

1976

Three Essays on Character and Credibility Under the Federal Rules of Evidence

Irving Younger

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

Recommended Citation

Younger, Irving (1976) "Three Essays on Character and Credibility Under the Federal Rules of Evidence," *Hofstra Law Review*: Vol. 5: Iss. 1, Article 2.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss1/2>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

THREE ESSAYS ON CHARACTER AND CREDIBILITY UNDER THE FEDERAL RULES OF EVIDENCE

*Irving Younger**

It is too early in the day for a thoroughgoing examination of how the Federal Rules of Evidence¹ work in practice, and the story of their troubles in the Advisory Committee, in the Supreme Court and in Congress need hardly be told again.² As the rejoicing which marked the enactment of the Rules gives way to more measured enthusiasm, however, it becomes easier to see them for what they are: in principle necessary and splendid, in execution something deficient; this many excellences tempered by that many failures; thick with good things but full of infelicities and mistakes. All, someday, will doubtless be corrected and made perfect. To that end, I offer here three essays on character and credibility under the Federal Rules of Evidence. They are related in that each points out an aspect of the subject requiring amendment. I call them "essays" because they came to me while I sat at my desk rather than rummaged in the library,³ because I have tried to keep them to a single line of thought and not worked them out with the detail characteristic of a traditional law review article, and because they are intended, in Montaigne's sense of the word, as "essais," attempts, sketches, testings—the opposite, in fine, of the last word.

I

Holmes said the life of the law was experience;⁴ Thayer said

* Samuel S. Leibowitz Professor of Trial Techniques, Cornell Law School. B.A., 1953, Harvard University; LL.B., 1958, New York University. Professor Younger served as Judge of the Civil Court of the City of New York from January 1969 to July 1974. While on the bench, he also served by designation as Judge of the Criminal Court and Justice of the Supreme Court.

1. 28 U.S.C.A. FEDERAL RULES OF EVIDENCE 101-1103 [hereinafter cited as FED. R. EVID.]. The Rules became effective on July 1, 1975.

2. See, e.g., H.R. REP. NO. 93-650, 93d Cong., 1st Sess. (1973); H.R. REP. NO. 93-1597, 93d Cong., 2d Sess. (1974); 120 CONG. REC. H303-18 (daily ed. Jan. 30, 1974); *id.* at H543-70 (daily ed. Feb. 6, 1974); *id.* at S19,866-67 (daily ed. Nov. 21, 1974); *id.* at S19,908-17 (daily ed. Nov. 22, 1974); *id.* at S21,644-45 (daily ed. Dec. 16, 1974); *id.* at H12,090 (daily ed. Dec. 17, 1974); *id.* at H12,253-60 (daily ed. Dec. 18, 1974). See also J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE *passim* (1975).

3. Cf. A Midsummer Night's Dream, act 4, sc. 1, lines 215-16: "[I]t shall be called Bottom's Dream, because it hath no bottom . . ."

4. O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

it was reason.⁵ They were talking about the difficulty of finding good arguments, and since experience and reason are the two chief sources of that commodity, each was half right.

What they were not talking about was the method of making good decisions. On that the law has little to say, which perhaps is why it learned long ago to pass to the jury any really tough question of morals or social life. In negligence cases, for example, the law has been unable to define the duty of care. It simply tells the jury to make use of the standard of the "reasonably prudent person"—which is to say, "You decide it. We can't."⁶ In criminal cases with insanity as the defense, one court has made open confession of its inability to draw the line that separates guilt from innocence: let the psychiatrist explain as much as he can of the defendant's personality, and trust the jury to decide whether it is "just" that the defendant be convicted.⁷ In obscenity cases, overmatched by the difficulty of devising a test for what is obscene,⁸ courts have openly acknowledged their reliance upon the power of juries to sense the ineffable.⁹

Even so, the law hesitates to give the jury free rein. It limits the evidence which a jury may consider by applying two different types of exclusionary rule. In one, governed by considerations of unreliability, the reasoning goes as follows: the evidence lacks probative force, the jury must be protected against the temptation to believe it, and hence the judge is obliged to exclude it. Examples are the rule against hearsay¹⁰ and the Dead Man's Statute.¹¹

In the other, governed by considerations of doctrinal purity,

5. J.B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 631 (1898). The remark occurs in the index, not at the page to which the index entry refers, from which I am led to believe both that Thayer himself prepared the index and that he concealed in it his riposte to Holmes.

6. *Cf.* Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock, May 13, 1898, in 1 *HOLMES-POLLOCK LETTERS* 85-86 (M. Howe ed. 1941):

I don't like to be told that I am usurping the functions of the jury if I venture to settle the standard of conduct myself in a plain case. Of course, I admit that any really difficult question of law is for the jury, but I also don't like to hear it called a question of fact

7. *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967); *MacDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962); *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1947).

8. *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

9. *E.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

10. Compare Professor Davis' view that the rule against hearsay should be inapplicable in nonjury trials. Davis, *Hearsay in Nonjury Cases*, 83 *HARV. L. REV.* 1362 (1970).

11. *E.g.*, N.Y. C.P.L.R. § 4519 (McKinney 1963).

the reasoning goes as follows: the law has concluded that a certain kind of evidence should not be used to prove a certain thing, the jury will inevitably take the evidence as proving precisely that, and hence the judge should keep it out. Examples are the rule excluding offers of settlement¹² and the procedure laid down in *Jackson v. Denno*.¹³

Rules governed by considerations of doctrinal purity give rise in practice to a peculiar problem. Evidence which the rule makes inadmissible to prove a certain thing may be admitted to prove something else. Six illustrative cases:

1. The law deems it wise to encourage the correction of dangerous conditions. Accordingly, evidence that a defendant made repairs after an accident is inadmissible to prove negligence. But if the evidence is offered to prove ownership or the feasibility of precautionary measures, it is admissible.¹⁴

2. The law deems it wise to encourage settlements. Accordingly, evidence of a defendant's offer to compromise is inadmissible to prove liability. But if the evidence is offered to prove the circumstances in which a witness gave a statement, it is admissible.¹⁵

3. To encourage official compliance with the fourth amendment, the law excludes evidence obtained by an unreasonable search and seizure.¹⁶ But if the defendant takes the stand and swears to something which the suppressed evidence contradicts, it is admissible.¹⁷

4. To vindicate rights guaranteed by the fifth amendment, the law excludes statements made by a defendant without appropriate prior warnings and explanations.¹⁸ But if the defendant takes the stand and testifies in a manner inconsistent with an

12. FED. R. EVID. 408.

13. 378 U.S. 368 (1964) (requiring a prior hearing to determine the voluntariness of a confession, as opposed to allowing the jury, which is deciding guilt or innocence, to decide also the confession question).

14. FED. R. EVID. 407. The Rule provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

15. *Johnson v. Minihan*, 355 Mo. 1208, 200 S.W.2d 334 (1947).

16. *Mapp v. Ohio*, 367 U.S. 643 (1961).

17. *Walder v. United States*, 347 U.S. 62 (1954).

18. *Miranda v. Arizona*, 384 U.S. 436 (1966).

inadmissible statement, it is now admissible.¹⁹

5. A defendant's guilt is to be determined solely on the basis of proof that he committed the crime charged in the case on trial. Accordingly, evidence of the defendant's other wrongful acts is inadmissible to show that he is wicked and deserves to be convicted. But if the evidence is offered to prove motive, intent, plan, identity, or the absence of mistake, it is admissible.²⁰

6. For the reason stated in the fifth example, evidence of a defendant's prior convictions is inadmissible to prove his guilt in the case on trial. But if the defendant takes the stand and testifies, he thereby puts his credibility in issue and the evidence of prior convictions is admissible.²¹

In each case, the rule that excludes the evidence for one purpose yields to the pressure of another. What is inadmissible on one theory of relevance becomes admissible on a different theory.

The jury, of course, gets a limiting instruction. "Ignore the evidence with respect to the inadmissible purpose," the judge says, "and consider it solely with respect to the admissible." But "discrimination so subtle is a feat beyond the compass of ordinary minds."²² Once the evidence is in, the jury will probably consider it for the prohibited purpose no matter how avid the judge's charge. Doctrinal purity then becomes doctrinal corruption. What is to be done about it?

In civil actions evoking a relatively mild emotional response, courts accept doctrinal corruption with equanimity.²³ In criminal trials during which the defendant's own conduct brings about the receipt of otherwise inadmissible evidence, courts tend to shrug off the corruption of doctrine: since the defendant caused it, he should not complain about it.²⁴ But if the defendant does nothing

19. *Harris v. New York*, 401 U.S. 222 (1971).

20. FED. R. EVID. 404(b). This section of the Rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See also *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901).

21. See generally 3A J. WIGMORE, EVIDENCE §§ 980, 980a, 985-87 (Chadbourn rev. 1970).

22. *Shepard v. United States*, 290 U.S. 96, 104 (1933).

23. See the first and second illustrative cases at text accompanying notes 14 & 15 *supra*.

24. See the third and fourth illustrative cases at text accompanying notes 16-19 *supra*.

to invite forbidden evidence, courts are uneasy.²⁵

Dealing with the prior-similar-act rule,²⁶ at least one court has expressed concern;²⁷ dealing with impeachment-by-conviction,²⁸ a number of courts have acted.²⁹ The Federal Rules of Evidence struck a political compromise.

On one side were those who argued for unlimited use of convictions to impeach. On the other were those who urged strict limits.³⁰ To secure the votes of both sides, something was given to each. Exception was piled upon qualification to please Marcus and qualification upon exception to please Lucius,³¹ until Rule 609³² had been tortured into a mockery of the form one expects of

25. See the fifth illustrative case at text accompanying note 20 *supra*.

26. *Id.*

27. *United States v. Bradwell*, 388 F.2d 619, 622 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968).

28. See the sixth illustrative case at text accompanying note 21 *supra*.

29. *E.g.*, *United States v. Palumbo*, 401 F.2d 270 (2d Cir. 1968); *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965); *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971); *People v. Sandoval*, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

30. For an account of the debate see 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 609[01] (1975).

31. I am indebted to Wigmore for this trope. 4 J. WIGMORE, *EVIDENCE* § 2184 (2d ed. 1923).

32. *FED. R. EVID.* 609 provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence 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. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

a statutory rule of evidence. In symbols, the first two of Rule 609's five paragraphs read thusly: A is the rule if either B and C are the facts or D is the fact. But A is not the rule if E is the fact, unless F is the fact, in which case A is the rule, but only if G is the fact.

I have argued elsewhere in condemnation of complexity so impenetrable as this.³³ Simplicity is a great and underrated virtue, in whose name I dare to hope that Congress will some day amend Rule 609 along these lines: Any witness may be impeached with convictions, subject to the judge's discretion under Rule 403.³⁴

II

On the question whether a witness may be impeached by interrogation about some particular immoral, criminal, or vicious act that has not been the subject of a conviction, there seem to be no fewer than six rules. First, that it is permissible;³⁵ second, that it is permissible, but only with respect to misconduct bearing directly upon credibility;³⁶ third, that it is permissible, but only with respect to misconduct evincing such extraordinary wickedness "as would likely render [the witness] insensible to the obligations of an oath";³⁷ fourth, that it is permissible, but only if the witness is someone other than the defendant in a criminal case;³⁸

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

33. Younger, *In Praise of Simplicity*, 3 CORNELL LAW FORUM 2 (1976), reprinted in part, 62 A.B.A.J. 632 (1976).

34. FED. R. EVID. 403 provides:

Although 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.

35. *See, e.g., Cooper v. State*, 123 Tenn. 37, 138 S.W. 826 (1911). *See also State v. Jones*, 215 Tenn. 206, 385 S.W.2d 80 (1964).

36. *See, e.g., Vogel v. Sylvester*, 148 Conn. 666, 174 A.2d 122 (1961); *cf. Schreiber v. Southern Coatings & Chem. Co.*, 231 S.C. 69, 97 S.E.2d 214 (1957).

37. *Coulston v. United States*, 51 F.2d 178, 181 (10th Cir. 1931), quoting *Miller v. Oklahoma*, 149 F. 330, 338 (8th Cir. 1906).

38. *See, e.g., United States v. Schiller*, 187 F.2d 572, 576 (2d Cir. 1951) (Frank, J., concurring).

fifth, that it is permissible in the discretion of the trial judge;³⁹ and sixth, that it is not permissible at all.⁴⁰ Thus there is no general rule.⁴¹ This essay deals with the rule contained in the Federal Rules of Evidence, to understand which one must start with a New York case, *People v. Sorge*.⁴²

In *Sorge* the defendant was charged with performing an abortion. She took the stand and testified in her own behalf, whereupon the district attorney sought to discredit her by inquiring whether she had committed other abortions. On appeal, the defendant argued that this mode of impeachment was improper. Judge Fuld, writing for a unanimous court, rejected the argument:⁴³

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.

Although the cross-examination was not "improper as a matter of law,"⁴⁴ the trial judge had "wide latitude"⁴⁵ to curtail it. In *Sorge* the trial judge allowed it, and, since the court of appeals could not say that an injustice had resulted, the conviction was affirmed. *Sorge*, then, held that a cross-examiner might impeach a defendant by asking about acts of misconduct that had not been the basis of a conviction, subject to the trial judge's discretion to limit such inquiry.⁴⁶

39. See, e.g., *Lehr v. Rogers*, 16 Mich. App. 585, 587, 168 N.W.2d 636, 637 (1969).

40. See, e.g., CAL. EVID. CODE § 787 (West 1966).

41. See 3A J. WIGMORE, EVIDENCE §§ 979-87 (Chadbourn rev. 1970), where the master gives combat to confusion and is not victorious.

42. 301 N.Y. 198, 93 N.E.2d 637 (1950).

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

44. *People v. Sorge*, 301 N.Y. 198, 201, 93 N.E.2d 637, 639 (1950).

45. *Id.* at 202, 93 N.E.2d at 640.

46. A melding, in short, of the first and fifth rules mentioned above. See text accompanying notes 35 & 39 *supra*. Judge Fuld's reference to an act "that has a bearing on his credibility as a witness" is puzzling. Does he mean that, as in the second rule mentioned above (see text accompanying note 36 *supra*), the act must bear directly upon the witness' veracity? No, because *Sorge*'s prior abortions did not. Does he mean that, as in the third rule mentioned above (see text accompanying note 37 *supra*), the act must evince some extraordinary wickedness? No, because the commission of an abortion does not. I conclude, therefore, that the clause is tautological: the witness' credibility may be impeached with any immoral, criminal, or vicious act, and thus any immoral, criminal, or vicious act has a bearing on the witness' credibility.

The leading federal case on the issue is *United States v. Provo*.⁴⁷ There, the defendant was charged with treason. Like Sorge, he took the stand and testified in his own behalf. The prosecutor impeached Provo by asking whether, at various times in his army career, he had been placed in confinement for homosexuality. On appeal, the Government urged that:⁴⁸

[A] defendant who takes the stand in a criminal trial may be questioned as to any criminal or immoral act of his life since such information is relevant to his credibility as a witness.

The court of appeals held otherwise. Judge Swan, writing for himself and Judges Harlan and Medina, observed:⁴⁹

It is true that a defendant who takes the stand subjects himself to cross-examination, within the limits of the appropriate rules of evidence, like any other witness, and may be cross-examined for the purpose of impeaching his credibility. In *People v. Sorge*, . . . it is stated 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. Whether this is a correct statement of the New York law we need not stop to consider. Concededly local rules of evidence are not controlling in criminal trials in the United States courts. . . . In the Federal courts there has been an impressive unanimity of view on the point before us. As generally held, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes. . . . [W]e cannot say that we are committed to a position so radically at variance with that of the other circuits as to allow this examination.

Thus the Second Circuit separated itself from the rule of *Sorge*: “[S]pecific acts of misconduct not resulting in conviction . . . are not the proper subject of cross-examination for impeachment purposes.”⁵⁰ Plain enough. Except that Judge Swan continued as follows:⁵¹

47. 215 F.2d 531 (2d Cir. 1954).

48. *Id.* at 534. The Government made other arguments not relevant here.

49. *Id.* at 536 (citations omitted).

50. *Id.* (citations omitted).

51. *Id.* at 537. The court also found that:

[E]rror was committed in denying the defendant’s motion to vacate the judgment of conviction on the ground that newly discovered evidence showed that he had been tried in the wrong district.

Id.

[W]e do not conceive that inquiry into every accusation of criminal or vicious conduct will further the search for truth. Where, as here, the defendant's general character has not been put in issue, it is difficult to justify any examination other than into the trait of veracity. No authority has been cited which suggests that homosexuality indicates a propensity to disregard the obligation of an oath. The sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character. Permitting it was error.

Also plain enough. Questions about specific acts of misconduct will be proper so long as the acts involve misconduct bearing upon credibility.

But which rule applies: the no-such-impeachment rule⁵² of the first quoted paragraph, or the impeachment-only-with-acts-bearing-upon-credibility rule⁵³ of the second? The opinion did not say. Nor has any subsequent Second Circuit decision.⁵⁴ The Federal Rules of Evidence, however, do.⁵⁵ Rule 608(b) provides:⁵⁶

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than 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 on cross-examination of the witness (1) concerning his 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 his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

52. The sixth rule mentioned above. See text accompanying note 40 *supra*.

53. The second rule mentioned above. See text accompanying note 36 *supra*.

54. Each of the Second Circuit's later citations of *Provoe* is a passing reference, rising not even to the dignity of dictum.

55. FED. R. EVID. 608(b).

56. Both the House and the Senate left unchanged the language of Rule 608(b) as submitted to them by the Supreme Court. The reference to "the discretion of the court" seems superfluous, since Rule 403 permits relevant evidence (such as prior bad acts admissible under Rule 608(b)) to be excluded nevertheless on the grounds of prejudice, confusion, or waste of time.

The second sentence picks up the second of the two different rules laid down in *Provo* and carries it into general federal law.⁵⁷ Under that rule, a defendant who testifies is subject to bad-act impeachment so long as the act in question bears upon credibility.

Although Rule 608(b) is unequivocal, I wonder whether it is sound. Three questions trouble me:

1. What kind of act proves untruthfulness? Prosecutors will argue that any covert criminal act does so,⁵⁸ and, if one purpose of the Rules is to achieve certainty,⁵⁹ it is no answer to say that the point will be left to case-by-case development.

2. When a defendant takes the stand and is impeached with some prior unprosecuted criminal act suggesting untruthfulness, what is he to do? Answer the question and perhaps convict himself of that other crime, or plead the privilege against self-incrimination and pray that the jury in this case will not be affected?⁶⁰

3. Weighing a defendant's right to testify in his own behalf⁶¹ against the prejudice inherent in bad-act impeachment,⁶² might it not be wise to strike the balance in favor of the former, as *Provo* did in its first rule forbidding such impeachment altogether?⁶³

57. The first sentence states the practice that is nearly universal where bad-act impeachment is permitted: the witness may be asked the question, but if he denies it, extrinsic evidence of the bad act will not be admissible. See 3A J. WIGMORE, EVIDENCE § 979 (Chadbourn rev. 1970). The third sentence makes clear what had not been in doubt. See *id.* § 984.

58. *Sorge* will be cited in support of this argument. See Judge Fuld's language, discussed in note 46 *supra*. For a case that comes close to holding that any covert criminal act affects credibility see *People v. Duffy*, 36 N.Y.2d 258, 326 N.E.2d 804, 367 N.Y.S.2d 236 (1975).

59. This is implicit in the words of Rule 102.

60. It is conceivable that, if the defendant admits the act, his testimony may not be used against him in a subsequent prosecution for it. *Simmons v. United States*, 390 U.S. 377 (1968). Suppose the defendant takes the stand at the second trial and denies the act. What then? See *Harris v. New York*, 401 U.S. 222 (1971).

61. FED. R. EVID. 608(b), Advisory Comm. Note states:

While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions.

62. Judge Swan in *Provo* was well aware of this prejudice. See text accompanying note 50 *supra*.

63. One state supreme court has held impeachment by conviction to violate due process as applied to the defendant in a criminal case. *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971). I should think that there is an analogy to bad-act impeachment.

Curiously, the Advisory Committee's note on Rule 608(b) failed to cite or discuss *Provoo*. Had it done so, the draftsmen might have considered these problems and perhaps resolved them. But, as matters stand, the job is left to the judges. They will begin, I predict, by turning to another New York case—not *People v. Sorge*, but a recent New York Court of Appeals decision which substantially modifies *Sorge*.

In *People v. Sandoval*⁶⁴ the court approved a procedure whereby the trial judge is to determine, in advance of trial, whether convictions are or are not admissible to impeach the defendant, should he take the stand. Thus the court of appeals adopted for New York the doctrine of *Luck v. United States*,⁶⁵ familiar to all federal practitioners. It also sanctioned the application of this procedure to bad-act impeachment.⁶⁶

Evidence 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. . . . To the extent, however, that the prior commission 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.

. . . .
In each case the defendant shall inform the court of the prior . . . misconduct which might unfairly affect him as a witness in his own behalf. The trial court in its discretion and in the interests of justice shall then determine whether and to what extent the particular defendant has met his burden, and it is his, of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.

It is hard to quarrel with this. The reasoning, if not the authority, of *Sandoval* will doubtless be invoked by defendants in federal criminal cases. They will claim that bad-act impeachment is

64. 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

65. 348 F.2d 763 (D.C. Cir. 1965).

66. *People v. Sandoval*, 34 N.Y.2d 371, 376-78, 314 N.E.2d 413, 417-18, 357 N.Y.S.2d 849, 855-56 (1974).

unfair and should be forbidden, even where the bad acts do bear upon untruthfulness; prosecutors, just as certainly, will respond that Rule 608(b) provides otherwise. If the balance between prejudicial impact and probative value tilts in favor of the defendant, what is a federal judge to do?

I should think that a federal judge will take the Federal Rules of Evidence as a system, not as a set of independent provisions to be applied discretely. He will read each Rule in light of the rest, rather than as if none of the others existed.

Rule 102 commands that the Rules "shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined." Rule 403 allows the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" Surely this is enough, in appropriate circumstances, to warrant the qualification of bad-act impeachment along the lines of *Sandoval*, despite the untempered language of Rule 608(b). Moreover, Rule 609(a) codifies the *Luck* doctrine by authorizing the court to forbid the use of certain kinds of convictions for impeachment unless "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant" If balancing is permitted with respect to convictions, it should be permitted, a fortiori, with respect to bad acts.

III

The Federal Rules of Evidence use the word "character" in three different ways. In Rule 103(b), for example, "character" means "type" or "nature."⁶⁷ In Rule 405(a), it means a quality of the personality of a defendant or of the victim of a crime.⁶⁸ And in Rule 608(a), it means "credibility," the appearance of telling the truth.⁶⁹ The first of these usages is not to the point, and we

67. FED. R. EVID. 103(b) provides:

The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

68. FED. R. EVID. 405(a) provides:

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

69. FED. R. EVID. 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence

set it aside. The second and the third, however, bespeak a looseness of terminology which, commonplace though it be,⁷⁰ needs correction.

The Rules seem to designate as "character" anything that cannot be photographed. What is worse, "character" is not used consistently in the Rules to mean a person's nonphysical qualities. Sometimes the word "credibility" appears. Since "credibility" is an aspect of "character," it is capable of more precise deployment than "character." Yet the Rules slip from "credibility" to "character" with no system or principle that I can discern.

Let us imagine a lawyer reading consecutively through the Rules. In Rule 104(e), he comes upon a reference to "evidence relevant to . . . credibility," but then in Rule 404(a)(3) he learns that "character" may be proved in conformity with Rules 607, 608, and 609. Rule 607 speaks only of attacking "credibility," Rule 608 of attacking or supporting "credibility" with evidence of "character," and Rule 609 of attacking "credibility" with convictions. Rule 405, meanwhile, has taught the reader that "character" may be proved by reputation, by opinion, and occasionally by specific instances of conduct, the congruence of all of which with Rules 608 and 609 is not immediately obvious. In Rule 610 the reader finds "credibility" again and in Rule 803(21) "character" again, although it is plain that, at least in part, the same things are meant.

I suppose that, with intense application, the dedicated lawyer or judge will master the difficulty. But why should such application be required? The Rules might have been written in the first place so as to reveal, not obscure, their articulation. As matters stand, the work of clarification remains to be done. With respect to "character" and "credibility," I suggest the following maxims of draftsmanship:

1. Use the word "credibility" to mean, and only to mean, the jury's determination of the extent to which a witness seems to be telling the truth.

2. Use the word "character" to mean, and only to mean, evidence tending to show that the defendant in a criminal case has led a good life (or a bad life), in consequence of which the defendant should be acquitted (or convicted).

of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
70. See, e.g., C. McCORMICK, EVIDENCE § 41 (2d ed. 1972).

3. Since “credibility” and “character” mean two different things, they must not be used interchangeably or as if the one were part of the other.

4. Anything that is not “credibility” or “character” should be called by some other name and treated merely as an ordinary fact to be proved.

Applying these maxims to the Rules, we can lay out the following agenda for amendment:

1. In Rule 104(e), no change.

2. In Rule 404, eliminate subparagraphs (a)(2) and (a)(3) and turn them into separate rules in accordance with the fourth drafting maxim.

3. In Rule 404(b), rewrite to eliminate the word “character,” perhaps like this: “evidence of other crimes, wrongs, or acts is not admissible simply to show that a defendant is guilty or that a party is liable. It may, however, be admissible”

4. In Rule 405, subparagraph (a), no change, but might well be shifted to Rule 404. Subparagraph (b) should be rewritten to eliminate the word “character,” perhaps like this: “in cases in which it is relevant to prove a fact with respect to the nature of a person, proof may consist of reputation, opinion, or . . . specific instances of the person’s conduct.”

5. In Rule 607, no change.

6. In Rule 608, rewrite to eliminate the word “character,” substituting in its place the word “credibility.”

7. In Rule 609, no change.

8. In Rule 610, no change.

9. In Rule 803(21), rewrite to eliminate the word “character,” perhaps like this: “Reputation of a person among his associates or in the community.”

In formulating these suggestions, I have ignored other points on which amendment is necessary and concentrated upon the draftsmen’s confused use of the words “character” and “credibility.” It may be of little moment to those who value substance over form, but to one who, like myself, understands the professional competence of a lawyer to extend chiefly to matters of form, it is an issue worth fighting about. If a good carpenter cares for his tools, a good lawyer is prudent with words. What else do lawyers know but language? Haphazard vocabulary has no place in a statute so long lingered out as the Federal Rules of Evidence.