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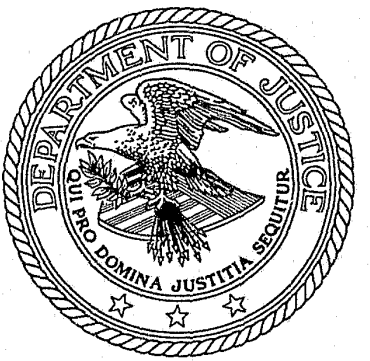
Report to the Attorney General

The Admission of Criminal Histories at Trial

August 14, 1986



Truth in Criminal Justice Series
Report No. 4

Report to the Attorney General on The Admission of Criminal Histories At Trial

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The function of the criminal justice system might best be summed up as the protection of the innocent. In criminal prosecutions, an extensive system of rights and procedures guards against the conviction of an innocent person. Equally important, enforcement of the criminal law in all its phases -- crime prevention, police investigations, criminal prosecutions and corrections -- also aims at protection of the innocent. By detecting, convicting and punishing those who break our laws, we protect innocent people from the depredations of criminals.

To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.

Over the past thirty years, however, a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial. This trend has been a cause of grave concern to many Americans, who perceive such rules as being at odds with the goals of the criminal justice system. Within the legal profession and the law enforcement community, debate over these rules has been complicated by disagreements about the extent to which constitutional principles or valid policy concerns require the subordination of the search for truth to other interests.

This report is a contribution to that debate. It was prepared by the Office of Legal Policy, a component of the Department of Justice which acts as a principal policy development body for the Department. At my request, the Office of Legal Policy has undertaken a series of studies on the current status of the truth-seeking function of the criminal justice system.

This volume, "The Admission of Criminal Histories at Trial," is the fourth in that series. It reviews the historical development of the rules governing the admission at trial of evidence of prior criminality by a defendant; discusses the

constitutional and policy considerations affecting the formulation of such rules; and compares the existing rules in this area in the United States with the corresponding rules of foreign jurisdictions. It also sets out recommendations for reform in this area of the law.

In light of the general importance of the issues raised in this report and its companion volumes, it is fitting that they be available to the public. They will generate considerable thought on topics of great national importance, and merit the attention of anyone interested in a serious examination of these issues.

Edwin Meese III

EDWIN MEESE III
Attorney General

EXECUTIVE SUMMARY

The common law has traditionally restricted the admission at trial of evidence of earlier offenses committed by the defendant. However, evidence of this sort frequently provides critical information concerning the character and dispositions of the accused, and may be unquestionably relevant in assessing the validity of the charges against him. The probative value of prior crimes evidence on these points is recognized in all contexts other than trials, including pretrial release decisions and post-trial sentencing decisions, in which the defendant's past commission of crimes is regularly relied on as evidence of an enhanced likelihood of subsequent criminality. Moreover, in many foreign democracies, whose political and legal systems are premised on the same values as those of the United States, the criminal records of defendants are routinely disclosed at trial.

The conflict between normal canons of rational judgment and the common law's traditional presumption in favor of concealing the defendant's history of criminal conduct from the trier has resulted in the development of exceptions and qualifications under which conviction records and other evidence of prior crimes are in fact admitted at trial in a variety of circumstances. However, these exceptions largely reflect ad hoc compromises and historical accidents, and the admissibility or inadmissibility of a criminal record pursuant to the existing rules frequently has little or no relationship to its actual probative value in a case. In many cases in which such evidence is of major import to an accurate determination of guilt or innocence, it remains subject to exclusion.

The restriction of prior crimes evidence has traditionally been justified as necessary to ensure that defendants have fair notice of the accusations they will face at trial, to maintain reasonable limits on the scope of inquiry at trial, and to avoid the risk that juries will be prejudiced by disclosure of the defendant's past misconduct. However, the fair notice and scope-of-inquiry rationales provide no support for the particular standards that currently govern the admission of such evidence, and any legitimate concerns they reflect could be addressed by measures other than broad rules of evidence exclusion. These concerns are not implicated at all by the disclosure at trial of past *convictions*—as opposed to evidence of previously unproven offenses—since the defendant has already had an opportunity to defend against the charges on which his prior convictions are based,

and their occurrence can normally be established without difficulty by public record or the defendant's admission. The final conventional rationale for limiting evidence of earlier offenses—the notion that this type of evidence, though relevant and probative, should be excluded because it carries an extraordinary potential for jury prejudice—is simply unproven. To the extent that empirical data is available on this issue, it suggests a contrary conclusion.

Neither the text and history of the Constitution nor the general course of judicial decisions provide any support for the view that the Constitution requires a restrictive approach to the use of prior crimes evidence. The Supreme Court's constitutional decisions affirmatively support the proposition that valid prior convictions can constitutionally be admitted whenever they are relevant to the determination of guilt or innocence or some other legitimate purpose is served by admitting them.

In formulating a reform proposal in this area, a choice is required between (i) proposing changes that would only enlarge the circumstances under which prior *convictions* are admitted, and (ii) proposing changes that would also create more liberal rules of admissibility for evidence of unproven offenses for which a person has never been prosecuted and for evidence of non-criminal "bad acts." The case for broader admissibility of convictions is clearly the most compelling, and changing the rules governing evidence of past misconduct that has not been established by a criminal conviction would raise a variety of practical problems and policy questions that do not arise under reform proposals which only affect the admission of convictions. It would accordingly be preferable to limit any initial proposal we might advance to proposing a broader rule of admissibility for prior convictions, although more permissive standards of admission would in principle be desirable for other evidence of uncharged misconduct as well.

The optimum reform affecting convictions would be a rule authorizing the uniform admission at trial of the prior criminal convictions of defendants and other persons whose conduct or credibility are at issue in a case. The Department should support an amendment to the Federal Rules of Evidence that would implement this reform. An amendment of this sort could be adopted either through legislation or through rulemaking by the Supreme Court, and state officials could be encouraged to seek the enactment of comparable reforms in their jurisdictions.

It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded . . . . [F]or nearly three centuries, ever since the liberal reaction that began with the restoration of the Stuarts, this policy of exclusion . . . has received judicial sanction . . . .

—Wigmore's *Evidence*

Alongside the general principle that prior offenses are inadmissible, despite their relevance to guilt . . . the common law developed broad, vaguely defined exceptions . . . whose application is left largely to the discretion of the trial judge . . . . In short, the common law, like our decision in [*Spencer v. Texas*], implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification.

—*Marshall v. Lonberger,*
459 U.S. 422 (1983)

[S]omewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. . . . You expect the trial to be a search for the truth; you find that it is a performance orchestrated by lawyers and the judge, with the jury hearing only half the facts . . . . The jury is never told that the defendant has two prior convictions for the same offense and has been to prison three times for other crimes.

—*Report of the President's Task Force on Victims of Crime* (1982)

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THE ADMISSION OF CRIMINAL HISTORIES AT TRIAL

INTRODUCTION

As part of a continuing series of studies on impediments to the search for truth in criminal investigation and adjudication, the Office of Legal Policy has carried out a review of the law governing the admission of the criminal records of defendants and other persons at trial.[1] The results of this review are set out in this report.

Section I of the report examines the historical development of the rules relating to the admission of evidence of prior offenses at trial and the contemporary rules that have resulted from this development. The general import of this historical review is that this area of the law has been characterized by a constant tension between an early-established presumption against admitting evidence of prior offenses and a desire to use such evidence on account of its obvious probative value in many contexts. This has resulted in the development of exceptions and qualifications to the rule of exclusion which admit such evidence under a variety of circumstances.

Section II examines the question of admitting evidence of prior offenses from the standpoint of policy. The conclusions of this section are that the use of such evidence is generally warranted on account of its relevance to the determination of guilt or innocence; that the reasons customarily given for limiting the use of evidence of prior offenses have limited persuasive force; and that the existing rules in this area are a crazy-quilt of irrational and capricious restrictions and exceptions. Where the evidence to be admitted is the record of a prior *conviction*—as opposed to evidence of an unproven offense or non-criminal "bad act"—the policy considerations supporting admission are particularly cogent and the arguments for exclusion are particularly weak.

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[1]The earlier papers in the "Truth in Criminal Justice" series are *Report to the Attorney General on the Law of Pre-Trial Interrogation* (Feb. 12, 1986); *Report to the Attorney General on the Search and Seizure Exclusionary Rule* (Feb. 26, 1986); and *Report to the Attorney General on the Sixth Amendment Right to Counsel under the Massiah Line of Cases* (June 27, 1986).

Section III examines the constitutional issues that have been raised in this area of the law. The principal conclusion is that there are no constitutional limitations on the admission at trial of constitutionally valid prior convictions.

Section IV examines the rules relating to prior crimes evidence in foreign jurisdictions. In England, the admission of such evidence now depends primarily on its probative value. In many of the European democracies, including countries that use lay jurors or juries in criminal cases, the defendant's criminal record is uniformly admissible.

Section V recommends that the Department support a uniform rule of admission for the prior convictions of defendants and other persons whose conduct or credibility are at issue in criminal cases. The section contains a proposed amendment to the Federal Rules of Evidence that would implement this recommendation and an analysis of the proposed amendment.

I. EVOLUTION OF THE LAW RELATING TO EVIDENCE OF PRIOR OFFENSES

A. The Historical Development

1. The Common Law

Prior to the late seventeenth century, there was no rule or practice in criminal cases excluding evidence of other crimes committed by the defendant. In the 1680's, however, cases appeared in which witnesses were prevented by the court from testifying about alleged offenses of the defendant that were not charged in the indictment. In connection with treason, this changed perspective was reflected in a statute of 1695 that limited the admission of evidence of overt acts other than the acts with which the defendant had been formally charged. The rationale given for these initial restrictions on prior crimes evidence was the need to ensure fair notice to the defendant. In the absence of such limitations, it was stated, a defendant could effectively be put on trial for acts extending over the whole course of his

life, and would not have a fair opportunity to prepare a defense to the accusations against him.[2]

Notwithstanding these concerns, the common law rule against admitting evidence of uncharged offenses was not absolute. For example, in prosecutions for passing forged checks or counterfeit money, efforts by the defendant to pass other forged checks or bills would be admitted as evidence of his knowledge that the particular instrument he was charged with passing was bogus. The admission of evidence of uncharged offenses in such cases was justified by the difficulty of proving the subjective element of the offense if the defendant's prior conduct could not be shown.[3]

In the nineteenth century, the volume of reported cases relating to the admissibility of prior acts of the defendant increased enormously, and there was a corresponding increase in the range of situations in which specific caselaw support could be found for the admission of evidence of other crimes. For example, courts found such evidence admissible where relevant to show the defendant's "intent," "knowledge," or "motive," the "absence of mistake or accident," a "common scheme" in the commission of a series of offenses, or the "identity" of the offender. While the early nineteenth century development was, in this sense, expansive as to admissibility, it also carried the seeds of a later restrictive development. Efforts to synthesize prior caselaw and arrive at a comprehensive formulation resulted in a tendency by courts to regard the admission of prior crimes as governed by a general rule of exclusion subject to a closed list of exceptions.[4] This clearly became the dominant view in the United States in the early part of the twentieth century, though a division of authority persisted on this point.[5]

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[2] *See* IA Wigmore's *Evidence* 1212-13 & nn. 1-2 (Tillers rev. 1983); Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954, 958-59 (1933); Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713, 716-17 (1981); *Walker v. Commonwealth*, 28 Va. 574, 575-76, 579-80 (1829); *United States v. Mitchell*, 26 F. Cas. 1282 (1795).

[3] *See Rex v. Whiley*, 168 Eng. Rep. 589 (1804); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 993-96 (1938). *See generally* Reed, *supra* note 2, at 718-19.

[4] *See* Stone, *supra* note 2, at 965-66; Reed, *supra* note 2, at 721-35.

[5] *See* E. Imwinkelried, *Uncharged Misconduct Evidence* § 2:27 (1984) (listing eighteen states as traditionally rejecting the restrictive approach).

2. Codifications of the Law of Evidence

Two influential articles written by Julius Stone in the 1930's provided the theoretical basis for a counterattack on the predominant, restrictive approach to the admission of prior crimes evidence.[6] In these articles, Professor Stone argued that this approach reflected a later "spurious" development of the rules of evidence. The authentic common law rule, in his view, only excluded evidence of other offenses when it was relevant *solely* to establish a general propensity on the part of a defendant to commit a certain type of crime, and to invite the inference that his guilt of a currently charged offense was made more probable by such a propensity. The so-called "exceptions" that had been recognized in early decisions—evidence of "motive," "intent," "knowledge," etc.—were not actually a closed set of exceptions to a general rule of exclusion, but only examples of types of situations in which prior offenses are relevant to a defendant's guilt or innocence other than by showing criminal propensity. As a matter of both history and sound policy, Stone argued, the admission of prior crimes evidence should depend on the general purpose for which it is offered, as opposed to inclusion in a fixed list of exceptions: If it is only relevant to establish criminal propensity based on past criminal conduct, it should be excluded. If it is relevant to guilt or innocence in some other manner, it should be admissible.

The approach advocated by Professor Stone has come to be known as the "inclusionary" version of the rule, as opposed to the "exclusionary" approach which predominated in the United States at the time his articles were written. The "inclusionary" approach has been increasingly influential in recent decades and has, in particular, affected the formulation of the American Law Institute's Model Code of Evidence, the Uniform Rules of Evidence, and the Federal Rules of Evidence.[7] Federal Rule 404(b), for example, provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, oppor-

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[6] *See* Stone, *supra* note 2; Stone, *supra* note 3.

[7] *See* Wright & Graham, *Federal Practice and Procedure: Evidence* §§ 5231 n.33, 5239 nn. 18-22 (1978) (Uniform Rule 55 and Model Rule 311).

tunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This is naturally understood as a formulation of the "inclusionary" approach. Other crimes are not admissible to support an inference of criminal conduct from the defendant's character evidenced by his prior conduct, but criminal history is admissible when it is relevant for some other purpose. A list of other purposes for which such evidence may be admitted is included in the rule, but it is only a set of examples, rather than an exclusive set of exceptions to a general rule of exclusion. Evidence of other crimes is admissible under the rule for any purpose other than showing a propensity to criminal conduct, even if the purpose is not one that the rule explicitly mentions.[8]

Although the inclusionary approach has carried the day in the formulation of model evidentiary rules, the exclusionary approach continues to command support, and it is unclear which, if either, is currently the predominant rule in the United States. Although most states have adopted codified rules with facially "inclusionary" formulations, courts accustomed to the exclusionary approach may ignore such rules in favor of prior caselaw or interpret them as codifications of that caselaw.[9]

B. The Admission of Prior Crimes Evidence under Current Law

The "exception" categories under which prior crimes evidence has conventionally been admitted remain important even in jurisdictions that follow the "inclusionary" approach, since these categories identify particularly common situations in which prior offenses may

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[8]Most federal circuits have interpreted Rule 404 in the obvious inclusionary sense. *See United States v. Moccia,* 681 F.2d 61, 63 (1st Cir. 1982); *United States v. Halper,* 590 F.2d 422, 431-32 (2d Cir. 1978); *United States v. Long,* 574 F.2d 761, 765-66 (3d Cir. 1978); *United States v. Johnson,* 634 F.2d 735, 737 (4th cir. 1980); *United States v. Beechum,* 582 F.2d 898, 910-11 (5th Cir. 1978); *United States v. Gustafson,* 728 F.2d 1078, 1083 (8th Cir. 1984); *United States v. Diggs,* 649 F.2d 731, 737 (9th Cir. 1981); *United States v. Nolan,* 551 F.2d 266, 271 (10th Cir. 1977); *United States v. Moore,* 732 F.2d 983, 987 & n.31 (D.C. Cir. 1984). *See generally* E. Imwinkelried, *supra* note 5, § 2:30.

[9]*See generally* E. Imwinkelried, *supra* note 5, §§ 2:28-30. Contemporary character evidence rules are usually modeled on Federal Rule 404. *See id.* Appendix.

be relevant to the truth of a criminal charge by some means other than an inference concerning propensity. Moreover, it is easier as a practical matter to secure the admission of such evidence if it fits into a conventional pigeonhole that may be explicitly mentioned as an example of proper use in a codified rule. There are also a number of special rules sanctioning the use of evidence of prior offenses that are accepted in both inclusionary and exclusionary jurisdictions. The main grounds for admitting this type of evidence under contemporary practice in the United States include the following:

1. Rebuttal of a Defendant's Good Character Evidence

It was established by the early eighteenth century that evidence of the defendant's character may be admitted where the defendant himself chooses to put his character in issue. Thus, if the defendant offers evidence of his good character, the prosecution may offer evidence to the contrary. This includes bringing out specific instances of misconduct by the defendant, including prior crimes, on cross-examination of defense witnesses.[10]

2. Character as an Ultimate Issue

It has also been recognized since the early eighteenth century that no special restrictions exist on the admission of relevant evidence of character in cases in which character is an ultimate issue in the determination of liability. For example, in cases involving the entrapment defense, evidence of similar prior offenses by the defendant is admissible to establish his predisposition to commit the charged offense. This rule is a corollary of the fact that the absence of such a disposition is an element of the entrapment defense.[11]

3. Inseparable Crimes

In describing the commission of a crime with which a defendant is charged, it is often difficult or impossible to avoid mention of other uncharged offenses that occurred as part of the same transaction. For

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[10] *See* Reed, *supra* note 2, at 717-18 n.20; Fed. R. Evid. 404(a)(1), 405(a); Wright & Graham, *supra* note 7, § 5268; S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 157-64 (3d ed. 1982); *see also* IA Wigmore's *Evidence* § 58.2 n.1 (Tillers rev. 1983).

[11] *See* Reed, *supra* note 2, at 717-18 n.20; Fed. R. Evid. 405(b); Wright & Graham, *supra* note 7, § 5235.

example, "when the victim testifies in a rape prosecution that the defendant broke into her apartment and forced her to have sexual relations at gunpoint, her testimony can be said to describe incidents of burglary, malicious destruction of property, assault, false imprisonment, and violations of firearms regulations."[12] When offenses are interwoven in this manner, the practical difficulty or impossibility of describing the charged offense without mentioning other crimes has resulted in an exception to the rule of exclusion for uncharged offenses. The catch-phrases under which it has been applied are "inseparable crimes" and "res gestae."[13]

4. Evidence of a Distinctive Course of Criminal Conduct

Evidence of prior offenses by a defendant is likely to be admitted where it tends to show that he has committed a series of crimes of a highly distinctive character or in a highly distinctive manner. For example, in a prosecution of a person for murdering a hitchhiker and burying the body in his backyard, it would be permissible to show that the bodies of other missing hitchhikers had also been found in the yard. The presence of the "body garden" in such a case would tend to show that all of the victims had been killed pursuant to someone's practice of picking up hitchhikers and murdering them, and to identify the defendant as the responsible individual. Evidence of prior crimes may be admitted in such cases under conventional exception categories described by such catch-phrases as "common scheme," "plan," "modus operandi," or "identity."[14]

5. Evidence of State of Mind

The rules relating to evidence of other crimes narrowly limit the use of such evidence to establish that a defendant engaged in the conduct elements of an offense, but are relatively unrestrictive in allowing such evidence to show that the defendant acted with the required state of mind. For example, in a murder prosecution, the fact that the defendant fired at a witness who appeared at the crime scene might be admitted as evidence that the homicide was not an accident, the effort to dispose of a witness being probative of an

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[12] Wright & Graham, *supra* note 7, § 5239 at 445.

[13] *See id.* § 5239 at 445-49.

[14] *See id.* §§ 5244, 5246; E. Imwinkelried, *supra* note 5, §§ 3:10-:14.

intentional killing. Another example is the historically early practice of admitting evidence of similar offenses in prosecutions for passing forged checks or counterfeit money to establish guilty knowledge. See pp. 2-3 *supra*. A number of the terms in conventional lists of "exception" categories reflect this more permissive attitude toward evidence of state of mind, including "intent," "knowledge," and "absence of mistake or accident."[15]

The conventional exception category of "motive" reflects another type of use of evidence of prior offenses to show state of mind. For example, in a murder case, the obvious motive for the crime might be that the victim had testified against the defendant at an earlier trial which had resulted in the defendant's conviction and incarceration for drug trafficking. The defendant's conviction for drug trafficking and the victim's role in securing it would probably be admitted in such a case to establish a motive of retaliation.[16]

6. Evidence of Criminal Skill or Capacity

Criminal histories are sometimes admitted as evidence of an unusual skill or capacity which would make it possible for the defendant to commit the charged offense. For example, in a prosecution for counterfeiting, prior acts of counterfeiting might be admitted to show that the defendant possessed the unusual technical skill required for the commission of such an offense.[17]

7. Evidence Relating to Credibility

At common law, a person who had been convicted of a felony or of an offense involving dishonesty (*crimen falsi*) was permanently disqualified from testifying as a witness in any proceeding. Later statutory developments abrogated this restriction, substituting a weaker rule that prior convictions are admissible to impeach the credibility of a witness. When the testimonial incapacity of defendants was eliminated by statutes enacted in the latter part of the nineteenth century, it became possible to treat the defendant who chose to take the stand like other witnesses, and to admit his criminal record or some part

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[15] *See* Wright & Graham, *supra* note 7, §§ 5242, 5245; E. Imwinkelried, *supra* note 5, §§ 5:01-:02, 5:04-:05.

[16] *See* E. Imwinkelried, *supra* note 5, §§ 3:15-:18.

[17] *See id.* § 3:03; Wright & Graham, *supra* note 7, § 5241.

of it as evidence bearing on his credibility. This is generally permitted in American jurisdictions today, albeit with variations from jurisdiction to jurisdiction in the types of crimes that can be used for impeachment. At the federal level, the use of prior convictions for impeachment is authorized by Fed. R. Evid. 609.[18]

The general impeachment rule differs significantly from the other exceptions to the prohibition of prior crimes evidence in that it authorizes the admission of prior *convictions* for impeachment, but not evidence of unproven offenses or non-criminal "bad acts." The other exceptions were developed without any consideration of possible differences between the implications of admitting evidence of unproven offenses and the implications of disclosing the fact that a person has already been convicted of other crimes. As a result, they have traditionally admitted evidence of alleged offenses for which the defendant has not been prosecuted and evidence of offenses established by prior convictions under essentially the same standards. In contrast, the general impeachment rule only admits convictions to attack a witness's credibility on account of its derivation from a rule of testimonial incapacity based on conviction of certain crimes.[19]

8. Evidence of Propensity

American jurisdictions currently divide between the "exclusionary" approach to prior crimes evidence, under which admission depends on the applicability of a closed list of exceptions to a general rule of exclusion, and the "inclusionary" approach, under which such evidence is admissible unless its sole relevance is to show a propensity on the defendant's part to engage in criminal conduct. Even the inclusionary approach, however, is too narrow to accommodate the actual course of judicial decisions. Courts frequently admit evidence of prior offenses where its only purpose is to establish criminal propensity.

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[18] *See* McCormick's *Evidence* § 43 (2d ed. 1972); II Wigmore's *Evidence* §§ 519-20 (Chadbourn rev. 1979). *See generally Report to the Attorney General on the Law of Pre-Trial Interrogation* 5-6, 33-34 (Feb. 12, 1986) (abrogation of testimonial incapacity of defendants).

[19] Offenses that have not resulted in convictions are admissible to attack a witness's credibility under much more restrictive standards set out in Fed. R. Evid. 608(b).

This approach is most prominent in the area of sex crimes. In some states the courts have frankly recognized an exception to the no-evidence-of-propensity rule, holding straightforwardly that evidence of prior sexual offenses is admissible to show a disposition to commit such offenses. In many others the same result has been reached by interpreting traditional exception categories so broadly in the area of sex crimes as to make evidence of relevant prior offenses uniformly admissible.[20]

A good example is the decision of the Supreme Court of Wyoming in *Elliot v. State,* 600 P.2d 1044 (1979), in which the court held that evidence of prior incidents of child molesting was admissible in a prosecution for that crime to establish "motive." The concept of "motive" was defined by the court so as to be essentially synonymous with disposition or propensity. *Id.* at 1048-49. In the course of the decision the court observed that "in recent years a preponderance of the courts have sustained the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses . . . . [I]n cases involving sexual assaults, such as incest, and statutory rape with family members as the victims, the courts in recent years have almost uniformly admitted such testimony." *Id.* at 1047-48.

Other sources corroborate the assessment that free use of propensity evidence in prosecutions for sex crimes is widespread. A contemporary edition of Wigmore's treatise, for example, states that "the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions."[21]

II. CONSIDERATIONS OF POLICY

This section of the report examines the principal policy considerations affecting the admission of a defendant's criminal record at trial. Part A sets out the general considerations supporting the relevance of such evidence in assessing the charges against a defendant. Part B considers arguments that have been offered in support of restrictive rules in this area. Part C analyzes and criticizes the par-

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[20] *See* IA Wigmore's *Evidence* § 62.2 (Tillers rev. 1983); E. Imwinkelried, *supra* note 5, §§ 4:11-:18; Wright & Graham, *supra* note 7, § 5239 at 461-62; Stone, *supra* note 3, at 1031-33.

[21] IA Wigmore's *Evidence* § 62.2, at 1334-35 (Tillers rev. 1983).

ticular rules that govern the use of prior crimes evidence under current law.

A. General Grounds Supporting the Relevance of Criminal Histories

The restrictive rules that currently govern the admission of prior crimes evidence in trials in the United States involve a departure from the practice in other social contexts in which judgments must be made concerning possible misconduct by others based on evidence. For example, an employer, a teacher, or a parent, in assessing the probability of misconduct by a person in his charge, would regard the past conduct of that person in like matters as a highly relevant piece of information, and would consider it impossible to make an intelligent and fully informed decision if such information were withheld. The probative value of past conduct is also recognized at the various stages of the criminal justice process other than trials. In pre-trial release decisions and post-trial sentencing decisions, for example, a defendant's criminal history is regularly considered as a factor indicating an enhanced probability of continued criminal activity.[22]

The reasons why we normally consider such information important are not difficult to discern. Evidence of prior wrongdoing by a person informs judgments concerning his later commission of similar acts in a number of obvious ways:

1. Evidence of Moral Character

Ordinary people do not commit outrages against the persons or property of others because they believe that it is wrong to do so and restrict their conduct accordingly. The fact that a person has committed crimes in the past shows that he lacked these normal moral convictions, or that they were too weak to restrain his actions. Since human personality has some degree of stability, a history of criminality, as evidence of moral character, is relevant to the merits of a later charge. The probative value of a criminal record in this respect tends to be greatest when the earlier offenses are similar in character or seriousness to the charged offense. For example, a conviction for income tax evasion shows some anti-social tendency, but has limited

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[22]The free use of prior offenses as evidence of criminal propensity in judicial proceedings other than trials is discussed at pp. 21-23 *infra*.

bearing on the probable truth or falsity of a charge of rape. In comparison, prior convictions of similar sex crimes tend to show that a person lacks moral inhibitions that would prevent him from committing rapes, and enhance the credibility of such a charge.

2. Evidence of Willingness to Risk the Consequences of Criminality

Committing crimes takes a certain amount of nerve, or at least some degree of insensitivity to the potential consequences of doing so. At a minimum, criminality entails a risk of penal consequences, including apprehension, restraint of liberty or other punishment, and the stigma and collateral disabilities that attend conviction. Certain types of criminality carry additional risks. For example, violent crimes commonly involve a danger of resistance by the victim or others, or the possibility that the police may appear and use force in effecting an apprehension. A criminal record accordingly may be relevant to the probable truth or falsity of a current charge as evidence that the defendant is willing to take the risks associated with criminality or is heedless of those risks.

3. Evidence of Desires and Impulses

The commission of crimes tends to show that a person desires the ends they achieve, and that these desires are strong enough to impel the individual to bear the risks of criminality and to overcome whatever moral scruples he may have against engaging in crime. For example, the commission of rape or child molesting indicates that the perpetrator possesses the unusual sexual desires or aggressive impulses that are gratified through the commission of such crimes, and crimes of fraud or embezzlement evidence a desire for money which is strong enough to offset the risk of obtaining it illicitly. A defendant's past commission of similar offenses accordingly tends to show that he has desires or impulses which could motivate him to commit such crimes again.

4. Evidence of Habitual Activity

Finally, prior criminality may be relevant as evidence of "propensity" in the narrow sense—the likelihood that a person will do something again simply because it is a familiar activity that he has engaged in in the past. Since human beings are, to some extent, creatures of habit, inferences of this sort are regularly drawn as a

matter of common sense. For example, if a person has made his living as a burglar in the past, there is an enhanced probability that he will turn to burglary again when he needs income, in comparison with a person who has not previously engaged in that activity.

The foregoing considerations are the most obvious ways in which prior criminality tends to bolster the plausibility of the charges against a defendant. They are also, however, generally excluded from consideration by the rules which currently govern the admission of a defendant's criminal record. Moral character, willingness to risk the consequences of criminality, characteristic desires or impulses, and habitual activities[23] would all be classified as elements of "character" or "propensity," and prior convictions are normally excluded as evidence on these points. Since, in every other context, we consider the past conduct of a person suspected of wrongdoing important precisely because of the bearing it has on these questions of character or propensity, the observance of a contrary rule in the context of criminal trials is, on its face, perplexing. An examination of the rationales that have traditionally been offered for restricting evidence of prior offenses does little to dispel this perplexity.

B. Reasons Given for Restricting Evidence of Prior Crimes

Restrictions on the admission of evidence of prior offenses or other "bad acts" by a defendant have traditionally been supported on three grounds: the need to ensure that a defendant has fair notice of the accusations to which he must respond; the need to place a reasonable limit on the scope of inquiry at trial; and the risk that a defendant will be prejudiced in the eyes of the jury if prior misconduct on his part is disclosed.[24]

1. Fair Notice

The concern over fair notice to defendants provided the impetus for the initial development of restrictions on evidence of uncharged

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[23] Under Fed. R. Evid. 406, evidence of "habit" is admissible, but "habit" under that rule refers to a person's regular response to a repeated specific situation. Habitual criminal activity is not habit in the relevant sense. *See* the Advisory Committee Note to that Rule.

[24] *See, e.g., Michelson v. United States,* 335 U.S. 469, 475-76 (1948); G. Williams, *The Proof of Guilt* 213-15 (1963).

offenses in the late seventeenth century. *See* p. 2 *supra*. It has routinely been reiterated in later justifications for these restrictions. In the absence of such limitations, it has been argued, a defendant could be confronted at trial with evidence implicating him in an unpredictable range of prior acts of misconduct extending over the whole course of his life, and would be denied a fair opportunity to prepare a defense to the accusations he would face at trial.

The force of this concern depends in part on whether the evidence to be offered is evidence of unproven offenses or evidence of prior convictions:

In relation to unproven offenses, the fair notice concern is not entirely without force, though it is difficult to say precisely how much weight it should be accorded. The question is not one of fair notice to the defendant of the charge for which he is being tried—an explicit requirement of the Sixth Amendment—but of notice that other alleged offenses may be introduced as evidence of the defendant's commission of the charged offense. In contrast to the practice of many foreign jurisdictions, which generally require the parties in a criminal case to disclose their contentions and evidence before trial,[25] the parties to criminal proceedings in the United States are largely free to keep their evidence to themselves until they are ready to use it. This naturally results in a greater potential for surprise at trial than exists under a full disclosure system, and requires each party to engage in guesswork about what evidence the other party will offer.

While the generally limited character of evidence disclosure requirements in criminal cases in the United States is not beyond criticism,[26] it must be kept in mind in assessing the force of arguments against admitting evidence of uncharged offenses on fair notice grounds. Prior notice is generally not required of an intent to offer other types of evidence against a defendant, and no notice requirement has traditionally been imposed in admitting evidence of other offenses under the numerous conventional exceptions to the general rule excluding such evidence. Taken for all it might be worth, the fair notice concern could support a requirement of pre-trial notice of intent to offer evi-

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[25] *See* Damaska. *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 533-36 (1973).

[26] Some aspects of this issue—pre-trial disclosure of evidence—will be addressed in a later report in the Truth in Criminal Justice series.

dence of unproven prior offenses in certain circumstances. It does not otherwise provide any support for the exclusion of such evidence.[27]

In relation to the admission of prior *convictions*—as opposed to evidence of unproven offenses—the fair notice point has no force at all. The defendant has already had notice of the charge underlying a conviction in the earlier proceeding which resulted in an adjudication of his guilt on that charge, and has either chosen to forego his right to defend against the charge or has exercised that right unsuccessfully. The facts established by a prior conviction cannot be contested by the defendant when it is admitted in evidence at a later trial, and he can logically claim no right to be notified again of the charges or evidence on which it was based.[28]

It might nevertheless be urged that unfair surprise of a different sort could result from the admission of a prior conviction, on the ground that the defense may wish to be prepared to offer some evidence or explanation that would mitigate the prior offense's import as evidence of the defendant's commission of the currently charged offense, or to contest the accuracy of the public record which is offered to prove the conviction. This point, however, also provides no support either for a restrictive approach to admitting prior convictions or for special notice requirements when such evidence is to be used. Under a general rule of admissibility for prior convictions, defense counsel would have to expect that the government would put the defendant's criminal record in evidence routinely, and would have to be prepared to address its significance. At least in relation to federal proceedings, there is also no problem of preparedness to challenge the accuracy of the record of convictions offered by the government, since the defense can obtain the government's record of the defendant's convictions before trial pursuant to Fed. R. Crim. P. 16(a)(1)(B).

2. Limiting the Scope of Inquiry at Trial

The second traditional argument for limiting prior crimes evidence is the need for reasonable limitations on the scope of inquiry

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[27] Most American jurisdictions continue to follow the traditional practice under which pre-trial disclosure of an intent to offer evidence of other offenses is not required. However, a limited number of states have adopted pre-trial notice requirements in this context. *See* E. Imwinkelried, *supra* note 5, § 9:09.

[28] *See* IIIA Wigmore's *Evidence* § 980 at 828 (Chadbourn rev. 1970).

at trial. The general sense of this argument is that admitting such evidence could turn trials into prolonged explorations into the defendant's personal history in which the proper focus of the proceedings on the matters most directly relevant to the charged offense would be lost in argumentation and contrary offers of proof concerning other alleged misconduct by the defendant.

As support for a generally restrictive approach to prior crimes evidence, this argument presupposes that maintaining an appropriate scope and focus in criminal proceedings is best accomplished through a broad exclusionary rule, as opposed to more discriminating judgments by trial courts concerning the value of such evidence and the effects of admitting it.[29] Be that it may, the force of this argument, like the "fair notice" argument, is essentially limited to evidence of unproven offenses and non-criminal bad acts, whose occurrence can be controverted by the defense. It offers no reason for limiting the admission of prior convictions, since they are necessarily limited in number, their predicate facts cannot be contested by the defense in a later trial, and their occurrence can normally be established by public record or the defendant's admission.[30] The regular admission of the criminal records of witnesses "for impeachment" under current law, *see* Fed. R. Evid. 609, supports the conclusion that the admission of prior convictions is not unduly time-consuming or distracting.

3. The Risk of Prejudice

The final traditional rationale for excluding evidence of prior offenses is its supposedly prejudicial effect on juries. Specifically, it is alleged both that juries are likely to accord prior offenses more weight than they rationally merit as evidence of a defendant's guilt of the charged offense, and that juries are likely to convict a defendant maliciously on account of antagonism resulting from disclosure of his prior offenses, though not persuaded of his guilt of the currently charged offense under the applicable standard of proof. Before turning to the substance of this contention, two types of fallacious argument

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[29] *Cf.* Fed. R. Evid. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by its potential for confusing the issues, causing prejudice, or wasting time).

[30] *See* IIIA Wigmore's *Evidence* § 980 at 828 (Chadbourn rev. 1970); G. Williams, *supra* note 24, at 213-14.

that have been offered in support of the "prejudicial" character of prior crimes evidence should be noted.

First, writers have sometimes put forward information which indicates that admitting a defendant's criminal record increases the likelihood of conviction, and have suggested that this fact in itself shows that such evidence is "prejudicial" and should be restricted.[31] This argument, however, confuses the question whether prior crimes evidence is prejudicial with the question whether it has probative value. The fact that the use of a certain type of evidence increases the likelihood of conviction in no way implies that its significance as evidence of guilt is likely to be overestimated or that it is likely to result in lawless convictions based on antagonism. It is equally true, for example, that the admission of eyewitness testimony or fingerprint evidence against a defendant increases the likelihood that he will be convicted, but no one would suggest that this shows that these types of evidence are "prejudicial" in any objectionable sense, or implies that they should be presumptively inadmissible.[32]

Second, writers sometimes point to particular cases in which innocent defendants were mistakenly convicted, and in which evidence of prior offenses was admitted, as showing that such evidence is prejudicial and should be excluded.[33] Even putting aside the speculative nature of the assumption that the defendants in these cases would have been acquitted if their earlier crimes had been concealed from the trier, the existence of rare cases of this sort does not support a presumption against the use of such evidence. It is equally possible to point to isolated cases in which innocent people have mistakenly been convicted on the basis of eyewitness testimony, circumstantial evidence, and other types of evidence that are admitted routinely.[34]

In general, the fact that evidence of prior offenses tends to support an inference of guilt on a later charged offense does not rationally

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[31] *See* E. Imwinkelried, *supra* note 5, § 1:02; *see also id.* § 1:03.

[32] *See* Note, *Developments in Evidence of Other Crimes*, 7 U. Mich. J.L. Ref. 535, 543-45 (1974).

[33] *See* E. Borchard, *Convicting the Innocent* xv-xvi & n.21 (1961); G. Williams, *supra* note 24, at 215-16.

[34] In E. Borchard, *supra* note 33, the author concluded that the main causes of erroneous convictions in the cases surveyed were mistaken identifications, erroneous inferences from circumstantial evidence, and perjury. *Id.* at viii, xiii-xv.

support its exclusion or limitation. Rather, the probative value of such evidence in establishing guilt is precisely the consideration that supports its admission. *See* pp. 11-13 *supra*. A special rule of exclusion would be justified only if it could be shown that the risk of overestimation or antagonism is substantially greater in connection with prior crimes evidence than with other types of evidence of comparable importance that are not subject to special exclusionary rules. To complete the argument, it would also be necessary to show that the likelihood that innocent defendants will be convicted as a result of such prejudice is sufficiently great that it outweighs the value of admitting prior crimes evidence in securing the conviction of the guilty, and that the risk of prejudice resulting from such evidence cannot be brought within acceptable bounds by means short of exclusion, such as cautionary instructions to the jury.

While the notion that evidence of other offenses carries such an extraordinary risk of prejudice has acquired the status of dogma through sheer force of repetition, there is really no reason to believe that such a risk exists. Information bearing on this issue appears in Kalven and Zeisel's *The American Jury* (1966), a study which analyzed reports on 3576 jury trials by the judges who presided at those trials. The reports indicated that in 47 percent of all cases the defendant in fact had a criminal record, and in 28 percent of all cases the jury knew that the defendant had such a record.[35]

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[35] The figure of 47 percent for defendants with criminal records can be derived directly from figures given in the study. *See* H. Kalven & H. Zeisel, *The American Jury* 145 & n.12 (1966). The 47 percent figure relates to a subuniverse of 3528 cases, rather than the full study sample of 3576 cases, since judges failed to provide information concerning the defendant's criminal history (or lack of it) in 48 cases.

The figure of 28 percent for cases in which the jury knew that the defendant had a criminal record is derived from Table 44 in *id.* at 147, which states that criminal records were disclosed in 59 percent of the cases in which the defendant in fact had a record. Multiplying the figure of 47 percent for cases in which the defendant in fact had a record by 59 percent gives a figure of 28 percent for cases in which the jury knew that the defendant had a record.

This figure is to some degree approximate: As noted above, the 47 percent figure for defendants with records related to a subuniverse which excluded some cases, and additional cases were excluded from Table 44. Specifically, the 59 percent figure for disclosure of records in Table 44 related to a subuniverse of 1534 cases in which the defendant in fact had a criminal record, in contrast to a total figure of 1658 cases in which it was reported that the defendants had records. *See id.* at 145. The discrepancy is presumably the result of the omission of other information

Notwithstanding the jury's frequent awareness of the defendant's criminal record, jury verdicts which disagreed with the verdict that the judge would have entered were overwhelmingly in favor of the defendant. In 16.9 percent of the cases the jury acquitted where the judge would have convicted, but in only 2.2 percent did the jury convict where the judge would have acquitted.[36] Moreover, virtually all of the cases in the small class in which the jury was less favorable to the defendant were characterized by the judge as being close on the evidence.[37] Thus, the findings of the study tend to support the proposition that (1) there are few cases of any sort in which a jury will convict where the judge would acquit, and (2) there are virtually no cases in which misestimations of the evidence by the jury or antagonism toward the defendant results in guilty verdicts that are factually indefensible from the standpoint of the judge's assessment of the case, even though juries are aware of the defendant's criminal record in a large proportion of all cases.[38]

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in some of the judges' reports that was required in compiling Table 44. However, the cases excluded were a small part of the total sample, and there is no reason to believe that the bottom line figures would have differed significantly had the same information been available for all the cases in the study sample.

[36] *See id.* at 56; *see also id.* at 55-62, 168-90 (description and analysis of greater leniency of juries and greater disposition to resolve doubts in favor of the defendant); Damaska, *supra* note 25, at 538-39 & n.72 (comparable phenomenon in European systems).

[37] *See* H. Kalven & H. Zeisel, *supra* note 35, at 376-77, 381 (96 percent of cases in which judge would have entered more lenient verdict than jury characterized as close on the evidence); *see also id.* at 412 (judges who would have entered more lenient verdicts than juries nevertheless let the jury verdict stand 90 percent of the time); *id.* at 431 (judges characterized jury verdicts as "without merit" in only 7 percent of cases in which they would have entered more lenient verdicts).

There were only four cases in the study in which the judge characterized the evidence as clear for acquittal but in which the jury convicted. All of these cases involved plausible reasons for the disagreement that were unrelated to the disclosure of criminal records. *See id.* at 404-05 & n.11

[38] The Kalven and Zeisel study elsewhere characterized its findings as supporting the traditionally restrictive approach to disclosure of a defendant's criminal record. *Id.* at 389-90. However, this assertion was based on data indicating that in five cases out of forty-eight in which the judge was more lenient than the jury, the disagreement could be attributed to the jury's differing reaction from the judge to the defendant's failure to take the stand or to the disclosure of his criminal record. This data clearly does not support the stated conclusion, since it does not distinguish between reaction to a failure to take the stand and reaction to the disclosure of a criminal record. Even if this methodological defect is put aside, the cited discrep-

While the supposed risk of prejudice is simply unsupported in relation to any type of prior crimes evidence, it is particularly weak as an argument against the admission of convictions. As noted above, one form of prejudice that allegedly results from the admission of past misconduct is the risk that a jury will, in effect, convict a defendant to punish him for his prior crimes, though not persuaded of his guilt of the charged offense under the applicable standard of proof.[39] For example, suppose that in a prosecution for selling narcotics, evidence is introduced that the defendant has a prior history of involvement in drug trafficking. In such a case, the argument runs, a jury might see no injustice in convicting him of the charged offense, though not persuaded of his guilt on the charge, on the ground that he deserves to be punished for his earlier alleged crimes.

However, any risk that a jury might unjustifiably convict a defendant to punish him for earlier offenses is certainly reduced where the earlier crimes are evidenced by convictions, since in such a case the defendant has already been punished for those crimes. For example, in the drug trafficking case described above, suppose that the evidence admitted consists of one or more prior convictions for drug offenses. In such a case the trier would be aware that the defendant has already been brought to justice for his earlier crimes, and accordingly could have relatively little incentive to convict him lawlessly of the charged offense on inadequate evidence to punish him for those crimes.

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ancy could equally well be explained by hypotheses involving no greater likelihood of jury prejudice—for example, simple differences of opinion between juries and judges concerning the import of a defendant's silence or criminal record in a few close cases, or a slightly greater willingness of judges to abide by legal rules barring rationally warranted inferences from a defendant's failure to testify or from his criminal record. *See generally id.* at 143-44 (rules barring adverse inferences from defendant's failure to take the stand); *Report to the Attorney General on the Law of Pre-Trial Interrogation* 33-34 (Feb. 12, 1986) (same subject); pp. 4-13 *supra* (existing rules generally preclude giving prior offenses their natural probative force and require that they only be considered as evidence concerning credibility or other limited issues); pp. 26-27 *infra* (juries may not comply with limiting instructions concerning permissible inferences from prior crimes evidence).

[39]This is the supposed risk that a jury will unjustifiably convict a defendant on the basis of antagonism because he is perceived to be of "bad character" if his criminal history is disclosed. The other form of prejudice that allegedly results from prior crimes evidence is the risk that such evidence will be taken by juries for more than it is rationally worth as evidence of guilt. *See* pp. 16-17 *supra*.

C. Critique of Existing Rules

In the decision of *Michelson v. United States,* 335 U.S. 469, 486 (1948), the Supreme Court characterized the conventional rules governing the use of character evidence as a "grotesque structure" which is "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly-reasoned counter-privilege to the other." Our review of the rules governing the admission of criminal histories supports a similar characterization. The existing standards in this area are characterized by arbitrary restrictions, a heavy reliance on fictions, and internal inconsistencies and incoherencies. The more blatant anomalies include the following:

1. Inconsistency with Rules Admitting Propensity Evidence in other Proceedings

In many types of judicial proceedings a defendant's criminal history is regularly relied on as an important indication that he will persist in criminality if not adequately deterred or restrained. Against this free use of propensity evidence in other contexts, the adoption of a contrary rule for criminal trials bears some burden of justification. Post-trial sentencing proceedings, pre-trial release proceedings, and civil commitment proceedings for dangerous offenders illustrate this point.

Sentencing. In sentencing, the defendant's criminal record is routinely considered as an important factor in deciding on the appropriate sanction. This is reflected in the sentencing practices of individual judges, in recidivist statutes which authorize or require enhanced penalties for defendants with criminal records, and in statutes governing the formulation of sentencing guidelines.[40]

Under these rules and practices, the sentencing authority takes prior convictions as establishing an enhanced probability that an of-

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[40] *See, e.g.,* 18 U.S.C. § 3577 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); 18 U.S.C. § 3575(b), (e)(1) (enhanced penalty authorization for offenders with serious criminal records under "dangerous special offender" statute); 28 U.S.C. § 994(d)(10), (h)-(j) (formulation of sentencing guidelines).

fender will later commit other crimes, and accordingly as showing a need for stricter correctional measures. If the defendant's criminal record is admitted at trial and given its natural probative force, the trier similarly takes prior convictions as establishing an enhanced probability that the defendant subsequently committed the crime with which he is charged. In either case, the inference is from a record of earlier criminal conduct to an enhanced probability of subsequent criminal conduct. Considering that this type of inference is universally accepted as valid in the context of sentencing proceedings, it is difficult to see why it is regarded with such suspicion in the context of trials.

A distinction that might be urged between trials and sentencing proceedings is that the ultimate decisionmaker at trial is often a lay jury rather than a judge. However, juries may be informed of a defendant's prior convictions in sentencing proceedings in jurisdictions in which they do serve as sentencing bodies.[41] As noted above, there is no reason to believe that juries are more likely than judges to overestimate the significance of criminal histories to the detriment of defendants, and juries are generally more disposed to leniency and less conviction-prone than judges. *See* pp. 16-20 *supra*.

Pre-trial release decisions. Pre-trial release proceedings are another context in which prior offenses are considered as evidence of criminal propensity. This point appears with particular clarity in the modern type of bail statute, which authorizes the consideration of dangerousness in setting release conditions or denying release. A defendant's prior offenses are treated by such statutes as significant indications that he may engage in further acts dangerous to the public if not adequately restrained pending trial.[42]

The same point is illustrated by the conventional authorization in bail statutes for considering the risk of flight. Under such provi-

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[41] This occurs regularly in capital cases, and may be specially authorized in jurisdictions in which juries have broader sentencing functions. *See* Ark. Stat. Ann. § 41-1005 (convictions admitted in jury sentencing of habitual offenders); Ky. Rev. Stat. § 532.080 (similar); Tex. Code Crim. Proc. art. 37.07 (criminal records admissible in penalty determinations by juries).

[42] *See* 18 U.S.C. § 3142(e)(1)-(3), (f)(1)(d), (g)(3); 18 U.S.C. § 3148(b); S. Rep. No. 225, 98th Cong., 1st Sess. 19, 21, 23, 35-36 (1983); *see also* E. Imwinkelried, *supra* note 5, § 1:06 (admissibility of prior offenses in other pre-trial proceedings).

sions, the fact that a person has failed to appear in court in the past is treated as an indication that more restrictive release conditions should be imposed or that release should be denied.[43] This is simply an inference based on a defendant's past commission of the crime of bail-jumping, *see* 18 U.S.C. § 3146, that he has a propensity to commit that crime, and is likely to commit it again if not adequately restrained.

Civil commitment of dangerous offenders. A final illustration is provided by provisions authorizing the civil commitment of dangerous offenders with psychological disorders. One example is the Illinois procedure for commitment of "sexually dangerous persons," which was recently considered by the Supreme Court in *Allen v. Illinois*, 54 U.S.L.W. 4966 (1986). Under that procedure, a mentally disordered person can be committed for purposes of treatment and protection of the public if it is shown that he has "criminal propensities to the commission of sex offenses" and has "demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children." In establishing the required propensity, the government may introduce "evidence of the commission by the respondent of any number of crimes." Though commitment under this procedure is civil in nature, the determination of sexual dangerousness may be made by a jury, and the commitment proceeding is procedurally similar to a criminal trial in various other respects.[44]

Like sentencing and pre-trial release proceedings, commitment procedures of this type recognize the probative value of prior criminal conduct as evidence of criminal propensity. It is not apparent why the same recognition should not be accorded in the context of criminal trials.

2. Inconsistency with the Practical Operation of the "Exception" Categories

In theory, prior crimes are inadmissible in criminal trials as evidence of criminal propensity. As a practical matter, however, pro-

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[43] *See* 18 U.S.C. § 3142(g)(3) (record concerning appearance at court proceedings to be considered in deciding on release); S. Rep. No. 225, 98th Cong., 1st Sess. 23 & n.67 (1983) (same).

[44] *See* Ill. Ann. Stat., ch. 38, art. 105; *Allen v. Illinois*, 54 U.S.L.W. 4966 (1986); *see also Addington v. Texas*, 441 U.S. 418, 420-21 (1979) (admission of criminal acts in Texas civil commitment proceeding as evidence that mentally ill person requires commitment for his own welfare and protection of others).

pensity evidence may be highly probative when taken in conjunction with the other evidence in a case. This has resulted in pressures on judges to recognize express exceptions to the no-evidence-of-propensity rule, or to admit propensity evidence covertly by calling it evidence of something else. This tendency has been most pronounced in connection with sex crimes, *see* pp. 9-10 *supra,* but it can also be observed in the practical operation of the orthodox exceptions to the rule excluding such evidence in other areas.

The exception for evidence of a "common scheme" or "modus operandi" is a good illustration. If, for example, a person is charged with drowning his recently married and heavily insured wife in the bath, there would be little difficulty in securing the admission of the fact that two earlier heavily insured brides of the defendant had also drowned in the bath. *See* p. 7 *supra.*

Writers have commonly rationalized this doctrine by saying that the need for an impermissible inference by way of character or subjective disposition is avoided in such cases because of the intrinsic improbability that a person would be mistakenly or accidentally implicated in a later offense where he has previously been involved in other incidents of the same highly distinctive character.[45] However, common sense propensity inferences can generally be recast as inferences from a reduced probability of a person's being innocently implicated in a crime where he has previously committed similar crimes.[46]

In realistic terms, evidence of similar offenses is admitted in "common scheme" or "modus operandi" cases because it shows

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[45] *See generally* E. Imwinkelried, *supra* note 5, §§ 4:01, 5:05; Elliott, *The Young Person's Guide to Similar Fact Evidence,* [1983] Crim. L. Rev. 284, 289-90; Graham & Wright, *supra* note 7, § 5239 at 462-65.

[46] The commission of a crime in itself puts an offender in a class of persons whose members have a greater than average probability of being responsible for later offenses of a similar character. For example, it would be quite a coincidence if a person with a history of muggings just happened to lose a ring at the site of a later mugging, though not involved in the crime. Or if a person had twice been convicted of rape, it would be a striking case of bad luck if he just happened to be passing through a neighborhood when a rape was committed there by another person of similar appearance. *Cf.* the rationale for the "common scheme" exception suggested in the sources cited in note 45 *supra.*

that the defendant has a propensity to engage in a very specific type of criminal activity, and invites the inference that the currently charged offense was a result of that propensity.[47] There is no more than a difference of degree between such cases and the ordinary situation in which a defendant has a record of offenses which show less specific or generic similarities to the currently charged offense. Recognizing the difference as one of degree, it becomes difficult to justify the current approach under which a judge draws an arbitrary line at some point along the continuum of specific similarity between a currently charged offense and earlier offenses, and excludes earlier offenses falling on one side of the line as mere propensity evidence, while admitting those falling on the other side as evidence of a common scheme or modus operandi. It is not apparent why such evidence should not be regularly disclosed to the trier, with the degree of specific similarity between the charged offense and earlier offenses going to their probative force rather than their admissibility.

Examples of arbitrary line-drawing can also readily be supplied in connection with other "exception" categories. For example, the existing exception for evidence of skill or criminal ability, *see* p. 8 *supra,* is generally limited to cases in which prior offenses show some technical skill or unusual ability.[48] In a much broader range of situations, however, prior offenses have some degree of relevance on this point. For example, in a prosecution for an unarmed battery, the prior commission of similar crimes tends to show that the defendant has the physical capacity and adeptness at physical aggression required to commit such an offense, and in a fraud prosecution the defendant's history as a con artist tends to show that he has the self-confidence and adeptness at psychological manipulation of victims which that occupation requires. Here, too, it is unclear why relevant evidence of this sort should be concealed from the trier unless a judge decides that it has an extraordinarily high degree of probative value. In the absence of a special rule limiting prior crimes evidence, the unusualness or prevalence of the skills or capacities shown by prior offenses would simply be considered by the trier as factors bearing on their probative value.

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[47] *See* Hoffman, *Similar Facts After Boardman,* 91 L.Q. Rev. 193, 197-98 (1975).

[48] *See generally* E. Imwinkelried, *supra* note 5, §§ 4:07, 5:12.

3. Incoherence of the Impeachment Rule

Evidence of a defendant's prior convictions is generally inadmissible, but it becomes admissible with certain limitations when the defendant takes the stand. For example, Fed. R. Evid. 609(a) provides that convictions for offenses involving dishonesty or false statement are admissible "[f]or the purpose of attacking the credibility of a witness," including a testifying defendant, and that felonies of any sort are admissible for the same purpose if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."

Impeachment rules like Fed. R. Evid. 609, as they apply to testifying defendants, are often characterized as providing that prior convictions are admissible to attack the defendant's credibility but "not as evidence of guilt."[49] Taken straightforwardly, this formulation appears to be self-contradictory. If a defendant takes the stand, his testimony will amount in one way or another to a denial of his guilt. If prior convictions are taken as evidence that he may be lying in making this denial, then they must also be taken as evidence that he may in fact be guilty.

A better understanding of the impeachment rule is that it does not bar an ultimate inference of possible guilt from prior convictions but that it bars a certain type of intermediate inference in reaching that conclusion. For example, suppose that a person is prosecuted for breaking into a house and stealing jewelry and silverware, and that a prior conviction for theft is admitted "for impeachment" when he takes the stand and claims to be innocent. An enhanced probability of guilt might be inferred from this evidence by two quite different lines of reasoning:

> (1) The defendant previously committed a theft; therefore, he may be a generally dishonest person; therefore, he may now be lying when he denies committing the burglary he is currently charged with; therefore, he may be guilty of that burglary.

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[49] *See* Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom,* 130 U. Pa. L. Rev. 845, 868 & n.84 (1982).

(2) The defendant previously committed a theft; therefore, he may lack respect for the property rights of others; therefore, he may be guilty of the currently charged burglary.

The impeachment rule apparently permits inference (1), in which the intermediate steps include an inference that the defendant has a propensity to lie, but not inference (2), in which the intermediate step is an inference that the defendant has a character trait which would dispose him to steal or commit other property offenses.

This understanding of the impeachment rule saves it from being self-contradictory, but says little for its rationality. It is not apparent why prior convictions can be admitted when the defendant takes the stand as evidence that he will commit perjury, but not as evidence of a propensity to commit other types of crimes. Moreover, the inference by way of a propensity to lie is likely to be weaker than a direct inference to an enhanced probability of committing the charged offense from a propensity to commit such offenses shown by earlier crimes. In the burglary case described above, for example, inference (2), which proceeds by way of the defendant's apparent lack of respect for other people's property rights, has considerably greater force than inference (1), which proceeds by way of an inference of general dishonesty. In such cases the impeachment rule permits relatively weak inferences but excludes relatively strong ones.

Another criticism of the impeachment rule is the difficulty of understanding and complying with it. It calls on the trier to distinguish between permissible and impermissible intermediate inferences running from the same evidence (a prior conviction) to the same conclusion (an enhanced probability of guilt), and to refrain from an inference by way of specific propensity while drawing an inference by way of general credibility, though the former is likely to be stronger and more natural than the latter. This difficult psychological trick is supposed to be performed on the basis of a charge indicating that a prior conviction may be considered as evidence impugning the credibility of a defendant's denial of his guilt, but not as evidence of his guilt. Not surprisingly, the view is often expressed that the impeachment rule's limitation on the purpose for which a defendant's criminal record is admitted is simply a fiction that does not affect the actual assessment of such evidence by juries.[50]

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[50] *See id.* at 868-69 & n.85; Wissler & Saks, *On the Inefficacy of Limiting Instructions:*

Other problems with the impeachment rule include the following:

First, by limiting the admission of prior convictions to cases in which the defendant takes the stand, the impeachment rule impedes the search for truth by making the decision to testify a potentially costly one. Whether a defendant is guilty or innocent, he is normally the person who knows the most about the truth of the charges against him, and it is conducive to the discovery of truth if he is available for questioning at trial. However, the existing rule which conditions the admission of a defendant's criminal record on his decision to take the stand provides him with an incentive to refrain from testifying. Through its tendency to enforce silence on the defendant at trial, this limitation both impedes the conviction of the guilty and potentially jeopardizes the innocent.[51]

Second, the admissibility of prior convictions under a rule like Fed. R. Evid. 609 tends to be inversely proportional to their actual value as evidence of guilt. In general, prior offenses are most probative of guilt if they are similar in character to a currently charged offense. For example, the information that a person has been convicted of making false statements on an income tax return is not very helpful in assessing a charge that he has committed an aggravated battery, but the information that he has a history of serious assaultive crimes has considerably greater relevance on this point. *See generally* pp. 11-13 *supra*. Under Rule 609(a), however, the defendant's conviction for income tax evasion—a crime involving "dishonesty or false statement"—would automatically be admissible to attack the credibility of his testimony.

In comparison, the admission of the defendant's history of assaultive crimes in such a case would be problematic in light of Rule 609's provision that crimes other than *crimina falsi* are admissible only if the court determines "that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Since prior convictions are only admissible under the rule for their relevance to credibility, the natural inference from the defendant's assault record—that he has a propensity to violence—would automatically be regarded as impermissible "prejudice," and some or all of it could

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When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 Law & Human Behavior 37 (1985).

[51] *See* H. Kalven & H. Zeisel, *supra* note 35, at 146 (criminal record correlated with increased likelihood that defendant will stay off the stand).

be excluded on that ground. The point of this example is generally applicable: The formulation of Rule 609 generally creates the strongest presumption against the admission of prior convictions which are actually of the greatest relevance in assessing the charge against the defendant on account of their supposedly "prejudicial" effect.[52]

4. Complication of Proceedings

A final point against the existing rules is their intrinsic complexity and the volume of litigation they generate. A defendant's past conduct may be a highly relevant consideration in assessing the charges against him, but the law has proceeded on the assumption that such evidence must be excluded under a broader or narrower range of circumstances. The tension between normal canons of rational judgment and the basic legal rule in this area has inexorably resulted in the development of a complex body of exceptions and qualifications which frequently call for controvertible judgments by individual judges concerning the admission of such evidence, and further litigation on appeal in challenges to such judgments. As a result, "[t]here is no question of evidence more frequently litigated in the appellate courts than the admissibility of other crimes, wrongs, or acts."[53] If some important interest of justice were furthered by restricting the use of such evidence, this cost would be justified, but it is dubious that this is the case. The affirmative grounds for considering such evidence on a regular basis seem quite strong, the reasons that have traditionally been offered in support of a restrictive approach seem highly deficient on examination, and the specific restrictive rules that now apply in this area are in many respects absurd.

III. CONSTITUTIONAL ISSUES

The text of the Constitution does not, on its face, purport to limit the use of prior offenses as evidence in criminal cases, and there is nothing in the history of the Constitution which suggests an intent to give constitutional status to limitations on this type of evidence. Judicial decisions in the United States have generally rejected constitutional arguments against the use of such evidence. Supreme Court

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[52] *See* D. Louisell & C. Mueller, 3 *Federal Evidence* § 316 at 329-30 (1979).

[53] Wright & Graham, *supra* note 7, § 5239 at 427; *see* E. Imwinkelried, *supra* note 5, § 1:04.

decisions and issues that have been raised in legal writing or inferior court litigation will be considered separately.

A. Supreme Court Decisions

Throughout most of the nation's history, the Supreme Court had no occasion to address this issue in constitutional terms, but did rule on the admissibility of prior crimes evidence in a number of cases as an evidentiary matter. Thus, in *Woods v. United States,* 41 U.S. 342, 359-61 (1842), the Court upheld the admission of other fraudulent acts by an importer to show his intent to evade the duty on imported goods through fraudulent invoices, finding the relevance of such evidence to a matter in issue to be a sufficient ground for its admission.[54] In *Boyd v. United States,* 142 U.S. 450, 457-58 (1892), the Court found reversible error in the admission of evidence concerning the commission of a number of robberies by the defendants in a prosecution for a murder that may have been committed in the course of a subsequent robbery, citing lack of fair notice to the defendants, potential jury prejudice, and the absence of adequate cautionary instructions. In contrast, in another murder case, *Moore v. United States,* 150 U.S. 57 (1893), the Court upheld the admission of evidence of an earlier uncharged murder to show that the victim's awareness of evidence implicating the defendant in the earlier crime might have motivated the defendant to kill him. In a bribery prosecution in 1948, *Michelson v. United States,* 335 U.S. 469, the Court found no error in the prosecutor's asking the defendant's character witnesses whether they had heard that the defendant had been arrested for receiving stolen property twenty-seven years earlier. In a prosecution in 1949 for defrauding the government by filing false invoices, *Nye & Nissen v. United States,* 336 U.S. 613, 618, the Court held that evidence of the filing of other false invoices, not charged in the indictment, was admissible to show intent. In a drug trafficking prosecution in 1954, *Walder v. United States,* 347 U.S. 62, the Court upheld the admission of evidence of an earlier unrelated offense of drug possession to impeach

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[54] In an earlier case the issue of prior crimes evidence had arisen tangentially. The defendant had been prosecuted for passing a counterfeit note, and evidence was admitted that he had passed a second counterfeit note to establish guilty knowledge. The defendant was acquitted, but was then separately prosecuted for passing the second note and convicted. The Court held that this was not double jeopardy. *See United States v. Randenbush,* 33 U.S. (8 Pet.) 288 (1834).

the defendant's credibility, in light of his specific assertion on the stand that he had never possessed narcotics.

These cases show that the Supreme Court has usually upheld the admission of prior crimes evidence as an evidentiary matter when presented with the question. However, the decisions in these cases turned on ad hoc applications of conventional rules and rationales relating to such evidence, and involved no independent doctrinal development by the Court.

The first constitutional decision was *Lisenba v. California,* 314 U.S. 219, 223-25, 227-28 (1941), in which the defendant was prosecuted for drowning his recently married wife to collect accident insurance. Evidence was admitted which tended to show that the defendant had drowned a former wife for the same purpose, under the conventional evidentiary principle that "similar but disconnected acts may be shown to establish intent, design, and system." The Supreme Court held that "[t]he Fourteenth Amendment leaves California free to adopt a rule of relevance" under which the evidence was properly admitted.

The second constitutional case was *Ciucci v. Illinois,* 356 U.S. 571 (1958). The case involved a defendant who was charged in four separate indictments with murdering his wife and three children, all of whom were found dead in a burning building with bullet wounds in their heads. The defendant was found guilty of murder in three separate trials, in each of which evidence was admitted concerning all four deaths. The Supreme Court rejected a due process challenge to the third conviction in a per curiam opinion, holding that the relevance of the entire occurrence in each of the prosecutions was sufficient to make the admission of this evidence constitutionally permissible.

The third constitutional case was *Spencer v. Texas,* 385 U.S. 554 (1967), which involved Texas recidivist statutes under which the defendant's prior convictions were specified in the indictment and evidence of those convictions was admitted at trial. The jury, though aware of the defendant's earlier convictions throughout trial, would be instructed to take them as relevant only to sentencing, and not to consider them in deciding on the defendant's guilt or innocence.

The Supreme Court upheld the constitutionality of this procedure against a due process challenge, noting that it reflected a common,

conventional approach to recidivist sentencing. In the course of the opinion the Court also noted that evidence of prior offenses was conventionally admissible for various other purposes, *id.* at 560-62, expressed some skepticism concerning the supposedly prejudicial effect of such evidence, *id.* at 565 & n.8, and rejected the argument that the Texas procedure's validity was impugned by the possibility of other recidivist procedures under which prior convictions would be withheld from the jury during the guilt-determination phase of trial, *id.* at 565-69.

The most recent constitutional decision was *Marshall v. Lonberger,* 459 U.S. 422 (1983), in which the Court upheld the admission of a prior conviction under an Ohio "aggravated murder" procedure that was similar in its operation to the recidivist statutes considered in *Spencer v. Texas.* In responding to a dissenting argument that *Spencer v. Texas* should be overruled, the Court explicitly reaffirmed its validity, pointed out that prior crimes evidence had traditionally been admitted in various circumstances, and downplayed the supposed risk of prejudice that such evidence presents (459 U.S. at 438 n.6):

> [The] dissent appears to rest on a view that the common law regarded the admission of prior convictions as grossly unfair and subject to some sort of blanket prohibition. In fact, the common law was far more ambivalent . . . . Alongside the general principle that convictions are inadmissible, despite their relevance to guilt, . . . the common law developed broad, vaguely defined exceptions—such as proof of intent, identity, malice, motive, and plan—whose application is left largely to the discretion of the trial judge . . . . In short, the common law, like our decision in *Spencer,* implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification.

Beyond these four decisions—*Lisenba v. California, Ciucci v. Illinois, Spencer v. Texas* and *Marshall v. Lonberger*—the only decisions of the Court directly relevant to this issue are those relating to reliance on prior convictions that are later determined to be constitutionally invalid. For example, in *Burgett v. Texas,* 389 U.S. 109

(1967), the Court overturned a conviction where a prior conviction obtained in violation of the defendant's Sixth Amendment right to counsel was admitted at trial as relevant for penalty-enhancement, and in *Loper v. Beto*, 405 U.S. 473 (1972), the same result was reached where prior convictions invalid on Sixth Amendment grounds were admitted to impeach the defendant's credibility. These decisions and others like them depend essentially on the invalidity of the prior conviction, and have no implications in other contexts.[55]

In sum, the Supreme Court's decisions support the proposition that a valid prior conviction can constitutionally be admitted if it is relevant in the determination of guilt or innocence (*Lisenba v. California, Ciucci v. Illinois*), or if there is some other reason for admitting it (*Spencer v. Texas, Marshall v. Lonberger*). The general attitude of the Court toward the admission of such evidence can only be described as casual. The Court has been skeptical of the supposed potential for prejudice in admitting such evidence and has not required the state to show any strong justification for permitting it to be used.

B. Arguments and Issues

Legal writers and litigants in the lower courts have advanced various constitutional arguments against admitting prior crimes evidence. None of these arguments, however, provide any convincing basis for imposing special restrictions on the use of this type of evidence. Specific arguments that have been raised include the following:

1. Fair Notice under the Fifth and Sixth Amendments

The Sixth Amendment provides that in a criminal prosecution "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." The due process clause of the Fifth Amendment is also understood to include a requirement of fair notice of charges. The admission of evidence of offenses that are not charged

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[55] *See Marshall v. Lonberger*, 459 U.S. at 438-39 n.6, 449-53 (rejecting dissenting argument that *Spencer v. Texas* should be overruled in light of subsequent decision relating to invalid convictions); *Burgett v. Texas*, 389 U.S. at 115-16 (distinguishing *Spencer v. Texas*).

in the indictment or information has been criticized as violating these provisions.[56]

There is, however, no reason to believe that these provisions were meant to require notice of anything other than the charge for which the defendant is being tried. There is nothing in the history of the Bill of Rights which suggests that notice was to be required in relation to uncharged offenses admitted for their evidentiary value.[57] The same understanding is supported by the historical practice of admitting evidence of uncharged offenses under various circumstances.[58] Congress did not accept the suggestion that pre-trial notice of intent to offer evidence of uncharged offenses be required in its consideration of Fed. R. Evid. 404(b), and most states continue to adhere to the same position.[59]

As noted in the earlier discussion of fair notice as a policy consideration, this type of argument could at most support a requirement of procedural safeguards—pre-trial notice of intent to offer evidence of uncharged offenses in certain circumstances—and does not otherwise logically support limiting the use of such evidence. Moreover, "fair notice" considerations, whether framed as policy arguments or constitutional arguments, have no bearing at all on the admission of prior *convictions* as opposed to evidence of unproven offenses. In relation to the Sixth Amendment requirement of notice of the nature and cause of "the accusation," a prior conviction is not an "accusation" to which the defendant may present a defense, but is admitted as a record of an adjudication of guilt on an earlier charge that the defendant is not free to controvert. In relation to the Fifth Amendment due process requirement of "fair notice," there is no unfairness in

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[56] *See* Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 Cin. L. Rev. 113, 163-69 (1984).

[57] *See* 1 Annals of Congress 452, 948 (1789); H. Storing, 2 *The Complete Anti-Federalist* 262 (1981); I *Elliot's Debates* 328, 334; III *id.* 467, 658; IV *id.* 243.

[58] *See* pp. 2-3 *supra;* Reed, *supra* note 2, at 718-19 (catalogue of grounds for admitting uncharged crimes evidence recognized in the late eighteenth and early nineteenth centuries); II Wigmore's *Evidence* § 369 at 375 & nn. 1-3 (Chadbourn rev. 1979) (historical admissibility of uncharged acts as evidence in treason cases); Stone, *supra* note 2, at 958, 960 (same).

[59] *See* E. Imwinkelried, *supra* note 5, §§ 9:09, 10:14; Wright & Graham, *supra* note 7, § 5249 at 525.

failing to provide defendants with case-by-case pre-trial notice of intent to offer prior convictions.[60]

2. The Due Process Right to a Fair Trial

It has been argued that the admission of evidence of prior offenses is so inherently prejudicial that it violates the general right to a fair trial implicit in the requirement of due process. Variant formulations of this argument have asserted that the prejudicial character of such evidence undermines or violates more specific "due process" rights, such as the presumption of innocence.[61]

However formulated, the "fair trial" arguments all rest on the unsupported empirical assumption that prior crimes evidence is likely to result in unjustified convictions based on antagonism or to be taken by the trier for more than it is rationally worth. Since there is no reason to believe that this is the case, *see* pp. 16-20 *supra,* there is no basis for implying special constitutional restrictions on the use of such evidence based on concerns over prejudice.[62]

3. The Requirement of Proof Beyond a Reasonable Doubt

The admission of evidence of prior offenses has been attacked as inconsistent with the requirement of proof beyond a reasonable doubt, since the evidence offered to establish such an offense may fall short of that standard of proof. However, the reasonable doubt standard only requires that the totality of evidence admitted in a case establish the defendant's guilt of the charged offense beyond a reasonable doubt. It does not require proof beyond a reasonable doubt

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[60] *See* pp. 13-15 *supra; United States v. Braasch,* 505 F.2d 139, 149 (7th Cir. 1974) (Sixth Amendment right to notice of the accusation does not limit evidentiary rule admitting "other crimes" evidence); *Burks v. State,* 594 P.2d 771, 774 (Okla. Crim. App. 1979) (pre-trial notice requirement for evidence of other offenses does not apply to convictions); Minn. R. Crim. P. 7.02 (pre-trial notice requirement does not apply to offenses for which defendant has previously been prosecuted); E. Imwinkelried, *supra* note 5, §§ 9:09, 10:14.

[61] *See Spencer v. Texas,* 385 U.S. 554, 572-75 (1967) (Warren, C.J., dissenting).

[62] *Cf. Ciucci v. Illinois,* 356 U.S. 571 (1958) (no due process violation in admitting details of uncharged murders in repeated prosecutions arising from same incident).

of any particular evidentiary fact, including the commission of a prior offense which is admitted for its evidentiary value.[63]

Like most other constitutional and policy arguments against admitting evidence of prior offenses, this argument has no possible application to the admission of prior *convictions*, as opposed to evidence of unproven offenses. The defendant's commission of the offense underlying such a conviction has already been established beyond a reasonable doubt or admitted by the defendant through a guilty plea.

4. The Right against Self-Incrimination

It has been argued that the admission of prior crimes evidence violates the Fifth Amendment right against compelled self-incrimination because it puts pressure on the defendant to take the stand in order to respond to that evidence.[64] This argument is specious because the offer of any type of evidence by the prosecution can put pressure on the defendant to take the stand in order to rebut it. There is no judicial support for this argument.[65]

IV. THE LAW OF FOREIGN JURISDICTIONS

An examination of foreign law shows no general view among the legal systems of democratic nations that evidence of a defendant's convictions should be restricted at all, much less that it should be restricted in conformity with the principles that now govern the use of such evidence in the United States. In contrast to American law's current preoccupation with the purpose for which prior crimes evi-

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[63] *See Manning v. Rose*, 507 F.2d 889, 894 (6th Cir. 1974); E. Imwinkelried, *supra* note 5, §§ 10:11, 10:13.

[64] *See* Note, *Evidence: Prior Crimes Used to Show Specific Intent and Identity*, 50 Marq. L. Rev. 133, 139-40 (1966); Wright & Graham, *supra* note 7, § 5239 at 438.

The sources cited *supra* argue more specifically that the admission of prior crimes evidence is objectionable on Fifth Amendment grounds because if the defendant takes the stand and only responds to the prior crimes evidence, adverse inferences may be drawn from his failure to respond to the other evidence of his guilt on the charged offense. However, they do not attempt to explain how this distinguishes prior crimes evidence from any other type of evidence. Whenever the defendant takes the stand and responds to some but not all of the evidence against him, inferences may be drawn that he cannot respond to the remainder.

[65] *See* E. Imwinkelried, *supra* note 5, § 10:19.

dence is offered—evidence of propensity versus other purposes—English law now regards the probative value of such evidence as the touchstone of admissibility. In many European democracies—including those which use lay jurors or juries—a defendant's criminal history is uniformly admissible in evidence.

A. England

Until 1974, the rule on prior crimes evidence in England was the same as the "inclusionary" version of the rule in the United States: Evidence of uncharged offenses could not be admitted to show the defendant's propensity to criminal conduct, but if it was relevant for some other purpose—e.g., to show intent, modus operandi, etc.—it could be admitted.

This approach was abrogated by the decision of *D.P.P. v. Boardman,* [1975] A.C. 421, in which the House of Lords effectively recognized that the distinction between propensity and non-propensity uses of prior crimes evidence was not consistent with the actual course of judicial decisions and did not provide a rational criterion of admissibility. *Boardman* has been understood as establishing the probative value of such evidence as the criterion of admissibility, regardless of whether the inference to guilt from prior offenses proceeds by way of an intermediate inference of criminal propensity or by some other route. It is unclear how great the probative value of such evidence must be to support its admission. However, one of the participants in the House of Lords debate in *Boardman* suggested that the standard should be whether the evidence, taken together with the other evidence in the case, points "so strongly to . . . guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in [the] face of it."[66]

Beyond the general caselaw rule of admissibility described above, there are some special statutory rules that authorize the admission of a testifying defendant's criminal record. This is permitted if the defense has (i) introduced evidence of the defendant's good character, (ii) made imputations against the character of the prosecutor or prosecution witnesses, or (iii) given evidence against a co-defendant.[67]

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[66] *See* Hoffman, *supra* note 47; Elliott, *supra* note 45.

[67] *See generally* G. Williams, *supra* note 24, at 216-26; J. Buzzard, R. May, & M.N. Howard, *Phipson on Evidence* 221-27, Appendix at 921 (12th ed. 1976).

B. European Systems

The legal systems of the European democracies do not start from a conventional presumption against the admission of evidence of other offenses committed by a defendant. In many of them, the defendant's criminal record is routinely admitted. In France, for example, "the history of the accused, including his criminal record, is read out at the beginning of the trial."[68]

The differing presumptions of the common law tradition and European practice on this point have sometimes been explained by reference to the common law's reliance on trial by jury, and a supposed likelihood that jurors will be prejudiced against the defendant by such evidence. However, the actual institutional arrangements of criminal adjudication in the European systems do not support this distinction. In most European countries serious criminal cases are tried before mixed tribunals which include "lay judges" or jurors as well as professional judges. There are also some European countries that use juries as fact-finding bodies separate from the court in the same way as common law jurisdictions.[69]

The free admission of prior convictions in European systems has been upheld in a quasi-constitutional context. Most of the European democracies subscribe to the European Convention on Human Rights. The European Commission on Human Rights is a court-like entity responsible for enforcing the Convention. Article 6 of the Convention enumerates various procedural rights of criminal defendants, including provisions that "everyone is entitled to a fair . . . hearing" and "[e]veryone charged with a criminal offense shall be presumed innocent until proved guilty."[70]

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[68] IA Wigmore's *Evidence* § 58.1 at 1212 & n.3 (Tillers rev. 1983) (quoting Eleventh Report of English Criminal Law Revision Committee); *see* Wright & Graham, *supra* note 7, § 5232 at 346-47; R. David & H.P. de Vries, *The French Legal System* 88-89 (1957); *see also* Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buff. L. Rev. 361, 380 (1977). *But cf.* Damaska, *supra* note 25, at 518-19 (restrictive interpretation of significance accorded to prior convictions in European systems).

[69] *See* G. Glos, *Comparative Law* 19-20, 135-36, 301-02, 437-38, 693, 703-06 (1979); H. Kalven & H. Zeisel, *supra* note 35, at 13-14 n.3.

[70] *See* C. Morrison, *The Developing European Law of Human Rights* 17-32, 216-17, 218-20 (1967).

In 1965, a Danish prisoner challenged the admission of his criminal record at trial as violative of the "fair hearing" and "presumption of innocence" provisions of Article 6. The Commission rejected this claim as "manifestly ill-founded":

> The Applicant was charged . . . with rape committed on two occasions in 1963, and, according to the procedure applicable, a jury was set up to determine the question of his guilt . . . . [T]he Applicant's counsel requested that an account of the Applicant's previous convictions should not be given . . . until the jury had reached its decision as to his guilt in the present case. This request was rejected by the Court which . . . referred to . . . the Code of Procedure . . . which expressly provides that records of previous convictions may be used as evidence . . . .
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> Following this decision . . . the Public Prosecutor gave an account of the Applicant's numerous previous convictions; in particular, on one occasion in 1956, he had already been convicted of rape, and sentenced to six years' imprisonment . . . . .[T]he jury found that the Applicant was guilty of the offenses charged . . . .
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> The Applicant now complains . . . that the Public Prosecutor was allowed to inform the jury of his previous convictions, not only in general terms but in considerable detail . . . . He . . . requests a new trial before an unbiased jury . . . .
>
> [W]hen interpreting such fundamental concepts as "fair hearing" . . . and "presumption of innocence" . . . the Commission finds it necessary to take into account the practice in different countries which are members of the Council of Europe . . . . [I]t is clear that in a number of these countries information as to previous convictions is regularly given during the trial . . . . [T]he Commission is not prepared to consider such a procedure as violating . . . the Convention, not even in cases where a jury is to decide on the guilt of an accused.[71]

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[71] *X v. Denmark*, Application No. 2518/65 (Dec. 14, 1965), *reproduced in Yearbook of the European Convention on Human Rights* 370 (1965).

V. RECOMMENDATIONS FOR REFORM

A. A Uniform Rule of Admission for Prior Convictions

In sum, limitations on the admission of evidence of uncharged offenses initially arose in the late seventeenth century as a response to concerns over fair notice to defendants. Throughout history, however, the rules limiting such evidence have been subject to a variety of qualifications and exceptions. The trend in recent decades has been in the direction of more liberal rules of admissibility in this area.

The persistence of extensive restrictions on prior crimes evidence in criminal trials is in conflict with the practice of considering all relevant evidence in assessing the plausibility of charges of misconduct against a person in non-judicial contexts and with the free use of propensity evidence in pre-trial and post-trial proceedings in criminal cases. The specific rules that now restrict the admission of such evidence are arbitrary, inconsistent, and untenable. There is no reason to believe that there is any particular constitutional constraint on modifying these rules or repealing them.

The policy arguments and constitutional arguments supporting the exclusion of prior crimes evidence are particularly insubstantial where that evidence is in the form of a prior *conviction* for an offense. Two of the traditional grounds for limiting such evidence—concern over fair notice to defendants and concern over maintaining reasonable limits on the scope of inquiry at trial—do not apply at all in connection with convictions. The third traditional rationale—the supposedly prejudicial character of evidence of prior offenses—is contradicted by the regular practice of relying on a defendant's criminal history as evidence of criminal propensity in pre-trial and post-trial proceedings and by the practice of many foreign jurisdictions in regularly admitting criminal histories at trial, including jurisdictions that use lay jurors or juries in criminal cases. There is no affirmative evidence supporting the assumptions of the "prejudice" rationale that would overcome the normal presumption in favor of admitting all relevant evidence of guilt.

A final problem with the existing system is that it is highly productive of litigation. The complex and amorphous rules that now govern the use of evidence of prior offenses are as fertile a source of litigated determinations as any issue in the law of evidence.

In considering the implications of this analysis for the future development of the law, there are four basic issues to be addressed:

First, there is the question whether any proposal we might advance should be limited to the strongest case—the admission of *convictions*—or should also propose broader rules of admissibility for evidence of unproven offenses and other bad acts. On this point we believe that it would be preferable to limit an initial reform proposal to broadening the circumstances in which convictions are admitted.

Second, there is the question whether we should propose a uniform rule of admission for prior convictions or a more limited expansion of the conditions of admission. On this point we believe that the Department should support a uniform rule of admission for the criminal records of defendants and other persons whose conduct or credibility are at issue in a case.

Third, there is the question whether a reform proposal should only require disclosure of the fact that the defendant has previous convictions for certain offenses, or should also require or authorize the admission of evidence concerning specific features of earlier offenses or proceedings resulting in conviction that affect their probative value in relation to a currently charged offense. On this point we believe that it would be preferable in an initial reform proposal to require only disclosure of the basic record of convictions.

Fourth, we will consider the various forums in which a proposal of this sort might be advanced.

1. Offenses Established by Convictions versus Other Misconduct

As noted above, the fair notice and scope-of-inquiry rationales that have traditionally supported rules excluding evidence of uncharged misconduct are essentially inapplicable to the admission of convictions. *See* pp. 13-16 *supra*. In relation to evidence of uncharged acts that have not been established by convictions, however, the policy considerations differ significantly. While the fair notice and scope-of-inquiry rationales do not specifically support the particular approach taken by current law to limiting such evidence—excluding it as evidence of propensity but admitting it where relevant for other purposes—broader rules of admissibility would necessarily accentuate the concerns that these rationales reflect. Proposed reforms

applicable to uncharged misconduct generally would accordingly be exposed to more substantial criticisms based on the need to ensure that defendants have a reasonable opportunity to prepare their defenses, and the need to maintain reasonable limits on the scope of inquiry at trial. Criticisms of this sort might be met by including in such proposals broadened requirements of pre-trial notice of intent to offer evidence of uncharged misconduct and alternative rules limiting the scope of inquiry in criminal trials. However, the formulation of such alternatives would raise difficult policy questions in its own right.

A second difference between offenses established by convictions and other acts concerns the relationship between the standards for admitting the criminal histories of defendants and those of other persons. Under existing law, the restrictions on admitting evidence of prior convictions for persons other than defendants are, as a practical matter, relatively slight, and there would no obvious harm in eliminating them.[72] Thus, a general rule of admissibility for conviction records, applicable to other persons as well as defendants, is an attractive option that would be immune from criticism as singling out defendants for unfavorable treatment.

In comparison, the existing rules on admitting evidence of prior acts by victims and non-defendant witnesses—other than offenses established by convictions—are more restrictive, and the problems entailed by relaxing them would be more substantial. For example, most American jurisdictions—including the federal jurisdiction in Fed. R. Evid. 412—have recently enacted amendments limiting the admission of a rape victim's history of unrelated sexual activity for the purpose of bolstering a defense of consent.[73] While the policy considerations affecting the admission of a defendant's personal history can differ significantly from those affecting the admission of prior acts of victims and other persons involved in a case,[74] a reform proposal

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[72] The conviction records of victims and other non-defendant witnesses generally become admissible when they take the stand. *See* pp. 53-54 *infra*.

[73] *See generally* S. Saltzburg & K. Redden, *supra* note 10, at 220-28; Wright & Graham, *supra* note 7, § 5238.

[74] For example, rape victim shield laws reflect in part the concern that rape victims will be less willing to report offenses or cooperate in prosecution if doing so exposes them to public fishing expeditions into their sexual histories. The same consideration does not apply to the defendant, since his cooperation is not required for carrying out the prosecution. *See* E. Imwinkelried, *supra* note 5, § 10:31.

that applied more liberal rules of admission against defendants would predictably be attacked as unfair to defendants and carry a heavier persuasive burden than an evenhanded rule. The alternative possibility would be to propose making prior acts of victims and other witnesses more broadly admissible on an evenhanded basis with defendants. However, changes of that sort would be in conflict with the trend of recent legal developments in the area of rape prosecutions, and would generally be subject to criticism as bolstering the efforts of defense counsel to divert proceedings from trials of the charges against the defendant into trials of the character of victims and other prosecution witnesses.

A final advantage of a broadened admission rule limited to convictions is that it would involve a more limited departure from existing law. Under the traditional rules of evidence, the conviction records of witnesses in criminal cases, including testifying defendants, have been broadly admissible for purposes of impeachment. A version of this traditional rule appears in the Federal Rules of Evidence as Rule 609. A reform proposal limited in its application to convictions could naturally be cast as an amendment to, or comparable substitute for, this existing rule, rather than as a wholly novel evidentiary principle. A draft amendment of this sort to the Rules of Evidence, and an analytic statement containing more specific support for the particular approach we recommend, appears in the final portion of this report (pp. 52-59 *infra*).

In sum, we think that the appropriate starting point for reform efforts in this area would be a rule broadening the admissibility of convictions. The adoption of such a rule could, of course, strengthen the case for other reforms we might ultimately wish to propose in relation to the admission of other types of uncharged misconduct evidence.

2. A Uniform Rule of Admission for Conviction Records

Under Fed. R. Evid. 402, evidence is not admissible unless it is relevant. Fed. R. Evid. 403 states a general rule that even relevant evidence can be excluded if the trial judge believes that its probative value is substantially outweighed by its potential for causing prejudice, confusing the issues, or wasting time. Other rules impose preconditions on the admission of specific types of evidence based on estimations concerning their probative value and potentially preju-

dicial effect, including Rule 609(a)'s provision that offenses other than *crimina falsi* are admissible for purposes of impeachment only if their probative value outweighs their prejudicial effect to the defendant.

If the existing rule against admitting criminal histories as evidence of character or propensity were repealed, the question would remain whether the admission of a conviction should be conditioned on a determination by the trial judge that it has some probative value or that its probative value is not outweighed by its prejudicial effect or other adverse consequences of admitting it. On this point we believe that a uniform rule of admission would be preferable. In other words, the criminal records of defendants and other persons whose conduct or credibility are at issue in a case should always be admissible. The reasons for not conditioning the admission of such evidence on determinations relating to efficiency and the reasons for not conditioning its admission on determinations relating to potential prejudice merit separate discussion.

Efficiency. Rule 402 states a general rule that evidence must be relevant to be admissible—in other words, it must have *some* probative value. Rule 403 states in part that even relevant evidence can be excluded if its probative value is substantially outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence."

The evident purpose of these provisions is to bar evidence of no probative value or relatively insubstantial probative value in order to prevent proceedings from being pointlessly complicated or prolonged. However, this policy would not be advanced by applying the standards of these rules to the admission of criminal records. Rather, in comparison with the simple expedient of admitting such records routinely, it is the approach of conditioning their use on particularized judicial determinations concerning probative value and other factors that carries the larger potential for prolonging proceedings and wasting time. *See* p. 16 *supra*.

The uniform rule of admission that we favor would predictably be criticized as authorizing the admission of convictions that are too remote in character and time from the charged offense to have any real bearing on the proceedings. For example, in a prosecution for securities fraud, an isolated thirty-year-old conviction for driving while intoxicated could be admitted, though doing so would not be of any

real value to the trier in deciding on the truth or falsity of the current charge. Three points may be noted in response to this objection:

First, while it is true that a prior conviction would lack significant probative value in such a case, it is equally true that its admission would be harmless. Remoteness in time and character that would tend to deprive a prior conviction of probative value in relation to a charged offense would also tend to eliminate any possibility that its admission would affect the verdict. Given the indifference of the question of admission or exclusion in such a case to the likelihood of an accurate verdict, the advantage of a simple, uniform rule that minimizes the possibility of litigation over questions of admission can properly be given controlling effect.[75]

Second, the admission of convictions in comparable circumstances is quite possible under the conventional rules of evidence. Under the traditional impeachment rule, for example, the felony and *crimen falsi* convictions of witnesses, including testifying defendants, were not subject to particularized determinations of relevance, but were admitted routinely with no requirement of similarity to the charged offense or time limitation.[76]

Finally, it may be noted that relevance to the determination of guilt or innocence is not the only permissible ground for admitting criminal records at trial. Rather, it is sufficient in constitutional terms

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[75] Of course the prosecutor might consider it prudent not to offer evidence of such a remote conviction, since it might be perceived as taxing the defendant unfairly with ancient or intrinsically irrelevant misconduct, as a tacit concession that the direct evidence of guilt is weak, or as an indication that the defendant has not committed other crimes of greater relevance to the charged offense. *See State v. Farmer*, 24 A. 985, 986 (Me. 1892); Note, *supra* note 32, at 544 & n.66; 120 Cong. Rec. 37081 (1974) (remarks of Senator McClellan in middle column). In furthering the objective of convicting the guilty, such judgments are best left to the strategic assessment of prosecutors in particular cases. For the reasons noted in the accompanying textual discussion, no legitimate interest of defendants would be impaired by doing so, and a contrary rule would carry substantial costs.

[76] *See* Advisory Committee Note to Fed. R. Evid. 609(b); Ladd, *Credibility Tests—Current Trends*, 89 U. Pa. L. Rev. 166, 176-77 (1940); 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, 441 (1964). Fed. R. Evid. 609(b) has departed from the traditional rule by imposing a general ten-year time limit on prior convictions, but this limitation is unsound for reasons discussed at pp. 56-57 *infra*.

if some legitimate purpose is furthered by their admission.[77] An unqualified rule of admission for criminal records would further the legitimate state interest of promoting efficiency, consistency, and predictability in criminal prosecutions, even though it could occasionally result in the admission of convictions too remote to be relevant to the pending charge.

Prejudice. Under Evidence Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by "the danger of unfair prejudice."[78] Rule 609 provides more specifically that a defendant's convictions for crimes other than *crimina falsi* are admissible for impeachment only if their probative value outweighs their prejudicial effect to the defendant. In contrast, judges have no discretion to exclude any witness's convictions for *crimina falsi* based on estimations of potential prejudice and, in relation to non-defendant witnesses, judges also cannot exclude convictions of other crimes based on such estimations.[79] The rule we recommend would apply the latter approach uniformly: Trial courts would have no discretion to exclude any prior convictions of defendants, as well as those of other persons involved in a case, based on perceived risks of prejudice.

We see no substantial objections to this approach. There is no reason to believe that admitting conviction records routinely at trial would carry any greater potential for unfairness than the contem-

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[77] *See Jervis v. Hall*, 622 F.2d 19, 22 (1st Cir. 1980) (interpreting Supreme Court's decision in *Spencer v. Texas* as upholding constitutionality of admitting prior crimes evidence whenever any legitimate state interest, such as judicial economy, is served by admission); pp. 31-32 *supra* (discussion of decisions in *Spencer v. Texas* and *Marshall v. Lonberger*, in which the admission of convictions in the guilt-determination phase of trial was upheld, despite their irrelevance under state law to the determination of guilt or innocence).

[78] Rule 403 also authorizes balancing against the risks of "confusion of the issues" and "misleading the jury." To the extent that these terms are specifications of the notion of "prejudice," they are addressed in the accompanying textual discussion. To the extent that they refer to the somewhat different concern over the possibility of general confusion or distraction resulting from the introduction of a large volume of marginally relevant evidentiary material, they are not implicated by a rule whose effect is limited to admitting records of convictions. *See* p. 16 *supra*. *See generally* Wright & Graham, *supra* note 7, § 5215 at 273-74, §§ 5216-17.

[79] *See* 1974 U.S. Code Cong. & Admin. News, 93d Cong., 2d Sess. 7102-03 (conference committee report); 120 Cong. Rec. 40891 (1974) (House floor consideration of final version of rules).

porary American practice of admitting such records routinely in sentencing proceedings, or the practice of various European legal systems in admitting such records as a matter of course at trial. *See generally* pp. 20-23, 36-39 *supra.*

Conversely, authorizing the exclusion of such evidence based on case-by-case balancing of probative value and supposed dangers of prejudice would carry substantial costs. The admission of conviction records would continue to be a litigable issue whose resolution would frequently be unpredictable, given the speculative nature of any particular judge's assessment of the likelihood that a jury will be "prejudiced" by such evidence, and the large subjective element involved in "balancing" such a perceived risk against probative value. The general effect would be to perpetuate the subjectivity and arbitrary line-drawing that characterizes the application of the existing rules in this area, *see generally* pp. 23-25 *supra,* and the perpetuation of this issue as a major source of litigation that makes no demonstrable contribution to the fairness of proceedings.

Moreover, conditioning the admission of conviction records on an amorphous prejudice-versus-probative-value standard would threaten the proposal's basic objective of allowing the most important evidence of a defendant's character and dispositions to be considered and accorded its natural probative force on a regular basis. Even in areas in which the existing exceptions to the rule excluding prior crimes evidence may apply, judicial opinions often reflect the groundless conviction that this type of evidence carries an extraordinary potential for prejudice and must be approached with caution.[80] Entrusting judges whose attitudes have been formed by the existing, restrictive rules to implement a fundamentally different approach under an essentially discretionary standard would accordingly tend to undermine the basic objective of the proposed reform. It would predictably result in the exclusion of relevant prior crimes evidence in many cases based solely on the prejudice of particular judges that juries cannot be relied on to assess this type of evidence fairly.

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[80] *See, e.g., United States v. Moccia,* 681 F.2d 61, 63 (1st Cir. 1982); *United States v. Lucero,* 601 F.2d 1147, 1148-49 (10th Cir. 1979).

3. Other Evidence Concerning Offenses and Proceedings Resulting in Conviction

If a person is prosecuted for rape and raises a defense of consent, disclosure of the fact that he has two prior convictions for rape would tend to support an inference that the defense is a fabrication. This inference would be strengthened if it were also shown that the defendant had unsuccessfully advanced similarly stated claims of consent in the earlier prosecutions, or that there were specific similarities between his behavior in committing the earlier offenses and the victim's account of his behavior in the current prosecution. In formulating a general rule of admission for prior convictions, there is a need to consider whether the information subject to disclosure should be limited to the fact that the defendant has previous convictions for certain offenses, or should also include evidence concerning particular features of earlier proceedings or offenses resulting in conviction which enhance their probative value in relation to the currently charged offense.

Under current law, the admissible information concerning a conviction brought in for impeachment pursuant to Fed. R. Evid. 609 includes the fact that the conviction occurred, the time when it occurred, and the nature of the offense on which it was based. Some authorities state that the punishment imposed pursuant to the conviction and the place where the conviction occurred can also regularly be disclosed. Beyond these basic facts, eliciting or offering more detailed information concerning offenses that underlie convictions admitted pursuant to Rule 609 is generally not allowed.[81]

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[81] *See, e.g., United States v. Mitchell,* 427 F.2d 644, 647 (3d Cir. 1970); *United States v. Boyce,* 611 F.2d 530 (4th Cir. 1979); *United States v. Tumblin,* 551 F.2d 1001, 1004 (5th Cir. 1977); *United States v. Harding,* 525 F.2d 84, 87-91 (7th Cir. 1975); *Radtke v. Cessna Aircraft Co.,* 707 F.2d 999, 1001 (8th Cir. 1983); *United States v. Wolf,* 561 F.2d 1376, 1381-82 (10th Cir. 1977). *But see United States v. Bogers,* 635 F.2d 749, 751 (8th Cir. 1980) (suggesting more flexible approach to admission of specific facts concerning earlier offenses established by conviction, considering probative value and potential prejudice).

If the defendant attempts to deny or explain away his guilt of an earlier offense established by conviction, the prosecution may be allowed to rejoin by bringing out specific facts on cross-examination which rebut the denial. *See United States v. Wolfe,* 561 F.2d 1376, 1381-82 (10th Cir. 1977); *United States v. Mitchell,* 427 F.2d 644, 647 (3d Cir. 1970).

In terms of policy, the objections to admitting evidence concerning the details of earlier offenses which resulted in convictions are not as strong as the objections that might be raised to broad rules of admission applicable to uncharged misconduct generally. Allowing specific facts to be brought out in the prior convictions situation would not subject a defendant to an open-ended inquiry into an unforeseeable range of acts of misconduct extending over the whole course of his life, but would only permit inquiry into the facts of the particular offenses for which he has been prosecuted and convicted. Since the records of earlier proceedings generally contain information concerning specific occurrences in those offenses,[82] the need to take new evidence in this context would be less than in connection with uncharged offenses for which a defendant has never been prosecuted.

The admission of evidence concerning specific features of earlier offenses established by conviction does, however, raise other policy questions and potential problems. Since a guilty verdict does not necessarily resolve questions concerning the specific manner in which an offense was committed, the admission of evidence on this point carries a greater potential for litigation than admission of the fact of conviction. Since an unrestricted rule of admission for evidence concerning the details of earlier offenses established by convictions would be unwieldy and unworkable, some exercise of discretion and judgment by the trial court would be required in deciding on what evidence of this sort to admit. In formulating standards for such exercises of discretion, there would be a need to consider whether evidence on this point should be limited to admissions elicited from the defendant in cross-examination and pertinent excerpts from the records of earlier proceedings, or whether specific occurrences in the commission of earlier offenses should be subject to proof or disproof by extrinsic evidence. Even if taking new evidence were prohibited, the possibility of questioning and argumentation concerning the character and import of specific occurrences in earlier offenses, and the introduction of transcripts of earlier proceedings, would carry a larger potential for prolonging trials and shifting their focus than a rule limited to requiring the admission of convictions.

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[82] Relevant records would include the transcripts of earlier trials, offers of proof and colloquys in guilty plea acceptance proceedings, and findings of fact by the judge in bench trials. *See generally* Fed. R. Crim. P. 11(f)-(g) (judge to determine that there is a factual basis for a guilty plea); Fed. R. Crim. P. 23(c) (judge in bench trial to make findings of fact on request).

On balance, we think that it would be preferable to follow the approach of current Rule 609 in any initial reform proposal we might advance, requiring only that conviction records be admitted. Sufficiently specific similarities between earlier offenses and the currently charged offense would continue to be admissible in any event under the existing exception for evidence of a "common scheme" or "modus operandi," *see generally* p. 7 *supra*. Moreover, the existing restrictive approach under Rule 609 to admitting specific information concerning offenses established by convictions is premised in part on the assumption that prior crimes evidence is highly prejudicial and can only properly be considered for its bearing on credibility.[83] The courts accordingly might be amenable to some relaxation of this approach under a new rule which rejected the prejudice assumption and reflected an overt legislative judgment that prior offenses established by convictions should be accorded their natural probative force. While reliance on these somewhat uncertain alternative avenues of admission may be less than optimal, a reform proposal that only mandates disclosure of the basic record of earlier convictions seems preferable as a means of staying as close as possible to current law and minimizing potential objections.

4. Means of Advancing the Proposal

A proposal to make criminal histories uniformly admissible at trial might be advanced in three forums:

First, under 28 U.S.C. § 2076, the Supreme Court has authority to promulgate amendments to the Federal Rules of Evidence.[84] We

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[83] *See, e.g., United States v. Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977); *United States v. Mitchell*, 427 F.2d 644, 647 (3d Cir. 1970).

[84] The statute provides that amendments to the Rules of Evidence go into effect one hundred and eighty days following promulgation by the Supreme Court, unless blocked by a one-House veto. The legislative veto provision is presumably invalid under *INS v. Chadha*, so a rules change promulgated by the Court could only be prevented from going into effect by affirmative legislation.

The invalidity of the veto provision should not affect the validity of the remainder of the statute. It is clear that Congress wanted to establish a larger measure of control for itself in relation to the rules of evidence than that authorized in the Enabling Acts for rules of procedure, but equally clear that it did not want to require affirmative legislative action as a prerequisite to the effectiveness of changes in the rules of evidence proposed by the Supreme Court. *See* 1974 U.S. Code Cong. & Admin. News, 93d Cong., 2d Sess. 7069-70, 7091, 7107 (committee reports).

could accordingly forward a proposed textual amendment with a supporting statement along the lines of this report to the Chief Justice, recommending that the Rules be amended in the manner indicated. As a practical matter, a proposal of this sort would normally be referred for study by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference and the Court would await the Conference's recommendation before acting on it affirmatively or negatively.[85]

Second, Congress can directly amend the Rules of Evidence. Other procedural reforms which could be adopted through legislation are proposed in the Truth in Criminal Justice series of which this report is a part. An amendment providing for the uniform admission of criminal histories might appropriately be included in a legislative package encompassing these proposals.

Third, we can encourage state officials to support the enactment of comparable reforms in their states. This could be done, for example, through addresses by Department officials at NAAG or NDAA

Since it is not "evident" that Congress would have refrained from enacting the remainder of § 2076 had it known of the unavailability of the legislative veto option, and since the portion of the statute remaining after severance is "fully operative as a law," the statute remains valid subject to the deletion of the legislative veto provision. *See INS v. Chadha*, 462 U.S. 919, 931-32, 934-35 & n.9 (1983); Brief for the United States at 12-13, 16-20, *Alaska Airlines v. Brock*, No. 85-920 (Sup. Ct. 1986).

The House of Representatives has passed a bill revising the Rules Enabling Acts, H.R. 3550, that would perpetuate the Supreme Court's authority to prescribe and amend the rules of evidence. The provision of the bill corresponding to current § 2076 deletes the legislative veto provision in light of its invalidity under *Chadha*, so rules changes promulgated by the Supreme Court could only be blocked by affirmative legislation. *See* 131 Cong. Rec. H11397-98 (daily ed. Dec. 9, 1985).

[85]The Chief Justice is the presiding officer of the Judicial Conference. If a proposal of the sort suggested were referred to the Judicial Conference's Rules Committee, it would probably be referred to an ad hoc committee for study and hearings; there is no standing advisory committee on the Rules of Evidence. If the ad hoc committee approved the proposal, it would go to the Rules Committee, and then to the Conference in the event of a favorable recommendation by the Rules Committee.

All this preliminary process is just a matter of custom. The Supreme Court has statutory authority to promulgate rules changes in its discretion, under whatever procedures it chooses to adopt. However, the House-passed bill revising the rule-making statutes, H.R. 3550, would provide a statutory basis for prior study and approval of proposed rules by the Judicial Conference and its committees. *See* 131 Cong. Rec. H11397-98 (daily ed. Dec. 9, 1985).

meetings, through personal contacts, and through offers of technical and litigative assistance to state officials in formulating reform proposals of this sort and defending their validity.

B. A Proposed Amendment to the Federal Rules of Evidence

1. Text of the Proposed Rule

Our recommendation that criminal histories be uniformly admissible could be implemented by repealing Fed. R. Evid. 609, which currently governs the admission of convictions for purposes of impeachment, and substituting a new rule of evidence along the following lines:[86]

Rule _____

ADMISSION OF EVIDENCE OF CONVICTION OF CRIME

(a) *General rule.* Notwithstanding any other provision of law, a person's conviction of a crime, elicited from that person or established by public record, shall be admitted as evidence of his character or a trait of his character to show that his conduct was in conformity therewith, as evidence concerning his credibility, and as evidence concerning any other matter to which it may be relevant.

(b) *Effect of pardon, annulment, or certificate of rehabilitation.* When a conviction is admitted, evidence shall be admitted that the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted. Evidence of a conviction is not admissible under this rule if it has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

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[86]The natural location for the proposed rule would be immediately before current Rule 406. Conforming changes would be required in some other rules. Rule 404 would continue to govern the admission of evidence of offenses that have not resulted in convictions.

(c) *Juvenile adjudications.* Evidence of a juvenile adjudication shall be admitted under this rule whenever the conduct to which the adjudication relates would constitute a crime if committed by an adult.

(d) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admitted.

2. Analysis of the Proposed Rule

The proposed amendment would establish a uniform rule of admission for the criminal records of defendants and other persons whose actions, states of mind, or credibility are relevant in a case. The basic change from current law is that the purpose of admitting convictions would not be limited to attacking credibility. This limitation is arbitrary and perverse for reasons discussed earlier in this report. *See* pp. 26-29 *supra.* The admissibility of convictions under the proposed rule would not be limited to situations in which the defendant or other person testified as a witness, and prior convictions, once admitted, could be considered as evidence concerning any matter to which they are logically relevant. Subsection (a) of the proposed rule contains explicit language emphasizing that the rule repeals the existing limitation on admitting prior convictions as evidence of character or propensity[87] and that the admission of convictions to attack credibility remains legitimate.

The broadened authorization for admitting criminal records under the proposed rule would apply to other persons as well as defendants. This approach reflects the fact that many of the objections to existing Rule 609's restrictions may apply in relation to other persons as well as to defendants, and the fact that a contrary approach would open the way for criticism that defendants are unfairly singled out for unfavorable treatment under the proposed rule. *See* pp. 42-43 *supra.* However, the practical effect of the proposed changes on defendants and other persons would be quite different.

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[87]The proposed rule states that "a person's conviction of a crime . . . shall be admitted as evidence of his character or a trait of his character to show that his conduct was in conformity therewith." *Cf.* current Rule 406: "Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit."

Since the government has the burden of proof in criminal cases, it normally cannot make its case without putting the victim and other critical witnesses on the stand. Once this is done, prior convictions of those persons for felonies and *crimina falsi* become admissible under Rule 609(a). Thus, while the proposed rule would remove certain restrictions on the admission of prior convictions of victims and other prosecution witnesses—principally eliminating the restriction to felonies and *crimina falsi* and the ten-year time limit of Rule 609(b)—it would not expose persons other than the defendant to a type of attack from which they are currently in a position to insulate themselves.[88] The proposed rule would also not undermine the policy of Fed. R. Evid. 412 and comparable "rape victim shield laws" at the state level, *see generally* pp. 42-43 *supra,* since the past sexual conduct of a rape victim that the defense might seek to bring out would virtually never be a criminal offense for which the victim has been convicted. Its practical effect on persons other than defendants would generally be limited by the fact that crime victims and other non-defendant witnesses usually do not have serious criminal records.

In contrast, the defendant under current law can normally bar disclosure of his criminal record by staying off the stand. Even if the defendant does take the stand, the admissibility under Rule 609(a) of a conviction other than a *crimen falsi* depends on a finding by the judge that its probative value on credibility outweighs its "prejudicial effect to the defendant." The proposed rule would eliminate these impediments to the search for truth, *see generally* pp. 26-29 *supra,* by making the defendant's full criminal record admissible in every case.

The proposed rule would also benefit the prosecution by broadening the range of convictions of defense witnesses that can be admitted. As with prosecution witnesses, the restriction of admissible convictions to felonies and *crimina falsi* within a specific time period would be eliminated.

Other features of the proposed rule include the following:

No requirement of similarity to the charged offense. The proposed rule would not condition the admissibility of prior convictions on similarity to the currently charged offense, on the ground that such

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[88] Defendants are also generally free under current law to attack the character of victims through opinion and reputation testimony. *See* Fed. R. Evid. 404(a)(2), 405(a).

similarity or dissimilarity should go to the probative value of earlier offenses rather than to their admissibility. *See* pp. 23-25 *supra*. Since similarity is a matter of degree and offenses may be similar or dissimilar to each other in various ways,[89] a contrary rule would necessarily result in the development of a body of caselaw and ad hoc judgments by individuals judges concerning the requisite type and degree of "similarity," undermining the proposal's objective of reducing the hypertechnicality and unpredictability that currently characterize this area of the law.

Moreover, prior offenses may be relevant to a later proceeding for reasons unrelated to any intrinsic similarity to an offense charged in the proceeding. For witnesses other than the defendant, the main significance of prior convictions is likely to be their relevance to the witness's credibility. The import of a non-defendant witness's conviction of an offense for his credibility, however, is normally unrelated to any incidental similarity it may have to the offense with which the defendant is charged. In relation to defendants as well, prior convictions sometimes enhance the plausibility of a current charge through an inferential chain that does not depend at all on similarity.[90]

No restriction on types of crime. Rule 609 currently limits the use of convictions for impeachment to felonies and offenses involving dishonesty or false statement ("*crimina falsi*"). The reasons for this restriction are essentially historical: It reflects the derivation of the impeachment rule from a common law rule of testimonial incapacity based on conviction of a felony or *crimen falsi*. *See* pp. 8-9 *supra*.

Since convictions would be admissible for any purpose under the proposed rule—not just to "attack credibility"—there is no reason to give *crimina falsi* any special status. The restriction to felonies should also be dispensed with, since the penalty grade of an earlier offense has no particular relationship to its probative value in relation

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[89] Offenses may be similar or dissimilar in constituting the same statutory offense or in being defined by different statutes, in having similar penalties or different penalties, in being directed against persons or against property, in being violent or non-violent, in being drug-related or not drug-related, in being sex crimes or in not involving a sexual element, in being motivated by a desire for pecuniary gain or in having some other motivation, in involving fraud or deceit or in not involving fraud or deceit, in being "white collar crimes" or "street crimes," in being intentional or in involving some lesser degree of culpability, etc.

[90] *See generally* pp. 7-8 *supra;* E. Imwinkelried, *supra* note 5, § 3:21.

to a currently charged offense. For example, in a prosecution for failing to file a tax return, a prior misdemeanor conviction for the same offense would normally have greater relevance than a prior felony conviction for incest.

No time restriction. The proposed rule does not set any time limit on the use of prior convictions. In contrast, under current Rule 609(b), a conviction is generally inadmissible for impeachment if more than ten years have elapsed from the date of conviction or release from confinement pursuant to the conviction, whichever is later. Convictions outside the specified time period are admissible only if "the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

The time restriction under Rule 609 is apparently predicated on the view that older convictions "generally do not have much probative value."[91] As the basis for a rule of exclusion, this is a *non sequitur*. The general principle is that evidence is relevant and admissible if it has *any* probative value, but that relevant evidence may nevertheless be excluded if its probative value is outweighed by its prejudicial effect.[92] The lapse of time from a conviction does tend to reduce its probative value, but it correspondingly reduces any risk there may be of a prejudicial effect from its admission. Since there is no reason to believe that a predominance of prejudicial effect over probative value is more likely in connection with older convictions than in connection with more recent ones, there is no reason to exclude older convictions.

Moreover, any difference in typical probative value between older and more recent convictions is a matter of degree. There is no reason to believe that there is any sudden falling off in probative value at the end of a ten-year period, or at the end of any other number of years that might be specified. Rather than following the arbitrary line-

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[91] S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7061-62; *see* H.R. Rep. No. 650, 93rd Cong., 2d Sess., *reprinted in id.* at 7075, 7085.

[92] *See* Fed. R. Evid. 401-403. Rule 403 also authorizes the exclusion of relevant evidence based on countervailing considerations of efficiency, but those considerations do not apply significantly to the admission of convictions. *See* pp. 16, 44 *supra*.

drawing approach of the current rule, the proposed rule imposes no time limit on the use of convictions. The lapse of time from a conviction would be considered by the trier as a factor bearing on its probative value.[93]

Effect of pardons, certificates of rehabilitation, etc. Current Rule 609(c) provides that a conviction is inadmissible if (1) it has been the subject of a certificate of rehabilitation or equivalent procedure, unless the person has subsequently been convicted of a felony, or (2) the conviction has been the subject of a pardon on grounds of innocence or equivalent procedure based on a finding of innocence.

The proposed rule follows current subsection (c) in excluding convictions that were later nullified by pardons on grounds of innocence or equivalent determinations of innocence, but adopts a different approach to indicia of rehabilitation. The specific rule on this point under current law is too restrictive. Suppose, for example, that a person is convicted for a misdemeanor "false statement" offense, later obtains a certificate of rehabilitation, but is subsequently convicted again for another misdemeanor of the same type. The later offense would show that the person had not in fact been rehabilitated, but the earlier conviction would be withheld from the trier under current law in light of subsection (c)'s provision that only subsequent felonies negate the exclusionary effect of a certificate of rehabilitation.

A broader problem with the current rule is that there seems to be no adequate reason why its provision relating to certificates of rehabilitation and the like is formulated as a rule excluding convictions rather than a rule admitting indicia of rehabilitation. Under the proposed rule, the trier would receive the full record of a person's convictions that have not subsequently been overturned or nullified by a later determination of innocence, and would be free to assess its significance in light of all the evidence in the case, including later determinations of rehabilitation.[94]

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[93] Under the conventional impeachment rule, the general view was that the lapse of time from a conviction affects its probative weight but not its admissibility. *See* p. 45 *supra*.

[94] *Accord,* Model Penal Code § 306.6(3)(e)(1962) (conviction vacated on grounds of rehabilitation is admissible for impeachment but vacating order is also admissible). The Advisory Committee Note to current Rule 609(c) justified its approach by saying that "[t]he alternative of allowing in evidence both the conviction and the

Admissibility of juvenile adjudications. Under current Rule 609(d), a defendant's juvenile adjudications are never admissible for impeachment. However, juvenile adjudications of witnesses other than defendants are admissible if the court determines that their admission "is necessary for a fair determination of the issue of guilt or innocence."

The Advisory Committee Note relating to current subsection (d) is essentially an apologetic statement which notes various arguments that have been offered for limiting the use of juvenile adjudications but also notes that good responses can be made to these arguments. The only reason given by the Advisory Committee for the favored position under the rule of defendants—whose juvenile adjudications are never admissible—is that this approach is "[i]n deference to the general pattern and policy of juvenile statutes." However, one would suppose, for example, that a trier responsible for deciding on the truth of a charge of rape against a nineteen-year-old has a legitimate interest in knowing that he was found guilty of similar offenses at the ages of seventeen and fifteen in juvenile proceedings, to the same extent as with older offenders and non-defendant witnesses.

While existing law does reflect a policy of protecting the confidentiality of juvenile records under various circumstances, convicting the guilty and acquitting the innocent are also important policy objectives, which may be disserved if the juvenile records of defendants or witnesses are concealed from the trier. The policy of non-disclosure in relation to juvenile records must also appear less forceful than it did at the time the Rules of Evidence were promulgated, since the trend of recent legal developments has been to reduce the distinction between juvenile and adult adjudications and to relax confidentiality requirements for juvenile records.[95] The proposed rule provides simply that juvenile adjudications are to be admitted on the same terms as adult convictions.

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rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation." The Note did not attempt to explain in any greater detail how admitting certificates of rehabilitation and comparable documents would give rise to these problems.

[95] *See, e.g.*, 18 U.S.C. §§ 5032, 5038 (broadened authorizations for prosecuting juveniles as adults and maintaining records on juvenile offenders enacted by Comprehensive Crime Control Act).

Pendency of appeal. The final subsection of the proposed rule perpetuates current Rule 609(e), which provides that the pendency of an appeal from a conviction does not limit the conviction's admission, but that evidence of the pendency of the appeal is admissible.

CONCLUSION

Under existing law, the most important evidence of the character and disposition of defendants and other persons involved in criminal cases is frequently withheld from the trier. This practice is at odds with normal canons of judgment in extra-judicial contexts, with the practice of considering a defendant's criminal history in pre-trial and post-trial proceedings, and with the law of many other democracies. By concealing an important type of relevant evidence from the ultimate decisionmaker on the question of guilt or innocence, the existing rules in this area disserve the search for truth. The manifest tension that exists between the conventional presumption against admitting evidence of prior offenses and the desire to do justice has also resulted in gross distortions in the law, producing a hodgepodge of ill-conceived exceptions and qualifications to the general rule of exclusion.

The most plainly warranted reform in this area would be a repeal of the rule limiting the admission at trial of evidence of prior offenses whose commission has been established by criminal convictions. The case for admitting such evidence is particularly compelling and the conventional grounds supporting the exclusion of character evidence are insubstantial where that evidence is in the form of a conviction for a crime. The Department should support an amendment to the Federal Rules of Evidence that would implement this reform—a uniform rule of admission for the record of a person's criminal convictions at trial.