The Dilemma of a Defendant Witness in New York: The Impeachment Problem Half-Solved

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IN NEW YORK: THE IMPEACHMENT
PROBLEM HALF-SOLVED

One of the most important tasks of any jury is to listen to and evaluate the testimony of witnesses called by either side. In determining whether or not to believe a particular witness, the jury may consider the reasonableness of his story, his demeanor on the stand, and any weaknesses in his testimony exposed on cross-examination.¹ As a further test of credibility, a witness may be impeached² by the introduction of evidence concerning his prior convictions³ and by interrogation regarding his prior specific acts of misconduct.⁴ This additional information concerning the witness' past life is intended to provide some evidence of the witness' character and thereby better enable the jury to decide whether he is worthy of belief.⁵

A defendant in a criminal trial who chooses to take the stand in his own behalf is, in his capacity as a witness, also subject to such impeachment.⁶ Thus, the prosecution's case, which is normally limited to establishing only the elements of the crimes charged,⁷ is extended, under the rules of impeachment, to include proof of the

¹ Form No. 21, in J. Dowsey, Charges to the Jury and Requests to Charge in a Criminal Case 3-24 (1968).
² In New York, the credibility of an opponent's witness may be impeached by:
   1. Showing [the witness'] general bad reputation for truth and veracity;
   2. Interrogating him on cross-examination concerning any immoral, vicious, or criminal act of his life which may affect his character and tend to show that he is not worthy of belief;
   3. Showing that he has made statements on other occasions which are inconsistent with his present testimony;
   4. Showing his bias in favor of the party calling him, his hostility towards the party against whom he is testifying, or his interest in the case;
   5. Showing that he has been convicted of a crime;
   6. Showing that, either at the time of the occurrences to which he has testified or at the time of giving testimony, he was under the influence of drugs or liquor or was ill or mentally deranged.

W. Richardson, Evidence § 493 (10th ed. J. Prince 1973) [hereinafter cited as Richardson].
³ See text accompanying notes 26-34 infra.
⁴ See text accompanying notes 12-25 infra.
⁵ The underlying rationale for these methods of impeachment is the belief that [w]hat a person is often determines whether he should be believed.... No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing they would wish to know.

⁷ See People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).
defendant's prior convictions and questions regarding his previous acts of misconduct. Consequently, a jury verdict on a defendant's guilt or innocence as to the present charges may in such cases be heavily influenced by the jurors' knowledge of the defendant's guilt or impropriety on previous occasions.

Many jurisdictions have struggled with the conflict inherent in the jury's dual function of evaluating credibility based upon a defendant witness' past conduct and rendering a verdict based only upon evidence relevant to the crime presently charged. In *People v. Sandoval* the New York Court of Appeals, by limiting the evidence which will be admissible for impeachment purposes and instituting pretrial procedures which give the defendant advance notice of evidence to be introduced at trial, for the first time both recognized the problem and tried its hand at a solution. While *Sandoval* was at first enthusiastically hailed as an addition "to the illustrious list of constitutional safeguards joining such company as *Miranda, Wade, Huntley* and others," it now appears that this reception to the court's attempted reform was unduly optimistic. An examination of post-*Sandoval* lower court decisions reveals that many of the problems found in the process of impeaching a defendant witness remain unsolved.

**IMPEACHMENT OF A WITNESS IN NEW YORK**

**Prior Acts**

In New York a witness may generally be cross examined concerning any immoral, vicious, or criminal act which may affect his character and show him unworthy of belief. The acts shown need

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8 One of the first courts to recognize and attempt to deal with the problems involved in impeaching a defendant witness through the use of his past conduct was the Court of Appeals for the District of Columbia Circuit. See Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). For examples of subsequent federal and state court approaches to the problem see United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971), and State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1967).


11 *See* notes 93-113 and accompanying text *infra*.

not have been the subject of a criminal prosecution or any legal action at all provided they have some bearing on the credibility of the witness or are indicative of "moral turpitude." While the ultimate issue of credibility is always left to the jury, the court initially determines the admissibility of such evidence. The appellant who seeks a reversal of a trial judge's decision on this matter has the heavy burden of showing an abuse of discretion.

In most instances, the trial court will not permit cross-examination beyond the broad perimeter of the "moral turpitude" standard. Although moral turpitude has never been precisely defined by the courts, acts revealing dishonesty, lack of moral principle, or disregard for the truth are usually ruled proper subjects for cross-examination. Conversely, it has been held reversible error to question a witness concerning nonpayment of rent or expulsion from a church since such acts do not necessarily demonstrate negative traits in a person's moral character. Questions concerning previous arrests or indictments are similarly excluded since neither arrest nor indictment carries a presumption of guilt or wrongdoing on the part of the witness.

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13 People v. Montlake, 184 App. Div. 578, 583, 172 N.Y.S. 102, 106 (2d Dep't 1918).
14 See People v. Williams, 6 N.Y.2d 549, 187 N.Y.S.2d 750, cert. denied, 361 U.S. 920 (1959), wherein the court, excluding expert testimony to the effect that drug addicts are often pathological liars, emphasized that credibility is solely a jury question.
15 See cases cited note 12 supra.
16 See People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950), in which the court stated that although there may be room for a difference of opinion as to the scope and extent of cross-examination, the wide latitude and the broad discretion that must be vouchsafed to the trial judge . . . precludes this court, in the absence of "plain abuse and injustice," . . . from substituting its judgment for his and from making that difference of opinion, in the difficult and ineffable realm of discretion, a basis for reversal. Id. at 202, 93 N.E.2d at 640 (citations omitted).
17 For a collection of cases illustrating the types of acts admissible under the moral turpitude rule, see 3 L. FRUMER & E. BISKIND, BENDER'S NEW YORK EVIDENCE § 141 (1974).
18 People v. Montlake, 184 App. Div. 578, 583, 172 N.Y.S. 102, 106 (2d Dep't 1918).
20 See, e.g., People v. McKinley, 39 App. Div. 2d 749, 332 N.Y.S.2d 154 (2d Dep't 1972) (mem.) (questioning concerning eight prior arrests held reversible error even though three of these had in fact resulted in conviction); People v. Jusino, 10 App. Div. 2d 618, 196 N.Y.S.2d 321 (1st Dep't 1960) (mem.) (questioning concerning an arrest that occurred during a disturbance in a public park held reversible error).
21 See, e.g., People v. Morrison, 195 N.Y. 116, 88 N.E. 21 (1909) (questioning defendant's witness concerning his own indictment for a larceny similar to that for which the defendant was then on trial considered improper); People v. Korn, 40 App. Div. 2d 561, 334 N.Y.S.2d 115 (2d Dep't 1972) (mem.) (questioning defendant concerning counts of an indictment dismissed for insufficient evidence held reversible error); People v. Branch, 34 App. Div. 2d 541, 309 N.Y.S.2d 347 (2d Dep't 1969) (mem.), aff'd per curiam, 27 N.Y.2d 834, 265 N.E.2d 457, 316 N.Y.S.2d 633 (1970) (questioning defendant concerning indictment for crimes similar to crime for which he was on trial held reversible error).
In all cases, the sole purpose of cross-examination as to prior acts of misconduct is to impeach the credibility of the witness; therefore, questioning for any other purpose is impermissible.\textsuperscript{22} The cross-examining attorney is held to a standard of "good faith," requiring not only that his questions have a basis in fact, but also that the length and manner of questioning be reasonable and not overly prejudicial.\textsuperscript{23} Moreover, since it is feared that the introduction of independent evidence of prior vicious, criminal, or immoral acts will cause the multiplication of collateral issues which might confuse the jury, proof of such acts is limited to admissions elicited on cross-examination.\textsuperscript{24} Although the cross-examiner may inquire further as to a particular act or repeat a question hoping to obtain an affirmative answer,\textsuperscript{25} he is ultimately bound by a witness' denial and may not introduce evidence to contradict the responses given.

\textit{Prior Convictions}

The same reasoning that permits impeachment by prior acts underlies the rule allowing impeachment by evidence of prior convictions,\textsuperscript{26} namely the jury is entitled to know the type of person

\textsuperscript{22} It is not the purpose of cross-examination to create suspicion and mistrust in the minds of the jurors. See People v. Slover, 232 N.Y. 264, 133 N.E. 633 (1921) (per curiam). Nor should cross-examination be used to instill prejudice. In this regard, courts often scrutinize the length and manner of an attorney's cross-examination. See, \textit{e.g.}, People v. Malkin, 250 N.Y. 185, 164 N.E. 900 (1928) (confronting defendant on cross-examination with seven witnesses and phrasing questions in such a way as to suggest that defendant's denials were false held reversible error); People v. Redmond, 265 App. Div. 307, 38 N.Y.S.2d 727 (3d Dep't 1942) (detailed interrogation about the burning of three other buildings in cross-examination of 18-year-old defendant charged with arson held reversible error since the questions unavoidably raised a presumption of guilt in the minds of the jurors). In some cases the very content of the evidence introduced on cross-examination is found to be overly prejudicial. See, \textit{e.g.}, People v. Bilanchuck, 280 App. Div. 180, 112 N.Y.S.2d 414 (1st Dep't 1952) (exposure of defendant's entire record as a police officer, which included allegations of defendant's use of foul language, absence from post, participation in barroom fights, and making of unnecessary arrests held unduly prejudicial).


\textsuperscript{25} See People v. Schwartzman, 24 N.Y.2d 241, 244, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 820 (1969). In People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950), the defendant, who was on trial for performing an abortion, was questioned about other abortions she allegedly performed. Despite the defendant's denial of the allegations, the State was permitted to pursue this line of questioning and inquire further as to whether she had signed a statement admitting that she had performed another abortion and whether she had been present while others performed such an operation.

\textsuperscript{26} See, \textit{e.g.}, People v. Zabrocky, 26 N.Y.2d 530, 260 N.E.2d 529, 311 N.Y.S.2d 892 (1970); People v. Russell, 266 N.Y. 147, 194 N.E. 65 (1934).

In a criminal prosecution, New York permits the impeachment of a witness by evidence of a prior conviction for any offense. N.Y. \textit{Crim. Pro. Law} § 60.40 (McKinney 1971). In a civil action, such impeachment is limited to the use of evidence of prior criminal convictions,
who, by taking the stand, is asking to be believed.27 Prior conviction is not considered a collateral matter and thus may be proven by evidence independent of an admission from the witness on cross-examination.28 Indeed, even if a witness denies the fact of conviction, the cross-examiner’s right to introduce the witness’ prior record into evidence is unaffected.29

The scope of judicial discretion in this area is extremely limited. Proof of convictions for felonies and misdemeanors is routinely introduced.30 In addition, the court of appeals has recently indicated that convictions for violations may be used for impeachment purposes.31 Most traffic offenses, however, may not be used to impeach a witness.32 Youthful offender adjudications, which do not result in criminal convictions, are also inadmissible.33

N.Y. CIV. PRAC. LAW § 4513 (McKinney 1963), crime being defined in the Penal Law as a felony or misdemeanor. N.Y. PENAL LAW § 10.00(6) (McKinney 1975). See generally Richardson, supra note 2, § 506; E. Fisch, NEW YORK EVIDENCE § 459 (1959); 3 L. Frumer & E. Biskind, BENDER’S NEW YORK EVIDENCE § 146 (1974); G. Mottinger, NEW YORK EVIDENCE PROOF OF CASES § 439 (2d ed. 1969); 2 L. Paperno & A. Goldstein, CRIMINAL PROCEDURE IN NEW YORK § 34 (rev. ed. 1971).

27 See note 5 supra.
28 N.Y. CRIM. PRO. LAW § 60.40(1) (McKinney 1971) provides in pertinent part:
If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction.
29 If in response to proper inquiry whether he has ever been convicted of any offense, the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

Id. 30 See, e.g., People v. Wilson, 75 Misc. 2d 720, 348 N.Y.S.2d 486 (Sup. Ct. Queens County 1973); People v. Killian, 74 Misc. 2d 120, 344 N.Y.S.2d 814 (Nassau County Ct. 1973).
31 See People v. Gray, 34 N.Y.2d 903, 316 N.E.2d 719, 359 N.Y.S.2d 286 (1974), aff‘g mem. 41 App. Div. 2d 125, 341 N.Y.S.2d 485 (3d Dep’t 1973), cert. denied, 419 U.S. 1055 (1974). N.Y. CRIM. PRO. LAW § 60.40(1) (McKinney 1971), which permits the impeachment of a witness by evidence of a prior conviction for any “offense,” has led to some confusion since it would seem to allow impeachment of a witness in a criminal prosecution by proof of a conviction for an offense not a crime. Adopting this view, the Gray court permitted impeachment of a defendant by proof of a conviction for harassment, which is only a violation. N.Y. PENAL LAW § 240.25 (McKinney 1975). This approach has been strongly criticized, however, and the weight of authority seems to favor the view that the drafters of § 60.40 did not intend to so extend the boundaries of impeachment. See 20 N.Y. JUD. CONF. ANN. REP. 236-37 (1975); 19 N.Y. JUD. CONF. ANN. REP. A69-70 (1974); Richardson, supra note 2, § 506.
32 N.Y. VEH. & TRAF. LAW § 155 (McKinney Supp. 1975) specifically states:
A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof.
Relying on this statute, the court, in People v. Oliver, 80 Misc. 2d 905, 365 N.Y.S.2d 422 (Sup. Ct. Queens County 1975), refused to permit cross-examination of the defendant concerning three prior motor vehicle convictions.
Similarly, a juvenile proceeding occurring before the family court may not be used against a witness in any other court. Beyond these limited exceptions, however, courts have been less than discriminating in permitting the use, in cross-examination, of evidence from a witness’ prior record, often disregarding its relevance to the witness’ credibility.

**Impeachment Complicated: The Defendant Witness**

*The Question of Relevance*

At common law conviction of any infamous crime rendered a witness incompetent to testify. Although this principle has become obsolete, the underlying rationale continues as the basis for modern rules of evidence. From the fact that a person has committed a criminal act in the past, the jury is permitted to infer that he may be testifying falsely when he takes the stand. It seems reasonable that such a damaging inference should be permitted only upon a showing that there exists some rational or logical relationship between commission of a criminal act in the past and a present tendency to falsify.

It is especially important to determine whether prior convictions or acts of misconduct are relevant to credibility when the witness to be impeached is the defendant in a criminal prosecution. The defendant's initial choice to either testify in his own behalf or remain silent is often dictated by the nature of his prior record. If he elects not to take the stand, the prosecutor may neither comment on his silence nor refer to the existence or content of any prior record. On the other hand, if the defendant chooses to

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34 See N.Y. Family Ct. Act §§ 781, 783 (McKinney 1963). In addition to § 781, which states that no adjudication under the Act shall be considered a conviction, § 783 provides that evidence from any stage of a family court proceeding is inadmissible in any other court except for the purpose of sentencing an adult after conviction.

35 C. McCormick, Evidence § 43 (1954); 2 J. Wigmore, Evidence § 519 (3d ed. 1940).

36 H. Kalven & H. Zeisel, The American Jury 146 (1966). Statistics reveal that a defendant without a record will testify 91% of the time. The rate drops to 74% where the defendant has been previously convicted.


38 When the defendant does not testify, the prosecution is effectively foreclosed from introducing any prior record the defendant may have unless the fact of prior convictions or criminal acts is independently admissible as proof of elements of the crime such as motive, intent, or common scheme or plan. See People v. Molineux, 168 N.Y. 264, 61 N.E. 286
exercise his right to testify, the prosecutor will undoubtedly reveal
the defendant's entire prior record to the jury.39

The substantial risk of prejudice incurred by a defendant
witness is a factor which cannot be ignored in determining the
validity and reliability of impeachment procedures as a test of
credibility. It is undeniable that a jury will be much less favorably
disposed towards a defendant with a prior record than towards one
who can say that he has never been in trouble.40 The jury may
draw the inference that "he's done it once, he probably did it
again"41 or "once a criminal always a criminal." Some jurors might
even feel that an alleged second or third offender deserves to be
locked away regardless of his guilt or innocence of the particular
charges against him. In such cases, the possibility always exists that
a defendant will be convicted on the basis of past acts rather than
present guilt.

The prejudicial effect of prior conviction evidence has been
documented in studies of jury behavior, and it has been demonstrat-
ed that defendants whose prior record is revealed at trial have
a much lower chance of acquittal.42 Courts are well aware of this
phenomenon. Indeed, the effect of prior conviction evidence upon
the defendant's case has been described by one judge as "devastat-
ing."43 Not surprisingly, therefore, prosecutors are reluctant to
relinquish such a powerful weapon.44

(1901). See generally N.Y. CRIM. PRO. LAW § 60.40(3) (McKinney 1971). See also Lacy,
Admissibility of Evidence of Crimes Not Charged in the Indictment, 31 ORE. L. REV. 267 (1952);
Slough & Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325, 326-36 (1956); Trautman,
Logical or Legal Relevancy—A Conflict in Theory, 5 VAND. L. REV. 385, 403 (1952).
39 See note 6 supra.

40 Commentators unanimously agree that the use of a prior record to impeach a
defendant witness has a prejudicial effect. See, e.g., Spector, Impeaching the Defendant by His
Backward, 1 LOYOLA U.L.J. 247, 249-50 (1970); Note, Impeaching the Accused by His Prior
Convictions—A New Approach to an Old Problem, 19 HASTINGS L.J. 919, 922-24 (1968); Note,
Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the
Purpose of Impeaching the Credibility of the Defendant Witness, 37 U. CINN. L. REV. 168, 170-80
(1968).
41 Where the conviction or criminal act introduced to impeach the defendant is similar
to the offense charged, see, e.g., People v. Wilson, 75 Misc. 2d 471, 347 N.Y.S.2d 336 (Sup.
Ct. Queens County 1973) (hearing ordered); People v. Wilson, 75 Misc. 2d 720, 348
N.Y.S.2d 486 (Sup. Ct. Queens County 1973) (posthearing determination); People v. Anderson,
31 Misc. 2d 863, 222 N.Y.S.2d 270 (Westchester County Ct. 1961), the probability that
the jury will draw this inference is likely to increase.
42 H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160-61 (1966). In their analysis of the
effect of the strength of the prosecution's case and disclosure of a defendant's prior record,
the authors discovered that if they "take the average of the cases where the defendant has no
record as against the cases where he has a record, the acquittal rate declines from 42 to 25
percent." Id. at 161.
43 Interview with Judge Richard E. Edstrom, District Court of Nassau County, Mineola,
44 Id.
Ideally, impeachment procedures should incorporate some mechanism for distinguishing between prior acts that are relevant to credibility and acts that demonstrate character traits which are in no way related to truthfulness. Certainly many unascertainable subjective factors influence a defendant's decision to tell the truth in court. Psychological data on the relationship between past criminal behavior and a present tendency towards dishonesty are at best inconclusive. Indeed, one of the most influential factors coloring a defendant's testimony at trial may well be his guilt or innocence of the particular crime charged. The threat of a possible jail sentence unquestionably fosters false testimony by many guilty defendants irrespective of their prior records. An innocent defendant, on the other hand, has an incentive to speak the truth. Nevertheless, consideration of this factor as well as the many social and psychological motivations underlying a defendant's testimony is admittedly beyond the province of a court.

There seem to exist, however, certain objective criteria, capable of incorporation into judicially created rules of impeachment, which are helpful in determining whether particular prior behavior is relevant in ascertaining credibility. The type of criminal behavior involved is one such factor. For example, if a person has previously engaged in conduct exhibiting dishonest or deceitful character traits, one might logically assume that such behavior is relevant to whether the person is now to be believed. Violent or impulsive behavior, on the other hand, may reveal little about the honesty or integrity of a person and thus be of dubious value to the jury in judging credibility. Another relevant consideration should be the remoteness of the acts sought to be introduced. The relationship between past criminal behavior and a present propensity towards falsehood is, it is suggested, further weakened by the passage of time. Incidents that occurred during a person's youth may merely indicate a troubled period in his life rather than an inherent lack of

45 See Glick, Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Evidence for U.S. District Courts, 6 CRIM. L. BULL. 330, 332 (1970) [hereinafter cited as Glick]. The author points out that while there have been no definitive studies on the relationship between a criminal record and a tendency to falsify, available data seem to indicate that the rationale permitting impeachment by prior conviction to be used as a test of credibility has questionable support in psychological theory.

46 See Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 YALE L.J. 763, 774-78 (1961).

47 The theory that admissible prior convictions should be limited to crimes involving dishonesty, deceit, or untrustworthiness has received wide support. See, e.g., Cohen, Impeachment of a Defendant-Witness by Prior Conviction, 6 CRIM. L. BULL. 26 (1970); Glick, supra note 45. See also UNIFORM RULE OF EVIDENCE 21 (1965 version), which limits the scope of impeachment to crimes involving "dishonesty or false statement."
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honesty. It seems clear, therefore, that since all prior acts do not bear on credibility to the same degree, an approach that fails to discriminate between the different types of behavior involved is unjustified.

Constitutional Objections

In an era in which the constitutional guarantees afforded a criminal defendant have been expanded to protect his rights at trial,\(^4^8\) any evidentiary rule that threatens the exercise of those rights appears deserving of close scrutiny. The constitutional questions raised by the admissibility of prior criminal acts or convictions to impeach a defendant witness, therefore, merit serious consideration.

A defendant might well argue that the prejudicial effect of prior conviction evidence constitutes a deprivation of due process. The Supreme Court has already held, in a different context, that a defendant need not show specific detriment to himself to prevail on a due process argument.\(^4^9\) Rather, a showing that a particular practice is inherently prejudicial may provide a sufficient basis for a finding of unconstitutionality. The virtually indiscriminate use of impeachment evidence by some courts, given its demonstrable prejudicial effect, certainly seems vulnerable to such a due process attack.\(^5^0\)

Lack of a strong logical relationship between prior conviction


\(^{4^9}\) In Estes v. Texas, 381 U.S. 532 (1965), the Texas procedure permitting the televising of a criminal trial within the discretion of the trial judge was attacked on due process grounds. The State contended that since the defendant could establish no demonstrable prejudice resulting from the use of television, his conviction must stand. The Court agreed that this was the general rule, but rejected the need for a showing of prejudice in the instant case, explaining that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Id. at 542-43. Estes' conviction was reversed.

\(^{5^0}\) A denial of due process may also result when a specific constitutional right has been abridged. Taking this approach, the Supreme Court of Hawaii has held that the use of prior convictions to impeach the credibility of a defendant witness is an unreasonable burden on his right to testify and therefore a denial of due process. State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971), noted in 25 VAND. L. REV. 918 (1972). During his trial for first degree murder, Santiago was questioned about a prior burglary conviction. Balancing the relatively slight probative value that prior convictions have on the issue of credibility against the probability that the defendant with a prior record will forego his privilege to testify and that the jury will use the impeaching evidence to determine the defendant's guilt of the crime charged, the court concluded that the impeachment procedure was unconstitutional as applied to a defendant witness and reversed the conviction.
of crime and truthfulness on the stand may also give rise to an equal protection problem. Although the equal protection clause does not require identical treatment for all persons, it clearly mandates that any distinctions drawn be reasonably related to a legitimate state goal. The use of prior convictions for impeachment purposes creates two distinct classes of defendants. The prior offender who testifies in his own behalf lessens his chances of acquittal because of the potentially damaging effect exposure of prior criminal acts and convictions may have upon a jury. A first offender, however, does not suffer the same fear that the jury's evaluation of his testimony, and presumably its ultimate verdict, will be heavily influenced by factors extraneous to his guilt or innocence of the crime charged. If the impeachment procedure furthered a legitimate purpose, such as aiding the jury in assessing credibility, the distinction between these two classes of defendants might be justified. The propriety of the distinction is suspect, however, since the premise upon which it is based—that prior acts are relevant to credibility—is open to question.

Related to the due process and equal protection considerations is the defendant's right, under the sixth amendment, to a fair trial by an impartial jury. Although the amendment itself contains no specific guidelines as to what constitutes an impartial jury, case law indicates that any practice which affects the jury's ability to be openminded on the question of guilt regarding a specific charge is subject to scrutiny. Excessive pretrial publicity, for example, has been held grounds for reversal of a defendant's conviction, since it deprived him of a jury of impartial men and women who would convict or acquit solely on the basis of evidence presented at trial. In a case where the defendant is impeached by prior convictions or criminal acts, there exists the similar danger that the jury will convict, not solely on the basis of evidence of the defendant's guilt, but because the disclosure of other extraneous facts which theoretically may be used only to gauge credibility has colored its decision.

53 Sheppard v. Maxwell, 384 U.S. 333 (1966). Prior to his arrest for the murder of his wife, numerous newspaper articles proclaimed the defendant guilty. The publicity increased thereafter: the names and addresses of prospective jurors were published, and all jurors reported receiving numerous telephone calls and letters in regard to the impending trial. Both the jury selection and trial were extensively covered by the news media, and the presence of numerous reporters interfered with the orderly conduct of the trial. Finding that the state trial judge's failure to adequately protect the defendant from such inherently prejudicial publicity and maintain order in the courtroom constituted a violation of due process, the Supreme Court reversed the defendant's conviction.
Finally, it is arguable that the use of prior conviction evidence runs afoul of the fifth amendment because it forces the defendant to choose between two fundamental rights—his right to testify and his privilege against self-incrimination. By testifying, a defendant may substantially reduce his chances of acquittal. To avoid incriminating himself, therefore, he may be forced to remain silent. The rule seems to preclude the exercise of one right without detriment to the other.

Significantly, the Supreme Court has never ruled on the use of prior convictions or criminal acts to impeach the credibility of a defendant witness. Indeed, in such cases, certiorari has been consistently denied. In analogous situations, the Court has held that the jury's knowledge of a defendant's record, although perhaps prejudicial, did not rise to the level of a violation of the defendant's constitutional rights. For example, in *Michelson v. United States*, the Court ruled that cross-examination of a character witness for the defense concerning the defendant's arrest 27 years earlier was not improper. In *Spencer v. Texas*, the Court upheld the state recidivist procedure which permitted the full disclosure of the defendant's record to the jury. A limiting instruction that the prior record was to be used for sentencing purposes only was considered sufficient to protect the defendant's rights. Finally, in *Murphy v. Florida*, although jurors had knowledge of the defendant's prior record from newspaper stories and admitted to some prejudice against the defendant, the Court concluded that the constitutional requirements of a fair trial had been met.

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54 *See In re Oliver*, 333 U.S. 257, 273 (1948).
56 *See*, e.g., De Angelis v. United States, 416 U.S. 956, denying cert. to 490 F.2d 1004 (2d Cir. 1974); Cook v. United States, 406 U.S. 925 (1972), denying cert. to 450 F.2d 339 (5th Cir. 1971); DiLorenzo v. United States, 402 U.S. 950 (1971), denying cert. to 429 F.2d 216 (2d Cir. 1970); Allison v. United States, 396 U.S. 968, denying cert. to 414 F.2d 407 (9th Cir. 1969); Morefield v. United States, 396 U.S. 916, denying cert. to 411 F.2d 1186 (7th Cir. 1969); Palumbo v. United States, 394 U.S. 947 (1969), denying cert. to 401 F.2d 270 (2d Cir. 1968); Pinkney v. United States, 390 U.S. 908 (1968), denying cert. to 380 F.2d 882 (5th Cir. 1967); Plaza v. United States, 385 U.S. 841, denying cert. to 361 F.2d 958 (7th Cir. 1966).
57 335 U.S. 469 (1948).
59 In a strong dissenting opinion, Chief Justice Warren, with whom Justice Fortas concurred, expressed disapproval of the procedure that permitted the jury to know of the defendant's prior record before reaching their verdict where such record was to be used only to determine the sentence. Notably, however, the Justices distinguished this situation from one where evidence of prior convictions is used to impeach a defendant's credibility, commenting that "prior-convictions evidence introduced for certain specific purposes relating to the determination of guilt or innocence ... would not violate the Due Process Clause." *Id.* at 578 (Warren, C.J., dissenting). The admission of prior conviction evidence is proper in the case of impeachment, they stated, since it is relevant to credibility and thus to the jury's determination of guilt or innocence.
60 421 U.S. 907 (1975).
In light of these decisions, it is conceivable that, if faced with the issue of the permissible scope of impeachment against a defendant witness, the Supreme Court would sanction a broad range of impeachment procedures. Since the Court has indicated, however, that it is "not the best forum for developing rules of evidence," it is more likely that the present hands-off policy will continue. Notwithstanding the Court's position that the jury's knowledge of a defendant's prior record does not, in analogous situations, necessarily amount to a violation of his constitutional rights, perhaps the Court's refusal to finally resolve the issue will enable state courts and legislatures to develop more enlightened evidentiary rules on their own.

The Limiting Instruction

Defenders of the procedures permitting impeachment by evidence of prior convictions or criminal acts assert that the limiting instruction effectively protects the defendant against any resultant prejudicial effects. The typical limiting instruction calls attention to the prosecutor's introduction of prior conviction evidence and explains that the evidence may be used only in considering the believability of the witness. In practice, however, the limiting instruction has proved to be an all but useless device for minimizing prejudice and has been recognized as such by judges and com-

63 The following is a limiting instruction applicable to any defense witness:
The People have produced proof that the witness, called to the stand by the defendant, had previously been convicted of a felony. This evidence was admitted solely to aid you in considering his believability, and to determine the weight to be given the testimony of that witness. You must not consider this evidence of the witness's prior conviction for any other purpose, or permit it otherwise to influence you with respect to your verdict or determination.

You may also consider the nature of the crime of which he was convicted. The fact that a man has been convicted of a crime does not automatically make him unworthy of belief. But if it is a crime which involves his capacity to be truthful, such as perjury or fraud, or one which would normally and reasonably make you believe that he is not to be trusted to tell the truth, you may apply that fact, with others, to your determination of whether you will believe his testimony, and to what extent.

Form No. 27, in 1 J. Dowsey, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE 3-30 (1968).
64 See, e.g., Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."); United States v. Banmiller,
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mentators\textsuperscript{65} alike. It is unrealistic to assume that the decisionmaking process is so compartmentalized as to enable a jury to decide the issues of credibility and guilt independently. Indeed, the instruction may even emphasize the fact of prior conviction, and for this reason many defense attorneys prefer that the charge not be given at all.\textsuperscript{66} Far from being protective of a defendant, therefore, the limiting instruction only enhances the prejudicial effect that this kind of evidence has on the minds of the jurors.

AN ATTEMPT TO SOLVE THE PROBLEM—
A LOOK AT SANDOVAL AND DUFFY

The problems surrounding the procedures for impeachment of a defendant witness — the resulting prejudice, the constitutional objections, the ineffectiveness of the limiting instruction — have been particularly critical in New York, a jurisdiction that has traditionally allowed a wide range of criminal convictions and acts to be introduced at trial.\textsuperscript{67} Recently, an increased sensitivity to many of these problems began to develop in the lower courts. In recognition of this trend, the New York Court of Appeals, in People v. Sandoval\textsuperscript{68} and People v. Duffy,\textsuperscript{69} attempted to alleviate some of the worst effects of the impeachment rule.

310 F.2d 720, 725 (3d Cir. 1962) (Where the jury was charged to consider 25 prior convictions only in regard to sentencing and not with regard to the issue of guilt, the court commented that "[c]ertainly such a feat of psychological wizardry verges on the impossible even for robed judges."); United States v. Grunewald, 233 F.2d 556, 573-74 (2d Cir. 1956) (dissenting opinion) ("Such a cautionary instruction is a kind of judicial lie."); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Here the court characterized the limiting instruction as "[t]he device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic].").

\textsuperscript{65} See Note, The Limiting Instruction—Its Effectiveness and Effect, 51 MINN. L. REV. 264, 282-83 (1966) ("Other crimes' evidence must either be totally excluded, or admitted with the understanding that the jury probably will not be able to circumscribe its use of the evidence."). See also Ladd, Credibility Tests—Current Trends, 89 U. PA. L. REV. 166, 184-91 (1940).


One commentator has suggested dealing with the problem of prejudice by allowing the judge to interrupt cross-examination to instruct the jury as to the limited purpose of prior conviction evidence. The judge would then reiterate the instruction at the close of the case. Katz, Cross-Examination of the Defendant in Criminal Trials—Impeachment Limits, 173 N.Y.L.J. 61, Mar. 31, 1975, at 1, col. 1. A defense attorney, however, would probably shudder at such a tactic since it appears to further emphasize the fact of prior conviction to the jury.

\textsuperscript{67} See text accompanying notes 12-34 supra.


People v. Sandoval

Sandoval, who was indicted for common law murder, had a lengthy criminal record available for impeachment purposes. He had a lengthy criminal record available for impeachment purposes. His attorney made a pretrial motion requesting the court to prohibit use of the defendant's record on cross-examination. The trial court ruled that evidence of defendant's two prior convictions, one for disorderly conduct and the other for assault, was admissible for impeachment purposes. Upon conviction, Sandoval appealed the ruling to the appellate division, but that court found no abuse of discretion by the trial court. The murder conviction was again affirmed by the court of appeals, which also indicated that the pretrial motion is the proper vehicle for the judge's evidentiary ruling and set down guidelines governing the types of acts or convictions to be admitted on cross-examination.

The court's first proposal was that the trial judge employ a balancing test, used in a number of other jurisdictions, pursuant to which

a balance must . . . be struck between the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility on the one hand, and on the other the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him from taking the stand on his own behalf.

Sandoval's record included convictions for disorderly conduct (1964), assault in the third degree (1961), and driving while intoxicated (1963 and 1965). He had been charged with contributing to the delinquency of a minor (1960) and gambling (1967), but these charges did not result in convictions. Also on record were a 1965 arrest for felonious assault, which resulted in dismissal, and a 1965 traffic violation. 34 N.Y.2d at 373, 314 N.E.2d at 415, 357 N.Y.S.2d at 852.

One of the earliest and most widely cited formulations of this test appeared in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). The Luck court stated that sound judicial discretion should intervene where it would be preferable to let the jury hear the defendant's story rather than have the defendant remain silent or where the probative value of the prior conviction in regard to credibility is far outweighed by the prejudicial effect of the evidence. Id. at 768. For some interesting comments on Luck by Judge McGowan, the author of the opinion, see McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 L. & Soc. Ord. 1.

Notably, the Luck formula has been approved by the Second Circuit. See United States v. Puco, 453 F.2d 539, 541 (2d Cir. 1971); United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969).

As articulated, this test appears to imply an equal balance between the rights of the defendant and the interests of the state. The court seems to have allowed the scale to be tipped against the defendant at the outset, however, by noting that impeachment evidence will always be detrimental and prejudicial. And rather than recognize the prejudicial effect of such evidence as an evil to be avoided, it readily accepted the propensity of such evidence to influence the jury as "inevitable."\footnote{34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855.}

The court proceeded to outline in greater detail the types of acts that may or may not be admissible.\footnote{Id. at 376-78, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56.} Acts of impulsive violence, especially those remote in time, or crimes resulting from addiction or uncontrollable habit would have limited relevance to credibility. In addition, traffic infractions, the court noted, should almost always be excluded. On the other hand, crimes involving dishonesty, especially perjury, because of their great probative value in determining a defendant's credibility, would almost always be admissible. Acts tending to show criminal propensity would be inadmissible, however, despite their relevance, because of their strong prejudicial effect upon a jury.

In discussing these specific types of acts it characterized as admissible or inadmissible, the court enunciated a second test to guide judicial discretion:

To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand.\footnote{Id. at 377, 314 N.E.2d at 417, 357 N.Y.S.2d at 855.}

This second test is substantially different from the first and has no prior history in case law. The use of such terms as "principle," "interests of society," and "individual self-interest" is vague, confusing, and susceptible to many different interpretations.\footnote{See Prince, Evidence, 1974 Survey of N.Y. Law, 26 S.N.Y. L. Rev. 423 (1975). Notwithstanding his approval of the Sandoval decision, the author commented that "[i]t is difficult, however, to determine precisely what the Court of Appeals had in mind" when it formulated the self-interest test. Id. at 425 n.15.} Moreover, the test would seem to be distinctly unfavorable to the defendant to the extent that all crimes may be said to reflect selfish motives.
Finally, and perhaps most importantly, the test fails to consider the prejudicial effect of prior conviction evidence on the jury.

It is submitted that the two tests articulated in Sandoval confuse, rather than clarify, the substantive issues involved. One must look to the holding of the case to discover which test is in fact controlling. The admission of prior convictions for disorderly conduct and assault would be unjustified under the balancing test, since remote incidents of this type have little relevance to credibility and are highly prejudicial to the defendant. On the other hand, these two offenses, like all criminal acts, do demonstrate a certain disregard for the interests of society. It appears, therefore, that the court, in admitting both the disorderly conduct and assault convictions chose to apply only the self-interest test, thereby allowing the jury to gauge the defendant's credibility on the basis of acts that had little or no bearing on his tendency to lie on the stand.

Far from being innovative, the Sandoval decision appears totally consistent with the then existing New York case law permitting the almost unlimited use of prior convictions to impeach. Part of Sandoval's record which was suppressed would have been inadmissible in any event under that case law. Furthermore, the admissibility of Sandoval's disorderly conduct conviction is an example of the much criticized broad scope of impeachment earlier approved by the third department in People v. Gray. Thus, while much of the language in Sandoval seems to favor a more narrow scope of impeachment, the actual facts of the case appear to condone a very extensive use of a defendant witness' prior record.

A further ambiguity in the decision results from the terms used to describe the prior incidents in the defendant's record. Although the Sandoval court, throughout its opinion, speaks of cross-examination concerning prior criminal, vicious, or immoral acts, the holding of the case related to the defendant's prior convictions as well as prior criminal acts. Nowhere does the court even mention prior convictions as a separate category of admissible impeachment evidence. It is uncertain, therefore, whether or not

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79 An arrest not resulting in conviction has never been available to the prosecution as impeaching evidence. See note 20 and accompanying text supra. Similarly, traffic infractions are traditionally inadmissible. See note 32 and accompanying text supra.


81 34 N.Y.2d at 371, 373, 376, 314 N.E.2d at 413, 415, 417, 357 N.Y.S.2d at 849, 852, 854.
the court intended to abolish the distinction between these two methods of impeachment.

The opinion of the court was quite clear, however, with respect to the procedural issue. It unequivocally approved the use of a pretrial motion to give both prosecution and defense advance notice of the scope of cross-examination and, more importantly, to aid the defendant in deciding whether to take the stand or remain silent. In rare instances the court may, in its discretion, order an evidentiary hearing on the motion. In such cases the defendant may submit supporting affidavits or appear in person. Prior to Sandoval a few lower courts had allowed such a motion before trial on a purely discretionary basis. Sandoval now authorizes its use as a routine part of pretrial procedure.

People v. Duffy

Use of the pretrial motion as the vehicle for securing a ruling on the scope of cross-examination was reaffirmed by the court of appeals in People v. Duffy. Duffy, however, added to the confusion engendered by the Sandoval decision regarding the method of determining the specific convictions or acts of misconduct which are admissible to impeach the defendant.

On trial for the alleged commission of robbery and grand larceny, the defendant in Duffy was questioned on cross-examination regarding his previous use of heroin. Ruling that the cross-examination was proper, the court of appeals reasoned that “[t]he [defendant’s] responses evinced a ‘demonstrated determination deliberately to further self-interest at the expense of society’ and went to ‘honesty and integrity.’” No mention was made of the Sandoval balancing test which requires the court to weigh the value of the evidence sought to be introduced against the prejudicial effect on the defendant. Nor did the court refer to the

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82 Id. at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 854. While in most cases the motion is to be made prior to trial, the court left open the possibility that the issue might also be considered during the trial itself.

83 Id.


85 36 N.Y.2d at 263, 326 N.Y.2d at 807, 367 N.Y.S.2d at 241.

86 Id. at 261-62, 326 N.Y.2d at 806, 367 N.Y.S.2d at 239.


88 See text accompanying notes 73-75 supra.
Sandoval concept that "crimes or conduct occasioned by addiction or uncontrollable habit . . . may have lesser probative value as to lack of in-court veracity."\(^{89}\)

In the trial court, Duffy had also been questioned about a youthful offender adjudication involving an assault.\(^{90}\) The court of appeals disposed of this issue briefly, mentioning that while evidence of the youthful offender conviction was inadmissible, the underlying act could be the subject of cross-examination.\(^{91}\) It appears from this ruling that the Duffy court gave little consideration to the defendant's age at the time of this conviction or to the Sandoval court's observation that acts of violence seldom have a bearing on credibility at trial.\(^{92}\)

There appears to be little doubt that Duffy represents a retreat from the halfhearted attempt of the Sandoval court to limit the scope of cross-examination of a defendant witness for impeachment purposes. Duffy's concentration on the broad self-interest test of Sandoval, to the exclusion of the balancing test, indicates that the court does not seriously intend to curtail the scope of impeachment and for all practical purposes leaves the old law unchanged. While the court has given the defendant a procedural advantage in the pretrial motion, his ultimate dilemma seems as serious as ever. Should he choose to testify, he is vulnerable to impeachment by an almost full range of prior convictions or criminal acts. Admittedly, such impeachment is scrutinized by the trial court, but in the absence of more specific limitations on the use of impeaching evidence against a defendant witness, it is submitted that the insurance against a court's abuse of its discretion is inadequate.

The Aftermath of Sandoval

The Sandoval decision has understandably created more than a little confusion in the lower courts. While the advance ruling on the admissibility of prior convictions and criminal acts appears to have been quickly integrated into routine pretrial procedure, the courts are sharply divided on the substantive issues involved.

\(^{89}\) 36 N.Y.2d at 377, 314 N.E.2d at 418, 357 N.Y.S.2d at 855-56.
\(^{90}\) See 44 App. Div. 2d at 304, 354 N.Y.S.2d at 678.
\(^{91}\) 36 N.Y.2d at 264, 326 N.E.2d at 807-08, 367 N.Y.S.2d at 241.
\(^{92}\) See 34 N.Y.2d at 376-77, 314 N.E.2d at 417, 357 N.Y.S.2d at 855, wherein the Sandoval court acknowledged that "[t]he commission of an act of violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity, or honesty at the time of the trial."
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The Pretrial Motion

Use of the pretrial motion has been uniformly adopted by the lower courts so that every defendant is now afforded the opportunity to secure an advance ruling as to the admissibility of impeachment evidence against him. As a result, the lower courts have now begun to focus on the development of specific procedures to be followed. For example, whereas the Sandoval court recommended that the motion for a ruling on the permissible scope of cross-examination be made at some point prior to trial, the Appellate Division, Second Department, has further indicated that such determination should be made promptly and well in advance of the time a defendant must choose whether or not to testify. One court has also granted the defendant the right to secure a copy of his police record to aid him in preparing his motion papers.

Although Sandoval's requirement that the evidentiary ruling be made by the "trial court" has been interpreted to mean that the trial judge himself should make the determination, it has also been considered proper for any judge of the court where the trial will be held to rule on a defendant's Sandoval motion. The applicability of Sandoval to grand jury proceedings has also been discussed, but not resolved. One court found "no legal justification or rational basis" for limiting Sandoval only to defendants on trial.
while another court has ruled that the impeachment of witnesses in grand jury proceedings is within the discretion of the district attorney alone, who need give no advance notice of the scope of his cross-examination.  

To date no court has addressed the issue of the specific content of the Sandoval motion papers. Prior convictions on record are available to both prosecution and defense. It is clear from Duffy, however, that the Sandoval procedure also applies to impeachment by evidence of vicious, criminal, or immoral acts. Nevertheless, the court failed to specify whether the burden falls exclusively on the defendant, who is now required to make the motion, to spell out every act of misconduct in his past history or whether the prosecution must also come forward with the evidence it possesses. A more equitable solution might be to require the prosecutor to make a Sandoval motion and preclude him from offering at trial evidence of specific acts of misconduct not contained therein. Another problem arises from the lack of safeguards to prevent the prosecution from gaining knowledge of the defendant's past criminal conduct from the motion papers, information that otherwise might never have come to light. Perhaps the defendant should be permitted to reveal to the judge only, and not to the prosecutor, any specific criminal acts not part of his official record of convictions. Although the appropriate content of the Sandoval motion papers will inevitably have to be determined, no court has as yet addressed these problems.

Prior Criminal Acts and Convictions

The pronounced lack of agreement among lower courts on the standards to be used to guide the judge's exercise of discretion court regarded the introduction of prior convictions to be especially prejudicial in this case in view of the numerous inconsistencies in the testimony presented by both sides. The court ruled therefore that since the "prosecutor had knowingly and deliberately put this incitive material before the grand jury in violation of the reason and spirit of the Sandoval doctrine," the indictment should be dismissed. Id. at 328, 363 N.Y.S.2d at 251.

100 In People v. Adams, 81 Misc. 2d 528, 366 N.Y.S.2d 311 (Sup. Ct. New York County 1975), the court denied defendant's motion for an advance ruling restraining the district attorney from cross-examining him before the grand jury concerning his prior criminal record. Observing that the United States Supreme Court has held that a grand jury should not be delayed so that suppression hearings could be held, the court reasoned that the same considerations of expediency and judicial economy should control in this case. Id. at 531, 366 N.Y.S.2d at 314, citing United States v. Calandra, 414 U.S. 338 (1974) and United States v. Dionisio, 410 U.S. 1 (1973).

101 See 3 HOFSTRA L. REv. 168, 176 (1975), in which the author comments on the Sandoval court's failure to delineate the specific content of the pretrial motion papers.

102 The Duffy court permitted cross-examination of the defendant concerning his alleged prior history of heroin use, despite the absence of drug-related convictions on the defendant's record. 36 N.Y.2d at 261-62, 326 N.E.2d at 806, 367 N.Y.S.2d at 239.
indicates that Sandoval and Duffy have accomplished little in the way of clarification of the substantive problems associated with impeachment of a defendant witness. The trend in the Appellate Division, Second Department, appears to be in favor of limiting cross-examination of the defendant to convictions or criminal acts having a direct bearing on credibility. Very remote convictions have been ruled inadmissible, especially where there was a danger that the evidence was going to be used to demonstrate criminal propensity. In People v. Jackson, the court seized upon the broad language in Sandoval to establish definite categories of admissible and inadmissible criminal convictions and acts. Thus, the court ruled that cross-examination concerning traffic offenses, because of their immateriality, and convictions more than 10-years-old, because of their remoteness, should be barred altogether. Convictions linked to addiction or uncontrollable habit were similarly recognized to be of little probative value in determining credibility. The Jackson court further recommended that, due to the great danger of prejudice, convictions similar or identical to the crime charged be used sparingly. With respect to youthful offender adjudications, the court noted that in most cases evidence of the underlying act as well as evidence of the conviction itself should be excluded. In sum, the Jackson court determined that only those crimes involving individual dishonesty or untrustworthiness have such a direct relation to credibility as to override the prejudice that inevitably arises from their use to impeach a defendant. Thus the court barred the prosecution from exploring both the convictions and the underlying acts relating to the defendant's narcotics offenses.

See, e.g., People v. President, 47 App. Div. 2d 535, 363 N.Y.S.2d 612 (2d Dep't 1975). The court refused to sanction the admission of evidence of the defendant's 30-year-old manslaughter conviction on the theory that it was too remote to have any relevance to credibility and too likely to have an adverse effect on the jury.

79 Misc. 2d 814, 361 N.Y.S.2d 258 (Sup. Ct. Queens County 1974) (mem.).

Id. at 816-18, 361 N.Y.S.2d at 261-63.

Id. at 816-17, 361 N.Y.S.2d at 262. In People v. Mallard, 78 Misc. 2d 858, 358 N.Y.S.2d 913 (Sup. Ct. Queens County 1974), another judge had limited admissible convictions to those for "perjury, fraud and deceit, larceny by misrepresentation and other closely related crimes which have at their very core the prior dishonest or untruthful quality of the defendant." Id. at 864-65, 358 N.Y.S.2d at 919 (emphasis in original). In Mallard, the defendant's entire criminal record of nine convictions was suppressed.

79 Misc. 2d at 818, 361 N.Y.S.2d at 263. The Jackson court admitted, however, evidence of the defendant's convictions for attempted criminal possession of stolen property and possession of weapons.

Even where the defendant's prior convictions meet the relevancy criteria set forth in Jackson, in some situations part of the record may nevertheless be excluded. For example, in People v. Utley, 173 N.Y.L.J. 47, Mar. 11, 1975, at 18, col. 6 (Sup. Ct. Queens County), evidence of the defendant's prior convictions for attempted possession of stolen property,
Far less liberal in their interpretations of the Sandoval decision are the Third and Fourth Departments of the Appellate Division. Decisions from these courts lend strong support to the view that the law has undergone no real change. The third department has adopted very strict standards for appellate review of decisions concerning the grant of a Sandoval hearing or the permissible scope of impeachment. For example, in People v. Bullock, the court indicated that the trial court's determination should rarely be upset since Sandoval issues are "subject to the sound discretion of the Trial Judge and best determined by him." The fourth department in People v. Law permitted cross-examination concerning a burglary charge that was reduced to petit larceny as well as reference to an arrest that never resulted in conviction. While inquiry into prior arrests had not even been permitted before the court of appeals decided Sandoval, the prosecutor's references to the defendant's arrest for the sale of drugs were excused on the ground that they were merely incidental to legitimate questioning about prior acts of misconduct. Perhaps most significant was the fourth department's observation that Sandoval "does not change the substantive law in this respect even though it gives opportunity to limit such use by the vehicle of a pretrial motion.

Conclusion

While initially hailed as a solution to the dilemma of the defendant witness, the Sandoval decision seems to have created as many problems as it has solved. Sandoval is highly innovative insofar as it establishes a new procedure allowing a defendant to gain an advance ruling on the scope of the cross-examination that will be permitted should he take the stand at trial. The pretrial motion has been uniformly accepted by the lower courts, and any fears that it would increase the already overwhelming backlog in our criminal courts have proved unfounded.

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45 App. Div. 2d 902, 357 N.Y.S.2d 722 (3d Dep't 1974) (mem.).
Id. at 902, 357 N.Y.S.2d at 724.
48 App. Div. 2d 228, 368 N.Y.S.2d 627 (4th Dep't 1975).
See note 20 and accompanying text supra.
48 App. Div. 2d at 234, 368 N.Y.S.2d at 634.
Id. at 235, 368 N.Y.S.2d at 634.
Interview with Judge Richard E. Edstrom, District Court of Nassau County, Mineola, New York, in chambers, July 15, 1975.
The procedure at this stage is fairly informal, and the motion can be made at any time prior to trial. In conformity with the trend to expedite pretrial procedures, the *Sandoval* motion and hearing could easily be incorporated into the omnibus pretrial motion recently adopted in New York and successfully utilized in other jurisdictions. Attorneys have already anticipated legislative action in this regard by submitting the *Sandoval* motion along with the other papers required to be submitted in the omnibus motion.

Regrettably, the substantive problems with *Sandoval* remain. In the absence of clear and definitive judicial guidelines, the lower courts are sharply divided as to the types of prior convictions and vicious, criminal, and immoral acts that are admissible. The ambiguity of the language in *Sandoval* and the use of the self-interest test, which is so broad as to be all but meaningless, have produced, rather than solved, a multitude of problems.

Hopefully, the New York Court of Appeals will soon rectify the situation and definitively limit the scope of impeachment. It is submitted that the approach of the second department best exemplifies the spirit of the *Sandoval* ruling and therefore should be adopted. Criminal acts that reflect on the honesty or trustworthiness of the witness should be admissible. Acts of violence, incidents that occurred during the defendant's youth, or very remote acts of misconduct have little bearing on the defendant's credibility and should accordingly be excluded. The defendant has been given the benefit of an advance ruling on the range of permissible impeachment. Now the trial court should also be given a set of firm standards to govern that ruling and protect the defendant's right to a fair trial and an impartial jury.

Joanne T. Marren

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118 Interview with Judge Richard E. Edstrom, District Court of Nassau County, Mineola, New York, in chambers, July 15, 1975.