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Admission of Prior Bad Acts in New York for Impeachment Purposes: A Movement with the Majority

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ADMISSION OF PRIOR BAD ACTS IN NEW YORK FOR IMPEACHMENT PURPOSES: A MOVEMENT WITH THE MAJORITY

Impeachment is the process by which a witness's veracity is called into question for the purpose of showing that the witness lacks credibility, and therefore, his testimony is not worthy of belief.[1] There are several methods by which counsel may impeach the credibility of a witness.[2] Although authorities and commentators categorize the methods of impeachment differently,[3] a witness is usually impeached through prior inconsistent statements,[4]

[1] *See* Steven Lubet, *Understanding Impeachment*, 15 AM. J. TRIAL ADVOC. 483, 485 (1992). "[I]mpeachment is actually intended to discredit the witness as a reliable source of information. Successful impeachment renders the witness less worthy of belief, as opposed to merely showing him to be unobservant, mistaken, or otherwise subject to contradiction." *Id.*; *see also* Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884). An early rationale in support of the rule of impeachment of a witness's credibility, was stated by Justice Oliver Wendell Holmes:

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

Id.; BLACK'S LAW DICTIONARY 753 (6th ed. 1990). The impeachment of a witness means to "call in question the veracity of a witness, by means of evidence adduced for such purpose, or the adducing of proof that a witness is unworthy of belief." *Id.*

[2] *See infra* notes 3-6 and accompanying text (discussing methods by which witness may be impeached); *see also* United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972) (impeaching by implying witness had fabricated testimony to escape prosecution); Felice v. Long Island R.R., 426 F.2d 192, 197-98 (2d Cir.) (impeaching by showing witness's failure to state fact in accident report that he later testified to), *cert. denied*, 400 U.S. 820 (1970); Ryan v. United Parcel Serv., 205 F.2d 362, 364 (2d Cir. 1953) (impeach by showing police officer's testimony conflicted with that of defendant's employee thereby implying employee altered his testimony); Affronti v. United States, 145 F.2d 3, 7-8 (8th Cir. 1944) (impeaching through evidence of inconsistent statements at trial).

[3] *See* EDWARD CLEARY, MCCORMICK ON EVIDENCE § 33, at 111 (4th ed. 1992) (stating there are five main modalities of attack upon credibility of witness, namely physical and mental capacity, actuality of employment of such capacity to perceive, record and recollect, and his ability to narrate); Lubet, *supra* note 1, at 485. "There are three basic categories of witness impeachment . . . prior inconsistent statements, character and 'case data.'" *Id.* "[C]ase data" includes bias, prejudice, personal interest, and motive. *Id.*; H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 781 (1993). Impeachment methods fall into six categories: contradiction, inconsistency, incoherence, bias, character, and demeanor. *Id.* at 781-87.

[4] *See* WILLIAM P. RICHARDSON, RICHARDSON ON EVIDENCE § 501, at 486 (10th ed. 1973 & Supp. 1972-85). Testimony of a witness may be impeached by showing that the witness has, at some other time, made a statement that is inconsistent with the testimony presently given. *Id.*; Michael H. Graham, *Evidence and Trial Advocacy Workshop: Prior Incon-*

partiality,[5] and character.[6]

The use of character evidence to impeach credibility has proven to be one of the more troublesome methods of impeachment.[7] The character of a witness may be attacked through conviction of a crime, past untruthfulness, and other prior bad acts.[8] The extent

sistent Statements—Requirements for Impeachment, 21 CRIM. L. BULL. 156, 160 (Mar.-Apr. 1985). Impeachment of a witness through the use of prior inconsistent statements may be implemented by proving: (1) that the witness made a statement outside of the courtroom contradicting his in-court testimony; or (2) that the witness failed to speak under circumstances where it would have been natural for him to relate the matters testified to in court to another outside of the courtroom if they are indeed true. *Id.*; Lubet, *supra* note 1, at 497. A contradictory statement made by the witness outside the courtroom is the most dramatic because it directly confronts the witness to be impeached with a previous inconsistent statement tending to show that he has altered his original accounting of the events. *Id.*; *see also* FED. R. EVID. 613. Rule 613 provides in relevant part:

> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Id.

[5] *See* Thomas Black, *Witnesses Commentary*, 30 HOUS. L. REV. 673, 719 (1993). The most effective mode of impeachment is showing the witness has made an inconsistent or contradictory statement in the past. *Id.*; *see also* 1 MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE—A COMPREHENSIVE REFERENCE TEXT 599 (1989). "Matters which may reasonably be expected to color the testimony of a witness or cause him to testify falsely are proper subjects of inquiry of any witness by any party." *Id.*; EUGENE J. KAPLAN, A LAW ENFORCEMENT OFFICERS GUIDE 39 (1979). "Even though personal interest no longer makes a witness incompetent to testify, it can certainly damage his credibility in the eyes of the jury." *Id.*; Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1413 (1990). Because informants are often tempted to lie, possibly implicating innocent persons, defendants should be given a greater opportunity to impeach them. *Id.*; Lubet, *supra* note 1, at 538. A witness who has a personal interest in the outcome of a case may be tempted to testify falsely. *Id.* at 535. Consciously or subconsciously, there is a tendency to shape recollections in the direction of the preferred outcome. *Id.*

[6] *See* Lubet, *supra* note 1, at 485. "Character impeachment, . . . refers to the use of some inherent trait or particular characteristic of the witness, essentially unrelated to the case at hand, to render the testimony less credible." *Id.*

[7] *See* Uviller, *supra* note 3, at 789. "Of the several methods for the recognition of truth, one of the most impressive and most troublesome is . . . character." *Id.*; *see also* JACK B. WEINSTEIN ET AL., EVIDENCE, CASES AND MATERIALS at xx (8th ed. 1990). Despite ten years of experience with the Federal Rules of Evidence and a plethora of cases available construing evidentiary law, issues pertaining to credibility of witnesses, especially those dealing with prior bad acts, remain difficult to interpret. *Id.*; Mark Voightmann, Note, *The Short History of a Rule of Evidence that Failed (Federal Rule of Evidence 609,* Green v. Bock Laundry Machine Co. *and the New Amendment)*, 23 IND. L. REV. 927, 927 (1990). Impeachment by character evidence has become one of most difficult and controversial forms of impeachment. *Id.* Federal Rule of Evidence 609 presents treatment of only one character issue, while Federal Rule of Evidence 404 tries to resolve the more difficult problem of using character evidence for out of court actions. *Id.*

[8] *See* Lubet, *supra* note 1, at 530. "The most common forms of character impeachment

to which a witness's prior bad acts are admissible varies according to the particular jurisdiction's rules of evidence.[9] The majority of jurisdictions have codified their rules of evidence, and most have modeled them after the Federal Rules of Evidence.[10] New York, however, remains one of the few jurisdictions with rules of evidence governed primarily by case law.[11]

Where a prior bad act is at issue, the New York Court of Appeals ruled, in the seminal case *People v. Sorge*,[12] that "a defendant, like any other witness, may be interrogated upon cross-examination in regard to any vicious or criminal act of his life that has a bearing on his credibility as a witness."[13] Contrary to this rationale, Federal Rules of Evidence 609(a) and 608(b) require that the prior bad act in question be either a crime for which the witness has been convicted,[14] or be probative of the truthfulness or

include conviction of a crime, defect in memory or perception, and past untruthfulness." *Id.* Past untruthfulness is further explained along with the category "other bad acts." *Id.* at 532; *see also* CLEARY, *supra* note 3, §§ 40-43, at 137-60. Character impeachment may be accomplished by showing: misconduct for which there has been no criminal conviction; conviction of crime; or proof of opinion or bad reputation. *Id.*; Black, *supra* note 5, at 719-20. A witness may be impeached by demonstrating: past inconsistent statements; bias or pecuniary interest in the case; ability to perceive; capacity to remember or recount; contradiction through testimony of another witness; and attacking the witness's character by showing he is generally unworthy of belief. *Id.*

[9] *See infra* notes 13-16 and accompanying text (noting state applications of rules of evidence based upon Federal Rules of Evidence, common law, or individual code).

[10] *See* 28 U.S.C. §§ 733-804 (1988). The Federal Rules of Evidence were enacted into law on July 1, 1975. *Id.* "Although a number of states still languish codeless, many have drafts in the works—and soon (it is fair to predict), the evidentiary codification of the United States will be virtually complete." *See* Uviller, *supra* note 3, at 794.

[11] Barbara C. Salken, *To Codify or Not to Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 642 n.2 (1992). The only other jurisdictions that remain without codified rules of evidence are Connecticut, Illinois, Indiana, Maryland, Massachusetts, and Virginia. *Id.* Of the remaining forty-three jurisdictions, thirty-four enacted rules of evidence modeled after the Federal Rules of Evidence. *Id.* "New York State's law of evidence continues to be governed largely by cases, despite codification efforts dating back almost 150 years." *Id.* at 641.

[12] 301 N.Y. 198, 93 N.E.2d 637 (1950).

[13] *Id.* at 200, 93 N.E.2d. at 638 (quoting People v. Webster, 139 N.Y. 73, 84, 34 N.E.2d 730, 733 (1893)).

[14] FED. R. EVID. 609(a). Rule 609(a) provides that for purposes of attacking the credibility of a witness:

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Id. Rule 609(a)(1) requires the judge to permit impeachment of a civil witness with evidence of a prior felony conviction, regardless of the prejudice to the witness. *Id.* When a defendant takes the stand in a criminal case, his credibility may be impeached, and his

untruthfulness of the witness.[15] Although New York courts continue to follow the rule promulgated in *Sorge*, more recent decisions appear to be moving in the direction of the Federal Rules of Evidence.[16]

Part One of this Note explores the impact of information regarding a witness's prior bad acts on the jury. Part Two recounts the history and philosophy of the modern impeachment process using prior bad acts. Part Three examines Federal Rule of Evidence 608(b), which sets forth the federal standard for impeachment of a witness based on prior bad acts. Part Three also focuses on Federal Rule of Evidence 609(a), which sets forth the standard of admissibility of prior bad acts for which a conviction has already been obtained. Finally, Part Four reveals that based on an analysis of New York case law commencing with *Sorge*, New York courts are impliedly applying the Federal Rules of Evidence while expressly stating otherwise. Part Four concludes with a determination of the extent to which the Proposed New York Rules of Evidence are similar to the Federal Rules of Evidence.

I. THE IMPACT OF PRIOR BAD ACTS OF WITNESSES ON THE JURY

One of the many roles of the jury, as the finder of fact, is to weigh the veracity of a witness.[17] Doubtlessly, character evidence

testimony attacked in the same manner as any other defendant, including reference to prior convictions. *Id.*

[15] FED. R. EVID. 608(b). Rule 608(b) provides, in relevant part:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than for conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into during cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Id. Rule 608(b) generally bars evidence of specific incidents as proof in chief of the character of a witness for purposes of attacking or supporting his credibility. *Id.* However, these incidents may be inquired into during cross-examination of the principal witness or of a witness who testifies concerning the defendant's character for truthfulness. *Id.*

[16] *See infra* notes 62-121 and accompanying text (discussing case law supporting use of Federal Rules of Evidence).

[17] *See* Uviller, *supra* note 3, at 776. "[T]he adversary trial might be fairly described as a structured process for the determination of the credibility of strangers, many of whom will, for one reason or another, try to deceive those who rely upon their word." *Id.* Underlying the adversarial nature of our adjudication process is the premise that jurors possess the ability to assess the testimony of witnesses and to conclude which of those witnesses are

elicited on cross-examination effects the jury's verdict.[18] Federal Rules of Evidence, therefore, accompanied with appropriate judicial discretion, determine what information the jury will be given in order to appraise a witness's credibility.[19]

Jurisdictional rules vary regarding the degree and the nature of previous bad acts that the jury will be permitted to hear about the witness.[20] These variations reflect, in part, different beliefs concerning the jury's ability to assess information about the witness, and to apply the information according to the court's instructions.[21] Psychological studies concerning how people form impres-

not being forthright and which are telling the truth. *Id.*; *see also* KAPLAN, *supra* note 5, at 35. It is for the jury, as the fact-finder, to decide which witnesses are believable. *Id.*; MARTIN F. KAPLAN, THE PSYCHOLOGY OF THE COURTROOM 172 (Norbert L. Kerr & Robert M. Bray eds., 1982). One way to conceptualize the trial process is to view it as a test of credibility. *Id.* at 170. The two major dimensions of credibility are competence and trustworthiness. *Id.* Competence is relevant where the intent to deceive is unlikely, whereas, trustworthiness relates primarily to situations where it is more likely the witness is lying. *Id.* Other dimensions of credibility which relate to competence and trustworthiness are: dynamics, composure, and sociability. *Id.* These elements are relevant "if a witness lacks dynamism and composure as exhibited by a barely audible voice . . . and numerous nonverbal adapters such as self touching and fidgeting with clothing, he or she is likely to be perceived as relatively incompetent and/or untrustworthy." *Id.*; Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 820-21 (1987). Although some accomplices to a crime will testify truthfully, others will elaborate testimony to ensure reduced sentences. *Id.*

[18] *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 164 (1985) (discussing ability of jurors to detect inaccurate or deceptive character testimony, impact of testimony on verdicts and means of modifying impact); David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1201 (1992) (stating that specific acts of character impeachment evidence may have pivotal impact); Uviller, *supra* note 3, at 780 (overall courtroom setting does not provide particularly useful arena for detection of truth).

[19] *See supra* note 14 (discussing Federal Rule of Evidence 609). Rule 609 allows into evidence a prior bad act which was a crime and resulted in a conviction for which a sentence of death or imprisonment of greater than one year could have been imposed, provided that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Id.*; *see also infra* note 76 (discussing Federal Rule of Evidence 403). For impeachment purposes, crimes may either be felony grade, without particular regard to the nature of the offense; or involve dishonesty and false statement. *Id.* Crimes involving dishonesty or false statements include perjury, false statement, criminal fraud, embezzlement, or false pretense. *Id.* at 3, 7.

[20] *See supra* notes 9-11 and accompanying text (noting differences among individual states' rules of evidence); *see also* CLEARY, *supra* note 3, § 41, at 138-39. The majority of courts have adopted Federal Rule of Evidence 608(b) which limits cross-examination of a witness, regarding his own conduct, to such acts relating to his credibility as a witness. *Id.* Some courts allow cross-examination as to any acts of misconduct, while other courts do not permit any cross-examination regarding misconduct for the purpose of impeachment. *Id.*

[21] *See* United States v. Beechum, 582 F.2d 898, 915 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). The *Beechum* court held that extrinsic evidence that closely resembled the charged offense had a greater prejudicial effect. *Id.*; PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 696 (1987). Since information about previous convictions and prior bad acts is only admissible to determine the credibility of the witness-defendant, the jury must be able to comprehend this information when assessing the credibility of his testimony. *Id.* Similarly, such information should not to be used to determine whether he

sions of others confirm that character evidence offered against a witness is extremely prejudicial.[22] However, studies also reveal that people generally behave in accordance with their individual character traits, leading juries to infer that those with bad characters are not to be believed.[23] The impact, therefore, of information regarding a witness's prior bad acts on a jury can neither be ignored nor underestimated.[24]

As a general rule, the common law prohibits evidence that the act which defendant is accused of is characteristic of the defendant's personality.[25] An exception to the general rule is the process of impeaching a witness's credibility with evidence of a character trait.[26] Furthermore, while evidence of a witness's prior bad acts

committed the crime for which he is being tried. *Id.*

[22] *See* KASSIN & WRIGHTSMAN, *supra* note 18, at 159. Information regarding specific acts has a great impact upon the jury, even more so than general reputation testimony, since such information is "more concrete, immediate, and vivid." *Id.*; *see also* KAPLAN, *supra* note 17, at 200. "Few would assert that a juror's mind is a tabula rosa." *Id.* "Jurors integrate into their judgement elements aside from the implications of the evidence for the verdict." *Id.* at 200-01; MARGARET C. ROBERTS, TRIAL PSYCHOLOGY: COMMUNICATION AND PERSUASION IN THE COURTROOM 113, 232 (1987). Jurors form impressions of the credibility of witnesses by relying on dress and appearance, as well as facial and bodily expressions. *Id.* Specific acts which are "more extreme in nature" may be carefully selected by a party and therefore likely to carry more weight. *Id.* at 160. Furthermore, people tend to believe negative information since "it is more unexpected and hence violates social norms." *Id.*

[23] *See* Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 506 (1988). "The psychological studies of how people form impressions of the personalities of others appeared to confirm the intuitive belief in the highly prejudicial nature of character evidence that is reflected in the exclusionary rules. *Id.* Individuals seem to have consistent behavioral tenancies in certain situations. *Id.* at 516. In view of this, trait theorists may accurately predict behavior. *Id.* Furthermore, "psychologists now recognize that, as a general matter, a lay person, given information about a subject's past behavior, can predict the subject's future behavior with a significant degree of accuracy." *Id.* at 517; *see also* DWIGHT GAYLORD MCCARTY, PSYCHOLOGY AND THE LAW 407 (1960). Although it was believed that juries were easily swayed, jurors are now viewed as intelligent persons who realize when a trial lawyer is attempting to play on their emotions or prejudices. *Id.* at 408 n.32 (citing Orin Bartlett, *Gentlemen of the Jury*, SATURDAY EVENING POST, Dec. 5, 1925, at 12).

[24] *See* KAPLAN, *supra* note 17, at 100. After reviewing research performed in the field, the authors concluded that jurors were more likely to convict defendants of low moral character if their victims possessed high moral character. *Id.*

[25] *See* RICE, *supra* note 21, at 696. The author explains:

> [P]arties . . . cannot generally use character evidence to establish an individual's propensity from which the individual's conduct can be inferred. The reasons for this are twofold. First, courts believe that character evidence has limited probative value. Second, courts do not believe that the limited probative value of character evidence justifies the risk that the jury will improperly use it.

Id.; *see also* United States v. Fernandez, 496 F.2d 1294, 1302 (5th Cir. 1974) (prosecuting attorney improperly argued defendant's prior convictions evidenced his propensity to commit present crime).

[26] *See* RICE, *supra* note 21, at 626. A witness's credibility may be impeached with character evidence or evidence of specific instances of conduct. *Id.* The justification for these exceptions include:

> (1) that the focus of the character impeachment evidence is on the witness' present

is generally not an acceptable means of examining a witness, counsel may use evidence of prior bad acts to attack the witness's credibility on cross-examination.[27] This prevents the jury from being misled into converting such a prior bad action into palpable evidence of present wrongdoing.[28] That prior bad acts should only be used for impeachment purposes is, therefore, an especially important rule when the witness to be cross-examined is a criminal defendant.[29] If the defendant's prior bad acts are permissibly used at will by the prosecution during the course of the defendant's cross-examination, the jury may begin to believe that, due to the defendant's prior bad acts, he is a person who possesses criminal propensities, or that he has likely committed other crimes for

> conduct—whether the witness is now telling the truth while testifying under oath—as opposed to the witness' conduct in the past. Because such evidence relates to conduct occurring in the presence of the fact-finder, demeanor during testimony enhances the evidence's probative value.
> (2) that the potential for prejudice from the fact-finder's improper use of character impeachment evidence (for example, using such evidence as evidence of the defendant's present culpability) will be less because the evidence is generally offered against witnesses and not the accused.

Id.; *see also* CLEARY, *supra* note 3, § 40, at 53. "The character of a witness for truthfulness or mendacity is relevant circumstantial evidence on the question of the truth of a particular testimony of the witness." *Id.* "The theory underlying the use of evidence of character of conduct for impeachment purposes is that a person who possesses certain inadequate character traits . . . is more prone than a person whose character, in these respects, is good, to testify untruthfully." *Id.*; United States v. Melton, 739 F.2d 576, 579 (11th Cir. 1984). The *Melton* court stated that if the defendant was able to convince individuals to trade expensive cars for worthless gems, the trial judge could have concluded that the government should be allowed to call five witnesses to counteract the effect of defendant's obviously believable personality on the jury. *Id.*

[27] *See* FED. R. EVID. 611(b). Rule 611(b) provides in pertinent part: "[E]vidence should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." *Id.*; *see also* RICE, *supra* note 21, at 696. The common law prohibits use of evidence of an individual's character, such as with prior act testimony, to show witness acted in conformity with that character. *Id.* An exception to this general rule is that such evidence can be used to impeach an individual's credibility. *Id.* Specific instances of conduct or misconduct may be used to support or attack a witness's credibility. *Id.*; United States v. Byrd, 771 F.2d 215, 219 (7th Cir. 1985). The court did not agree with the defendant's argument that evidence of prior convictions used to attack the witness's credibility was prejudicial. *Id.*; People v. Sorge, 301 N.Y.2d 198, 200, 93 N.E.2d 637, 638 (1950). Prior bad acts have been described as immoral, vicious or criminal acts. *Id.*

[28] *See* People v. Mayrant, 43 N.Y.2d 236, 239, 372 N.E.2d 1, 2, 401 N.Y.S.2d 165, 166 (1977). The policy underlying the belief that a person may not be convicted of one crime because he committed another is "rooted in practical policy, justice and fairness." *Id.* (quoting People v. Richardson, 222 N.Y. 103, 109-10 (1917)); People v. Zachowitz, 254 N.Y. 192, 198 (1930). Chief Justice Benjamin Cardozo stated:

> There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of a milder type, a man of more dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril of the innocent if character is accepted as probative of crime.

Id.

[29] *See* CLEARY, *supra* note 3, § 42, at 153. Impeachment by a prior conviction has the strongest impact on the criminal-defendant witness. *Id.*

which he has not been apprehended.[30] This places the defendant at a distinct disadvantage because the veil of blamelessness has been removed from his character.[31]

II. THE HISTORY AND PHILOSOPHY OF IMPEACHMENT ON THE BASIS OF PRIOR BAD ACTS

The extent to which a witness could be cross-examined to show that he was unworthy of belief was generally unlimited under early English and American common laws.[32] Both permitted coun-

[30] *See id.* If the criminal defendant was forced to reveal his prior convictions, there was a danger that the jury would give such fact considerable weight, especially if the past conviction was for a crime similar to the one for which he was currently on trial. *Id.*; *see also* 3 JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE § 608, at 609-31 (1993). The criminal defendant is often placed in a difficult dilemma because if he testifies, he may risk impeachment due to his prior convictions. *Id.* On the other hand, if he decides not to testify, his silence may induce the jury to determine guilt. *Id.*

In 1990, Federal Rule of Evidence 609(a) was amended in order to protect criminal defendants who wished to testify by treating them differently than other witnesses. *Id.* at 609-42. When a criminal defendant is the witness, this rule required "a determination that the 'probative value' of 'the conviction' outweighs its prejudicial effect to 'the accused.'" *Id.* The conference determined that prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect to the defendant. *See* FED. R. EVID. 609. The danger of prejudice to a witness other than the defendant, such as injury to the witness's reputation in his community was expressly rejected by the conference as an element to be weighed in determining admissibility. *Id.*; United States v. Turner, 960 F.2d 461, 465 (5th Cir. 1992). The defendant was convicted on three counts of knowingly and intentionally causing a threatening communication to be delivered through the U.S. Postal Service. *Id.* The court determined that the use of defendant's prior convictions for aggravated sexual abuse, burglary, and possession of a deadly weapon was admissible because the probative value of the evidence outweighed any potential unfair prejudice. *Id.*

[31] *See* Terre E. Foster, *Rule 609(a) in the Civil Context: A Recommendation of Reform*, 57 FORDHAM L. REV. 1, 6 (1988) (arguing for abolition of use of convictions for impeachment in civil context); *see also* Joel Cohen, *Impeachment of a Defendant Witness by Prior Convictions*, 6 CRIM. L. BULL. 26, 32-36 (1976) (discussing prejudicial effect of prior convictions upon criminal defendants); Leslie Alan Glick, *Impeachment by Prior Convictions: A Critique of 609 of the Proposed Rules of Evidence for U.S. District Courts*, 6 CRIM. L. BULL. 330, 330 (1970) (considering lying as psychological phenomenon); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 758 (1975) (discussing problem of lack of knowledge regarding character of human beings in determining testimonial credibility); Erwin N. Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965) (standing for proposition that criminal defendants are at mercy of prosecutorial officials).

[32] *See* GRAHAM, *supra* note 5, at 560. Prior to the Federal Rules of Evidence, England and approximately eleven states utilized the wide-open rule, which allowed the cross-examiner to question the witness's credibility and any other subject whether or not it related to the case at bar. *Id.* Approximately 39 states adopted the restrictive direct examination rule which limited the cross-examination to the subject matter of the direct-examination and the witness's credibility. *Id.*; JOHN H. WIGMORE, WIGMORE ON EVIDENCE §§ 983-86 (Chadbourn rev. 1970). In the 18th century, exploitation of a witness's life and associations was liberally permissible and performed with reckless abandon. *Id.* The general rule was that "any question tending to discredit" could be asked and the judges usually did not interfere with these lines of questioning. *Id.* This practice of allowing broad power to cross-examine continued through the 19th century. *Id.*

sel to probe into a witness's past associations and personal history for the purpose of discrediting the witness's testimony.[33] Thus, virtually all prior bad acts committed by the witness were "fair game" for the opposition upon cross-examination.[34] This view echoed the principle that the jury should see the witness within the context of the entirety of his life, so that they could choose whether or not to give credence to his testimony.[35] The only restrictions on the broad freedom to cross-examine were those imposed by the trial judge.[36]

By the 1800s, it became well-settled that testimony, elicited for impeachment purposes regarding the character of the witness, was limited to general character and not particular facts regard-

[33] *See* WIGMORE, *supra* note 32, § 983, at 842. Cross-examination to discredit a witness's testimony was called "cross-examination to credit," and counsel was given wide latitude to "cross-examine to credit." *Id.* (quoting Thomas Hardy's Trial, 24 How. St. Tr. 199, 719 (1794)). As a general rule, the only limitation on the extent of "cross-examination to credit" was that the witness to be impeached was not to be tortured unnecessarily by a barrage of questions. *Id.* After a lengthy cross-examination regarding past misdeeds including, but not limited to, previous statements that he would guillotine the king and that he lived by smuggling and cheating, the court stated:

> [G]entlemen, I stated to you before, that this witness has given very important evidence . . . . All they rely upon to shake his credit is what turns out upon his cross-examination—the account he gives of himself, ... Gentlemen, it is your province to judge what degree of credit you think fit to give to this man's evidence.

Id. at 843.

[34] *See* WIGMORE, *supra* note 32, § 922, at 726 (proposing all bad acts should be admissible to show general bad moral character and propensity toward lack of veracity); *see also* People v. Sorge, 301 N.Y. 198, 200, 93 N.E.2d 637, 638 (1950) (court contemplated use of all prior bad acts for impeachment purposes); *infra* note 39 and accompanying text (explaining some crimes preclude witness from testifying altogether).

[35] *See* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (purpose of impeachment rule was to gain information from defendant regarding past actions), *cert. denied*, 390 U.S. 1029 (1968); Anne F. Curtin, *Limiting the Use of Prior Bad Acts and Conviction to Impeach the Defendant-Witness*, 45 ALB. L. REV. 1099, 1115-17 (1981). There are two views under which evidence of prior bad acts may be used to impeach, namely, the traditional view whereby there is almost a total admission of such evidence and the modern view whereby admissibility of such evidence is determined by balancing defendant's interests. *Id.*; Note, *Evidence—Impeaching the Credibility of the Defendant-Witness*, 41 BROOK. L. REV. 665, 667 (1975) (stating purpose of credibility impeachment rule was to elicit background information from defendant from which jury may determine credibility).

[36] *See* WIGMORE, *supra* note 32, § 983, at 848. "The extent to which cross-examination will be permitted is no doubt, in a large measure, in the discretion of the trial court." *Id.*

> The cross-examination was merciless; and it is impossible to read it without regretting that the exigencies of modern trials may be thought to justify such, and wondering that counsel cannot see that they are fraught with more danger to the accused than possible benefit. Witnesses have rights as well as the accused; and, while the Courts allow an investigation of the character of a witness through cross-examination, there is a broad discretion lodged in the trial [c]ourt in such matters.

Id. (quoting People v. McArron, 79 N.W. 944, 956 (Mich. 1899) (Hooker, J.)); *see also* CLEARY, *supra* note 3, § 41, at 139. In the United States, the danger of victimizing the witness and unduly prejudicing parties has led most courts to recognize that cross-examination is under the discretionary control of the judge. *Id.*

ing past actions.[37] Although a witness was competent to testify despite his character flaws, his testimony was readily impeachable with evidence of poor character. Further, testimony from those with "infamous characters" was given no credit.[38] Many judges and scholars, however, saw no validity in the argument that those exhibiting general bad moral character[39] were not worthy of belief.[40] To protect defendants from juries, judges were ordered to distinguish for the jury the differences between bad acts in general and those that specifically showed the witness's propensity to lie.[41] Under modern common law, a distinction is made be-

[37] *See* Zephaniah Swift, *Digest of the Law of Evidence, in Civil and Criminal Cases and a Treatise on Bills of Exchange, and Promissory Notes* 110, 143 (reprinted 1972) (1810).

> Though a witness may be competent to testify, yet his character may be so infamous that his testimony is entitled to no credit. In consequence of this, a rule has been adopted, to admit the party against whom a witness swears, to call other witnesses to impeach his character; but he is confined, in his inquiries, to his general character in respect of truth; and may not prove particular facts; for every many is supposed to be able to support his general character; but not to answer particular charges, without notice.

Id.

[38] *See* CLEARY, *supra* note 3, § 42, at 55. "At common law the conviction of a person of treason or any felony, or of a misdemeanor involving dishonesty or false statement (crimen falsi), or the obstruction of justice, rendered the convicted person altogether incompetent as a witness." *Id.* These were said to be "infamous crimes." *Id.* Today, the extreme nature of this rule has been abandoned and reduced to one ground on which testimony of a witness may be impeached. *Id.*

[39] *See* WIGMORE, *supra* note 32, §§ 977-88, at 821-921. The general consensus by the early 19th century was that character evidence for truth of its content was only admissible whereas proof of bad acts continued to be allowed generally. *Id.* § 986, at 855-61. Specifically, Wigmore stated that "historically, the use of bad general character appears as originally allowable. . . ." Id. § 923, at 728-34. "But, . . . [b]y the first part of the 1800s, a compromise had been reached; and . . . character for truth only was taken as the fundamental requirement. . . ." *Id.* at 728-29.

[40] United States v. Hans, 738 F.2d 88, 94 (3d Cir. 1984). The *Hans* court held that a conviction for knowingly transporting forged securities is a crimen falsi offense and there was no abuse of discretion in permitting such evidence for purposes of impeachment, as long as § 922, at 727. Wigmore noted:

> 1. that, as a matter of human nature, a bad general disposition does *not* necessarily or commonly involve a lack of veracity, and that therefore the former is of little or no bearing probatively;
> 2. that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part on personal prejudice and on mere differences of opinion on points of belief or conduct—a chance of error which is relatively small in the specific inquiry as to the other's notorious untruthfulness; and
> 3. that the incidental unpleasant features of the witness-box are largely increased when the way is opened to this broad and loose method of abusing those who are called as witnesses.

Id..

[41] *See* CLEARY, *supra* note 3, § 42, at 130. Thus, certain crimes became known as "crimen falsi." *Id.* Crimen falsi crimes were crimes involving dishonesty, false statements, or the obstruction of justice and once proven, would render the witness incompetent to testify before the court. *Id.*; BLACK'S LAW DICTIONARY, *supra* note 1, at 372. Crimen falsi is defined as:

tween character evidence used to prove that a person acted in conformity with that character and use of prior bad acts to impeach credibility.[42]

III. The Federal Rules of Evidence

The majority of jurisdictions today have adopted rules of evidence which mimic the Federal Rules of Evidence ("Rule").[43] Under the Federal Rules of Evidence, evidence of prior bad acts are admissible for impeachment purposes, provided the criteria of either Rule 608(b) or Rule 609(a) have been met.[44]

Rule 608(b) requires that the prior bad act called into question be probative of the truthfulness or untruthfulness of the witness to be impeached.[45] A criminal conviction, based on the alleged prior bad act, does not necessarily act as a threshold to the admissibility of the act into evidence for the purpose of impeaching a witness's character under Rule 608(b).[46] Rule 608(b) does, however, constrain the use of prior bad acts for which there is no criminal conviction by prohibiting the cross-examiner from using extrinsic evidence to prove the prior bad act.[47] In other words, the

> crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully. The definition of "crimen falsi" at common law is: any crime which rendered the perpetrator incompetent to be a witness, such as forgery, perjury, subornation of perjury and other crimes affecting the administration of justice.

Id.

[42] *See* Rice, *supra* note 21, § 6.02, at 696.

[43] Salken, *supra* note 11, at 658; *see also* L. Kevin Wroth, *The Federal Rules of Evidence in the States: A Ten Year Perspective*, 30 Vill. L. Rev. 1315, 1318 (1985) (stating that 10 years after adoption of Federal Rules of Evidence, 30 states adopted Federal Rules of Evidence or rules derived therefrom).

[44] *See supra* notes 14-15 (discussing Rules §§ 608(b) and 609(a)).

[45] *See supra* note 15 (discussing Rule 608(b)); *see also* United States v. Greer, 643 F.2d 280, 282 (5th Cir.) (defense counsel's inquiry of witness's reputation not limited to truthfulness and therefore improper), *cert. denied*, 454 U.S. 854 (1981).

[46] Fed. R. Evid. 608(b).

[47] *Id.*; *see also* United States v. Agnes, 753 F.2d 293, 304 (3rd Cir. 1985) (holding district court did not err by precluding expert testimony pertaining to dealings with extortion victim); United States v. Reed, 715 F.2d 870, 875 (5th Cir. 1983) (extrinsic evidence excluded to prove misconduct that did not result in conviction); Carter v. Hewitt, 617 F.2d 961 (3d Cir. 1980) (discussing Rule 608(b)'s prohibition on extrinsic evidence and effect of barring cross-examiner from using questions to obtain admission of prior bad act by witness); Herzog v. United States, 226 F.2d 561, 565 (9th Cir.) (witness denied difficulties with OPA and evidence could not be introduced to show payment of attorney's fees in connection with threatened OPA suit), *aff'd*, 235 F.2d 664 (1965); Hug v. United States, 329 F.2d 475, 483 (6th Cir.) (witness denied he had been fired for stealing and cross-examiner was not free to bring in independent proof to show that answer was true), *cert. denied*, 379 U.S. 818 (1964); United States v. Whiting, 311 F.2d 191, 196 (4th Cir. 1962) (witness may be questioned as to past misconduct, even as to collateral matters in order to impeach credibility and inter-

question is collateral and the cross-examiner must accept the witness's answer even if he has dispositive proof of the commission of the bad act.[48]

On the other hand, Rule 609(a) addresses prior bad acts for which the witness to be impeached has been convicted.[49] The prior bad act for which the witness was convicted must either have been one involving dishonesty, false statements, or for which a sentence of death or imprisonment of greater than one year could have been imposed.[50] Under Rule 609(a), extrinsic evidence regarding the fact of the conviction is permitted.[51]

The rules appear explicit, however in operation it becomes apparent that the slight variations in admissibility between Rule 608(b) and Rule 609(a) can lead to inconsistent results depending upon judicial interpretation[52] and discretion.[53] This is so despite the fact that the rules, particularly Rule 609(a), were hotly debated in Congress, leading to legislative compromises and care-

rogator bound by answer), *cert. denied*, 372 U.S. 935 (1963); State v. Freeland, 340 S.E.2d 35, 37 (N.C. 1986) (reversible error to allow mother to show child's good character for truthfulness because child was able to distinguish reality from fantasy).

[48] *See* People v. Pavao, 59 N.Y.2d 282, 288, 451 N.E.2d 216, 219, 64 N.Y.S.2d 458, 461 (1983). The New York rule in this regard is the same. *Id.* The cross-examiner is bound by the witness's answer on collateral matters and therefore extrinsic documentary evidence concerning collateral matters is not admissible solely for impeachment purposes. *Id.*; *cf.* People v. Hudy, 73 N.Y.2d 40, 56, 535 N.E.2d 250, 259, 538 N.Y.S.2d 197, 207 (1988) (holding that extrinsic proof to show reason for fabrication never collateral and may not be excluded on that ground).

[49] *See supra* note 14 (discussing Rule 609(a)).

[50] *See* FED. R. EVID. 609(a)(1)-(2). Traditionally, felonies were used to impeach a witness without regard to the nature of the particular offense. *Id.* However, under subdivision (a), for purposes of impeachment, crimes were divided into two categories. *Id.*

[51] *Id.*

[52] *See* Uviller, *supra* note 3, at 809. The author noted that the language of 609(a)(2), "involv[ing] dishonesty and false statement," could be construed as meaning the manner in which the particular crime was committed or as referring to the elements of the crime. *Id.* By using the former construction, almost any crime could fall within the meaning if it was committed in some way which entails a misrepresentation. *Id.*; *see also* CLEARY, *supra* note 3, § 40, at 54. It is difficult to determine exactly which acts fall under the gambit of truthfulness of character. *Id.* The nature of specific offenses properly included within the phrase "dishonesty and false statement" has been subject to great debate. *Id.* § 42, at 56.

[53] *See supra* notes 14-15. Both Rules 608 (b) and 609 (a) leave considerable discretion to the trial judge to determine "whether the probative value of the bad acts to be admitted for impeachment purposes outweighs the prejudicial effect to the accused". *Id.*; United States v. Mahone, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976). When balancing probative value against prejudicial effect, several factors should be considered: the impeachment value of the prior crime; how long ago the conviction occurred; the importance of the defendant's testimony; how similar the past crime and the charged crime are; and how central the issue of credibility is to the case. *Id.*; *see also* United States v. McIntosh, 426 F.2d 1231, 1233 (D.C. Cir. 1970) (narcotics conviction bears weight on issue of credibility); United States v. Bailey, 425 F.2d 1236, 1239 (D.C. Cir. 1970) (trial court not permitted to exercise discretion on basis of abstract beliefs, but rather on individualized rulings).

fully, and cautiously worded rules.[54]

The logic of these two rules appears inconsistent. Under Rule 609(a), bad acts for which a sentence of death or imprisonment for a term greater than one year, are admissible to impeach; whereas under Rule 608(b), only those prior bad acts which are probative of the truthfulness or untruthfulness of the witness to be impeached are admissible.[55] For example, a conviction for murder would be admissible under Rule 609(a) because it would be a conviction for greater than one year, conversely, such conviction would not be admissible under Rule 608(b) because the crime did not involve truthfulness or untruthfulness. The basis behind Rule 609(a), allowing into evidence those bad acts for which a conviction has been obtained, dates back to the common law.[56] The tenet underlying the common-law rule was that a witness who had a criminal record was assumed to possess a bad moral character which would naturally lead him to disregard the oath he undertook and to lie on the stand.[57]

Despite the inherent problems with the Federal Rules of Evidence,[58] the fact that so many states have adopted them is testa-

[54] *See* RICE, *supra* note 21, at 794 (stating Rule 609 was one of more hotly contested of Federal Rules of Evidence); 1 S. SALTZBERG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 150 (5th ed. 1990). There was probably no single rule which caused as much controversy as Rule 609. *Id.* The reason given for this controversy was the continuing support for the rule that the trial judge balance probative worth against prejudicial effect. *Id.* In the House of Representatives, however, the view was that a prior conviction should only be introduced if the crime involved dishonesty or false statement. *Id.*

[55] *See supra* notes 14-15 (discussing Rules 608(b) and 609(a)).

[56] *See supra* notes 36-41 and accompanying text (discussing history of common-law evidence rules).

[57] *See* RICE, *supra* note 21, § 6.02, at 696. The author noted:

> [T]he cross-examiner could make these inquiries concerning a witness's prior convictions regardless of whether the acts giving rise to the felony convictions had any relevance to the witness's character trait for truth and veracity. Courts believed that merely being convicted of such a serious offense reflected negatively on the witness's willingness to disregard his oath.

Id.; GRAHAM, *supra* note 5, at 607. The author explained:

> [E]mployment of a prior conviction to impeach a witness is premised upon the assumption that a person with a criminal record has a bad general character, evidenced by his willingness to disobey the law, and that his bad general character would lead him to disregard his oath to testify truthfully. It is also asserted in support of using a prior conviction to impeach "with much force that it would be misleading to permit the accused to appear as a witness of blameless life, and this argument has prevailed widely."

Id. (quoting CLEARY, *supra* note 3, § 43, at 89).

[58] *See* RICE, *supra* note 21 (comprehensive text regarding problems encountered under Federal Rules of Evidence); Graham, *supra* note 4 (discussing problems under Federal Rules of Evidence). One of the especially noteworthy problems encountered in the area of impeachment of credibility of the criminal defendant, was the defendant's dilemma in deciding whether or not to testify. *See* Mason Ladd, *Credibility Tests-Current Trends*, 89 U.

ment to their credit. New York, one of the few states lacking codified rules of evidence, adheres to much broader rules of admissibility of prior bad acts.[59] However, this broad application appears to be changing.

IV. THE NEW YORK RULE

In *People v. Sorge*,[60] the New York Court of Appeals held that "[a] defendant, like any other witness, may be interrogated upon cross-examination in regard to any specific vicious, criminal or immoral act of his life that has a bearing on his credibility."[61] While New York courts have continued to apply the *Sorge* rule, they have moved slowly toward applying the Federal Rules of Evidence. The following three aspects of the *Sorge* rule have been impacted by recent cases: the distinction between defendant and nondefendant witnesses; the acts deemed to impact credibility; and the time frame from which the witness's prior acts will be used to impeach.

A. *The Distinction Between Defendant and Non-Defendant Witnesses*[62]

The *Sorge* court made no distinction between defendant and

PA. L. REV. 166, 184 (1940). Particularly, the author explained:

> A defendant in deciding whether he will take the witness stand and testify in his own behalf must take into account not only the question of his innocence and the proof by which he may establish it but also the dangers to which he is exposed by the evidence which the prosecution will present at least ostensibly to discredit his testimony.

Id.

[59] *See* People v. Sorge, 301 N.Y. 198, 198, 93 N.E.2d 637, 637 (1950).

[60] 301 N.Y. 198, 93 N.E.2d 637 (1950).

[61] *Id.* at 200, 93 N.E.2d at 638. The court explained:

> There can, of course, be no doubt as to the propriety of cross-examining a defendant concerning the commission of other specific criminal or immoral acts. A defendant, like any other witness, may be interrogated upon cross-examination in regard to any vicious or criminal act of his life that has a bearing on his credibility as a witness.

Id.; *see also* People v. Dokes, 79 N.Y.2d 656, 661, 595 N.E.2d 836, 839, 584 N.Y.S.2d 761, 766 (1992) (allowing prosecution to cross-examine defendant about prior bad acts); People v. Betts, 70 N.Y.2d 289, 293, 514 N.E.2d 865, 866, 520 N.Y.S.2d 370, 371 (1989) (holding *Sorge* removed barrier, conditionally, to further interrogation of defendant as to specific acts).

[62] *Sorge*, 301 N.Y. at 198, 93 N.E.2d at 637. "A defendant like any other witness." *Id.*; *see also* People v. Kass, 25 N.Y.2d 123, 126, 250 N.E. 2d 219, 221, 302 N.Y.S.2d 807, 809 (1969) (inquiring into defendant's misappropriation of diamonds relevant to credibility, as long as, prosecutor asked questions in good faith and had sufficient basis for asking same); People v. Schwartzman, 24 N.Y.2d 241, 244, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 820 (nature and extent of cross-examination subject to sound discretion of trial judge), *cert. denied*, 396 U.S. 846 (1969); People v. Duffy, 36 N.Y.2d 258, 262, 326 N.E.2d 804, 806, 367 N.Y.S.2d 236, 239 (2d Dep't 1975) (by choosing to testify, defendant may be cross-examined

non-defendant witnesses.[63] More recently, however, it has been recognized that defendants may be placed in a particularly difficult position when testifying as a witness.[64] In *People v. Wilson*,[65] an order was sought to prohibit the prosecution from cross-examining defendant regarding prior bad acts and convictions.[66] The prosecutor opposed this motion on the grounds that the *Sorge* decision permitted him to cross-examine the defendant regarding his past immoral acts and convictions.[67] The New York City criminal court stated that although the *Sorge* rule allowed interrogations of this nature, "a trend ha[d] developed in recent years in the law to examine this general principle in the light of the particular circumstances of each individual case."[68]

concerning any immoral, vicious or criminal acts bearing on credibility).

[63] *Sorge*, 301 N.Y. at 198, 93 N.E.2d at 637 (language of rule itself and court's opinion freely interchanged "defendant" and "witness" throughout).

[64] *See* People v. McGee, 68 N.Y.2d 328, 332, 501 N.E.2d 576, 578, 508 N.Y.S.2d 927, 929 (1986) (holding *Sandoval* rule does not apply to nondefendant witness); People v. Mayrant, 43 N.Y.2d 236, 239, 372 N.E.2d 1, 2, 401 N.Y.S.2d 165, 166 (1977) (defendant exercising constitutional right to testify may be cross-examined in good faith concerning prior immoral, vicious or criminal conduct it if bears on credibility); People v. Dickman, 42 N.Y.2d 294, 297, 366 N.E.2d 843, 844, 397 N.Y.S.2d 754, 756 (1977) ("examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial"); *see also* People v. Ventimiglia, 52 N.Y.2d 350, 362, 420 N.E.2d 59, 63, 438 N.Y.S.2d 261, 265 (1981) (court should balance admissibility of evidence based on manner discovered, relevance, probativeness, and necessity against prejudicial effect); People v. Innis, 98 A.D.2d 808, 809, 470 N.Y.S.2d 26, 28 (2d Dep't 1983) (defendant retains right to object at trial to prejudicial cross-examination and if objection challenges inquiry into his prior misconduct, he is entitled to ruling based upon same criteria as would have been applied had issue been raised before trial); People v. Otero, 75 A.D.2d 168, 174, 428 N.Y.S.2d 956, 969 (2d Dep't 1980) (*Sandoval* merely establishes procedural guidelines and identifies relevant criteria for issuance of ruling in advance of trial limiting scope of potential cross-examination of defendant who testifies on own behalf).

[65] 75 Misc. 2d 720, 348 N.Y.S.2d 486 (N.Y.C. Crim. Ct. Queens County 1973); *see also* People v. Pavao, 59 N.Y.2d 282, 292, 451 N.E.2d 216, 221, 464 N.Y.S.2d 458, 463 (1983) (within discretion of trial judge to decide whether probative worth of other crime evidence on issue of defendant's credibility outweighs risk of unfair prejudice); *cf.* People v. Bennett, 79 N.Y.2d 464, 468, 593 N.E.2d 279, 282, 583 N.Y.S.2d 825, 827 (1992) (court held cross-examination on unrelated pending criminal charge, solely for purpose of impeaching defendant's credibility, was impermissible).

[66] *See Wilson*, 75 Misc. 2d at 721, 348 N.Y.S.2d at 489 (defendant sought order to repress information regarding history of arrests for burglary, possession of dangerous drug, resisting arrest, petit larceny, and attempted assault).

[67] *Id.* at 722, 348 N.Y.S.2d at 489 (holding general rule that witness may be cross-examined with respect to any immoral, vicious or criminal act which may affect character and credibility); People v. Duffy, 36 N.Y.2d 258, 262, 326 N.E.2d 804, 806, 367 N.Y.S.2d 236, 239 (2d Dep't 1975) (stating long-recognized New York rule that defendant may not only be cross-examined regarding any criminal convictions, but also as to commission of any vicious or criminal acts, so long as questions are asked in good faith).

[68] *See Wilson*, 75 Misc.2d 722, 348 N.Y.S.2d at 489; People v. President, 47 A.D.2d 535, 535, 363 N.Y.S.2d 612, 613 (2d Dep't 1975) (holding scope of cross-examination left to discretion of trial judge); *see also* Michelson v. United States, 335 U.S. 469, 480-81, 487-88 (1948) (discussing trial court's responsibility in regulating introduction of evidence of accused's character).

The *Wilson* court looked to federal law in *Luck v. United States*.[69] The court cited *Luck* for the proposition that judicial discretion was especially important in situations where the witness was the defendant, because the trial judge could believe that it would be more helpful for the jury to hear the defendant's story, rather than the defendant not taking the stand out of fear of impeachment due to prior convictions.[70] Although the *Wilson* court did not grant the motion for a pre-trial hearing regarding the admissibility of prior bad acts, it sanctioned the propriety of the motion in similar instances.[71]

Finally, in the landmark decision of *People v. Sandoval*,[72] decided just one year after *Wilson*, the New York Court of Appeals approved a pre-trial determination of the permissible scope of cross-examinations regarding past criminal, vicious, and immoral acts.[73] This rule, which has been become known as the "Sandoval motion,"[74] is the New York equivalent of the balancing approach required under rule 609(a).[75] Under Rule 609(a), the trial judge is

[69] 348 F.2d 763 (D.C. Cir. 1965).

[70] *Id.* at 768; *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 514 (1989) (admissibility conditioned upon judicial balancing expressly provided in uniform rules and model codes); People v. Schwartzman, 24 N.Y.2d 241, 244, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 820 (stating nature and extent of cross-examination and inquiry into transactions to impeach defendant's credibility within range of trial court's discretion), *cert. denied*, 396 U.S. 846 (1969).

[71] *See* People v. Wilson, 75 Misc. 2d 720, 722, 348 N.Y.S.2d 486, 469 (N.Y.C. Crim. Ct. Queens County 1973). Ordinarily, a hearing on notice to the People would be ordered before arriving at a decision of this nature. *Id.* In this case, however, the information furnished to the court by defense counsel and the People, was sufficient to enable the court to arrive at a fair determination of the defendant's request without the necessity of a formal hearing. *Id.* In a criticism of allowing pre-trial hearings in most cases, the *Wilson* court said:

> [B]ased upon our experience, such a hearing should be granted only in those unique factual situations where a defendant (1) can show a valid, disputed issue of law by establishing that his prior convictions would violate a recognized constitutional right or create substantial prejudice to him, and (2) where a defendant can clearly show a pressing need for such a determination in advance of trial.

Id.; *see also* People v. Otero, 75 A.D.2d 168, 174, 428 N.Y.S.2d 956, 969 (2d Dep't 1980). The procedure established in *Sandoval* required that, in order to obtain an advanced ruling, limiting scope of cross-examination, the defendant must inform the court of prior convictions and misconduct which might unfairly effect him as a witness. *Id.*; People v. Innis, 98 A.D.2d 808, 809, 470 N.Y.S.2d 26, 28 (2d Dep't 1983) (within court's discretion to make advanced ruling concerning prosecutor's use of prior convictions).

[72] 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

[73] *Id.* at 375, 314 N.E.2d at 416, 357 N.Y.S 2d at 854. The *Sandoval* court explained:

> [I]n most cases, as in this case, but not necessarily in all cases, a pretrial motion will be preferable. Thereby, the defendant with definitive advance knowledge of the scope of cross-examination as to prior conduct to which he will be subjected, can decide whether to take the witness stand.

Id.

[74] *Id.*

[75] *See supra* note 14 (discussing Rule 609).

mandated to determine whether the probative value of admitting the evidence outweighs its prejudicial effect on the accused.[76] Although the balancing approach is mandatory under Rule 609(a), it is permissive in New York under *Sandoval*.[77] The New York Court of Appeals, in *People v. Pollock*,[78] specifically stated that *Sandoval* prescribed a procedural means by which the defendant could obtain an advance ruling, but it did not mandate the application of a particular balancing process.[79]

Such balancing was never required under the holding of *Sorge*.[80] Despite the clear affirmation by the New York Court of Appeals in *Pollock* that *Sandoval* did not change the existing law,[81] the court in *People v. Simpson*,[82] determined that in exercising its discretion, the trial court was required to balance probative worth with the risk of unfair prejudice.[83] In New York, some courts have determined that not weighing probative value with prejudicial effect should constitute reversible error because the trial judge did not properly exercise his discretion.[84]

[76] *See id.* The rule states in pertinent part: "[E]vidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." *Id.*; *see also* FED. R. EVID. 403. This rule generally requires a balancing for all relevant evidence:

> [A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id.

[77] *See supra* note 73 (discussing permissive use of *Sandoval* hearing).

[78] 50 N.Y.2d 547, 407 N.E.2d 472, 429 N.Y.S.2d 628 (1980).

[79] *Id.*

[80] *See supra* note 73.

[81] *See infra* note 84 and accompanying text (discussing that *Sandoval* decision did not change existing law according to New York Court of Appeals).

[82] 109 A.D.2d 461, 492 N.Y.S.2d 609 (1st Dep't 1985).

[83] *Id.* at 464, 492 N.Y.S.2d at 613. "In exercising that discretion, the trial court is required to balance the probative worth . . . against the risk of unfair prejudice to the defendant." *Id.*

[84] *See* People v. Pollock, 50 N.Y.2d 547, 550, 407 N.E.2d 472, 474, 429 N.Y.S.2d 628, 630 (1980) (Meyer, J., dissenting). Judge Meyer stated:

> [O]n the *Sandoval* issue it is clear that the Trial Judge used the wrong criteria and thus did not properly exercise his discretion in determining the extent of permissible cross-examination . . . . [T]he thrust of *Sandoval* is that because a jury may be led by such evidence to infer criminal propensity . . . defendant is in effect denied his constitutional right to be a witness in his own behalf unless he knows before he takes the stand what evidence of prior crime he will face. *Sandoval* spells out the factors on which the determination turns. . . .

Id.; People v. Woods, 149 A.D.2d 550, 550, 539 N.Y.S.2d 1002, 1003 (2d Dep't 1989) (court may properly weigh probative value of defendant's prior bad acts, as it relates to credibility, against potential prejudice); People v. Simpson, 109 A.D.2d 461, 472, 492 N.Y.S.2d 609, 617 (1st Dep't 1985) (discretion of trial judge to determine extent to which defendant can be cross-examined); People v. George, 54 A.D.2d 410, 418, 389 N.Y.S.2d 94, 99 (1st Dep't 1976)

In *People v. Gottlieb*,[85] the Appellate Division, First Department, stated that the permissive balancing approach dictated in *Sorge* was inconsistent with the balancing test as it had since developed.[86] The First Department, therefore, requires the trial court to balance the probative worth of the specific criminal, vicious, or immoral acts on the issue of a defendant's credibility, against the risk of unfair prejudice to the defendant.[87] The New York Court of Appeals explained in *People v. Betts*,[88] that based on the privilege against self-incrimination, the defendant was entitled to a pretrial ruling precluding cross-examination for credibility purposes of information regarding a pending unrelated criminal charge.[89]

However, the *Betts* court did not mandate the application of the balancing approach used under Rule 609(a).[90] This rule of required balancing emanated from *People v. Duffy*,[91] where the Appellate Division, Second Department, announced that such bal-

(Murphy, J., dissenting). Judge Murphy stated that it should be reversible error not to grant a motion to determine the admissibility of prior bad acts, "[s]ince the trial court's denial of the motions to preclude cross-examination regarding prior drug convictions may have effectively denied defendants a fair trial . . ." *Id.*; *see also* People v. Travison, 59 A.D.2d 404, 408, 400 N.Y.S.2d 188, 190 (3d Dep't 1977) (holding court can reverse conviction as matter of discretion in interest of justice where cross-examination deprives defendant of fair trial), *aff'd*, 46 N.Y.2d 758, 386 N.E.2d 256, 413 N.Y.S.2d 648 (1978), *cert. denied*, 441 U.S. 949 (1979); People v. Wilson, 75 Misc. 2d 720, 722, 348 N.Y.S.2d 486, 490 (Sup. Ct. Queens County 1973) (power of inquiry not unlimited and extent of such examination lies largely within discretion of trial judge).

85 130 A.D.2d 202, 517 N.Y.S.2d 978 (1st Dep't 1987).

86 *Id.* at 208, 517 N.Y.S.2d at 983.

87 *Id.* at 206, 517 N.Y.S.2d at 980; *see also* People v. Schwartzman, 24 N.Y.2d 241, 247, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823 (1969) (rules governing admissibility of evidence of other crimes represent balance between probative value of such proof and danger of prejudice presented to accused).

88 70 N.Y.2d 289, 514 N.E.2d 865, 520 N.Y.S.2d 370 (1987).

89 *See id.* at 291, 514 N.E.2d at 865, 520 N.Y.S.2d at 370. The *Betts* court stated:

> [T]he applicable evidentiary rule is that a defendant is entitled to a pretrial ruling, based on the assertion of the privilege against self-incrimination, precluding the prosecution from cross-examining for credibility purposes only as to pending unrelated criminal charges if defendant takes the stand as a witness at the trial. We recognize that the issue seemed to many to have been well settled in New York that a defendant could, as a general rule, be cross-examined in these circumstances. While particular circumstances not present in this case may permit appropriate cross-examination on such an issue, careful analysis of the precedents affecting the specific evidentiary rule manifest the correctness of precluding it here.

Id.; *see also* People v. Bennett, 79 N.Y.2d 464, 468, 593 N.E.2d 279, 282, 583 N.Y.S.2d 825, 827 (1992) (while per se rules are eschewed where defendant's misconduct is another pending criminal charge, more categorical approaches are appropriate because of constitutional protection against self-incrimination).

90 *Betts*, 70 N.Y.2d at 291, 514 N.E.2d at 865, 520 N.Y.S.2d at 370.

91 44 A.D.2d 298, 354 N.Y.S.2d 672 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 258, 326 N.E.2d 804, 367 N.Y.S.2d 236 (1975).

ancing was required.[92] Although that announcement was qualified by a statement that the varying circumstances of each case would depend upon ad hoc applications,[93] and a footnote explaining that although this was a guideline, the nature of judicial discretion precluded rigid standards,[94] the foundation was established to adopt mandatory balancing. The use of a uniform approach is furthered by New York's Proposed Rule of Evidence 608(b) which would adopt mandatory balancing.[95]

B. The Acts Bearing on Credibility[96]

The *Sorge* rule enunciated that a witness could be cross-examined for credibility purposes regarding a broad array of bad acts as long as it affected his credibility as a witness.[97] Prior to

[92] *Duffy*, 44 A.D.2d at 305, 354 N.Y.S.2d at 678 (stating trial court should determine whether prejudicial effect outweighs probative value, and "[h]ence we today announce that to be the applicable law"); *see also* People v. Dowdell, 88 A.D.2d 239, 243, 453 N.Y.S.2d 174, 177 (1st Dep't 1982). Not only is a defendant entitled to a *Sandoval* hearing, but should it be determined in the hearing that questioning regarding certain bad acts is to be precluded during the trial, any such subsequent questioning is reversible error. *Id.*

[93] *Duffy*, 44 A.D.2d at 306 n.2, 354 N.Y.S.2d at 678 n.2.

[94] *Id.* (quoting Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied.*, 390 U.S. 1029 (1968)). The *Duffy* court stated that according to *Gordon*:

> We are well aware that these are not firm guidelines which can be applied readily . . . the very nature of judicial exercise precludes rigid standards for it's exercise; we seek to give some assistance to the trial judge, to whom we have assigned the extremely difficult task of weighing and balancing these elusive concepts.

Id.

[95] *See* NEW YORK PROPOSED CODE EVID. 608(b). The proposed rule states in pertinent part:

> [I]n a criminal case, specific instances of conduct bearing on the credibility of the accused offered by the prosecution are not admissible if the prejudicial effect of the evidence, including the effect the evidence would have in deterring the accused from testifying, outweighs the probative worth of the evidence on the accused's credibility.

Id.; People v. Vaughn, 175 A.D.2d 414, 415, 572 N.Y.S.2d 483, 485 (3d Dep't 1991) (discretion requires "careful balancing of probative value and prejudicial effect . . . ."); People v. Wilson, 75 Misc. 2d 720, 722, 348 N.Y.S.2d 486, 489 (Sup. Ct. Queens County 1973) (holding power of inquiry lies largely within discretion of trial judge); *see also* Coursey v. Broadhurst, 888 F.2d 338, 342 (5th Cir. 1989) (holding prejudice-weighing prerequisite to admissibility of felony convictions applies only in criminal trials); People v. Hunter, 88 A.D.2d 321, 322, 453 N.Y.S.2d 212, 214 (2d Dep't 1982) (stating proposed code of evidence for State of New York drastically limits what may be admitted for credibility purposes when witness is defendant).

[96] People v. Sorge, 301 N.Y. 198, 198, 93 N.E.2d 637, 637 (1950). "Any vicious, criminal or immoral act . . . that has a bearing on credibility." *Id.*

[97] *See id.* at 200, 93 N.E.2d at 638; *Wilson*, 75 Misc. 2d at 723, 348 N.Y.S.2d at 491 (stating adversarial system exposes witness's life to scrutiny and jury entitled to consider all relevant factors in determining credibility); *see also* People v. Dickman, 42 N.Y.2d 294, 297, 366 N.E.2d 843, 844, 397 N.Y.S.2d 754, 756 (1977) (defendant may be cross-examined, with appropriate limiting instructions, with respect to crimes or conduct similar to that for which defendant presently being tried); People v. Wright, 41 N.Y.2d 172, 175, 359 N.E.2d 696, 698, 391 N.Y.S.2d 101, 103 (1976) (proper to question defendant regarding drug addiction and conviction for possession of hypodermic needle, since pertain to credibility).

Sorge, in *People v. Montlake*,[98] the Appellate Division limited the types of bad acts to those involving moral turpitude.[99] Contrary to the Court of Appeal's intention in *Sorge*, many courts continue to follow this rule.[100] *Sorge*, however, never required that the bad acts involve moral turpitude. Instead, the *Sorge* court stated that the jury's knowledge of previous bad acts would "cast light upon the degree of turpitude involved and assist the jury in evaluating the witness's credibility."[101]

By continuing to equate "vicious, criminal or immoral acts" with the term "moral turpitude" courts have attempted to limit the scope of the *Sorge* rule.[102] In *People v. Moore*,[103] the Appellate Division, Second Department, used moral turpitude to determine whether a previous act was admissible. The court held that the defendant's previous act of vandalism "was not, under the circumstances, an act which evidenced some fair tendency to show moral turpitude" and thus the bad act was not admissible.[104]

Substitution of the term "moral turpitude" for "any vicious, criminal, or immoral act" continues to cloud the application of the *Sorge* rule since there are many definitions of moral turpitude.[105] Since most of these definitions require some graveness or vileness, they are not as broad as the all inclusive language of *Sorge*.[106] The

[98] 184 A.D. 578, 172 N.Y.S. 102 (1918).

[99] *Id.* at 578, 172 N.Y.S. at 106 (holding unpaid rent not constitute moral turpitude to warrant cross-examination).

[100] *See* People v. Hunter, 88 A.D.2d 321, 322, 453 N.Y.S.2d 212, 214 (2d Dep't 1982) (witness may be interrogated regarding any vicious, criminal or immoral act involving moral turpitude); Seventh Ave. Deli. v. Manhattan Provision Co., 146 N.Y.S.2d 25, 29 (Sup. Ct. Kings County 1955) (matters introduced for purpose of discrediting party must show moral turpitude), *aff'd*, 1 A.D.2d 1037, 153 N.Y.S.2d 572 (2d Dep't 1956).

[101] People v. Sorge, 301 N.Y. 198, 200, 93 N.E.2d 637, 640 (1950).

[102] *See supra* notes 85-88 and accompanying text (citing cases where evidence of vicious, criminal or immoral acts are disqualified from evidence for impeachment purposes).

[103] 42 A.D.2d 268, 346 N.Y.S.2d 363 (2d Dep't 1973).

[104] *Id.* at 273, 346 N.Y.S.2d at 369.

[105] *See* BLACK'S LAW DICTIONARY, *supra* note 1, at 1008. Moral turpitude has been defined as:

> [T]he act of baseness, vileness, or the depravity in private and social duties which many owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita.

Id.; *see also* Mishkin v. Roreck, 202 Misc. 2d 653, 656, 115 N.Y.S.2d 269, 272 (Sup. Ct. Nassau County 1952). Moral turpitude is "an act of baseness, vileness or depravity in the private or social duties which man owes to his fellow men or to society in general, contrary to the accepted and customary rule or right and duty between man and man." *Id.*

[106] *See* BLACK'S LAW DICTIONARY, *supra* note 1, at 1008 (stating various definitions of

New York definition of moral turpitude excludes those crimes which are merely statutory mala prohibita.[107] Crimes such as gambling, failing to pay debts, depravation of a driver's license, or vandalism have long been held not to involve moral turpitude.[108] More recently, crimes such as failure to pay rent and employment in the pornographic industry have been similarly held not to involve moral turpitude.[109] However, use of aliases has been allowed to show moral turpitude.[110] Using the term "moral turpitude" for "vicious, criminal, and immoral acts" has, therefore, effectively narrowed the scope of crimes which may be introduced.

Although many courts define which bad acts may be introduced by determining whether the act in question involves moral turpitude, the *Sorge* rule permits those acts which are vicious, criminal, or involve immorality to be introduced.[111] The *Sorge* rule, therefore, is a broader classification of crimes which are admissible.[112] Adoption of New York's Proposed Rules of Evidence would eliminate this disparity, because they do not require courts to determine whether an act involves moral turpitude.[113]

C. *The Time Frame from Which Acts May Be Used*[114]

The holding in *Sorge* contemplated the use for impeachment purposes of almost any bad act of the witness's life.[115] There was no specific preclusion for acts occurring a certain length of time in

moral turpitude). *Id.*

107 *See* BLACK'S LAW DICTIONARY, *supra* note 1, at 956. Mala prohibita crimes are acts or omissions that are made criminal by statute, but are not criminal of themselves. *Id.*

108 *See* EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE § 456, at 296 (2d ed. 1977). Acts which have been held to not show moral turpitude are: gambling, card playing, betting on horses; failure to pay debts; violating college rules; deprivation of a drivers license; and vandalism. *Id.*

109 *See id.* The failure to pay rent or employment in the pornographic industry does not establish moral turpitude. *Id.*

110 *See id.* (citing People v. Greer, 181 A.D.2d 422, 580 N.Y.S.2d 331 (1st Dep't 1992); People v. Bost, 176 A.D.2d 1085, 575 N.Y.S.2d 392 (3d Dep't 1991)).

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

112 *See* People v. Batista, 113 A.D.2d 890, 891, 493 N.Y.S.2d 608, 610 (2d Dep't 1985) (permitting cross-examination of witness with respect to any immoral, vicious or criminal act which may reflect on his credibility); People v. Arrellano, 150 Misc. 2d 574, 580, 569 N.Y.S.2d 574, 578 (N.Y.C. Crim. Ct. Kings County 1991) (holding witness may be impeached with any immoral, vicious or criminal act which show him to be untrustworthy, even never convicted).

113 *See supra* note 95 (discussing New York Proposed Rule of Evidence 608(b)).

114 *Sorge*, 301 N.Y. at 200, 93 N.E.2d at 638. "[O]f his life." *Id.*

115 *Id.* (court did not qualify statement "of his life" with any time barrier); People v. Brailsford, 106 A.D.2d 648, 650, 482 N.Y.S.2d 907, 908 (2d Dep't 1984) (questioning witness regarding any acts involving moral turpitude permissible).

the past.[116] In contrast, the Federal Rules of Evidence preclude evidence of prior convictions if they occurred more than ten years ago, unless it can be shown that there is special probative value of the conviction.[117] Even prior to the passage of the Federal Rules of Evidence, some New York courts took special notice of the issue regarding the passage of time and, additionally, the age of the witness when those bad acts were committed.[118]

In *Sandoval*, the Court of Appeals noted that the passage of time would affect the materiality of prior bad acts.[119] Similarly, in *People v. Wilson*,[120] the Queens County court, Criminal Term, did not allow a twenty-one-year-old narcotic conviction to be used to impeach the defendant.[121] More recently, courts, in cases decided after adoption of the Federal Rules of Evidence, have held that the passage of time is an important factor in admitting bad acts into evidence. In *People v. Ocasio*,[122] the Court of Appeals held that it was not reversible error to exclude from impeachment, evidence of a thirty-two-year-old manslaughter conviction since it was "part of a skein of convictions . . . cover[ing] too many years."[123]

The Proposed Rules of Evidence in New York would amend the

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

117 *See* FED. R. EVID. 609(b). The rule states in pertinent part:

> [E]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction . . . unless the court determines that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Id.

118 *See supra* notes 114-17 and accompanying text (providing no time barrier used to determine whether act would be admissible for impeachment purposes); *see also* People v. Caviness, 38 N.Y.2d 227, 233, 342 N.E.2d 496, 501, 379 N.Y.S.2d 695, 701 (1975) (excluding twenty year old gun conviction). *But see* People v. Mackey, 49 N.Y.2d 274, 282, 401 N.E.2d 398, 403, 425 N.Y.S.2d 288, 292-93 (1980) (ten year old petit larceny and disorderly conduct convictions admitted).

119 *See* People v. Sandoval, 34 N.Y.2d 371, 376, 314 N.E.2d 413, 417, 357 N.Y.S.2d 849, 855 (1974). The *Sandoval* court stated:

> [E]vidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct.

Id.

120 75 Misc. 2d 720, 348 N.Y.S.2d 486 (Sup. Ct. Queens County 1973).

121 *Id.* at 725, 348 N.Y.S.2d at 490 (discussing People v. Puco, 453 F.2d 539 (2d Cir. 1971)).

122 47 N.Y.2d 55, 389 N.E.2d 1101, 416 N.Y.S.2d 581 (1979).

123 *Id.* at 60, 389 N.E.2d at 1103, 416 N.Y.S.2d at 584; *see also* People v. Provenzano, 79 A.D.2d 811, 814, 435 N.Y.S.2d 369, 372 (3d Dep't 1980) (trial judge should use discretion in instances where passage of time coupled with witness's conduct since occurrence of acts in question would suggest injustice).

Sorge rule in that the introduction of bad acts for impeachment purposes would be prohibited if the act occurred at least fifteen years prior.[124] Although the comment to the Proposed Rules noted that it has always been the case that courts recognize that lapse of time affects probative value,[125] the definitive time period proposed was similar to the time period used by the Federal Rules of Evidence.[126]

CONCLUSION

Impeachment of a witness's credibility through the use of prior bad acts continues to be permissible in New York. Since the rule in New York is inconsistently applied, and continues to be amended through case law, there is a need for a clear enunciation of the current rule and uniform application. The Federal Rules of Evidence and the New York Proposed Rules of Evidence appear helpful in this regard. These rules would set guidelines for judges to use in determining the admissibility of a bad act. More definitive rules would, therefore, aid the courts in determining whether a specific act is admissible, and thereby lead to more consistent results rather than ad hoc decisions.

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[124] *See* NEW YORK PROPOSED CODE OF EVID. 608(c). This rule would provide, in pertinent part:

> (1) General rule. Evidence of a specific act of conduct under this section is not admissible if a period of more than fifteen years, excluding any period of incarceration, has elapsed since the date of the occurrence of the act, unless the court determines that the probative worth of the specific act on the witness's credibility substantially outweighs its prejudicial effect.

Id.

[125] *See* NEW YORK PROPOSED CODE OF EVID. 608(c)(1) cmt. The comment to the proposed rule provides:

> [U]nder this section, conduct that occurred more than 15 years before the witness's testimony in the instant case is subject to a special balancing test. That test requires the court to be persuaded that the probative value of the evidence substantially outweighs its prejudicial effect. Under the present law there is no time limit, although courts recognize that the older the act, the less its probative value.

Id.

[126] FED. R. EVID. 609(b). The rule states, in pertinent part:

> [E]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Id.