennsylvania case of Commonwealth v. Payne, 205 Pa. 101, 54 Atl. 489 (1903) proof of general reputation was excluded, even though it was coupled with reputation for veracity. See Richardson v. State, 237 Ala. 11, 12, 186 So. 580 (1938); Tarling v. People, 69 Colo. 477, 194 Pac. 939 (1921); Stock v. Dellapenna, 217 Mass. 503, 105 N. E. 378 (1914); Mathey v. Flory Milling Co., 283 Pa. 331, 334, 129 Atl. 109, 110 (1925); Commonwealth v. Williams, 209 Pa. 529, 58 Atl. 922 (1904). There are some jurisdictions, however, where it is held that a witness cannot be impeached by showing his bad character for honesty and integrity. Ray v. Shemwell, 174 Ky. 54, 58, 191 S. W. 662, 665 (1917); Calkins v. Ann Arbor R. R., 119 Mich. 312, 78 N. W. 129 (1899). These courts have failed to recognize the relationship between general honesty and truthfulness. It is hard to see how the two may be segregated. It would, furthermore, be much easier for character witnesses to testify as to honesty and veracity because honesty and integrity may become generally known and recognized as such, whereas experiences to judge only veracity may be more isolated. The test of honesty and veracity to determine credibility is broad enough to provide a real test and definitely excludes unrelated elements which come under general moral character.

An equally vital problem concerns the method by which character may be proved. Because of the fear of founding character proof upon some limited personal experience or prejudice and through a misunderstanding of the earlier cases,[18] the rule has developed in many jurisdictions that when character is the subject of inquiry, the method of proof must be by reputation alone. A substantial body of law has been built up in defining what is meant by reputation and the extent to which reputation must have expanded in order to be admissible. In a pioneer period where communities were small, there was some justification in requiring that the reputation be community wide or at least that it not be limited to a specific group. With our modern urban society and more scattered activities of people even in smaller localities, the community-wide reputation as a requisite for proof of character is difficult to secure. More consistent with conditions today is the rule fast gaining recognition that reputation as a means of proving character should be sufficiently established if it exists among the people with whom the person habitually associates in his work or business or otherwise.[19]

The distinction between reputation and character is sound, the latter being what a party is in fact, the former being the composite hearsay opinion of people generally in regard to what a person is or what particular traits he possesses. When a trait of character has demonstrated itself sufficiently through external manifestations so that persons with whom an individual habitually associates speak of him generally concerning these traits, a reputation in respect to them is acquired. This reputation becomes the means of proof of character.[20]

New developments in the law have not tended to exclude reputation as a means of proof where character is involved but have tended to supplement it by personal opinion of a character witness. This represents the orthodox view in the opinion of Professor Wigmore [21] and is consistent with the modern notion that the best evidence of a fact should supplant the use of indirect fictions. If a witness testifies that another's general reputation for honesty and veracity is bad, it undoubtedly expresses his personal opinion as well. Most courts are willing to admit in evidence a statement by the character witness that from his knowledge of that reputation he would not believe the person in question on oath.[22] It is going but little further to permit the character

18. Ladd, *Techniques and Theory of Character Testimony* (1939) 24 IOWA L. REV. 498, 509-518.

19. Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937), 112 A. L. R. 1013, 1020.

20. State v. Poston, 199 Iowa 1073, 203 N. W. 257 (1925); State v. Baldanzo, 106 N. J. L. 498, 148 Atl. 725 (1930), 67 A. L. R. 1207.

21. 3 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1981, 1982.

22. Hamilton v. People, 29 Mich. 173 (1874); State v. Boswell, 13 N. C. 209 (1829); State v. Hooker, 99 Wash. 661, 170 Pac. 374 (1918). *Contra:* People v.

witness to express his personal opinion directly based upon his perception of that person's behavior. In reshaping the rules of evidence for the future, personal opinion as well as reputation ought to be available as a means of proving character. Cross-examination of the character witness would provide an equal safeguard against personal prejudice under both methods of proof.

PREVIOUS CONVICTION OF A CRIME AS A TEST OF VERACITY

At the common law the conviction of a person for an infamous crime rendered him thereafter incompetent as a witness. This doctrine was established by the sixteenth century and persisted well into the nineteenth century. It rested upon the theory that one who had engaged in such reprehensible conduct was a person without honor and wholly unworthy of belief. The incompetency also was regarded as a part of the punishment.[23] Blackstone in his commentaries states that "Infamous persons are such as may be challenged as jurors, *propter delictum,* and thereafter never shall be admitted to give evidence to inform the jury, with whom they were too scandalous to associate." [24] This strict rule of law included not only those crimes pertaining to dishonesty but to all infamous crimes under the laws of England, generally enumerated as treason, felony, and the crimen falsi.[25] The reason, apparently unsurmountable at that time, was stated by Greenleaf that since "almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a court of justice." [26] In America likewise in the earlier period of our history persons convicted of felonious crimes were held thereafter incompetent to testify in court. Both in England [27] and in this country the incompetency has been removed by statute, with but few exceptions, but usually by the same act it is provided that the conviction of a crime

Lehner, 326 Ill. 216, 157 N. E. 211 (1927), but in this case the witnesses expressed their opinion both from personal knowledge and from party's reputation. Supporting opposition to the use of personal opinion, *see* (1928) 22 ILL. L. REV. 681. For an interesting conflict within the same case, see State v. Ferguson, 222 Iowa 1148, 270 N. W. 874 (1937), and compare in the same volume of the reports, State v. Treager, 222 Iowa 391, 269 N. W. 348 (1936).

23. State v. Bezemer, 169 Wash. 559, 570, 14 P. (2d) 460 (1932); 3 WIGMORE, EVIDENCE (3d ed. 1940) §§ 519, 986, 987.

24. 3 BL. COMM. *370.

25. GREENLEAF, EVIDENCE (16th ed. 1899) § 373; STARKIE, EVIDENCE (1860) 118; SWIFT, EVIDENCE (1810) 52.

26. GREENLEAF, EVIDENCE (16th ed. 1899) § 373.

27. The early English statute states that ". . . no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition. . . ." 6 & 7 VICTORIA c. 85 (1843). Later in 1898 the statute was expanded to permit the accused in a criminal trial to give testimony and protected him from an unfair use of former conviction. Criminal Evidence Act, 1898, 61 & 62 VICTORIA c. 36. *See* Stone, *The Rule of Exclusion of Similar Fact Evidence: England* (1933) 46 HARV. L. REV. 954.

shall thereafter be admissible as a test of the credibility of witnesses.[28] The statutes widely vary in their provisions as to what crimes afford the basis of testimonial impeachment; none of them being drafted upon the basis of the specific relationship of the crime to the character of the witness for truthfulness.[29] It is quite generally provided that convictions of a felony may be so used. This limits the use of previous convictions to crimes serious enough to carry a penitentiary sentence [30] but does not distinguish between the various grades of crimes carrying such penalties, as for example operating a motor vehicle while intoxicated, murder and perjury, all of which might provide a penitentiary sentence. Conviction of a felony,[31] crimes of infamous nature,[32] crimes involving moral turpitude,[33] and crimes without further designation thus inclusive of misdemeanors [34] are representative of the statutory provisions permitting proof of a crime to be used to impeach the veracity of a witness.

The theory of the use of previous convictions to test credibility is well stated in the case of *Gertz v. Fitchburg Railroad Company,* in which the plaintiff sought to recover damages for personal injuries received by him while in the defendant's employ. The plaintiff had testified as a witness and the defendant put in evidence the record of his conviction for impersonating a United States revenue officer several years before the trial. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded. On appeal, exceptions to the trial court's ruling were sustained, Justice Holmes saying:

> ". . . when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof

28. JONES, EVIDENCE (4th ed. 1938) § 716.

29. There are a few exceptions to the removal of incompetency in some states. Conviction of perjury or subornation of perjury renders a person incompetent in Pennsylvania. PA. STAT. ANN. (Purdon, 1930) tit. 28, § 315.

The Tennessee statute is unusual in the crimes it lists rendering a witness incompetent. Some of the crimes have apparently no relationship to the truthfulness of the witness but are in the nature of punishment. The crimes rendering the witness incompetent ("unless they have been restored to full citizenship") are: ". . . abusing a female child, arson and felonious burning, bigamy, burglary, felonious breaking and entering a dwelling house, bribery, buggery, counterfeiting, or violating any of the laws to suppress the same, forgery, incest, larceny, horse-stealing, perjury, robbery, receiving stolen property, rape, sodomy, stealing bills of exchange or other valuable papers, subornation of perjury, and destroying a will. . . ." TENN. CODE (1938) § 11762.

30. *See Ex parte* Wilson, 114 U. S. 417, 422 (1885).

31. People v. Gray, 148 Cal. 507, 83 Pac. 707 (1906); Palmer v. Cedar Rapids & M. Ry., 113 Iowa 442, 85 N. W. 756 (1901).

32. Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920).

33. See Chandler, *Attacking Credibility of Witnesses by Proof of Charge or Conviction of Crime* (1932) 10 TEX. L. REV. 257, an article which discusses the Texas rule based upon moral turpitude involved in the crime.

34. Rittenberg v. Smith, 214 Mass. 343, 101 N. E. 989 (1913), 47 L. R. A. (N. S.) 215; Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180 (1915); State v. Stone, 66 Wash. 625, 120 Pac. 76 (1912).

> affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit." [35]

This statement by Justice Holmes pointedly presents the whole of the theory upon which previous convictions are now admitted. The reason for disbelieving the witness is his supposed readiness to lie inferred from his general readiness to do evil which is predicated upon his former conviction of a crime. It is not the specific tendency of the witness to falsify but the general bad character of the witness as evidenced by the single act of which he was convicted that creates the basis of admissibility. By the common law such a witness was not permitted to testify at all because of this strong inference of unworthiness. Today the theory is retained but its application is changed, permitting the conviction to brand the witness with the stigma of distrust, but still if the jury, being conscious of his past, regards his testimony as true, it may be given credit.

Common law incompetency created by the conviction of a crime and the present day use of the record of a criminal conviction to test credibility originate out of the same premise, that the doing of an act designated by organized society as a crime is itself an indication of testimonial unreliability. Is the premise in its broad scope and application a true basis for prediction of falsity? Does it harmonize with other accepted principles of the law of evidence? Does it function in accord with its intended purpose of assisting to secure just decision of cases?

In the first place an analysis of the use of previous convictions for impeachment shows that the unreliability of a witness is predicted from the commission of a single act. The conviction does no more than give authoritative proof that the party did some particular act which is under the law a crime. The accepted certainty of proof avoids the policy objection to proof of collateral acts, which are held inadmissible.[36] From the criminal act, with the stamp of a conviction as proof of its commission, the victim is henceforth subjected to impeachment whenever he takes the witness stand. Most of the courts have placed no limit upon the time after which a previous conviction cannot be used

35. 137 Mass. 77, 78 (1884).

36. People v. Dean, 253 Mich. 434, 235 N. W. 211 (1931); see also the discussion of this problem in Note (1931) 29 MICH. L. REV. 473. Knowledge of independent acts may, however, be shown to impeach character witnesses but may not be independently proved. See Ladd, note 18 *supra* at 529.

and permit remoteness to go only to the weight of testimony.[37] Some courts have refused to admit proof of prior convictions when regarded so remote that they cannot reasonably bear upon the present character of the witness.[38] It is significant that the use of this testimony is definitely not based upon service of a term in a jail or a penitentiary.[39] If such were the case there might be some basis of predicting future untruthfulness as a result of prison environment and experience. This, however, may be shown in some states.[40] The mere fact of a conviction, even if accompanied by a parole, is enough to place the stigma of testimonial unreliability upon the convicted person.[41] Pardon or commutation of the sentence does not affect the use of this proof to discredit a witness [42] but it may be shown by better authority to mitigate its influence upon the jury.[43] The criminal act solemnized by the conviction creates its own admissibility for discrediting the witness. This is emphasized here in considering the value of this proof since there is danger of being overwhelmed by the thought of the unworthiness of a witness because of the conviction without considering that in reality the distrust is being predicated only upon the doing of a single act.

Is the use of a previous conviction of a crime to test credibility consistent with other legal theories of character evidence? One of the principal reasons urged for the requirement of reputation rather than opinion as proof of character is to prevent the party from being judged by a single act or experience. It is only when the person's conduct becomes so notorious because of a succession of acts drawing wide public notice that proof of the character of the witness is admitted by many courts. It is at once apparent that in admitting the previous conviction of a crime as a test of veracity the fundamental basis of admitting other character testimony is disregarded and character as a fixed quality is predicated upon a single act. The bare fact that the act is a crime and that there has been a conviction makes the single experience otherwise regarded unreliable and unsafe, a basis of future prediction

37. State v. Farmer, 84 Me. 436, 24 Atl. 985 (1892); State v. Bezemer, 169 Wash. 559, 14 P. (2d) 460 (1932).

38. Duncan v. State, 136 Tex. Cr. 18, 123 S. W. (2d) 344 (1938); Lott v. State, 123 Tex. Cr. 591, 60 S. W. (2d) 223 (1933).

39. Kwong Nom v. United States, 20 F. (2d) 470 (C. C. A. 2d, 1927).

40. Smith v. State, 159 Ala. 68, 48 So. 668 (1909); Smith v. State, 136 Tex. Cr. 53, 123 S. W. (2d) 655 (1939).

41. Herrin v. State, 97 Tex. Cr. 494, 262 S. W. 486 (1924).

42. Vedin v. McConnell, 22 F. (2d) 753 (C. C. A. 9th, 1927); People v. Andrae, 295 Ill. 445, 129 N. E. 178 (1920); Rittenberg v. Smith, 214 Mass. 343, 101 N. E. 989 (1913), 47 L. R. A. (N. S.) 215.

43. People v. Hardwick, 204 Cal. 582, 269 Pac. 427 (1928), 59 A. L. R. 1480, 1489 (1929) 16 CAL. L. REV. 161, 1 SO. CALIF. L. REV. 200; Commonwealth v. Quaranta, 295 Pa. 264, 145 Atl. 89 (1928), (1930) 34 DICK. L. REV. 175. *Contra:* Gallagher v. People, 211 Ill. 158, 71 N. E. 842 (1904). Under the common law pardon removes the incompetency. Boyd v. United States, 142 U. S. 450 (1891). For a discussion of the subject, see Williston, *Does a Pardon Blot Out Guilt?* (1915) 28 HARV. L. REV. 647.

of the lack of veracity. Tested upon logical grounds it is difficult to see how convictions-at-large of crimes-at-large satisfy the needs of relevancy to the task which they are assigned to perform. The admission of such proof to test credibility in its broad application would find little support upon psychological theories because as an isolated event it would not be sufficiently representative to become the basis of establishing a personality type.[44] This is particularly true because the broad scope of crimes included in the conviction test eliminates application of any specification of human traits. A scientific method of determining character could not proceed upon the deduction from one isolated act without consideration of its details or of its nature other than the fact that it was a crime under the existing social order. Even if all particulars are known it is doubtful if many single acts would be adequate for determining true character. The principle, if justifiable at all, must rest upon the assumption that a person with a record of conviction was not discovered, tried and convicted the first time he committed a crime, but probably had been engaged in the commission of crimes for some time before he was caught. Also some crimes frequently represent a course of conduct as in the usual case of embezzlement. It often happens that an accused person is tried upon one criminal act which is selected from many acts for the purpose of trial. In these situations the particular conviction becomes representative of the witness in a much larger way with a tenable basis for predicting his character as a falsifier.

Although there is great danger in the use of previous convictions to test credibility, this method of impeachment is so generally recognized that it will probably be difficult to change in the future. It does cause jurors to consider with caution the testimony of a witness whose proven acts have been sufficiently serious to require prosecution by the state. There should be, however, a rationalization of the kind of crimes which may be used to test credibility. There is no justification for the use of crimes in omnibus. Many crimes give no light upon the credibility of the offender. Murder is both an infamous crime and a felony and yet it may have no bearing upon veracity. Bentham demonstrated the irrational use of this evidence in the illustration in which he says:

> "Take homicide in the way of duelling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is

44. See Ladd, note 18 *supra* at 532.

> put in fear—and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it,—has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie,—and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion." [45]

Infamous crimes and felonies indicate a marked departure from the approved standard of social conduct such as will justify severe punishment, but the departure may be in so many directions that its bearing upon the truthfulness of the person committing them may be close in point or very remote. For example, a felony is commonly defined by statute as a crime for which the punishment may be a penitentiary sentence.[46] A similar definition has been given to infamous crimes.[47] This is in no sense descriptive of the crime but only indicates its general seriousness and for whatever reason it may be regarded as serious. The term crimen falsi in most states has not been made the basis of discrimination among felonies and infamous crimes to determine their relevancy to truth-testing. Some states have permitted records of convictions of felonies in general, and misdemeanors in the nature of crimen falsi, to impeach credibility, thus making the relationship of the crime to the purpose of impeachment apply in misdemeanors but not in the more serious crimes.[48] The term crimen falsi has not been well defined but may be said to include generally crimes injurious to the administration of justice by the introduction of falsehood and fraud. Perjury, subornation of perjury, suppression of testimony by bribery, conspiracy to procure absence of witnesses, barratry, and forgery have been included under crimen falsi.[49] The relationship of these crimes

45. 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (Bowrings' ed.) 407. Quoted in 2 WIGMORE, EVIDENCE (3d ed. 1940) § 519.

A Pennsylvania trial court expressed a similar thought in instructing the jury that: "'If you believe them (the witnesses), you can waive their criminal records. . . . It is a collateral matter to be determined by you.' . . . 'There has been a lot of unnecessary rattling of family skeletons, the purpose of which is to discredit their credibility. They have openly and frankly admitted the crimes they have been accused of, the times they were guilty, the times they have been sentenced, and the times they have served. If they owed a debt to society they have paid (it) by their probationary period, or by their prison sentences. It does not matter if they have been the blackest criminals in the city, except as it affects their credibility, if you believe the testimony they gave on the witness stand you will be justified in giving them as much credence as though they were the whitest lilies ever painted'." This instruction was so strong that it was held to constitute reversible error, but it shows a very good understanding of the problem. Weiss v. London Guarantee & Accident Co., Ltd., 280 Pa. 325, 329, 124 Atl. 472, 473 (1924). See Note, 120 A. L. R. 1441, 1456.

46. Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920).

47. Mackin v. United States, 117 U. S. 348 (1886); Jones v. Robbins, 74 Mass. 329, 349 (1857).

48. Commonwealth v. Schambers, 110 Pa. Super. 61, 167 Atl. 645 (1933).

49. Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861 (1920).

to veracity is self-evident. In the Pennsylvania case of *Commonwealth v. Quaranta,* Justice Kephart said:

> "But every offense of crime under the law is not relevant to prove one's character for veracity, and, it is not permissible to show general bad character because of the abuse that could be made of it by the prosecution . . . the only crimes admissible to attack veracity are such as affect credibility and refer to the conviction of a felony or misdemeanor in the nature of crimen falsi." [50]

The classification of crimen falsi is too narrow and felonies too large to meet the credibility test. Any classification of crimes on the basis of their relationship to credibility is difficult. Personal crimes of murder, assault, and mayhem, show a vicious disposition but not necessarily a dishonest one. On the other hand robbery, larceny, and burglary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness. If the witness had no compunctions against stealing another's property or taking it away from him by physical threat or force, it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony. Furthermore, such criminal acts, although evidenced by a single conviction, may represent such a marked breach from sanctioned conduct that it affords a reasonable basis of future prediction upon credibility. It is quite possible that with each other the robber class hold to some code of honor, but it is unlikely that it would express itself in court proceedings if there were a motive to falsify. The group of offenses including forgery, uttering forged instruments, bribery, suppression of evidence, false pretenses, cheating, embezzlement, roughly disclose a type of dishonesty and unreliability characteristic of those lacking veracity. Not only would witnesses with such records tend to be conscience free in giving false testimony, but these crimes, being of the enlarged crimen falsi class might indicate the propensity to gain by false means and thus to falsify. Perjury has been regarded a sufficient indication of the probability of future perjury that some legislatures in removing incompetency of the common law retained it as to perjury. Whether perjury in one case would be a stronger indication that the witness would perjure in another than the commission of other crimes in the crimen falsi group is questionable.

The class of sex crimes presents a difficult problem. It is hard to associate honesty and truthfulness with general prostitution or disorderly house offenses. The associations and habit of living of those

50. 295 Pa. 264, 272, 145 Atl. 89, 92 (1928).

engaged in such conduct places them in the class of those whose moral sense has become so impaired that the obligation to speak the truth is very lax. The subject of proof of other sex offenses of a female complainant in a sex charge against a man has been extensively considered by Professor Wigmore who is of the opinion that the entire sex history of the complainant should be before the court. He regards it vitally significant on the issue of veracity.[51] Whether all sex crimes are an indication of a want of veracity is a disputed question, likewise is the difference in sex offenses of men and women.[52] History contains the names of many highly respected persons whose honor in telling the truth would not be questioned and yet whose sex life would hardly be the model for future generations. The frank novels and biographies of the present day disclose habits of living, not commendable or in conformity with legal or ethical standards, and yet not representative of people whose word under oath would be regarded bad. The pathological cases and the problem of adolescent girls which Professor Wigmore discusses would hardly afford adequate criteria for a broad classification that sex offenses in general indicate untruthfulness. Convictions of sex offenses are now generally received.[53] Is their value in truth-testing greater than the resulting prejudice? There may be this distinction between the use of such convictions in cases involving sex crimes and in other types of cases: they might have a vital bearing upon truthfulness in cases involving sex offenses but have little or no bearing in cases not in any way pertaining to sex matters, where the use of such conviction appears doubtful.

The courts which have permitted evidence of the conviction of a misdemeanor to test credibility have included another wide range of crimes varying still more in their character than those included under infamous crimes and felonies. It is here that the provision requiring that the crime be one involving moral turpitude or crimen falsi is principally important. It tends to segregate crimes purely mala prohibita from those mala in se.[54] In many jurisdictions this restriction is not

51. 3 WIGMORE, EVIDENCE (3d ed. 1940) § 924a.
52. State v. Sibley, 131 Mo. 519, 33 S. W. 167 (1895).
53. Conviction of sex offenses come in under felonies or misdemeanors. A similar dispute has arisen in the admission of evidence as character. In the recent case of State v. Perelli, 125 Conn. 321, 5 A. (2d) 705 (1939), the court held that questions concerning sexual offenses and irregularities asked witnesses on cross-examinations were properly excluded as not relevant for the purpose of affecting the credibility of a witness. Also in Godfrey, *et al.* v. State, 187 Miss. 70, 187 So. 199 (1939), the court held that the veracity of a witness cannot be impeached by proof of unchastity. *Contra:* Keesee v. May, 280 Ky. 583, 133 S. W. (2d) 920 (1939).
54. A crime *mala in se* is "defined as one which is naturally evil as adjudged by the sense of the civilized community". A *mala prohibita* act, though, is one which is wrong only because made so by statute. It does not involve "any moral dereliction which carries with it a disregard of the obligation of an oath". Commonwealth v. Schambers, 110 Pa. Super. 61, 167 Atl. 645 (1933).

made, and the mere fact that there is a conviction of a crime, whether a misdemeanor or one of a more serious grade, constitutes the basis of admissibility.[55] The man who pleaded guilty for being drunk, the husband who drives through a stop light, and the housewife who paid a fine for overparking while shopping are all in this class. Obviously such a classification is nonsense, but misdemeanors involving dishonesty or false statement might conceivably be as significant for truth testing as a felony.

Thus, the attitude toward previous convictions of a crime has gone through a gradual development. In the first stage strict rules were applied rendering one convicted of an infamous crime incompetent to testify at all. This was followed by removal of the disqualification but retaining the use of the conviction for impeachment. The next stage points to a reappraisal of the rules in the light of their actual services. Since the occasion to admit previous convictions of a crime is to test the veracity of a witness, then only those crimes representative of qualities which would tend to discredit the witness should be admitted for that purpose. A fair classification would include those crimes involving dishonesty or false statement committed at a time not unreasonably remote. These crimes would be as easily determined as crimes involving moral turpitude. This classification is simpler than that under the crimen falsi group and much more realistic. It would harmonize the rule admitting convictions of a crime with the rule limiting evidence of character for impeachment to traits of honesty and veracity. Whether other crimes should be included such as those involving sex offenses is a matter which should be scientifically determined upon some basis other than an omnibus classification. In making a reclassification it is believed preferable to place the limitation to include those crimes specifically relating to dishonesty and false statement rather than take in the marginal cases.

Since the character of the criminal act rather than the length of sentence is to be the basis of the test, misdemeanors as well as felonies should be included. If such evidence is to have probative force, the conviction should be recent enough so as to be an index of character. In the case of reputation testimony to prove character, a reputation

55. Under statutes including misdemeanors, a violation of the liquor laws has been admitted for impeachment. United States v. Wroblewski *et al.*, 105 F. (2d) 444 (C. C. A. 7th, 1939); Commonwealth v. Ford, 146 Mass. 131, 15 N. E. 153 (1888); Howard v. State, 94 P. (2d) 947 (Okla. 1939). Upon this subject there has been a wide divergence of opinion. Palmer v. Cedar Rapids & M. C. Ry., 113 Iowa 442, 85 N. W. 756 (1901); State v. Johnson, 76 Utah 84, 287 Pac. 909 (1930). The disfavor with which the liquor laws were received tended to mitigate the seriousness of their violation. Judged in that light alone, the conviction of such crimes might not indicate untrustworthiness. Yet, when considered in the light of the criminal associations and activities which developed in that business, the conviction under the liquor laws might indicate a most unreliable witness.

remote in time is inadmissible and the same principle should apply to crimes.[56] The Texas statute places a fixed limitation of ten years during which the conviction may be used to impeach. The time element, however, might be related somewhat to the character of the crime committed. In the creating of a new rule it should be made clear that the party calling a witness, as well as the adversary, should be able to use a previous conviction for impeachment to impair credibility.[57] Thus, for the future, a rule permitting any party to a law suit to impeach the credibility of a witness by showing his conviction of a crime involving dishonesty or false statement committed within a reasonable time prior to the trial would constitute a real improvement upon the diverse classifications now existing upon the subject.

The remaining question is whether or not the conviction of any crime should render a witness incompetent to testify at all. The only rational exception would conceivably be a conviction of perjury or subornation of witnesses. The relationship between the commission of the crime to truth testing is indeed immediate, and yet at most it would indicate only a willingness upon the part of the witness to falsify under oath. Clearly it does not mean that the witness will forever and under all circumstances swear to false testimony. Psychologically, it is doubted if such a person would falsify under less stimulation than a witness who had committed other crimen falsi crimes. The safeguard afforded by impeachment through a conviction of perjury would be so strong as to make negligible the danger of misleading the triers of fact by false testimony. If the testimony were true, and the circumstances were such that it was believable in the face of such impeachment evidence, the former conviction of the crime of perjury should not pre-

56. In State v. Dillman, 183 Iowa 1147, 1157, 168 N. W. 204, 207 (1918) Ladd, J., stated that "Even to cross-examination there should be some limit, beyond which the veil should not be raised. . . . So much depends on the peculiar circumstances of each case that no unvarying rule can be laid down; but it may be said that the cross-examination can be extended back as far as inquiry of general reputation for truth and veracity, or proof of general moral character; and there seems no tenable reason for permitting cross-examination relating to specific acts to extend farther into the past, unless these are in some way related to the facts or acts under consideration, and are in some manner given significance thereby. This is a rule well calculated to allow sufficient leeway to inquiry, and, at the same time, put a stop to opening up the past, short of turning cross-examination into oppression and an attempt to harass or disgrace the witness, rather than to test his credibility."

57. In Vause v. United States, 53 F. (2d) 346, 351 (1931) the witness for the government "was known to be a man who could and would indulge in trickery and fraudulent financial schemes, and was an ex-convict because of his previous practices in that regard. When (this witness) was put upon the stand to testify for the government, the district attorney introduced him to the jury by questions and answers which brought out his real character. His credibility as a witness was an important matter for the jury to decide in order to get at the truth, and there is certainly no point in condemning the district attorney for frankly disclosing at the outset what would enable the jury to do its duty in that regard. The complaint now made rather savors of the thought that he stole a march on these defendants in not letting that phase of the matter wait until they could, if the saw fit, bring out the facts on cross-examination and make the most of their apparent desire to put the witness in his proper place. . . ."

clude its use in determining the truth in a testimonial conflict. The testimony of a witness who had been convicted of the crime of perjury might become very important in a case where he had no motive to falsify, and the proof should not be lost.

Credibility Tests and the Accused as a Witness

Issues pertaining to the credibility of the accused as a witness cut into the most fundamental principles of the trial of criminal cases. They have a significant relationship to the constitutional inhibition against compelling the accused to testify and the associated problem of whether or not comment may be made by the prosecution upon his failure to do so. These issues materially relate to the theory that the character of the defendant in a criminal case shall not be assailed by the state where he has not put it directly in issue. The application of the approved means to test credibility invades upon the rule that other crimes of an accused are inadmissible to prove him guilty of the offense with which he is charged. The interrelation between the evidence used to determine veracity and the basic conceptions of criminal justice make these two problems component parts of the same issue and require a greater appreciation of the way they function together if the ultimate end of a fair trial with a just result is to be achieved.

The defendant in a criminal case occupies a dual position when he takes the witness stand. As a witness the accused is subject to proof of his former conviction of crime because of its indirect bearing upon his likelihood to falsify; as a defendant the commission of other crimes is expressly excluded because of the danger of influencing the jury to believe that because of what he did in the past it is probable that he did the act charged against him in the trial. A defendant in deciding whether he will take the witness stand and testify in his own behalf must take into account not only the question of his innocence and the proof by which he may establish it but also the dangers to which he is exposed by the evidence which the prosecution will present at least ostensibly to discredit his testimony.

The problem most pointedly appears in those states in which a bad general moral character is admissible to impeach the veracity of the accused as a witness. In the recent case of *State v. Williams* [58] the Missouri court remedied this situation which had long troubled that court and consumed many pages of lengthy opinions. A statute of this type [59] was in effect and although it has not had smooth sailing in

58. 337 Mo. 884, 87 S. W. (2d) 175 (1935), 100 A. L. R. 1503.
59. 1 Mo. Rev. Stat. (1929) § 3692.

Missouri, it was consistently followed in the case of *State v. Scott.*[60] Judge Ellison delivered an opinion vigorously protesting against the rule but ultimately conceding its application on the theory that any witness as mentioned in the statute included the accused as a witness. In the *Scott* case, the accused was tried for the commission of a robbery alleged to have been committed at six o'clock in the evening, and the state's evidence pointed to him as one of four men who had engaged in the offense. The defendant took the witness stand and testified that he was at home eating dinner some thirty miles away at this time. This was confirmed by evidence of members of his family. The defendant did not raise the issue of his good character to show improbability but depended upon his own testimony and that of others upon facts which, if true, established an alibi. The state, however, introduced character testimony showing that the defendant's general moral character was bad, ostensibly to impeach his credibility, and the court in its instruction advised the jury as to the purpose of this evidence informing them not to regard it as an indication of the probability that he had committed the offense. The character of the accused was paraded before the jury as much as if the accused had expressly put his character in issue, the only limitation being the use of this evidence as explained in the instruction. The case was tried three times; twice the jury failed to agree, and on the third trial convicted the accused and assessed the punishment for the comparatively light term of two years considering the gravity of the offense. How much the evidence admitted showing the bad moral character of the defendant had to do with the verdict cannot be accurately ascertained. The facts were close and the verdict may indicate that the jury thought the defendant was a bad man and ought to be put away for awhile but that in view of their doubt upon the evidence they hesitated in giving him the maximum punishment which he deserved if guilty. It is, indeed, doubtful, in view of the result, that the jury segregated the bad character evidence and used it only to test veracity. A reasonable speculation is that the evidence of bad moral character permitted acceptance of the propensity of the accused to commit the crime as well as to falsify. It is significant, therefore, that when Judge Ellison was again faced with the same problem in the *Williams* case he overruled the *Scott* case and held even in face of the Missouri statute that impeachment by proof of bad general moral character should no longer be permitted.

In other jurisdictions in which evidence of bad moral character is admitted for impeachment purposes the same rule is applied when the accused takes the witness stand in his own behalf. There have been

60. 332 Mo. 255, 58 S. W. (2d) 275 (1933), 90 A. L. R. 860.

express holdings sustaining this view in Alabama,[61] Arkansas,[62] Indiana,[63] Iowa,[64] Kentucky,[65] Louisiana,[66] North Carolina,[67] Oregon,[68] and Tennessee.[69] The chief objection to this evidence is that for all practical purposes it very definitely puts character in issue without consent of the accused thereby violating what upon general grounds of policy is regarded as a sound rule. This doctrine is founded simply upon the desire to avoid unfair prejudice and unjust condemnation which such evidence might induce in the minds of the jury.[70] When proof of bad character is admitted there is the real danger that the defendant may be overwhelmed with prejudice instead of being tried upon evidence produced to prove his guilt of the specific offense with which he is charged. Moral character in general fills a big gap in the trial with the jury. Although general in its terms it may be taken to go to the very trait involved in the crime charged whatever it is irrespective of what the background of the moral character evidence may be. It helps the jury to be satisfied with much less proof than they otherwise would demand for conviction. It may be the turning point of the case to the untrained mind. It is easy to grasp and gives confidence in conviction. Even to those among the jury who carefully discriminate and endeavor to make proper uses of the evidence as the court charges, evidence of bad character of the accused makes them less critical in their effort to be sure that they have rightly convicted, finding solace from the possibility of error in the fact that after all the defendant is a bad man.

Aside from other reasons which would deny the use of general character as evidence of credibility of a witness, as a practical matter it should be excluded if applied to the accused as a witness because

61. Riggan v. State, 21 Ala. App. 482, 109 So. 888 (1926); *cert. denied*, 215 Ala. 107, 109 So. 889 (1926).
62. Herren v. State, 169 Ark. 636, 276 S. W. 365 (1925).
63. Foreman v. State, 203 Ind. 324, 180 N. E. 291 (1932).
64. State v. Hart, 205 Iowa 1374, 219 N. W. 405 (1928).
65. Shell v. Commonwealth, 245 Ky. 223, 53 S. W. (2d) 524 (1932).
66. State v. Guy, 106 La. 8, 30 So. 268 (1901).
67. State v. Efler, 85 N. C. 585 (1881).
68. State v. O'Donnell, 77 Ore. 116, 149 Pac. 536 (1915).
69. Peck v. State, 86 Tenn. 259, 6 S. W. 389 (1888).
70. Professor Wigmore speaks of the reason of excluding evidence of moral character when offered by the prosecution in the first instance as based upon the auxiliary policy to avoid uncontrolled prejudice and possible unjust condemnation. In commenting upon this policy he says, "This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court. . . . The rule, then firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character." 1 WIGMORE, EVIDENCE (3d ed. 1940) § 57.

it does not fit into the basic principles guiding the trial of criminal cases. Under the guise of impeachment this rule permits the presentation of evidence which is in conflict with the fundamental conceptions of criminal justice. The limitation of character testimony to the specific trait of honesty and veracity not only strengthens the evidence for its intended use but, at least in many cases, would avoid abuse where the accused is a witness. Even this does not go the whole way in correcting the misuse of such evidence because in the cases in which the crime charged relates to dishonesty or perjury, use of those traits to impeach the accused would repeat the danger. The problem of the accused as a witness shows the impracticability of using general moral character for impeachment generally and affords a strong argument to abolish it altogether in accord with modern developments, as has been done by the *Williams* case in Missouri.

Whereas the use of moral character as a credibility test by the state against the accused is allowed in only a minority of jurisdictions, the right of the state to prove convictions of a crime is almost universally admitted as a test of veracity.[71] Our present problem is to see its effect upon the accused who offers himself as a witness in a criminal case. The same principles operate here which have just been considered in respect to moral character, only with greater force. The admission of this testimony also comes into direct conflict with the theory of exclusion of proof of similar offenses. Whether the value to discredit outweighs the possibility of misuse by the jury in rendering a verdict has not been dealt with a great deal by the courts since the right of admission is usually decided on the basis of the interpretation of a statute upon the subject. Three possible effects from the introduction of the previous conviction of the accused who offers himself as a witness should be kept in mind in examining the cases: (1) The previous conviction may be taken for its intended purpose only, i. e., to test his credibility. (2) It may be used to show the propensity of the accused to commit the particular act charged. This is particularly true when the prior conviction was the same as the present charge and its nature is stated. (3) Proof of the former conviction may create a general prejudice against the accused causing the jurors to regard him as a bad individual and to consider it generally desirable that he be put away quite apart from whether the present proof of his guilt is sufficient under the law.

The Iowa cases illustrate the problem of these different ways by which the proof of a conviction of a crime may be used by the jury and the recognition of the danger by the court. In the case of *State*

71. 3 *id.* §§ 980, 987.

v. Concord[72] the defendant was on trial for the crime of burglary and offered himself as a witness in his own behalf. When cross-examined by the state he was asked if he had been convicted of the crime of burglary before. The questioning of the prosecutor as reported in the opinion is here set out to show the emphasis placed upon the specific felony.

> Question. "Have you ever been convicted of a felony?"
> Answer. "I pleaded guilty to a felony."
> Question. "What was the charge against you?"
> Objected to as immaterial. Objection sustained and exceptions.
> Question. "You pleaded guilty and were convicted of burglary, were you not?"
> Objected to as incompetent, irrelevant and immaterial. Objection overruled and exception.
> Answer. "I was convicted of a felony."
> Question. "Will the reporter read the question?"
> The reporter read the question.
> Answer. "Yes, sir."

The court looked upon the examination as not being designed for impeachment but rather to show that the defendant had been convicted of the same offense for which he was being tried and reversed the case. This is one of the relatively few cases which has made this distinction, most courts permitting indiscriminately the right of state's counsel to interrogate upon or prove by record the specific crime. In the opinion the court said:

> "The defendant being a witness on his own behalf, it was competent to show, as affecting his credibility, that he had previously been convicted of a felony. CODE § 4613 . . . The same statute provides that no other proof is competent except the record thereof. We held, in *State v. Carter,*[73] that practically similar inquiries of a witness were proper. The writer is disposed to think that, as applied to such facts as are here shown, the rule should not be adopted. Counsel, in propounding the question, was evidently not intending to use the answer for impeaching purposes, but to show that he (defendant) had theretofore been convicted of a like offense. It was not admissible for that purpose, and the majority of the court as now constituted are of the opinion that, as this was the manifest purpose of the inquiry, it was error to press the question to an answer. . . . Of course, he (the accused) is subject to impeachment as any other witness; but the state, in conducting the cross-examination, should be confined strictly

72. 172 Iowa 467, 154 N. W. 763 (1915).
73. 121 Iowa 135, 96 N. W. 710 (1903).

to matters of impeachment and not, under cover thereof, be permitted to inject prejudicial matter." [74]

Other Iowa cases have approved the *Concord* case but have admitted proof of a specific felony if it was not of the same type as the crime for which the defendant was being tried.[75] The court while recognizing the danger of using this method of impeachment in showing similar offenses has not generally been concerned with what may be more serious, namely permitting specific felonies to be shown which may create passion and prejudice against the accused and even more forcibly influence the jury. In the case of *State v. Friend* [76] in which the defendant was being tried for receiving stolen property, the prosecutor on cross-examination propounded the question whether or not he had been previously convicted of the crime of rape. The court contented itself in affirming the decision upon the ground that there was no error in admitting this proof to discredit the defendant as it did not involve the same crime for which he was being tried. Obviously the conviction of the crime of rape would create a hostile attitude toward the accused and develop a feeling of willingness to convict him if they could.

The effect of showing a previous conviction of crime is so strong in either creating prejudice in the minds of the jury or causing them them to believe that the accused has a propensity to do evil that the desirability of the use of this type of evidence for impeachment purposes when the accused is a witness is very doubtful. Commenting upon the effect of proof of former conviction of the accused, Justice Willis in the California case of *State v. Granillo* said:

> "It is a matter of common experience and knowledge that once the average juror learns that the defendant has previously been convicted of a crime of the same class as that for which he is being tried, that juror will consciously or unconsciously consider and allocate to a type or class the man on trial, as distinguished from the admeasuring of his credibility as the witness on the stand; and this despite all instructions by the court, for the court may not, except by virtue of presumption, control the ordinary process of the human mind and its natural gravitation toward the ordinary and usual inferences or implications which flow from knowledge of an established fact." [77]

74. State v. Concord, 172 Iowa 467, 475, 154 N. W. 763, 765 (1915).

75. In the case of State v. Williams, 197 Iowa 813, 819, 197 N. W. 991, 994 (1924), the court approved questions of the prosecution pointing out and identifying the character of previous felonies, saying, "The offenses inquired about were not similar to the one for which the defendant was then being tried, and the case does not come within the rule laid down in *State v. Concord* . . . where there was a manifest effort to show, under the guise of impeachment, that the defendant had been convicted of a like offense."

76. 210 Iowa 980, 230 N. W. 425 (1930).

77. 140 Cal. App. 707, 718, 36 P. (2d) 206, 211 (1934).

The accused was being tried for murder and the prosecuting attorney had made some prejudicial remarks, claiming that he was a killer, which would justify a new trial. The court, however, refused to reverse and held that the error was without prejudice because, through legal channels, evidence of a previous conviction had been admitted and in the natural course the jury would draw the same conclusions as were reflected by the district attorney's statement. The conclusion of the court was that the prejudice instilled in the minds of the jury by the state's remarks was non-consequential because the prejudice already had been created when the accused admitted that he was an ex-convict. After the jury had this knowledge the court regarded the accused as good as convicted in advance regardless of his actual guilt. If this is true, it means that the impeachment process is being made a false condition for the admission of evidence of the most damaging sort and constitutes a practical repudiation of what are regarded as fundamental principles of fair trial. It was this error that the *Concord* case sought to avoid by denying proof that the accused had been convicted previously of the same crime for which he was being tried. A partial solution would be to eliminate proof of crimes to discredit a witness which have no relationship to dishonesty or false statement. But even this may be insufficient where the accused takes the stand as a witness. A previous conviction plays such a vital part in influencing the jury against the accused that some further safeguards may be necessary to secure just decisions in criminal trials. The courts fully recognize the danger and have regarded it sufficiently serious to reverse any cause where the other offense does not come into the case upon the bypath of some orthodox excuse for its admission.[78] But the bypath of previous convictions for the purpose of testing credibility is something never missed by the prosecuting attorney. The more carefully the defense attorney and the court warn the jury that its purpose is only to test credibility, the more emphasized the fact becomes that the jury has before them one who has been convicted of crime before, that he is up for trial again, and that it is perhaps time that something should be done about it. The accused becomes classified by the jury as a person of moral depravity with the consequent disregard for what may happen to him. The feeling is developed that if the accused did the acts for which he was formerly convicted, he would have no moral scruples against committing the crime with which he is now charged. The jury feel less

78. People v. Adams, 76 Cal. App. 178, 244 Pac. 106 (1926); State v. Shields, 195 Iowa 1360, 192 N. W. 521 (1923); Commonwealth v. Vandenhecke, 248 Mass. 403, 143 N. E. 337 (1924); Stock v. Dellapenna, 217 Mass. 503, 105 N. E. 378 (1914); Daggett v. State, 114 Neb. 238, 206 N. W. 735 (1925).

of the urge to be right in their verdict because they believe they have a bad subject before them and that the consequences of their mistake cannot be so serious.

The whole problem is closely related to the constitutional privilege of the accused not to testify and with the associated problem of the right of the state's attorney to comment upon his failure to do so.[79] Undoubtedly one of the principal reasons the accused with a prior conviction fails to testify is that he fears even with an honest defense that the knowledge of his former conviction will make certain a verdict of guilty in spite of whatever he has to say. This calls into question a balancing of values. Does it mean more to have the accused testify than it does to keep him from the witness stand because of a fear of prejudicial cross-examination? If, in accord with modern developments, comment is to be permitted upon the accused's failure to testify thereby increasing the pressure to cause him to take the witness stand, should the law be revised so as to permit him to tell his side of the story without being subjected to diverse collateral matters not immediately related to the case and which blacken into insignificance even a story of the truth which might be told? In considering the future of the law of evidence upon this point, the solution may be that the previous conviction of a crime involving untruthfulness should be permitted to impeach witnesses generally except that it should be inadmissible against the accused in a criminal case when he takes the stand. While it may be reasonably questioned whether so great a step should be taken, there can be no doubt that restricting admissibility of convictions for testing credibility to those involving dishonesty and false statements will prevent at least many of the present abuses.

79. The right of state's attorney to comment upon the accused's failure to testify has in recent years been regarded as of great significance. The rule prohibiting such comment having been regarded in some states through judicial interpretation as a constitutional guarantee has required constitutional amendment for change. California submitted the amendment to popular vote and obtained its adoption. CONSTITUTIONAL AMENDMENT TO ART. I, § 13 (1934). In the same manner the right to comment became a part of the Ohio constitution. CONSTITUTIONAL AMENDMENT TO ART. I, § 10 (1912). For collection of authorities see Note (1928) 37 YALE L. J. 955 and (1930) 68 A. L. R. 1102. For excellent discussions on both sides of the problems see Bruce, *The Right to Comment on the Failure of Defendant to Testify* (1932) 31 MICH. L. REV. 226; Reeder, *Comment upon Failure of Accused to Testify* (1932) 31 MICH. L. REV. 40. The right of the comment has been strongly favored by 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2272, 2272a. The literature in legal periodicals is abundant on the subject. A factor often lost sight of is the relationship of the right to comment to the credibility tests imposed upon the accused. As important as the comment may be in securing fair trial from the standpoint of the state, in turn it should be considered in the light of a fair trial of the case as a whole so as to eliminate some of the credibility tests used primarily in practice to create prejudice rather than serve their intended function.