# SANITIZING PRIOR CONVICTION IMPEACHMENT EVIDENCE TO REDUCE ITS PREJUDICIAL EFFECTS

James H. Gold*

## INTRODUCTION

It is a common practice in this country for a criminal defendant to be impeached through cross-examination about his[1] prior criminal convictions.[2] Typically, the prosecutor is permitted to elicit the name of the crime, the time and place of conviction, and perhaps the punishment for the crime, but he is not allowed to bring out any additional details surrounding the crime.[3] The law permits the jury to consider evidence of a defendant's prior convictions in assessing whether the defendant's character is such that he is more likely to testify untruthfully.[4] However, the jury is normally[5] not permitted to consider a defendant's prior convictions as substantive evidence of his guilt.[6] The jury may not infer that it is more likely that the defendant is guilty of the charged offense because he has committed crimes in the past.[7]

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* Visiting Instructor, University of Illinois College of Law. B.A. Grinnell College, 1972; J.D. Wayne State University, 1979. The author gratefully acknowledges the able research assistance of Daniel Shinkle, a second year law student at Indiana University.

1. To avoid the ungainly use of "he/she", "him/her", and "his/her", "he", "him", and "his" are used generically to refer to both genders.

2. *See infra* notes 31-32 and accompanying text.

3. *See* United States v. Boyce, 611 F.2d 530 (4th Cir. 1979); United States v. Harding, 525 F.2d 84, 88-89 (7th Cir. 1975); MCCORMICK ON EVIDENCE § 43, at 98 (E. Cleary ed. 1984).

4. United States v. Coats, 652 F.2d 1002 (D.C. Cir. 1981).

5. Although evidence of criminal conduct separate and distinct from the charged offense is inadmissible to show that the accused has a criminal disposition, it may be introduced in the judge's discretion to show motive, intent, identity, or a common plan. MCCORMICK ON EVIDENCE, *supra* note 3, § 190, at 558-59. It is not possible to set forth a precise formula defining when prior convictions will be admissible for one of these substantive purposes. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 404[08], at 404-45 (1982). Evidence of a defendant's prior convictions offered for non-impeachment purposes, however, is "not looked upon with favor," United States v. Back, 588 F.2d 1283, 1287 (9th Cir. 1979), and is "ordinarily inadmissible." United States v. Jamar, 561 F.2d 1103, 1106 (4th Cir. 1977). *See also* United States v. Jackson, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979); Gustafson v. State, 267 Ark. 278, 286, 590 S.W.2d 853, 858 (1979), *modified on other grounds*, Rhodes v. State, 276 Ark. 203, 634 S.W.2d 107 (1982); State v. Kern, 307 N.W.2d 22, 26 (Iowa 1981). A prior conviction will not be admissible as substantive evidence of guilt merely because it is similar to the charged offense. Crammer v. State, 391 So. 2d 803, 804 (Fla. Dist. Ct. App. 1980); Worthen v. State, 42 Md. App. 20, 38, 399 A.2d 272, 282 (1979); People v. Major, 407 Mich. 394, 396, 285 N.W.2d 660, 662 (1979).

6. *Coats*, 652 F.2d 1002.

7. *Id.* The law prohibits the jury from considering a defendant's prior convictions as substantive evidence of his guilt, not because such evidence lacks relevance, but because of the danger that it will be given too much weight by the jury and thereby deny the defendant a fair opportunity to defend against the charged offense. Michelson v. United States, 335 U.S. 469, 475-76 (1948). *See*

Therefore, when a defendant's prior convictions are introduced for impeachment purposes, the jury will be instructed to limit its consideration of the convictions to the issue of credibility.[8]

Despite its widespread use, the admission of a defendant's prior convictions for impeachment purposes has been the target of frequent criticism. Critics contend that a defendant's criminal record proves little about his veracity as a witness, particularly when the prior criminal offense did not involve an element of untruthfulness.[9] They have also vigorously argued that the introduction of a defendant's prior convictions creates a great likelihood of prejudice.[10] Many critics are skeptical of the jury's ability to adhere to an instruction permitting the jury to infer from the defendant's criminal record that it is likely he lied on the stand, but forbidding the jury from inferring that it is likely he committed the charged offense.[11] Because of the perception that evidence of a defendant's prior convictions significantly damages his chances for acquittal, a defendant will often choose not to testify in order to keep his criminal record from coming before the jury.[12] Thus, critics charge that the prior conviction impeachment rule impedes the jury's truth-finding function by frequently preventing the jury from hearing the defendant's side of the case.[13]

It is widely acknowledged that the danger of unfair prejudice is greatest when the impeaching crime is similar to the charged offense. Chief Justice Warren Burger, while a judge on the United States Court of Appeals, wrote in an oft-cited opinion that such prior convictions create "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this

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*also* People v. Huff, 101 Mich. App. 232, 244, 300 N.W.2d 525, 531 (Ct. App. 1980), *rev'd on other grounds*, 411 Mich. 974, 308 N.W.2d 110 (1981).

8. Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 912 (1980).

9. Collins, *The Changing Luck of Montgomery: Impeachment of the Accused by Prior Convictions*, 63 ILL. B.J. 614, 616-17 (1975); Nichol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 406-07 (1980); Spector, *Rule 609: A Last Plea For Its Withdrawal*, 32 OKLA. L. REV. 334, 343-44, 349-51 (1979); Note, *An Eclectic Approach to Impeachment by Prior Convictions*, 5 U. MICH. J.L. REF. 522, 524 (1972).

10. Krauser, *The Use of Prior Convictions as Credibility Evidence: A Proposal for Pennsylvania*, 46 Temp. L.Q. 291, 294-95 (1973); Nichol, *supra* note 9, at 402-05, Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247, 249-50 (1970); Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 217-19 (1968).

A defendant is always "prejudiced" when he is impeached with his prior convictions in the sense that the likelihood of a guilty verdict increases when the defendant's credibility is weakened. For purposes of this Article, however, "prejudice" refers to the greater likelihood of conviction that results when the jury considers a defendant's prior convictions for an *impermissible* purpose.

11. Nichol, *supra* note 9, at 403; Spector, *supra* note 9, at 347; Surratt, *supra* note 8, at 912. In a random, national survey, 43% of the trial judges and 98% of the criminal defense attorneys who responded believed that jurors were unable to follow instructions limiting their consideration of a defendant's prior convictions. Note, *supra* note 10, at 218. All practicing lawyers know that the naive assumption that prejudicial effects can be overcome by instructions to the jury is an unmitigated fiction. Krulewitch v. United States, 336 U.S. 440, 453 (1948) (Jackson, J., concurring).

12. One study showed that criminal defendants without prior convictions testified 91% of the time while only 74% of those with a criminal record elected to take the stand. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 146 (1966).

13. Collins, *supra* note 9, at 618; Jones, *Convicting the Innocent—Revisited: A Remedy Afforded by Federal Rule 609*, 38 J. MO. B. 168, 170 (1982); Spector, *supra* note 10, at 250.

time.' "[14]

Most of the proposed reforms of the prior conviction impeachment rule have defined situations in which a prior conviction would be totally inadmissible to impeach a criminal defendant.[15] The only one of those reforms to be widely adopted, requiring the trial judge to suppress a criminal record if he determines that its prejudicial impact would outweigh its probative value, has generally proven to be ineffective in alleviating the problems perceived in the use of prior conviction impeachment evidence.[16] Commentators have paid less attention to the possibility of reducing the prejudicial effect of such evidence by limiting the scope of the information presented to the jury about each prior conviction.

Three appellate courts, however, have recently endorsed an impeachment procedure in which the jury is informed that the defendant was previously convicted of a felony, without the specific felony being identified.[17] Under this procedure, known as "sanitization,"[18] the prosecution is prohibited from eliciting or presenting any information except that the defendant was previously convicted of an unnamed crime. This Article evaluates the merits of sanitization and addresses specific issues with respect to the application and adoption of a sanitization rule. It concludes that sanitization can substantially reduce a defendant's risk of prejudice while enabling the prosecution to effectively impeach a defendant's credibility.[19] Its use is therefore recommended in jurisdictions which allow impeachment with prior convictions.

## I. HISTORICAL BACKGROUND

### *A. The Rule Permitting Impeachment With Prior Convictions*

The practice of impeaching a witness with his prior convictions had its genesis in the common law rule prohibiting a person who had been convicted of an infamous crime from testifying in court.[20] The rationale underlying the rule was that a person who had engaged in such criminal conduct was unworthy of belief.[21] States began abandoning conviction of a crime as a basis for testimonial disqualification in the second half of the nineteenth century, and by 1924 nearly every jurisdiction had done so.[22] Statutes removing

14. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). *See also* Nichol, *supra* note 9, at 402; Surratt, *supra* note 8, at 936.

15. *See infra* notes 24-28 and accompanying text.

16. *See infra* notes 30-33 and accompanying text.

17. State v. Geyer, 194 Conn. 1, 480 A.2d 489 (1984); Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984); State v. McClure, 298 Or. 336, 692 P.2d 579 (1984).

18. This phrase is used in People v. Barrick, 33 Cal. 3d 115, 120, 654 P.2d 1243, 1245, 187 Cal. Rptr. 716, 718 (1982).

19. Although sanitization can be employed whenever *any* witness is impeached with a prior conviction, impeachment with unsanitized prior convictions poses a greater threat of prejudice to a criminal defendant than to any other witness. *See* Gilbert, *Impeachment by Prior Convictions—Recent Developments*, 29 FED'N INS. COUNS. Q. 69, 72, 85 (1978). This Article therefore focuses on the question of whether a criminal defendant's prior convictions should be sanitized.

20. MCCORMICK ON EVIDENCE, *supra* note 3, § 43, at 93. Crimes considered to be infamous included any felony and misdemeanors involving dishonesty or obstruction of justice. *Id.*

21. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 174 (1940).

22. *Id.* at 174-75; Williams v. United States, 3 F.2d 129, 130 (8th Cir. 1924).

this incompetency typically provided that evidence of the previously disqualifying conviction would thereafter be admissible to impeach the witness' credibility.[23]

As impeachment of a defendant with his prior convictions became a common practice, critics of this procedure responded with a number of proposals to limit the admissibility of such evidence. Some commentators have advocated a blanket prohibition of impeachment with a defendant's prior convictions.[24] Others would not allow a defendant to be impeached with his prior convictions unless the defendant brought forth evidence in support of his credibility.[25] Another approach would allow impeachment only when the prior conviction directly involved dishonesty or false statement.[26] A proposal that would prohibit impeachment with any prior conviction similar to the charged offense has also been considered.[27] Finally, several commentators suggest that the trial judge be given discretion to exclude prior convictions in cases where the judge determines that the potential prejudicial effect of such evidence outweighs its probative value.[28]

Efforts to implement these reforms have been only moderately successful. Until 1965, prosecutors in the "overwhelming majority" of jurisdictions had the unquestioned right to impeach a defendant with his prior convictions.[29] However, in *Luck v. United States*,[30] the United States Court of Appeals for the D.C. Circuit interpreted the relevant District of Columbia statute to vest the trial judge with discretion to exclude prior convictions offered for impeachment purposes. A number of jurisdictions, through either legislative or judicial action, have subsequently empowered trial judges with the discretion to exclude at least some types of prior convictions.[31] None of the other proposed reforms noted above have been adopted

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23. Ladd, *supra* note 21, at 174-75.

24. *Id.* at 183, 191; Nichol, *supra* note 9, at 409; Spector, *supra* note 9, at 343-44; Note, *supra* note 10, at 219; Note, *Impeachment by Prior Convictions: Procedural Problems, Substantive Dilemmas, and Constitutional Infirmities*, 4 CRIM. JUST. J. 223 (1980).

25. UNIF. R. EVID. 21 (1953) (superseded 1974); Krauser, *supra* note 10, at 319; Note, *supra* note 9, at 536.

26. Collins, *supra* note 9, at 619; Krauser, *supra* note 10, at 319; Ladd, *supra* note 21, at 191; Note, *supra* note 9, at 536.

27. *See* McGowan, *Impeachment of Criminal Defendants By Prior Convictions*, 1970 LAW & SOC. ORD. 1, 10.

28. Gilbert, *supra* note 19, at 74-78; Jones, *supra* note 13; Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DE PAUL L. REV. 1, 23 (1968); Note, *Impeaching the Accused by His Prior Crimes—A New Approach to an Old Problem*, 19 HASTINGS L.J. 919 (1968).

29. 120 CONG. REC. 1414 (1974) (statement by Rep. Hogan).

30. 348 F.2d 763 (D.C. Cir. 1965).

31. For instance, under Federal Rule of Evidence 609, enacted in 1975, a prior conviction not involving dishonesty or false statement is to be admitted only if the judge determines that the probative value of the prior conviction outweighs its prejudicial effect to the defendant. The rule has been interpreted as providing for the automatic admission of prior convictions which do involve dishonesty or false statement. United States v. Wong, 703 F.2d 65, 68 (3rd Cir.), *cert. denied*, 464 U.S. 842 (1983). Some jurisdictions follow rules virtually identical to Federal Rule 609. *See* State v. Morgan, 541 S.W.2d 385 (Tenn. 1976); ARK. STAT. ANN. § 28-1001, Rule 609 (1979); OKLA. STAT. ANN. tit. 12, § 2609 (West 1980); OR. REV. STAT. § 40.355, Rule 609 (1983); DEL. UNIF. R. EVID. 609; MINN. R. EVID. 609; N.M. R. EVID. 609; N.D. EVID. R. 609; UTAH R. EVID. 609; WASH. R. EVID. 609; WYO. R. EVID. 609.

Other states give trial judges discretion to exclude any prior conviction, even if it did involve dishonesty or false statement. *See* People v. Castro, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985); People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972); State v. Marquez, 160

by more than a handful of states.[32]

The discretionary balancing approach has not proven to be an effective means of reducing the prejudicial impact of impeachment with prior convictions. In most jurisdictions following such an approach, it is easy to find appellate court opinions upholding the discretionary admission of prior convictions under circumstances in which suppression would seem most appropriate—when the impeaching crime did not involve false statement and was identical or substantially similar to the charged offense.[33] Thus, despite the

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Conn. 47, 273 A.2d 689 (1970); People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971); Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984); Commonwealth v. Chase, 372 Mass. 736, 750, 363 N.E.2d 1105, 1114-15 (1977); Edwards v. State, 90 Nev. 255, 524 P.2d 328 (1974); State v. Cote, 108 N.H. 290, 235 A.2d 111 (1967), *cert. denied*, 390 U.S. 1025 (1968); State v. Sands, 76 N.J. 127, 386 A.2d 378 (1978); People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974); Merritt v. Grant, 285 S.C. 150, 328 S.E.2d 346 (1985); S.D. CODIFIED LAWS ANN. § 19-14-12 (1979); WIS. STAT. ANN. § 906.09 (West 1985); ARIZ. R. EVID. 609; IDAHO R. EVID. 609; ME. R. EVID. 609; MICH. R. EVID. 609; TEX. R. EVID. 609; VT. R. EVID. 609.

In fourteen states, most prior convictions are automatically admissible for impeachment purposes. *See* Dickerson v. State, 46 Ala. App. 183, 239 So. 2d 325 (1970); People v. Yeager, 182 Colo. 397, 513 P.2d 1057 (1973); Lewis v. State, 243 Ga. 443, 254 S.E.2d 830 (1979); Ashton v. Anderson, 258 Ind. 51, 57, 61, 279 N.E.2d 210, 213, 216 (1972); Thornton v. State, 313 So.2d 16 (Miss. 1975); State v. Giffin, 640 S.W.2d 128 (Mo. 1982); State v. Aptt, 441 A.2d 824 (R.I. 1982); Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971); ALA. CODE § 12-21-162 (1977); COLO. REV. STAT. § 13-90-101 (1974); FLA. STAT. ANN. § 90.610 (West 1979); IND. CODE ANN. § 31-1-14-14 (West 1983); LA. REV. STAT. ANN. § 15:495 (West 1981); MD. CTS. & JUD. PROC. CODE ANN. § 10-905 (1984); MISS. CODE ANN. § 13-1-11 (1972); MO. ANN. STAT. § 491.050 (Vernon Supp. 1985); NEB. REV. STAT. § 27-609 (1979); R.I. GEN. LAWS § 9-17-15 (1969); VA. CODE § 19.2-269 (1983); N.C. R. EVID. 609; OHIO R. EVID. 609.

32. In Montana, prior convictions are never admissible for impeachment purposes. MONT. R. EVID. 609. In West Virginia, a defendant may normally only be impeached with prior convictions for perjury or false swearing. If the defendant places his character in issue, however, he may be impeached with any prior criminal conviction. State v. McAboy, 236 S.E.2d 431 (W. Va. 1977). In two states, only prior convictions which involve dishonesty or false statement are admissible to impeach, and they are admissible only if the defendant has introduced evidence solely for the purpose of supporting his credibility. *See* KAN. STAT. ANN. § 60-421 (1983); HAWAII R. EVID. 609. Three states do not admit a defendant's prior convictions unless they involved dishonesty or false statement, and then only in the judge's discretion. *See* Commonwealth v. Roots, 482 Pa. 33, 393 A.2d 364 (1978); ALASKA R. EVID. 609; IOWA R. EVID. 609. The California Supreme Court has severely limited trial court discretion to admit prior convictions. Prosecutors may never introduce convictions which are identical to the charged offense; they may introduce similar prior offenses only sparingly. People v. Barrick, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982). Additionally, a prior conviction may not be admitted unless it contains an element of deceit or theft. *Id.*

33. For each citation, the charged offense, followed by the impeaching crime, is listed parenthetically. United States v. Charmley, 764 F.2d 675 (9th Cir. 1985) (robbery/robbery); United States v. George, 752 F.2d 749 (1st Cir. 1985) (conspiracy to possess amphetamine/manufacture of amphetamine); United States v. Washington, 746 F.2d 104 (2nd Cir. 1984) (robbery/robbery); United States v. DeBordez, 741 F.2d 182 (8th Cir.) (robbery/robbery), *cert. denied*, 105 S.Ct. 599 (1984); United States v. Booker, 706 F.2d 860 (8th Cir.) (firearms offense/firearms offense), *cert. denied*, 464 U.S. 917 (1983); United States v. Mehrmanesh, 682 F.2d 1303 (9th Cir. 1982) (distribution of heroin/importation of hashish); United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) (robbery/robbery); United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980) (distribution of narcotics/distribution of narcotics); United States v. Langston, 576 F.2d 1138 (5th Cir.) (robbery/robbery), *cert. denied*, 439 U.S. 932 (1978); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978) (burglary/burglary).

State v. Perkins, 141 Ariz. 278, 686 P.2d 1248 (1984) (armed robbery/armed robbery); State v. Sullivan, 130 Ariz. 213, 635 P.2d 501 (1981) (sale of narcotics/possession of narcotics); Williams v. State, 6 Ark. App. 410, 644 S.W.2d 608 (1982) (rape/rape); Washington v. State, 6 Ark. App. 85, 638 S.W.2d 690 (1982) (murder/murder); State v. Binet, 192 Conn. 618, 473 A.2d 1200 (1984) (robbery/robbery); Baptist v. United States, 466 A.2d 452 (D.C. App. 1983) (attempted robbery/robbery); People v. Hancock, 110 Ill. App. 3d 953, 443 N.E.2d 226 (1982) (armed robbery/armed robbery); People v. Medreno, 99 Ill. App. 3d 449, 425 N.E.2d 588 (1981) (rape/rape); State v. Latham, 366 N.W.2d 181 (Iowa 1985) (theft/armed robbery); State v. Hanscome, 459 A.2d

requirement that trial judges weigh the prejudicial effect and probative value of prior convictions offered for impeachment purposes, such evidence is being admitted in most jurisdictions under nearly all circumstances. The concerns voiced about the prejudice suffered by a criminal defendant when he is impeached with his criminal record remain largely unanswered.

### *B. The Practice of Specifically Identifying the Prior Conviction*

The practice of impeaching a witness by specifically identifying his prior convictions followed naturally from the procedure which had been used in the nineteenth century to disqualify convicted felons from testifying. Under the then prevailing rule, incompetency could be proven only by producing the record of conviction, rather than by cross-examination of the proffered witness.[34] When prior convictions became admissible to impeach, rather than disqualify, many jurisdictions continued to hold that the only proper method of proof was to introduce the record of conviction.[35] Inevitably, this record specifically identified the witness' prior conviction.

Cross-examination, however, soon came to be viewed as a reliable and convenient means of showing a witness' prior convictions. By the turn of the century, most states had enacted statutes authorizing proof of prior convictions either by cross-examination of the witness being impeached or by production of the official record.[36] As cross-examination became the customary method of prior conviction impeachment,[37] some courts began considering whether it was proper to specifically identify the impeaching crime. For example, in 1922, the Supreme Court of Utah held that the jury should be informed of the specific nature of a witness' prior convictions because some crimes affect credibility more than others.[38] One year later the Supreme

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569 (Me. 1983) (burglary/burglary); Commonwealth v. Carter, 383 Mass. 873, 417 N.E.2d 438 (1981) (assault with intent to commit rape/statutory rape); People v. Stokes, 134 Mich. App. 146, 350 N.W.2d 767 (1984) (assault/assault); People v. Ward, 133 Mich. App. 344, 351 N.W.2d 208 (1984) (possession of narcotics/possession and distribution of narcotics); State v. Lloyd, 345 N.W.2d 240 (Minn. 1984) (murder/murder); State v. Fischer, 354 N.W.2d 29 (Minn. App. 1984) (assault/assault); Hicks v. State, 95 Nev. 503, 596 P.2d 505 (1979) (armed robbery/robbery); State v. Sullivan, 121 N.H. 301, 428 A.2d 1247 (1981) (assault/assault); State v. Sands, 76 N.J. 127, 386 A.2d 378 (1978) (murder/atrocious assault and battery); People v. Cherry, 106 A.D.2d 458, 482 N.Y.S.2d 551 (1984) (rape/assault with intent to commit rape); State v. Eugene, 340 N.W.2d 18 (N.D. 1983); (burglary/burglary); Long v. State, 654 P.2d 647 (Okla. Crim. App. 1982) (robbery/armed robbery); State v. Carden, 58 Or. App. 655, 650 P.2d 97 (1982) (burglary/burglary); Commonwealth v. Toomey, 321 Pa. Super. Ct. 281, 468 A.2d 479 (1983) (burglary and theft/burglary); Commonwealth v. Gonce, 320 Pa. Super. Ct. 19, 466 A.2d 1039 (1983) (robbery/robbery); State v. Lilly, 278 S.C. 499, 299 S.E.2d 329 (1983) (possession of marijuana/possession of marijuana); State v. Ford, 328 N.W.2d 263 (S.D. 1982) (distribution of narcotics/distribution of narcotics); State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984) (murder/manslaughter); State v. Boucher, 144 Vt. 276, 478 A.2d 218 (1984) (assault and robbery/larceny); State v. Anderson, 31 Wash. App. 352, 641 P.2d 728 (1982) (murder/murder); State v. Jobe, 30 Wash. App. 331, 633 P.2d 1349 (1981)(assault/assault).

34. S. GREENLEAF, LAW OF EVIDENCE § 375 (16th ed. 1899).

35. *E.g.*, People v. Reinhart, 39 Cal. 449 (1870); Hall v. Brown, 30 Conn. 551 (1862); Johnson v. State, 48 Ga. 116 (1873); Bartholemew v. People, 104 Ill. 601 (1882); Peoples v. State, 33 So. 289 (Miss. 1903); State v. Douglass, 81 Mo. 231 (1883).

36. S. GREENLEAF, *supra* note 34, § 461b, at 579.

37. *See generally* State v. Coloff, 125 Mont. 31, 36, 231 P.2d 343, 345 (1951) (lists earlier cases from several states noting that prior convictions are normally proved by cross-examination).

38. State v. Crawford, 60 Utah 6, 12, 206 P. 717, 719 (1922). *See also* Hadley v. State, 25 Ariz.

Court of Florida held that once the witness acknowledged having previously been convicted of a crime, it was error for the prosecutor to pursue the cross-examination "to the point where the particular offense was named."[39] The court reasoned that, by showing that the impeaching crime was of a similar character to the charged offense, the prosecutor had used the impeachment rule for an "improper purpose."[40] A minority of jurisdictions continue to require all or some of a defendant's prior convictions to be sanitized.[41]

## II. THE MERITS OF SANITIZATION

### *A. Balancing Additional Prejudice and Probative Value Resulting from Identification of a Prior Conviction*

The merits of sanitization can be evaluated by balancing the additional risk of prejudice to a defendant which arises when an impeaching crime is specifically identified against the corresponding additional probative value on the issue of credibility. This author takes the position that sanitization can substantially reduce the risk of prejudice while still permitting effective impeachment of the defendant's credibility.

The identification of a defendant's prior conviction is particularly prejudicial in two situations. First, when the impeaching conviction is similar to the charged offense, jurors are prone to consider the prior conviction as substantive evidence of the defendant's guilt by drawing the impermissible inference that if he did it before he probably did it this time.[42] Second, the risk of prejudice is acute when the impeaching conviction is for a particularly reprehensible offense, such as murder or sexual assault. Jurors are likely to conclude that the defendant is an evil and dangerous person who ought to be behind bars whether or not he committed the charged offense.[43] At the very

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23, 212 P. 458 (1923); People v. Eldridge, 147 Cal. 782, 82 P. 442 (1905); State v. McBride, 231 S.W. 592 (Mo. 1921); McDaniel v. State, 8 Okla. Crim. 209, 127 P. 358 (1912).

39. Washington v. State, 86 Fla. 519, 523, 98 So. 603, 604 (1923). *See also* State v. Concord, 172 Iowa 467, 154 N.W. 763 (1915); State v. Coloff, 125 Mont. 31, 231 P.2d 343 (1951); Vanderpool v. State, 115 Neb. 94, 211 N.W. 605 (1926); State v. Gottfreedson, 24 Wash. 398, 64 P. 523 (1901); Rice v. State, 195 Wis. 181, 217 N.W. 697 (1928).

Statutes allowing proof of prior convictions by either cross-examination or by production of the judgment of conviction did not prevent courts from prohibiting a prior conviction from being specifically identified. Courts interpreted those statutes as authorizing the admission of the judgment (and therefore the identity of the prior crime) only when, on cross-examination, the defendant falsely denied that he had prior criminal convictions. State v. Coloff, 125 Mont. 31, 231 P.2d 343 (1951); Vanderpool v. State, 115 Neb. 94, 211 N.W. 605 (1926).

40. Washington v. State, 98 So. at 604.

41. State v. Geyer, 194 Conn. 1, 480 A.2d 489 (1984) (only for prior convictions involving dishonesty); Waller v. State, 395 A.2d 365 (Del. 1978) (all prior convictions); Johnson v. State, 361 So. 2d 767 (Fla. Dist. Ct. App. 1978) (all prior convictions except perjury); Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984) (all prior convictions); State v. Pitts, 212 Neb. 295, 322 N.W.2d 443 (1982) (all prior convictions); State v. McClure, 298 Or. 336, 692 P.2d 579 (1984) (only for prior convictions similar to the charged offense); McAmis v. Commonwealth, 225 Va. 419, 304 S.E.2d 2 (1983) (all prior convictions except perjury); State v. Rutchik, 116 Wis. 2d 61, 341 N.W.2d 639 (1984) (all prior convictions).

The Connecticut Supreme Court's decision in *Geyer* and the Oregon Supreme Court's decision in *McClure* are both somewhat ambiguous concerning whether sanitization is being required, or merely recommended. *See infra* note 82.

42. *See supra* note 14 and accompanying text.

43. People v. Barrick, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982); Nichol, *supra* note 9, at 397, 402; Gilbert, *supra* note 19, at 72.

least, any juror doubts about the defendant's guilt are likely to be resolved against the defendant in this situation.

In a jurisdiction utilizing sanitization, jurors will not hear testimony that a defendant's prior conviction was for conduct which was particularly reprehensible or which was similar to the charged offense. Of course, jurors might still draw impermissible inferences from evidence of a sanitized conviction by speculating about the identity of the defendant's prior crime. Nevertheless, both the frequency of such impermissible inferences and the weight given them will be less in jurisdictions employing sanitization than in those jurisdictions which, by allowing the prior conviction to be identified, provide the jury with the information directly suggesting the forbidden inferences.[44] Because sanitization makes improper consideration of prior conviction evidence more difficult, "the extraordinary prejudice that sometimes follows when the prior crime is specifically named"[45] can be reduced significantly.

Authorities have differed on the question of whether identification of a defendant's prior conviction is necessary for effective impeachment. Courts that have endorsed sanitization have argued that "[t]he mere fact that a defendant has been convicted of crime is sufficient to cast doubt on his believability."[46] Courts that have rejected sanitization have taken the view that the jury must know the nature of the prior conviction in order to intelligently

44. Some appellate courts, which provide for the discretionary admission of unsanitized prior convictions, have rejected the use of sanitization in any case based in part on their perception that the likelihood of jury speculation on the identity of a sanitized prior conviction poses too great a threat of prejudice. People v. Barrick, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982); People v. Van Dorsten, 409 Mich. 942, 298 N.W.2d 421 (1980); People v. Garth, 93 Mich. App. 308, 287 N.W.2d 216 (1979). This reasoning is unsound because sanitization does not increase the risk of prejudice that a defendant already faces with the discretionary admission of unsanitized prior convictions. Sanitization, in fact, will frequently reduce that risk.

In a jurisdiction utilizing sanitization, a defendant should always have the right to specifically identify his prior conviction if he feels that doing so would be to his advantage. *See infra* notes 87-89 and accompanying text. Because of the availability of this option, sanitization creates no prejudice to a defendant unless the prior conviction would have been suppressed had it not been sanitized. A trial judge in a jurisdiction which adopts sanitization, however, should continue to have the discretion to fully exclude evidence of a prior conviction whenever he determines that the conviction lacks sufficient impeachment value to justify the risk of prejudice created by the introduction of a sanitized prior conviction. *See infra* notes 90-100 and accompanying text. The exercise of that discretion should be subject to appellate review. *Id.* Because courts can protect defendants in individual cases by requiring prior convictions to be suppressed, rather than sanitized, courts cannot justify their refusal to allow prior convictions to ever be sanitized on the grounds that this procedure presents some risk of prejudice.

In many cases, identification of a prior conviction poses a much greater threat of prejudice than would sanitization. For instance, the Michigan Court of Appeals recently upheld the discretionary admission of an unsanitized narcotics distribution conviction to impeach a defendant charged with possession of a controlled substance with intent to deliver. People v. Ward, 133 Mich. App. 344, 355, 351 N.W.2d 208, 213 (1984). The defendant undoubtedly would have preferred to have the prior conviction sanitized because of its similarity to the charged offense. However, this procedure was not available because it had previously been rejected by Michigan courts, in part because of the perceived threat of prejudice it posed to criminal defendants. In California, the refusal to allow a defendant's prior convictions to be sanitized is less prejudicial because that state severely limits the discretionary admission of unsanitized prior convictions. *See supra* note 32.

45. State v. Geyer, 194 Conn. 1, 480 A.2d 489, 498 (1984). *See also* Nicholas v. State, 49 Wis. 2d 683, 688-89, 183 N.W.2d 11, 14 (1971).

46. Goodman v. State, 336 So. 2d 1264, 1266 (Fla. Dist. Ct. App. 1976). *See also* Williams v. State, 6 Ark. App. 410, 417-21, 644 S.W.2d 608, 611-13 (1982) (Cooper, J., dissenting).

evaluate its effect on the defendant's veracity.[47] A further analysis of this conflict follows.

Courts evaluating the impeachment value of prior convictions frequently distinguish between crimes which involve elements of dishonesty or false statement and those which do not.[48] The former group, known as *crimen falsi*, is considered to be "peculiarly probative of credibility."[49] It can therefore be argued with some force that the jury should be informed of the nature of these crimes. This can be accomplished, however, by permitting the prosecutor to simply ask the defendant if "he had been convicted of a crime which involved dishonesty or false statement."[50] This procedure enables the jury to consider the particular probative value of *crimen falsi* on the issue of credibility without introducing the additional risk of prejudice that arises when the impeaching crime is specifically identified.

Prior convictions which do not involve dishonesty lack the direct probative value on credibility of *crimen falsi*.[51] Nevertheless, most jurisdictions still consider this category of convictions to have some impeachment value.[52] The rationale is that the commission of a felony indicates a disposition to place self-interest ahead of the interests and values of society. Such self-interest, in turn, indicates a willingness to lie on the stand.[53] Thus, opponents of sanitization argue that a non-*crimen falsi* prior conviction should be identified so that the jury can consider the extent of the defendant's disregard of the law as it relates to his credibility as a witness. Any propensity to testify untruthfully, however, is adequately demonstrated through the introduction of a sanitized prior conviction. Most felonies involve conduct sufficiently anti-social to support the inference that a person willing to commit that crime will be willing to lie on the stand. Therefore, when evidence is presented that the defendant has been convicted of an unspecified felony, the suggestion is clearly made that the defendant is a person lacking respect for societal standards and therefore is more likely to testify falsely.[54]

A recent study conducted at Boston College suggests that if the prior

47. Floyd v. State, 278 Ark. 342, 349, 645 S.W.2d 690, 694 (1983) (Hickman, J., concurring); People v. Garth, 93 Mich. App. 308, 317-18, 287 N.W.2d 216, 219 (1979).

48. *E.g.*, Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); State v. Geyer, 194 Conn. 1, 480 A.2d 489, 496 (1984).

49. United States v. Wong, 703 F.2d 65, 68 (3rd Cir.) (quoting H.R. REP. No. 1597, 93d Cong., 2nd Sess. 9 (1974)), *cert. denied*, 464 U.S. 842 (1983). It is clear that perjury and fraud are *crimen falsi* and that crimes solely involving the use of force are not. Courts have reached conflicting results, however, in determining whether crimes involving the taking of property such as larceny, robbery, and burglary qualify as *crimen falsi* so as to be admissible under Federal Rule of Evidence 609 and similar state rules. *See* Note, *An Analysis of the Phrase "Dishonesty or False Statement" as Used in Rule 609*, 32 OKLA. L. REV. 427 (1979).

50. Cummings v. State, 412 So. 2d 436, 439 (Fla. Dist. Ct. App. 1982); State v. Pitts, 212 Neb. 295, 298, 322 N.W.2d 443, 444 (1982). *See also* M. GRAHAM, EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 607 (1983) (recommending this approach).

51. State v. Geyer, 194 Conn. 1, 480 A.2d 489, 497 (1984).

52. For a list of the jurisdictions permitting impeachment with non-*crimen falsi* convictions, see cases cited *supra* note 31.

53. People v. Medreno, 99 Ill. App. 3d 449, 425 N.E.2d 588, 591 (1981); State v. McClure, 298 Or. 336, 692 P.2d 579, 588 (1984).

54. If a court believes that the jury needs to be aware of the seriousness of the defendant's prior offense in order to intelligently assess his credibility, one possible solution is to allow disclosure of the sentence the defendant received or the maximum sentence permitted, or both, but not to allow disclosure of the name of the impeaching crime. Although this procedure has some appeal when the

conviction is identified, the jury is more likely to use this additional information to draw the improper inferences noted earlier than to refine its evaluation of the defendant's credibility.[55] One hundred and sixty randomly selected subjects were given a written description of the evidence in either a murder or a car theft case.[56] The only variable within each case description was the prior conviction impeachment evidence. Either no mention was made of the defendant's criminal record or the subjects were told that the defendant had a prior conviction for murder, for auto theft, or for perjury.[57] The subjects in the latter three groups were instructed to limit their consideration of the prior conviction to the issue of the defendant's credibility.[58] Each mock juror was asked whether he thought the defendant was guilty and to rate the credibility of each witness, including the defendant, on a ten-point scale.[59]

The authors concluded from the results of their study that the mock jurors were using the evidence of the type of prior conviction for the improper purpose of "help[ing] them judge the likelihood that the defendant committed the crime charged."[60] When case descriptions made no mention of the defendant's record, the conviction rate was 42.5%.[61] In those cases in which the prior conviction was the same as the charged offense, 75% of the subjects voted to convict.[62] When the impeaching crime was murder, an especially reprehensible offense, 70% voted to convict.[63] This figure remained the same whether the charged offense was murder or auto theft.[64] By contrast, only 60% voted to convict when the prior conviction was perjury.[65] If the prior conviction evidence was being used exclusively to evaluate credibility, the highest conviction rate should have resulted when perjury was the impeaching crime since it is a crime considered to be particularly probative of credibility.[66] That higher conviction rates resulted when the impeaching crime was either particularly reprehensible or identical to the charged offense suggests that identification of a prior conviction can often prejudice a criminal defendant.[67]

The Boston College study also indicates that identification of a defendant's prior conviction does not influence juror perceptions of his credibil-

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prior conviction is similar to the charged offense, its adoption is not recommended because it presents the danger that jurors will consider the sentencing information for impermissible purposes.

55. Wissler and Saks, *On the Inefficacy of Limiting Instructions—When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

56. *Id.* at 39-40.

57. *Id.* at 40.

58. *Id.*

59. *Id.* at 41.

60. *Id.* at 44.

61. *Id.* at 43.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. A prior conviction for perjury is more probative of a witness' credibility than any other crime. Johnson v. State, 361 So. 2d 767, 768 (Fla. Dist. Ct. App. 1978). *See also* State v. McAboy, 236 S.E.2d 431, 437 (W. Va. 1977).

67. It would be interesting to know the conviction rates that would have resulted had a group of mock jurors merely been informed that the defendant had a prior unspecified felony conviction. Unfortunately, the researchers did not attempt to obtain this information.

ity.[68] The mock jurors' ratings of the defendant's credibility did not vary "significantly" with the introduction of the different prior convictions.[69] In fact, even when there was no evidence of a prior conviction, the defendant's credibility rating did not "significantly" increase.[70] The defendant consistently rated "dramatically" lower than other witnesses on the credibility scale.[71] The investigators hypothesized that, even without evidence of a prior conviction, jurors already viewed a defendant's credibility as inherently suspect because of the defendant's obviously strong interest in presenting favorable testimony.[72] The study concluded that "evidence of prior convictions did not affect ratings of the defendant's credibility."[73]

The Boston College study provides some empirical evidence to support the intuitive argument, advanced by some courts (and this writer), that the risk of prejudice from specific identification of prior convictions outweighs any additional probative value on the issue of the defendant's credibility as a witness. Judge John C. Godbold of the Court of Appeals for the Fifth Circuit forcefully summarized this view in *Bendelow v. United States*[74] when he dissented from the majority's holding that it was proper to cross-examine a defendant being tried for car theft about his prior conviction for the same offense. In arguing that the impeaching conviction should have been sanitized, Judge Godbold wrote that "[t]he difference between lack of credibility as a repetitive felon and lack of credibility as a repetitive car thief was negligible to the prosecution, catastrophic to the accused."[75]

### *B. Advantages of Sanitization Over the Discretionary Balancing Approach*

Sanitization has several distinct advantages over the discretionary balancing approach currently being used in most jurisdictions under which the judge decides to either suppress or fully admit a prior conviction. Because of the deference commonly accorded trial court rulings on the admissibility of prior convictions,[76] consistency and predictability are sacrificed under the balancing approach.[77] One trial judge might suppress evidence of a defendant's criminal record, while another judge might find such evidence admissi-

68. Wissler & Saks, *supra* note 55, at 40-41.

69. *Id.* at 41. On a ten point scale, the defendant's average credibility rating was 2.95 when a prior conviction for perjury was introduced, 3.05 when a prior murder conviction was introduced, and 3.80 when a prior auto theft conviction was introduced. *Id.* at 40.

70. *Id.* at 41. The defendant's average credibility rating was 3.70 when no mention was made of a criminal record. *Id.* at 40. In the mock murder case, the defendant actually received a higher credibility rating when a prior auto theft conviction was introduced than when no evidence of a record was introduced. *Id.* at 40. The authors hypothesized that jurors tend to discount a prior conviction for a relatively minor crime when the defendant is charged with a serious offense. *Id.* at 44.

71. *Id.* at 43. The defendant's average credibility rating in the auto theft and murder cases was 3.58 and 3.18, respectively. By contrast, the credibility ratings of the other witnesses in each case were 7.52 and 7.30. *Id.* at 41.

72. *Id.* at 43. *See also* Nichol, *supra* note 9, at 408; Note, *supra* note 9, at 531.

73. Wissler & Saks, *supra* note 55, at 41.

74. 418 F.2d 42 (5th Cir. 1969), *cert. denied*, 400 U.S. 967 (1970).

75. 418 F.2d at 53 (Godbold, J., concurring in part and dissenting in part).

76. *See, e.g.*, State v. McClure, 298 Or. 336, 692 P.2d 579, 589 (1984).

77. *Id.* at 344, 692 P.2d at 587; Collins, *supra* note 9, at 618.

ble under very similar circumstances.[78] Although trial court discretion to fully exclude evidence of a prior conviction should continue in jurisdictions which adopt sanitization,[79] such dramatically contrasting results would be reduced. Because sanitization reduces the risk of prejudice to a criminal defendant, there are likely to be fewer instances in which a judge would consider exclusion than in a jurisdiction in which sanitization was not an option. In addition, when contrary rulings are made in a jurisdiction utilizing sanitization, the contrast will not be as extreme as in a jurisdiction in which a prior conviction will either be entirely suppressed or admitted with full identification (and all the attendant risks of prejudice). Thus, sanitization should promote greater uniformity in the law.

Another drawback to the traditional discretionary approach is that a defendant receives a windfall when a judge suppresses a prior conviction which has some relevance to credibility. For instance, in a robbery case a trial judge might exclude evidence of the defendant's prior conviction for robbery because of its similarity to the charged offense. If the defendant had no other criminal record, he would appear to the jury as a person with an unblemished past. If another defendant was on trial for a different offense, such as arson, his prior conviction for robbery would likely be admissible impeachment evidence. Judges frequently admit prior convictions which are similar to the charged offense, despite their acknowledged prejudicial impact, because suppression gives an unjustified trial advantage to the criminal who specializes in one crime.[80] If, on the other hand, a prior conviction is sanitized rather than suppressed, the defendant will not receive an undeserved benefit. The prosecution is still able to impeach the defendant's credibility with his criminal record. At the same time, sanitization decreases the likelihood that a conviction will result from an improper use of the defendant's record.

## III. APPLICATION OF A SANITIZATION RULE

### *A. Should All Prior Convictions Be Sanitized?*

The approach traditionally taken by jurisdictions that have adopted sanitization is to prohibit the prosecution from identifying any prior conviction offered to impeach a criminal defendant.[81] However, both the Connecticut and Oregon Supreme Courts have recently endorsed sanitization procedures which apply to only a limited category of prior convictions: non-*crimen falsi* in Connecticut and prior offenses similar to the charged offense

78. *McClure*, 298 Or. at 346, 692 P.2d at 589.

79. *See infra* notes 90-100 and accompanying text.

80. *E.g.*, United States v. Lewis, 626 F.2d 940, 950-51 (D.C. Cir. 1980); State v. Carden, 58 Or. App. 655, 650 P.2d 97 (1982).

81. *E.g.*, Waller v. State, 395 A.2d 365 (Del. 1978); Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984); State v. Kallos, 193 Neb. 113, 225 N.W.2d 553 (1975); State v. Rutchik, 116 Wis. 2d 61, 341 N.W.2d 639 (1984).

Florida and Virginia make one exception to their rules requiring all of the defendant's prior convictions to be sanitized: the prosecution is permitted to identify a defendant's prior conviction for perjury. Johnson v. State, 361 So. 2d 767 (Fla. Dist. Ct. App. 1978); Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

in Oregon.[82] These rulings raise the issue of whether sanitization should be required for all of a defendant's prior convictions.

In approving the use of sanitization for non-*crimen falsi* prior convictions, the Connecticut Supreme Court noted that this procedure allows the defendant's credibility to be "sufficiently impugned" while avoiding the "extraordinary prejudice" that can result when the prior crime is specifically named.[83] Because sanitization accomplishes those same objectives when the prior conviction is a *crimen falsi*, its use should not be confined to non-*crimen falsi* convictions. When a defendant is impeached with an unsanitized prior conviction which is similar to the charged offense, he faces a substantial risk of prejudice whether or not it is a *crimen falsi* prior conviction. If the prosecutor, instead of specifically identifying a *crimen falsi* prior conviction, is only permitted to ask the defendant if he had been convicted of a "crime involving dishonesty or false statement", that risk of prejudice is reduced while the special impeachment value of a *crimen falsi* conviction is still conveyed to the jury.[84]

There is also no sound reason for employing sanitization only when the impeaching crime is similar to the charged offense, as is the case in Oregon. Although the need for sanitization may be greatest in this situation, sanitization also alleviates the risk of prejudice which results when the defendant is impeached with a dissimilar, but serious prior offense.[85] The introduction of a sanitized prior conviction carries enough of a negative connotation to effectively impeach a defendant,[86] and this effectiveness is unaffected by the degree of similarity between the impeaching crime and the charged offense.

The arguments in support of sanitization do not lose their force when the prior crime is a *crimen falsi* or is dissimilar to the charged offense. Because it is never necessary to specifically identify a defendant's prior convictions in order to effectively impeach his credibility, and because such identification can often substantially prejudice the defendant, the prosecution should be required to sanitize any prior conviction offered for impeachment purposes.

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82. In State v. Geyer, 194 Conn. 1, 480 A.2d 489 (1984), the Connecticut Supreme Court reversed the defendant's drug possession conviction because of the trial court's failure to sanitize the defendant's three prior narcotics convictions. In so holding, the court stated that the "prudent course" for trial judges would be to sanitize "prior convictions for crimes that do not reflect directly on credibility." *Id.* at 498. In State v. McClure, 298 Or. 336, 347, 692 P.2d 579, 590 (1984), the Oregon Supreme Court found no abuse of discretion in the trial court's admission of a prior conviction for rape to impeach a defendant charged with rape, but "caution[ed]" that the prosecutor should be prohibited from specifying the type of crime in future "similar crime" cases. *Id.*

The language of both the Connecticut and Oregon decisions does not clarify whether a failure to sanitize a conviction within the designated category will always be considered error. No matter what category of prior convictions a court deems appropriate for sanitization, the failure to sanitize a conviction within that category should always constitute error, rather than being scrutinized on a case-by-case basis. Because the prosecution's interest in having a defendant's prior conviction identified is always minimal, there is no need for a balancing of interests in individual cases. A *per se* rule yields uniform results and is easy to apply. Appellate courts should therefore confine their review of a failure to sanitize an appropriate conviction to a determination of whether the error committed was harmless. *E.g.*, Cunningham v. State, 239 So. 2d 21 (Fla. Dist. Ct. App. 1970).

83. *Geyer*, 480 A.2d at 498.

84. *See supra* notes 48-50 and accompanying text.

85. *See supra* notes 43-45 and accompanying text.

86. *See supra* notes 48-75 and accompanying text.

### B. *Should the Defendant Have the Option to Identify His Prior Convictions?*

Most jurisdictions utilizing sanitization give the defendant the option to identify his prior conviction if he believes that such disclosure will be beneficial.[87] However, the Supreme Court of Kentucky recently adopted a rule that prohibits both the prosecutor and the defendant from identifying a prior conviction introduced for impeachment purposes.[88] Once it is established that the defendant had previously been convicted of an unidentified felony, neither side is permitted to pursue the matter further. The Kentucky Supreme Court offered no justification for imposing sanitization of an unwilling defendant and, in fact, none appears to exist.

The state has no legitimate interest in preventing disclosure of the nature of a defendant's prior conviction. Identification of the impeaching crime does not suggest any improper inferences adverse to the prosecution. And while the jury's ability to evaluate the defendant's credibility may not be enhanced when his prior conviction is specifically named, it certainly is not hindered. On the other hand, the refusal to allow a defendant to identify his prior conviction can, under certain circumstances, significantly prejudice his chances for acquittal. For instance, a murder defendant, being impeached with a prior conviction for a relatively insignificant felony such as bigamy, larceny, or criminal mischief,[89] would probably prefer to identify his prior conviction in order to eliminate jury speculation that it was for murder or some other violent crime. The Kentucky rule does not deter such speculation because the jury is not informed of the nature of the prior felony conviction. Sanitization should only bar the prosecution from eliciting evidence identifying a defendant's prior conviction; it should not prevent the defendant from voluntarily disclosing the same information.

### C. *Should Discretion to Suppress Prior Convictions Exist in Jurisdictions Utilizing Sanitization?*

In three of the six jurisdictions that sanitize all prior convictions, the trial judge has no authority to exclude prior convictions; broad categories of crimes are *always* admissible to impeach after being sanitized.[90] The better

87. Florida and Wisconsin have explicitly held that a defendant has a right to identify any prior convictions. Goodman v. State, 336 So. 2d 1264, 1267 (Fla. Dist. Ct. App. 1976); State v. Bailey, 54 Wis. 2d 679, 689-90, 196 N.W.2d 664, 670 (1972). Other jurisdictions utilizing sanitization have not directly addressed this issue, but presumably they will recognize the same right since they only have spoken of placing limits on the prosecution, not the defendant. State v. Geyer, 194 Conn. 1, 480 A.2d 489, 493 (1984); Waller v. State, 395 A.2d 365, 366 (Del. 1978); State v. McClure, 298 Or. 336, 692 P.2d 579, 590 (1984); Harmon v. Commonwealth, 212 Va. 442, 445-46, 185 S.E.2d 48, 51 (1971). This approach is consistent with that taken by a number of non-sanitizing jurisdictions that permit a defendant to offer a brief explanation of his prior conviction. *See* MCCORMICK ON EVIDENCE, *supra* note 3, § 43, at 99.

88. Commonwealth v. Richardson, 674 S.W.2d 515, 518 (Ky. 1984). Nebraska apparently follows this same rule. *See* Latham v. State, 152 Neb. 113, 115-16, 40 N.W.2d 522, 524 (1949).

89. In Kentucky, all three of these crimes are felonies which could be admitted to impeach a defendant's credibility under the Kentucky Supreme Court's holding in *Richardson*. KY. REV. STAT. §§ 512.020, 514.030, 530.010 (1985).

90. In Florida, Nebraska, and Virginia there is no judicial discretion to exclude prior convictions. FLA. STAT. ANN. § 90.610 (West 1979) (All felonies and *crimen falsi* misdemeanors are admissible); NEB. REV. STAT. § 27-609 (1979) (All felonies and *crimen falsi* misdemeanors are

rule, however, vests the trial judge with discretionary power to fully suppress prior convictions because, even after an impeaching crime is sanitized, there are situations in which its prejudicial effect arguably outweighs its probative value. The test for admissibility does not differ significantly from the traditional balancing test employed by states that do not utilize sanitization.[91]

In balancing probative value against prejudicial effect, the judge merely takes into account any reduction in the risk of prejudice that would result from sanitization of the prior conviction. The trial judge could consider whether the nature of the charged offense increases the likelihood of jury speculation on the nature of the impeaching offense. Perhaps the more serious the charged offense, the greater the likelihood that improper speculation will result. The judge could also evaluate the extent to which the impeaching crime involves dishonesty and the extent to which it tends to demonstrate a lack of respect for societal values. In assessing these factors, the judge should have discretion to consider the circumstances surrounding the commission of the impeaching crime, and not just the crime in the abstract.

If a prior conviction is ruled admissible and then sanitized, the jury, of course, is prevented from considering the factors noted above in evaluating the impeachment value of the prior conviction. There is nothing novel, however, in allowing a judge ruling on the admissibility of a prior conviction to consider more information than is made available to the jury when the prior conviction is ultimately introduced. In the federal courts, a judge may inquire into the underlying facts and circumstances of a prior conviction in determining admissibility.[92] But in the majority of the federal circuits, the prosecutor is not permitted to present the jury with details of a prior conviction beyond the name of the crime, the time and place of conviction, and perhaps the punishment imposed.[93]

One example in which full suppression, rather than sanitization, arguably is appropriate occurs when a defendant, charged with assault, has a prior conviction for the same offense. The crime of assault does not generally involve deceit, and it is often an impulsive act committed under provo-

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admissible if the conviction or release from confinement occurred ten years or less before trial.); VA. CODE § 19.2-269 (1983) (All felonies and perjury are admissible.). One commentator has recommended that there be no discretion to exclude prior convictions in jurisdictions requiring sanitization. M. GRAHAM, *supra* note 50, at § 608.

In Kentucky, Wisconsin, and Delaware the judge has discretion to suppress, rather than sanitize, a prior conviction. Commonwealth v. Richardson, 674 S.W.2d 515, 518 (Ky. 1984); WIS. STAT. ANN. § 906.09 (West 1975); DEL. R. EVID. 609.

91. In determining the admissibility of a defendant's unsanitized prior conviction, courts frequently cite and consider five factors set forth by then Judge Burger in Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968): 1) the nature of the prior conviction; 2) the nearness or remoteness in time of the prior conviction; 3) the similarity between the past crime and the charged offense; 4) the need for the defendant's testimony to be heard; and 5) the centrality of the credibility issue. It has been observed that the latter two factors tend to cancel each other out. Surratt, *supra* note 8, at 942-45.

92. United States v. Lipscomb, 702 F.2d 1049, 1064 (D.C. Cir. 1983).

93. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 319, at 350 (1979). *See, e.g.*, United States v. Beckett, 706 F.2d 519, 520 n.1 (5th Cir. 1983); United States v. Boyce, 611 F.2d 530, 530 (4th Cir. 1979); United States v. Wolf, 561 F.2d 1376, 1381 (10th Cir. 1977); United States v. Harding, 525 F.2d 84, 88-89 (7th Cir. 1975). *But see* United States v. Bogers, 635 F.2d 749, 751 (8th Cir. 1980).

cation.[94] In addition, assault encompasses conduct that, when compared to many other felonies, does not demonstrate a significant disregard for societal values.[95] Therefore, the impeachment value of an assault conviction is considered to be low.[96] On the other hand, the admission of an assault conviction to impeach a defendant on trial for the same offense creates a risk of prejudice whether or not the prior conviction is sanitized. If the assault is specifically identified, the defendant will be prejudiced because of the assault's similarity to the charged offense. Sanitization of the conviction would create some danger of jury speculation that the unnamed crime was particularly heinous or similar to the charged offense.[97] Based on these considerations, a judge may decide that the defendant's assault conviction lacks sufficient impeachment value to justify creating the risk of prejudice. Similar analysis can be employed to determine the admissibility of other prior convictions that tend to prove little about the defendant's credibility.

Suppression may also be appropriate when a defendant has more than one prior conviction. If a defendant on trial for robbery has prior convictions for robbery, resisting arrest, forgery, and possession of marijuana, he faces a significant risk of prejudice if all four prior convictions are ruled admissible.[98] If the defendant identifies all four convictions, the jury learns that the defendant was previously convicted of another robbery. If the defendant identifies his three non-robbery convictions in order to emphasize their relatively minor nature, the jury is especially prone to speculate on the nature of the unidentified fourth conviction. If none of the impeaching crimes is identified, the defendant could be prejudiced by jury speculation that he had previously committed four particularly heinous crimes. In order to alleviate the risk of prejudice, the judge could order the suppression of either the robbery conviction or the other three convictions. If the robbery conviction is excluded, the defendant would still be subject to impeachment with forgery, a *crimen falsi*.[99] Although the suppression of a prior conviction is likely to be a relatively rare occurrence in jurisdictions utilizing sanitization,[100] courts should have the discretion to take such action when it is warranted.

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94. *Gordon*, 383 F.2d at 940.

95. In Florida, aggravated assault is a felony and is therefore automatically admissible to impeach. FLA. STAT. ANN. § 784.021 (West 1976). The crime can be committed by pointing a firearm at an antagonist even if the weapon is never fired. Blanton v. State, 388 So. 2d 1271 (Fla. Dist. Ct. App. 1980).

96. *Gordon*, 383 F.2d at 940; *McClure*, 692 P.2d at 589.

97. People v. Rollo, 20 Cal. 3d 109, 119, 569 P.2d 771, 776, 141 Cal. Rptr. 177, 182 (1977).

98. This scenario closely parallels the facts of People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).

99. The threat of prejudice posed by multiple prior convictions is not an issue in Kentucky because the prosecutor is normally limited to introducing *one* sanitized prior conviction. *See* Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984); Cowan v. Commonwealth, 407 S.W.2d 695 (Ky. 1966). Most jurisdictions that have adopted sanitization require the defendant to indicate the number of prior convictions he has. *E.g.*, Sneed v. State, 397 So. 2d 931 (Fla. Dist. Ct. App. 1981); Sadoski v. Commonwealth, 219 Va. 1069, 254 S.E.2d 100 (1979).

100. Because sanitization reduces the risk of prejudice to a defendant, his criminal record will usually be admissible. For instance, because a prior conviction for rape, robbery, or burglary demonstrates a strong willingness to place self-interest above societal values and the rights of others, the conviction's relevance to the issue of credibility will normally outweigh the risk of prejudice created by the introduction of a sanitized prior conviction.

## IV. ADOPTING A SANITIZATION RULE

In many jurisdictions the legislature, rather than the judiciary, promulgated the rules regarding prior conviction impeachment evidence.[101] Therefore, the question arises whether there are any statutory impediments to judicial adoption of a sanitization rule.

In those jurisdictions where the legislature has authorized judicial discretion to either suppress or fully admit prior convictions, courts should be free to require sanitization of those same convictions.[102] For instance, a trial judge could rule that, unless a particular prior conviction was sanitized, it would be inadmissible because its prejudicial effect would outweigh its probative value if it was fully identified before the jury. Similarly, an appellate court could promulgate a sanitization rule by holding that the failure to sanitize a prior conviction, or a particular category of prior convictions, *always* constitutes an abuse of discretion.[103]

Judicial implementation of sanitization is more problematic when legislative action has denied courts the discretion to exclude prior convictions. For example, Federal Rule of Evidence 609(a), enacted by Congress, provides that evidence that a witness "has been convicted of a crime *shall* be admitted" for impeachment purposes if the crime involved dishonesty or false statement.[104] The rule is commonly construed to entitle the prosecutor to specifically identify a defendant's prior convictions.[105] However, one federal district court has interpreted this language in a manner which would allow judicial discretion to sanitize *crimen falsi* prior convictions.[106] In ruling that a defendant charged with mail fraud could be impeached with evidence that he had prior felony convictions "involving fraud," but not with evidence that the felonies were for *mail* fraud, the court stated:

> Neither Rule 609 nor any other . . . defines the scope of the evidence to be received, once a determination has been made that the prior conviction involved dishonesty or false statement. "[E]vidence that he has been convicted of a crime" shall be admitted, according to the rule. It seems to me that discretion is thereby left in the judge to decide the range of that evidence.[107]

Thus, authority exists to support the argument that a statute which uses language similar to Federal Rule 609(a), mandating the admission of prior

101. *See supra* notes 31-32.

102. The fact that many statutes authorize proof of prior convictions (when admitted), either by cross-examination or introduction of the official record, should not bar judicial implementation of sanitization even though the official record invariably identifies the prior conviction. *See supra* note 39.

103. That is what the Oregon Supreme Court appears to have done with respect to prior convictions which are similar to the charged offense when it "caution[ed]" that such convictions should not be identified. State v. McClure, 298 Or. 336, 692 P.2d 579, 590 (1984). *See also* M. GRAHAM, FEDERAL RULES OF EVIDENCE § 609.6, at 504-05 (1981).

104. FED. R. EVID. 609(a) (emphasis added). This rule has been widely interpreted as providing for the automatic admission of *crimen falsi* prior convictions. *See supra* note 31 and accompanying text.

105. *See* the cases cited *supra* note 93.

106. United States v. Phillips, 488 F. Supp. 508 (W.D. Mo. 1980), *modified on other grounds*, 674 F.2d 647 (8th Cir. 1982).

107. 488 F. Supp. at 513.

convictions, does not preclude judicial adoption of a sanitization rule.[108] Such a reform, however, would fly in the face of the traditional application of Federal Rule 609 and similar statutes.[109]

## CONCLUSION

Sanitization does not eliminate the risk that jurors will find a defendant guilty because they considered his prior convictions for an improper purpose. In addition, sanitization is not feasible when a defendant's credibility is impeached with evidence of prior criminal conduct that did not result in a conviction.[110] Therefore, adoption of a sanitization rule will not end the debate over whether impeachment with a defendant's prior crimes should be prohibited altogether. However, because sanitization can substantially reduce a defendant's risk of prejudice while still permitting effective impeachment of his credibility, adoption of a sanitization rule would constitute a significant improvement over the practice currently prevailing in most jurisdictions. Therefore, prosecutors should be prohibited from specifically identifying any of a criminal defendant's prior convictions offered for impeachment purposes. The defendant should have the option of identifying any such convictions, and the trial judge should have the discretion to fully suppress a prior conviction when he determines that its prejudicial impact, even after sanitization, would outweigh its probative value. Adoption of these procedures for sanitizing prior convictions will provide practical support for the principle that an accused should be convicted, if at all, based on evidence showing him to be guilty of the charged offense, and not merely because he has committed other crimes in the past.

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108. A number of state prior conviction impeachment statutes use language similar or identical to that considered in *Phillips*. *E.g.*, ARK. STAT. ANN. § 28-1001, Rule 609 (1979); LA. REV. STAT. ANN. § 15:495 (West 1981).

109. It should be noted that in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), the court overturned the established interpretation of a prior conviction impeachment statute when it ruled that under the statute trial judges were empowered with the discretion to exclude prior convictions. *Compare* Watson v. United States, 234 F.2d 42 (D.C. Cir. 1956) *and* Goode v. United States, 149 F.2d 377 (D.C. Cir. 1945).

110. Most jurisdictions permit, in the discretion of the court, a defendant to be impeached through cross-examination about prior criminal activity for which there has been no conviction. J. WEINSTEIN & M. BERGER, *supra* note 5, §§ 608[05], 608[09]. It does not appear possible to phrase such cross-examination in a way that avoids identifying the specific conduct at issue. For several reasons, however, this form of impeachment does not pose as serious a threat of prejudice to criminal defendants as does impeachment with prior convictions. First, most courts prohibit impeachment with prior criminal conduct that did not result in a conviction unless the crime was a *crimen falsi*. *Id.* Second, the prosecutor must have a good faith basis for believing that a defendant committed a prior offense before he will be permitted to bring that offense up on cross-examination. M. GRAHAM, *supra* note 50, at 612. Because of these rules, impeachment with prior misconduct that did not result in a conviction occurs relatively infrequently and generally does not involve particularly serious criminal offenses. Finally, the prosecution is not allowed to present extrinsic evidence to contradict a defendant's denial of prior misconduct for which there was no conviction. *Id.* at 613-14. By contrast, when a defendant denies having a prior conviction, the prosecution is permitted to introduce the official record of the conviction.